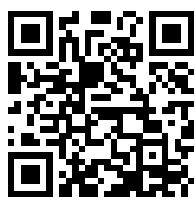
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United States. Armed Services Board of Contract Appeals

Board of Contract Appeals Decisions

VOLUME 94-1

Cited 94-1 BCA

The full texts of Armed Services and other Boards of Contract Appeals Decisions, with case table, finding lists and topical index.

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By CCH Business Law Editors

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CONTRACT APPEALS DECISIONS REPORTS

Nos. 994-1001 (1993-1994)

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FOREWORD

This volume is the ninety-second of the series of BOARD OF CONTRACT APPEALS DECISIONS—a Reporter of the full texts of decisions rendered by the Armed Services and other Boards of Contract Appeals. Special features are the case table, finding lists, and topical index. These contain, for direct and most convenient use, references to all opinions that appear in the 94-1 volume of the series.

In addition to ASBCA decisions, opinions of the Interior Department Board of Contract Appeals, General Services Administration Board of Contract Appeals, Department of Energy Board of Contract Appeals, Corps of Engineers Board of Contract Appeals, Postal Service Board of Contract Appeals, Department of Housing and Urban Development Board of Contract Appeals, Department of Transportation Board of Contract Appeals, Department of Labor Board of Contract Appeals, Department of Agriculture Board of Contract Appeals, and Department of Veterans Affairs Board of Contract Appeals are reported in full text in the volume. All cases included are exact reproductions of the decisions originally reported in the current issues of CONTRACT APPEALS DECISIONS REPORTS.

Each BCA opinion report includes the name of the case, the docket number, the contract number, the date of the decision, a headnote or headnotes, and the names of attorneys representing the government and the contractor or subcontractor litigants if available.

The contents of this volume, cited "94-1 BCA ¶ . . . .," consist of the decisions reported in CONTRACT APPEALS DECISIONS REPORTS during the period from December 17, 1993, through March 25, 1994.

In planning and producing BOARD OF CONTRACT APPEALS DECISIONS, the publishers aim to make this series most useful in the important and constantly expanding field of federal acquisition. That subject is also covered in the CCH GOVERNMENT CONTRACTS REPORTER, which contains digests of these decisions, keyed to the full texts in this volume and coordinated with the other cases, regulations, and statutes.

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ABBREVIATIONS

A

AAA—Army Audit Agency
AAF—Awaiting Additional Funds
AC—Acquisition Circular
ACD—Administrative Commitment Document
ACM—Authorized Controlled Material Order
ACO—Administrative Contracting Officers
ACRDN—Awaiting Contract Record Disposition Notice
ADD—Awaiting Delivery of Data
ADM—Administration—used by General Services Administration
ADO—Advanced Development Objective
ADP—Automatic Data Processing
AE—Architect-engineer
AEC—Atomic Energy Commission
AEM—Advance Engineering Memorandum
AF—Air Force
AFA—Air Force Academy—Construction Agency
AFAC—Air Force Acquisition Circular
AFAFC—Air Force Accounting and Finance Center
AFARS—Army FAR Supplement
AFB—Air Force Base
AFCMD—Air Force Contract Management District
AFCS—Air Force Communication Service
AFD—Air Force Depot
AFDIERSS—Air Force Departmental Industrial Equipment Reserve Storage Site
AFE—Aerospace Facilities Engineer
AFFARS—Air Force FAR Supplement
AFFC—Air Force Finance Center
Aff'd—Affirmed
Aff'g—Affirming
AFI—Awaiting Final Invoice
AFISR—Air Force Industrial Security Regulations
AFL—Air Force Letter
AFM—Air Force Manual
AF-MIPR—Air Force-Military Interdepartmental Purchase Requests
AFMPP—Air Force Manual Procurement and Production
AFN—Air Force Finance Center
AFPC—Air Force Procurement Circular
AFPI—Air Force Procurement Instruction (Superseded by HQ USAF Supplement to ASPR which was subsequently retitled "Air Force ASPR Supplement.")
AFPP—Air Force Procurement Procedures
AFPRO—Air Force Plant Representative Office
AFPRO—Air Force Procurement Representative Office
AFR—Air Force Regulations
AFRCE—Air Force Regional Civil Engineer
AFROTC—Air Force Reserve Officers Training Corps
AFSWAP—Armed Forces Special Weapons Project
AG—Adjutant General's Corps
AGBCA—Department of Agriculture Board of Contract Appeals
AGE—Aerospace Ground Equipment
AGO—Attorney General's Opinion
AID—Agency for International Development
AL—Acquisition Letter (Army)
ALO—Air Logistic Officer
AMA—Air Materiel Area (Air Force)
AMEDS—Army Medical Service
AMP—Additional Military Production
AMPR—Aeronautical Manufacturers Planning Report
ANFE—Aircraft not fully equipped
ANMB—Army-Navy Munitions Board (subsequently Munitions Board)
ANPP—Army Nuclear Power Program
AOCP—Aircraft out of commission for lack of parts
AOCP rate—Aircraft-out-of-commission-for-lack-of-parts rate
APC—Awaiting Plant Clearance
APD—Air Procurement District (Air Force)
APL—Authorized Price List
APO—Air Procurement Officer
APOE—Aerial Port of Embarkation
APP—Army Procurement Procedure
App.—Appellate; Appendix
APR—Awaiting Price Redetermination
APRA—Aircraft Production Resources Agency
APRC—Awaiting Patent and Royalty Clearance
AQL—Acceptable Quality Level
AR—Army Regulations
ARD—Army Renegotiation Division, Armed Services Renegotiation Board
ARD—Automatic Release Date
AREF—Awaiting Removal of Excess Funds
ARLS—Automatic Resupply Logistic System
ARPA—Advanced Research Projects Agency
ARS—Awaiting Report of Survey
Art.—Article
ASBCA—Armed Services Board of Contract Appeals
ASD—Aeronautical Systems Division

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ASD/C—Assistant Secretary of Defense (Comptroller)
ASD/Comptroller—Assistant Secretary of Defense (Comptroller)
ASD/P&I—Assistant Secretary of Defense (Properties and Installations)
ASD (R&D)—Assistant Secretary of Defense (Research and Development)
ASD/R&E—Assistant Secretary of Defense (Research and Engineering)
ASO—Aviation Supply Office
ASO (Navy)—Aviation Supply Office
ASPM—Armed Services Pricing Manual
ASPPO—Armed Services Procurement Planning Officer
ASPR—Armed Services Procurement Regulation
ASPS—Armed Services Procurement Regulation Supplement
ASTIA—Armed Services Technical Information Agency
ATA—Air Transport Association
Atty. Gen. Op.—Attorney General's Opinion
AU—Air University

B

BA—Basic Agreement
BAC—Army Budget Advisory Committee
BAFO—Best and final offer
BALPRO—Balance of Payments Program
BAR—Board of Appeals Review; Bureau of Aeronautics Representatives
BARC—Barge, amphibious, resupply, cargo
BARR—Bureau of Aeronautics Resident Representatives
BCA—Board of Contract Appeals. Also BOARD OF CONTRACT APPEALS DECISIONS REPORTS (published by Commerce Clearing House, Inc., and containing in full text the decisions of the Armed Services and other boards of contract appeals.)
BDSA—Business and Defense Services Administration
BFM—Bureau of Facilities and Materiel
BFS—Bureau of Federal Supply
BLMT—Bailment
BOAs—Basic Ordering Agreements
BOB—Bureau of the Budget
B&P—Bid and Proposal
BPA—Blanket Purchase Agreement
BSA—Basic Standardization Agreement
BSD—Ballistic Systems Division
BUD—Budget Office, Department of the Army
Bull. J.A.G.A.—Bulletin of the Judge Advocate General of the Army
BUSANDA—Bureau of Supply and Accounts
BUSH—Buy United States Here
BUSHIPS—Bureau of Ships (Navy)
BUWEPS—Bureau of Naval Weapons
BUWEPSREPS—Bureau of Naval Weapons Representatives

C

c., ch.—chapter
C of E—Corps of Engineers
CA—United States Court of Appeals. (Name, since September 1, 1948, of the former United States Circuit Court of Appeals.)
CA DofC—U. S. Court of Appeals for the District of Columbia Circuit
CA-FC—United States Court of Appeals for the Federal Circuit
CAA—Civil Aeronautics Administration
CAA—Civil Aeronautics Authority
CAB—Civil Aeronautics Board; Contract Adjustment Board (Army, Air Force, Navy, etc.)
CAC—Contract Audit Coordinator
CACO—Corporate Administrative Contracting Officer
CADC—Crown Assets Disposal Corporation
CAM—Civil Aeronautics Manuals
CAM—Contract Audit Manual
CAP—Civil Air Patrol
CAS—Cost Accounting Standards
CASB—Cost Accounting Standards Board
CASG—COST ACCOUNTING STANDARDS GUIDE (published by Commerce Clearing House, Inc.)
C. B.—Cumulative Bulletin, U. S. Internal Revenue Service
CBD—Commerce Business Daily
CCA—United States Circuit Court of Appeals. (Since September 1, 1948, the United States Court of Appeals—See CA above.)
CCB—Configuration Control Board
CCF—CONTRACT CASES FEDERAL (published by Commerce Clearing House, Inc.)
CCG—Commodity Coordination Groups
CCH—Editorial comments by Commerce Clearing House, Inc.
CCN—Contract Change Notification
CDA—Contract Disputes Act of 1978
CDF—Class Determination and Finding
CDR—Critical Design Review
CEEOP—Contracts Equal Employment Opportunity Program
Cert.—Certiorari
CFE—Contractor Furnished Equipment
CFO—Contract Financing Offices
CFP—Contractor-Furnished Products; Contractor Furnished Property
CFR—Code of Federal Regulations

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CFS—Contract Financial Status
CGBCA—Coast Guard Board of Contract Appeals (The Department of Transportation Contract Appeals Board is the successor to the Federal Aviation Agency Contract Appeals Panel and the Coast Guard Board of Contract Appeals, both of which have been abolished.)
CGD—Comptroller General's Decision
CGEN—COMPTROLLER GENERAL DECISIONS GOVERNMENT CONTRACTS (published by Commerce Clearing House, Inc.)
C. G. O.—Comptroller General Opinion
CGPR—Coast Guard Procurement Regulations (superceded by the Department of Transportation Procurement Regulations)
CIA—Central Intelligence Agency
CICA—Competition in Contracting Act of 1984
CID—Change in Design; Criminal Investigation Division
CIL—Contractor Involved in Litigation
CIP—Chief Industrial Property
CICt—United States Claims Court
CLO—Congressional Liaison Office
CML—Chemical Corps
CMO—Contract Management Office
CMP—Controlled Materials Plan
CMR's—Contract Management Regions
CoC—Certificate of Competency
Com.—Commission; U. S. Commissioner of Internal Revenue
Comp. Gen.—Comptroller General
Comp. Gen. Dec.—Decisions of Comptroller General
Cong.—Congress
CONUS—Continental United States
COPARS—Contractor-Operated Parts Stores
COR—Contracting Officer's Representative
COST—Cost Reimbursement
CP—Central Procurement
CPAF—Cost-Plus-Award-Fee
CPFE—Contractor Furnished Equipment
CPFF—Cost-Plus-Fixed-Fee
CPIC—Cost Price of the Items Canceled
CPIF—Cost-Plus-Incentive-Fee
CPIT—Cost Price of Items Terminated
CPO—Chief of the Purchasing Office
CPPC—Cost-plus-a-percentage-of-cost
CPR—Civilian Personnel Regulations
CRD—Chief of Research and Development
CRFC—Cost Reimbursement Facilities Contract
CS—Cost-Sharing Contract
CSA—Chief of Staff
CSA's—Communication Service Authorizations
CSC—Civil Service Commission
CSD—Contract Support Detachment
CSS—Commodity Stabilization Service
Ct.Cl. or Ct.Cls.—United States Court of Claims
Ct.Cls. Trial Div.—United States Court of Claims Trial Division
CTR—Capital Type Rehabilitation
CTS—Chief of the Technical Service
CWAS—Contractor Weighted Average Share in Cost Risk
CY—Calendar Year

D

DA—Department of the Army
DAC—Defense Acquisition Circular
DAR—Defense Acquisition Regulation
DARC—Defense Acquisition Regulatory Council
DARCOM—Army Materiel Development and Readiness Command
DATA—Defense Air Transportation Administration
dba or d.b.a.—doing business as
DBA—Davis-Bacon Act Determination Pending
DC—United States District Court
DCAA—Defense Contract Audit Agency
DCAB—Department of Commerce Appeals Board (functions now under IBCA)
DCASD—Defense Contract Administration Services District
DCASR—Defense Contract Administration Services Regions
DCMS—Depot Command Management System
DCS—Deputy Chief of Staff
DCSC—Defense Construction Supply Center
DCSLOG—Deputy Chief of Staff Logistics (Army)
DD—Department of Defense
DDC—Defense Documentation Center
DDR&E—Deputy Director for Research and Engineering
DEC—Date of Estimated Closing
DECCO—Defense Commercial Communications Office
DEAR—Department of Energy Acquisition Regulation
DESC—Defense Electronics Supply Center
DFARS—Department of Defense Federal Acquisition Regulation Supplement
D&F—Determination and Finding
DFSC—Defense Fuel Supply Center
DIER—Departmental Industrial Equipment Reserve
DIRS—Departmental Industrial Reserve System
Dist. Ct.—United States District Court
DJ—Department of Justice

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Dkt.—Docket
DLA—Defense Logistics Agency
DLAR—Defense Logistics Acquisition Regulation
DLSC—Defense Logistics Services Center
DMO—Defense Mobilization Order (Office of Defense Mobilization)
DMP—Defense Manpower Policy
DMS—Defense Materials System
DO—Disbursing Officer
DO—Defense Order
DoD—Department of Defense
DOE—Department of Energy
DoL—Department of Labor
DOT BCA—Department of Transportation Board of Contract Appeals
DOT CAB—Department of Transportation Contract Appeals Board (now DOT BCA); Department of Transportation Contract Adjustment Board
DPA—Defense Production Act; Delegation of Procurement Authority
DPAS—Defense Priorities and Allocations System
DPC—Date Physically Completed; Defense Procurement Circular (now Defense Acquisition Circular)
DPSC—Defense Personnel Support Center
DQ/PL—Definite Quantity Price List Contracts
DRB—Defence Research Board (Canada)
DRM—Defense Research Member
DSA—Defense Supply Agency (subsequently Defense Logistics Agency)
DSAM—Defense Supply Agency Manual
DSAR—Defense Supply Agency Regulations
DSPR—Defense Supply Procurement Regulations
DSSC—Defense Subsistence Supply Center
DTMS—Defense Traffic Management Service

E

EAM—Electrical accounting machines
EBCA—Department of Energy Board of Contract Appeals
ECAB—Department of Energy Contract Adjustment Board
ECD—Estimated Completion Date
ECP—Engineering Change Proposals
EDR—Experience Data Report
EDTR—Experimental, Developmental, Test or Research
eff.—effective
ENG—Corps of Engineers (Army)
ENG BCA—Corps of Engineers Board of Contract Appeals
E.O.—Executive Order of the President
EPAAR—Environment Protection Agency Acquisition Regulation
EPS—Emergency Procurement Service (GSA)
ERDA—Energy Research and Development Administration
ESD—Electronic Systems Division
et al.—and others

F

F. or Fed.—Federal Reporter
F., F.2d, F2d—Federal Reporter or Federal Reporter, Second Series
FAA—Federal Aviation Agency
FAA CAP—Federal Aviation Agency Contract Appeals Panel (The Department of Transportation Contract Appeals Board is the successor to the Federal Aviation Agency Contract Appeals Panel and the Coast Guard Board of Contract Appeals, both of which have been abolished.)
FAC—Federal Acquisition Circular
FAP—Facilities Assistance Program
FAR—Federal Acquisition Regulation
FBI—Federal Bureau of Investigation
FBM—Fleet Ballistic Missile
FBO—Foreign Building Office (State department)
FCIR—Facility Chance Initiation Request
FCR—Facility Capability Reports; Facility Change Request
FD—Finance Corps
F&D—Findings and Determinations
FFP—Firm Fixed-Price Contract
FIP—Federal Information Processing
FIRMR—Federal Information Resources Management Regulation
FMB—Federal Maritime Board
FMS—Foreign Military Sales
FOA—Foreign Operations Administration
FOIA—Freedom of Information Act
FOUO—For Official Use Only
FOUSA—Finance Officer, United States Army
FP—Fixed Price
FPA—Free of Particular Average
FPAS—Federal Property and Administrative Services Act of 1949
FPC—Fixed Price Call
FPE—Fixed Price with Escalation
FPI—Federal Prison Industries; Fixed Price Incentive
FPIF—Fixed-Price Incentive Contracts (Firm target incentive)
FPIFV—Fixed-Price Incentive (Value Engineering)
FPIS—Successive Target Incentive Contract

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FPMR—Federal Property Management Regulations; Fixed Price Material Reimbursable
FPO—Fixed Price Open
FPR—Federal Procurement Regulations
FPR-A—Fixed Price With Redetermination
FPR-B—Fixed Price With Redetermination
FPR-C—Fixed Price With Redetermination
FPR-D—Fixed Price With Redetermination
FPR-E—Fixed Price With Redetermination
FPS—Fixed-price supply
FR or F.R.—Federal Register
FRAM—Fleet Rehabilitation and Modernization
FSC—Federal Supply Classification
FSE—Facilities System Engineer
FSN—Federal Stock Number
FSS—Federal Supply Schedule
F. Supp., FSupp—Federal Supplement Reporter
FY—Fiscal Year

G

G&A—General and Administrative
GAM—Guided Air Missile
GAO—General Accounting Office; General Administration Order (Office of Defense Mobilization)
GAOW—General Accounting Office, Washington
GBL—Government Bill of Lading
G. C. M.—General Counsel's, Assistant General Counsel's or Chief Counsel's Memorandum. (U. S. Internal Revenue Service)
GEEIA—Ground Electronics Engineering Installations Agency
Gen. Con.—General Counsel
GFAE—Government Furnished Aircraft Equipment
GFE—Government Furnished Equipment
GFM—Government Furnished Material
GFP—Government Furnished Property
GFPL—Government-Furnished Property List
GOCO—Government-owned Contractor-operated
GOGO—Government-owned Government-operated
GPO—U. S. Government Printing Office
GSA—General Services Administration
GSAR—General Services Administration Acquisition Regulation
GSBCA—General Services Administration Board of Contract Appeals
GSPR—General Services Administration Procurement Regulations

H

HBCU—Historically Black Colleges and Universities
HHS—Health and Human Services
HI-VALU—High priority Air Force contract (generally in missile field)
H. J. Res.—House Joint Resolution
How.—Howard's U. S. Supreme Court Reports
HPA—Head of Procuring Activity
H. R.—United States House of Representatives
H. Rept.—U. S. House of Representatives Committee Report
H. Res.—House Resolution, U. S. House of Representatives
HUD—Department of Housing and Urban Development
HUD BCA—Department of Housing and Urban Development Board of Contract Appeals

I

IAC—Integration, Assembly and Checkout
IAW—In Accordance With
IBCA—Department of Interior Board of Contract Appeals
IBOP—International Balance of Payments
ICA—International Cooperation Administration
ICPFF—Incentive Cost Plus Fixed Fee
ID—Military Attache
IDA—Institute of Defense Analyses
IE—Information and Education Division
IFB—Invitation for Bids
IFPH—Industrial Facilities Handbook
IG—Inspector General
I&L—Installations and Logistics
IM—Installation and Materiel; Item Manager
INSMAT—Material Inspection Service (Navy)
INSMATS—Inspectors of Naval Material
IPD—Issue Priority Designator
IRAN—Inspection and Repair as Necessary (of aircraft)
I. R. B.—Internal Revenue Bureau
I. R. C.—Internal Revenue Code
IR&D—Independent Research and Development
I. R.-Mim.—U. S. Internal Revenue Service Mimeographed Ruling
I. R. S.—Internal Revenue Service
ISO—Information Services Officer
I. T.—Income Tax Unit Rulings
ITAR—International Traffic in Arms Regulations

J

JAG—Judge-Advocate General's Corps; Judge-Advocate General
JCP—Joint Committee on Printing
JCS—Joint Chiefs of Staff

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JPL—Jet Propulsion Laboratory

L

LBCA—Department of Labor Board of Contract Appeals
LC—Letter Contract
LCSS—Land Combat Support System
L-H—Labor-Hour Contract
LRS—Labor Relations Specialists
LSE—Lease

M

MA—Maritime Administration; United States Military Academy
MAELU—Mutual Atomic Energy Liability Underwriters
MAP—Military Assistance Program
MATS—Military Air Transport Service
MCD—Modification of Contract Documents
MCP—Military Construction Program
MCR—Master Change Record
MI—Minority Institution
MIAM—Major Items Automated Management
MIL—Military
MILSTAMP—Military Standard Transportation and Movement Procedures
MILSTRIP—Military Standard Requisitioning and Inventory Procedure
Mim.—Mimeographs
MIP—Materiel Improvement Project
MIPR—Military Interdepartmental Purchase Requests
MIRR—Material Inspection and Receiving Report
MIS—Material Inspection Service
MOD—Miscellaneous Obligation Document
MPF—Missile Procurement Fund
MRL—Material Requirements List
MRO—Maintenance, Repair and Operating Supplies
MSTS—Military Sea Transportation Service
M. T.—Miscellaneous Tax Ruling
MTMC—Military Traffic Management Command

N

NACA—National Advisory Commission for Aeronautics
NAPCA—National Air Pollution Control Administration
NARSUP—Department of the Navy Acquisition Regulations Supplement
NASA—National Aeronautics and Space Administration
NASA BCA—National Aeronautics & Space Administration Board of Contract Appeals
NASA PR—National Aeronautics & Space Administration Procurement Regulation
NASA PRD—National Aeronautics and Space Administration Procurement Regulation Directive
NASC—National Aeronautics and Space Council
NAVY CAB—Navy Contract Adjustment Board
NAWD—Notice of Award
NBS—National Bureau of Standards
NCEL—Navy Contractor Experience List
NCPD—Navy Current Procurement Directives
NCS—No Charge Storage Agreement
NELIA—Nuclear Energy Liability Insurance Association
NFSD—NASA FAR Supplement Directive
NIB—National Industries for the Blind
NIP—Notice of Intent to Purchase
NLRB—National Labor Relations Board
NOA—New Obligational Authority
NPD—Navy Procurement Directive
NPR&D—Navy Property Redistribution and Disposal

O

OA—Obligation Authority
OASD (Comptroller)—Office of the Assistant Secretary of Defense (Comptroller)
OCR—Office of Collateral Responsibility
OCRD—Office of the Army Chief of Research and Development
OCS—Office of Contract Settlement
OCSAB—Office of Contract Settlement Appeal Board
ODM—Office of Defense Mobilization
OECIC—Open End Contract Information Circulars
OFCC—Office of Federal Contract Compliance
OFPP—Office of Federal Procurement Policy
OGE—Operational Ground Equipment
OIA—Oil Import Administration
OICC—Officer in Charge of Construction (Navy)
OMB—Office of Management and Budget
Op. A. G.—Opinion of the Attorney General
Op. Atty. Gen.—Opinion of the Attorney General
OPC—Ordnance Procurement Center (Army)
OPI—Ordnance Procurement Instructions
Op. Judge Adv. Gen.—Opinion of the Judge Advocate General
OPR—Office of Primary Responsibility
OQMG—Officer of the Quartermaster General
OSA—Office of the Secretary of the Army
OSD—Office of the Secretary of Defense
OSP—Offshore Procurement

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OSRD—Office of Scientific Research and Development

P

P. A.—Public Act
PAC—Production Acceleration Capacity
PAM—Priorities and Allocations Manual
Par. or ¶—Paragraph
PARO—Patent Royalties
PAS—Pre-award Survey
PBS—Public Building Service
PCC—Production Compression Capability
PCO—Procurement Contracting Officer
PCP—Program Change Proposal
PD—Procurement Directives—(now PRD)
PDO—Publications Distribution Officer
PERG—Production Equipment Redistribution Group
PERT—Program Evaluation and Research Technique (utilizing a digital computer)
PIA—Predominant Interest Agency
PII—Predominant Interest Installation
PIIN—Procurement Instrument Identification Number
PL—(Suffix) Price List
P.L.—Public Law
PMA—Purchase Methods Analyst
PMG—Provost Marshal General
PMI—Program Management Instruction
PMR—Property Management Regulations
PN—Procurement Notio (NASA)
POD BCA—Post Office Department Board of Contract Appeals (now PSBCA)
POL—Petroleum-Oil-Lubricants
POOD's—Provisioning Order Obligating Documents
PPL—Preferential Planning List
PQA—Procurement Quality Assurance
PR—Procurement Regulation; Procedural Regulation (Small Defense Plants Administration); Purchase Requests
PRD—Procurement Regulation Directive
Pres. Proc. or Proc.—Presidential Proclamation
PR-MIPR—Purchase Requests—Military Interdepartmental Purchase Requests
PRN—Procurement Reallocation Notice
PRO—Program Representative Office
Proc.—Proclamation of the President
Proc. Cir.—Procurement Circular
PSBCA—Postal Service Board of Contract Appeals
PSIG—Per Square Inch Gauge
PSPP—Proposed System Package Plan
Pub. L.—Public Law
Pub. res.—Public resolution
PYO—Contractor Computing Prior Year Overhead

Q

QA—Quality Assurance
QM—Quartermaster
QMDO—Qualitative Material Development Objectives
QMR—Qualitative Materiel Requirements
QPL—Qualified Products List

R

RAE—Report After Execution
RAN—Request for Authority to Negotiate
RB—Renegotiation Board
RC/PL—Requirements Contract Price List
RCS—Reports Control Symbol
R&D—Research and development
RDB—Research and Development Board
RDD—Required Delivery Date
RDIS—Replenishment demand inventory system
RDT&E—Research, Development, Test, and Evaluation
Reg.—Regulation
Rev. Rul.—Revenue Ruling, U. S. Internal Revenue Service
RFO—Reconciling with Accounting and Finance Officer
RFP—Request for Proposals
RFQ—Request for Quotation
RFTP—Request for Technical Proposals (used in two-step formal advertising)
RIF—Reduction-in-force
RIR—Reduction in Requirement
RO—Responsible Office
ROICC—Resident Officer in Charge of Construction
ROTC—Reserve Officers Training Corps
RPIE—Real Property Installed Equipment
R. S.—Revised Statutes

S

S.—United States Senate
SAGE—Semi-Automatic Ground Environment
SBA—Small Business Administration
SC—Signal Corps
S. Ct. or Sup. Ct.—United States Supreme Court Reporter
SDB—Small Disadvantaged Business
SDCP—Supply demand control points
Sec. or §—Section
SECDEF—Secretary of Defense
SECNAV—Secretary of the Navy
Sen.—United States Senate
Sen. Rep.—U. S. Senate Committee Report
Sess.—Session of the United States Congress

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SE/TD—Systems Engineering and Technical Direction
SF—Special Facilities; Standard Forms
SFP—Straight Fixed Price
SIC—Standard Industrial Classification
S&L—Systems and Logistics
S. M.—Solicitor's Memorandum, U. S. Internal Revenue Service
SMD—Surplus Materials Division
SNAP—Systems for Nuclear Auxiliary Power
SNPO—Space Nuclear Propulsion Offices
Sol. Op.—Solicitor's Opinion, U. S. Internal Revenue Service
SOR—Specific Operational Requirement
SP—Special Provisions
SPCR—Spare Parts Change Request
SPJG—Decisions of the Judge Advocate General of the Army
SPO—System Program Offices
S. Rept.—U. S. Senate Committee Report
SPP—System Package Program
SSB—Source Selection Board
SSD—Space Systems Division
SSEP—System Safety Engineering Plan
SSG—System Safety Group
SSM—System Supply Manager
SSS—Special Source Survey
SSSP—System Source Selection Procedure
Stat.—United States Statutes at Large
STG—Storage
SUP—Supply Contract
Supp.—Supplement or Supplementary
SUPSHIPS—Supervisors of Shipbuilding

T

TA—Technical Assistance
ta or t/a—trading as
TAG—Technical Assistance Group
TAR—Department of Transportation Acquisition Regulation
TC—Transportation Corps
T. C.—Tax Court (formerly Board of Tax Appeals)
TCO—Termination Contracting Officers
TCS—Transportation and Communications Services
TCSMC—Transportation Corps Supply Maintenance Command (Army)
TCTO—Time Compliance Technical Orders
T. D.—Treasury (Department) Decision
TDPL—Technical Data Package List
TE—Technical Exchange
TEPI—Training Equipment Planning Information
TL—Transmittal Letter (issued by General Services Administration)
T&M—Time and materials
TM—Technical Manual
TOC—Technical Order Compliance
TSO—Test Site Office

U

UCC—Uniform Commercial Code
UDB—Unliquidated Dollar Balances
UFPS—Uniform Federal Procurement System (proposed)
UR—Unsatisfactory Report
U. S.—United States (Supreme Court) Reports
USA—United States Army
USAF—United States Air Force
U.S.C.—United States Code
U.S.C.A.—United States Code Annotated (based on official U.S.C.)
USDO—United States Disbursing Officer
USES—United States Employment Service
USIA—United States Information Agency
USN—United States Navy
USTC—UNITED STATES TAX CASES (published by Commerce Clearing House, Inc.)

V

VABCA—Department of Veterans Affairs Board of Contract Appeals
VACAB—Veterans Administration Contract Appeals Board
VE—Value Engineering
VEA—Vehicle engineering analysis
VECP—Value Engineering Change Proposal
VFR—Visual Flight Rules

W

WA—With Average
Wall.—Wallace's U. S. Supreme Court Reports
WCPAB—War Contracts Price Adjustment Board
WDBCA—War Department Board of Contract Appeals
Wheat.—Wheaton's U. S. Supreme Court Reports
WSSL—Weapons System Stock List

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Contract Appeals Decisions

Cited "94-1 BCA ¶ . . . ."

[¶ 26,258] E.M. Scott & Associates, Inc.

ASBCA No. 45869, July 30, 1993. Solicitation Nos. N00189-90-R-0108, N00189-91-R-0118.

Data—Disclosure—Board Jurisdiction.—A firm's claim alleging an implied-in-fact agreement with the government concerning the use of a trade secret was within the jurisdiction of the board, despite the government's contention that the appeal sounded in tort, because the appeal on its face appeared founded upon an agreement licensing the use of a trade secret, a type of contract within the scope of the Contract Disputes Act. The CDA confers jurisdiction on the boards to hear claims founded upon implied or express contracts, but not on matters sounding in tort. In considering the nature of the claim, the board noted that a trade secret holder can pursue a claim founded upon a contract in the event of unauthorized disclosure or use of the trade secret by those to whom the secret had been confided under restriction of nondisclosure. In this case, the firm alleged that the government had used, without authority, secret data and manuals it had submitted in two solicitations that were eventually canceled. Because the firm had alleged an implied-in-fact contract concerning the disclosure of a trade secret, the board ruled that it should be furnished an opportunity to prove the existence and terms of any such agreement.

For the appellant: Edward M. Scott, Owner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Anita D. Polen, Trial Attorney, Fleet and Industrial Supply Center, Norfolk, Virginia.

Before HARTMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

HARTMAN, Administrative Judge: On 14 May 1993, the Government moved to dismiss this appeal for lack of jurisdiction. During early June 1993, appellant E.M. Scott & Associates ("EMS") submitted an opposition to the Government's motion and seven volumes of documents, in addition to the one volume it had submitted previously, to supplement the Rule 4 file. On 17 June 1993, the Government served a reply to EMS's opposition. Six days later, on 23 June 1993, EMS served a three-paragraph letter addressing the Government's reply.

BACKGROUND

On 17 April 1990, the Regional Contracting Department of the Naval Supply Center in Norfolk, Virginia, issued solicitation No. N00189-90-0108 for bids to provide "technical and support services in the planning, preparation, conduct, analysis, and report of anti-terrorism and training for Naval units & facilities" during fiscal year ("FY") 1991, and optionally during FY 1992, 1993, and 1994. Section C of the solicitation, "Description/Specifications/ Work Statement," advised that the Naval Security Coordination Team ("NSCT") intended to conduct annually approximately 40 anti-terrorism awareness seminar games, vulnerability assessments, and/or security enhancement exercises which would vary in duration from 1/2 to 10 days. Section C further advised that

> [t]he following is required:
>
> * * *
>
> Research terrorist threat to Navy assets at exercise location and provide information and analysis of techniques likely to b [sic] employed by terrorist groups threatening those assets. For exercise location, collect and evaluate directives, procedures and other pertinent information regarding anti-terrorism and physical security measures. Inspect installation perimeter, command and control arrangements. Provide recommendation for specific exercise events. Provide input for development of Rules of Exercise Play (ROEP) to ensure realism without harm to participants or equipment. . . . Provide input for development of site-specific exercise scenario and scenario event list. Conduct on-site anti-terrorism seminar games for senior base personnel in conjunction with vulnerabil-

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ity assessments and/or security exercises, or as separate events. Prepare draft exercise OPORDERs.

Section L of the solicitation, "Instructions, Conditions, And Notices To Offerors," provided that offerors must submit their proposals in two separate parts—"Price" and "Technical." With respect to the "Technical" proposal, section L stated that:

> Offerors are required to submit a detailed technical proposal which will be used to assess the offeror's capability to perform the tasks described in the Statement of Work [("SOW")] ....
>
> * * *
>
> The proposal should clearly demonstrate that the offeror has a thorough understanding of the effort called for herein. It is recognized that all technical factors cannot be detailed in advance, but the proposal must be sufficient to show how the offeror proposes to accomplish the effort described by the statement of work, including a full explanation of the procedures and techniques to be followed. ...
>
> * * *
>
> Offerors shall set forth in detail their technical approach to implementing each specification requirement .... Included herein shall be staffing concepts to effectively implement the technical approach described.

Section L of the solicitation also incorporated by reference various provisions of the FAR, including FAR 52.215-12 which provides as follows:

> RESTRICTION ON DISCLOSURE AND USE OF DATA (APR 1984)
>
> Offerors or quoters who include in their proposals or quotations data that they do not want disclosed to the public for any purpose or used by the Government except for evaluation purposes, shall—
>
> (a) Mark the title page with the following legend:
>
> "This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed—in whole or in part—for any purpose other than to evaluate this proposal or quotation. If, however, a contract is awarded to this offeror or quoter as a result of—or in connection with—the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets *[insert numbers or other identification of sheets]"*; and [emphasis in original]
>
> (b) Mark each sheet of data it wishes to restrict with the following legend:
>
> "Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal or quotation."

(R4, tab 1)

EMS and others submitted proposals in response to the Navy's solicitation. However, after the NSCT completed a technical evaluation of the proposals, the solicitation was cancelled. (App. supp. R4, vol. 2 at B2p1; Gov't. br. at 2, 4)

Approximately one year after issuance of the cancelled solicitation, on 15 April 1991, the Naval Supply Center issued solicitation No. N00189-91-R-0118 to obtain bids to "provide specialized anti-terrorism training and technical support" to NSCT during FY 1992 and 1993. Except for its omission of a requirement to provide a "final report," section C of the new solicitation, which set forth the work statement, was virtually identical to section C of the first solicitation. In addition, like section L of the first solicitation, section L of the new solicitation required submission of both a price and technical proposal, set forth a description of the detail expected to be included in the technical proposal, and incorporated by reference various provisions of the FAR, including FAR 52.215-12. However, in contrast to the first solicitation, section L of the new solicitation expressly provided that:

> The offeror shall provide his comments and/or answers on how he will prepare for and execute the following efforts:
>
> [(1)] Technical Scenario 1:
>
> ... Provide Vulnerability Assessment/Security Enhancement Exercise (VASEX) support at Naval Base, Subic Bay, PI:
>
> 1. Conduct pre-site survey to include:
>
> (a) Research specific terrorist threat to installation being exercised and provide this information to the NAVSECORDTM exercise coordinator.
>
> (b) Collect and evaluate directives and procedures used .... Assess tradeoffs of

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how personnel assets and hardware on hand are employed.

(c) Recommend exercise events based on terrorist threat and as test of installation procedures to deal with threat. . . .

(d) Recommend rules of exercise play (ROEP) which apply to installation being exercised in order to maximize safety and minimize liabilities.

(e) Prepare and provide officer conducting the exercise a draft Exercise Operations Order via NSCT.

2. Provide VASEX support:

(a) Provide daily summary of exercise events which will include details of all events executed and lessons learned to include recommended security improvements and identification of specific vulnerabilities.

(b) Evaluate installation command center operations.

(c) Recommend changes to exercise event schedule based on observation/evaluation of security force reaction to events with a view towards maximizing training and identification of specific vulnerabilities.

(d) Provide an out brief report . . . .

(2) Technical Scenario 2:

Prepare and conduct an Anti-terrorist Awareness Seminar Game (ATASG) at Naval Station, New York, N.Y.

1. Prepare overview of world wide terrorist threat followed by site specific threat assessment. . . .

2. Prepare site specific ATASG which provides scenarios that include bombings, assassinations, ambushes, kidnapping and hostage barricade situations. . . .

3. Serve as Game Director and conduct ATASG.

(3) Technical Scenario 3:

Conduct stand alone vulnerability assessments (VA) at NAF Atsugi, Japan that includes a report which identifies specific vulnerabilities and recommends security improvements.

(4) Technical Scenario 4:

Develop and maintain data base for and of all ATASG's VASEX's and stand VA's.

(5) Technical Scenario 5:

Produce an annual lessons learned report . . . .

(R4, tabs 1, 3)

EMS and others submitted proposals in response to the Navy's second solicitation. However, after NSCT completed a technical evaluation of those proposals, the second solicitation also was cancelled. (R4, tab 4; app. supp. R4, vol. 3 at B4p1; Gov't. br. at 3, 5)

On 29 October 1991, EMS submitted a "Formal Claim" to a Naval Supply Center contracting officer. EMS's claim provided, in part, as follows:

> This ["]short form" claim will be followed by a full and final claim. A short form claim is used because the Navy refused a Freedom of Information Act request (FOIA) to provide the information needed to complete a long form, final claim. . . .
>
> *BASIS FOR CLAIM*
>
> * * *
>
> The Navy violated the FAR by wrongly using an RFP . . . to obtain marketing information such as price and delivery. . . .
>
> The Navy used RFPs to *twice* pick the brains of industry, and walk away with their collective expertise without paying a penny for the wealth of data and products they "liberated." . . . [A]ll respondents had to provide their methodologies, ideas and processes rolled into a [sic] well illustrated manuals for PSSs, VAs, ATASGs, VA/SEXs, and detailed report outlines at great expense to the respondents. [Emphasis in original]
>
> * * *
>
> R-0108 was canceled on the basis that there was a significant change in the SOW. . . . As shown in the body of the claim dealing with comparisons of the SOWs for R-0108 and R-0118, *there was no change in the two SOWs;* both remained exactly the same in all material respects. The Navy did change the *format* (but not content) of the technical scenarios under R-0118. This false cancellation reason shows that the Navy was really after free manuals. Whereas under R-0108 they required a single, comprehensive but amorphous manual, under R-0118 they asked for separate illustrated manuals for PSSs, VAs, ATASGs, and VA/SEXs, and a detailed report outline. [Emphasis in original]
>
> R-0118 was canceled on the basis that there was no longer a requirement for this service.
>
> In an arrogant, twisted way the reason is true, but not because all the terrorists were "born again" or all Navy personnel who would have received this training be-

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came mysteriously "enlightened", but because the requirement is now being fulfilled by the Navy Security Coordination Team (NSCT), with all the free manuals and training it liberated from all the contractors who responded to their RFPs 0108 and 0118.

Attached to EMS's "Formal Claim" was a chart indicating that it currently was seeking $75,000.00 as "the selling price of what NSCT 'liberated' from [it]," $70,890.63 in costs to prepare the proposals it submitted in response to the solicitations, $8,506.88 as an "Eichleay Amount," and $4,687.50 in costs to prepare its claim or a total of "$159,085.00." (R4, tab 5)

By letter dated 21 January 1992, the Naval Supply Center's contracting officer advised EMS that she did not believe the two solicitations were cancelled wrongfully, that EMS's claim had been submitted pursuant to the Contract Disputes Act of 1978 ("CDA"), and that she "must apply the same rational [sic] that the *Coastal Corp.* court applied to various boards of Contract Appeals," *i.e.*, a "claim for bid preparation costs falls outside the scope of the Contract Disputes Act." The contracting officer stated that, while she "regret[s] any inconvenience the cancellations of these solicitations has caused," she does "not, however, as contracting officer, have the authority to grant the relief [EMS was] requesting." (R4, tab 6)

By letter dated 23 January 1992, EMS advised the contracting officer that it had received her letter, the letter's legal "citation is inappropriate," and the letter seems "premature" because EMS "continue[s] to develop (its] claim" and, when "the incorrect FOIA denials are settled in court, ... will formalize [its] final claim, have it reviewed by a law firm specializing in this field, submit it to [her) and, upon denial, appeal it" (R4, tab 7).

On 7 December 1992, EMS submitted to the contracting officer a claim, which was "the final version of the short form claim" it had submitted previously and which was certified by Edward M. Scott, EMS's "Owner." The "Executive Digest" set forth by EMS for its 10-volume claim provided, in part, as follows:

> In 1984, reacting to the Beirut airport bombing that killed and maimed more than 250 military personnel, the Navy began to illegally contract out certain Navy security services. In late 1988, a DOD-IG investigation discovered that this contract duplicated work done by an existing Navy agency. Navy counsel pointed out that contracting out these activities violated the law. DOD-IG recommended that the Navy militarize this work by performing it themselves. SecNav agreed with the DOD-IG; the Navy Comptroller stopped funding this effort in 1989.
>
> Notwithstanding SecNav's agreement with DOD-IG and the complete lack of funding for this effort, in 1990 and again in 1991 Navy *military* personnel initiated solicitations for detailed proposals from industry to do this work. The first solicitation asked for one comprehensive "how-to" manual from respondents. After the manuals were received, this solicitation was canceled on the basis of a purported major change in work scope, resulting in a second solicitation in 1991. This solicitation asked for 5 separate "how-to" manuals. After the manuals were received, this solicitation was canceled on the basis the work was no longer needed. Both cancellation reasons were completely specious. [Emphasis in original] [Footnote omitted)
>
> In sum, the Navy deliberately abused the federal procurement system to steal manuals and knowledge from industry so it could continue to do this work themselves. At worst, this is criminal activity; at best it is reckless negligence.

The "Executive Summary" set forth by EMS for the claim further provided as follows:

> By deliberate violations of the Federal Acquisition Regulations and other laws, the Navy . . . twice requested, received, and assimilated products from numerous, technically qualified security contractors without payment for these products ....
>
> * * *
>
> The total claim is $250,782.62 which consists of:
>
> 1) Theft of product $75,000;
>
> 2) Needless and costly preparation of technically sound and cost-realistic RFPs and changes thereto, and costs to prepare for, undergo, and react to DCAA audits $70,890.63;
>
> 3) Costs to prepare this claim $80,187.50;
>
> 4) Interest for one year $18,576.49.
>
> 5) Attorneys' fees and costs, and court costs, should they be incurred.
>
> . . . [T]he Navy Security Coordination Team (NSCT) was created to "increase anti-terrorism skills." Shortly thereafter the Navy decided to contract-out some of this work. The last contract (C-0037) for this work was awarded in 1988 to Kapos

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Associates Incorporated (KAI) who employed several ex Navy officers to perform these services into January 1991....

* * *

While the contract was running its course, the Navy made at least two separate, unsuccessful attempts to buy manuals from KAI, in preparation to carry on without the services of a contractor. They were not successful because they simply did not have the money to pay for these products, which were not within the SOW of the KAI contract and therefore required additional effort and funds. The Navy resorted to the tactic of using bogus RFPs (0108 and 0118) requesting respondents to provide a technical section that in fact resulted in the best illustrated Physical Security manuals tailored to NSCT's purposes. No such technical section was required on *any* of the earlier contracts.

Well before R-0108 was issued in April 1990, and well before the last service was performed by KAI in December 1990, the Navy knew it did not have the money to continue contracting-out these services, and it knew of the decisions made as a result of the DOD-IG report....

* * *

The evidence shows that NSCT itself was engaged in an intense bureaucratic struggle to preserve its own redundant existence. To survive without Contractor Assisted Advisory Services, NSCT needed to eliminate CAAS but obtain their collective knowledge embodied in "how to" manuals for each SOW service, before getting rid of them.

... Twice the claimant provided the Navy with manuals, graphics, guidelines and report outlines that embodied knowledge gained over 46 years of professional experience, tailored to the specific needs of the NSCT. The claimant's technical products under R-0118 were found by NSCT to be superior even to the Navy's incumbent contractor, who had been doing the work for years and had all the inside knowledge of an incumbent....

Not only did the Navy in effect steal these tailored products from the claimant ..., it also caused the expenditure of a great deal of time and effort in preparing and revising ... two detailed offers and undergoing one DCAA audit in response to these RFPs, which the contracting officer should never have allowed to become "production" RFPs per the FAR, for the absence of funding.... [T]he Navy should pay for what it got, and the needless expense caused by its negligence and deceit.

(R4, tab 8)

By letter dated 24 February 1993, a Navy contracting officer advised EMS that, "[a]s stated in our 21 January 1992 response to your earlier claim, the Navy has no authority to decide a claim under ... (FAR) clause 52.233-1, Disputes (APR 1984), or the Contract Disputes Act where no contract has been awarded" and "[c]onsequently the Navy will not consider your 7 December 1992 claim under the Disputes clause or the Contract Disputes Act" (R4, tab 9). On 17 March 1993, EMS notified the Board by letter that the Navy's contracting officer had failed to render a decision upon its 7 December 1992 claim within the 60 days allowed by the FAR and "an appeal is intended." In accordance with the Board's Rules, on 9 April 1993, EMS submitted a "complaint" to the Board, which reiterated the allegations set forth in EMS's 7 December 1992 claim and indicated that EMS's appeal was "under de facto contracts" arising from solicitation Nos. N000189-90-R-018 and N000189-91-R-0118 (R4, tab 10).

DECISION

In moving to dismiss for lack of jurisdiction, the Navy contends that, because "no contract was ever awarded" by it, EMS's claim of "theft" must sound in tort and the remaining claims must "necessarily be based upon an implied contract with the Navy to treat [EMS's] bid honestly and fairly," a "type of implied contract [which] is not covered by the CDA." In opposing dismissal, EMS asserts that: the Navy's "characterization of [its] claim as an attempt to recover Bid and Proposal Preparation (B&PP) costs and ... to have ... proposals ... considered '... honestly and fairly...'" is a "red herring;" it "recognizes that the Board has no jurisdiction over criminal matters" or "contracts [implied] in law;" its "claim is sounded in contract law and not in torts;" and it "has always *expressly* stated that [its] claim was based on implied contracts-in-*fact*" (emphasis in original).

The CDA confers jurisdiction on the Boards of Contract Appeals to hear claims founded upon the types of contract specified in the CDA. *Coastal Corp. v. United States* [31 CCF ¶71,373], 713 F.2d 728, 730-31 (Fed. Cir. 1983); *accord Institut Pasteur v. United States*, 814 F.2d 624, 627-28 (Fed. Cir. 1987); *Forman v. United States* [32 CCF ¶73,682], 767 F.2d 875, 878-79 (Fed. Cir.

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1985). The scope of the CDA is limited specifically to implied or express contracts for the procurement of property or services and for the disposal of personal property. 41 U.S.C. § 602(a). An implied contract to treat a bid honestly and fairly, therefore, is not among the types of contract specified in the CDA and not a basis for a Board to hear a claim. *Coastal Corp.*, 713 F.2d at 730-31; *Apex Management Services, GmbH*, ASBCA No. 27341, 86-3 BCA ¶ 19,167 at 96,887.

The CDA does not confer jurisdiction on the Boards to hear claims "sounding in tort." *E.g., Alfred Bronder*, ASBCA No. 29938, 86-3 BCA ¶ 19,102, *aff'd*, 824 F.2d 980 (Fed. Cir. 1987) (table). However, claims which might be "characterized" as tortious can be entertained if the duties or obligations purportedly breached arise primarily from express or implied-in-fact contracts. A Board, therefore, may hear a claim "with a tort aspect" if the claim is founded upon a type of contractual obligation specified in the CDA. *E.g., HTC Industries, Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560 at 127,309; *Aulson Roofing, Inc.*, ASBCA No. 37677, 91-2 BCA ¶ 23,720 at 118,728; *see H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985); *Chain Belt Co. v. United States*, 115 F. Supp. 701, 711-12, 127 Ct. Cl. 38, 54 (1953).

Accordingly, in order to rule upon the pending motion to dismiss for lack of jurisdiction, we must examine the nature of the obligation alleged by EMS. *See, e.g., Institut Pasteur*, 814 F.2d at 627-28; *HTC Industries, Inc., supra*, at 127,309. In doing so, we express no views regarding the veracity of EMS's allegations and, due to the inflammatory nature of some of the allegations, for purposes of fairness, stress that EMS's allegations are unproven at this time.

As set forth above, in its claim, EMS essentially asserts that: twice it provided the Navy with manuals, graphics, guidelines and report outlines, which embodied knowledge it had gained over 46 years of professional experience and which were tailored to the specific needs of the NSCT; it did so in response to solicitations issued by the Navy expecting that the Navy would abide by Federal procurement regulations and use the data submitted only for purposes of awarding a service contract; both times it submitted such data the Navy cancelled the solicitations for specious reasons; the Navy knew before issuing the solicitations that no funding was available for the service contracts solicited and issued the solicitations solely to obtain data from contractors deemed necessary to perform the solicited services "in-house;" and the Navy should have to pay EMS monies for subsequently using "in-house" the data EMS submitted. EMS, which apparently has been proceeding without benefit of legal counsel, thus appears to contend, in sum, that it furnished "trade secrets" in confidence to the Navy with the understanding use of the data would be limited to evaluating proposals submitted for performance of a service contract and that the Navy did not abide by the understanding.

A "trade secret" is often defined as any formula, pattern, device or compilation of information which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), *citing* Restatement of Torts § 757, comment b (1939); *E.I. Du Pont de Nemours & Co. v. United States*, 288 F.2d 904, 911, 153 Ct. Cl. 274, 286-87 (1961). In various cases, courts have found that a manual, graphics, outline, or report constituted a "trade secret." *E.g., Tlapek v. Chevron Oil Co.*, 407 F.2d 1129, 1134-35 (8th Cir. 1969) (maps, analyses, and studies); *SmokEnders, Inc. v. Smoke No More, Inc.*, 184 U.S.P.Q. 309, (S.D. Fla. 1974) (manual containing step-by-step information to be conveyed by lecture to participants in a controlled classroom situation); *accord International News Service v. Associated Press*, 248 U.S. 215, 236-38 (1918) (news reports).

It is well-established that the public is at liberty to discover trade secrets by fair and legitimate means, such as independent invention, accidental disclosure, or by so-called reverse engineering. Further, it is well-established that, upon discovery by legitimate means, the public is at liberty to use the subject matter of a trade secret with impunity. *E.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475-76 (1974); *Radioptics, Inc. v. United States* [27 CCF ¶ 80,365], 621 F.2d 1113, 1129, 223 Ct. Cl. 594, 623 (1980).

As a result, the law affords protection to a trade secret holder under two circumstances. First, if the discovery of a trade secret is by an improper means, such as theft or wiretapping, the trade secret holder can pursue a claim sounding in tort against the party taking such action. *E.g., Kewanee Oil*, 416 U.S. at 475-76; *Radioptics*, 621 F.2d at 1130, 223 Ct. Cl. at 625; *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 147-48 (D.C. Cir. 1951).

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Second, if a trade secret holder reveals its trade secret to another in confidence and under an obligation limiting use and disclosure, the trade secret holder can pursue a claim founded upon "contract" in the event of unauthorized disclosure or use of the trade secret by those to whom the secret has been confided under restriction of nondisclosure and nonuse. *E.g., Kewanee Oil*, 416 U.S. at 475-76; *CompuDyne Corp.*, ASBCA No. 14556, 72-1 BCA ¶ 9218 at 42,770.

While parties often enter into an express agreement which reveals a trade secret in confidence and authorizes a specific use of that trade secret by those to whom the secret has been confided under restriction of nondisclosure, *e.g., Lear v. Adkins*, 395 U.S. 653, 657 (1969), there are occasions where such agreements are implied-in-fact. *E.g., The Padbloc Co. v. United States* [9 CCF ¶ 72,374], 161 Ct. Cl. 369 (1963); *Research, Analysis & Development, Inc. v. United States* [32 CCF ¶ 73,471], 8 Cl. Ct. 54 (1985). Indeed, in *Airborne Data, Inc. v. United States* [30 CCF ¶ 70,905], 702 F.2d 1350 (Fed. Cir. 1983), precedent by which we are bound, the United States Court of Appeals for the Federal Circuit sustained a determination that the Government had breached an implied-in-fact contract arising from circumstances similar to those alleged to exist here.[1]

Because EMS fairly has alleged an implied-in-fact agreement concerning use of a trade secret, we must reject the Navy's contention that EMS's appeal, on its face, sounds in tort. *See id.* at 1352-53. As the United States Court of Appeals for the District of Columbia Circuit has explained:

> [O]ne who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use. In that event a licensee who uses the secret for purposes beyond the scope of the license granted by the owner is liable for breach of contract, but he commits no tort, because the only right of the owner which he thereby invades is one created by the agreement of disclosure. The owner could not maintain a suit against him for damages arising from unlicensed use without pleading and proving the contract. This being true, the gist of the owner's action is the breach of the licensing agreement.

Aktiebolaget Bofors v. United States, 194 F.2d at 148; *accord American Science & Engineering, Inc. v. Califano* [24 CCF ¶ 82,149], 571 F.2d 58, 61 (1st Cir. 1978) (allegation of abrogation of license agreement "is essentially a contract dispute"); *International Engineering Co. v. Richardson* [21 CCF ¶ 83,870], 512 F.2d 573, 578-79 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976) (same).

Although the Navy further contends in its motion to dismiss that EMS's appeal is founded, for the most part, upon a type of contract not specified as being within the scope of the CDA, on various occasions, courts and Boards have entertained under the CPA claims founded upon contracts licensing the use of data. *E.g., SCM Corp. v. United States* [29 CCF ¶ 82,334], 675 F.2d 280, 281, 230 Ct. Cl. 199, 200 (1982); *General Atronics Corp.*, ASBCA No. 37923, 91-3 BCA ¶ 24,047; *Software Design*, ASBCA Nos. 23616, 24897, 82-2 BCA ¶ 16,073; *see* 10 U.S.C. § 2321. Moreover, prior to the CDA, Boards of Contract Appeals entertained claims founded upon contracts licensing the use of data that were entered into pursuant to the Armed Services Procurement Act of 1947, 62 Stat. 21. *E.g., Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415; *CompuDyne Corp.*, ASBCA No. 14556, 72-1 BCA ¶ 9218. Like the CDA, 41 U.S.C. § 602(a), which governs contracts for the procurement of "property" and "services," the Armed Services Procurement Act authorized and governed contracts for the procurement of "supplies or services." *See Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 114 (1954).

Since EMS's appeal, on its face, appears founded upon an agreement licensing use of a trade secret, a type of contract within the scope of the CDA, we also must reject the Navy's contentions characterizing the appeal as premised on an implied contract to honestly and fairly consider bids, a type of contract not within the scope of the CDA.[2] EMS fairly has alleged an implied-in-fact

[1] In *Airborne Data*, 702 F.2d at 1359 and n.18, the claimant submitted a proposal containing trade secrets to the Government pursuant to 41 C.F.R. §14-4.5101 (1977). That regulation, like FAR 52.215-12, provided that one could submit to the Government proposals containing trade secrets and bearing a legend restricting disclosure and use of the data set forth to only that necessary for purposes of evaluating the proposal, and that Government officials "shall comply" with the terms of the restrictive legend.

[2] Although not cited to us by the parties, in two prior decisions, this Board has addressed a motion to dismiss for lack of jurisdiction similar to that filed by the Navy here, *i.e.*, arguing a claim con-

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agreement and must be furnished an opportunity to prove the existence and terms of any such agreement. *See Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910 at 124,221; *Balboa Systems Co.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702; *Reynolds Shipyard Corp.*, ASBCA No. 37281, 90-1 BCA ¶ 22,254; *Lance Dickinson & Co.*, ASBCA No. 36804, 88-3 BCA ¶ 21,186 at 106,936.

CONCLUSION

The motion to dismiss is denied, without prejudice to renewal after an evidentiary presentation. The Navy shall file its answer to the complaint on or before 10 September 1993.

[¶ 26,259] Spinazzolo Systems, Inc.

ASBCA No. 44536, July 29, 1993. Contract No. 1030-761034.

Contract Disputes, Claims—Quantification—Meaningful Review.—A government motion to dismiss a breach of contract claim on the ground that the contractor had failed to submit a properly quantified claim was rejected, because the statement of the claim provided the contracting officer with an adequate notice of the basis and amount of the claim. The claim was broken down into logical elements such as travel, labor costs, lost profits, and per diem for employees.

For the appellant: David L. Spinazzolo, President. For the government: Jessica R. Holmes, Attorney-Advisor, U.S. Department of State.

Before GIERTZ, RUBERRY, and SPECTOR, Administrative Judges.

GIERTS, Administrative Judge: This appeal is before the Board on the Government's motion to dismiss based on appellant's alleged failure to submit a properly quantified claim. Alternatively, the Government moves for partial summary judgment arguing that the profit element of appellant's claim is not recoverable as a matter of law.

Statement of Facts

In June of 1987, appellant and the United States Department of State entered a contract calling for the removal of asbestos at the American Consulate General in Karachi, Pakistan. The contract completion was required within 224 days, *i.e.*, by 26 January 1988. On 19 February 1988, the contract was terminated for the convenience of the Government. At that time, performance was less than 50 percent complete.

Appellant submitted a settlement proposal in the amount of $25,628. The contracting officer eventually issued a final decision determining that appellant was due $13,027. Appellant appealed this decision to the Board and the matter was docketed as ASBCA No. 38601. The complaint, however, sought an additional $85,908 for breach of contract damages. Upon the Government's motion, the Board dismissed that portion of the appeal related to breach of contract matters which had not been properly certified and presented to the contracting officer for decision. *Spinazzolo Systems, Inc.*, ASBCA No. 38601, 91-1 BCA ¶ 23,578 (28 November 1990).

(Footnote Continued)

cerning trade secrets was founded upon an implied contract to honestly and fairly consider bids. In *SCM Corp.*, ASBCA Nos. 26544, 26786, 26788, 26790, 26791, 26792, 85-1 BCA ¶ 17,783 at 88,823-24, the Board granted the Government's motion to dismiss *after* the Board had conducted a trial and found as a fact that, although the appellant's practice had been to affix a restrictive legend to all documents that "tend to contain proprietary information," appellant had not affixed such a legend to the proposal it had submitted to the Government containing information later used by the Government. Further, in *General Connectors Corp.*, ASBCA No. 32298, 87-2 BCA ¶ 19,751, the Board granted the Navy's motion *after* determining that the appellant was a second tier subcontractor of a company possessing an express contract with the Government requiring the delivery of data and that there was no assertion of a delivery of proprietary data to the Government other than pursuant to the express prime contract. Thus, although dicta in these two decisions could be construed as suggesting grant of the Navy's motion here, we find both decisions to be distinguishable and not persuasive with respect to the circumstances presented in this appeal.

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Subsequently, on 2 April 1991, the parties settled that portion of ASBCA No. 38601 related to the convenience termination reserving those matters involving breach of contract which had been dismissed by the Board.

On 3 March 1992, appellant submitted a properly certified claim seeking $118,032.24 for breach of contract. A variety of allegations form the basis of the breach of contract claim. Appellant contends that the Government failed to make certain Consulate's rooms available, failed to adhere to an agreed nine stage schedule, failed to provide Pakistani laborers and interpreters, and failed to follow a phase-in schedule. Appellant claims that it is entitled to compensation as follows:

$ 8,100	cost of unscheduled recycling of the appellant's management team to Pakistan due to a Government caused 65 day delay in the project.
$ 11,050	cost of additional per diem and living cost for salaried employees.
$ 14,313	cost of additional salaries
$ 12,311	additional overhead computed at the rate of
$ 189.40	per day for the 65 day delay.
$ 11,541.75	increased overhead expenses related to original work.
$ 24,860	lost profits which it would have earned had the contract been completed.
$ 28,282	value of equipment seized by the Government.
$ 7,574.49	value of material seized by the Government.
$118,032.24	

On 20 April 1992, the contracting officer denied appellant's claim. Although the contracting officer noted that the claim was "deficient" because it failed to explain the basis for the amounts claimed and provide any documentation, he found that these deficiencies were "not material since ... we believe the claim has no merit." The contracting officer essentially determined that the delay to the completion of the project was appellant's fault.

DECISION

The Government first argues that the Board lacks jurisdiction to entertain the appeal since the claim submitted to the contracting officer was not properly quantified. The Government places primary reliance on the Board's decision in *Holk Development, Inc.*, ASBCA No. 40579, *et al.*, 90-3 BCA ¶ 23,086. In *Ebasco Environmental*, ASBCA No. 44547, 93-3 BCA ¶ 26,220 (9 July 1993), we stated:

> In determining whether or not appellant submitted a "claim" within the meaning of the CDA, we employ a "common sense" analysis. *Transamerica Insurance Corp. v. United States* [38 CCF ¶ 76,374], 973 F.2d 1572, 1579 (Fed. Cir. 1992). "All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

Unlike *Holk* where the contractor provided only a bottom-line amount, appellant here has provided more detail. The instant claim is broken down into logical elements such as travel, labor and per-diem for the added work. This is "sufficient to enable the contracting officer to undertake a meaningful review of the claim." *Holk, supra.* at 115,938. We find that appellant's claim provides "adequate notice of the basis and amount of the claim." *Id.*

Alternatively, the Government moves for partial summary judgment on appellant's claim for lost profits. It is not fully developed regarding what these elements of profit pertain to and we deny the Government's motion at this time. Further factual development is necessary.

The Government's motions are denied. The parties shall confer and advise the Board regarding their desires for further proceedings.

[¶ 26,260] K.C. Construction Co.

ASBCA No. 44448, August 2, 1993. Contract No. N62472-88-C-5527.

Delays—Approval Delays—Review of Drawings.—A contractor's contention that the government's failure to timely approve duct-work shop drawings delayed the fabrication

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and installation of the ducts was rejected because the contractor failed to show that the review time was unreasonable or that the overall project was delayed.

Interpretation of Contracts—Reasonableness—Government-Furnished Equipment.—Under a contract for the renovation of an office, a contractor's interpretation that the requirement to install movable office partitions did not include the requirement to provide electrical components to be affixed to the partitions was not reasonable, because the contractor's position would have rendered meaningless certain paragraphs. The contractor asserted that the government was required to supply the electrical components and that the contractor was required to "only install" the partitions with the exception of providing several minor items. The contractor ignored the provision that it "was required to supply miscellaneous fittings" as well as the provision that the government would not furnish any material or equipment "unless otherwise specified." The contractor's position, when considered with a drawing that depicted the need for 79 electrical receptacles, would also have rendered meaningless a reference in the amendment that the government would provide 27 electrical receptacles.

For the appellant: Davis & Costa, Blue Bell, Pennsylvania, by David I. Davis. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Audrey Van Dyke, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before ELMORE and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: K.C. Construction Co. (KC or appellant) has appealed the contracting officer's (CO) 24 January 1992 "final decision" denying KC's claim for an equitable adjustment for (1) a 10-calendar day time extension due to the alleged excessive time the Government took to review KC's HVAC duct work shop drawings; (2) a 119-calendar day time extension due to KC having to procure and provide 55 "Hauserman" electrical components that, allegedly, were to be provided as Government furnished equipment (GFE) and; (3) release of liquidated damages (LD).

The appellant has elected to utilize the Board's ACCELERATED procedure. Entitlement only will be decided regarding the issue of delay damages and both entitlement and quantum are in issue regarding the issues of GFE and withholding of LDs. (Tr. 11-14; R4, tabs 23, 25)

SUMMARY FINDINGS OF FACT

On 22 May 1989 Northern Division, Naval Facilities Engineering Command awarded KC contract N62472-88-C-5527 (C-5527), with amendments 0001 through 0004, for a contract price of $258,000, to (R4, tab 1; tr. 16, stipulation):*

> [R]enovation of 4800 S.F. of existing office area and the provision to provide approximately 4400 S.F. of additional office area. included to be new movable partitions (installation only), wall coverings, new suspended ceilings, new lighting, new floor finishes, modification to existing and new HVAC system, new partitions where

* The parties verbally stipulated on the record as follows (tr. 16-17):

Mr. Davis: The following statements are admitted for purposes of these proceedings. On May 2, 1989, KC was awarded Contract N62472-88-C-5527 by the Navy for renovation of NPPSO spaces at Building 4-D at the Naval Aviation and Supply Office in Philadelphia for the contract price of $258,000. During the course of performance, there were four approved modifications increasing the contract price to $296,042 and extending the completion date from September 14, 1989 to November 10, 1989.

KC completed performance on or about February 16, 1990. During the course of performance, certain disputes arose concerning timeliness of performance and acquisition of certain electrical components. The Navy has alleged that KC was delayed in its progress and has assessed $19,000 in liquidated damages, which sum is being retained from the contract proceeds.

The Navy furnished certain electrical components, i.e., receptacles for installation in Hauserman partitions, which is [sic] alleges were the responsibility of KC to furnish. The Navy has retained $1,042 of the contract proceeds on account of its furnishing the receptacles for the Hauserman partitions. Addendum No. 4 to the contract identifies certain Government-furnished equipment for the subject contract. One such item is a receptacle for the Hauserman partitions of which the Navy was to provide 24.

The contract drawings indicate a total of 79 receptacles to be installed in the partitions. The Navy provided the Hauserman receptacles on February 5, 1990, and work was completed promptly thereafter. Thank you.

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shown on drawings and incidental related work.

The contract specifications instructed the bidders, in pertinent part, as follows (R4, tab 1; exh. G-10):

8. Movable partitions supplied by the Government were manufactured by Hauserman, Inc., 21 S. 5th Street, Philadelphia, PA 19106, (215) 928-1080. The following will be supplied:

85 EA. Panel, Warm White, 9'6" high w/panel connector, carpet gripper, ceiling channel and black vinyl base.

16 EA. Switch, Single Complete w/panel connector, plate, and box.

24 EA. Receptacle, Duplex, complete w/cut out panel connector, plate and box.

* * *

NOTE: Glass is not supplied with the Hauserman Partitions. Contractor shall supply tempered glass, 1/4 inch thick. Contact Hauserman for method of installation and glazing requirements.

* * *

(Added by Amendment 0004 to solicitation)

Section 01010, GENERAL PARAGRAPHS:

5.1 Omissions from the drawings or specifications or the inaccurate or incomplete description of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or inaccurately described details of the work but shall be performed as if fully and correctly set forth and described in the drawings and specifications.

* * *

6.2 Liquidated Damages: If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of $200.00 for each day of delay.

* * *

7.1 The Government will not furnish any labor, material or equipment, unless otherwise specified on the drawings and specifications.

7.2 Contractor to furnish all required material and equipment

Section 16402. INTERIOR WIRING SYSTEMS:

3.1.2 Wiring Methods: Wiring method shall be insulated conductors installed in conduit, except where specifically indicated or specified otherwise, or required by NFPA 70 to be installed otherwise....

* * *

3.1.11 Government-Furnished Equipment: The Contractor shall make connections to this equipment to make it operate as intended, including providing miscellaneous items such as plugs, receptacles, wire, cable, conduit, flexible conduit, and outlet boxes or fittings.

Drawings A-1, A-5 and E-1, when viewed together, depicted "MOVABLE PARTITIONS SUPPLIED BY OWNER, INSTALLED BY G.C." with 79 receptacles. The contract neither included a movable partitions specification section nor manufacturer's instructions for the partition assembly. KC alleges its bid was based on its determination that the Government furnished partitions would have pre-installed receptacles and switches and KC would not be required to provide any material for the GFE. KC was unable to get Hauserman to provide installation instructions prior to or after contract award. However, prior to submitting its bid, KC neither informed the CO of a need for the partition installation instruction nor did it request clarification regarding Amendment 0004's instruction that only "24" receptacles would be supplied while 79 were required. (Tr. 39-44, 89-90; exh. G-4, A-12; note 1 *supra)*

On 18 May 1989 KC transmitted to the Government for approval its "duct layout" shop drawings with suggested modifications, which the Government on 6 June 1989 returned for revision and resubmittal and which the Government's HVAC architect-engineer, PennEast Corp., on 12 June 1989 approved as submitted. However, KC was not told of the approval until 29 June when it was verbally informed in response to its inquiry. No delay in completing the contract was attributable to a delay in approving the duct layout shop drawings. The HVAC duct installation was completed prior to 6 November 1989, when KC left the job due to the unavailability of the Hauserman electrical components. KC did not provide Daily Reports to Inspector for the period 15 June 1989 to 30 August 1989 when a Contract Construction Compliance Notice was issued. (R4, tab 4; tr. 74-87, 121-25; exh. A-5 through A-10)

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On 11 October 1989 the Navy's "Assistant Resident Engineer In Charge" (AREIC), based on the extensive contract work remaining and KC's insufficient job manning, concluded the contract completion date of 20 October 1989 would not be met and requested KC to immediately outline its contract completion plan. (R4, tab 6; exh. G-1)

On 20 October 1989 KC, for the very first time, informed the Government that although the electrical portion of the contract included "the installation of electrical circuits and connections to the two types of movable office partitions supplied by the Government," and Amendment 0004 required the "installation and wiring of certain government furnished proprietary [sic] and custom made electrical receptacles within the Hauserman partitions, in addition to the circuits which feed the partitions," the "quantity of specially fabricated electrical receptacles supplied by the Government for this purpose is not sufficient to complete all of the Hauserman electrical work as shown on the contract drawings." KC, contending the Government was responsible to furnish the additional quantities of electrical materials needed to make up the deficit, argued it was contractually required, under Amendment NO. 4, to "only install" the Hauserman partitions with the exception of the glass and minor touch up painting. KC also argued that: specification section 16402, paragraph 3.1.11 did not apply since it is "intended to apply to electrical connections for Government supplied pumps, motors and other equipment" and it neither requires that KC make up any deficits or missing components in the Government supplied partitions themselves, nor does it apply to the specially designed proprietary electrical components, fabricated by the Hauserman company exclusively for use on their partitions and which are an integral part of the GFE. (R4, tab 8; tr. 102; note 1, *supra)*

The AREIC in a 31 October 1989 letter responding to KC's 20 October letter stated KC's "assumption" that section 16402, paragraph 3.1.11, applies only to some specific type of Government furnished equipment is baseless because amendment 0004 listed the Government furnished equipment and did not include sufficient electrical fixtures to complete the installation, and section 16402, para. 3.1.11 required the "contractor to supply miscellaneous fittings to make the equipment operate as intended." KC was told to supply the remaining electrical components to make the partitions operate as intended. (R4, tab 11)

On 2 November 1989 KC, stating it did not agree with the Government's position that KC was responsible for furnishing the electrical components for the Hauserman partitions, indicated it would endeavor to locate a supply source but, since the particular type of Hauserman partition is "obsolete" and no longer in production, there is a possibility the part will not be readily available. KC contended that since the drawings and specifications "clearly state" the partitions were to be Government furnished, and since the proprietary electrical components were an "integral part of the Hauserman system," responsibility for errors and omissions in the contract documents ultimately rests with the Government. KC requested the Government make the parts available from inventory free of charge since the job was at a standstill and no further work could be accomplished until the subject parts are received/procured. (R4, tab 12)

On the Daily Report To Inspector dated "11/6/89 to 2/4/90" KC reported it had "officially pulled off job [due to) Gov't inability to fulfill its end of contract." KC complained it had waited nearly a month for Hauserman panel connectors and electrical components with no action coming from the Government side but that KC would return when the Government supplied the missing electrical components. The Government's 9 March 1990 comments affixed to the same report stated the panel connectors and the electrical components listed on amendment No. 4 had been delivered to the contractor and were eventually lost when the contractor failed to secure them, and the specifications and amendment 0004 state the contractor is to supply the rest. (R4, tab 13)

In its letter dated 14 November 1989 KC informed the Government that it considered itself "prevented from completing the subject Project due to the ongoing delays associated with the 125 A breakers for the HVAC service and electrical outlets and switches for the Hauserman Partitions"; that the delays were due to the errors or omissions in the original contract documents and, therefore, the responsibility of the Government; that KC would continue to assist in finding a solution to the problem but intended to submit a claim for KC's increased cost of superintendence, project management, and office overhead; and labor production inefficiencies suffered by the electrical subcontractor "as a consequence of being denied the ability to complete the Hauserman internal wiring

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work in conjunction with the contract electrical work." KC also withdrew its offer to wire the additional 55 Government supplied Hauserman receptacles and switches at no change in contract price. (R4, tab 14)

By speed letter of 14 December 1989 KC informed the Government that its electrical subcontractor had confirmed that Hauserman's distributor, Advance Office Systems, had the electrical parts, except the connectors, available and delivery would take 2 to 3 weeks from the date a purchase order is placed, which would be issued as soon as Advance can confirm the availability of the connectors (R4, tab 15; exh A-11).

On 8 January 1990 the Government issued a "cure notice" notifying KC that it was in danger of being terminated for default due to its failure to order the required electrical components for the movable partitions and to prosecute the work. KC was given "10 days [to] demonstrate [its] ability to perform the work by producing the required material and submitting a practical schedule of work." (Exh. A-13)

On 18 January 1990, in responding to the Government's 8 January cure letter, KC declared it disagreed with the Government's contention that KC was not making a concerted effort to complete the contract and maintained it had been unable to get Hauserman to provide installation instructions prior to or after contract award; that not until 14 December 1989 was KC able to locate some of the electrical components needed, and not until 22 December were the "proprietary" connectors located. KC argued the connectors were considered GFE since they were not an "off the shelf item" but specially assembled by Hauserman for use in its partitions. (Exh. A-1, -3)

KC's letter of 12 February acknowledged receiving the Government furnished electrical components for the Hauserman partitions and informed the Government that KC had "field modified" 34 receptacle and 12 switch locations because Hauserman panels did not permit back-to-back installation of the electrical components as indicated on the drawing (exh. A-2).

By letter dated 19 December 1990 KC filed a claim requesting an equitable adjustment (EA) and time extension (TE) for the following alleged delays which the Government, in conceding partial liability, by letter of 5 March 1991 granted as follows (R4, tabs 19, 20):

Description of delay	*KC Requested EA/TE*	*Government Granted EA/TE*
Unaccessible Project Site	$2,061.92/14 cal. days	$1,031/7 cal. days
Review of Ductwork Drawings	$1,472.80/10 cal. days	$0/0 cal. days
Interest for Late Payment	$247.96/0 cal. days	$0/0 cal. days
Hauserman Partitions	$10,296.03/23 cal. days	$7,846/9 cal. days
Hauserman Partitions Electrical Components	$15,169.84/103 cal. days	$0/0 cal. days
Cutting Hauserman Partitions	$3,166.96/5 cal. days	$1,000/2 cal. days
Hauserman Partitions Door Hardware	$3,166.96/5 cal. days	$800/2 cal. days

The Government's letter further assessed liquidated damages as follows:

Total Recommended Equitable Adjustment:	$10,677.00
Recommended Time Extension:	Twenty (20) calendar days
Total Liquidated Damages:	$20,000.00 (100 days)*
Total of previous claim:	$9,964.00 (0 days)
Cost of customer furnished electrical component	$1,042.00

On 1 and 2 August 1991 KC requested the CO issue a "final decision" on its equitable adjustment claims as follows:

> The claim for Equitable adjustment includes a time for the 10 calendar days beyond the allowable 21 days permitted for review of submissions, release of the appropriate liquidated damages, and payment for KC's extended overhead. . . . The total amount of the claim is:
>
> | | |
> |---|---|
> | 10 Calendar days × 147.28 | = $1,472.80 |
> | Released liquidated damages | = $2.000.00 |
> | Total | $3,472.80 |

(R4, tab 22)

* From 22 October 1989 until 20 February 1990 (120 days minus 20 days)

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The claim for Equitable adjustment includes a time extension for the time from October 19, 1989 to February 15, 1990 (119 Calendar days), payment for KC's extended overhead, release of the $1,042 the Navy is withholding for the components they provided in excess of the 24 and release of appropriate liquidated damages .... The total amount of the claim is:

119 Calendar days × 147.28/day	= $17,526.32
Release for components	= 1,042.00
Released liquidated damages	= $23.800.00
Total	$42,368.32

(R4, tab 23)

On 24 January 1992 the CO issued the "final decision" denying KC's $45,841.12 equitable adjustment claim (R4, tab 25). By letter dated 21 April 1992 KC timely appealed the CO's adverse decision (Board correspondence file).

PARTIES' POSITIONS

HVAC Claim:

KC contends the Government took 10 days longer than was reasonable to review the duct work shop drawings forcing KC to stop work on the project. KC contends that had the drawings been approved when submitted the duct fabrication and installation could have been completed in "early June" 1989. (R4, tab 22)

The Government contends the shop drawings were submitted for review on 26 May 1989 and returned on 6 June because they were incomplete; that KC resubmitted the drawings on 6 July and the Government approved them on 11 July 1989; that the two review periods were within a reasonable submittal review period. In the alternative the Government contends that KC did not suffer any damages since its construction schedule shows the HVAC work starting ten weeks after mobilization and the work was completed within the originally scheduled contract performance period. (R4, tab 25)

Electrical Component Claim:

KC contends that the contract drawings indicated 79 receptacles were "to be installed" in the Hauserman partitions; that amendment 0004 presented a list of Government furnished equipment and included 24 receptacles; that KC intended to install the contractually permitted standard duplex receptacles with a surface mounted "wiremold" system for the remaining 55 receptacles and was subsequently told the surface mounted receptacles were unacceptable; KC started installation of the Hauserman partitions approximately 2 October 1989 and on 19 October informed the Navy that the lack of GFE, the electrical components, was delaying the project; that Hauserman electrical components were no longer manufactured and were obtainable only from existing stock sources/suppliers; that on 14 and 22 December 1989 KC located sufficient stock but refused to pay for the purchase of the components; that on 5 February 1990 the Navy provided the Hauserman receptacles to KC and on 16 February 1990 KC completed the contract. (R4, tab 23)

The Government contends Drawing E-1 shows that 79 receptacles and 6 switch outlets are to be installed in the Government furnished Hauserman partitions; that Amendment 0004, setting forth the GFE, indicated only 24 receptacles would be provided; that KC was responsible for determining the availability of the electrical components prior to bidding; that standard commercial electrical components could be used in the partitions; that KC failed to proceed diligently with contract performance pending final resolution of its request for relief as required by the Disputes clause; therefore, the delay in completing the contract resulting from the late installation of the electrical components into the Hauserman partitions was KC's responsibility, and not the Government's; and KC is not entitled to either an equitable adjustment or the remission of the LDs. (R4, tab 25)

DECISION

HVAC Delay Claim

To prevail on a claim of delay, appellant must show: (1) specific delays were attributable to Government-responsible causes; (2) these delays resulted in delay of the overall project; and (3) the Government-caused delays were not concurrent with delays within the contractor's control. *Lambrecht & Sons, Inc.*, ASBCA No. 42773, 92-2 BCA ¶ 24,863 and cases cited.

We have held that "in any situation involving delayed approval of shop drawings, first articles, subcontractors, etc., a contractor is not entitled, as a basic premise, to any adjustment unless the delay is unreasonable" and "[t]he length of time taken to give approval does not 'establish ipso facto an unreasonable delay on the part of the defendant. It is the contractor's burden to show 'where the work was delayed because of lack of approval.'" *R.J. Crowley, Inc.*, ASBCA

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No. 35769, 88-3 BCA ¶ 21,151 citing, *H.Z. & Co., Ltd.*, ASBCA Ho. 29776, 87-1 BCA ¶ 19,384; *Law v. United States* [16 CCF ¶ 80,286], 195 Ct. Cl. 370, 385 (1971); *Jefferson Construction Co. v. United States* [11 CCF ¶ 80,767], 177 Ct. Cl. 581, 595-96, 368 F.2d 247, 256 (1966).

KC's contention that had the shop drawings been approved when submitted, the duct fabrication could have been completed in early June 1989 is self serving, purely speculative, and unsupported by the record and, accordingly, is insufficient basis for allowing a claim against the Government. *Zinger Construction Company, Inc.*, ASBCA Nos. 28788, 32424, 87-3 BCA ¶ 20,196 at 102,291. KC has failed to establish the actual approval/review time (6 June to 29/30 June 1989) was unreasonable or delayed the overall project, as required if KC is to prevail. *Technocratica*, ASBCA No. 39119, 90-3 BCA ¶ 22,997.

Electrical Component Claim

In contract interpretation, where a provision of the contract is phrased in plain and unambiguous language, the words of that provision must be given their plain and ordinary meaning in defining the rights and obligations of the parties. *Craft Machine Works, Inc. v. United States*, 926 F.2d 1110 (Fed. Cir. 1991).

It is undisputed that KC was contractually required to "only install" Government furnished partitions. KC argues that at the time it was preparing its bid it determined the partitions had the electrical components installed and, accordingly, "install only" meant that there were no other material items to be affixed prior to the installation. We are hard pressed to accept KC's determination as reasonable since "install only" was definable only after a thorough review of the specifications and drawings which, at the very least should have caused KC to question what material it had to provide and what material the Government would provide.

Specification Section 01010, paragraphs 7.1 and 7.2 state that the Government will not furnish any material or equipment "unless otherwise specified" and "the Contractor" was to furnish all required material and equipment. Amendment 0004 unambiguously stated, and KC acknowledged it understood Amendment 0004 to state, that only 24 receptacles would be provided while drawing E-1 depicted a need for 79 receptacles. KC knew 24 receptacles were insufficient to meet the requirements depicted on drawing E-1. KC, aware of this inconsistency, called Hauserman to seek instructions on the panel installation but was rebuffed. At no time prior to submitting its bid did KC request either assistance or clarification from the CO. When faced with an obvious inconsistency or discrepancy of significance, a contractor is obligated to bring the situation to the Government's attention. *Space Corporation v. United States* [18 CCF ¶ 81,891], 470 F.2d 536, 538 (Ct. Cl. 1972). KC having actual knowledge of a patent ambiguity prior to bidding had a duty to seek clarification and failing to do so cannot prevail in its claim for an equitable adjustment. *Westerchil Construction Company*, ASBCA No. 35191, 88-2 BCA ¶ 20,528.

Assuming, *arguendo*, we were to accept KC's interpretation we would still have to deny its claim for an equitable adjustment. We have previously held that when reviewing a contract a contractor must give effect to all of its terms so as to not render any of them meaningless or useless. *Reflectone, Inc.*, ASBCA No. 34891, 89-3 BCA ¶ 21,962. KC's interpretation would render meaningless and useless paragraphs 7.1 and 7.2 of Section 01010 as well as Amendment 0004's reference to the Government providing only 24 receptacles.

Based on the discussion above, the appeal in its entirety is denied.

[¶ 26,261] Alco Environmental Services, Inc.

ASBCA No. 43183, July 28, 1993. Contract No. N62472-88-D-2222.

Convenience Termination—Propriety—Nonresponsiveness.—The rescission of an indefinite delivery contract for asbestos removal was improper and was treated as a termination for the convenience of the government, although the government insisted that the contractor's failure to bid a line item rendered the bid nonresponsive, because the contractor's failure was a minor irregularity that the contracting officer should have waived or permitted the contractor to cure. A minor irregularity under the regulations is defined as an immaterial variation from the terms of the invitation that can be cured or waived

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without prejudice to other bidders and that has a negligible effect on price, quantity, quality, or delivery of the total services being procured. In view of the contracting officer's failure to waive the minor irregularity or allow an opportunity to cure, the board deemed the rescission a termination for the convenience of the government.

For the appellant: Sam Zalman Gdanski, Montebello, New York. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Audrey J. Van Dyke, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: Alco Environmental Services, Inc. (ALCO) claims a convenience termination for a cancelled contract. We sustain the appeal on entitlement and remand to the parties for settlement of amount.

FINDINGS OF FACT

1. On 12 October 1989, the Naval Facilities Engineering Command office at Portsmouth Naval Shipyard (NAVFAC-Portsmouth) invited bids on an indefinite quantity contract for removal of asbestos-contaminated materials and installation of asbestos-free materials at the shipyard. The proposed contract included the FAR 52.216-22 clause entitled "INDEFINITE QUANTITY (APR 1984)," and the FAR 52.249-2 clause entitled "TERMINATION FOR CONVENIENCE OF TEE GOVERNMENT (FIND PRICE)(ALTERNATE I)(APR 1984)"

2. A six-page bid schedule contained five line items with 84 sub-line items. The line items grouped similar sub-line items for total pricing purposes, but unit price bids were invited on each sub-line item and ordering was to be done on a sub-line item basis. A maximum quantity was specified for each sub-line item. The sub-line items were not dependent on each other as to price, quality, quantity or delivery. The Government was obligated to order a minimum quantity of $100,000 in total services under the contract, but was not obligated to order any particular quantity under any particular sub-line item. Clause 13 of specification section 01010 provided that if the Government failed to order the specified minimum quantity, the convenience termination clause would apply to the unordered amount.

3. Clause 12(c) of the Instructions to Bidders stated: "If the solicitation requires bidding on all items, failure to do so will disqualify the bid." Clause 17(c) of the Instructions to Bidders stated: "The Government may accept any item or combination of items, unless doing so is precluded by a restrictive limitation in the solicitation or at the bid." The invitation did not require bidding on all items. There was no restrictive limitation in the invitation or at the bid on the Government accepting any item or combination of items.

4. On 15 December 1989, NAVFAC-Portsmouth issued Amendment 0003 to the invitation. Amendment 0003 substituted a new page 1 to the bid schedule. The new page 1 increased the specified maximum quantity for sub-lne item 0001AJ, "Remove asbestos-contaminated bulk debris," from 20 cubic yards to 40 cubic yards, and added new sub-line item 0001AK, "Remove asbestos-contaminated soil," with a maximum quantity of 200 cubic yards.

5. On 28 December 1989, Alco bid $727,715.61 for the contract. Bids were opened on that date. Alco was the low bidder. The second low bid was $905,934.39. After verifying its bid, Alco was awarded the contract on 19 January 1990. Alco then submitted the required performance and payment bonds and certificate of insurance, and performed various administrative tasks while waiting for delivery orders and notice to proceed with on-site work. However, before any orders or notice to proceed were issued, NAVFAC-Portsmouth discovered that Alco had submitted its bid with the original page 1 of the bid schedule. Thus, the contract as awarded did not include the increased maximum quantity for sub-line item 0001AJ or the new sub-line item 0001AK.

6. NAVFAC-Portsmouth estimated the cost of the increased maximum quantity for sub-line item 0001AJ as $2,000, and the cost of the new sub-line item 0001AK as $20,000. On 12 February 1990, it recommended to its next higher headquarters (NAVFAC-Northern Division) that Alco's contract be amended to add these items. NAVFAC-Northern Division, however, decided that the contract had been awarded erroneously on a non-responsive bid, and should be rescinded. By letter dated 7 March 1990, the NAVFAC-Portsmouth contracting officer who awarded the contract notified Alco that the award was rescinded. When Alco's President protested the rescission, he was told that the decision to rescind was under review and that "there was a possibility it

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might be overturned." (tr. 1/38, 1/7/93). NAVFAC-Northern Division reviewed the decision to rescind to determine if it was made at the proper level of authority. While this review was in progress, Alco made numerous inquiries as to when a decision would be made, but it did not demand return of its bonds while the review was in progress.

7. NAVFAC-Northern Division notified NAVFAC-Portsmouth orally on 4 April 1990 and in writing on 9 May 1990 that the "cancellation" of Alco's contract was approved. On 23 May 1990, NAVFAC-Portsmouth returned Alco's bonds, and on 6 June 1990 issued a contract modification cancelling the contract. During the period that the Government held Alco's bonds, Alco was unable to obtain bonding for other projects because it was at the limit of its bonding capacity.

8. On 13 September 1990, Alco submitted a claim for $100,000, the specified minimum quantity under the contract. Alco properly certified the claim on 12 December 1990. On 23 January 1991, it revised the claim to add $158,589.27 for unabsorbed overhead (Eichleay formula) from 6 February 1990 through 31 October 1990. By final decision dated 11 April 1991, the contracting officer denied the claim. This appeal followed.

DECISION

At issue is whether the Government had a right to rescind the award. In deciding that issue we must determine whether Alco's bid was responsive, and if non-responsive in any particular, was it subject to cure or waiver as a minor irregularity. *Cf. Albano Cleaners, Inc. v. United States* [17 CCF ¶ 81,144], 197 Ct. Cl. 450, 455, 455 F.2d 556, 559 (1972).

Alco's omission of new sub-line item 0001AK did not make its bid non-responsive. The invitation did not require bidding on all items, nor did it restrict the Government from accepting any item or combination of items less than the total in the invitation. *See* Finding 3 above and *Decision of the Comptroller General*, B-148624, May 2, 1962, 41 Comp. Gen. 721. Alco's bid on less than the specified maximum quantity for sub-line item 0001AJ, as amended, was nonresponsive as to that item, but this was a minor irregularity which Alco was entitled to cure.

FAR 14.405 states that a minor irregularity includes an immaterial variation from the terms of the invitation which can be cured or waived without prejudice to other bidders and which has a negligible effect on the price, quantity, quality, or delivery of the total services being procured. The cost of the additional 20 cubic yards for sub-line item 0001AJ, which as an indefinite quantity might or might not be ordered, was .27 percent of the total bid. The effect of this defect on the price, quantity, quality and delivery of the total services procured by the contract was negligible. Moreover, cure or waiver of the defect would not affect the relative standing of bidders. The second low bid was $178,220 more than Alco's bid. See *TECOM, Inc.*, B-236929.2, 11 May 1990, 69 Comp. Gen. 411 (.5 percent of total bid held immaterial); *Leslie & Elliott*, B-216676, 19 February 1985, 64 Comp. Gen. 279 (.214 percent of total bid held immaterial); *Custom Environmental Service, Inc.*, B-234774, 24 May 1989, 89-1 CPD ¶ 501 (.4 percent of total bid held immaterial). FAR 14.405 states that the contracting officer "shall" either waive or allow opportunity to cure a minor irregularity. In Alco's case he did neither. Accordingly the rescission of the award on 7 March 1990 was improper and must be deemed a termination for convenience of the Government.

Alco's claim for unabsorbed overhead costs following the rescission notice is without merit. The rescission notice terminated Alco's obligation to hold itself ready to perform the contract. The subsequent review of the decision to rescind did not revoke the notice. Alco was told only that there was a "possibility" of the decision being overturned. Moreover, even if it had been overturned, the contract could have been reinstated only with Alco's consent. Alco complains that the Government's retention of its bonds prevented it from taking other work. Alco, however, never demanded their return. Alco allowed the Government to retain the bonds while it hoped that the contract would be reinstated. That was Alco's voluntary choice, and not compelled by the Government.

The appeal is sustained to the extent that Alco is entitled to a convenience termination effective 7 March 1990. The appeal is remanded to the parties for settlement of amount pursuant to the convenience termination clause and this decision.

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[¶ 26,262] **Duffy Electronics & Mfg. Co.**

ASBCA Nos. 42753, 42754, 42812, 42822, July 30, 1993. Contract No. DLA500-84-C-3299, DLA500-85-C-1590.

Defaults, Excuses—Specification Problem—Summary Judgment.—A government motion for summary judgment in an appeal in which a contractor challenged the default termination of its contract was denied because there remained issues of material fact concerning whether the contractor's failure to deliver acceptable first article test results was attributable to defective specifications.

For the appellant: S. Dubroff & Associates, Inc., Howell, New Jersey, by Stanley Dubroff. For the government: Keith Levinson, Attorney/ Advisor, Defense Industrial Supply Center (DLA), Philadelphia, Pennsylvania.

Before REITER, RUBERRY, and SPECTOR, Administrative Judges.

REITER, Administrative Judge: The appellant's contracts for Bearings, Plain, Rod End were terminated for default in January 1991 for failure to deliver acceptable first article test results (FATR). Timely appeals were filed. The gravamen of the appeals (2 for wrongful termination and 2 for refusal to grant an equitable adjustment) is that the appellant's failure to deliver acceptable first article test results and its claim for an equitable adjustment were attributable to defective specifications.

The Government has moved for summary judgment in toto and in part on the basis that the item has been produced to the exact same specification without deviations or waivers by others, and that appellant agreed to forego equitable adjustment claims in return for extensions of delivery when it wrote "We understand and agree that you are unable to consider any additional compensation for the efforts expended ... but will use this situation as consideration ... to reschedule these contracts."

In response to this preemptory challenge to its case, the appellant has submitted evidence that those items successfully produced were so produced because they were exposed to operations not called out in the very detailed specification, *i.e.*, a certain hammering, rolling, and bumping to loosen up the assembly so that it could pass the no load break away test. As to there being any accord and satisfaction on the claim for equitable adjustments, the appellant contends none was intended and if the appearance of one did evolve, it did so under duress.

DECISION

Whether this hammering, rolling, and bumping are dehors the specification as appellant claims or merely unarticulated "know how" as the Government claims, presents a factually impacted issue which requires taking evidence. The same is true on the issue of accord and satisfaction. Whether the appellant's writing quoted above constitutes an offer (or an offer uncompelled by duress) accepted by the Government can not be decided without a fleshing out of the surrounding context. These unresolved issues of fact preclude the Board from entering summary judgment in toto or in part.

The Government's Motion for Summary Judgment in toto and in part is denied.

[¶ 26,263] **C Construction Co., Inc.**

ASBCA No. 41706, July 30, 1993. Contract No. N62470-86-C-6349.

Quality—Approvals—Notice of Deviation.—Although a contracting officer approved steel vanities rather than the wooden vanities called for under a building construction contract, the contractor was not entitled to recover the costs of complying with a direction to supply wooden vanities, because the contractor's failure to bring the deviation to the attention of the contracting officer negated any approval. When the contractor submitted its shop drawings for steel vanities, it failed to include, as required by the Specification and Drawing for Construction clause, a letter or other writing separate from the drawings that called attention to the fact that the steel vanities were a deviation from the contract requirements.

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For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Thomas J. Kelleher, Jr. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Audrey J. Van Dyke, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: C Construction Co., Inc. claims $60,277 for two alleged changes under a construction contract. The Government moves for summary judgment. We find no genuine issue of material fact and deny the appeal.

STATEMENT OF FACTS

1. The contract was awarded on 27 March 1989 for construction of bachelor quarters at Cap Lejeune, North Carolina. The contract drawings showed a vanity in each sleeping room. The alleged changes involve the material for fabricating the vanities and their interior finish.

2. The contract specifications at section 12331, paragraph 2.1, required the vanities to be fabricated in accordance with MIL-V-28639 "except as provided herein." MIL-V-28639 allowed the vanities to be made either of wood or steel. But paragraph 2.1 stated: "Wood construction shall be used. Particleboard shall not be used. Countertop, doors, and all wood panels shall be 3/4-inch plywood ...." Particleboard is a wood product.

3. Contract drawing A-3 at detail 1 showed the vanity body made of 3/4 inch plywood with a painted interior finish. However, paragraph 2.1.2.2 of specification section 12331 stated: "Interior of doors and cabinet body ... shall be nondecorative laminated plastic."

4. Orders of precedence were established in paragraph 22 of specification section 01010, and in paragraph (a) of the FAR 52.236-21 "SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984)" clause of the contract. Paragraph 22 provided that the contract specifications would govern any difference with referenced military specifications. Paragraph (a) provided that the contract specification would govern any difference with the contract drawings.

5. On or about 8 June 1989, C Construction submitted shop drawings for steel vanities to the project architect-engineer (A-E) for approval. This submittal was made on a Government form at the top of which were three boxes labelled respectively "Contractor Approved," "OICC Approval," and "Deviation/Substitution For OICC Approval." C Construction checked the box labelled "OICC Approval." The submittal was not accompanied by a letter or other writing separate from the drawings calling the attention of the A-E or contracting officer to the fact that steel vanities were a deviation from the contract requirements.

6. Pursuant to paragraph 14.2 of specification section 01011, the A-E was to "review and provide surveillance for the Contracting Officer to determine if Contractor-approved submittals comply with the contract requirements." On 28 June 1989, the A-E returned the vanity submittal to C Construction "[a]pproved as noted." An A-E note on one of the submitted drawings stated: "The paint color for main steel carcass shall match the HPL color submitted." The A-E also checked a box on the submittal form which was labelled: "Submittals are returned with action indicated. Approval of an item does not indicate approval of any deviation from the contract requirements unless the contractor calls attention to and supports the deviation."

7. Paragraph (e) of the Specifications and Drawings for Construction clause of the contract stated in relevant part: "Approval [of submittals] by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below." Paragraph (f) stated in relevant part: "If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission...."

8. Paragraph 15 of specification section 01011 stated in relevant part: "Approval [of submittals] will not be construed as relieving the Contractor of compliance with the specification, even if such approval is made in writing, unless the attention of the Contracting Officer is called to the non-complying features by letter accompanying the submitted matter."

9. On or about 8 February 1990, the Government directed C Construction to supply wood vanities for the project rather than the steel vanities on the approved submittal.

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C Construction complied with the direction under protest. On 25 May 1990, it submitted a certified claim for $60,277 for supplying wood vanities and for providing a non-decorative plastic rather than a painted finish on the vanity interiors. The claim was denied by the contracting officer on 9 August 1990. This appeal followed.

DECISION

The contract specifications stated that the vanities were to be fabricated in accordance with MIL-V-28639 "except as noted herein." Among the exceptions noted in the specifications was the requirement that "Wood construction shall be used." This direction excluded the steel option under MIL-V-28639. The express exclusion of particleboard did not create an ambiguity with respect to the use of steel. Particleboard is a wood product and would have been within the scope of wood construction if not expressly excluded. Steel is not a wood product and was within the scope of exclusion under the direction "Wood construction shall be used." There was only one reasonable meaning of these terms of the contract. Steel vanities were not permitted. There was also no ambiguity with respect to the interior finish of the vanities. The conflict between the specifications and drawings was resolved by paragraph (a) of the Specifications and Drawings for Construction clause which provided that the specification requirement was governing.

Since there was only one reasonable meaning to be given the contract provisions at issue, the A-E's approval of the vanity submittal was not an interpretation of ambiguities, but inadvertence or negligence in failing to reject a clear deviation from contract requirements. The Specifications and Drawings for Construction clause and paragraph 15 of specification section 01011 both expressly provided that approval of a deviating submittal would not bind the Government unless the deviation was called to the contracting officer's attention by accompanying letter or other writing "separate from the drawings" at the time of submittal. No such letter or writing was presented by C Construction with the deviating submittal.

C Construction argues that it was entitled to substitute a steel vanity for a wood vanity under the provisions of the FAR 52.236-5 "MATERIAL AND WORKMANSHIP (APR 1984)" clause of the contract. We disagree. The cited clause does not contain a broad charter to substitute functionally equivalent materials for those specified. The right of such substitution is limited by the clause to cases where a product is specified by trade name, make or catalog number. The vanities in C Construction's contract were not specified by trade name, make, or catalog number, or otherwise restricted to a single manufacturer's product.

C Construction's further argument that the Government is estopped to require the specified wood construction is also without merit. As noted above, two contract provisions expressly warned C Construction that it could not rely on approval of a deviating submittal unless it had pointed out the deviation in a separate writing at the time of the submittal. Moreover, the same warning was contained on the submittal approval that was returned to C Construction. Reasonable reliance on a representation is an essential element of estoppel. In light of the provisions of the contract and the submittal form, C Construction could not have reasonably relied on the A-E's approval of the submittal. *Cf. Martin K. Eby Construction Co., Inc.*, ASBCA No. 15848, 72-2 BCA ¶ 9521 at 44,359 and 44,331.

Joseph Morton Company, Inc., ASBCA No. 19793, 78-1 BCA ¶ 13,173 is inapposite. The shop drawing approval in *Morton* was binding because the dimensions at issue had been specified as "approximate" and the approval was held to be "concurrence in the appellant's views that the $77\frac{1}{2}$ inches appearing on the drawing represented a proper approximation." 78-1 BCA at 64,418. In C Construction's case there was no term such as "approximate" or other ambiguity requiring interpretation.

The appeal is denied.

[¶ 26,264] Walsky Construction Company

ASBCA No. 41541, July 30, 1993. Contract No. F65503-90-C-0021.

Defaults, Procedure—Government Decision—Contracting Officer's Independent Judgment.—A termination for default was improper because the contracting officer was improperly influenced by a lieutenant colonel's direction to monitor the contractor

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more closely than was usual and to terminate for the smallest thing. Detecting performance problems to support the Corps of Engineers in denying an award was not a justification for more than normal surveillance, and termination for the smallest thing would violate the government's duty to exercise discretion in default terminations. The contracting officer's haste to issue a cure notice and then a termination, stating weak and technical reasons, was best explained by reference to the lieutenant colonel's directive. A subsequent review by a termination contracting officer was not sufficiently unbiased to remove the taint. The government's more positive approach to cooperating with the contractor after it was hired as subcontractor under the post-termination takeover agreement also indicated that the lieutenant's colonel's directive had been influential.

For the appellant: Wade & DeYoung, Anchorage, Alaska, by R.R. DeYoung. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Capt. Wayne D. Loosbrock, USAF, and Robert P. Balcerek, Trial Attorneys.

Before DELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

DELMAN, Administrative Judge: Appellant, Walsky Construction Company, seeks to overturn the Government's default termination of its contract. Our jurisdiction over the appeal lies under the Contract Disputes Act, 41 U.S.C. §601 *et seq.* A hearing was held and briefs were filed. We sustain the appeal.

FINDINGS OF FACT

1. On 15 March 1990, the Government issued an IFB for a project known as "Repair Roof Structure and Install Fire Protection Building 1306," at Eielson AFB, Fairbanks, Alaska. In brief, the work involved the removal of the existing roof and its replacement with a new standing seam metal roof; reinforcing the existing structural system; and the installation of a fire sprinkler system. The roofing specification was based upon the product of a particular manufacturer—the "Butler CMR 24" system. The successful contractor was to provide the design, the product and the installation of all systems. The work was to be accomplished in two phases and was to be completed within 180 days from notice to proceed.

2. During the prebid period, contractors raised a number of questions regarding the scope and phasing of the work. Insofar as pertinent here, questions were raised by a number of mechanical contractors regarding the adequacy of the specifications to design the fire sprinkler system. These contractors sought "water flow data" so as to be able to hydraulically calculate the fire sprinkler system, i.e. static pressure, residual pressure, and the number of gallons flowing in the system (exh. A-6, -12). These data were not included in the specifications, as originally issued, or as amended.

3. At the hearing, appellant provided evidence from an expert in the design and calculation of fire protection systems. The Government did not. Appellant's expert stated, and we find, that the water flow data were necessary to design the fire sprinkler system envisioned by the specifications (Harpole deposition, at 26, 42).

4. Because the Government needed time to answer all prebid questions, it issued Amendment 0001 which extended bid opening indefinitely. Amendment 0002 made a number of substantive changes to the specifications. Insofar as pertinent, the Government eliminated the phased nature of the work. It decided to turn over the entire building at once to the contractor to facilitate performance, and the performance period was reduced from 180 days to 90 days. Bid opening was extended to 21 May 1990. The Government added to the IFB a four page Schedule of Material Submittal, AF Form 66, which, *inter alia,* listed the required submittals by contract section and their due dates. With respect to this form, Amendment 0002, paragraph 8, further provided as follows:

> Specifications (Specs), section 01020, 1.01—insert the following "Revised" statement—Scope of Work: This section covers procedures for submitting and substituting materials. Submittals received which do not conform to the requirements of this section will be returned to the contractor whithout [sic] consideration. *Refer to AF Form 66 for a listing of all submittal items by section.* Section 15020 of this specification covers required Fire Equipment review submittals and substituation [sic] procedures. It shall be the contractors [sic] responsibility to review each section of this specification for additional material submittal requirements. [Emphasis added]

Additional pertinent provisions of Amendment 0002 are set out below:

19. Q: Clarify specs, section 13600, 1.05 A.

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A: The contractor shall provide structural certification by a registered Professional Engineer as to the adequacy of the "roof system", to include the roofing metal, purlins, clips, and the method of fastening the purlins to the existing structural frame.

* * *

23. Q: What is the water flow date [sic] for the Fire Protection System design?

A: The water source is a non-potable, closed loop system serving the airfield loop area. There are three high capacity, pressure demand pumps, and a 180,000 gallon holding tank. The top [sic] will be on a 10 inch line, running at 150 psi.

5. Appellant's bid of 21 May 1990 was lowest amongst the bidders and was responsive. For purposes of determining appellant's responsibility for award, the contracting officer, who was also to administer this contract (ACO), contacted a number of sources regarding appellant's financial and technical ability to perform. Overall, the information received was satisfactory. On 24 May 1990, the contracting officer issued a determination of contractor responsibility, which concluded as follows (exh. A-21):

> Based upon the above information and findings [sic] no discrepencies [sic], I hereby determine Walsky Construction a responsible and responsive contractor eligible for award of this contract.

The contract was awarded to appellant on 25 May 1990. The contract contained the standard article, Default (Fixed Price Construction) (APR 1984), FAR 52.249-10. A preconstruction conference was set for 5 June 1990.

6. On 4 June 1990 the Director of Contracting, a lieutenant colonel at Elmendorf AFB, Headquarters Alaskan Air Command, telephoned the contracting office at Eielson and wished to speak to the base contracting officer. The base contracting officer was not available and the contract administrator for this contract took the call in his absence. The following was the contract administrator's written summary of this conversation (exh. A-22):

> *Situation*
>
> Received a call from [the lieutenant colonel] who stated there was a possible problem with the award to Walsky Construction. He stated the *Corp of Engineering are working [sic] a file to try to deny award to Walsky and by us awarding to them it weakened there [sic] position.* I questioned him as to what we could do now as award has been made and a pre-con scheduled for 05 Jun 9[0] and *he stated we could only monitor this company more than normal and if the smallest thing goes wrong take normal steps to default.* [The ACO] did a background check prior to award and amoung [sic] other people spoke with Elmendorf and did not have any information that would lead to a non-responsibility rejection; however, it sounds like the Corp. [sic] does. Anyways [sic] to make a long memo short [the lieutenant colonel] wants you to call him when you get in. [Emphasis added]

Neither the lieutenant colonel, the contract administrator, nor the base contracting officer gave testimony at the hearing.

7. The Army Corps of Engineers directly contacted key Government contracting personnel on 4 June regarding the award to Walsky, including the termination contracting officer (TCO) and the contract administrator (exh. A-75). The TCO gave testimony at trial. When confronted with the Corps' telephone notes of his conversation, he testified that he did not remember the call (tr. 1/74).

8. The Eielson base contracting officer, the ACO and the contract administrator met to discuss the lieutenant colonel's directive (tr. 1/195). On the official file copy of the contract administrator's written summary, the words "the smallest thing" were circled in red ink. At the hearing, the ACO was able to identify that certain handwritten notes on the summary were made by her direct supervisor, the base contracting officer. She testified that the words "the smallest thing" were probably circled by the base contracting officer as well (tr. 1/192-93). Absent other evidence, we find that the base contracting officer did in fact circle the phrase.

9. At hearing, the ACO, a master sergeant, testified that she was not influenced by, nor did she follow the lieutenant colonel's directive in the administration of this contract, nor was she influenced by the matter which was circled by the base contracting officer, her immediate supervisor.

10. Appellant's vice president attended the preconstruction conference of 5 June 1990. Appellant was given an immediate notice to proceed—contract completion was due within 90 days, or by 4 September 1990. Appellant was also advised that under the contract, many submittals, certificates, and shop drawings were required to be provided to the Government within 10 days of notice to proceed. Appellant advised the Government that this was a contractor-designed job

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and it would be unrealistic to expect these shop drawings within 10 days. The Government representative advised appellant, in essence, to make as many submittals as it could within the 10-day time frame.

11. At the preconstruction conference, appellant furnished the Government with its performance and payment bonds and a certificate of insurance. It also advised that it expected to begin field work around 15 July 1990. The Government did not object. (Tr. 2/357-61)

12. By letter to the Government dated 12 June 1990, appellant confirmed in writing the position it took at the preconstruction conference regarding submittals. Appellant concluded: "We are deligently [sic] pursuing these submittals and will turn them in at the earliest possible time" (R4, tab 5).

13. On 13 June 1990, the contract administrator called appellant and asked for the status of submittals. Appellant replied that some submittals would be made the next week (exh. A-25). The next day, the parties spoke again by telephone. The Government advised appellant that a contract modification would be forthcoming for a change in the color of the roof panels; appellant asked for the color as soon as possible (tr. 2/375-76). During this conversation, the Government's project engineer asked appellant's vice president whether he could complete the project on time. He replied in the affirmative (tr. 2/91).

14. As of Friday, 15 June 1990, the tenth day after notice to proceed, the Government had not received any submittals from appellant. By letter to appellant of the same date, the ACO issued a cure notice, which stated in part as follows (R4, tab 6):

> 1. You were given a "Notice to Proceed" on 05 Jun 90 to begin work on subject project. In accordance with FAR 52.212-3 and AF FAR Sup 36.290, you are obligated to submit all material submittals, and to begin performance within 10 days of receipt of the Notice to Proceed. As of this date, no material submittals have been received by our office. . . .
>
> 2. Several administrative letters were issued at the preconstruction meeting that require your completion and return to this office for coordination, ie, Contract Insurance, Performance of work, Superintendence by Contractor, etc. Again, to date none of these letters have been returned.
>
> 3. You are notified that the Government considers your lack of providing the required submittals and administrative letters, a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default. . . .

15. The parties spoke by telephone on Monday, 18 June 1990. Appellant had not yet received the cure notice. The ACO questioned appellant's lack of submissions and also the projected start date of 15 July 1990. Appellant's vice president indicated that the major design systems could not be submitted yet, and that other submittals would be sent soon. Appellant again stated that it could complete the project on time.

16. During this telephone conversation, the ACO also advised appellant that a cure notice had been issued. We find that the following colloquy occurred, in accordance with the testimony of appellant's vice president (tr. 2/381-82):

> . . . [I]t really caught me off guard because this is ten days after notice to proceed. I had absolutely no indication that the government had any concerns either verbally, in writing, in any way. She said that she had her—excuse me, let me remember as best I can her exact words. I wrote them down in my notebook and I do keep very very good notes on a daily basis.
>
> *She said that she was going to aggressively manage our contract, that she had her "marching orders," that's an absolute direct quote.* If there was the slightest glitch, as she called it, she was not going to sit idly by. She said she—I asked her why, and she said we view you as a marginal contractor. . . . I said where did you get your information. She said [the termination contracting officer]. [Emphasis added]

Apparently, the TCO had provided the ACO with information regarding Walsky's performance on earlier contracts. Appellant challenged the accuracy of this information.

17. In view of the parties' telephone conversation of 18 June, appellant's vice president decided to fly to Eielson to meet the ACO personally with the hope of developing a better rapport and a meeting of the minds (tr. 2/387). The parties met at Eielson on 20 June. Appellant hand carried several submittals, primarily administrative in nature (tr. 2/389-90). Insofar as appellant was concerned, the sought after "meeting of the minds" was not reached. However, matters of substance were addressed. For one thing, the Government gave appellant the name of the color for the anticipated roof panel color

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change. The Government also issued to appellant a request to price the color change; appellant's cost estimate was to be submitted by 29 June 1990 so as to allow the negotiation of price prior to the ordering of the panels (R4, tab 7). On 29 June 1990, appellant timely submitted its cost proposal to the Government.

18. By letter to the Government dated 29 June 1990, appellant also submitted its reply to the cure notice. In brief, appellant reiterated the information it provided the Government at the preconstruction conference on 5 June and in writing on 12 June—that because of the design elements, it was not possible to make the submittals within 10 days from notice to proceed, but that appellant would submit them at the earliest possible time. In fact, appellant had just recently subcontracted the work—roof shop drawings were begun on 26 June 1990 (tr. 3/73).

19. Along with the cure notice reply, appellant transmitted several of the "administrative letters" referenced in the cure notice which had been sought by the Government. Appellant also stated in its reply that it had just recently received the contract set of plans and specifications from the Government, on 13 June 1990. Appellant maintained that the cure notice was not warranted, and concluded: "We understand that timely performance is of utmost importance. We have been and will continue to diligently prosecute the work." (R4 tab 8)

20. By letter to appellant dated 29 June 1990, the Government proposed another contract change—a revision of the tap line from 8 inches in diameter to 6 inches. The Government sought appellant's cost estimate by 9 July 1990 in order to negotiate a price prior to ordering this material.

21. On 3 July 1990 the parties attempted to negotiate the pricing of the proposed roof panel color change, but negotiations broke down. The ACO withdrew the proposed change. The original galvanized roof panel was to be installed.

22. On or about that same date, the ACO made several telephone calls—to RDM Sanders, Butler's Alaska representative; to Butler's Kansas City reroof group, and to Butler's California representative to determine the status of this project and appellant's ability to timely perform. The ACO was advised that it could take three to four weeks to ship a galvanized roof order on an expedited basis, otherwise it could take five to six weeks. It does not appear that the Government obtained any information regarding roof installation time.

23. None of the aforementioned sources was aware of the status of appellant's roof design. Appellant was working through Pacific Northern Constructors, a Butler authorized dealer out of Seattle, Washington. Pacific's structural engineer was preparing the roof shop drawings at this time.

24. Based in part upon the information received from the above sources, and the fact that appellant had yet to submit the roof shop drawings, the ACO concluded on 3 July that "Walsky could not possibly hope to complete this project by 4 Sep 92" (exh. A-28). She determined to issue a show cause notice for default termination. As of 3 July, 70 percent of the contract performance period remained. This was also only two workdays after receipt of appellant's reply to the cure notice. As of 3 July, appellant had not begun field work. However, appellant had advised the Government at the preconstruction conference that it would begin site work around 15 July.

25. The show cause notice was issued on 6 July 1990 (R4, tab 11). The Government cited appellant for failure to "adequately begin performance and make progress." The Government indicated it was unaware of any roof engineering activity for the project. However, it is unclear whether the ACO ever confirmed this information with appellant, since its roof design work had begun on 26 June (tr. 3/73). The Government also indicated in its notice that the galvanized roof would take five to six weeks to ship. It is also unclear whether the ACO ever confirmed this information with appellant. It appears that an expedited delivery could have taken less time. The Government stated it was considering default termination and asked appellant to submit any information that would bear on the question of excusable delay. Reply was required within 10 days of receipt of the show cause notice.

26. Appellant received the show cause notice on 12 July. Its reply was due on Sunday, 22 July, or the next business day, Monday, 23 July.

27. On 9 July 1990, appellant timely submitted its cost proposal on the proposed piping change. It appears that appellant did not hear from the Government on this matter prior to default termination.

28. By letter to the Government dated 10 July 1990, appellant sought water flow data to enable it to complete its hydraulic calculations for the sprinkler system (R4, tab 12).

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This was the same information requested by a number of contractors in the prebid period (finding 2). Amendment 0002 provided pertinent information but not the data requested. Appellant's letter was routed to the engineering office for a reply. The Government's project engineer furnished a reply to the contract administrator for submission to appellant, but this information was not relayed to appellant. The contract administrator's notes for 19 July state as follows (exh. A-30):

> Received Response from Capt. E., and *decision was made for other reasons to T For D this contract.* [Emphasis added]

The Government failed to explain the nature of this "decision." We presume, at this early date, that this was the view of the Eielson contracts office, not that of the TCO. In any event, this decision was made before the Government received appellant's reply to the show cause notice.

29. Appellant's reply to the show cause notice, dated 20 July 1990, was telefaxed to the Government on 20 July, and a hard copy was timely received on 23 July 1990 (R4, tab 13). Appellant protested the show cause notice as arbitrary, capricious, and "so erroneous as to constitute bad faith." It characterized the 4 September 1990 completion date as now being unrealistic, and "impossible to meet" in "any practical manner," and attributed the current state of the project to various Government actions and delays. Among other things, it stated, and we find, that it was unable to submit its fire protection shop drawings pending receipt of technical information (the water flow data) from the Government. Appellant stated it would accelerate performance. In letters to the Government dated 20 July, appellant sought to begin field work on 25 July, designated its superintendent, and requested to work on Saturday, 28 July.

30. The ACO testified that she expected to see a plan of action towards project completion in appellant's reply to the show cause notice—the filing of crucial submittals; indications of mobilization and commencement of performance (tr. 1/146-47). However, the show cause notice did not ask for a "plan of action"; it asked for appellant's defenses (any excusable delay) to a default termination. In any event, as for the status of the shop drawings, the record reflects that appellant submitted the key roofing and miscellaneous metal shop drawings between 13 July and 20 July (exh. A-65). On 22 July 1990, the Government's project engineer recommended approval of the pre-engineered roofing system shop drawings (supp. R4, tab 75). As for an indication of mobilization, appellant advised that it planned onsite work in the coming week.

31. The Government moved forward with the default termination. The ACO and project engineer worked the weekend of 21-22 July to prepare the paperwork for default. The ACO prepared a Determination and Findings in support of default termination (exh. A-67). FAR 49.402-3(f). The regulation states that the contracting officer shall consider, *inter alia,* the following:

* * *

> (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

In addressing this factor, the ACO determined as follows (exh. A-67):

> 4. Due to mission requirements on Eielson AFB, *this project must be complete by mid September 1990. If another contractor could come in and complete this project by accelerated performance, they would be allowed to perform this year.* If, due to long material lead times and the onset of severe weather, the project cannot be completed this year, we would be forced to postpone the start of this project until the spring of 1991. [Emphasis added]

32. As far as this record shows, appellant was never advised that the Government's planned completion date for the project was "mid September 1990." Nor was it aware that a replacement contractor would be allowed to perform through the end of the year. The delivery date in the contract was 4 September, but the contract contained a liquidated damages clause which could have protected the Government's interests beyond 4 September. It does not appear that the ACO considered the use of the contract's liquidated damages provision for a reasonable period of time to allow for project completion by appellant.

33. The ACO did not make any finding that appellant could not complete the project by mid-September 1990. The ACO did not compare projected delivery dates of a new contractor and Walsky.

34. The ACO telefaxed her Determination and Findings, along with a number of other documents to the TCO on Monday, 23 July. The ACO and TCO discussed the case prior to the issuance of the termination notice.

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35. The TCO testified at the hearing. We find that this witness was evasive when answering questions (tr. 1/38-39, 63-64), and this affected his credibility. He also testified that he became involved with this project about the time that the show cause notice was issued (tr. 1/42), but we have found that he provided the ACO with damaging information regarding Walsky's performance on earlier contracts (finding 16) well before the date of the show cause notice. This also affected his credibility. The record also shows that the TCO was a participant in an important conversation with the Army Corps of Engineers regarding this project on 4 June (finding 7). The TCO testified that he did not have any recollection of the conversation, nor did he recall whether he had discussed it with any of his superiors, of whom the lieutenant colonel was one. However, the lieutenant colonel's directive was given on 4 June and the TCO was contacted by the Corps on 4 June. The lieutenant colonel must have received his information regarding the Corps' predicament from someone, and this record does not show that he was contacted by the Corps directly. Under all the circumstances, we find it hard to accept the TCO's total lapse of memory regarding this important matter.

36. Based upon all the evidence of record and the credibility of witnesses, we find that the TCO was well aware of the Corps' concerns about Walsky, and how they might impact upon this contract.

37. The TCO testified that he considered the FAR termination factors prior to issuing the default termination. FAR 49.402-3(f). However, he spoke only in broad generalities about the nature of the FAR provisions and did not state how he actually applied any of the FAR factors to the facts of this case (tr. 1/31-32). He kept no notes of his deliberations, nor did he document any of his findings (tr. 1/70). As the contracting officer terminating the contract, he did not prepare a memorandum for the contract file, explaining the reasons for the action he took. FAR 49.402-5. For the foregoing reasons, and based upon our overall view of the witness' credibility, we are not persuaded that the TCO considered the FAR termination factors in any meaningful way.

38. The TCO did not make any finding that appellant could not complete the project by mid-September 1990, the completion date cited by the ACO in her Determination and Findings. The TCO did not compare projected delivery dates of a new contractor and Walsky. It does not appear that the TCO considered the use of the contract's liquidated damages provision for a reasonable period of time to allow for project completion by appellant.

39. The TCO did not review the complete contract file. The package he reviewed was put together by the ACO (tr. 1/312). It did not contain the memorandum of the lieutenant colonel's directive of 4 June. It did not contain appellant's request for water flow data to enable it to design the fire sprinkler system. Also, it is not clear whether the TCO was aware that the project engineer had recently recommended the approval of appellant's pre-engineered roofing system. We find that the above documentation was material to an understanding of how both parties—appellant and the Government—were acting under the contract. Moreover, it does not appear that the package contained the document which authorized the termination activity in the first instance. The AF Form 3056, Termination Authority, was executed, dated, and forwarded from the engineering office to the ACO at Eielson on 24 July 1990 at 5:00 p.m. (exh. G-12), which appears to have been after the default termination was issued.

The Bases Cited for Default Termination

40. On 24 July 1990, the TCO issued to appellant unilateral contract modification P00001, terminating this contract for default for appellant's failure to provide complete, accurate and timely submittals so as to complete the project by 4 September 1990 (R4, tab 16). The TCO apparently relied upon that portion of the Default article which allows for default termination for a contractor's failure to prosecute the work with the diligence necessary to insure timely completion.

41. The TCO cited appellant for a number of submittal deficiencies in the notice of default termination. First, he contended that appellant failed to provide structural certification as to the adequacy of the roof system, per Amendment 0002 (finding 4). Appellant contended that the roof shop drawings were stamped by its registered professional engineer, which constituted a certification. The Government apparently wanted a separate letter to this effect, but the contract did not state that a separate letter was required. In any event, appellant did not know that the Government wanted a separate letter until well after default termination (tr. 3/250). Appellant, acting as contractor for the surety, provided a separate letter at that time. The Government also cited appellant for failing to provide a certification of mate-

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rial compliance. Appellant later was willing to provide such a certification after the material was fabricated (tr. 3/252-53). The Government failed to provide any credible evidence supporting its need to have this certification in hand prior to fabrication, or prior to its delivery to the site.

42. Similarly, the Government cited appellant for failure to provide a certificate, authorizing it to install the Butler roof. However, the roof was not yet ready to be installed, and appellant was willing to provide the certification at that time (tr. 3/254-56). The Government failed to provide any credible evidence supporting its need to have this certification in hand prior to the time that the roof was ready to be installed.

43. The Government contended that appellant's pre-engineered roof system was overall "severely deficient." However, the Government's project engineer recommended approval of the pre-engineered roof system on 22 July 1990 (supp. R4, tab 75). Appellant's roof designer testified, and we find, that he was never required to make any changes in his drawings by the Government after 13 July (tr. 3/80).

44. Finally, the Government cited to appellant's reply to the show cause notice as an admission that it was unable to timely complete the contract by 4 September. At hearing the Government also adduced evidence from the project designer that a 4 September completion was unrealistic (tr. 2/291). However, we have found that the Government was, in part, responsible for delay (finding 29). Moreover, at the time appellant replied to the show cause notice, it was unaware that the project needed to be complete by mid-September, as stated by the ACO in her Determination and Findings. The project designer offered no opinion as to likelihood of appellant's completion by mid-September, nor did any other Government witness. In 1991, Walsky performed all contract work within 60 days as the surety's contractor under a takeover agreement, apparently without multiple shifts or other accelerated effort. We find that a few additional weeks could have made a difference in appellant's ability to complete the project.

45. At hearing the Government emphasized the importance of contract completion in early September because of the onset of winter in Fairbanks. However, the climatological data in the contract indicated that on average, September weather in Fairbanks was not unlike that of May. Extremes in cold and snow are rare (R4, tab 2 at 64).

46. The Government also cited appellant for failure to reference AF Form 66 in its submittals to the Government. In support of this position, it relied upon Amendment 0002, Paragraph 8 (finding 4). While Paragraph 8 directs appellant's attention to AF Form 66 for pertinent information, we find that it does not require appellant to reference the form in its submittals.

47. At the hearing the Government adduced evidence, and we find, that appellant failed to provide an AF Form 3064, Contract Progress Schedule, within 10 days of notice to proceed as specified in the contract (R4, tab 2, Contract, ¶ 8, at 38). However, it does not appear that this was a matter of vital concern to the Government during the pendency of the contract—the matter was not raised in the cure notice, the show cause notice, or the termination notice. Under the takeover agreement, *infra*, appellant submitted the work schedule as the surety's contractor, and it was approved (supp. R4, tab 55).

Post-Termination

48. On or about 7 September 1990, the Government agreed to a takeover agreement with appellant's surety. The Government approved the use of Walsky as the surety's contractor to perform the work. The Government also agreed to meet and to work with Walsky directly. While the contracting officer testified that it was not normal procedure to hold meetings to discuss shop drawings (tr. 2/50-53), the Government agreed to meet with Walsky to discuss the Government's requirements in the post-termination period. The Government's project engineer testified as follows (tr. 2/126):

> We went in with a positive attitude. Both Mr. Howells did as well as myself. We talked about the submittals, what we felt was required, and what was not required. We agreed to disagree on some things. We negotiated and compromised.

49. By letter dated 23 August 1990, appellant filed a timely notice of appeal with this Board.

DECISION

The law of default termination is well settled. "[A] default termination is a drastic sanction [citation omitted] which should be imposed (or sustained) only for good grounds and on solid evidence." *J.D Hedin Construction Company, Inc. v. United States* [13 CCF ¶ 82,580], 408 F.2d 424, 431 (Ct. Cl. 1969). As we stated in *M.A. Santander Construction,*

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Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 at 120,403:

> The Government has the burden to go forward and to establish the propriety of a default termination action. *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759 (Fed Cir. 1987). That a contractor is in technical default is not determinative. The Government is given discretion to default terminate, and that discretion must be exercised reasonably, *Darwin Construction Company, Inc. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593 (Fed. Cir. 1987).

It is also well settled that a reasonable and proper exercise of discretion must not be tainted by impermissible motive. *Darwin, supra see Schlesinger v. United States* [12 CCF ¶ 81,097], 390 F.2d 702 (Ct. Cl. 1968). *See also Fairfield Scientific Corporation v. United States* [26 CCF ¶ 83,881], 611 F.2d 854, 862 (Ct. Cl. 1979), where the Court stated:

> If the contracting officer was improperly influenced by plaintiff's competitor or by anyone else to terminate the contract for default rather than to exercise his own independent judgment in light of the factors set out in the regulations, it would represent an abdication rather than an exercise of his discretion. [Citations omitted]

See also Quality Environment Systems v. United States [32 CCF ¶ 73,267], 7 Cl. Ct. 428, 431 (1985) (on Wunderlich Act review).

In response to the apparent needs of the Army Corps of Engineers, Elmendorf AFB directed Eielson AFB to monitor Walsky more than normal and to default terminate if the smallest thing went wrong (finding 6). On the memorandum that memorialized this directive, the ACO's immediate supervisor circled the words "the smallest thing" in red ink for emphasis.

We hear the Government to argue, first, that there was "nothing wrong" with this directive (reply br. at 52). We do not agree. While we can think of many legitimate reasons for a contracting officer to monitor a contractor "more than normal," to do so to detect performance problems for the purpose of supporting an agency's denial of an award is not one of them. Moreover, for the Government to default terminate a contractor for "the smallest thing" would be a breach of the duty that the Government owes every contractor—to exercise discretion whenever the issue of default termination is presented. *Darwin, supra.*

Alternatively, the Government asks us to believe that military personnel at Eielson ignored the lieutenant colonel's directive, and administered this contract as if the directive did not exist. For us to accept this proposition would require us to suspend our common sense and to ignore the weight of the evidence. Based on this record, we do not have the slightest doubt that the Government's administration of this contract was impermissibly influenced by the lieutenant colonel's directive, as well as by the emphasis placed upon it by the ACO's immediate supervisor.

Preaward, the ACO, after investigation and deliberation, found appellant to be an acceptable and responsible contractor, and made an affirmative determination of appellant's responsibility for purposes of award. Less than two weeks after award, and after receipt of the lieutenant colonel's directive, the ACO suddenly was of the view that appellant was a "marginal" contractor, *i.e.*, a purveyor of shoddy work. She told appellant that she had her "marching orders" (read—the lieutenant colonel's directive), and would not stand for the slightest glitch in appellant's performance (finding 16).

A mere 10 days after the notice to proceed, the ACO issued a cure notice to appellant on the grounds that its failure to provide shop drawings and submittals within 10 days after notice to proceed was endangering contract completion, even though she was well aware that the major design drawings would take much more than 10 days to submit. This was the earliest date that a cure notice could have been issued on this ground. Barely two work days after appellant's timely reply to the cure notice, the ACO decided to issue a show cause notice for default. About 70 percent of the contract time still remained (finding 24). Notwithstanding that appellant had 10 days to reply to the show cause notice, a decision to default terminate, insofar as Eielson was concerned, was made prior to the date that appellant's reply was due (finding 28). Apparently, Eielson's mind was already made up—nothing appellant could have said in the reply would have made any difference.

When appellant's reply to the show cause notice arrived on Friday, 20 July, the default termination plan went into high gear. Both the ACO and the project engineer worked over the weekend to put together a package of documents for the review of the TCO. The package was telefaxed to the TCO on Monday, 23 July. The TCO issued the default termination on Tuesday, 24 July.

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We are at a loss to logically explain this frenetic activity, this rush to judgment—at least without reference to the lieutenant colonel's directive. The Government does not suggest that such a quick termination would have allowed a new contractor to complete performance by 4 September. In fact, the surety began and completed the work the following year.

Clearly, the administration of this contract was impermissibly tainted by the lieutenant colonel's directive. We cannot believe that Eielson would have rushed to default so early in the contract period absent the lieutenant colonel's marching orders. We must now address whether the review by the TCO had the effect of dissipating the taint. While we would grant the possibility that a complete, deliberate and unbiased review of the facts by one unfamiliar with or untouched by the Government's hidden agenda might dissipate the taint and legitimize the Government's position on the merits, we are not persuaded that the TCO's review was of such a character. This TCO was familiar with the Corps' concerns about Walsky. He was the TCO who received the Corps' inquiry of 4 June; it was his boss who issued the 4 June directive to Eielson. In fact, the TCO fed the ACO damaging information about Walsky during contract performance (finding 16). On top of this, the TCO's deliberations were incomplete and inadequate (findings 37 through 39). We must conclude that this default termination was not a reasonable exercise of discretion.

Our conclusion is also buttressed by the Government's conduct during the post-termination phase of the project. While the Government was quick to default terminate Walsky for its inaccurate submittals and its failure to perform, it was perfectly willing to accept, and work closely with Walsky as a subcontractor under the takeover agreement, although Walsky would still be providing those very same submittals and performance. Why would the Government reject Walsky as a contractor, but accept it as a subcontractor? It made little sense, if not for the lieutenant colonel's directive and the Corps' predicament. The Government's attitude towards Walsky also changed dramatically in the post-termination phase. At hearing, the ACO stated that the Government did not meet with Walsky during the contract period to discuss submittals because it was not normal procedure to do so (finding 48). But the Government chose to sit down with Walsky during the takeover period to iron out their conflicting interpretations of some of the submittal requirements. The Government went into these meetings with "a positive attitude" (*id.*). The project moved forward. Why was Walsky not entitled to this same positive attitude when it was the contractor? Again, the answer lies within the lieutenant colonel's directive.

We also fail to see how the Government was materially prejudiced by a number of the technical violations cited in the termination notice. We are aware of no sound reason why appellant could not have provided the certificate, authorizing it to install the roof system, shortly before the roof system was ready to be installed. Similarly, we do not know why appellant could not have provided the certificate of material compliance shortly before the material was to be delivered to the site. There is nothing of record to suggest that appellant would have been unable to provide this information. To support a default termination on these grounds was improper.

Notwithstanding that may of the grounds asserted by the Government for default termination are weak (findings 41 through 46), we need not explore whether there existed any other conceivable technical grounds to default terminate this contract under the circumstances of this case. A technical reason for default, even if established by the Government, does not require a default termination. We must review the totality of the circumstances to ascertain whether the termination decision was a reasonable exercise of discretion. *Darwin, supra*; *Schlesinger, supra*. When we view the facts of this case in the context of the Government's predisposition against Walsky under this contract, the conclusion is inescapable that this default termination may not stand.

The appeal is sustained, and the default termination is converted to a termination for the convenience of the Government.

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[¶ 26,265] **Hogan Construction Company, Inc.**

ASBCA Nos. 37347, 37348, July 28, 1993. Contract No. F41613-87-C-0043.

Interpretation of Contracts—Methods of Interpretation—Knowledge of Other's Definition.—A contractor was bound by the government's definition of storm windows because it knew of the government's interpretation during price negotiations and did not indicate disagreement. Conflicting testimony on whether the government advised the contractor of its definition was resolved on the basis of demeanor and the contractor's faulty memory. The contractor's interpretation that it could install a single uninsulated pane was inconsistent with any definition of storm windows.

Interpretation of Contracts—Methods of Interpretation—Knowledge and Price Agreement.—A contractor was bound by the government's interpretation of a specification for rubber mats because it knew of that interpretation and seemingly accepted it by accepting the price. The government had given the contractor a reference to a source for a brand-name product to check the price. The brand-name product was specified on a drawing note. Although the contractor was entitled to substitute products equal to those named, it was unreasonable to assume that the government would be satisfied with a generic rubber mat that lacked the features of the brand-name product and cost less than one-third the price of that product.

For the appellant: Williams & Jensen, P.C., Washington, D.C., by Robert J. Martinez and Sally B. Pfund. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and R. Stephen Houlihan and John M. Taffany, Trial Attorneys.

Before SCHEPERS, RUBERRY, and RIISMANDEL, Administrative Judges.

SCHEPERS, Administrative Judge: These timely appeals, tried with other appeals under this construction contract, are from two contracting officers' decisions denying appellant's claims which request costs for: (1) installing a second glass with a frame in certain of the windows; and (2) providing a brand name Pedi-Mat rather than a generic footmat. The parties stipulate to quantum in these appeals.

GENERAL FINDINGS OF FACT

On 27 September 1987 appellant was awarded Contract No. F41613-87-C-0043 in the initial amount of $278,770 for renovation of the Willis-Cartwright School at Carswell Air Force Base, Texas (the contract). Modifications raised the contract price to $339,943.75.

The contract incorporated by reference the standard Disputes, FAR 52.233-1 (APR 1984), Changes, FAR 52.243-8 (APR 1984), and Material and Workmanship, FAR 52.236-3 (APR 1984) clauses.

Mr. Richard D. Hogan, appellant's president and sole owner, had over 25 years' experience in the construction industry and had been in business for himself since 1966, with experience in a wide range of general construction projects.

On 24 November 1987 appellant received the Government's undated memorandum which requested a pricing proposal for certain contemplated changes. After appellant's submittal and the parties' negotiations, the Government issued Modification No. P00001 to the contract, a bilateral modification, dated 10 December 1987, which made a number of changes to the contract and increased the contract price by $62,500.

FINDINGS OF FACT PERTINENT TO ASBCA No. 37347

Paragraph g of Modification No. P00001 states:

> g. Replace the existing windows with storm windows and bronze anodized aluminum frames at the following locations: (see drawings, sheet 5 of 11).

Neither the modification nor the specifications contained a definition of a storm window. Section 8D-1, of the Technical Specifications, "Windows," Part 1.01A states:

> Provide and install fixed double glaze insulated lite windows to replace doors existing at the entrance area as indicated on the plans.

Mr. Hogan understood "that a storm window is a window to be applied to the outside or inside of an existing window," and usually is a single pane (tr. 6-7). Mr. Hogan was aware of the requirement to remove the existing windows, and that requirement did

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not alter his view that Modification P00001 required the contractor to install only one pane of glass.

The following definitions of "storm window" are part of the record:

> A secondary window attached over the usual window to protect against the wind and cold.
>
> A sash placed outside an ordinary window as a protection against severe weather—called also *storm sash*.
>
> A door (or window) placed outside the regular one as added protection.

Olin Long, Chief of Contract Management for Carswell Air Force Base, testified that during negotiations, in response to appellant's question the Government defined storm windows as two single panes separated by an air gap, i.e., a double-pane window. Mr. Hogan testified that he recalled the storm windows were discussed during negotiations of Modification P00001, but he had no recollection of being told the Government's definition. The price negotiation memorandum does not include this conversation. The parties' proposed prices for the storm windows were virtually the same. We find, based on both witnesses' demeanor, and the record as a whole, specifically the fact Mr. Hogan at times changed his testimony due to faulty memory (tr. 8, 32, 36), that during the negotiations of Modification P00001, a Government representative advised Mr. Hogan of the Government's definition of storm windows.

At the locations specified, appellant removed those existing windows which were not already broken out, and installed one single, non-insulated pane in the existing steel frames. These first windows installed by appellant could not have been screwed on over the existing windows.

In March 1988 the contracting officer rejected the single pane glass as not being storm windows. Appellant was given the option of either installing an additional pane, or replacing the first installation with double pane windows. Appellant installed second panes in anodized aluminum frames outside the first panes.

Installation of double pane windows resulted in costs to appellant of $1,775.03.

DECISION IN ASBCA No. 37347

Appellant asserts that installing a single, non-insulated pane of glass in the old steel frames met the requirements to replace existing windows with storm windows within anodized aluminum frames. The Government contends that appellant was required to provide double pane windows.

A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language. *Community Heating & Plumbing Co. v. Kelso* [38 CCF ¶ 76,488], 987 F.2d 1575 (Fed. Cir. 1993). If ambiguous, appellant prevails if its interpretation is reasonable and the ambiguity is not patent. *Interstate General Government Contractors. Inc.* [38 CCF ¶ 76,446], 980 F.2d 1433 (Fed. Cir. 1992). We are unaware of any definition of "storm window" which includes the single panes appellant initially installed. We do not find appellant's interpretation reasonable, thus we need not explore this question further.

Additionally, appellant knew of the Government's interpretation of "storm windows" during price negotiations, did not indicate disagreement, and thus is bound by the Government's interpretation. *Cresswell v. United States,* 146 Ct.Cl. 119, 173 F.Supp. 805 (1959) and cases cited.

Accordingly, the appeal is denied.

FINDINGS OF FACT PERTINENT TO ASBCA No. 37348

Paragraph y of Modification No. P00001 states:

> y. Remove the rubber walk-off mat at the main entry and install a new pedi-mat with color selected by user and approved by contracting officer. See drawings, sheet 4 of 11, note 26.

Note 26 of drawing 4 states:

> REPLACE EXISTING RUBBER WALK-OFF MAT AT THE MAIN ENTRY WITH A PEDI-MAT. COLOR TO BE SELECTED BY USER AND APPROVED BY CONTRACTING OFFICER.

Modification P00001 did not capitalize the term pedi-mat, or otherwise specifically denote a brand name. Pedi-Mat is a registered trademark. We are unaware of any dictionary definition of pedi-mat.

The Material and Workmanship, FAR 52.236-5 (APR 1984) clause within the contract states:

> (a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifica-

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tions to equipment, materials, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

Mr. Hogan testified that during the negotiations of Modification P00001, appellant's proposed price for the mat exceeded the Government's proposed price of $615. The parties were only about $100 apart on the total modification price of approximately $60,000. The Government gave appellant the address and telephone number of a source for Pedi-Mat to confirm the $615 price, along with sources for most of the plumbing supplies. Appellant did not check the source, rather accepted the Government's $615 price. Olin Long, the Chief of Contract Management for Carswell Air Force Base, testified that during negotiation the Government advised appellant specifically of the type of mat it wanted. Mr. Hogan testified he understood the Government wanted a generic footmat. Appellant did not, prior to installing the initial footmat, submit a color selection for approval by the Contracting Officer.

The mat appellant originally supplied cost approximately $200, was rubber and available only in black, was not intended as an entry mat, had no provisions to clean shoes and no area for water to drain. The existing mat was made of approximately 1/2-inch thick rubber connected with metal, and was used in an area of heavy traffic, thus the Government wanted a thinner mat, reducing the tendency to trip. The Pedi-Mat was made of aluminum, thus was thin; shoes could be cleaned of snow and the like, and water could drain.

We find that during negotiations of Modification P00001, appellant understood the Government considered Modification P00001 to require the brand name Pedi-Mat or equal, and appellant made no objection and seemingly accepted this interpretation by accepting the price. The price of Modification P00001 was based in part on the $615 price of the Pedi-Mat. Our finding is based on: (1) observing the demeanor of the two witnesses; (2) the record as a whole but particularly the facts in the two immediately preceding findings; and (3) Mr. Hogan's change or conflict in testimony, specifically on whether he was provided the telephone number of the supplier and whether there was an existing mat (tr. 6-7, 15-16).

On 24 March 1988, appellant was directed to install a Pedi-Mat, Part No. PM 375RM. Appellant incurred costs in installing the brand name Pedi-Mat of $805.80. There is no indication in the record that a product equal to Pedi-Mat was available or that appellant proposed an allegedly equal product.

DECISION IN ASBCA No. 37348

Appellant contends that it satisfied the contract requirements by supplying a $200 rubber mat which was not designed for an entryway, rather than the Pedi-Mat for the $615 price. We do not consider appellant's interpretation reasonable. Further, we found that appellant knew of the Government's interpretation of these provisions and seemingly accepted the interpretation by accepting the price. Based on the authorities and legal statements set out in the decision in ASBCA No. 37347, appellant's position fails.

Accordingly, the appeal is denied.

[¶ 26,266] L.J.C. Mechanical Contractors, Inc.

VABCA Nos. 3507, 3513, 3531, August 3, 1993. Contract No. V679C-5560.

Delays—Time for Performance—Notice by Contractor.—A contractor was not entitled to an extension of its contract to replace an air-conditioning system on the basis of the government's refusal to let it begin work when it was ready, because the contract required it to give two weeks' notice before beginning on-site work. Work was permitted on site when the two-week period had passed, except for tasks requiring prior approval of submittals. The government's refusal to allow demolition of the existing system was not shown to impact the contractor's work.

Modifications—Contractual Effect—Acceptance of Price.—A contractor was entitled to payment of the price it had proposed for change work, because the government's

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change order had accepted two items as per the proposal. The order did not indicate that prices would be tentative, and there was no objective evidence to support the contracting officer's assertion of an agreement that cost would be determined later.

Quality—Compliance with Specifications—Approvals.—Approval of a contractor's submittal for fencing did not excuse the contractor from providing visual screening slats, because the contractor failed to call the omission of slats to the government's attention as a change in contract requirements. Visual screening slats, though not shown on contract drawings, were required by the specifications.

For the appellant: Richard E. Crum, President. For the government: William G. Stevens, Trial Attorney, Office of the District Counsel, Montgomery, Alabama, Kenneth B. MacKenzie, Trial Attorney, Office of the General Counsel, Washington, D.C., and Phillipa L. Anderson, Deputy Assistant General Counsel.

Before ANDERS, MCMICHAEL, and PULLARA, Administrative Judges.

ANDERS, Administrative Judge: These appeals arise under a contract awarded by the Department of Veterans Affairs (VA or Government) to L.J.C. Mechanical Contractors, Inc. (LJC or Contractor) to replace air conditioning equipment at the VA Medical Center, Tuscaloosa, Alabama.

The three appeals, VABCA Nos. 3507, 3513, and 3531, were consolidated for the purposes of hearing and decision. The record consists of the Rule 4 Appeal Files submitted by the Contracting Officer (CO), as supplemented by the parties, the pleadings, transcripts of the hearing held in Montgomery, Alabama, and posthearing briefs.

VABCA-3507: FINDINGS OF FACT

On March 6, 1991 the VA awarded LJC, as low bidder, a contract in the amount of $183,000 for KITCHEN A/C RENOVATION, the general purpose of which was set forth in GENERAL REQUIREMENTS Section (01010) paragraph 1.1 A as follows:

> Contractor shall completely prepare site for building operations, including removal of (2) two Direct Expansion Air Handling Units, and furnish labor and materials and perform work to install a new constant volume Central Station Air Handling Unit/100 ton Chiller in Building 3 as required by drawings and specifications.

The Contract specifications contained the usual provisions found in VA construction contracts, as provided for by Federal Acquisitions Regulations (FAR), 48 CFR Part 52, and as supplemented by VA Acquisition Regulation (VAAR) in Part 852.

The Notice to Proceed (NTP) was received by the Contractor on Monday, May 13, 1991 (R4, tab 21; Tr. 229). On the following day, LJC personnel arrived on the job site and requested permission to begin work (Tr. 212-22). The CO would not permit any on-site work, reminding LJC of the Contract requirement that two-weeks notice must be given before any on-site work could begin (Tr. 230, 254).

The Contract requirement for a two-week notice before starting work on-site appears in two sections of the Contract. The GENERAL REQUIREMENTS, Section 01010, 1.4.G, Phasing, states that the "contractor shall notify Resident Engineer two weeks in advance of the proposed date of starting work in each specific area of site, building or portion thereof." Paragraph 1.28 of the GENERAL REQUIREMENTS, WORK SCHEDULE, states that the "Contractor will notify Resident Engineer two weeks in advance before beginning work." Richard M. Crum, LJC's estimator, testified that LJC envisioned being able to begin demolition of the existing air conditioning (AC) equipment on the roof on "day one," *i.e.*, upon receipt of the NTP. Mr. Crum assumed that the VA would have shut down the AC by that time in accordance with Amendment #1 to the Invitation for Bids, and that demolition could proceed since no submittals were required for that work (Tr. 1416). Amendment # 1 included the statement that "[a]ll compressors will be removed by the [VA] prior to start of contract."

LJC was informed on May 14, 1991 that the VA intended to continue operation of the AC until temporary AC could be installed, conceding that this was not in accordance with Amendment #1, and advising LJC that, if there were costs resulting from this, LJC should detail such costs for VA's consideration. (R4, tab 39; Tr. 234-35)

Mr. Crum testified that he had given notice to the VA during a preconstruction conference on April 11, 1991 that LJC would begin on-site work upon receipt of the NTP (Tr. 88). LJC offered no written record of what was discussed at the pre-construction

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conference, and Mr. Crum's testimony was denied by VA personnel who attended the conference.

Andrew Britt, the Contracting Officer's Technical Representative (COTR), testified that LJC did not indicate a date on which it planned to begin on-site work. Mr. Britt testified that the notification requirement was discussed, but he did not recall Appellant's representatives saying when they planned to start work. He added that, if Appellant had made such a statement, it would have been recorded in the minutes of the pre-construction conference. (Tr. 177-78) The minutes of the conference contain no reference to when LJC planned to commence on-site work. (R4, tab 12) Terry Galbraith, the CO, testified that the subject of when LJC intended to begin on-site work did not arise at the preconstruction conference. (Tr. 228)

The Daily Logs submitted by LJC to the VA for the period May 14, 1991, the day after LJC's receipt of the NTP, through June 3, 1991 contain the following under the heading "LOCATION AND DESCRIPTION OF WORK." Pertinent remarks added by the VA Resident Engineer are also shown:

[5-14-91 (Tuesday)]

[LJC:] No work performed.

[VA:] (1) Contractor showed up on site after Terry G. had told Richard Crum that they could not start work because of progress chart rejection, submittals, etc. This happened yesterday. (2) The VA allowed the contractor to drop off his trailer to prevent him from having to pull to site at a later date. (3) Meeting held today at request of Richard Crum (LJC) at 1:30. Meeting was to discuss submittals for chiller. R.C. wanted to submit literature for two (2) separate units w/total of four (4) compressors in lieu of one (1) unit w/ four (4). We looked at submittal literature & told him he could send to A/E for evaluation. At first glance it appeared OK, however, we told him that the A/E & the VA would need a proper amount of time to review. He was told he would receive a "Return of Submittal" (approved or disapproved) after review. We would try to expedite.

[5-15-91 (Wednesday)]

[LJC:] No work performed.

[5-16-91 (Thursday)]

[LJC:] No work performed.

(VA: Resident Engineer summarized discussions with LJC about submittals.]

[5-24-91 (Friday)]

[LJC:] No work performed 5-17-91 thru 5-24-91.

(VA:] (1) (5-22-91) Gave Randall [LJC supervisor] information to help him find someone to modify roof membrane & still retain warranty. Also explained to him the submittal process and told him I would make a list of submittals that was required for project, but the list was for information only; he must still go by specs. His coworker was w/him. (2) (5-23-91) Told Randall & his coworker that the chiller submittals would be ready today.

[5-27-91 (Monday)]

(LJC:] Holiday. No work performed.

[5-28-91 (Tuesday)]

(LJC:] Started layout of forms for concrete pad. Also put up temporary string barrier.

(VA:] (1) Carroll B. allowed him to proceed w/the above only. All his submittals on concrete work & the Progress Chart has not been approved yet. Work must be on items that do not require submittals. (2) Don W. only one here.

[5-29-91 (Wednesday)]

(LJC:] Constructed forms for concrete pad and backfilled w/loose dirt around forms.

[VA:] (1) I rec'd revised Progress Chart, late afternoon today. Still awaiting submittals from A/E.

[5-30-91 (Thursday)]

(LJC:] No work performed.

(VA:] (1) Don W. (LJC) came to my office this morning & we set up a time for our weekly meeting. I also gave him a name & no. for Traco, so he could get information on existing wdws. The new wdw must match existing.

[5-31-91 (Friday)]

[LJC:] Started removal of [window] in mech. room.

[6-3-91 (Monday)]

[VA:] Contractor removed window & double checked forms for chiller pad.

(Gov't Ex. 4)

On May 30, 1991, LJC requested "additional funds and contract time extensions per the attached breakdown on a daily basis starting on our Notice to [Proceed] date 5/13/91" because "[t]he Government has refused to let this contractor [proceed] with on site work." LJC stated that when the VA allows it to proceed, "the daily rate will be multiplied by the final number of days and a request for a MOD for time and money will

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be finalized." LJC's claim reads as follows (R4, tab 37):

FIELD OVERHEAD PER WEEK

R. Padgett D. Whisman		$1230
Out of town	5 days @ 60	300.00
Per Diem	5 days @ 30	150.00
Travel 2 Trucks	1200 miles @ 30¢	360.00
Truck on Job	25 x 2	50.00
		2090.00
	15% OH	313.50
		2403.50
	10% Fee	240.35
		2643.85

÷ 7 = 377.69$/day starting 5/13/91

With no claim for [lost] profit due to us not able to man other job.

Mr. Bement, Chief of the VA Contracting Activity, responded to LJC's May 30, 1991 letter on May 31, stating that LJC had already been reminded of the contract requirement for a two-week notice before beginning on-site work; that this requirement was mandatory; and, that LJC had been allowed to mobilize and set up between May 14 and May 28. (R4, tab 39)

LJC's June 1, 1991 response included the following:

> On 5/13/91 we received a N.T.P. and when I arrived in Tuscaloosa on 5/14/91, our company was advised to coordinate our start of on site work with the Resident Engineer. Mr. Padgett, our Superintendent and I met with Mr. Tim Lyons and Mr. Steve Johnson around 9:00 a.m. on the 14th. The question posed to the R.E., Mr. Lyons was "How can we coordinate our forces so that we may start on site work?" Mr. Lyons comment was "Since you have a N.T.P. we have no objections to your commencing on site work on any items of which you have received approval."
>
> * * * * *
>
> Our consistent position, since our letter of 5/14, was that by the Government not allowing us to start demolition, the Government impacted this contractor in the amount of our field overhead expenses for these three weeks. This [figure] was furnished to you on 5/30/91. Assuming that we are able to go to work 100% on 6/3/91 the impact amount is $2,643.85 x 3 weeks = $7,931.55. This is the dollar amount spent by L.J.C. Mechanical for on site work the past three weeks.
>
> (R4, tab 41)

In that same letter, LJC suggested that a fair settlement of time and money could be negotiated to cover the impact of the VA's decision to keep the existing AC operating until temporary AC could be set up. On June 4, 1991, the CO wrote to LJC denying its claim. The CO explained his denial as follows:

> I have reviewed your explanation in your latest letter of June 1, 1991. Your statements related to the ability to start on-site work without notice required by your contract was verbally discussed in our meeting of May 14, 1991. I advised you at that time the two-week notice required would not be waived and you would be allowed to only set-up prior to the completion of the notice period. The meeting in question was subsequent to your meeting with the Resident Engineer. Based on your allegation of delays, I can only assume you intended to rely on an answer that met your immediate needs. The role of the Contracting Officer was previously discussed at the preconstruction meeting. The authority to waive contract requirements does not rest with anyone except the Contracting Officer. Your claim for alleged delays based on the date of the notice to proceed receipt date (May 13, 1991) is denied.
>
> * * * * *
>
> Your subject letter indicates a desire to "negotiate a fair settlement of time and money to cover this impact on our con-

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tract" when the major equipment is delivered on site. If there is an impact of time or money, it is appropriate to consider those factors at this time. Please submit your proposal at this time if you feel our analysis is in error and your performance is impacted by our continued operation of the current system.

(R4, tab 45)

On June 11, 1991, LJC requested a CO's final decision on its claim in the amount of $7,931.55 ($2,643.85 × 3 weeks) plus 21 days of additional contract time for not being allowed to work during the period from May 13, 1991 to June 3, 1991, which, according to LJC, was the date the VA allowed it to work. LJC asserted in its June 11 letter that this claim was "due solely to the impact of the Government not complying with Amendment #1 to this contract." (R4, tab 50) In that same letter, LJC stated that it did not know the time frame for continued use of the existing AC and that, therefore, "[t]he future impact [of continued use of the existing AC] hinges on what you do in the future." (R4, tab 50)

The CO issued his final decision on June 28, 1991. In that decision, the CO pointed out that LJC gave the required two-week notice on May 14, 1991, making the start date for on-site work May 28, 1991, and that LJC began on-site work on that date on work for which no submittals were required. LJC's claim for $7,931.55 and a time extension of 21 calendar days was denied. (R4, tab 53)

VABCA-3507: DISCUSSION

LJC first gave the VA the required two-weeks notice for beginning on-site work on May 14, 1991, thereby establishing the first permissible day for beginning on-site work as May 28, 1991. LJC began on-site work on May 28, 1991. Appellant's assertion that it gave the required two-week notice at the preconstruction conference on April 11, 1991 is not supported by the evidence.

Appellant argues that the Contract requirement for a two-week notice in advance of any on-site work should not have been strictly enforced, but provides no justification for that position. The notice was a clear contract requirement and the rationale behind the requirement is not relevant to the VA's right to enforce it.

Accordingly, we find that the VA was acting within its contractual rights when it insisted on the two-week notice prior to on-site work, and that the fourteen days between May 14 and May 28 did not constitute a compensable delay period.

The 21 calendar days for which LJC claims a time extension is calculated by LJC as running from May 14, 1991 to June 3, 1991. However, the evidence shows that LJC was permitted to, and did begin on-site work on May 28. The only work it was not permitted to do May 28 was that for which approved submittals were required, and demolition of the existing AC system.

Although LJC was persistent in referring to the cause of its inability to begin on-site work as the VA's failure to shut down the existing AC system, or as LJC puts it, VA's failure to comply with Amendment #1, that is not the case. LJC was precluded by the CO from performing any on-site work until the expiration of the two-week notice period required by the Contract.

Other than its claim for a time extension for the period from May 14, 1991 to June 3, 1991, together with costs claimed for this period of time, LJC has presented no evidence or claim for any impact of the VA's continued operation of the existing AC system.

Appellant's general complaints about the submittal process are not supported by the evidence and are not relevant to the 21-day period on which its claim is based.

"The ultimate burden of proof or persuasion is upon the claimant and the final evidentiary question is whether the claim is supported by substantial evidence and proved by a preponderance of the evidence." *J.C. Edwards Contracting and Engineering Inc.*, VABCA Nos. 1947 & 1969, 85-2 BCA ¶ 18,068 at 90,690. Appellant has failed to meet its burden of proving that it was delayed by, or incurred additional costs because of any improper actions by the VA, or that the decision by the VA to keep the existing AC unit in operation caused an increase in its performance time or costs.

VABCA 3507: DECISION

The appeal is denied.

VABCA 3513: FINDINGS OF FACT

LJC seeks $1,837.21, the amount of its proposal which it says the Contracting Officer accepted when he issued Change Order B. This appeal involves Change Order B. The Government argues that it was only authorizing the work and that no agreement had been reached as to the price of the change order, which it maintains should not exceed $1,464.10.

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On or about August 8, 1991, LJC personnel on the job site contacted Mr. R.M. Crum, LJC's estimator, and told him of a problem with apparent omissions from the specifications of certain items they considered necessary for operation of the AC system. The LJC personnel asked Mr. Crum to come to the site and make an estimate for the additional work involved. Mr. Crum hand-carried a proposal for a change order to a Mr. Drennon of VA's engineering office on August 8, 1991. (R4, tab 1; Tr. 6,46-47)

This proposal consisted of three items, the first of which covered a motor inadvertently omitted from the specifications plus two "optional" proposals concerning additional safety wiring and a unit lock pump intended to enhance the project. (Tr. 20-21) Mr. Crum "made a fairly detailed presentation" to Mr. Drennon covering all of the individual cost items. (Tr. 8-9) After going over the proposal with Mr. Drennon and other unidentified VA personnel, Mr. Crum was told that the VA personnel would have to talk to the CO, since he was the only one who could approve it. (Tr. 7-10)

LJC's proposal stated that LJC was sending a change order to the CO for approval. In the "REMARKS" section it reads, "We will need 2 additional days for this work. We will not be able to order material until you advise." The proposal reads as follows:

EXTRA ELECTRICAL AHU #6

1- Size 2 Nema 3R Starter		$350.00	
40′ Rigid Conduit @2.50		100.00	
120′ #8 Wire		25.00	
Rigid Fittings		25.00	
Flex Conduit		10.00	
Change Main Power Feed From #4 to #2		100.00	
Hook-up Heater in Unit		25.00	
Labor:	8 hours Electrician @ 25 =	200	
	8 hours Labor @ 12.50 =	100	
Out of Town	Motel	50	
Eats		30	
Truck		25	405.00
		040.00	
	15% OH		156.00
			196.00
	10% Profit		119.60
			315.60
	2½% Bond		32.89
			$1,348.49

EXTRA SAFETY WIRING FOR CHILLER WIRE EVAPORATOR HEATER

Breaker for your Box	50.00	
Wire	25.00	
Rigid Conduit	100.00	
	175.00	
		175.00
Labor:		
4 hours plus out of town (see pg1)		202.00
		377.00
15% OH		56.55
		433.55
10% Profit		43.35
		476.90
2½% Bond		11.92
		488.82

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INTERLOCK PUMP W/CHILLER

Ditto Above w/no Breaker	125.00
	202.00
	327.00
15% OH	49.05
	376.05
10% Profit	37.61
	413.66
2½% Bond	10.34
	424.00

(R4, tab 1)

The Contracting Officer testified that "[a]fter engineering had evaluated them, they recommended the [first] two [items] . . . and I issued a change order B to get the work started." (Tr. 47-48) The Change Order was issued by facsimile transmission and received by LJC on August 9, 1991. Paragraph 14, DESCRIPTION OF AMENDMENT/MODIFICATION, reads:

> This change order is hereby issued for the contractor to proceed in providing all labor, material, equipment, transportation & supervision for extra electrical AHU (starter) and Wire Evaporator Heater (Chiller) only *as per your proposal* received August 8, 1991. (Emphasis added)

(R4, tab 2; Tr. 11)

LJC interpreted Change Order B to mean for it to proceed with the work described in the first two of the three items in their proposal, and that the VA had accepted the prices set forth in its proposal. As Mr. Crum put it, "I gave him a price and he bought the thing." (Tr. 12) LJC completed the work under Change Order B sometime prior to August 20, 1991. (Tr. 13)

On August 15, 1991, the CO sent a facsimile transmission to LJC, which reads as follows:

> Prior to issuing a supplemental agreement I need to point out the requirements of para 1.47 Changes—Supplement in the General Conditions Section of the Contract V679C-556 which limits overhead and profit to 10% respectively and bonding adjustment prior to completion and closing of the contract. I do not dispute direct materials or labor as noted in your proposed costs of 8/8, as issued for the 2 of 3 items listed in change order "B". Will issue a S/A for $1464.10 to cover as follows in C/O "B":
>
> 1. Extra Electrical (AHU) Starter:
>
> | | |
> |---|---|
> | Material | $635.00 |
> | Labor | 300.00 |
> | | 935.00 |
> | OHVD 10% | 93.50 |
> | Profit 10% | 102.85 |
> | Total | $1,131.35 |
>
> 2. Wire Evaporator Heater
>
> | | |
> |---|---|
> | Material | $175.00 |
> | Labor | 100.00 |
> | | 275.00 |
> | OHVD 10% | 27.50 |
> | Profit 10% | 30.25 |
> | Total | $332.75 |
>
> Need further explanation on 2 day extension as the superintendent indicated that materials were in receipt when I gave him C/O "B" on site the morning of the 12th. I am not [necessarily] indicating that I will not grant the extension, but am merely requesting for additional explanation over that of your proposal.

(R4, tab 6)

LJC responded:

> Our direct cost (labor, material) for these two changes were $1040 and $377 [respectively]. You state you do not dispute these costs and then you list a different figure in your recap. If you are going to cut our overhead we must request you to start with our correct material and labor figures.

(R4, tab 7)

The CO replied:

> In response to your 8/16 fax, I stated that I did not dispute your *direct* material and labor costs that are cited in your proposal. "Out of town motel, eats and truck" are not direct labor costs for the work to be accomplished. Additionally, we are not cutting your overhead as [you] put it, but only allowing what is contractual. Refer to Para 1.47 of General Conditions. The labor cited is 8 hrs electrician/8 hrs labor

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for starter work and 4 hrs electrician for wire evaporator. (Emphasis in original)

(R4, tab 8)

Supplemental Agreement #3, for an increase in the Contract price of $1,464.10, was issued September 13, 1991 and sent to LJC for signature. (R4, tab 18)

LJC refused to sign the supplemental agreement and on September 23, 1991, requested a Contracting Officer's decision on its claim for "out of town" expenses. (R4, tab 19) The final decision denying LJC's claim was issued September 26, 1991. In that decision, the CO gave the following explanation for denying the claim:

This letter is in response to your September 23, 1991 correspondence requesting a contracting officers final decision regarding the denial of "out of town" expenses that you wish to be included in the resulting supplemental agreement issued to incorporate the work required by Change Order "B".

Your proposal indicated the direct costs associated with the work: overhead @15%, profit @10%, bonding @2.5% and out of town expenses (motel, eats and truck). The direct costs for labor and material were found to be reasonable and not in question. Paragraph (d) of VAAR 852.236-88(b) Changes—Supplement (General Conditions 01001-30) authorizes "allowances not to exceed 10 percent each for overhead and profit". Bond premium adjustments are limited to final contract settlement in accordance with VAAR 852.228-70 (General Conditions 01001-12). Paragraph (j) of VAAR 852.236-88(b) authorized as follows: "Overhead and contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made therefore" (General Conditions 01001-31). Therefore, the "out of town" expenses that you allude to are considered as field overhead and therefore unallowable.

On September 30, 1991, the CO issued a unilateral "Settlement by Determination #A," in the amount of $1,464.10 rather than the $1,837.31 requested in LJC's original proposal. (R4, tab 22)

At the hearing, the Contracting Officer said that he viewed Change Order B to be simply an order to proceed with the work with pricing to be determined later. He pointed to the VA's supplement to the Changes clause contained in GENERAL CONDITIONS Section 01001 paragraph 1.47(b) which provides;

(b) When the necessity to proceed with a change does not allow sufficient time to negotiate a modification or because [of] a failure to reach an agreement, the contracting officer may issue a change order *instructing the contractor to proceed on the basis of a tentative price* based on the best estimate available at the time, with the *firm price to be determined later.* Furthermore, when the change order is issued, the contractor shall submit a proposal for cost of changes in work within 30 calendar days. (Emphasis added)

Relying on this provision, he insisted that the language of Change Order B, "to proceed in providing all labor, material equipment... as per your proposal" was just "to identify that we selected only the two [of three proposed] items" and that it did not include "the cost as proposed by the contractor." (Tr. 50) He said he issued Change Order B because the "project was near the completion date of the contract and in order to keep from any delays... I wanted to get notice to the contractor immediately." (Tr. 50) This was an apparent departure from his normal procedure. He said:

Generally, when I issue change orders or contracts, I generally discuss what the work is going to be about and then tell them we'll deal with the cost later, especially if they haven't received a final proposal.

(Tr. 53)

The Contracting Officer could recall no conversation with LJC officials about this work prior to the issuance of Change Order B. (Tr. 52) The CO was asked on cross examination, "Why did you not put [in Change Order B] 'only as per your proposal but not your price?'" The Contracting Officer responded that "I don't feel I left any ambiguity there... I'm only issuing a directive to do two items of work, the price will be determined later." He denied that he had accepted the price by issuing Change Order B, insisting that he had "accepted the work only." (Tr. 62-63)

VABCA 3513: DISCUSSION

LJC cites general contact law for the principle that an offer when accepted becomes a binding contract. It asserts that the government accepted two of the three items proposed without any qualification when it

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issued Change Order B per your proposal." Having done the work pursuant to that Change Order, the Contractor asserts that it should now receive the price it quoted to the Government. For its part, the Government, which does not bother with any citation to legal authority, simply references the Contacting Officer's testimony for the proposition that Change Order B was "issued upon an agreement to have work performed and the cost would be determined later." (Gov't Br. at 3)

As an initial observation we recognize that the Contracting Officer, anxious to get the air conditioning system operational, may have departed from his normal way of processing changes by issuing Change Order B. Additionally, we find no reason to question his subjective *belief* that all he was doing was authorizing the work and not agreeing to a price. But as the court observed in *WPC Enterprises, Inc. v. United States* [9 CCF ¶ 72,289], 323 F.2d 874, 879 (Ct. Cl. 1983):

> For a contract to exist there does not have to be, and rarely is, a subjective meeting of the minds all along the line. See Corbin, CONTRACTS, § § 96, 106, 546, 559.

As we noted in *Saturn Construction Company,* VABCA No. 3229, 91-3 BCA ¶ 24,151 at 120,857, "the test to be applied looks not to the subjective intent but to an objective manifestation of the parties intent." The objective manifestation of the parties intent in this case is that the Contractor, at the request of the Government, presented a detailed cost proposal separately priced for three items. In issuing Change Order B and accepting two of the three proposed items, the Contracting Officer did not issue a unilateral change order with the price reduced by those items he found unacceptable or unallowable. Nor did he order the work to be done with an explicit indication that the prices were "tentative" and that a "firm price" would be negotiated at a later date as VA "Proceed Orders" routinely do. Rather, the Contracting Officer ordered the Contractor to "proceed in providing all labor material equipment, transportation & supervision... as per your proposal received August 8, 1991." There is no objective evidence in the record that there was any "agreement" that "cost would be determined later." As the Contractor so succinctly put it in his testimony, "I gave him a price and he bought the thing." *See Stampco Construction,* VABCA No. 1599, 83-2 BCA ¶ 16,697 where we found that a "proposal submitted by Appellant which, upon acceptance by the Government, formed a binding contract." The Contracting Officer had the authority to bind the Government and did so when it issued Change Order B. *Texas Instruments Inc. v. United States* [36 CCF ¶ 75,980], 922 F.2d 810 (Fed. Cir. 1990); *Penn-Ohio Steel Corp. v. United States* [11 CCF ¶ 80,189], 354 F.2d 254 (Ct. Cl. 1965); *United States v. Purcell Envelope Co.,* 249 U.S. 313, 29 S.Ct. 300, 63 L.Ed. 620 (1919). When the Government enters the marketplace, as the court noted in *Purcell* at 318, "it should be animated by a justice as anxious to consider the rights of [its contractors] as to insist upon its own."

Finally, we observe that even if we were to find the language of Change Order B ambiguous, the Contractor would prevail under the doctrine of *contra proferentum.*

VABCA 3513: DECISION

The appeal is granted. Appellant is awarded $373.11, plus interest as authorized under the Contract Disputes Act.

VABCA 3531: FINDINGS OF FACT

The dispute in this appeal is over whether the Contract required visual screening slats in the fencing around the chillers.

The VA issued a deductive change order deleting visual screening slats from the Contract and requesting that LJC submit a proposal for the amount of the deductive change. (R4, tab 10) LJC advised the Contracting Officer that it did not know how much money was involved because it had never priced the visual screening slats inasmuch as they were not required under the contract. (R4, tab 13)

The VA issued a unilateral SETTLEMENT BY DETERMINATION which deducted $242 from the Contract price for the deletion of the visual screening slats. (R4, tab 15) LJC does not dispute this amount. (Tr. 106)

The parties agree that the Contract drawings do not show the visual screening slats.

The Contract Specifications, however, include, in Section 02444, CHAIN LINK FENCES AND GATES, the following references to visual screening slats:

Part 2—**Products**

2.6 **Accessories**

2. [V]isual screening slats: Equal to Deco-Link Mfg. Color to be brown.

Part 3—**Execution**

3.9 **Accessories**

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2. Supply metal visual screening slats as required and recommended by the manufacturer.

3.12 Installation Of Visual Screening Slats

Install visual screening slats per manufacturers written recommendations.

Article 1.57 of Section 01001, General Conditions, of the Contract specifications, Specifications And Drawings For Construction. Alternate #1 (Far 52.236-21) (Apr 1984), reads, in part, as follows:

(a) ... Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.

Appellant's submittal for the chain link fence included no reference to visual screening slats. The submittal was returned approved, subject to the following: "Need mfg. literature and data on gate & acc as per spec. section 02444-1.3A1." (R4, tab 3) Section 02444-1.3A1 requires the Contractor to furnish "Manufacturer's Literature and Data: Chain link fencing, gates *and all accessories.* (Emphasis added)

VABCA-3531: DISCUSSION

The only issues here are whether visual screening slats were required by the Contract, and whether the VA's approval of Appellant's submittal for the fencing, which included no visual screening slats, precluded the VA from requiring them.

Appellant's contention that the visual screening slats were not required because they were not detailed on the drawings is without merit because of Article 1.57 of Section 01001, GENERAL CONDITIONS, which provides that "[a]nything mentioned in the specifications and not shown on the drawings ... shall be of like effect as if shown or mentioned in both." Construing this provision in *Saturn Construction Co., Inc.* VABCA No. 2600, 88-2 BCA ¶ 20,632, we noted at 104,296:

> Under this provision, the failure of the Government to show the precise location of the fence on the drawings by use of a fence symbol does not negate the requirement for a construction fence imposed by the specifications. A Contractor is not permitted to rely solely on the drawings and disregard additional work required by the specifications.

Accord, B.D. Click Co. v. United States [27 CCF ¶ 80,096], 614 F.2d 748, 753 (Ct. Cl. 1980); *Merritt-Chapman & Scott Corp v. United States* [11 CCF ¶ 80,243], 355 F.2d 622, 626 (Ct. Cl. 1966)

The Contract specifications specifically require that visual screening slats be installed. Article 3.12 of SECTION 02444, INSTALLATION OF VISUAL SCREENING SLATS, requires that the Contractor "[i]nstall visual screening slats per manufacturers written recommendations."

Appellant's submittal was approved subject to its providing manufacturer's literature on, *inter alia,* accessories, which included visual screening slats. Approval of submittals does not relieve a contractor from the responsibility for furnishing precisely what is specified, nor does it constitute a change in the contract requirements, except where the change, *i.e.,* deviation from the contract specifications, has been specifically called to the Government's attention, which is not the case in this appeal. *Bhandari-Davis-Eckert,* VABCA No. 3475, 93-1 BCA ¶ 25,456 at 126,790; *J.C. Edwards Contracting and Engineering, Inc.,* VABCA Nos. 1947, 1969, 85-2 BCA ¶ 18,068; *Vogt Brothers Mfg. Co. v. United States* [9 CCF ¶ 71,991], 160 Ct. Cl. 687, 714 (1963).

VABCA 3531: DECISION

The appeal is denied.

[¶ 26,267] Hardrives, Inc.

IBCA Nos. 2319/2514, 2375/2475, 2414/2515, 2510, 2511, 2516, 2518, 2519, 2524, August 4, 1993. Contract No. 6-CC-30-04090.

Performance—Specifications—Alteration Without Notice.—Earthwork specifications in a contract for canal construction were defective because the inadequate survey information included incorrect elevations. In addition, they had been altered without notice. Furthermore, estimated borrow quantities, though appearing to a reasonable bidder to be overstated, were in fact greatly underestimated, and borrow quantities provided by the architect-engineer during performance were also inaccurate.

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Performance—Cooperation Duty—Administration of Contract.—A contractor was entitled to an equitable adjustment under the Changes clause because misadministration of the contract by an architect-engineer amounted to a constructive change. The government agency failed to exercise its right to intercede, although, as the party that had contracted with the contractor, it had the duty to intercede. Although the government and the architect-engineer blamed the contractor's response to requests for proposals for some of the problems, under the Changes clause in the contract (derived from the 1984 version of FAR 52.243-4) the contractor was not obligated to respond to requests for proposals.

Delays—Concurrent Causes—Multiple Government Delays.—A contractor was entitled to an extension of time and an equitable price adjustment because it proved with adequate specificity that delay was the result of government-caused problems. The right to relief was not defeated merely because it was impossible to separate the effects of concurrent, overlapping, and continuous causes of delay attributable to the government. The contractor provided well-supported, as-planned versus as-built evidence to prove it could have completed the project essentially on time but for the government-caused problems. Although it did not use formal critical path method scheduling, its evidence included expert critical path analysis.

Pricing of Adjustments—Total Cost Method—Criteria for Use.—A contractor's use of a modified total cost method of establishing costs attributable to constructive changes was proper, because the four criteria for use of the total cost method were met. Overlapping problems and delays chargeable to the government made it impracticable to prove actual losses directly. The reasonableness of the contractor's bid was shown by comparison to other bids and the government estimate, as well as by expert testimony. The bid was prepared by experienced estimators and was not questioned by the government at the time of bidding. The reasonableness of the contractor's costs was shown by a preponderance of evidence, even assuming that the contractor had the burden of proof. Little weight was given to government audits because of their questionable objectivity. The contractor segregated additional costs for which it was responsible.

Cost Principles—Reasonableness—Presumption Before 1987.—A contractor's incurred costs were presumed reasonable for the purpose of computing an equitable adjustment because the contract was awarded before May 27, 1987. The Pricing of Adjustments clause in the contract required cost questions to be determined by FAR cost provisions in effect on the date of the contract. Prior to May 27, 1987, FAR 31.1201-3 did not state that there was no presumption of reasonableness, and case law at the time was that incurred costs were presumed to be reasonable.

Cost Types—Equipment Costs—Waiver of Designated Schedule.—Equipment ownership costs were computed for purposes of an equitable adjustment using the 1986 Associated General Contractor rates rather than the Yellow Book rates referenced in the contract, because the government had instructed during the contract that the AGC rates were to be used. Modifications prepared according to these instructions had been approved. Thus, the government had waived the contractually specified schedule. The AGC rates that contracting officers had previously agreed upon as reasonable were appropriate for the board to use in calculating adjustments.

Delays—Overhead—Seasonal Business.—A contractor was not entitled to recover unabsorbed overhead at a rate reflecting the seasonal nature of its business, because the lower rate used by both parties at the hearing was the appropriate rate. The contractor urged at the hearing that the board should use a modified version of the *Eichleay* formula for unabsorbed overhead, but the board declined to modify the formula, citing *Capital Electric Co.*, 31 CCF ¶ 72,119. The contractor's entitlement to recover unabsorbed overhead was established in that the contractor met its initial burden to show that uncompensated delay had occurred and that it could not assume other jobs, and the government did not meet its ensuing burden to show that the contractor would suffer no loss by using a fixed mark-up formula.

Pricing of Adjustments—Profits—Contractual Limitation.—A clause limiting the amount of overhead to be included in contractor proposals for modifications was not

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relevant to the board's determination of the amount of an equitable adjustment for constructive changes, because the board was not considering a contractor proposal. Aside from requiring the adjustment to be equitable, the Changes clause does not limit profit. The government argued that the rate should be less than the maximum allowed in the Contractor Proposals clause in view of weighted profit guidelines, but the clause was inapplicable, and the applicable guidelines did not limit profit to any particular percentage.

Interpretation of Contracts—Ambiguities, Latent—Reliance on Own Interpretation.—A canal construction contractor was not entitled to recover costs of correcting turnouts to install two gates rather than one, because it failed to show that it relied at the time of bidding on its interpretation that only one gate was required. Evidence of unused gates suggested that the gate-supplier or the contractor at the time of bidding interpreted the drawings to require two gates. Although one-gate turnouts were installed under the oversight of government inspectors, the inspector was not authorized to change the specifications. Under the Inspection of Construction clause, inspections were for the sole benefit of the government and did not imply acceptance.

Quality—Approvals—Notice of Variation.—The alleged approval of a canal construction contractor's drawings showing pipe bends without encasement did not relieve a contractor of the obligation to provide encasement, because the contractor failed to give the government notice of the deviation from contract requirements and did not establish the elements of estoppel against the government.

Quality—Compliance with Specifications—Economic Waste.—A canal construction contractor was obligated to comply with specifications requiring encasement for pipe bends, because it failed to show economic waste. It alleged that there was no practical reason to require field encasement of banded mitered pipe bends. However, in the absence of economic waste, the government is entitled to precisely what it specifies, even if that exceeds what is needed for a satisfactory result. The contractor did not show the exceptional facts needed to establish economic waste.

Interpretation of Contracts—Contract as a Whole—Specific Antecedent.—A specification requiring no sealant for tooled grooves in transverse contraction joints did not conflict with or create ambiguity with respect to drawings and specifications requiring sealant generally in such joints, because the no-sealant clause referred only to tooled grooves. It provided that a groove be "tooled across the concrete curb from the end of each transverse joint," and then provided that no sealant was required for "these tooled grooves." In actual construction, as in the language of the specification, the curb grooves were treated differently.

Payments, Prompt—Invoices—Substantiation of Title.—A canal construction contractor's invoices were properly rejected as a basis for payment because they did not contain lien waivers for unincorporated on-site materials. Although the Payments clause provided that the contracting officer could authorize materials delivered on site to be taken into consideration, the Administration of Payments clause stated that such material could be included in payment estimates only if the contractor had furnished satisfactory evidence of title. Acceptance of the materials for payment purposes was optional. Because the contractor failed to meet its burden of proof of the amount of progress payments that were late after sending a proper invoice, a better-supported calculation was used.

Interpretation of Contracts—Excavation, Grading, and Fill—Surcharge.—A contractor was not entitled to additional compensation for royalties it was required to pay for using a particular borrow area, because the contract required that the borrow surcharge be included in the unit price for excavation from borrow. Both the contractor and its subcontractor had included the royalty charge in their bid prices for borrow.

For the appellant: Graeme Hancock, John R. Jefferies, and Fennemore Craig. For the government: Fritz L. Goreham and Wayne C. Nordwall, U.S. Department of the Interior, Phoenix, Arizona.

Before ROME and PACKWOOD, Administrative Judges.

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ROME, Administrative Judge: Hardrives has appealed under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(5), largely from the contracting officer's failure to issue decisions on its claims under its contract with the Bureau of Reclamation (BOR) for the construction of the Hohokam Canal (Canal or Project), part of the Central Arizona Project (CAP). After a 3-week hearing and thousands of pages of transcript, exhibits, and briefs, the parties' combined, oft-disputed, proposed findings of fact totalled over 1000. For the complex procedural background, *see Hardrives, Inc.*, IBCA No. 2319, *et al.*, 91-2 BCA ¶ 23,769 (granting motion to stay); *Hardrives, Inc.*, IBCA No. 2319, *et al.*, 93-2 BCA ¶ 25,669 (opinion on certification); and *Hardrives, Inc.*, IBCA No. 2319, *et al.*, 93-2 BCA ¶ 25,779, 1992 IBCA LEXIS 11 (12/30/92 opinion denying motions to dismiss). We make only those findings necessary to the understanding and resolution of the appeals. Of those, with editing, we have adopted some uncontested proposed findings ("U").

FINDINGS OF FACT

I. *The Contract*

1.U. The Hohokam Irrigation and Drainage District (District) obtained Government financing for the Canal. It hired Franzoy-Corey, Architects and Engineers, Inc. (FC or A/E), to prepare the specifications[1] and to manage construction for BOR, at District expense (Appellant's Exhibits (AX) 7, 10, 15, 21, 22, 51; Transcript (Tr.) 3543-45).

2.U. FC prepared the Canal specifications, served as Construction Engineer, and administered the Project as BOR's authorized representative. BOR retained the right to assume contract administration (Government's Exhibit (GX) 2A at § I.1.1(d) and (e); AX 22 at 11/18/85 agt. at ¶¶ 1, 4; AX 51; AX 134 at Tr. 2/9/87 mtg., lined version with typed names at end at 13; amended complaint and answer (c&a) ¶¶ 21, 25, 29; Tr. 112-13, 426, 3085).

3.U. FC admits that its primary concern was to protect the District (Tr. 3559-60).

4. BOR awarded the contract, in the bid amount of $6,743,617.65, to Hardrives[2] on May 15, 1986, which thereafter subcontracted with MRT Construction, Inc. (MRT), for earthwork, and with Valley Ditch Lining, Inc. (Valley Ditch), for trenching and lining. The contract covered construction of about 14.1 miles of concrete-lined Canal and the Kleck Road Turnout. BOR prepared the specifications for, and administered, the turnout portion of the contract, not at issue. Of Hardrives' bid, $6,225,188.30 pertained to the Canal. Hardrives received the notice to proceed on June 12, 1986. It was to complete the Canal and turnout in 270 days, by March 9, 1987, extended to March 10, 1987, by modification 45 (c&a ¶¶ 3, 4, 17; AX 19, 44, 45; GX 1; GX 2A at § H.1 and at specifications (spec.) 1.1.1 and 1.1.2 a.; GX 2C; GX 478 at Tab A; Tr. 112-13, 237-40, 247-48, 1647).

5. The bid schedule called for lump sums and unit pricing based upon given estimated quantities. Among the latter, excavation for canal was estimated at 280,608 cubic yards (c.y.), for which Hardrives bid $2.78 per c.y., for a total of $780,094.24; excavation from borrow was 409,684 c.y., bid at $1.08, for a total of $442,458.72; excavation for pipe trenches was 18,174 c.y., bid at $4.85, for a total of $88,143.90; compacting embankments was 186,749 c.y., bid at $1.26, for a total of $235,303.74; construction of canal lining was estimated at various amounts of linear feet (l.f.) and bid at varying unit prices; furnishing and applying soil stabilizing solution was estimated at 21,245 l.f., bid at $0.38 per l.f., for a total of $8,073.10; and structural reinforced concrete work, excluding precast, was estimated at 1,241 c.y., bid at $410, for a total of $508,810. The schedule stated that estimated quantities were for bid comparison and, except under the contract's Variation in Estimated Quantity clause (VEQ), no claim was to be made for any excess or deficiency (GX 1 at F-11, *et seq.*).

Among others addressed below, the contract contained the following relevant Canal specifications, in pertinent part (all at GX 2A):

6. For staking the work, "the District" was to establish reference points for horizontal alignment with vertical control to be provided by benchmarks. The contractor was to make all detail surveys needed for construction (spec. 1.1.3).

[1] Unless otherwise indicated, the term "specifications" includes drawings, plans, and earthwork computer analyses provided by FC as part of the contract documents.

[2] On Aug. 12, 1986, Hardrives notified BOR that, to transact business in Arizona, it had to change its name in that State to U.S. Industrial Constructors, Inc. For consistency with the parties, we use "Hardrives" (IBCA 2414 Appeal File (AF) at Tab 8).

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7. Project design was based upon the geological description, drawings, logs of subsurface explorations, and test data contained in the specifications. Bidders were encouraged to conduct their own tests. "The District" denied any representation that information provided, other than at the point from which derived, depicted conditions to be encountered. Conclusions about materials to be excavated, difficulties, or other work affected by geology or subsurface conditions, were said to be the contractor's responsibility. The upper hundreds of feet of valley fill were said to be loose, but with thick clay below interbedded with sands and gravels "often partially cemented." Detailed test information was said to be available at FC's offices (spec. 1.3.12; *see also* spec. 1.3.13).

8. The contract's boring logs indicated that weakly or moderately cemented materials had been encountered (GX 2C at 80). They provided: "Where used in these specifications, the terms 'weakly' 'moderately', and 'strongly' cemented refer to materials * * * easily crushed with finger pressure, broken manually, or required a hammer blow to break, respectively" (GX 2C at 72).

9. The Site Drainage clause, at § 2.3.1a., provided: "The Contractor shall handle all flows from natural drainage channels intercepted by the work * * *. He shall provide and maintain any temporary construction required to bypass or * * * cause the flows to be harmless to the work and adjacent property."

10. Direct payment for earthwork would be made only for that required for construction of open canal, excavation for pipe trenches, and excavation from borrow (spec. 3.1.1).

11. "To the extent that they exist[ed]," mass diagrams and earthwork data would be available at FC's offices. "The District" disclaimed any representation that the information was accurate or complete, denied responsibility for conclusions the contractor might reach, and noted that the information was not intended to prescribe the contractor's excavation and hauling procedures. "The District" reserved the right to use and distribute earthwork materials during work. The contract provided further:

> The ground elevations shown on the drawings and used in the earthwork analysis were established photogrammetrically from aerial surveys. The vertical accuracy of the ground elevations is ± 0.25 feet, subject to standard industry tolerances. The bidder/contractor may elect to verify, at his own expenses, the accuracy of the elevations. If in the opinion of the Contractor any deviations cause an increase in cost, these costs shall be included in the unit prices submitted in the bid schedule.
>
> Payment for earthwork items will be made to the neat line dimensions shown on the plans and the quantities in the bid schedule * * *.

(spec. 3.1.2). Again, the contractor was to assume responsibility for the nature and difficulty of materials to be excavated. "The District" disclaimed any representation that the excavation could be performed or maintained at the pay lines described or shown in the specifications (spec. 3.2.1).

12. Compacted materials required certain moisture content, with moistening at the excavation site to be done to the extent practicable, supplemented at the compaction site if necessary (spec. 3.1.3).

13. There were clearing, grubbing, and stripping requirement (*see* specs. 2.1.1a., 3.2.6, 3.4.1).

14. The excavation from Borrow clause provided:

> Where the canal excavation at any section does not furnish sufficient suitable material for embankments, additional material shall be obtained from Borrow Areas A and B. Borrow Area C will be made available to the Contractor upon * * * written notice [to FC]. *However, the Contractor will be charged $0.15 for each [c.y.] of material removed from Borrow Area C.*
>
> * * * * * * *
>
> Payment * * * for "Excavation from Borrow" will be made at the unit price per [c.y.] bid * * *. This price shall include the costs of excavating, hauling, placing embankment, moisture application, *plus the $0.15 per [c.y.] cost of purchasing only borrow material from Borrow Area C,* and all other work described in this paragraph, except * * * clearing and grubbing * * *. [Emphasis in original.]

(spec. 3.2.6a.; *see also* spec. 3.4.2a.). There was no limit upon free-haul distance for excavation and no overhaul was to be paid. All costs were to be included in bid prices for canal or borrow excavation (spec. 3.2.7).

15. Where original ground surface was below Canal grade, and construction of fill below Canal bottom was prescribed, the fill was to be placed as compacted embankment. Where the original ground surface was below the base of a structure, fill to form a

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foundation was to be placed as compacted embankment (specs. 3.4.2a., 3.4.3a.).

16. Concrete structures were to be located as on the drawings and built to the lines, grades, and dimensions shown. There were to be no allowances above bid prices for minor modifications or extensions to adapt a structure to a site (spec. 5.1).

17. The Drawings clause, at § 10.1.1, provided:

> The drawings which form a part of these specifications show the work to be done * * *.
>
> Specifications and details shown on these drawings which are not applicable * * * shall be disregarded. Where details shown differ from the requirements of these specifications, the specifications shall govern. In the event there are minor differences as determined by the Contracting Officer between details and dimensions shown on the drawings and those of existing features at the site, the details and dimensions of existing features at the site shall govern.
>
> The Contractor shall check all drawings carefully and advise the Contracting Officer of any errors or omissions discovered.
>
> * * * the specifications drawings will be supplemented by such additional or revised general and detail drawings as may be necessary or desirable as the work progresses; and the Contractor shall do no work without proper drawings and instructions.

The contract contained the following relevant General Provisions, in pertinent part:

18. Liquidated damages for failure to complete the Canal work on time were $1,000 per each day of delay (§ H.3).

19. Under, § H.4, the contractor was to provide to the contracting officer for approval a construction schedule in the form of a progress chart showing the order of work and time periods for completion of the various elements. If, in the opinion of the contracting officer, the contractor fell behind its approved schedule, it was to take steps necessary to improve progress. If the contracting officer determined that the contractor was not prosecuting the work with sufficient diligence to ensure completion within the contract period, the contracting officer could terminate the contractor's right to proceed, in accordance with the Default clause. The contract also provided that the contractor was to give FC, for information, a complete construction program, which the contractor was to revise in a timely manner as necessary. The program was to depict work scheduling and progress details, or the contractor could use and provide a critical path method or similar analysis (§ H.8).

20. Time extensions were to depend upon the extent to which changes caused delay (§ H.7).

21. The term "Contracting Officer" included authorized representatives acting within the limits of their delegated authority (§ I.1.1(b)). FC was said to be the District's representative for construction surveillance and contract coordination with the duty to monitor compliance with the specifications and to report violations to the contracting officer (§ I.1.1(d)). Authority to modify the contract on behalf of BOR was limited to contracting officers. Unless otherwise provided in the contract, the contractor assumed all risks of performance in accordance with any written or oral order, including interpretation, of a person not authorized in writing to issue it (§ I.1.2).

22. The contractor was to comply "without unnecessary delay" with any written or oral order, including interpretation, of the contracting officer or his authorized representative, except that, if the contractor considered the order to have been issued without proper authority, or to be a change under the Changes clause, it immediately was to request written confirmation from the contracting officer. Performance pending receipt of confirmation was to be at the contractor's risk (§ I.1.3).

23. If cost or pricing data were submitted for any non-competitively priced contract modification, BOR could examine documentation to evaluate the data's accuracy, completeness, and currency (§ I.1.5).

24. The Site Investigation and Conditions Affecting the Work clause, § I.2.4, provided that the contractor acknowledged that it had ascertained the nature of the work; investigated conditions, including conformation and conditions of the ground; and satisfied itself as to surface and subsurface materials or obstacles to be encountered, as reasonably found from a site inspection, exploratory work done, and from the drawings and specifications. Any failure by the contractor to do so was not to relieve it from determining the difficulty and cost of the work, or from performing without additional expenses to BOR, which assumed no responsibility for conclusions based upon information it had made available.

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25. a. Under the Specifications and Drawings For Construction clause, § I.2.16, anything mentioned in the specifications and not shown on the drawings, or vice versa, was deemed included in both. In case of differences, the specifications governed. Discrepancies in figures, drawings or specifications were to be submitted promptly to the contracting officer, who promptly was to make a determination in writing. Any adjustment by the contractor without such a determination was to be at its own risk. Shop drawings were those submitted by the contractor or subcontractor showing in detail the proposed fabrication, assembly, and installation of materials or equipment. The contractor was to coordinate shop drawings and to review them for accuracy and completeness. The contracting officer was to indicate approval or disapproval and, if not approved as submitted, was to indicate the reasons. Any work before approval was to be at the contractor's risk. The clause also provided:

> (e) * * * Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.
>
> (f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

b. The Administration Of Specifications And Drawings For Construction clause, § I.2.17, provided that, if individuals other than the contracting officer were authorized to approve shop drawings, the authorization was to appear in the contract or otherwise be provided in writing to the contractor by the contracting officer. They did not have authority to approve technical data varying from contract requirements that involved a change in price or in performance time and BOR was not to be liable for any increase in cost or time resulting from the contractor's reliance on such approvals. Adjustments for BOR delay in approving requests for approval "of shop drawings or other technical data" were to be made only if BOR approval were required and if the requests were "properly and timely submitted and approvable" (§ I.2.17(c)). Any adjustment was to be under the Suspension of Work clause.

c. The Inspection of Construction clause, at § I.3.1(c)(3), provided that inspections were for the sole benefit of BOR and did not relieve the contractor from providing adequate quality control measures or "[c]onstitute or imply acceptance." The clause also stated: "(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization." The contractor, without charge, was to replace or correct work found by BOR not to conform to contract requirements unless, in the public interest, BOR agreed to accept it with a price adjustment (§ I.3.1(f)).

26. The contractor's operations, including forces employed, sequence, and method, were to be subject to the contracting officer's approval at all times during performance and were to insure completion of the work during the contract period (§ I.2.22).

27. The VEQ clause stated that if a unit-priced item varied more than 15 percent above or below the estimated quantity, an equitable adjustment was to be made upon demand of either party, based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimate. If the variation caused an increase in time to complete the work, the contractor could request an extension, subject to contracting officer approval (§ I.4.1).

28. The Changes clause, § I.4.5, provided:

> (a) The Contracting Officer may, at any time * * * by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—
>
> (1) In the specifications (including drawings and designs);
>
> (2) In the method or manner of performance of the work;
>
> (3) In the Government-furnished facilities, equipment, materials, services, or site; or
>
> (4) Directing acceleration in the performance of the work.
>
> (b) Any other written or oral order (which, as used in this paragraph (b), in-

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cludes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work * * *, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" * * * based on defective specifications, no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice * * *. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

29. a. Under the Pricing of Adjustments clause, § I.4.6, when costs were a factor in BOR evaluation or determination of a price adjustment under the Changes or other clause, they were to be in accordance with cited provisions of the Federal Acquisition Regulation (FAR), as supplemented by any applicable contract clauses. The applicable FAR provisions were "those in effect on the date of this contract."

b. The Change Order Accounting-Modification clause, § I.4.7, provided that the contractor was to maintain sufficient records and data to establish the cost of the work. If the estimated cost of a proposal or claim were to exceed $100,000, the contractor was to keep separate accounts of all incurred segregable direct costs of work, changed and unchanged, allocable to the proposal or claim.

c. The Contractor Proposals—Reclamation clause, § I.4.8, provided:

> (a) The Contractor, in connection with any proposal it makes for a contract modification, shall furnish a price breakdown, itemized as required by the Contracting Officer. Unless otherwise directed, [it] shall be in sufficient detail to permit an analysis of all material, labor, equipment, subcontract, and overhead costs, as well as any profit * * *. Any amount claimed for subcontracts shall be supported by a similar price breakdown * * *. * * *
>
> (b) If adjustments are allowed for work performed wholly or substantially by subcontractors * * *, [they] may include an allowance for the prime contractor's indirect cost and profit. However, the total of such allowances * * * shall not exceed 10 percent of the adjustment allowed for the subcontractor * * *.

30. The Differing Site Conditions clause, at § I.4.11(a)(1) and (b), provided that the contractor was to notify the contracting officer of subsurface or latent physical conditions differing materially from those indicated in the contract. If the contracting officer found they so differed and caused an increase in the cost or time of performance, an equitable adjustment was to be made and the contract modified.

31. a. Under the Default clause, § I.4.14, if the contractor failed to prosecute the work, to insure its completion within the contract period, BOR could terminate the contractor's right to proceed, unless delay arose from unforeseeable causes beyond the contractor's control and without its fault or negligence, including acts of BOR in its contractual capacity. The time for completion was to be extended if deemed warranted by the contracting officer.

b. Regarding Government-caused delays, the Suspension of Work clause, § I.4.12, provided:

> (b) If the performance of * * * the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within

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the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance * * * (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified * * *. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment if [sic] provided for or excluded under any other term or condition of this contract.

32. a. The Equipment Ownership and Operating Expense clause, § I.4.16, provided that adjustments under the Changes, Differing Site Conditions, or Suspension clauses could include allowance for ownership of equipment by the contractor or any subcontractor. Allowances for ownership and operating expenses were to be based upon the contractor's actual cost records when possible. Except for fully depreciated equipment, for which a reasonable use charge could be agreed upon within limits, the clause provided that allowance for certain depreciation, taxes, insurance, and incidental costs were to be calculated using Tables in the Contractor's Equipment Manual, 1974 Edition, published by the Associated General Contractors of America (AGC) (referred to at hearing as the "yellow book"), and were to constitute the hourly cost of equipment ownership.

b. The Forward to the 1974 yellow book twice stresses that it is intended as a guide only, subject to adjustment to fit the experience of individual equipment owners (GX 577).

33. The Administration of Funds clause, § I.5.6, disclaimed any warranty that funds would be available for payment of earnings, including contract adjustments. The contractor was to notify the contracting officer if it appeared that such funds would be exhausted within 30 days. The contracting officer then could advise of any additional funds available. Prosecution of work at a rate that would exhaust available funds before the end of the fiscal year was to be at the contractor's risk.

II. *IBCA 2375/2475*

Earthwork, Trenching and Lining, Structures, and Contract Management

A. *Earthwork Overview*

34. To ensure proper water flow, the Canal had to be built at specified elevations. The contract included detailed information about the vertical elevation of existing ground and the design elevation of the bottom (invert) of the Canal (c&a ¶ 7; GX 2C at 4-23; AX 528).

35. After clearing and grubbing, Hardrives moved more earth to construct the Canal enbankment. Depending upon the difference between existing ground and design elevations, the embankments were formed either by excavating "cut" dirt or by adding "fill" to raise the existing ground level, or both. Embankments either were compacted or non-compacted. A compacted embankment consisted of fill dirt placed and compacted to a specified density. Substantially all of the fill used to build the portion of the embankments beneath the Canal had to be compacted. The area of compaction changed based upon the elevation of existing grade compared to the Canal invert. The degree of embankment slope also depended upon the difference between the height of the Canal invert and existing ground. If the invert were above existing ground, the embankments required more dirt and flatter slopes. The contract required more fill dirt than was available from cut, but the contractor had to use all material excavated from the Canal before it would be paid for obtaining extra dirt (borrow) elsewhere (specs. 2.1.1a., 3.4.1; GX 2C at 31; Tr. 130-133, 136-39, 146, 150, 158, 169-72).

36.U. To assist in planning construction activities, the contract documents included a computer printout prepared by FC describing the amount of material to be excavated and the amount of fill at all points along the Canal. The printout showed existing grounded elevations, the elevation of the Canal invert, and the volumes of dirt to be excavated at each 100-foot segment (station) of the Canal. BOR also provided Hardrives with drawings graphically depicting the elevation data contained in the printout (AX 528; GX 2C; Tr. 269-78).

37. The data in the specifications correlated to the cut-fill information in FC's computer printout (AX 458).

38.U. Contractors routinely use earthwork quantities and elevations in bid documents

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to determine work required and to estimate costs (Tr. 1715).

39. In determining bid prices and its anticipated construction schedule, Hardrives relied upon FC's station to station cut/fill information in the computer printout and related drawings. It used the given elevations and earthwork quantities to anticipate haul distances and balance points (where hauled or other cut will equal required fill) to determine the most efficient way to move dirt between cut, fill, and borrow areas (AX 502; Tr. 269-70, 274, 278-80, 284-85, 1191-92, 1385-90).

40.U. Hardrives did not have any information before construction began to suggest that the ground elevations in the contract documents were inaccurate. Before MRT, the earthwork subcontractor, began working, it reviewed and relied upon the earthwork quantities and elevations in the contract to plan its operations (AX 100; Tr. 287-91, 1192, 1396, 2114-16).

41. MRT was not aware of FC's computer printout until after the job was underway. It then found it to be inaccurate and did not use it. It reviewed revisions, but did not find the trustworthy either. It did use the drawings prepared by FC, which, like the printout, depicted alleged existing grades and the elevations to which the contractor was to build. MRT used that information to identify anticipated quantities of cut and fill in portions (reaches) of the Canal (AX 100; Tr. 1192-93; 1974-78).

42. BOR's Chief of the Construction Division, Mr. Fraser, opined:

> * * * this contract included an express warranty as to the accuracy of the original ground profile. [Specification 3.1.2] states in part:
>
> "The ground elevation shown on the drawings and used in the earthwork analysis were [sic] established photogrammetrically from aerial surveys. The vertical accuracy of the ground elevation is ± .25 feet, subject to standard industry tolerances."
>
> * * * * * * *
>
> * * * Bidders are not required to prepare their bids based on their own prebid surveys and investigations. A reasonable job site inspection would not include surveying to check the elevations shown in the specifications. [Footnote omitted.]

(AX 458 at 6, 8).

B. *Trenching And Lining Overview*

43.U. During the first stage of earthwork, the contractor had to construct preliminary Canal embankment. It built a "pad" upon which the trencher would travel while trimming the final inside shape (prism) of the Canal. The contract also required an operations and maintenance (O & M) road. In constructing the embankment, MRT left excess dirt along the Canal sides and invert to enable the trenching equipment to trim the dirt and deposit it where the O & M road was to be built. The contractor had estimated the amount of dirt needed, and the amount to be removed by the trencher, so that it would not require more to complete the road and would not leave excess material when trenching was complete (AX 512D; specs. 1.3.3; 3.4.2b; Tr. 130, 133, 142-43, 145-50, 166-67).

44.U. After its trencher had formed the prism, Hardrives' subcontractor, Valley Ditch, used a continuous paving machine, which sat in the prism and was pulled along by a bulldozer, to line it (Tr. 178-79, 181, 192, 194).

45. The contract specified prism moisture content. If paving fell too far behind trenching, the prism would dry, and more water and reshaping would be required. To prevent this, Valley Ditch tried to keep the paving less than 1 work day behind the trenching. It was not always able to do so (GX 159 A and B; Tr. 179-82).

46.U. As paving proceeded, workers finished the lining surface and others tooled grooves in it (AX 449; Tr. 192).

C. *Structures Overview*

47. The contract required 65 siphons, culverts, field turnouts, lateral turnouts, bridges, and other structures, of which 26 were siphons, pipe drops, and culverts having separate inlet and outlet structures within the Canal prism (spec. 5.1; *see* GX 2C at 44-45, 54; Tr. 113, 125).

48.U. Underground concrete pipe had to be installed as a siphon at numerous locations where the Canal crossed roads, rail lines, and other Canals to convey the Canal water underneath (Tr. 119-20, 2992).

49.U. All of these structures extended into the canal prism. Therefore, it was more efficient to complete the trenching and lining before beginning the structures in a particular location. The alternative would have required stopping the trencher and paving machine and lifting them out of the prism with a crane every time structures were en-

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countered (Tr. 128-42, 196-228, 262-63, 529-30, 1738-39, 1986).

50. The paving machine paved over the area where turnouts and other structures were to be constructed. Before the concrete hardened, a hand-trowel was used to cut the concrete adjacent to the future structure. When the cut piece had cured, it was removed with a backhoe. The structure then could be built at the opening (AX 584; Tr. 208-12, 215-16).

51.U. When a structure was complete, hand-placed lining was required between it and the machine-placed lining. The hand-placed took more time, equipment, and materials than the machine-placed, and created more breaks or gaps in the Canal. Completing the trenching and lining before the structures kept hand-placed lining to a minimum (Tr. 203-04).

D. *Finish and Cleanup Work*

52.U. After the structures were built in a particular area, final Canal shaping, finishing, and grading; completion of the O & M road; cleanup; and several smaller work items were required. It was most efficient and economical to perform the finishing operations after all others had been completed in a reach, so that the final work would not have to be redone (Tr. 228-30).

E. *Construction*

53. Hardrives submitted a construction schedule prepared before work began to attempt to comply with the contract requirement and to provide an initial outline showing an orderly progression. It was not a critical path analysis and depicted "early" start and finish dates as identical to "late" ones, with no float. During construction, the schedule was not used, but Hardrives and MRT planned to adhere to a sequential operation (GX 478H; Tr. 261, 886-88, 891, 895-96, 1442-44).

54. MRT began earthwork on July 22, 1986, within 1 day of the schedule. It planned to complete the initial embankment by about December 15, 1986, 2 days earlier than the schedule (GX 478H; Tr. 244).

55. The "schedule" gave an October 1, 1986, start and a December 15, 1986, finish for trenching and lining. Valley Ditch told Hardrives that it planned to start on October 15, and to finish in late January 1987. It expected to complete early, though, as it had in other jobs, to enhance its good reputation. The plan was for it to complete all trenching and lining without catching up with the earthwork and having to demobilize. Assuming placement of 400 c.y. of concrete daily, Valley Ditch expected to complete lining within 45 working days, including 4 10-hour days per week. Lining, not trenching, controlled its progress; it could trench much faster than it could pave. Downtime was anticipated for equipment modification for varying canal widths, breakdowns, and weather (AX 527; GX 478H; Tr. 244-45, 256, 262, 264, 1181-84, 1264-68, 1305-06, 1321-23, 2826).

56.U. To finish the Project on time, the contractor scheduled trenching and lining so that enough would be completed to begin the structures, and then to begin final grading work (Tr. 255, 260-63).

F. *Earthwork Problems*

1. *Elevation Errors*

57. To set the slope stakes and construction stakes, Hardrives hired Mr. Rice, a licensed civil engineer and registered surveyor with experience on Federal, state, and private projects, including prior canal and other work on the CAP (Tr. 292-301, 1490-1511).

58. Mr. Rice attempted to set construction stakes about one-half mile ahead of MRT's earthwork, to avoid getting too far ahead, which would subject the stakes to loss due to weather, animal traffic or other causes, and necessitate rework (Tr. 299-300, 1507).

59.U. As Mr. Rice began slope staking in the first reach, he discovered that original ground elevations were lower than indicated in the contract, by an average of about 0.8 foot (Tr. 291-92, 302-03, 1514).

60.U. Mr. Rice did not know of the elevation "bust" before he began surveying (Tr. 1513).

61.U. Mr. Rice also discovered that the survey bench marks, which had been set by FC, were not accurate. FC did not address the problem (AX 49; Tr. 1518-21, 1581, 1586-87).

62.U. Hardrives informed FC about the erroneous elevations immediately upon discovery. Ms. Hodges, FC's project manager, responded that the 0.8-foot discrepancy likely was an isolated problem and ordered work to continue (Tr. 303-05, 309, 1680-81).

63. Ms. Hodges was not an engineer and had not been involved in earth-work construction prior to joining FC (Tr. 3487).

64.U. Based upon his initial review of actual field elevations and those in the contract documents, Mr. Rice found that FC's

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elevations were inaccurate by as much as 2 feet (Tr. 1522-24).

65.U. FC's internal memorandum of August 25, 1986, reported the discrepancies between contract elevations and those found by Mr. Rice (AX 67; Tr. 310-11).

66. Hardrives continued to notify FC of elevation problems as it slope staked and promptly sent FC copies of Mr. Rice's survey notes for each new Canal section (Tr. 311-13, 329).

67.U. FC also discovered significant errors in the elevations. In an internal memorandum of August 11, 1986 (AX 65), FC's Mr. Boston noted:

> After reviewing computer earthwork run for HoHoKam Main Canal, I found an error in canal invert elevation between Sta. 110+67.23 and Sta. 135+58. The grade shown on the plans is about 1.71 feet higher than the grade used in the earthwork calculations.
>
> It appears that a change was made to the plans after the computer run was made. The earthwork calc's are not adjusted for this change.

I believe the change in earthwork quantities would be significant enough to warrant new calculations and a plan/ spec revision.

68. FC had had pre-contract concerns, based upon its experience with other Government canal projects that had suffered from inaccurate aerial surveys. Despite those concerns, and despite its own check, completed the day after bid opening, which revealed elevation discrepancies greater than the 0.25-foot contract tolerance, FC did not tell Hardrives that elevations could be inaccurate throughout the Project until September 1986, when the contractor discovered a 4-foot discrepancy between actual and contract-supplied ground elevations (AX 458; Tr. 329-45).

69.U. By letters to Hardrives and the District of November 4, 1986, with copies to BOR, FC asserted that its consultant, Cooper Aerial Survey Co. (Cooper), bad not met accuracy requirements. The discrepancies ranged from 4 feet too low at station 430 to 2 feet too high at station 461 (AX 88, 89, 542; Tr. 310-11, 2150-51).

70.U. BOR and FC admit that some contract elevations were inaccurate throughout the Canal. About 4 percent were accurate; about 20 percent were within ± 0.25 foot, and about 69 percent were within 1 foot of actual elevations (AX 207; GX 478-N; c&a ¶ 39; Tr. 3162-65).

71.U. FC asserts that erroneous aerial surveys caused the elevation errors, which it concedes contributed to additional earthwork (Tr. 3547).

72.U. BOR did nothing substantial during construction to investigate the earthwork problem (Tr. 1679).

2. The Shrink Factor Error and its Effect upon Borrow Calculations, Haul Distances and Overall Planning

73.U. When a c.y. of earth in natural state is excavated, transported, and compacted, it usually becomes less than a c.y. Project site dirt was compacted naturally to about 85-percent density. The contract required "compacted embankment" to be compacted to 95 percent. Thus, more than a c.y. had to be excavated to fill a c.y. after compaction. Thus is the "shrink factor" (spec. 3.1.3; Tr. 355, 522, 2116-17, 2710-16, 3077-78).

74.U. In preparing the contract documents, FC used a shrink factor of 30 percent, equivalent to a cut/fill ratio of 1.43. Based upon this, the contract anticipated borrow at 409,684 c.y. (AX 594; Tr. 2718, 2720, 2723, 2725, 3318-19, 3513).

75.U. Prior to submitting Hardrives' bid, Mr. Hite, then its vice-president and civil division head, who signed and was in charge of the contract, discussed with one of his estimators that the contract's shrink factor seemed too high. The estimator stated that dirt to be excavated from borrow areas might be 50,000 c.y. less than indicated in FC's estimates. Anticipating an underrun, Hardrives priced borrow work without profit or overhead, to avoid losing money (Tr. 2098, 2106-07, 2117-18).

76. Mr. Blattner, with 45 years' experience in the construction industry, including significant experience with BOR, was offered by appellant and recognized as an expert by the Board. He would have expected about 15 percent shrink. Hardrives did not inquire about it pre-bid. In Mr. Blattner's opinion, while he and some contractors likely would inquire if they thought a shrink factor was erroneous, others would not, because it often is a matter of judgment. There is no evidence that any bidder on this Project inquired. Any pre-bid inquiries would have been directed to FC, which knew that the shrink was erroneous and thought that it had overstated its borrow estimate. It bad done so deliberately, without notice to bidders, as a "cushion," to avoid future change orders and administrative difficulties (AX 179; Tr. 1705-14, 1722-24, 1749-50, 2117-24,

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2728-30, 2732, 2898, 2923, 3107-08, 3443-44, 3492-94).

77. That shrink might be inaccurate would not put a contractor on notice that contract ground elevations were inaccurate (Tr. 1205, 2122, 2734-35).

78. During construction, as FC made new computer runs, it changed its reported borrow figure from the bid schedule amount of 409,684 c.y. to 628,614 c.y. while, internally, it estimated 532,000 c.y. Its post-contract analysis reported 494,046 c.y. BOR's November 20, 1991, post-contract analysis, which assumed FC's final survey quantities were accurate (disputed by Hardrives), computed borrow at 512,408 c.y. BOR's December 19, 1991, final quantities analysis, also relying upon FC's survey figures, applied a corrected cut/fill ratio and arrived at an adjusted bid schedule amount of 311,296 c.y. Thus, absent the other contract defects, Hardrives would have been correct that borrow had been overestimated in the bid schedule (AX 132, 174, 179, 605; GX 478 at quantum analysis and at Tab I; Tr. 3200-3204, 3235, 3277-3284, 3319, 3492-94).

79. Although MRT did not knowingly consider a shrink factor in estimating its own job costs, it used the contract estimate for borrow, which incorporated one (AX 502; *see* AX 594; Tr. 1920, 1959, 2900).

80.U. Mr. Duin, with a bachelor of science degree in civil engineering, with honors, and significant experience in the construction industry and earthwork operations, was retained by Hardrives in about January 1988, as a consultant. He was offered by appellant and qualified by the Board as an expert witness in estimating, construction, and engineering matters pertaining to the Project. In his experience, it would be prudent for a contractor to bid borrow work at cost if it expected an underrun. It would be balancing its bid to account for the incorrectly estimated quantity (Tr. 2681-2708, 2733-34).

81.U. In Mr. Duin's opinion, FC was obligated to adjust the shrink factor and to provide Hardrives with accurate quantities and information after the first balance point (Tr. 2743-45).

82.U. After the Project, FC figured shrink at about 23 percent, cut/fill at 1.3. At hearing, BOR calculated it at 18 percent, cut/fill at 1.226 (AX 132; GX 478 at Tab K; Tr. 2731-32, 3202, 3233-34, 3318-19, 3513).

83.U. At a predesign meeting, Mr. Corey, a founder of FC, had expressed the need for an accurate cut/fill ratio, but FC never provided Hardrives with an analysis of earthwork quantities using an accurate shrink factor (AX 23; Tr. 521, 1676, 3513, 3526-27, 3539).

84.U. Mr. Chapman, Chief of BOR's Arizona Projects Office's (APO) Major Claims Branch, acknowledged at hearing that FC's shrink factor was too high, and that this resulted in FC's providing Hardrives with misleading information (Tr. 2928-29, 4068-69).[3]

85. The borrow figures in excess of 600,000 c.y. that FC provided to Hardrives and MRT during construction were misleading (Tr. 4068-69).

3. *The Quarter of a Foot Lowering of Elevations*

86.U. In addition to random elevation errors and the faulty shrink factor, undisclosed, FC artificially had lowered all ground elevations in the contract documents by 0.25 foot to account for settlement by earthmoving equipment (AX 49, 67, 134, 458; Tr. 315-20, 325, 411, 1537-39, 2746).

87. Such an undisclosed artificial lowering is not common. It affects the accuracy of unit prices, pay quantities, and job planning. Mr. Anderson, APO's Chief of Engineering at Project time, could not recall any project where BOR had so lowered original ground elevations (Tr. 1623-24, 1724-25, 2746, 2890, 3082, 3090).

88.U. In Mr. Anderson's opinion, bidders should be notified about a lowering of existing ground elevations by 0.25 foot (Tr. 3090-94).

89.U. The specifications indicated that the contractor would be paid based upon volume of earth moved, measured between neat line (design line) and existing grade—not existing grade less 0.25 foot (*see* spec. 3.1.2; Tr. 318-20, 325-26, 3375, 3552).

90.U. The lowering affected pay quantities for excavation for canal and compacted em-

[3] BOR has objected to appellant's allegation that the contract's shrink factor was misleading, because Hardrives did not use that factor. However, BOR did not contest this proposed finding of fact. Also, although Hardrives did not rely upon the contract's shrink factor, per se, it did rely upon the contract representation that the given borrow quantity, and related cut/fill ratio, were indeed FC's (and, thus, BOR's) actual estimate and not deliberately misstated. The contractor also relied upon the given ground elevations and excavation quantities, and their relationship to borrow and to the nature of the work to be done.

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bankment. The contractor had assumed it would be paid, based upon existing grade, for all c.y. moved and placed (Tr. 1724-26).

91. Even after Hardrives notified FC, by at least August 1987, about elevation discrepancies, FC did not disclose that it had lowered ground elevations by 0.25 foot (AX 67; Tr. 317-28, 1077-78).

4. *Slope Errors*

92. In addition to the other elevation errors, Hardrives found discrepancies in the designated slopes for canal embankment. FC attempted to correct the problem by plan and specification revisions (PSR's) 8 and 9, but Hardrives discovered numerous additional fill sections with discrepancies, totalling almost 20,000 l.f. of slope (AX 49; GX 5; Tr. 1535-37).

5. *Borrow Area C Not Available As Represented*

93. For Borrow Area C, near the Canal, the contract indicated that contractors could dig a 4-foot-deep hole to secure borrow, but a new owner acquired the property and only would allow MRT to excavate dirt by leveling the property and removing the top portion of soil, which required more work, time, and expense (AX 74; AX 172, Tr. 1864-67, 2801-02).

6. *Caliche*

94. During construction, caliche (hard, rock-like material) was discovered, mainly at two locations, which was considerably harder than contract indications. FC was notified upon discovery. The caliche could not be broken by finger pressure or by hand, without a tool. In one area, it stopped Valley Ditch's trencher, which had to be lifted from the Canal and relocated. FC directed over-excavation and removal of the caliche. Placement and corporation of additional material in the embankment was required before Valley Ditch could return the trencher. The remedial operation was concluded within 5 days. In the other area, Valley Ditch was allowed to pave over the caliche, but was able to trench only 282 l.f. on the day the caliche impeded it, compared to its average 1,229 l.f. per day (AX 82, 84, 86, 136, 141, 512G, 586; GX 2C at 72; GX 159A (10/15/86-10/21/86 and 1/27/87); Tr. 427-29, 504-14, 520, 545-48, 1276-79, 1333-34).

G. *Contract Administration Problems*

1. *FC's Treatment of Elevation Problems*

95.U. Before preparing contract documents, FC hired Cooper to perform aerial surveys to determine existing ground elevations. In its original May 1, 1984, proposal, Cooper agreed to conduct a high-level flight at 2,900 feet to produce aerial photographs and provide cross-sectional data accurate to within ± 0.5 foot. Photographs from such a high-level flight should not be used, however, to determine ground elevations due to their accuracy limitation (AX 3, 272, 458; Tr. 1594, 1599, 1601, 1603-04).

96. FC set ground control and called for the flight, which occurred on August 6, 1984 (AX 458; Tr. 1616).

97. FC requested 0.25-foot accuracy. Cooper stated that it needed to conduct lower flights. On August 8, 1984, 2 days after its flight based upon its May 1 proposal, Cooper submitted a proposal for a lower flight. FC did not approve it. Amidst FC and Cooper personnel changes and miscommunications over several months, FC instructed Cooper to determine existing ground elevations, although there had been no lower flight. FC faced deadlines and was in a hurry to get its plans approved (AX 6, 11, 14, 272, 458; Tr. 1595, 1598-99, 1604-11, 1615, 1627-28, 1635).

98. Notes of FC's December 11, 1985, design review meeting record:

> Fred C[orey].—Has not seen an aerial survey yet * * * within its specified accuracy. Company running into earthwork problems on aerial jobs such as Tonopah. Fred recommends to put burden of proof, that aerial surveys are not accurate for pay items, on the contractor. Put paragraph in specifications stating that contractor can get services of registered surveyor to shoot pay quantities before and after construction at his expense. Fred suggests that we need better accuracy than ± 0.5 feet. HoHoKam vertical accuracy is + 0.25 feet.

(AX 23; Tr. 1610, 1612, 1615).

99.U. Compounding matters, when Cooper had conducted the high-level flight, there had been about 2 to 3 feet of cotton along 4.6 miles of the Canal, which decreased the photogrammetric survey's accuracy (Tr. 1616-17).

100. FC had received advance warning from an engineering company that vegetative ground cover could prevent an accurate

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photogrammetric survey (AX 4; Tr. 1616-18).

101.U. After photogrammetric surveys, it is customary for designers to conduct ground surveys to confirm the accuracy of elevations determined by the photo surveys (Tr. 1620).

102.U. In March 1986, FC conducted a cursory field check at random locations, which showed ground elevations to be "somewhat erratic" (AX 272; 458, Tr. 1622).

103.U. On April 25, 1986, the day after bid opening and 3 months before construction began, FC found the elevations to be off by an average of 0.36 foot (AX 458; Tr. 3505).

104. Industry standard is that 80 percent of all elevations must be within the required accuracy (AX 458).

105.U. FC complained to Cooper that 84 percent of the survey points did not meet the contract's 0.25-foot vertical accuracy requirement; that 67.7 percent did not satisfy a 0.5-foot industry standard; and that discrepancies of more than 1 foot were not uncommon. FC and Cooper blamed each other (AX 133, 207, 272, 458).

106. FC's use of the aerial survey figures, failure to check them in a timely manner, and continued use of them after problems were revealed, were contrary to BOR's and industry's engineering standards (AX 458; Tr. 4051-53, 4059, 4061, 4065-66).

107.U. Mr. Babitzke, one of BOR's claims analysts, admitted that only 20 percent of the data points that he evaluated met the 0.25-foot contract standard (GX 478N; Tr. 3261-64).

2. *FC's Delays in Re-Surveying*

108.U. FC notified Cooper in September 1986, that the contract ground elevations were inaccurate. Cooper offered to resurvey, which would have taken a month. FC advised that it did not have time for that to occur (Tr. 1622-23).

109. FC began to resurvey in October 1986, starting east of about station 515 because MRT had completed the initial earthwork westerly (Hardrives and MRT worked from west to east). Thus, the only elevation data available west of station 515 was accumulated by Mr. Rice (GX 117; Tr. 235, 344-47, 351-52).

110.U. FC did not provide new elevations and quantities until January 20, 1987. By then, MRT had completed a substantial portion of the initial earthwork (AX 131; Tr. 361-62, 367-69, 1859).

111.U. BOR acknowledges that it should not have taken FC until January 20, 1987, to resurvey the Canal or to provide a revised computer run. FC's project manager Hodges felt that FC should have resolved the earth quantities problem (Tr. 1681-83, 1827, 4065).

112. Until January 20, 1987, MRT had been forced to build the embankments based upon the slope stakes and substantially inaccurate contract elevations (Tr. 362-64, 366-67, 473).

113.U. BOR admits that if it had been administering the contract and had received information that the elevations were inaccurate, it immediately would have conducted a ground survey and issued a modification, to minimize impact. Because FC was administering the contract, however, BOR would not assist unless FC so requested (Tr. 3085-89).

114.U. On March 26, 1987, FC informed Hardrives that the computer run provided on January 20, 1987, was inaccurate. FC provided another revision, but it also was inaccurate (AX 174; GX 91; Tr. 459, 1530-31).

115.U. It was in these revised computer runs that FC indicated that borrow would be in excess of 628,000 c.y., although it actually anticipated about 532,000 c.y. (see above and Tr. 3493-94).

116.U. FC complicated matters by indicating to the contractor that it was moving more borrow than it actually was moving (Tr. 2788-89).

3. *Payment Delays*

117. Hardrives, and thus MRT, were not always timely paid, in part due to FC. For example, FC was to prepare monthly vouchers for BOR, but relied upon Hardrives to do its paperwork for about a year, delaying matters (AX 161; GX 496; Tr. 440-46, 4267-68).

118. While payments were delayed, MRT was in dire financial straits after contract inaccuracies and changes had severely affected its work (AX 152, 154; Tr. 446, 475-79).

119. As of a meeting on February 9, 1987, Hardrives had expected retainage to be reduced to 5 percent. By March 2, 1987, it bad not been; FC said only that it would "get back to" Hardrives (AX 161; Tr. 443).

120.U. To sustain MRT, Hardrives tried to pay it in most cases immediately upon receipt of funds from BOR, even though the subcontract only required payment within 10 days thereafter (Tr. 1353-54).

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121. Thoughout the Project, MRT's measure, by load count, of earthwork performed, did not match FC's computer run. MRT repeatedly asserted that it was moving more quantities than those for which it was being paid. When Hardrives protested use of the January 1987, computer run for pay purposes, FC threatened to hold its payments (Tr. 449-50, 474, 1870).

We address these issues further, below.

4. *Delays in Design Resolution*

122. FC and BOR issued 48 PSR's and required Hardrives to respond to every request for proposal (GX 4, 5; Tr. 548, 559-60, 2154).

123.U. FC told Hardrives that change orders would not issue until an acceptable pricing proposal was provided (AX 221; Tr. 560).

124. Early on, to attempt to speed matters, Hardrives responded to requests for proposals, although the contracting officer had not issued change orders (Tr. 549, 560-61, 2154-55).

125. FC rejected at least most of Hardrives' initial submissions. If FC did not accept a proposal, it took no action on the underlying engineering issue. If it did accept one, it tried to negotiate a "time and materials," "cost not to exceed" modification. If the work were completed for less than the ceiling, only actual costs would be paid. If there were excess costs, Hardrives would not be reimbursed. Also, it was to sign a complete release. Hardrives did not agree to such modifications. FC then issued unilateral undefinitized modifications providing that commencement of work constituted agreement to a price ceiling (normally a price first proposed by Hardrives). To obtain any adjustment, Hardrives was to submit a proposal within 30 days of receipt of the modification (see GX 4 at 28; Tr. 552-55, 2157, 2161).

126. On March 4, 1988, contracting officer Harding informed Hardrives that proposals had not been received or had not been sufficiently detailed. As of March 10, 1988, Hardrives had completed work described in several modifications and had not been paid. Aborted negotiations ensued. On April 20, 1988, after the Project largely had been competed, the contracting officer still sought proposals, stating that the release requirement had not changed (AX 396; GX 4 at 29; Tr. 2155-59).

127. The procedures and restrictions sought to be imposed upon Hardrives were atypical and unacceptable (Tr. 1705-1714, 1740-41).

128. Hardrives successfully had negotiated modifications and payment with BOR directly concerning the Kleck Road Turnout (Tr. 2158).

H. *Hardrives' and MRT's Attempts to Resolve Problems and Claims*

129. By letter to Hardrives of November 19, 1986, after FC had not resolved the earthwork problems known months before, MRT detailed the problems and their adverse impact upon its operations and finances. It foresaw the need to shut down shortly if compensation for changes were not negotiated and received immediately (AX 100; Tr. 384-88, 390).

130. By copy of FC's notification to the District, BOR was notified by at least November 4, 1986, of elevation inaccuracy, increased borrow, and excess cost problems. BOR met with FC concerning the problems prior to November 20, 1986. By letter to BOR of November 24, 1986, Hardrives cited the earthwork problems, their impact, forthcoming claims, and requested a meeting. One month later BOR asked FC to convene a meeting with Hardrives, the District, FC, and BOR "as soon as possible." FC did not schedule one until February 9, 1987. BOR did not attend because FC failed to notify it (AX 89, 101, 108, 119, 120, 326; Tr. 391-94, 435-37, 2135-37).

131. On January 2, 1987, MRT added a third shift. It eventually had to discontinue it because it could not afford it (GX 117; Tr. 475-76).

132.U. By the end of January 1987, Hardrives still had not been notified of FC's 0.25-foot elevation adjustment. It was notified orally prior to the February meeting, but given no explanation (Tr. 405, 409-11).

133. At the February 9, 1987, meeting, among other things:

a) Hardrives questioned the rationale of the .25 foot adjustment and the lack of notice.

b) Hardrives sought clarification of the .25 foot reduction's relation to FC's computer runs. FC stated that it had no practical effect, but that FC promptly would supply data about the reduction and latest computer run.

c) Hardrives stressed the need for cash flow to MRT; noted that Valley Ditch had had to demobilize due to the earthwork

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problems; and discussed problems with caliche.

d) FC first sought a VEQ proposal; Hardrives asserted that the problems amounted to a changed condition. FC stated that BOR was aware that there would be substantial quantity overruns and was urging FC to prepare a modification. Hardrives noted that it intended to file a claim, to protect its rights to interest, and to move matters along more quickly. FC stated that a claim would make no difference; it would work toward prompt resolution by modification.

e) FC conveyed its satisfaction with MRT's methods of operation.

f) To assist with Hardrives' and MRT's cash flow problems, and due to completion to date and known work overruns, FC said it would recommend that BOR drop retainage to five percent and ultimately to zero.

g) FC undertook promptly to secure payments for earthwork performed, upon receipt of information from Hardrives, with unresolved matters to be negotiated thereafter. Hardrives inquired how to submit information to effect the best resolution; FC did not direct a format.

h) FC stated that the December pay voucher had been released for payment and that the January voucher was close to release. FC recognized problems with slow processing and MRT's need for money.

i) FC noted that the meeting was being taped and that everyone would get a copy of the discussion.

The meeting had been amicable. Hardrives expected prompt resolution of problems and monetary relief. It requested a transcript, but was not given one until at least 2 months after the meeting, when it filed a Freedom of Information Act (FOIA) request (AX 134, 163, 181; Tr. 406-31, 444-45, 495, 2137-42, 2246-47).

134. On February 12, 1987, Hardrives sent FC its calculation of the requested pricing changes and time extension due to earthwork problems. FC rejected it as not in accordance with FAR requirements, noted that new computer run information now applied, and sought inclusion of a proposal from MRT. Hardrives undertook to submit a new proposal (AX 137, 142, 144).

135.U. On March 2, 1987, FC and Hardrives met to discuss continued problems; FC had not fulfilled prior promises (AX 161; Tr. 438-50, 457).

136. By letters to Hardrives of March 2 and 3, 1987, treated as a claim, MRT stressed the negative impact of the erroneous elevations upon its financial stability and that it might be forced to shut down within 15 days without relief (AX 152, 154, 159).

137. FC did not secure retainage reduction, did not provide data concerning the 0.25-foot adjustment, and did not expedite monthly payments (Tr. 2141). Rather, it blocked retainage reduction. When Hardrives on March 9, 1987, requested elimination of retainage, citing as security $424,076.27 retained to date, and payment and performance bonds, FC advised BOR not to reduce retainage, noting that, although earthwork progress was good, other work remained. FC concluded: "The balance of the work yet to be done is in the structures and pipe. We believe that the elimination of retention would put our client, [the District], at risk. We recommend that the retainage not be reduced at this time. The district concurs with this viewpoint" (AX 165). BOR followed FC's recommendation (AX 175).

138. FC opined that earthwork problems did not affect structures and pipe work (AX 165), but the entire record demonstrates that it was considerably affected and delayed (see also Tr. 466-67).

139. On March 10, 1987, invoking the contract's Administration of Funds clause, Hardrives notified the contracting officer that it believed that the value of work performed, plus the apparent value of outstanding change orders, modifications, and claims, would exhaust available funds within 30 days. Hardrives cited the risk of proceeding without a commitment of sufficient funds, and notified the contracting officer of its intent to cease operations on April 10, 1987, until sufficient funds were made available. By letter of April 2, 1987, the contracting officer responded that there were sufficient funds remaining in the contract as of that date and that work cessation would subject Hardrives to action under the Default clause (AX 176, 180).

140.U. To alleviate the financial impact of the erroneous elevations upon Hardrives, by letter of April 3, 1987, BOR instructed FC to issue a modification to increase performance time and to provide additional payments to Hardrives. FC did not do so (AX 185; Tr. 481-82).

141.U. On April 9, 1987, MRT submitted a "revised claim" to Hardrives showing in-

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creased costs and requesting a 148-day extension (AX 190).

142. FC had stressed to Hardrives that all contract administration matters, including claims and disputes, were to be processed through FC. Frustrated with FC, however, Hardrives arranged for a meeting with the contracting officer, then Mr. Cain, the original one on the Project. The meeting occurred on April 9, 1987, among at least Mr. Cain; his assistant, Mr. Mayhew; Hardrives' representatives; and Mr. Franzoy of FC. All but the BOR personnel had attended the February meeting. Prior to the April meeting, Mr. Mayhew had informed Hardrives orally that BOR had reserved funds to resolve the earthwork problems. During the meeting, Mr. Franzoy disclaimed knowledge of the problems. The contracting officer acknowledged them and directed FC quickly to try to quantify the "earthwork bust" and to prepare a modification for Hardrives' review. The contracting officer expected it to exceed $1 million. Mr. Franzoy was instructed to contact Hardrives as soon as possible. Hardrives was assured that he would inform it about the value and timing of the modification by that afternoon, or no later than the next day (AX 192; Tr. 482-85, 2140-46).

143. Mr. Franzoy did not contact Hardrives or return its several calls. FC told Hardrives that he was in meetings, not to be disturbed. MRT then notified Hardrives of its insolvency due to defective contract documents and payment delays. It had continued under hardship, hoping Hardrives could resolve the problems through the meetings and expected modification. On April 13, 1987, Hardrives informed BOR that it had been forced to terminate MRT and that it would complete MRT's work "in as efficient manner as possible given the quality of the contract documents and direction we have received, to date" (AX 192; Tr. 487-89, 710-11, 2146).

144. On April 14, 1987, BOR notified Hardrives that it was FC's position that there would be no adjustment in payments. BOR alleged that it could not act without action by FC and did not issue the anticipated modification (AX 193; Tr. 490-92, 2147).

145. Mr. Cain and Mr. Mayhew, who had expressed understanding of Hardrives' and MRT's problems, retired shortly after the April 9, 1987, meeting (Tr. 493-94).

146.U. On April 15, 1987, Hardrives filed a certified claim for equitable adjustment in price and time due to the defective specifications and FC's failure timely to cure the problems (AF for IBCA 2375, V, Tab 6 at 7; Tr. 495).

147. On April 22, 1987, Mr. Ellis, now contracting officer, informed Hardrives that FC would contact it for information necessary to process its "proposal" and to expect a reply within 30 to 60 days after receipt of the information (AX 201). BOR requested that FC perform a technical analysis. FC alleged that Hardrives' claim was insufficient, did not meet the criteria for certified claims, erroneously was based upon "so called 'defective documents,'" and that a decision by the contracting officer on that aspect had to be rendered "prior to any serious analysis" (AX 213).

148. By letter to FC of May 19, 1987, BOR characterized Hardrives' claim as a request for equitable adjustment and stressed to FC that it was its responsibility to prepare a technical analysis, alleging that the contracting officer could not make a decision without one. FC requested a detailed breakdown of equipment, labor, materials, incidentals, overhead, and profit from Hardrives, which provided it on June 16, 1987 (AX 227, 229).

149. On August 17, 1987, Ms. Hodges submitted a "rough draft" to BOR, stating that the contractor was entitled to a time extension for earthwork overruns and payment for increased concrete, but generally denying Hardrives' claims. In graphic terms, BOR rejected most of the draft, noting that there were contract changes, and that the requirement for more haul had changed the nature of the work (AX 280; Tr. 3474-76).

150. Mr. Salisbury, Ms. Hodges' supervisor, was assigned to redo the analysis. He, too, was not an engineer. He drafted his analysis, dated November 23, 1987, with no firsthand knowledge of the earthwork problems. He concluded, *inter alia*, that it was "readily apparent" that the defective documents claim was "based on supposition, innuendo, and unsupported documentation." BOR did not approve of this draft either (AX 333, 334, 358; Tr. 3440, 3476, 3480-82, 3487).

151. The contract documents had been based upon some done for another CAP project by Mr. Salisbury, with no professional training (Tr. 3491-92).

152. FC's final analysis, by Mr. Salisbury, was dated January 28, 1988. He concluded, *inter alia*, that the VEQ clause applied and that the contractor was entitled to payment for extra borrow and for excavation and

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compaction costs (AX 132; GX 17; Tr. 3458-59).

153.U. The contracting officer prepared a draft decision for an Assistant BOR Commissioner's comments, which included the following:

> [Paragraph 8 states]: "There is a changed condition in that more material was excavated from borrow pits and hauled to embankments than could have been anticipated * * *" * * * The decision apparently confused the terms "changed condition" and "constructive change." Further, our review indicates that the Government's interests will not be best served by the use of the constructive change theory because this principle is equivalent to a condition of defective specifications. * * * Using a constructive change is tantamount to agreed with theory [sic] posed by the contractor * * *. As you are aware, the Government would be potentially liable for related costs incurred since the inception of the contract under the constructive change theory.
>
> It is recommended that your revised position be based upon [Type I] differing site conditions * * *.

(AX 446; Tr. 3473).

154. Three months later, by letter of September 14, 1988, to the Field Solicitor's office that tried these appeals, a disgruntled former Hardrives employee accused it of fraud, and no contracting officer's decision issued (AX 459; Tr. 4240). Our earlier opinions address the ensuing civil fraud case. In his June 6, 1991, rule in favor of Hardrives, dismissing the Government's case, United States District Court Judge Copple found the ex-employee devoid of credibility (*United States v. Hardrives, Inc.*, No. 90 CV-1656 (D. Ariz.), appended to appellant's 7/29/91 motion to lift stay).

I. *Elevation Problems' Impact Upon Earthwork*

155. The erroneous elevations, in particular, had a profound impact upon MRT's and Hardrives' abilities to plan and complete the job efficiently. At most locations, the elevations were lower than indicated in the contract, meaning canal excavation was less; more borrow was required; haul distances were longer; and the planned direction of borrow hauls changed; requiring backtracking and hauling dirt to unanticipated places. Areas where elevations were higher than indicated reduced borrow, but were intermingled randomly with areas requiring more borrow, and could not be predicted. No significant area remained unaffected by the erroneous elevations (AX 88, 100; GX 478-N; Tr. 348-357, 372-74, 384-88).

156. Neither Hardrives nor MRT prepared a mass diagram, but it is clear from the entire record, including expert testimony, that they had planned the job based upon the contract information and that a mass diagram was not necessary to estimate haul lengths and costs (see Tr. 1047-48, 1390, 1716, 2751-53, 2787).

157. Hardrives and MRT could not analyze or plan earthwork once underway, because FC and BOR never gave them accurate elevation information or quantities. Beyond the immediate areas staked by Mr. Rice, they could not determine balance points, haul lengths, borrow needs, most efficient source, amount, and timing of pre-wetting, equipment needed, other aspects of the work, or performance times (Tr. 175-76, 347-48, 364, 369-72, 380-82, 417, 473-74, 1682, 1863, 2149-50, 2181, 2919-20).

158.U. BOR admits that it was not Hardrives' responsibility to conduct new engineering surveys and recalculate quantities after the erroneous elevations were discovered (Tr. 1682-83).

159. When the earthwork first fell behind schedule, Hardrives deployed an additional project manager, but without accurate information, it was unable to evaluate acceleration, additional workforce, equipment or takeover options (Tr. 1201-03, 1729, 1733-34, 2183-86, 2803, 2814).

160. BOR's Deputy Construction Engineer and its chief claims analyst admit that lack of accurate information on ground elevations would adversely affect Hardrives' ability to plan (Tr. 3095-97, 4191-92, 4219).

161.U. Mr. Canez, a civil engineer with extensive experience at BOR, who served as its inspector and its only representative somewhat regularly on site, acknowledged that a discrepancy as little as one-half foot in elevations would be a serious problem and eliminate the contractor's ability to balance the material (Tr. 1642-49, 1669).

162. Mr. Canez agreed that problems become more difficult when a bust exceeds one-half foot and even greater when discrepancies are inconsistent, as here. Discrepancies of this magnitude change significantly the contractor's haul sources and deposit sites (Tr. 1670-71).

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163.U. FC never informed Mr. Canez that the busts were as great as 4 feet too high, and 2 feet too low (Tr. 1670-71).

164.U. During the Project, Mr. Canez was not aware that FC had lowered original ground elevations by 0.25 foot. He agreed that this would make a difference in earthwork quantities and payment due (Tr. 1678).

165.U. Despite the changes in the earthwork operation, Hardrives was still being paid at the original unit price for borrow (Tr. 403).

166. Based upon the entire record, including expert testimony, and testimony by BOR's personnel, appellant has proved that the earthwork fell behind, and the delay could not be remedied by the contractor, due to the considerable problems and additional work encountered by MRT and Hardrives because of contract inaccuracies and FC's faulty contract management, not because of deficiencies in MRT's or Hardrives' operations. Although MRT planned to use more scrapers and average more scraper hours per day than it was always able to do, and there were some equipment and weather delays, as in most projects, neither FC nor BOR criticized MRT's earthwork operations, nor suggested that it alter its methods, even when earthwork fell behind schedule. FC's field personnel complimented MRT. Mr. Canez was not critical of Hardrives' or of MRT's operations and efforts. He was critical of FC. BOR has not provided persuasive, competent, countervailing evidence that MRT or Hardrives would not have been able to complete the job on time even if there had not been the numerous delay-causing problems attributable to FC and BOR (*see* AX 175, 190, 533, 543; GX 117, 118, 478, as amended; Tr. 458, 465-66, 493, 1642-49, 1657-58, 1804, 1808-11, 1813-14, 1935-36, 1949-50, 2142, 2180, 2817-22, 2917, 3185, 3380, 3401, 4318-24).

J. *Trenching and Lining Problems*

167. Although Valley Ditch had planned to complete trenching and lining in mid-December 1986 to January 1987, and its price had assumed uninterrupted work, it was unable to complete work until about June 16, 1987 (AX 242, 541; GX 159B, 478-H; Tr. 522, 531, 1267, 1270-71, 1325).

168. Due to the delays experienced by MRT, lining caught up with it on November 25, 1986. Valley Ditch had to demobilize its paving that day, which was shut down until January 14, 1987. It performed some machine testing and trenching during the week ended December 5, 1986, then had to shut down until January 6. It did not know when it could re-start and had 10 pieces of equipment idle on site (AX 242, 541; GX 159A, 162; Tr. 383-84, 405, 717-18, 720-21, 1094, 1271-72, 1280, 1283, 1292, 2150).

169. Valley Ditch remobilized and began trenching on January 6, 1987. Lining started on January 14. On January 28, it had to demobilize again because it had caught up with the earthwork. On March 30, it began readying its equipment for further operations. In the interim, it had used some on another project. It began trenching again on April 20, 1987, and lining on April 23. It would not have been efficient or cost-saving for it to return sooner and work piecemeal as earthwork permitted. Lining was completed in June 1987 (AX 242, 541; GX 159A, 162; Tr. 522, 718, 721, 1094-97, 1205-06, 1267, 1270, 1272-76, 1282-84).

170. Valley Ditch's owner planned to retire in 1987 and intended the Project to be its last job. Due to Project delays, he was forced to keep its home office open longer than planned (Tr. 1303-04, 2479).

171. There were some Valley Ditch equipment breakdowns and adjustments but none shown to have delayed completion of its work. It had been able to meet its work completion estimate on every other job and never had been late (GX 159A&B; Tr. 1306).

172. In May to mid-June 1987, trenching and lining, particularly lining, were the critical activities on the job (AX 527; Tr. 1218).

K. *Impact Upon Structures*

1. *Delays Attributable To Earthwork*

173.U. Excavation was beyond a structure's dimensions; Hardrives built forms to shape the structure; installed reinforcement steel; poured concrete; stripped the forms to be used at another location; backfilled; and hand-placed lining if required to connect the structure with machine-placed lining (Tr. 1987-90, 2001-03).

174 .U. Hardrives planned to have its various structures crews follow the lining crews as closely as possible, starting with an excavation and pipe crew. Once that crew progressed, Hardrives would organize carpenter, rebar, and pour and placement crews (Tr. 2005, 2071-72).

175. The structures crews had prior experience with irrigation projects, and with the types of structures involved here. FC's on-site inspector Stanley stated that "they did very good work, very good work" (Tr. 3435).

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Hardrives was not able to develop or use the specialized crews as planned. Several times it hired additional people for the crews but had to lay them off due to delays in trenching and lining and in resolving design problems (Tr. 534-36, 1108, 2006-07, 2092).

176. Several times lining had been completed past a structure's designated location, but construction was not begun immediately. BOR did not prove Hardrives responsible for the delays (GX 159A&B, 161, 519).

2. *Delays Due To Design Problems*

a. *Miscellaneous*

177. Throughout, defects in structure specifications prevented uninterrupted construction. Hardrives was not able to sequence its operations, build its crews to anticipated size, or maintain continuity (Tr. 526, 2032, 2034, 2051-52).

178.U. For turnouts to divert water from the Canal, stationing on the drawings did not match farmers' existing field ditches (Tr. 2046).

179.U. There were elevation discrepancies from one drawing to another and structural dimensions that did not match (Tr. 526-527).

180. In addition to the erroneous elevations affecting earthwork, invert grades shown on FC's January 12, 1987, computer run did not match plan elevations at 27 locations (AX 324; Tr. 1529, 1531-33).

181. While forming and pouring broken back structures, Hardrives found that FC had miscalculated concrete required. Hardrives poured as much as 15 more yards per structure than had been indicated. This increased its cost, including due to a $2 per c.y. price increase for concrete ordered after March 15, 1987 (Tr. 522-525, 2007-11).

182. Hardrives notified FC whenever it encountered discrepancies in structure specifications (Tr. 527).

183.U. Typically on jobs of this size, the engineer's field representative has authority to resolve minor discrepancies within a day. Here, 50-75 percent of the minor structure problems could have been resolved in the field. However, FC's field personnel had no authority and had to solve its FC's main office, which took several days or weeks to provide a solution. Ms. Hodges stated that she had all the responsibility but none of the authority (Tr. 528, 1112-14, 1211-16, 2020-22).

184.U. Ms. Hodges' authority concerning modifications was simply to request proposals from Hardrives. It was her understanding that, even if no change order issued, BOR could demand a proposal from Hardrives before any extra work would be ordered or paid (Tr. 1818-20, 1822).

185.U. Mr. Canez was critical of FC's staffing and administration of the Project, including Ms. Hodges' lack of authority. At times, FC did not have an engineer available to supervise construction (Tr. 1658, 1662-67).

186.U. Because Hardrives did not receive timely responses from FC, it had to wait for instructions, or to move its crews inefficiently to other structures. Mr. Rice continuously had to resurvey structure locations because Hardrives was unable to build when first surveyed due to contract document problems (Tr. 530, 713-14, 1214-15, 1217, 1540-42).

187.U. When various structures problems arose, FC, in many instances, asked Hardrives to design and price a revision to resolve the problems (*see, e.g.*, Tr. 2052-54).

188.U. The structures delays affected MRT's ability to complete the final grading around the Canal and structures (Tr. 1900-1901).

189.U. In its June 16, 1987, claim letter to FC, Hardrives noted that the number of PSR's had reached 48 and that Hardrives could not complete the construction until FC completed the design (GX 6-D).

190. The inefficiencies caused by Hardrives' inability to establish its specialized structures crews and to maintain its as-planned schedule were not readily quantifiable (Tr. 531, 1217).

b. *O & M Road Blocked*

191.U. As designed, a structure at station 670 would have blocked part of an O & M road used by another irrigation district. Mr. Rice found the error. Hardrives immediately notified FC and suggested moving the structure by about 12 feet, at no cost. However, FC instructed Hardrives to install it as designed (AX 587; Tr. 567-72).

192.U. Hardrives installed the siphon as directed, but did not install the structure because the irrigation district discovered the blocking problem and notified FC. FC issued a PSR in November 1986, containing two alternative designs (GX 5 at Tab 39; Tr. 572-75).

193.U. On February 10, 1987, FC issued PSR 39-A, instructing Hardrives to do what it originally had proposed, but not until it had submitted an itemized proposal for a

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modification. On February 19, 1987, Hardrives submitted its proposal in the amount of $14,729.92, containing detailed breakdowns of all aspects of work. Until the structure was completed, water could not go into the Canal. Thus, as of February 1987, apart from other problems, the contract could not be completed because Hardrives was waiting for instructions from FC regarding station 670. As of July 27, 1987, Hardrives had not been instructed to proceed and no change order had issued. BOR transmitted Modification 16 for PSR 39-A to FC on August 17, 1987. It did not include an extension of time and contained a release unacceptable to Hardrives (AX 143; GX 4 at Tab 16; Tr. 583-99).

194. Except for disputed clauses (including a notice that there was no guarantee of funds), Modification 16 was based upon a July 27, 1987, agreement with BOR that Hardrives would do the work for $10,231.27. The parties had left any time extension as "disputed" until the actual time was determined (GX 4 at Tab 16; Tr. 591-93, 595).

195. On December 14, 1987, replacing Modification 16, BOR issued Modification 27, a unilateral change order to complete the work for $10,231.27, plus overhead. It did not contain the release clause, but still contained the disputed funds clause (GX 4 at Tab 027; Tr. 603-04).

c. *PSR 19*

196.U. Hardrives was not provided guidance concerning changes to five broken back structures. When it began constructing one at station 722, it discovered a discrepancy in the specifications and conferred with Mr. Canez as to whether broken back or check and pipe inlet structures were required [4] (Tr. 2013-14).

197.U. On July 29, 1986, FC transmitted PSR 19, deleting the five broken back structures and replacing them with check and pipes, describing the changes as a "clarification." Hardrives informed FC that it considered PSR 19 a compensable change (AX 55; Tr. 532-33, 605-10).

198. Mr. Locke had received PSR 19, but his crew had began constructing the slab base for a broken back structure at station 722+40, before he notified them to stop. He had reached other crews to instruct them not to do PSR 19 work (AX 512 M; Tr. 1247-48, 2013-14).

199.U. FC eventually agreed that PSR 19 was a change and, by letter of December 11, 1986, asked Hardrives to submit a proposal by December 15. BOR recognized that the change was due to inadequate or defective specifications (AX 115, 290; Tr. 533, 610-11).

200.U. On February 19, 1987, Hardrives sent its proposal to FC with a breakdown of costs for each structure. It took until then because the request had come at Christmas time and it had to contact suppliers, who did not respond until after the first of the year (AX 145; Tr. 533, 612-15).

201.U. After submitting its proposal in February, Hardrives raised PSR 19 at every weekly meeting throughout the rest of 1987 (Tr. 621).

202. FC admits that it had no sense of urgency about resolving the check and pipe issue (Tr. 3458).[5]

203.U. FC did not forward the proposal to BOR until March 9, 1987 (AX 160; Tr. 615).

204.U. Between February 19 and May 12, 1987, Hardrives did not receive actions to proceed with the PSR 19 changes; FC had notified it not to do so until a modification issued (AX 56, 221; Tr. 617-18).

205.U. In May 1987, FC told Hardrives to revise its price as too high. Hardrives suggested various changes to FC's design of the check and pipe structures to lower their cost (Tr. 533, 618, 622).

206.U. As of June 2, 1987, FC still maintained that Hardrives had to revise its price before it would authorize the work. On June 4, 1987, FC requested another proposal (AX 55, 245; Tr. 619-22).

207. On September 30, 1987, FC provided a new set of drawings with Hardrives' suggested changes. On October 20, 1987, after receiving pricing from suppliers, Hardrives submitted a revised proposal at a price of about $47,011 and a 25-day performance time (AX 306, 314; Tr. 533, 622-25).

208.U. Mr. Canez' weekly report for September 24-30, 1987, indicates that, as of the end of September, the structures were 95 percent complete and Hardrives was waiting for direction on the five check and pipe inlets (AX 519; Tr. 3522-23).

209.U. Mr. Canez' report also states that FC discovered that two turnouts had been

[4] With a broken back structure, water flows directly from the canal through the inlet. A check and pipe inlet contains internal weir walls to slow and control the flow of water (Tr. 564-65).

[5] Mr. Salisbury opined that the contractor had no sense of urgency either, but he was not competent to testify about the contractor's views and the great weight of the evidence is to the contrary.

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constructed with one gate, whereas the drawings detailed two (AX 519).

210. Hardrives' Mr. Matheny had interpreted a combination of drawings and a table to require one gate. Although he had seen a drawing depicting two, the drawings had been inaccurate in that pipe required for two structures had been switched, and Mr. Matheny judged that they likely were inaccurate in depicting two gates when the tables appeared to depict one. Mr. Matheny did not know what any shop drawings submitted to FC had depicted and did not inquire of FC or BOR about gates prior to construction. During the work, in May 1987, inspectors did not object to the one-gate installation. Mr. Matheny later found that he had an unused matching gate or gates and raised the issue. On September 30, 1987, Hardrives was direct to install two gates, which FC and BOR interpreted the drawings to require (AX 357, 408 at 4-5; Tr. 646-47, 1658, 1660-61; 2033-34, 2036-45).

211. By October 1987, trenching and lining (but for several hundred feet of hand lining) and major structures, including minor cleanup, were complete, except for the five check and pipes. A broken back transition, four small weirs, and other miscellaneous work (including modifying the two turnouts), also remained, some of which had been scheduled deliberately for Project end (AX 343, 378, 519—Canez weekly report 11/16-11/19/87, attch.; GX 2C at 54; GX 161, 520; Tr. 627, 3711-12).

212.U. FC knew that PSR 19 and the five check and pipes had to be done for Hardrives to complete the Project, but Hardrives had not received the change order or instructions to build. FC stressed that it was not to work on PSR 19 until FC issued a modification. Hardrives had completed all adjacent concrete lining (except hand-placed), siphon installation and outlet structures. Cleanup and finish grading were hampered because it had to avoid the areas where the check and pipes were to be placed. Finishing operations, including O & M road earthwork, would have been more efficient if Hardrives had been able to begin at one end of the Canal and proceed continuously to the other (AX 143; Tr. 608-10, 627, 711-12, 1119-20).

213. While waiting for PSR 19, Hardrives had skilled personnel doing unskilled labor, paying their skilled rates, so they would not seek other employment (Tr. 654-55, 1207-08, 2054-55, 2062-63).

214.U. On November 30, 1987, BOR directed FC to issue an undefinitized modification on the check and pipe structures (AX 338).

215.U. On December 4, 1987, Hardrives met with BOR and FC to discuss Project delays. It informed BOR that it would be forced to demobilize on December 23, if it did not receive direction. On December 4, FC sent BOR an undefinitized modification draft; FC's engineers estimate, done in September 1987; and Hardrives' October 1987, proposal for the five structures (AX 340, 343; Tr. 602, 626-29).

216.U. On December 11, 1987, the contracting officer, then Ms. White, signed undefinitized, unilateral Modification 28; on December 14, BOR sent it to Hardrives (AX 347; Tr. 628-29, 1117).

217. Modification 28 contained $47,011 and 25-day price and time ceilings, the same proposed by Hardrives nearly 2 months earlier. The Modification did not increase reserved funds. If Hardrives began work, it agreed to be bound by the modification's limitations; if it disagreed, it was not to begin and was to notify the contracting officer (AX 314, 347; Tr. 630-31, 1117).

218. On December 17, 1987, Hardrives informed the contracting officer that it was unable to agree because the overhead estimate in its proposal was inaccurate and dated and field overhead alone for the 25-day period would exceed the amount of the modification. It offered to submit a revised estate. It also objected to the lack of additional funding, noting that, in spring of 1987, when it had become clear that the cost to complete would exceed funds reserved, it had been assured of more funding and had relied upon that in staying on the job (AX 350).

219. From the outset, Hardrives had objected to the release, "No change In Reservation Of Funds," and "Contractor's Agreement To Limitations" clauses contained in proposed modifications, because it was concerned about the impact of the job changes, about giving up claims, and about performing extra work at its own risk (Tr. 2162-65).

220.U. BOR sent Hardrives unilateral, undefinitized modification 30, dated January 5, 1988, to replace modification 28, with the same price and time ceilings, albeit subject to overhead audit. It still contained the "Contractor's Agreement to Limitations" and "No Change In Reservation Of Funds" clauses (AX 366; Tr. 632-33).

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221.U. BOR admits that Hardrives did not receive clear direction on the five check and pipe inlets until January 22, 1988 (when BOR issued a cure notice, below) (AX 602; Tr. 4212).

222.U. Structures work was not completed until spring 1988, because Hardrives had to await instructions for the five inlets (Tr. 712-13).

223.U. Ms. Ramirez, BOR's technician, admitted that it could issue unilateral modifications. Sometimes the contracting officer had authorized them for a negotiated price. When Hardrives filed its appeals, then contracting officer Harding decided not to issue any more unilateral modifications, although Ms. Ramirez had wanted to do so (Tr. 3604-05, 3613, 3647).

224. Although he preferred the "request a proposal route," and that the contractor do the paperwork and agree to cost in advance, BOR's Mr. Anderson acknowledged the considerable importance of resolving changes and modifications as soon as possible and that BOR could issue unilateral modifications directing work, with settlement paperwork to follow. He also admitted that BOR yielded virtually all responsibility for construction and problem management to FC and determined not to intervene unless FC so requested (Tr. 3087-88). The entire record establishes that FC was inordinately slow, and failed to manage the structures problem originating with its defective specifications, and that BOR was slow to address it.

L. *Cure Notice*

225. On January 22, 1988, BOR issued a cure notice, identifying 81 items that it considered critical to March 1, 1988, water deliveries and 52 items not critical but required. Hardrives was to respond satisfactorily or the contract might be terminated for default (AX 374; Tr. 641-42).

226.U. Hardrives responded to the cure notice on January 29, 1988, addressing each item listed (AX 378; Tr. 641-42).

227.U. The first items were the five check and pipes, pending since August 1986. Hardrives had received unilateral modification 30 for them only 2 weeks before the notice (AX 338, 343, 366; Tr. 633-35, 642-43).

228. For the modification, Hardrives had had to submit rebar drawings to FC for approval. It had done so in late December 1987, to January 1988. It did not receive approval, or of rebar drawings for the broken back outlet at station 670, another cure item, until January 27, 1988, after the cure notice (Tr. 643-45, 1117-18).

229.U. When the cure notice was received, the remaining structures were on the critical path (Tr. 666, 1108).

230.U. The other cure items (1) were under construction and completed within days after the notice, (2) had been accepted by FC and now were said to be defective, (3) were incidental to the five check and pipes and the broken back outlet at station 670, (4) related to storm damage at the end of 1987, (5) were contract changes, (6) already were complete, (7) involved testing best left to Project end, and (8) were miscellaneous minor items such as trash racks and ladders that Hardrives planned to install last to minimize vandalism (AX 393; Tr. 260, 642, 645-666, 723-26, 1125).

231. When Hardrives received the cure notice, which it considered its first unencumbered directive to complete work, in order to finish the five check and pipes in time, it had to build them at once, rather than sequentially as planned, resulting in five times the material costs for forming, extra backhoes and other equipment, and overtime (Tr. 641-42, 715, 717, 892, 2066-68).

232. The Project was accepted as substantially complete on March 17, 1988, 373 days after the March 10, 1987, due date. Hardrives accepts responsibility for 3 days' delay due to embankment repairs. On April 28, 1988, BOA decided to release the remaining $200,000 retainage. We have not been directed to any evidence that liquidated damages were assessed (c&a ¶ 34; AX 433; GX 478 at Tab A).

M. *Criticism Of FC*

233. BOR has criticized FC's specifications for the District's CAP water system in general, finding them error-prone (AX 17, 361, 466).

234.U. An Interior Department Office of Inspector General (IG) audit of BOR projects where A/E's such as FC had drafted the specifications and managed the project, found potential conflicts of interest and management and contract problems, including failure promptly to rectify deficient specifications and lax control over payments. this contract, the IG report (AX 361) stated:

> Deficiencies in the specifications * * * could add about $1.042 million to the cost of the [Canal]. Elevations used by [FC] to write the excavation specification (originally estimated at 409,684 [c.y.]) were in-

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accurate and resulted in an underestimate of 201,195 [c.y.] (50 percent) of material for the canal * * *. The construction contractor considered such a significant difference to be a change of conditions instead of an increase in quantity * * *.

According to the [COTR], [BOR] will likely pay some additional amount on this claim. However, we believe that a determination of [FC's] liability for deficient specifications should first be made prior to any payment for this deficiency. Having the same consultant engineer that designed the deficient specifications also perform contract administration is not conducive to an objective resolution * * *.

235. BOR has assessed that FC administered the contract poorly. IG Auditor Macy's report of a March 29, 1988, meeting among auditors and contracting officer Harding records:

Art [Harding] stated that [FC] wrote the contract specifications and served as the on-site construction engineers directing the work. At times, BOR had no representatives at the job site and felt that this was a mistake. * * * Art said that BOR agrees that [FC] did a poor job of administering the contract * * *.

(GX 38 at Tab A-7-2 at A-7-13).

236.U. BOR's claims analyst Chapman admits that processing change orders through FC, the District, and BOR was cumbersome and that having FC administer the contract was not conducive to objective claims analysis. BOR no longer enters into such agreements (c&a ¶ 30; Tr. 4090-92, 4096).

237. Judge Copple found that FC had a double conflict of interest.

N. *Delay Attributable To BOR*

238. BOR's challenge to Hardrives' proof was not persuasive. BOR did not offer expert witnesses. The testimony of its analysts was diminished by the fact that, except for a last minute deposition of Mr. Duin, BOR did not conduct discovery and relied principally upon material gathered in the failed Department of Justice (DOJ) fraud case. BOR's key analysts did not review the district court trial and deposition test of Hardrives' witnesses and did not have personal, contemporaneous, knowledge of the job. They relied upon information supplied by FC, which they did not subject to close scrutiny, undermining the objectivity of their work. Some of their quantum and other exhibits changed significantly during and after hearing. Mr. Babitzke, BOR's principal spokesman on earthwork, relied in part upon material he had prepared to advance DOJ's case, further undermining its objectivity (see, e.g., Tr. 2941-42, 3084-85, 3162, 3172, 3177, 3181, 3187, 3205, 3209-13, 3215-23, 3249-50, 3269, 3297-3301, 3327-29, 3331-32, 3336-37, 3345-46, 3987, 4125-26). Ms. Hodges' testimony was very limited and of little impact, except to confirm her lack of authority to resolve problems. We did not credit the testimony of FC's Salisbury and Franzoy due to their obvious bias. Although scheduled, BOR did not call MRT's former principal, Mr. Tripp. No contracting officer testified.

239. Based upon the considerable evidence of record, we find that the earthwork and structure specifications were defective. Hardrives relied upon them in evaluating and submitting its bid. It reasonably believed, based upon the contract information, that borrow had been overestimated when, in fact, it had been greatly underestimated. MRT also relied upon defective specifications in bidding and planning its work.

240. Upon weighing all of the evidence, the Board accepts the contractor's proof, including, but not limited to, the testimony and analysis of: its project manager Locke, whom Judge Copple found to be "totally credible" (6/6/91 ruling), as do we; Mr. Hite; structures supervisor Matheny; surveyor Rice; Hardrives' president, Mr. Hall; MRT's former principal, Mr. Acreman; Valley Ditch's Mr. Crabtree; and appellant's expert witnesses, Mr. Duin and Mr. Blattner. Each of these gentlemen was credible, persuasive, and backed by documentary evidence, as well as by the corroborating records and credible testimony of BOR's Mr. Canez. That proof establishes that Hardrives could have completed the Project essentially on time but for the earthwork and structure problem resulting from defective specifications, FC's and BOR's failures to respond timely or appropriately, and other contract misadministration. Hardrives was delayed by 370 days through no proven fault of its own. Of the 370 days, the Board accepts expert Duin's allocation of 149 days to earthwork problems and 221 days to trenching and lining, structures and mismanagement delays (AX 527; Tr. 2448, 2826-2848, 4323).

O. *Non-Delay Damages*

1. *Hardrives' Accounting System Was Good*

241. Each foreman completed a daily job cost report identifying work performed, all employees on the job, their craft codes, pay rates, and all hours worked. Each craft code

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and activity had a different cost code. The daily reports also identified each piece of equipment used by a particular crew. This information was entered into Hardrives' accounting system weekly (AX 495; Tr. 731, 737-39, 2257-61).

242.U. Hardrives and its subcontractors also prepared certified payrolls identifying the various employees, hours worked, and pay rates. The payrolls were submitted to BOR weekly (Tr. 2263).

243.U. All material and equipment rental expenses were accounted for and processed as they were received (Tr. 2269).

244.U. Hardrives also accounted for all fixed overhead expenses for its Arizona operations, including salaried supervision, support equipment, living per diems, office yard expenses, contracted services, and incidentals. These expenses represented 14.41 percent of direct Project costs. The auditors found Hardrives' field overhead rate to be 17.8 percent (AX 521 at Tab J; GX 33 at 5-6; Tr. 2177-80, 2291-2310, 3927).

245. One auditor told Hardrives' president that its system was comparatively sophisticated and its books as good as any and better than most (Tr. 1356).

246. Hardrives' Chief Financial Officer (CFO), Mr. Sinjem, is a licensed certified public accountant with a fine academic background including a degree in accounting, with honors, and considerable auditing and accounting experience (Tr. 2248-56). His testimony was credible and persuasive, as was that of Hardrives' other witnesses concerning Hardrives' accounting system.[6] Based upon the testimony and documents of record, we find that Hardrives had a good accounting system.

2. *Cost Segregation Was Impracticable*

247. Hardrives has attempted to segregate costs when possible. However, despite its good accounting system, it was unable to segregate most costs or to attribute specific increased costs to specific earthwork and structure problems. This is because FC defined the job improperly originally, it changed repeatedly, and the changes, problems, and costs were intertwined (GX 38 at Tab A-7-2 at A-7-12; Tr. 1730, 1733, 1767-68, 1895, 1902-03, 2056, 2060-61, 2191-93, 2414-18, 2606, 2611-12, 2627-28, 2658, 2273-74, 2811, 3496, 4278-79).

248.U. The contracting officer recognized the difficulty in determining the impact upon Hardrives. He commented to the auditors: "BOR is completing an analysis of Hardrives' work, and alleged inefficiencies to be used in settlement of the claims. However, this is very difficult to do since BOR changed the contractors [sic] excavation requirements and the original method of work" (GX 38 at Tab A-7-2 at A-7-12).

3. *Hardrives' Bid Was Reasonable*

249. Hardrives' bid was only 9.3 percent lower than the second lowest bid and was 3.3 percent higher than BOR's estimate. It was based upon estimates compiled by two estimators. The chief estimator, who testified at hearing, was a registered professional engineer with many years of experience. There is no evidence that BOR questioned the bid contemporaneously. Mr. Duin's expert analysis, which the Board accepts, also establishes that the bid was reasonable, and we so find (AX 488, 540; Tr. 232-34, 1378-83, 2851-52, 2869, 3622).

250.U. Based upon its estimate and bid submitted, Hardrives expected the job to be profitable, by as much as $1 million (Tr. 1441, 2128).

251. BOR has not controverted successfully appellant's evidence that its individual bid prices were reasonable, and logically based, and we so find (AX 490, 502; Tr. 1378-98, 1720-21, 1737-38, 2031, 2065).

4. *Hardrives' Total Cost Calculations*

252. Judge Copple found that the Interior Department's IG auditors, aware of the civil fraud investigation, and encouraged by the contracting officer to minimize costs and to find claims overstated, because BOR believed it would be subject to liability, were unlikely to have approached their job objectively. The testimony and documentary evidence presented at hearing, including that the auditors were participating in the Government's investigation and that the audit reports were prepared in that context, lead us to the same conclusion. Also, although, prior to its exit conference with the auditors, Hardrives requested a copy of the draft audit report, they did not supply one for review and comment. Ultimately, Hardrives obtained a copy of the audit report only through a FOIA request. Further, the auditors who conducted the audit and testified

[6] BOR's post-hearing allegations as to its "belief" that the daily cost reports are not originals and were prepared by Mr. Sinjem for hearing, are untimely, unsubstantiated, and contradicted by the credible testimony of appellant's witnesses.

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at hearing were not certified public accountants. Both took, but neither one passed, the CPA examination. Due to all of these impediments, we give the audit report and auditors' testimony little relative weight (GX 38 at Tab A-7-2 at A-7-8 A-7-15; Tr. 1359-60, 3862, 3867-78, 3898-3907, 4006, 4261-62).

253. In presenting its total costs, appellant used the daily job cost reports and certified payrolls. It summarized the components, including labor, equipment, materials, subcontractor expenses, various overhead, and other markups, in AX 521. In AX 522, it gave day-by-day breakdown of the labor and equipment hours depicted on the daily progress reports and certified payrolls, summarized on a monthly basis in AX 521 (Tr. 2264-731).

254.U. To calculate its labor costs, Hardrives used a labor burden rate of 32.53 percent of the actual wage rate. This represents FICA and unemployment taxes, general insurance costs, workers' compensation, and any other benefits required by law, and was confirmed by the auditors (AX 521 at Tab D-1; Tr. 2286-87).

255. Hardrives asked BOR to waive the portion of the Contractor Proposals clause (Finding of Fact (FF) 29c.) limiting a contractor's recovery for overhead and profit in the event of its proposal for a modification for work performed by a subcontractor. The contracting officer reported to the auditors that he "[felt] that he will accept [the waiver], since he thinks the provision is inequitable for a construction broker firm like Hardrives" (GX 38 at Tab A-7-2 at A-7-11).

256. Based upon its original job cost estimate, Hardrives had anticipated a profit of 11.84 percent. In its claims, it used a 10-percent profit rate, which the auditors also used. We find the 10-percent rate to be fair and reasonable under the circumstance of these appeals (12/89 audit report; Tr. 2339, 2655).

257. Hardrives' bond rate applicable to this Project, and claimed, is 0.4 percent of all amounts received, except for home office overhead, claim interest, and any attorney fees reimbursed. It claims an effective sales tax rate of 3.575 percent which, under the circumstances of these appeals, we accept[7] (AX 521 at Tab J-3; GX 33 at 14, n. 15; Tr. 2339-43).

258. a. Hardrives' and MRT's accounting systems did not track and segregate all equipment expenses. At hearing, BOR used relatively low ownership rates derived from the "yellow book" in conjunction with equipment operating rates derived from the AGC's 1986 Contractors' Equipment Cost Guide (AX 536, described at hearing as the "1986 AGC rates"), which are lower than the yellow book's relatively high operating rates. Expert testimony was that the yellow book is outdated and, at a minimum, it is inequitable to use it for ownership rates, but to disallow its use for operating rates. BOR offered that "pressure" had been applied unsuccessfully to AGC for years to revise the yellow book, but alleged that the rates BOR used were not dated. Its chief claims analyst, Mr. Chapman, conceded that, for settlement purposes, BOR "also always" uses 1986 AGC rates, not the yellow book. He stated that, when an audit is required, for claims over $300,000, the auditors use the yellow book. BOR has not supplied the authority for this policy.

b. During the contract, neither FC, BOR, nor the contractor used the yellow book. At first, FC instructed Hardrives to use "blue book" rates to price proposals. Later, pursuant to BOR's recommendation, specifically that of Mr. Harding, a cost/price analyst who became the contracting officer, FC instructed Hardrives to use 1986 AGC rates for proposals and modifications. No distinction was made for proposals over $300,000. Hardrives obtained a computer system that applied the 1986 AGC rates in light of local conditions. FC and BOR also used the 1986 AGC rates for modifications which had been reviewed and approved by contracting officers. In its damage analysis, AX 521, appellant used equipment ownership and operating costs based upon the same 1986 AGC rates used during the Project (AX 169, 536; GX 500; Tr. 876-80, 2187-89, 2275-77, 3012-13, 3892, 4006-11, 4196-97, 4203-06, 4220-21, 4260-61, 4282-87, 4335-36, 4346-47).

259. The 1986 AGC rates were significantly lower than the rates charged by inde-

[7] The auditors found a higher bond rate of 0.48 percent, but appellant asserts that it negotiated a lower one. BOR states that the sales tax rate is 3.55 percent. Appellant asserts that the tax is calculated upon all amounts received from the Government, including payment to compensate for the 3.55 percent tax and, to make itself whole, it must collect 3.575 percent. Because there is only 0.00025 difference; the recomputation of tax would be very time consuming to little effect; and BOR was willing to apply a higher bond rate and, at one point, a much higher daily overhead rate than we use (*infra*), we accept appellant's sales tax rate without rendering any opinion as to whether such an adjustment is properly chargeable to the Government under other circumstances.

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pendent equipment rental companies in the area during 1986-87. After MRT's subcontract was terminated, Hardrives rented its equipment at rates exceeding the 1986 AGC tax rates but did not use the higher rates in its damage calculations (AX 521; Tr. 2583, 4256-61).

5. *Direct Costs*

a. *Earthwork*

260. Using the 1986 AGC rates, for the initial earthwork, *i.e.* construction of Canal berm for the trenching and lining operations, Hardrives and MRT incurred costs of $2,747,865—including direct costs for MRT of $2,001,409 and for Hardrives' completion of MRT's work of $400,440 (total $2,401,849), plus field overhead of $346,016. including $23,268 to repair an earthen ditch, a cost for which Hardrives was responsible, earthwork costs exceeded BOR's payments by $1,359,416 (see AX 521 at Tab A, sheet 1; Tr. 2418-46).

261. In the opinion of construction expert Blattner, given the inaccurate elevations throughout the length of the Canal, the considerable amount of extra dirt moved, and the shifting job requirements, the earthwork costs were reasonable and relatively modest (Tr. 1732-33). Based upon his testimony, the weight of the other persuasive evidence, and the fact that job performance time more than doubled, we find the earthwork costs, and Hardrives' other costs, to be reasonable.

b. *Segregable Concrete Costs*

262. After applying certain credits for BOR, including due to the fact that five broken back structures originally were required under the contract, Hardrives was able to segregate extra costs due to a March 1987, price increase for concrete, and the additional costs required to convert the broken backs to check and pipe inlets. Those costs total $53,010 (see AX 521 at Tab A, sheet 4; Tr. 2487-90, 2494-98).

c. *Unsegregable Impact Of Structure Inefficiencies, Defective Elevations and Contract Misadministration*

263. After crediting the estimated direct and field overhead costs of the two-gate turnout correction, which totalled $26,885, and of removal of the slab at station 722+40, which totalled $3,315, both of which we find to be Hardrives' responsibility, Hardrives incurred additional, unsegregable, direct job costs, including field overhead, of $1,181,998 for the inefficient operation of its structures crews and the impact of the defective elevations and contract misadministration upon its operations (AX 521 at Tab A, sheet 4; Tr. 2499-2506).

6. *Home Office Overhead*

264.U. Hardrives has six divisions, performing different work, with their own personnel and division managers. Corporate office staff supplement and support the divisions. The civil division was responsible for the Project (Tr. 1342-43).

265. Hardrives has corporate and divisional overheads (Tr. 3918).

266.U. Given the construction season in Minnesota, Hardrives generally reduces its administrative staff during the winter (Tr. 1350).

267.U. For the Project, the civil division maintained its office staff through the winter. Also, Hardrives was required to maintain additional corporate staff to assist the civil division (Tr. 1351, 1362-63).

268. During the first few months of the Project, Hardrives was able to submit bids on other projects in Arizona. As of summer 1987, due to losses sustained on the Project, the civil division was unable to take on additional work. Ultimately, Hardrives was forced to close it (Tr. 1351-52, 1361, 2175).

269.U. From the beginning of the Project, the civil division did not have any other jobs (Tr. 1364).

270.U. Using the *Eichleay* formula, Hardrives' daily home office overhead rate was $847.76. On a percentage basis, the home office overhead expenses represent 3.625 of the revenues generated during the contract. Hardrives used the $847.76 figure in its proof book. Auditor Macy generally has no objection to computation of overhead on a daily basis (AX 521 at Tab J-2; Tr. 2311-27, 4237-38).

271. Originally, BOR calculated Hardrives' daily unabsorbed home office overhead at $1,434.85 (apparently $1,273 marked up for profit, bond and tax); then used $1,273; then, during hearing, used $847.76 (GX 518, 518(1), 518(2); Tr. 2330-2334, 4037-38).[8]

[8] At hearing, Hardrives presented $1,273 as an alternative overhead rate. It urged that, during winter, the Project had to absorb the majority of its home office overhead expenses and if the seasonality of its construction business were accounted for in the *Eichleay* formula, based upon a weighted average of monthly overhead rates applicable to the Project, the daily overhead rate would

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272. At the $847.76 daily rate, given the 370 days of delay charged to BOR, absorbed overhead totals $313,670 (AX 521 at Tab J-2; Tr. 2334).

7. *Total Earthwork Quantum*

273. Accounting for home office overhead for the 149 days of delay attributable to the earthwork, the increase in earthwork costs, including bond, profit, and tax is $1,683,930. This includes the extra costs of caliche excavation ($18,195) and costs associated with MRT's default ($2,903), both of which we find to be BOR's responsibility[9] and for which we make no deduction (AX 521 at Tab A, sheet 3; Tr. 2448, 2451).

8. *Valley Ditch Quantum*

274. Information used in assessing Valley Ditch's damages was derived from the audit, the best evidence in its case. Due to the delays and disruptions it experienced, and taking into account the period when it was employed elsewhere (but including its demobilization and remobilization and associated costs), using 1986 AGC rates, and including certain costs disallowed by the auditors and not now claimed, Valley Ditch incurred additional costs of $129,539. This includes $44,460 for equipment standby, $8,575 for mobilization, $32,105 in direct (field) overhead, and $32,623 in home office overhead. Profit at 10 percent was used, although Valley Ditch's normal profit rate was higher. Hardrives' direct and field overhead and markup brings total Valley Ditch-related excess costs to $177,096 (AX 521 at Tab A, sheets 1, 4, and Tab I, AX 541; GX 35, 57 at Tab P-8-1 at 8-1(1); Tr. 1267, 1270, 1273-75, 1282, 1303-04, 2473-83, 2491-92).

9. *Other Delay and Impact Quantum*

275. Accounting for the 221 days of delay associated with structures and general contract management, increase costs include segregable concrete costs of $274,565.[10] Unsegregable loss of efficiency and impact costs (crediting BOR with the contractor's total estimated costs, including burden, of correcting the two-gate turnout error, which were $32,127, and of removing the concrete slab at station 722+40, which were $3,961) are $1,419,493. The total is $1,694,058 (AX-521 at Tab A, sheet 4).

10. *Total Quantum IBCA 2375/2475*

276. With the stated credits, and after eliminating $58,547 in duplicative home office overhead, and adjusting profit and tax accordingly, total earthwork (including MRT and Hardrives), Valley Ditch, structures, mismanagement, delay, and impact quantum is *$3,488,260* (AX 521 at Tab A, sheet 4; Tr. 2512).

277. The contracting officer received Hardrives' certified claim, in the amount of $2,423,260.38,[11] on April 17, 1987 (AF for IBCA 2375 at Tab V, No. 6). In response to a certification challenge by BOR, Hardrives recertified its claim on December 9, 1987, in the amended amount of $3,773,997.30. We have found the December submission to be an amended, and not a new claim (12/30/92 opinion denying motions to dismiss).

III. *Storm Damage Claim—IBCA 2518*

278.U. In August 1987, Hardrives began installing a siphon pipe at station 135 under Fast Track Road. The contract required that it be placed with at least 3 feet of cover. The road at that location had a "Texas culvert," a dip to allow storm water to cross. In FC's design, the culvert was to move floodwater in runoff canals from the south to the north side of the Canal. When it reached the road, runoff was to cross over the pipe installed by Hardrives in the Texas culvert and proceed to the north side of the road into a designated floodway (AX 589; GX 2C at 68 (drawing No. V-4); GX 10; Tr. 677-78, 684-89).

(Footnote Continued)

be $1,273, which reflects its costs and the impact of Project delays more accurately than the *Eichleay* calculation used in its proof book. BOR's auditor Macy disagreed (Tr. 2327-29, 3922-23). In post-hearing briefing, BOR suggests that corporate and civil division overheads should be combined, for a rate of $337 per day. Hardrives established that separate calculations were required to ensure that civil division overhead was applied only to that division's revenue and that other divisions' overhead was not applied to civil division revenues. Its calculations did not include other divisions' overhead (Tr. 2317-25, 2543, 4235-37). We are not persuaded to modify the $847.76 daily rate used by both parties in their quantum proof at hearing.

[9] Our findings regarding BOR's responsibility are in the context of the appeal before us. Hardrives' contract was with BOR, not with FC. Our findings should not be interpreted to allocate any particular measure of responsibility between FC and BOR.

[10] Expert Duin allocated the 221 delay days to the concrete structure work and the resulting $187,354 in unabsorbed overhead costs are included in this $274,565 figure. He noted, however, that the delay essentially was intermingled with overall contract midsadministration delays.

[11] Hardrives' claim, and those below, also sought time extensions.

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279.U. During construction, Hardrives discovered that there would be insufficient cover if the pipe were placed at the contract-specified elevation. Instead of 3 feet, the pipe would be only 0.3 foot under the road. Hardrives immediately notified FC and resurveyed to confirm the elevations (AF for IBCA 2518 at Exh. 17; AX 327; Tr. 677-78, 686, 3705).

280. BOR does not contest, and we find, that the pipe design was defective.

281.U. FC directed Hardrives to install the pipe at the contract-specified elevation and to place 2 feet of cover over it to prevent traffic on Fast Track Road from damaging it. This caused a hump that blocked the Texas culvert. FC stated that it would redesign drainage to account for the obstruction (AX 327; Tr. 687-88, 690, 1128).

282.U. During early November 1987, 2 months after FC directed Hardrives to install the pipe as designed, it rained about 1.2 inches near the Project in 2 days—20 percent of the area's yearly rainfall (Tr. 3706-07).

283.U. When the storm runoff came down the Canal's south side, it could not cross Fast Track Read as intended and ran into a berm, which was not part of natural drainage and had been built by a farmer after Hardrives had completed that portion of the Canal. The floodwater ponded; broke through a 1-foot embankment built per contract requirements; entered the Canal; destroyed 10 to 12 concrete panels; and proceeded downstream through all the siphons and structures that Hardrives had completed in this area (AX 319; Tr. 690-95, 702-03, 729, 773-74, 3696).

284.U. The floodwater carried silt, mud, rocks, trash, and other debris down the canal for 3 miles before the water stopped at a closed gate (GX 112 A-E; Tr. 696; 700-02, 3708).

285. At the time of the storm, Hardrives had completed most of its work in the area and was awaiting FC's design solution to problems at Fast Track Road before completing the remainder (AX 322, 343; GX 366 at 5-6, Item 28; Tr. 703, 728-29, 3393-97).

286. Mr. Canez investigated and three draft reports stated: "Personally, I do not see how we could pin this on the contractor." He suggested only that the contractor could have constructed a V ditch (a drainage ditch) and reduced pipe cover to only 6 inches to 1 foot (AX 319, 322). His final report, prepared after a visit with FC, eliminates his opinion that the contractor was not liable and adds that the contract called for a 1-foot berm that could have prevented some damage. Mr. Canez appeared to recall at hearing that the V ditch and berm had not been constructed because Hardrives was waiting for FC's revised design (AX 319, 322; GX 20; Tr. 703-04, 3397). Consistently, BOR's claims analyst Whetstine concluded that "a delay in providing direction for correction of a design deficiency immediately upstream of the damaged lining may have caused the contractor to wait before completing temporary or permanent drainage facilities" (GX 502).

287.U. Although the contract called for a V ditch, the elevation of the pipe at Fast Track Road interfered with its construction. Mr. Whetstine acknowledged the design problem and that FC should not have allowed 3 months to expire without providing information to Hardrives to resolve it (Tr. 605, 703-06, 3704, 3714).

288.U. FC directed Hardrives to repair the damage without additional compensation. Hardrives had to (1) pump rain water from the Canal, (2) remove mud and other debris from it and clean affected siphons and other structures, (3) reconstruct the damaged concrete panels with hand-placed lining, (4) regrade the area where the water had ponded and broken into the Canal, and (5) completely clean the Canal (c&a ¶ 91; Tr. 730-31).

289. FC found Hardrives' resulting claim to be meritless (GX 20).

290.U. BOR commented as follows about FC's analysis (AX 415):

> C.6. The pipe, installed per specifications, failed to meet the 3 ft. minimum cover requirement. This discrepancy was brought to the Engineer's attention on or about August 10, 1987.
>
> * * * * * * *
>
> E.1 contractor also claims expense. It should be noted that contractor has never received a site plan for this crossing.
>
> * * * * * * *

The contractor did give notice of a conflict in the specifications prior to the damage; from the specifications and site visits, they could have reasonably assumed that there was no danger from flooding.

H. We disagree with the Engineer. It is our opinion that failure to resolve the drainage/cover problem places some liabilities on [BOR]. It must also be noted that if the contractor had completed the irrigation crossing at this location, the

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damage would not have occurred. We recommend negotiating an equitable adjustment * * *.

291.U. FC eventually accepted responsibility for inadequate pipe cover. However, it alleged that, under the Site Drainage clause (FF 9), Hardrives was responsible for repair of storm damage (AX 448; GX 20, 357; Tr. 1698-99).

292. BOR analyst Chapman, and a contracting officer's decision dated April 14, 1988, admit that the storm damage claim has merit in part. Hardrives has not received any payment (AX 416; GX 4 (Modification 043); Tr. 2346, 4097-98).

293. The weight of the evidence is that the overriding causes of the storm damage were the defective design of the pipe and FC's failure timely to address and cure the drainage problem (see above and Tr. 694, 727-29).

294.U. Hardrives properly kept track of the labor hours, equipment, and materials used to clean up the storm damage (Tr. 731).

295. Hardrives worked on repairing the storm damage at periods from November 1987, to early February 1988. It was performing some, but little, other work, awaiting resolution of the PSR 19 problem. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered. Excess, reasonable, costs and burden not accounted for elsewhere total $27,578 (AX 521 at Tab A, sheet 2; AX 527; Tr. 740-41, 1126-27, 2343-44, 3672-75).

296. The contracting officer received the storm damage claim, in the amount of $91,195.41, on February 8, 1988 (AF for IBCA 2518 at Tab 23).

IV. *FCG Canal Crossing Claim—IBCA 2524*

297.U. The contract required installation of a 60-inch reinforced concrete pipe, with 3 feet of cover, to siphon water under the Florence/Casa Grande Canal (FCGC), which crosses the Canal at about station 42+50. The contractor could either jack pipe underneath the FCGC, divert the FCGC, or take advantage of a period when water was not flowing in it, and excavate a trench for the pipe. Hardrives elected the latter (c&a ¶ 115; spec. 7.1.1; AX 454; GX 2C at 41; GX 111-A; Tr. 118-19; 741-42, 745).

298. Water was drained from the FCGC only during November each year and Hardrives had a limited time to install the siphon (Tr. 742, 750).

299.U. When Hardrives been excavating, it found that the contract's FCGC bottom elevation was inaccurate because the bottom was covered by about 2.34 feet of silt. If Hardrives had installed the pipe as specified, it would have been covered only by the silt, which would have eroded. Hardrives promptly notified FC (AX 90, 590; GX 5 at Tab 36; Tr. 743-49).

300.U. After Hardrives confirmed true bottom, FC directed it to lower the siphon about 2.3 feet. Because of the new depth, Hardrives had to perform additional work and backhoe operations became more difficult and inefficient. The siphon lowering also required changes in the trench side slopes. While Hardrives was excavating to the new depth, FC ordered it to flatten the slopes for safety, which increased the amount and difficulty of excavation. The flatter slopes and deeper trench also caused problems with an earthen dam that Hardrives had constructed in the FCGC to prevent water entry. Material that had been placed into the dam had to be moved (c&a ¶ 118; AX 125, 590; Tr. 749-50, 752-63).

301.U. After excavation, Hardrives laid the siphon, but due to its lowering, the pipe was not long enough to reach the designated elevations of its associated inlet and outlet structures. Hardrives had its supplier prepare drawings for pipe extensions (Tr. 765-68).

302.U. It took about 4 months to design the pipe extensions, obtain FC's and BOR's approval, and manufacture the pipe. Hardrives could not complete the inlet and outlet structures here until the extensions were installed (Tr. 768-69; 774-75).

303. Among other costs, heavy equipment for the additional pipe work had to be transported several miles around the Canal, now full of water; dirt, pipe, forms, and rebar had to be moved in and out; and there was extra excavation, including digging a ditch twice, and extra backfill (Tr. 1174-78, 2065-66).

304.U. BOR and FC admit that the lowering of the siphon was a change and that this claim has some merit, but Hardrives has not received any paymant. The contracting officer received Hardrives' claim, in the amount of $40,211.68, on December 28, 1987 (AX 454; GX 12; Tr. 2377, 4099).

305. Without engaging in comply swing and lift time equipment calculations that were not cost-effective, Hardrives could not segregate to the cost of the additional work. It could not determine exactly what dirt was excavated due to the lowering of the siphon or to the adjustment to the slopes. Estimated conservatively, direct costs, including

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field overhead, total $20,974. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered. Excess, reasonable, costs and burden not accounted for elsewhere total $25,063 (AX 521 at Tab A, sheet 2; GX 44 at Tab C-15; Tr. 769-72, 1173-81, 2366-76).

V. *Soil Stabilization Claim—IBCA 2511*

306. The contract's soil stabilization clause provided in part.

a. General—The Contractor shall be required to obtain and apply a soil stabilizing solution to the subgrade of a selected test section of the canal prism for the purpose of reducing possible failures of the canal.

* * * * * * *

Product Availability—As part of a proposed field trial and study and in cooperation with [BOR] and the District, the manufacturer of Dustgard will make approximately 4,600 gallons * * * available at no charge * * * This quantity will be roughly 50 percent of the total quantity needed. Additional quantities of the product can be purchases from the same location.

d. Application—The soil stabilizing solution shall be sprayed evenly over the entire canal prism from inside edge to inside edge of berms, including the refill area after excavation, and also the material to be compacted in the refill area, between stations 2+90 and 226+85. Application of the solution must be in such a manner that penetration of the 5-percent magnesium chloride solution will be at least 6 inches into the canal subgrade.

The application rate and number of passes required to obtain the 5 percent concentration and 6-inch penetration shall be at the discretion of the Contractor, but must be compatible with the type of sprayer being used and the method of application so that an excessive accumulation of the solution will not occur in the canal invert or elsewhere.

(GX 3 at spec. 7.2.7 (blue pages)).

307.U. The soil stabilization requirement covered over 4 miles. The solution had to penetrate Canal embankment by 6 inches after trenching but before lining. When it dries, magnesium chloride causes surface dirt to bind and crust (c&a ¶ ¶ 132, 133; GX 3 at spec. 7.2.7; Tr. 776-81, 792-93).

308. Hardrives had planned to test the process, and application rates, with a fire hose and then to make three passes with a water truck with an attached spray bar, adjusted for the proper application rate. The spray bar method would have required one person to operate the truck and a potentially part time foreman. The fire hose method required two full time people (GX 482, 483, 561; Tr. 779-80, 783, 786, 793-94, 913-19, 1444-45).

309.U. BOR's intent, expressed to FC in a pre-contract memorandum dated March 10, 1986, was that: "Application is to be by water truck with modified spray arm. The coverage will probably be one-half the canal section per pass. The penetration of the solutions will determine the rate of application and the number of passes needed" (AX 30 at 3).

310. The beneficiaries of the soil stabilization test program were the District and the supplier of the solution (AX 30 at 4).

311. Hardrives had purchased the contract-estimated amount of solution to be purchased. (Tr. 785).

312.U. Before the overall test program, Hardrives arranged for field tests to define the magnesium chloride solution's penetrability. BOR, FC, and independent testing lab personnel attended (Tr. 780-82).

313. For the field tests, Hardrives used a truck and a fire hose with a variable-rate nozzle to test rates and penetrability and determine proper spray bar design (Tr. 782-83).

314.U. Six-inch penetration could not be achieved, as BOR and FC eventually recognized. The solution ran down the Canal sides and collected in the invert. FC orally released Hardrives from this penetration requirement (AX 222, 233, 235, 256; Tr. 783-88, 795-96, 3450, 3655).

315. Based upon the foregoing and all of the evidence of record, we find that the soil stabilization specification was defective.

316. After FC's oral release of Hardrives from the 6-inch penetration requirement, Hardrives and Mr. Canez asked for written confirmation and direction from FC, but did not receive it (GX 159B at 5/6/87 Canez report; Tr. 1688-89, 4110-11).

317. FC first instructed Hardrives to make three passes in the contract-specified test area. Mr. Canez agrees with Hardrives that FC later directed it to use the entire amount of solution, which it had on hand. PC Instructed Hardrives to apply it evenly throughout essentially the contract-specified test area until it was used up (AX 222,

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519 (Canez reports for 5/6-8/87); GX 483; Tr. 785-89, 920-24, 1689).[12]

318. Hardrives understood that it was to continue with the fire hose. In any case, application rate adjustments necessary as soil penetration rates changed with succeeding solution applications dictated use of the hose. It required more labor and tine than the planned spray bar (Tr. 783, 787, 794, 796, 917-19).

319. Soil stabilization took longer then planned because of soil impenetrability and the directive to use all of the solution. It delayed trenching and lining (Tr. 787-804, 1330, 1689-90).

320.U. Hardrives kept track of the costs associated with the soil stabilization (Tr. 804-09).

321. After the work was finished, on August 19, 1987, FC transmitted no-cost Modification 23, stated to be issued by BOR. The modification, which contained a release of claims, described the contract change regarding soil stabilization as follows: "In specifications paragraph 7.2.7(d) change the soil stabilization penetration depth from 6" to 3", as applicable, *applying total plan quantity as detailed*" (GX 487 (emphasis added)). Mr. Hite signed the modification on August 25, after excising the release clause and writing that Hardrives had incurred delay and increased costs due to the specification defect. On September 22, 1987, BOR requested a proposal, which Hardrives submitted on November 12. On December 29, 1987, after receiving no response, Hardrives submitted its certified claim in the amount of $55,231.66 (AF for IBCA 2511 at Tabs 14-20; GX 486, 487).

322. A BOR supervisor reported to the auditors that BOR was at fault, that the solution requirement should have been eliminated, and that Hardrives had been required to attain penetration where none could be achieved (GX 38 at Tab A-7-3 at A-7-17).

323. Crediting BOR because Hardrives did not use its own water truck as planned but rented it at a $264 higher cost, and crediting it with Hardrives' estimate of planned costs, Hardrives incurred excess, reasonable, costs and burden not accounted for elsewhere of $21,780 in complying with the order to apply all of the solution. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered (AX 508, 521 at Tab A, sheet 2, Tab O, 522; Tr. 2391-96, 2560, 2562-63, 2566-73, 2653).

324. The contracting officer received Hardrives' claim on January 6, 1988 (AF for IBCA 2511 at Tabs 18, 20).

I. *Pipe Bend Encasement Claim—IBCA 2510*

325.U. Hardrives installed reinforced concrete pressure pipes and siphons that had horizontal and vertical bends to channel water around or under obstacles along the Canal (Tr. 811).

326. Reinforced concrete pressure pipe was to be manufactured in accordance with BOR's standard specifications (spec. 4.2.1). The Fittings For Reinforced Concrete Pressure Pipe specification (spec. 4.2.2) provided:

> a. General—* * * curves and bends, connections at structures and *encasements* * * * *shall be furnished and installed as shown on the drawings* and in accordance with this paragraph and paragraph 4.2.3 [Laying Reinforced Concrete Pressure Pipe]. * * * [C]urves, and bends, connections at structures and encasements *** shall conform to [BOR's standard specifications].
>
> * * * * * * *
>
> b. Approval of fittings—* * *
>
> * * * * * * *
>
> Any fabrication or procurement performed before approval of details shall be at the Contractor's risk. Approval by the Construction Engineer of the Contractor's details shall not be held to relieve the Contractor of any part of the Contractor's responsibility to meet all the requirements of these specifications or of the responsibility for the correctness of the Contractor's details.
>
> * * * * * * *
>
> d. Curves and bends
>
> (1) General—where shown on the drawings, changes in alignment and grade shall be made with miter bends. Other changes in alignment and grade shall be made by

[12] Mr. Salisbury prepared a technical analysis of this claim on Jan. 14, 1988, in which he alleged that he had instructed Hardrives to do no more work than what it had bid and to apply the plan quantity of material in the test section in three applications and no more. He testified similarly at hearing (AF for IBCA 2511 at Tab 21; Tr. 3451). BOR acknowledges that the technical analysis was many months after the fact (Tr. 4143). Mr. Locke agreed that FC had made such an instruction originally, but testified that it later was changed (Tr. 920). Contemporaneous documentation supports Mr. Locke.

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pulling the pipe joints, by using beveled end pipe, by using a combination of pulling pipe joints and beveled end pipe, or with miter bends: Provided, That no direct payment will be made to the Contractor for concrete, including cement and reinforcing bars, *in encasements and blocking for miter bends*, and the cost shall be included in the cost of the pipe. * * *

(2) Miter bends—Miter bends shall be fabricated as shown on the Drawing. * * *

* * * * * * *

Reinforcement at bends shall be lapped or welded as shown on the above drawing [but none specified] * * *. After the reinforcement has been lapped or welded, the space between the mitered pipe units shall be filled with mortar. * * * *The mortared space in the bend shall be completely wrapped with welded-wire fabric, which shall be covered with a suitable mortar bend. The mortar shall be allowed to cure before the miter bends are encased or blocked with concrete.*

Miter bends shall be encased or blocked with concrete as shown on the Drawings. [Emphasis added.]

327.U. Hardrives reasonably concluded that it could block or encase pipe bends, depending upon what was shown on the drawings (Tr. 813-14).

328.U. The contract included drawings identifying various pipe bends. All referred to another drawing, V-5, entitled "Pipe Bend Details and Encasement," which depicted the types of possible bends and different methods of reinforcement, and showed a "banded mitered pipe bend" that was neither encased nor blocked (GX 2C, GX 556; Tr. 814-19).

329. No drawing showed an encased banded mitered pipe bend (GX 2C, 556; Tr. 821-22, 1152, 1154-55, 3043).

330.U. BOR's manual, "Commonly Used Drawings for Open Irrigation Systems," which provides standard drawings in detail, does not show how to encase a banded mitered pipe bend (GX 558, 559; Tr. 3043-44).

331. However, the dimension table in drawing V-5 setting the thickness for bands referred only to pipe up to 36 inches in diameter. There were no pipe sizes in the contract between 36 inches and 42 inches and no pipe at issue smaller than 42 inches in diameter. Every drawing in the contract depicting pipe bends 42 inches in diameter or larger showed the pipe bends as encased (GX 547-554, 556; Tr. 957, 3002).

332. Notes to Drawing V-5 provided that "1. Contractor may submit alternative design for approval" and "3. *Encase all pipe bends when [diameter is greater than or equal to 42 inches]*" (GX 556 (emphasis added); Tr. 820, 3001, 3003).

333.U. A mitered bend is formed during pipe fabrication (Tr. 812-13).

334. A banded mitered pipe bend has a band of mortar and wire mesh

(Tr. 817-18, 978, 2993).

335. Encasing entails building a form and pouring a concrete collar around the pipe bend. In blocking, a large monolithic piece of concrete is placed under or along a bend. Blocking supports the joint, disperses water pressure, and prevents pipe movement and leakage. Encasing does the same, but secures pipe more firmly and protects it against ground settlement, vibrations, and exterior and interior water forces. Banding resists hydraulic pressures and prevents leakage, but does not prevent pipe displacement from external forces. If encasement is required, there is no point in banding (GX 562, 570; Tr. 822-23, 966-67, 978, 2994-97, 3006-07, 3045).

336.U. BOR's claims analyst Green had never seen an encased banded mitered pipe bend used on any project (Tr. 3044-45).

337. Hardrives had received a quote, prebid, from Ameron for banded mitered pipe bends. It is not clear whether it covered pipe of 42 inches in diameter or more, or whether Hardrives' bid was estimated based upon factory-supplied banded bends. Mr. Locke, who was not involved in the bid process (Tr. 1037), testified that he decided during the Project that ready-made banded mitered bends would "cut [his] cost" of pipe installation (Tr. 819). Although the factory-made bends were more expensive than straight pipe, they were cheaper than ordering straight pipe, cutting it to form bends, and blocking or encasing the bends. Mr. Locke admitted that Note 3 on drawing V-5 provided that the contractor was to encase all pipe bends, including banded mitered pipe bends, when pipe diameter was equal to or greater than 42 inches (Tr. 820-21). Because the drawings did not show any encased banded mitered pipe bends, however, and because Note 1 to drawing V-5 allowed submission of alternative designs for approval, he concluded that encasing or blocking banded mitered pipe bends was not a contract requirement (GX 556; Tr. 816-21).

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338. Before it ordered pipe, Hardrives submitted drawings to FC which depicted banded mitered pipe bends without encasement. Hardrives did not submit rebar drawings, required for encasement. There is no evidence that the submissions stated that the banded mitered pipe bends were in lieu of blocking or encasement or that Hardrives requested approval for an alternate design. FC returned the drawings to Hardrives with no expression of disapproval and did not request rebar drawings (Tr. 821-23, 978, 3049).

339. Upon, or soon after, placement of at least one banded mitered pipe bend without encasement, FC told Hardrives that encasement was required to prevent joint leakage. Hardrives disagreed and FC issued field order No. 2 on September 26, 1986, directing placement of encased pipe bends, stating: "[M]itered pipe bends as supplied by the pipe supplier per pipe drawings does [sic] not suffice as an alternative to encasement." Hardrives continued to backfill. On October 3, FC issued field order No. 3 stating that Hardrives was backfilling at its own risk and might be required to re-excavate and place concrete encasements as directed in field order No. 2 at no additional cost (AF for IBCA 2510 at Tabs 9 and 11; GX 159A (10/3/86 Stanley and Canez reports; Tr. 823-25, 828, 1162, 3437).

340. By letter of September 29, 1986, Ameron asserted that it had manufactured pipe bends "in accordance with the detail for 'banded mitered pipe bends for reinforced concrete pressure pipe, as shown on [drawing V-5]" and that it had that option, or of providing pipe to be encased in the field. It stated that it had elected the banded option, which would provide a water tight bend, and that "further encasement" was not required unless needed for some other purpose (AF for IBCA 2510 at Tab 12).

341. Hardrives was directed to encase all banded mitered pipe bends of 42 inches in diameter or more and did so, ultimately filing a claim (AF for IBCA 2510 at Tab 19; Tr. 827-29, 1224-25, 3003).

Because we find for BOR, we do not reach quantum.

VII. *The Joint Sealant Claim—IBCA 2319/2514*

342. The Contraction Joints For Concrete Canal Lining specification, 5.2.3, provides in pertinent part:

a. General—Contraction joints shall be constructed in unreinforced and reinforced (hand placed) concrete lining as shown on the Drawings.

Joints shall be continuous across the canal section. Terse contraction joints shall be terminated at the top of the side slopes and a 3/4-inch-minimum-depth groove shall be tooled across the concrete curb from the end of each transverse joint. No filler or sealant will be required for these tooled grooves.

* * * * * * *

c. Materials—Elastomeric sealant—The sealant shall conform to [BOR] "Specifications for Elastomeric Joint Sealer", dated August 1, 1983.

d. Sampling, testing, and certification—Elastomeric sealant—The Government will require certification of each batch of elastomeric sealant prior to use. However, acceptance of the joint sealant materials *** will not be made until the materials have been satisfactorily applied at the jobsite.

* * * * * * *

e. Placing elastomeric sealant—The canal lining concrete shall be cured at least 7 days before the two-component elastomeric sealant is placed in the joint grooves. Immediately before placing the sealant in the joint grooves, the joint grooves shall be thoroughly cleaned. * * * Elastomeric sealant shall not be placed while rain is falling. At the time of placing the joint sealant, the joint groove shall be clean * * *.

Before use, each component of the elastomeric sealant shall be thoroughly mixed * * *. * * *

* * * * * * *

The extrusion machine for mixing and placing the sealant shall conform to the manufacturer's recommendations. * * *

The method of mixing and placing shall result in a homogeneous material. The sealant shall be extruded at the bottom of the joint groove and shall be tooled as necessary to work the sealant into intimate contact with the bonding surfaces without entrapping air bubbles. The top surface of the sealant shall be tooled to the shape shown on the drawing.

Elastomeric sealant which does not cure to a homegenous, rubber-like compound, which does not bond to the joint groove faces, or which does not comply with any other requirements of this paragraph shall be removed. The joint groove shall then be recleaned and new sealant placed therein

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by the contractor at no additional cost to the Government.

Sealant pulled out of joints or damaged by the Contractor's operations or otherwise damaged during the contract period, shall be replaced * * *.

343. Payment for concrete canal lining work was to beat the bid price and to include the cost of joint sealer (specs. 5.2.5; 5.3.21).

344. The drawing of a contraction joint, No. 7506, showed elastomeric sealant in the bottom of the joint groove (GX 2C at 31, GX 538).

345.U. Mr. Rodgers, a registered professional engineer, in the construction business since 1949, prepared most of Hardrives' bid estimate (Tr. 1378-82).

346.U. Prior to the estimate, Mr. Rodgers and his assistant examined the Project site. They also examined two other BOR canal projects. On one, sealant was installed in transverse contraction joints; on the other, it was not (Tr. 1382-85).

347. Mr. Rogers anticipated construction of the Canal lining with a slip form paving machine. Because the contract required transverse contraction joints at 10-foot intervals in the lining, he planned that they would be tooled (Tr. 1400).

348. A "transverse contraction joint," as used in § 5.2.3a., is a groove formed in concrete either by a template (form board) or by tooling. On the job, Valley Ditch hand-tooled the portion of the joint in the Canal and then "hit the curb" with a stick to form the portion located there, which it considered to be the same as tooling. BOR deemed that this method satisfied the specifications. To avoid cracking in the curb, the need to continue the groove placed in the canal up to and over the curb is stressed by BOR. Because it is impractical to place the curb groove at the same time as the groove in a canal, curb grooving is usually done separately (Tr. 1297-98, 1312-13, 2976-81).

349.U. Use of a paving machine and hand tooling were reasonable assumptions (Tr. 3026-27, 3104-05).

350.U. Hand tooling the transverse grooves is the custom and practice in the industry (Tr. 1300).

351. Elastomeric sealant is a caulking compound commonly used to seal contraction joints to form a water-tight seal (Tr. 830, 2969-70).

352.U. In preparing his estimate, Mr. Rodgers first reviewed drawing No. 7506 and concluded that transverse contraction joints required elastomeric sealant (GX 538; Tr. 1401).

353.U. While under that assumption, he listed 25 cents per l.f. of contraction joints, for all equipment, time, materials, and other non-labor expenses. He did not specifically allocate part of the 25 cents to sealant; rather, he used 25 cents as an arbitrary, or "bogeyed," number (AX 494; Tr. 1403-05, 1415, 1420, 1456-59).

354.U. Mr. Rogers then examined the specifications for the first tine. After reviewing § 5.2.3a., he perceived a conflict between the specifications and the plans and concluded that no sealant would be required for tooled grooves (GX 537; Tr. 1405-06).

355. Mr. Rogers brought the alleged conflict to Mr. Hite's attention. The 25 cents was left in the bid as a contingency. A minor amount of joint sealant was required in any case for certain construction joints (Tr. 1415, 1420-22, 1459, 1462-63, 1474-75).

356.U. Mr. Rogers did not question FC or BOR about the matter until after contract award. Appellant concedes that it did not make a pre-bid inquiry (Reply Brief at 326; Tr. 1416, 1462-63, 1474-75).

357. In a series of exchanges, Hardrives sought a change order, alleging that sealant was not required in transverse contraction joints. FC and BOR disagreed. On April 14, 1987, BOR issued a show cause notice, stating that Hardrives had failed to cure a condition deemed to endanger contract performance and that BOR was considering a default termination. on April 23, Hardrives responded that it fully intended to place the sealant and that the delay in completion of the canal lining was due to delays associated with the earthwork portion of the Project, unrelated to sealant (AF for IBCA 2319 at Tab V(a), multiple correspondence).

358.U. Prior to the show cause notice, Hardrives had ordered the sealant and had it on site (AX 203; Tr. 862-63).

359. Under Hardrives' plan, however, the Project had not been ready for the sealing, because the Canal lining had not been completed nor the Canal cleaned. Nonetheless, it began to prepare for and to seal upon receipt of the notice (AX 203, 519; Tr. 863-65).

Because we find for BOR, we do not reach quantum.

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VIII. *Sump and Wells Claim—IBCA 2519*

360.U. During construction, Hardrives encountered a sump and wells near the canal that were not on the drawings (c&a ¶ 153; Tr. 872-73).

361.U. By letter of August 11, 1986, enclosing PSR 21, FC asked Hardrives to develop an itemized proposal to cap a well in a right-of-way at station 410+00 (AF for IBCA 2519 at Tab 4; AX 64).

362. It later was determined that unsuitable materials had to be excavated from a sluice pit (apparently the "sump") and that an abandoned well at station 355+50 required capping (AF for IBCA 2519; AX 105; GX 497)

363. On November 17, 1986, estimated that the work would take 4 days and cost $5,500 (AF for IBCA 2519 at Tabs 9, 11, 13, 14; AX 105).

364.U. On November 20, 1986, BOR issued undefinitized unilateral Modification 9, directing Hardrives to excavate unsuitable materials from the sluice pit and to cap the wells (c&a ¶ 155; AX 105).

365. MRT started the work on about November 7, 1986, and completed it on about November 20, using Hardrives' backhoe in at least one case (AX 521 at Tab P; Tr. 873-74, 2345, 2347).

366. On November 20, 1986, BOR asked FC to seek a proposal from Hardrives to be submitted by December 19. On December 9, FC asked for a proposal for Modification 9 and for other modification work, to be submitted by December 18 (AF for IBCA 2519 at Tabs 14, 15).

367. The record includes three invoices from MRT to Hardrives, each dated December 13, 1986, totalling $6,299.47. Two of them, totalling $2,744.68, were marked "Received" by Hardrives on December 19, 1986. Hardrives submitted those two to FC on March 19, 1987, with its proposal. Whether the other invoice, in the amount of $3,554.79, had been provided to Hardrives at the tine is unclear, but the lack of a "Received" stamp, and events below, suggest that it had not been. Hardrives' proposal cited $6,240.17 in subcontractor costs and burden, to which Hardrives added its own costs and burden, for a grand total of $9,512.98 (AX 521 at Tab P; GX 13, 497; Tr. 873).

368. By letter to Hardrives of June 16, 1987, FC stated that the contractor's proposal had omitted the costs to cap the well at station 355+50 and that FC could not write a definitizing modification without that information (AF for IBCA 2519 at Tab 18).

369. Whether the letter was received is unclear because, on February 23, 1988, Hardrives wrote to the contracting officer that there had been no action on its March 19, 1987, submission and asserted a claim for $11,452.51. The claim included $6,240.55 in subcontractor costs and burden. Handrives sought a 1-day extension. We find that the contracting officer received the claim no later than March 3, 1988. There is no apparent correlation between the omitted MRT invoice and the claim increase because subcontractor costs remained virtually the same. However, the station number for the work covered by the third invoice suggests that it pertains to the omission noted by FC. Hardrives included costs reflected on the third invoice in its revised claim amount presented at hearing (AF for IBCA 2519 at Tab 19; GX 13, 497).

370. On April 14, 1988, the contracting officer issued a decision stating that it had always been BOR's intent to compensate the contractor; that the claim had merit; and that an equitable adjustment would be negotiated upon completion of a pending audit (AF for IBCA 2519 at Tab 21).

371. On September 20, 1988, FC transmitted a price negotiation memorandum to BOR. It noted that it was disregarding a price ceiling contained in Modification 9 and concluded:

> The basic costs that the contractor is requesting are generally not out of reason, as this memorandum will demonstrate. There are various markups for overhead and extended overhead which are issues that may be tied to overall project claims and may not be able to be resolved during negotiation of this modification.

(GX 497, Negotiation Memorandum at 2). FC recommended payment of $3,530.86, accepting all claimed direct costs, tax, and bond, but applying only one direct overhead and profit calculation and including extended overhead (GX 497, Negotiation Memos at 6-8).

372.U. BOR admits that the claim has merit, but has never paid anything to Hardrives (Tr. 875, 2350, 3617-18, 3637-38, 4100).

373. Hardrives modified its claim amount for consistency with the calculation of its other claims and to avoid duplication or augmentation of indirect costs. We find that appellant demonstrated direct costs, including field overhead, not accounted for else-

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where, of $4,402. To that we add profit, bond, and tax at the stated rates, for a total of $5,035. The extension sought overlaps with that awarded in IBCA 2375/2475 and is not considered (AX 521 at Tab A, sheet 2, and Tab P; Tr. 2346-50, 2364-66).

IX. *Interest on Delayed Payments—IBCA 2516*

374. The Payments clause, § I.5.1, provided in pertinent part:

(b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the contracting Officer, on estimates approved by the Contracting Officer. * * * [T]he contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration.

375. However, the Administration of Payments clause, § I.5.2, provided:

(a) Payments shall be made as close to 30 calendar days as administratively possible after receipt by the Government of signed invoices from the contractor on estimates approved by the Contracting Officer.

(b) *Material delivered on the site may be included in the estimates only if the contractor furnishes satisfactory evidence (1) that it has acquired title to such material* and (2) that the material shall be used to perform the contract. [Emphasis added.]

The Mobilization and Preparatory Work clause, § I.5.3, provided for progress payments for such work. Certain mobilization costs were to be paid at intervals.

376. The Prompt Payment Act (PPA) clause, § I.5.12, provided in part:

INTEREST ON OVERDUE PAYMENTS

(a) The [PPA] * * * is applicable * * * and *requires* the payment to contractors of interest on overdue payments * * *.

(b) Determinations of interest due will be made in accordance with the [PPA] and Office of Management and Budget [OMB] circular A-125.

PAYMENT DUE DATE

(a) Payments under this contract will be due *on the 35th calendar day after the later of:*

(1) *the date of actual receipt of a proper invoice in the office designated to receive the invoice*, or

(2) the date the supplies or services are accepted by the Government.

(b) For the purpose of determining the due date for payment and for no other purpose, acceptance will be deemed to occur on the 30th calendar day after the date of delivery of the supplies, or performance of the services required, in accordance with the terms of the contract.

* * * * * * *

(d) Payment shall be deemed to be made on the date of issuance of the Government check.

INVOICE REQUIREMENTS

(a) Invoices shall be submitted * * * to the government office designated to receive invoices in this contract * * *. [Emphasis added.]

A "proper invoice" had to contain basic price and quantity and other information, along with "other substantiating documentation or information as required by the contract."

377. Circular A-125 provided, *inter alia:*

3. Policy. * * * *Agencies will pay interest penalties without the need for business concerns requesting them* * * *.

* * * * * * *

8. Interest Penalty Requirement

a. *An interest penalty will be paid when all of the following conditions are met:*

* * * * * * *

—A proper invoice has been received * * *.

* * * * * * *

c. *Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of a contract* * * *. Claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled, will be resolved in accordance with the [CDA]. [Emphasis added.]

(GX 497 at OMB circular A-125 at 2).

378. Hardrives seeks interest for alleged late payment of vouchers 1—11, covering about the first year of the contract, through May 25, 1987 (AX 521 at Tab R; AX 588).

379.U. It was FC's responsibility to prepare BOR's monthly payment vouchers (AX 51, 226; Tr. 1694, 3647).

380. For about 1 year after contract award, FC required Hardrives to do the paperwork for it, without instructing Hardrives as to standard BOR format (AX 226; Tr. 441, 1098-99).

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381. Normally, on the 25th of each month, Hardrives met with FC to discuss the monthly progress payment (Tr. 670-71, 1098, 1831).

382. Often, FC would seek more information, or ask for changes, before it would submit a voucher to BOR. On occasion, after Hardrives believed agreement had been reached, Ms. Hodges would request changes and, after resubmittal, sometimes would request more. FC did not forward any part of the vouchers, even if related to Kleck Road Turnout work administered by BOR, until Hardives had made all requested changes (GX 51; GX 497 at contact reports; Tr. 671-73, 1832).

383. Hardrives did not get paid within 30 days of submission of any of the 11 vouchers at issue (AX 588).

384. BOR admits that "on six occasions Hardrives did not get paid within 30 days from the date it submitted *proper* vouchers" (emphasis added) (BOR's proposed findings at 127, No. 605; GX 496).

385. On May 15, 1987, BOR reminded FC that it was to prepare the vouchers, stating that Hardrives' submissions had not been in standard BOR format, which had contributed to payment delay. BOR noted that Hardrives had requested the proper format; directed FC to supply it promptly; and strongly recommended that FC prepare the vouchers (AX 226).

386. Mr. Canez was asked to attend progress payment meetings and the procedure was changed so that, if FC disagreed with Hardrives, FC still would forward the voucher to BOR, noting the disagreement. In Mr. Canez opinion, this was the proper procedure. Beginning with voucher 12, progress payments were much faster (see AX 410; GX 496 at Hardrives' 11/30/87 claim letter; Tr. 671, 673, 1694-95).

387. BOR policy is to process all vouchers by not more than 5 working days after receipt (GX 496 at BOR 3/10/87 letter to FC).

388. On February 26, 1987, Hardrives wrote to FC complaining of late payments; asserting financial burden and profit jeopardy due to potential loss of prompt payment discounts from its suppliers; and requesting interest. When BOR inquired about the reasons for payment delays, FC cited format disagreement, and that it was waiting for lien releases in certain cases, among other things (GX 496).

389. If a lien waiver is not with a request for payment for materials, BOR does not consider it a "proper invoice" (Tr. 3615-16).

390. On April 7, 1987, BOR found that the interest request had merit in part. On April 14, though, the contracting officer denied it, alleging that the payment period began when BOR's payment office received a proper, authorized invoice; that any interest would be based upon any delays by that office; that "[t]he courts have held that the Contracting Office [sic] does not have authority to award interest" absent a claim under "Section 611" of the CDA; and that a demand was not a claim (GX 496).

391. Ms. Ramirez opined that undisputed interest could have been paid automatically (Tr. 3644-45).

392. On December 3, 1987, the contracting officer received Hardrives' claim for interest in the amount of $17,216.38 (GX 496).

393. On February 2, 1988, the contracting officer advised Hardrives that its claim had some merit and that it would be notified when BOR was prepared to negotiate it (AX 379).

394. On February 10, 1988, Hardrives appealed to this Board, which remanded the appeal for decision by the contracting officer within 60 days. On June 15, 1988, Hardrives refiled its appeal because the contracting officer had not issued a decision (GX 496).

395. BOR has not paid Hardrives any interest (Tr. 676-77).

396. Interest rates are undisputed; the parties have agreed to a 30-day payment period, rather than 35; and BOR now assert that the period began when FC received a "proper invoice," *i.e.,* one as finally revised per FC's directions. In all but two cases, the deemed "proper invoioe" dates are later than Hardrives' original submissions. Appellant contends without support, that the triggering date is the voucher's "cut-off" date. For this appeal, we accept BOR's triggering date. Appellant has not directed us to documentary evidence that its original invoices in question were "proper," or segregated any alleged "proper" portions, and BOR has supplied evidence that the invoices were improper, at least in part. Regarding payment dates, BOR's were supplied by its fiscal office in Denver. Appellant's are substantially the same, varying by 1 day in BOR's favor and by 4 days in appellant's favor. Because appellant has not directed us to documentary evidence of payment dates, we accept BOR's record (AX 521 at Tab R at R-1; AX

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588; GX 496 at Technical Analysis and at FC's 12/28/87 analysis; Tr. 3615-17, 3639).

397. An April 1987 prenegotiation memorandum, reviewed by BOR in July 1988, for a proposed Modification 46 (ultimately not issued) recorded the Independent Government Estimate (IGE) of interest due Hardrives at $3,868.13, using a 30-day payment period. BOR's maximum negotiation objective adopted that estimate. The minimum objective, which used a 35-day payment period and fewer days of delay, was $1,964.71. Both calculations credited BOR with overpayments for mobilization costs and for Borrow Area C material. Hardrives has not directed us to any evidence that BOR was mistaken about the mobilization cost overpayment. Accordingly, for purposes of the interest claim, we accept that there was one. Also, it is clear that Borrow Area C costs were disputed and, therefore, not the basis for an interest penalty. At hearing, BOR presented a revised estimate that $1,735.55 was due, with no explanation of the dates upon which it was based or of its differences from the IGE estimate (GX 496; Tr. 3617).

398. We find that the IGE is the best-supported calculation. Thus, interest due is $3,868.13, plus CDA interest as of December 3, 1987.

X. *Borrow Area "C" Royalty Claim—IBCA 2414/2515*

For the relevant contract provision see specification 3.2.6 (FF 14).

399. Per MRT's diary for November 4, 1986, Ms. Hodges thought BOR would pay the contractor 15 cents per c.y. for Borrow Area C material (GX 117).

400. BOR paid Hardrives $14,893 for Borrow Area C royalties, but deducted it from a later process payment, as having been paid in error (c&a ¶ ¶ 172, 173; GX 496).

401. Hardrives included the royalty cost of Borrow Area C material in its bid price for excavation from borrow. MRT also included the cost in its price to Hardrives (AX 502 (black book); Tr. 1477-79, 1918).

402. On July 10, 1987, Hardrives submitted a claim for $14,893 to recover the Borrow Area C surcharge (AF for IBCA 2414 at Tab 17).

Because we find for BOR, we do not reach quantum.

DISCUSSION

IBCA 2375/2475

[1] The Government impliedly warrants the correctness and adequacy for the job of design specifications, like those in this appeal. The warranty is not superceded by disclaimers, as in this contract, alerting bidders to investigate the site, plans and scope of work, nor affected by the fact that an A/E prepared the specifications. *United States v. Spearin*, 248 U.S. 132, 136 (1918); *Hollerbach v. United States*, 233 U.S. 165 (1914); *Pathman Construction Co.*, ASBCA No. 22343, 81-1 BCA ¶ 15,010; *Pilcher, Livingston & Wallace, Inc.*, ASBCA No. 13391, 70-1 BCA ¶ 8331 at 38,763-64. The warranty extends to the contract's survey information; if it contains significant and pervasive errors, the specifications are defective. *H. M. Byars Construction Co., and Nevada Paving Inc., a Joint Venture*, IBCA No. 1098-2-76, 77-2 BCA ¶ 12,568 at 60,937. Here, appellant, and its subcontractors MRT and Valley Ditch, suffered from a series of specification defects that caused overlapping problems and augmented them.

Regarding defective earthwork specifications, first, the contract stated that "[t]he vertical accuracy of the ground elevations is ± 0.25 feet, subject to standard industry tolerances" (FF 11). Bidders were invited to verify this at their expense. Industry standard is that 80 percent of all elevations must be within the required accuracy (FF 104). FC had inserted the bidder verification language because it had had prior bad experience with inaccurate aerial surveys and earthwork problems and wanted to put the onus upon the contractor, should such difficulties occur on this Project (FF 98). However, BOR's Chief of Construction acknowledged that this was unreasonable and deemed the "+ 0.25 feet" representation to be "an express warranty as to the accuracy of the original ground profile" (FF 42).

Earthwork elevations did not approximate the ± 0.25 feet warranty. They were inaccurate at random throughout the 14-mile-long Project, by as much as 4 feet at one point, and never consistently or predictably. The erroneous elevations impeded every aspect of the earthwork, including trenching, lining and structures (FF 53, 56, 69.U.—71.0., 112, 149, 155, 157, 160, 161.U., 162, 167-69, 171-72, 175).

Second, in bidding and planning, Hardrives had relied upon the specifications, including FC's computer printout describing the amount of material to be excavated and

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the amount of fill at all points along the Canal. MRT did not rely upon the printout, but relied upon other specifications containing essentially the same information. The cut/fill ratio, or "shrink factor," portrayed in these contract documents was inordinately high, strongly suggesting to a reasonable bidder that shrink would be less than indicated and borrow would underrun the estimated quantity, as Hardrives judged. It priced its borrow and related bids accordingly without inquiring of BOR or FC about shrink. According to expert Duin, this was, in effect, balanced bidding and the prudent thing to do. MRT did not rely upon a shrink factor, per se, in evaluating its projected job costs, but relied upon the contract's borrow estimate, which incorporated that factor (FF 36U., 37, 39, 40.U., 41, 74.U., 75.U., 76, 79, 80.U., 82.U.).

Shrink is often a matter of judgment. There is no evidence that any bidder inquired of FC or BOR about it. Under the circumstances, we find that Hardrives did not have a duty to inquire and reasonably concluded that the cut/fill ratio was high. Indeed, had the correct ratio been used in the contract, but for the other erroneous specifications, borrow would have underrun the estimated quantity, just as Hardrives had anticipated (FF 76, 78).

However, unrevealed to bidders, and without notice to Hardrives even after it had notified FC about elevation inaccuracies, FC deliberately had overstated the cut/fill ratio and, thus, in its belief, the borrow estimate, in a misguided attempt to protect itself against administrative difficulties should borrow be greater than it actually anticipated. In fact, despite this undisclosed manipulation, the contract's borrow estimate proved materially understated (FF 76, 78, 83.U.).[13]

FC exacerbated the borrow problem by providing Hardrives with exceedingly high revised borrow estimates during the job. Moreover, at the time, FC's own internal estimate, while then higher than the contract estimate, was considerably lower than the changing estimates given to Hardrives. FC never did supply Hardrives with an analysis of earthwork quantities using an accurate shrink factor. This affected evaluation of work performed, projection of additional work, payment, planning, selection and location of borrow areas, and anticipated haul routes. FC and BOR admitted the importance of an accurate shrink factor at hearing and BOR's then chief of APO's major claims' branch conceded that the use of the high shrink factor resulted in FC's providing Hardrives with misleading information. We base our determinations not upon the shrink factor, itself, but upon the resulting, continuously misleading borrow figures given to Hardrives from the outset of the contract (FF 78, 81.U., 83.U., 84.U., 85).

Third, the contract states that "[p]ayment for earthwork items will be made to the neat line dimensions shown on the plans and the quantities in the bid schedule" (FF 11). FC, however, again without notice to bidders, and without notice to Hardrives even after it had notified FC about the ground profile inaccuracies, deliberately had lowered the elevation of existing ground in the specifications by a quarter of a foot at all locations. BOR could not recall any other project where this had been done. The lowering affected the accuracy of unit prices, pay quantities (particularly excavation for canal and compacted embankment) and job planning (FF 86.U., 87, 88.U.-90.U., 91).[14]

Other contract representations proved inaccurate: there were discrepancies in embankment slopes; Borrow Area C, due to the imposition of new conditions upon its use and FC's failure to resolve the problem, was not made available in the manner represented; and unforeseen, very hard, caliche was encountered subsurface, when the contract had indicated only partially, weakly, or moderately cemented materials (FF 7, 8, 92-94). We consider the slope discrepancies and borrow area problem to be part of the many contract changes. The caliche constituted a "Type I" differing site condition under section (a)(1) of the Differing Site Conditions clause (FF 30); *Stuyvesant Dredging Co. v. United States* [34 CCF ¶ 75,414], 834 F.2d 1576, 1580-81 (Fed. Cir. 1987). These impediments occurred in combination with the contract errors addressed above and, under the applicable clauses, the measure of damages and delay is the same.

[13] Although the VEQ clause might provide redress under other circumstances, BOR did not use it in its quantum analysis at hearing or raise it in briefing and we find that it does not apply here, where the specifications clearly were defective.

[14] BOR claimed in briefing, but did not prove, that the artificial lowering of existing ground benefitted Hardrives because it increased pay quantities for excavation for canal. Regardless, it was the fact that the contractor believed that it was working from neat lines based upon existing ground levels, and so bid and planned its job, that was detrimental.

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Therefore, we have not segregated them in our quantum analysis.

BOR concedes that the contract's earthwork elevations were erroneous and that this resulted in increased costs. It disputes the impact of the errors and the amount of the costs (BOR's Brief at 1, 48). It is abundantly clear, however, that the earthwork specifications were so defective that they adversely affected Hardrives' and its subcontractors MRT's and Valley Ditch's bidding, planning, management, and conduct of the contract work in a major, material, delay-inducing, and costly manner.

When defective specifications cause extra work, extra costs, and delay, the contractor is entitled to recovery. Although its theories have changed from time to time, Hardrives now appears principally to invoke breach of contract. Defective specifications may be considered a breach of contract or a constructive change under the Changes clause. Boards typically rely upon the latter, continuing to apply the doctrine that developed pre-CDA, when Boards did not possess jurisdiction to consider breach claims, as we now do. *See* Rand L. Allen and Jeffrey M. Villet, "Implied Warranty of Specifications," Briefing Papers No. 91-8 (Federal Publications July 1991); *La Crosse Garment Manufacturing Co. v. United States* [15 CCF ¶ 83,673], 432 F.2d 1377, 1384 (Ct. Cl. 1970); *L.W. Foster Sportswear Co. v. United States* [13 CCF ¶ 82,493], 405 F.2d 1285, 1290 (Ct. Cl. 1969); *Pathman, supra,* 81-1 BCA ¶ 15,010 at 74,263. The Interior Board previously has applied the constructive change doctrine to defective specifications. *Gracon Corp.,* IBCA No. 2271, 89-1 BCA ¶ 21,232 at 107,100.

Indeed, the Federal Circuit recently stated that "contingencies contemplated by various contract clauses are remedial under those clauses * * * not as a breach of the contract." *Triax-Pacific v. Stone,* 958 F.2d 351, 354 (Fed. Cir. 1992). In *Triax-Pacific* the contractor had appealed from a Board decision denying its claims based upon the government's delay in issuing a notice to proceed. The Board had determined that the delay was due to the contractor's delay under a predecessor contract and was not compensable under the second contract's Changes or Suspension of Work clauses or as a breach of contract. The court of appeals reasoned that because a delay, and not a change, was at issue, the Suspension of Work clause applied to bar the contractor's claims, due to its responsibility for the delay, and that the Board did not err in concluding that there was no breach of contract remedy.

The "constructive" change doctrine, however, recognizes that defective specifications are not covered explicitly by the Changes clause. Moreover, *Triax-Pacific* relied upon *Johnson & Sons Erectors Co. v. United States,* 231 Ct. Cl. 753, *cert. denied,* 459 U.S. 971 (1982), which involved a pre-CDA contract and appeals brought under the Wunderlich Act, 41 U.S.C. § 321, and the CDA. In *Johnson,* the court affirmed the long-standing pre-CDA principle, discussed by the ASBCA at length in the underlying appeal, *Johnson & Son Erectors, Co.,* ASBCA Nos. 23689, 24564, 81-1 BCA ¶ 14,880, *aff'd on recon.,* 81-1 BCA ¶ 15,082, that claims remedial under contract clauses are to be so adjudicated, and not as contract breaches. The court recognized, nonetheless, that defective specification, and other claims, could amount to breach claims under some circumstances (231 Ct. Cl. at 759).

Hardrives did not assert breach during performance and completed the work, including after MRT was forced to default (FF 143; *see Johnson,* 231 Ct. Cl. at 757 ("A contractor having a breach issue not so compensable [under the contract] may be obliged to declare the contract at an end and cease performance in order to avoid a waiver and save its rights.") In any event, here, we conclude that the defective specifications constituted a constructive change and that the contract provides appropriate redress under the Changes clause, which entitles appellant to an equitable adjustment in money and time. Accordingly, we do not reach appellant's various breach claims.

In grounding our remedy in the Changes clause, we do not suggest that Hardrives was required to take the risky course of ceasing work in order to assert breach, or that it would have been warranted. The full extent of the defective earthwork specifications, the contract mismanagement, and their impact, was not known until work was complete (*see* 4A McBride & Wachtel, Government Contracts, § 31.20[1] ("Generally, the doctrine that election to perform waives a breach is limited to those instances in which a party continues performance in spite of a known excuse. If at the time of the supposed election the excuse was not known, the doctrine will not apply"). We do not reach those issues.

[2] In addition to the defective earthwork-related specifications, specifications affecting structures work also were defective, including those eventuating in PSR 19 (FF 239), resulting in constructive changes for which appellant is entitled to an equitable

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adjustment in money and time under the Changes clause (FF 177, 178.U., 179.U., 180, 181, 191.U., 199.U.).

[3] BOR admits that FC administered the contract poorly (FF 235). In fact, contract administration was egregious. FC, replete with inexperienced personnel with no authority to resolve problems, and burdened with conflicts of interest, did not do the job. BOR did not timely intercede, although it had the right to do so under its memorandum of understanding with the District and under the contract. It also had the duty to do so, as the entity which had contracted with Hardrives. Instead, BOR aggravated matters by failing to investigate problems when they occurred and by declining to intervene (FF 2.U., 72.U.; 113.U., 137, 144, 148, 150-51, 183.U.-185.U.).

The contract misadministration, in its multiple aspects, is delineated in our fact findings. Summarized:

(1) Despite notice of elevation accuracy problems from the aerial surveyor before the contract design was complete; additional notice from its own prior bad experience with aerial surveys and from its internal review before contract work began; and further notice from Hardrives immediately upon Hardrives' and MRT's discovery of problems in the field; FC allowed the contract to issue, allowed the work to commence, and directed that it continue. FC also did not arrange for an available, more accurate, aerial survey. It slowly conducted a resurvey itself and did not provide new information (still inaccurate) until months into the Project (FF 62.U., 65.U., 66, 67.U., 68, 106, 108.U., 109, 110.U., 111.U., 114.U.).

(2) Similarly, with respect to the discrepancies and defective specifications affecting structures, FC was painfully slow to respond, sometimes making resurveying necessary. Hardrives and MRT had to wait several days, or weeks, to obtain a solution from FC's home office, even for discrepancies that could have been handled in the field (FF 183.U., 186.U.).

(3) When Hardrives discovered that a structure, as designed, would have blocked part of an irrigation district's O & M road, it immediately proposed a no-cost solution, but FC instructed it to proceed as designed. Only when the irrigation district protested did FC issue a PSR. FC ultimately decided upon the solution Hardrives had proposed at the outset, but it took it at least 10 months to issue a change order to perform the work (FF 191.U.-193.U., 195).

(4) Hardrives found a contract discrepancy, which BOR acknowledges was due to inadequate or defective specifications, and on July 29, 1986, FC transmitted PSR 19 replacing five broken back structures with check and pipe inlet structures. BOR admits that Hardrives did not receive clear direction on how to proceed until January 22, 1988, about one and one half years later, even though the contract's other structures were 95 percent complete at the end of September 1987, and FC knew that Hardrives was waiting for direction on the five check and pipe inlets (FF 196.U., 197.U., 199.U., 201.U., 202, 208.U., 212.U., 221.U., 223).

(5) FC and BOR issued 48 PSR's. Even when, as with PSR 19, FC and BOR eventually razed the revisions as contract changes, and changes due to defective specifications, FC required Hardrives to submit proposals before it would issue change orders directing the work (FF 122, 184.U., 187.U., 189.U., 193.U., 199.U.). FC and BOR blame some Project delay upon Hardrives' alleged slow, or inadequate, proposals. Appellant though, without challenge from BOR in briefing, that the Changes clause (FF 28) did not obligate it to respond to requests for proposals from BOR or FC.

The 1984 version of the Changes clause in this contract is derived from FAR 52.243-4 (APR 1984) (48 CFR 52.243-4) (1986). It mandates that, when a change causes an increase in a contractor's cost or time of performance, the contracting officer "*shall* make an equitable adjustment and modify the contract" (§ I.4.5(d)(emphasis added). Proposal submission is linked to the issuance of a change order or, when there has not been an acknowledged change, to a contractor's claim that one has occurred. The clause implies that the submission of a proposal is elective:

> (e) The Contractor must submit *any* proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above [that a change has occurred], by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal * * *. [Emphasis added.] [15]

[15] The version of the Changes clause used in this contract was changed in 1987 to provide that:

> "(e) The Contractor *must assert its right to an adjustment* under this clause within 30 days after

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§ I.4.5(e). Similarly, the contract's Change Order Accounting and Contractor Proposals clauses (FF 29) refer to the submission of "any" proposal.

Case law is to the sane effect. In denying a contractor the costs of preparation of a proposal sought by the Government, which the contractor withdrew when the Government failed to take prompt action, the Armed Services Board of Contract Appeals (the ASBCA) noted:

> *The establishment of a price is not an essential part of the issuance of a unilateral order directing a change under the changes clause but may be a matter for subsequent agreement or resort to the disputes procedure.*
>
> On the facts it is evident that all the contracting officer did was invite or solicit an offer by appellant which, if accepted by the Government, would result in a bilateral supplemental agreement for performance of the proposed additional work for the offered price, rendering any action under the changes clause unnecessary. *Appellant, therefore, was not under any contract obligation to submit the requested proposal.* [Emphasis added.]

Greenhut Construction Co., ASBCA No. 14354, 70-1 BCA ¶ 8209 at 38,164. *Accord Campus Construction Co.*, VABCA No. 3019, 90-3 BCA ¶ 23,108 at 116,012; *George E. Jensen Contr., Inc.*, GSA No. 3260, 71-1 BCA ¶ 8850.

The ASBCA, in allowing a contractor to recover for Governmental delays in responding to a differing site condition design solution proposed by the contractor at the Government's request, addressed the issue of whether a contractor is obliged to respond to such requests:

> Once the contractor notified the Government of the problem it had encountered the ball was in the Government's court and it had an obligation to tell appellant what the Government wanted done about the situation. The Government was not free, under this differing site conditions situation, to task the contractor with proposing a solution to the problem without issuing a proper directive under the authority of the Changes clause * * * the [Assistant Resident Officer in Charge of Construction] did not issue a directive under the Changes clause which the contractor would have been obliged to follow even if it did not agree with the order. * * * This was a request not a directive even though the words "proposal" and "change order" were used.

GB&E Electrical Contractors, ASBCA No. 34026, 87-3 BCA ¶ 20,119 at 101,874-75.

The ASBCA has not confined the reasoning expressed in *GB&E* to differing site condition situations. In *Pilcher, supra*, a case analogous to this one, an A/E had prepared specifications which proved defective and Governmental delays in remedying the problem ensued. The ASBCA found:

> Much of the delay and expense experienced by the contractor as a result of inadequate and defective specifications could have been avoided if the Exchange representatives had recognized their responsibility for providing the contractor with correct and adequate specifications and taken prompt action to correct deficiencies in the specifications promptly after they had been reported by appellant. Instead, when appellant reported a problem the general practice of the COR and his inspection staff was to impose on appellant the burden of working out a proposed solution to the problem, submitting a shop drawing, showing the proposed solution, and getting it approved by the COR, which was time consuming *and was not the contractual responsibility of the contractor.* The Board has held many times that a contractor is entitled to a price adjustment under the Changes or Suspension of Work clauses for increased expenses resulting from the failure and refusal of the Government to acknowledge specification deficiencies and take prompt action to correct them. [Emphasis added.]

70-1 BCA ¶ 8331 at 38,764.

In another analogous case, the contractor was waiting for a design solution from the Navy to defective specifications. The Navy instead requested proposals from the con-

(Footnote Continued)

(1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above." (Emphasis added). (FAR 52.243-4 (Aug. 1987)) (48 CFR 52.243-4) (1988). The submission of a proposal still is linked to receipt of a change order or to a claim that one has issued. We render no opinion about whether this clause obligates a contractor to respond to requests for proposals when an acknowledged change has occurred.

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tractor and, like here, sought its signature on modifications which the contractor interpreted to require a release of its delay claims. Again like here, the Navy acknowledged that it could have issued a unilateral modification when negotiations for a bilateral one proved unfruitful. The Claims Court held:

> Defendant asserts that any critical path delay attributable to the Navy because of the duct work delay does not end beyond the date on which the Navy authorized plaintiff to proceed with the duct revision work * * *. Plaintiff contends that the delay attributable to the Navy continued until plaintiff received a change order for the work * * *. "[A] change authorization is not a change order * * *" *J.D. Hedin Constr. Co. v. United States* [10 CCF ¶ 73,076], * * * 347 F.2d 235, 252 (1965) (delay attributable to Government did not end until change order was issued). A contractor is not obligated to proceed until a change order is issued. *Id.* Therefore, delay attributable to the Navy continued until plaintiff received the change order for the work.

Wilner v. United States [37 CCF ¶ 76,330], 26 Cl. Ct. 260, 275 and n. 14 (1992), *aff'd*, 994 F2d. 783 (Fed. Cir. 5/24/93).

We conclude that, under the applicable 1984 Changes clause, and under the facts, when BOR recognized that contract changes had occurred, and admitted that it could have issued unilateral change orders directing that the work proceed, with cost and other negotiated matters to be resolved later, Hardrives had no contractual obligation to comply with FC's repeated requests for proposals (FF 223.U., 224).

Hardrives, nevertheless, attempted at first to comply as promptly as possible. However, FC frequently rejected its proposals. If a proposal were unacceptable to FC, it would not act upon the underlying matter. If it were acceptable, FC and/or BOR continued to try to force Hardrives to execute, or to be subject to, modifications containing provisions that Hardrives already had explained it disputed (FF 122, 123.U., 124-26, 193.U.).

Hardrives had been able to negotiate modifications successfully with BOR on the Kleck Road Turnout portion of the contract, when FC was not involved. On the Canal portion of the job, BOR largely abdicated responsibility to FC. When matters were disputed, FC and BOR either left work undone or, even when the contractor had completed work described in several modifications, refrained from paying for it (FF 126-27, 224).

With multiple problems and growing impact that was impossible to quantify contemporaneously, Hardrives' concerns were legitimate and FC's and BOR's requirements and actions were unreasonable.

(6) For about a year, without providing the proper format, FC had Hardrives do the paperwork for the submission of monthly pay vouchers, which were FC's responsibility. Although, contrary to its assertion at hearing, Hardrives was responsible under the Administration of Payments clause for providing lien waivers for on site materials (FF 374, 375), waivers were required for only a few of the pay items. FC did not forward any portion of the vouchers, including items pertaining to the Kleck Road Turnout, until Hardrives had satisfied all of its requests for changes or additional information, although it could have arranged for a modified voucher, omitting disputed or pending items, or sent the vouchers to BOR, noting areas of disagreement (FF 385).

Additionally, aware of MRT's reasonable claim that it was doing considerable extra work, and that MRT was in dire need of cash flow, FC raised Hardrives' and MRT's expectations of payment, stating that it would occur soon, and that retainage would be reduced. Despite FC's representations, it continued to fail to process vouchers promptly; threatened to hold payments when Hardrives protested the use an inaccurate computer run for pay purposes; and affirmatively blocked retainage reduction (FF 117-19, 121, 133, 136, 137, 379.U., 380-89).

(7) FC delayed, and did not make an objective effort to evaluate Hardrives' and MRT's problems and claims during the job, and during the formal claims process, defying BOR's directions on more than one occasion. BOR acknowledges that the process of having FC evaluate claims was not objective (FF 130, 132.U., 133, 135.U., 137, 138, 140.U., 142-44, 147-51, 234.U., 236.U.).

The question arises as to whether the delays associated with correcting defective specifications, and otherwise identified above, are remedial as contract breaches, or under the Changes clause, or under the Suspension of Work clause.

In *Chaney & James Construction Co. v. United States* [14 CCF ¶ 83,407], 421 F.2d 728 (Ct. Cl. 1970), a Wunderlich Act appeal from a board decision, when boards did not have breach jurisdiction, the court agreed with the contractor that delays due to defec-

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tive specifications could be compensable under the Suspension of Work clause, as an administrative substitute for a breach claim. That clause (FF 31b.) provides for some recovery for certain delays attributable to the Government. The court of appeals in *Triax-Pacific, supra*, stated that "[i]n this case, the Suspension clause contemplates equitable adjustments for unreasonable delays in the performance of the contract." 958 F.2d at 354. Although our review of cases reflects that the court is not alone in referring to "equitable adjustments" under the Suspension clause, in fact, in contrast to other remedial clauses, that clause literally refers only to an "adjustment" and excludes profit (*see The Government Contractor*, Vol. 34, No. 14, ¶ 210 at Note (4/8/92)).

In *Pilcher, supra* in addition to converting the default termination of the contract to a termination for convenience, the ASBCA also awarded separate compensation for the Government's unreasonable delays in rectifying design problems. The Board indicated that either the Changes or the Suspension of Work clause could cover the delay award, and it is unclear which of them it applied. More recently, the ASBCA appeared to except change order delays originating with defective specifications from coverage under the Suspension of Work clause: "*Except for delays resulting from defective specifications*, however, delays preceding the issuance of a change order are not compensable under the Changes clause, but are instead under the Suspension of Work clause." *Vic Lane Construction, Inc.*, ASBCA No. 30305, 85-2 BCA ¶ 18,156 at 91,146 (emphasis added). Consistently, in *M.E. McGeary Co.*, ASBCA No. 31700, 86-3 BCA ¶ 19,038 at 96,156, the ASBCA allowed recovery for the "protracted period of time over which appellant was developing proposals in the absence of a change order" and appeared to do so under the Changes clause—both because that was the only clause discussed end because the Board allowed profit as part of the recovery.

Moreover, in *La Crosse, supra*, decided the same year as *Chaney & James*, the Court of Claims held a contractor entitled to recovery under the Changes clause for defective specifications and included in its analysis recovery for delays in curing the defects. In remanding the case to the Board to allow quantum proof, the court noted:

> It is hard to believe that a contractor has not been "unduly delayed" when numerous substantial defects in the Government's drawings go unresolved, despite constant efforts, for almost the life of the contract, because of a breakdown in communication among the elements of the procurement system charged with responsibility for correcting the defects.

432 F.2d at 1385.

In contrast, although we are not bound by Claims Court rulings, as we are by those of the court of appeals, in a case where defective specifications were at issue, the Claims Court held that the Government's alleged unreasonable delays in issuing modifications under the Changes clause were covered by the Suspension of Work clause. *Beauchamp Construction Co. v. United States*, 14 Cl. Ct. 430 (1988).[16]

Here, BOR has not invoked the Suspension of Work clause, and has included profit in its delay quantum analyses presented to the Board. We find, in any event, that the combined effects of FC's and BOR's foregoing actions and failures to act amount to more than Government-caused delays under the Suspension clause. Instead, they constitute a breach of the duty to cooperate inherent in all contracts. We have articulated the standards for such a breach:

> In the realm of Government contracts, in determining whether there has been any Governmental breach of [the duty to cooperate] the court of appeals, Boards, and Claims Court largely have applied a standard of willful, negligent, or unreasonable interference with, or hindrance of, a contractor's performance. This includes unreasonable administration of a contract amounting to material breach; or unreasonable delay by the Government in meeting some obligation it was required by the contract to fulfill.

[16] *See also Atlas Contractors, Inc.*, ASBCA Nos. 34545, 34761, 88-1 BCA ¶ 20,225 (A contractor alleged Governmental delay in providing direction after an omission in the contract drawings was discovered. Without addressing whether the specifications were defective, the Board held that the Suspension clause applied, found concurrent delay by the contractor, and denied recovery. In applying the Suspension clause, the Board cited *Vic Lane, supra*, but did not focus upon that panel's defective specifications distinction.) *See also Berrios Construction Co.*, VABCA No. 3152, 92-2 BCA ¶ 24,828 at 123,874 (Delays in remedying a differing site condition were deemed covered by the Suspension of Work clause. The Board found it significant that, if the contractor had prevailed in its contention that the Differing Site Condition clause governed its delay claim, a Supplemental Changes clause in its contract might have precluded any recovery.)

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Blaze Construction Co., IBCA No. 2863, 91-3 BCA ¶ 24,071 at 120,504 (collecting cases.)

The tribunals have allowed contractors to recover for breach of the duty to cooperate either as a breach of contract (especially when a contractor is defending against a default termination—*see Malone v. United States* [34 CCF ¶ 75,508], 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Kahaluu Construction Co.*, ASBCA No. 31187, 89-1 BCA ¶ 21,308 at 107,465), or as a constructive change under the Changes clause *(R&B Berwachungsgesellschaft mbH*, ASBCA Nos. 42213, *et al.*, 91-3 BCA ¶ 24,310 at 121,495; *Cinusa Constructors, Inc.*, ENG BCA No. 4637, 85-3 BCA ¶ 18,258; *Johnson & Son Erectors*, opinion below on reconsideration, *supra*, 81-1 BCA ¶ 15,082; *see also John C. Grimberg Co. v. United States*, 869 F.2d 1475 (Fed. Cir. 1989) (refusal to grant Buy American Act waiver was abuse of Government's administrative discretion under contract and amounted to a constructive change). As with defective specifications, in a previous case involving Government interference with the contractor's performance, the Interior Board fashioned its remedy under the contract (albeit via a constructive partial termination for convenience), rather than finding a contract breach. *R & R Enterprises*, IBCA No. 2417, 89-2 BCA ¶ 21,708 at 109,156.

Here, we find that the constructive change doctrine is appropriate and that appellant is entitled to an equitable adjustment in money and time under the contract's Changes clause.

[4] To sustain the delay aspects of its claims, including those associated with the breach of the duty to cooperate, appellant must prove that (1) the specific delays were due to Governmental actions or inactions; (2) the overall completion of the Project was delayed as a result; and (3) appellant was not responsible for any delays that delayed overall contract completion concurrently with the Government-caused delays. *Commerce International Co. v. United States* [9 CCF ¶ 72,781], 338 F.2d 81 (Ct. Cl. 1964); *Rivera Construction Co.*, ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 at 104,855-56; *Pathman, supra*, 81-1 BCA at 74,267.

"[A]ll delay due to defective or erroneous Government specifications are [sic] *per se* unreasonable and hence compensable." *Chaney & James*, 421 F.2d at 732. Appellant submitted ample, convincing, documentary evidence and credible testimony, including expert analysis, and proved by a preponderance of the evidence, that the Project was delayed due to the defective earthwork and structural specifications. It submitted the same sort of proof that the Project additionally was delayed unreasonably due to contract misadministration and the breach of the duty to cooperate.

Appellant has established that 370 days of the 373-day Project delay are attributable to BOR, and not to it or to its subcontractors. It showed that, of the 370 delay days, 149 were due to the earthwork problems resulting from the defective specifications and 221 to the balance of the Governmental-caused problems. (See detailed findings above and FF 166, 240.) We find appellant's proof to be specific enough under the facts of this appeal, where there were many concurrent, overlapping, continuous causes of delay attributable to BOR. As another Board noted, in awarding a contract time extension and equitable price adjustment for an extended performance period under similar circumstances:

> Where so many delays occurred with concurrent or overlapping or consecutive time spans, all attributable to the Authority, the right to relief is not defeated merely because it is impossible neatly to separate the intertwined incidents and establish a specific critical impact for each. The present case is an appropriate one to be decided by the often disdained "total time" method.

Norair Engineering Corp., ENG BCA Nos. 3804, *et al.*, 90-1 BCA ¶ 22,327 at 112,209.

Appellant provided well-supported as-planned versus as-built evidence, including expert critical path analysis, in proving that it could have completed the Project essentially on time, but for the problems for which BOR is responsible. While Hardrives and its subcontractors did not utilize formal critical path method scheduling, they did start with a general, on-time schedule and work plan. Hardrives, though, was never able to follow the sequential operation it had planned in the time frame it had scheduled due to the specification errors and severe administrative problems (FF 53-55, 56.U., 155-157, 159, 160, 161.U., 162, 166-72, 174.U., 175, 176, 177, 186.U., 188.U., 189.U., 190, 193.U., 196.U., 201.U., 204.U., 208.U., 211, 212.U., 221.U., 222.U., 224, 240). Any more precise schedule, thus, would have had to have been abandoned in any case. *See John Driggs Co.*, ENG BCA Nos. 4926, *et al.*, 87-2 BCA ¶ 19,833 at 100,388. ("The occurrence of a significant delay generally will affect related work, as the contractor's attention turns to overcoming the delay rather

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than slavishly following its now meaningless schedule.")

Once appellant met its burden, BOR, unlike the Government in *Chaney & James*, for example, did not provide persuasive countervailing proof. It did not establish that Hardrives could not have completed the job on time even if there had been no defective specifications or the other delaying factors chargeable to BOR. *See John Driggs, id.* It did not prove that equipment breakdowns, or other delays for which the contractor may have been responsible, were extraordinary; or caused overall Project delay; or that FC or BOR sought any remedial action during the contract on account of any such alleged delays. To the contrary, contemporaneously, BOR's and FC's field personnel recorded that Hardrives and its subcontractors were doing good work. BOR's inspector Canez and FC's inspector Stanley so testified at hearing. FC's project manager Hodges provided no testimony to the contrary. Mr. Canez was critical of FC, on the other hand (FF 166, 175).

Although, after the contract due date, BOR issued a show cause notice concerning sealant placement, that involved a disputed requirement. Hardrives, nonetheless, had purchased the sealant before the notice and had been prepared to place it when the Canal was ready for it. The delays in readiness were caused by FC and BOR, not by Hardrives or MRT (FF 357-59). The other cure notice was not issued until well after the contract due date, and long after structures work was 95 percent complete. Moreover, BOR issued it at a time when Hardrives still had not received authorization to proceed with the PSR 19 work, which included structures on the Project's critical path. The cure notice items either were attributable to FC or BOR-caused problems, or were incidental items planned for the end of the Project and quickly completed. BOR's contemporaneous evaluation of the situation is best reflected in the facts that it released retainage in full and did not assess liquidated damages (FF 171, 185.U., 208.U., 211, 212.U., 221.U., 222.U., 225, 227.U., 228, 229.U., 230.U., 232).

Further, BOR offered no explanation for the absence of certain significant witnesses and we draw some adverse inference that their testimony would not have been helpful. *See Brunner Bau GmbH*, ASBCA Nos. 35678, 37526, 91-3 BCA ¶ 24,051 at 120,410; *Warwick Construction, Inc.*, GSA No. 5070, *et al.*, 82-2 BCA ¶ 16,091 at 79,852-53. At a minimum, countervailing, credible, proof by key individuals involved in the Project was missing. Also, unlike appellant, BOR did not offer any expert testimony or analysis. Finally, we have resolved all relevant credibility issues in favor of appellant (FF 238).

For all of the foregoing reasons, appellant is entitled to a contract time extension of 370 days and associated delay damages.

[5] Hardrives has presented its proof of quantum on a modified total cost basis, segregating from its claimed costs for earthwork, structural work, and contract mismanagement, some costs for which it acknowledges responsibility. While not favored, total cost, or modified total cost, proof is acceptable under limited circumstances, as here, where there were concurrent, overlapping, and continuous problems and delays chargeable to the Government, for which it is virtually impossible, or highly impracticable, to segregate the costs and impact. *J. D. Hedin, supra*, 347 F.2d at 246-47. *Accord Tyroc Construction Corp.*, EBCA No. 210-3-82, 84-3 BCA ¶ 17,621 (total cost method applied when, like here, extra work was difficult to segregate from expected work); *Robert McMullan & Sons, Inc.*, ASBCA No. 19129, 76-2 BCA ¶ 12,072 at 57,962 (total cost method applied when, like here, there was no period of performance free of problems); *Sovereign Construction Co.*, ASBCA No. 17792, 75-1 BCA ¶ 11,251 at 53,606 (total cost method applied when, like here, there were Government-caused work inefficiencies and the Board found it impossible to make a direct measurement of inefficient work); *Concrete Placing Co. v. United States* [37 CCF ¶ 76,267], 25 Cl. Ct. 369, 377-78 (1992) (court allowed contractor to change proof at trial from actual costs previously claimed to total cost method because of difficulty, as here, in distinguishing between work caused by defective specifications and work covered by bid).

To recover under a total cost approach, after proving BOR's liability, Hardrives must show: "(1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citation omitted). We have found that Hardrives has satisfied all four elements (*see, e.g.*, FF 249, 251-59, 261, 263, 275), and have discussed items (1) and (4) above.

Regarding Hardrives' bid, in assessing reasonableness, we will consider such elements

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as the estimator's experience, comparison with other responsive bids, and whether the Government questioned the bid at the time of submission. *See J. D. Hedin*, 347 F.2d at 247; *Akcon, Inc.*, ENG BCA No. 5593, 90-3 BCA ¶ 23,250 at 116,662; *Hewitt Contracting Co.*, ENG BCA Nos. 4596, 4597, 83-2 BCA ¶ 16,816 at 83,643. Prepared by experienced estimators, Hardrives' bid was only 9.3 percent lower than the second lowest bid and was 3.3 percent higher than BOR's estimate. There is no evidence that BOR questioned the bid contemporaneously. Mr. Duin, who was recognized as an expert in estimating (FF 80.U.), also established that the bid was reasonable. BOR's attempt to refute that expert analysis was not persuasive in any respect. There is, thus, substantial evidence that Hardrives' bid was reasonable and we so found (FF 249).

Concerning the reasonableness of costs, BOR alleges that there is no presumption of reasonableness and that Hardrives has the burden of proof. BOR cites to FAR 31.201-3(a), which has so provided, effective May 27, 1987. Under the Pricing of Adjustments clause, however, the applicable FAR provisions are "those in effect on the date of this contract" (FF 29). In 1986, when this contract issued, the FAR, then 31.201-3 (48 CFR 31.201-3 (1986)), did not state that there was no presumption of reasonableness. Rather, it stated that a cost was reasonable if it did not "exceed that which would be incurred by a prudent person in the conduct of competitive business." Case law at the time of the contract was that incurred costs were presumed to be reasonable:

> The Board views actual costs incurred in the performance of changed work as the single, most reliable measure for the required price adjustment not only because *the* costs are "historical" but because, by their very incurrence, they raise the presumption of reasonableness. This presumption controls unless it is proved, by a preponderance of the evidence, that the costs were unreasonable.
>
> *Hewitt, id.* (collecting cases).

Regardless, Hardrives provided a preponderance of evidence that its costs, and those of its subcontractors, were reasonable and we have so found (FF 261). BOR did not offer persuasive contradictory evidence. We have given the Interior Department's IG audits, and the auditors' testimony, little weight due to their questionable objectivity (FF 252), and have used them sparingly. *See Delco Electronics Corp. v. United States* [35 CCF ¶ 75,679], 17 Cl. Ct. 302, 323, 327-29 (1989). (Governmental audit evidence found flawed and of questionable objectivity because audits were prepared with express purpose of defending against claim and were contrary to earlier determinations that claim largely had merit. Claims Court found recovery allowable under either modified total cost approach or jury verdict.)

For the foregoing reasons, we have accepted appellant's modified total cost approach to its quantum proof.

[6] The parties dispute the proper manner of computing certain equipment ownership costs. The contract's Equipment Ownership and Operating Expense clause (FF 32) provides that these costs are to be calculated using the 1974 yellow book. That book provides that it is intended as a guide only, subject to adjustment for an individual contractor's experience. Expert testimony was that the book is outdated and that ownership rates derived from its tables are low, while its operating rates are high. BOR's witnesses for the most part corroborated that testimony and conceded, that, for settlement purposes, BOR "almost always" uses the 1986 AGC rates for ownership expenses.

In its quantum presentations at hearing, BOR used the yellow book to determine ownership expenses but the 1986 AGC rates for operating expenses. Expert testimony was that this is unbalanced and inequitable. Appellant used 1986 AGC rates for both ownership and operating expenses. Those rates were significantly lower than the rates charged by independent equipment rental companies in the area during 1986-87 (FF 402, 403).

Because the contract calls for the use of the yellow book, however, the identified problem with it would not persuade us to do otherwise but for the facts that: BOR instructed during the contract that the 1986 AGC rates were to be used; Hardrives changed its proposal method and adapted its computer system accordingly; FC prepared draft modifications accordingly; and BOR's contracting officers reviewed and approved modifications accordingly (FF 402). We thus deem BOR to have waived the contract's yellow book provision. The 1986 AGC rates, which the contracting officers, by their instructions and actions, previously had agreed were reasonable and should be used, are appropriate for our equitable adjustments. *See Southland Enterprises, Inc. v. United States*, 24 Cl. Ct. 596, 604 (1991).

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[7] Appellant has used the now well-known formula set forth in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894, to compute its unabsorbed home office overhead. Neither party briefed the *Eichleay* intricacies, although appellant addressed its factual underpinnings in its proposed findings. The Federal Circuit recently reviewed the genesis and offspring of *Eichleay*. In affirming the Claims Court's determination that the *Eichleay* formula should not be applied in a case where a contract modification provided for extra work and a time extension for a brief, known, period of time, the court concluded: "[C]omputation of extended home office overhead using an estimated daily rate is an extraordinary remedy which is specifically limited to contracts affected by government-caused suspensions, disruptions and delays of work." *C.B.C. Enterprises, Inc. v. United States* [38 CCF ¶ 76,395], 978 F.2d 669, 675 (Fed. Cir. 1992). In addressing the appropriate use of the *Eichleay* formula, the court focused upon the element of uncertainty engendered by disruption, suspension or delay of contract performance and cited with approval cases including ones where the Government's inaccurate estimate had caused delay that was unforeseeable and beyond the control of the contractor; the duration of delays was uncertain, so the contractor could not divert to other work; it was virtually impossible to trace the effect of each separate delay; and where changes continued throughout construction.

When a contractor meets its burden to prove that compensable delay occurred, and that it could not undertake other jobs during the contract period, the burden shifts to the Government to show that the contractor would suffer no loss by using a fixed percentage mark-up formula. *C.B.C*, 978 F.2d at 673-74, *citing Capital Electric Co. v. United States* [31 CCF ¶ 72,119], 729 F.2d 743, 745-46 (Fed. Cir. 1984); *accord Community Heating & Plumbing Co. v. Kelso* [38 CCF ¶ 76,488], 987 F.2d 1575, 1582 (Fed. Cir. 1993).

Here, we have found Hardrives entitled to 370 days of compensable delay. Those delay days are all beyond the original contract performance period. We have found that the job changed repeatedly and unpredictably (FF 155, 157, 159, 247, 248.U.); that non-segregable inefficiencies occurred (see FF 248.U., 263, 275); that Hardrives was not able to reduce its administrative staff as it generally does during the winter seasons and had to increase corporate staff to assist its civil division with the Project (FF 266.U., 267.U.); and that the civil division did not have any other jobs and was forced to close due to its Project losses (FF 268, 269.U.). An adjustment in claimed unabsorbed overhead has been made for the one period when Valley Ditch was able to assume other work (FE 274).

Appellant, therefore, has met its initial burden to show that uncompensated delay occurred and that it could not assume other jobs. BOR has not met its ensuing burden to prove that appellant would suffer no loss by using a fixed percentage markup formula. In fact, in post-hearing briefing, BOR did not challenge the use of the *Eichleay* formula. It argued only that Hardrives' civil and corporate, division overheads should be combined. However, Hardrives has separate corporate and divisional overheads and accounts for them separately (FF 264.U., 265; and *see* n. 8).

Also, BOR did not object to the use of a daily unabsorbed overhead rate and eventually used the same figure at hearing, $847.76, that Hardrives originally had advanced and used in its quantum proof. Prior thereto, BOR had used the higher figure of $1,434.85 (FF 270.U., 271).

Hardrives urged at hearing that the Board should apply a modified *Eichleay* formula to account for the seasonality of its business, and that its actual daily unabsorbed home office rate was $1,273. Like the court in *Capital Electric Co.*, 729 F.2d. at 747, we have declined to modify the *Eichleay* formula. We have found that the $847.76 daily home office overhead count used by both parties at hearing is the appropriate one (FF 270.U., 271; n. 8).

[8] Appellant has applied a 10-percent profit rate to its claimed amounts. Although the auditors also used that rate (FF 256), BOR now alleges that the rate should be 8.85 percent, citing the Contractor Proposals clause (FF29c.) and weighted profit guidelines in FAR 15.905 and in BOR and Departmental implementing regulations—RAD 15.905-80 and DIAR 1415.905.

The Contractor Proposals clause is not relevant. Apart from the contracting officer's intent to waive the clause in Hardrives' case (FF 255), it applies "in connection with any proposal [the contractor] makes for a contract modification" (FF 29c.) We are not considering a contractor proposal for a modification. (*See GB&E, supra*, where the ASBCA stressed the same fact in determining that a substantially similar clause did

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not apply.) We have a constructive change under the Changes clause, which provides for an equitable adjustment. Aside from the need for the adjustment to be equitable, there is no limitation upon profit imposed by that clause.

As to regulations, the applicable 1986 FAR provision is 15.905-1 (48 CFR 15.905-1 (1986)). It merely provides that unless "clearly inappropriate or not applicable," agencies are to consider general factors in developing a structured approach or other profit analysis. RAD 15.905-80 (1986) and DIAR 1415.905 (1986), both under headings entitled "Contracting by Negotiation," apply to negotiations for construction services, including construction contract modifications, and are to the some effect. We find no applicable regulation limiting profit to any particular percentage.

In a prior case where, unlike here, the contract provided that profit was to be in accordance with applicable BOR procurement regulations, the Interior Board noted that the proffered Departmental Manual, which seemed to be directed at negotiated resolutions (like the materials cited here), did not clearly apply. The Board added that, even if the BOR-espoused structural approach were that intended by the contract, the Board's own consideration of the various factors involved resulted in a higher profit rate than that urged by BOR. *Sanders Construction Co.*, IBCA No. 2309, 90-1 BCA ¶ 22,412 at 112,581.

Similarly, we have arrived at an equitable profit rate based upon our analysis of what is fair in this, and the following, appeals. Ten percent has been found to be a reasonable profit rate for Government construction contracts, even when a prime is seeking recovery for work largely performed by a subcontractor. *Design & Production, Inc. v. United States* [35 CCF ¶ 75,718], 18 Cl. Ct. 168, 210 (1989); *Delco, supra*, 17 Cl. Ct. at 334.

We have found the 10-percent profit rate applied by appellant for its work and that of its subcontractors to be fair and reasonable (FF 256).

[9] In our modified total cost award, we have deducted from the overall extra costs chargeable to BOR the cost of removing a slab apparently constructed after Hardrives' project manager had received PSR 19 changing the required work. The record is somewhat confusing on this point, but, absent clear proof that FC or BOR was responsible for the slab's placement, we have charged the contractor with the costs of removal (FF 196.U., 197, 198, 263, 275).

We also have deducted the cost of correcting turnouts to install two gates rather than one. Hardrives' concrete foreman had observed discrepancies in the drawings but had not sought clarification, and did not know what any shop drawings had shown. When he eventually raised the issue with FC, he was informed that two gates were required, although, to that point, neither FC nor BOR had protested the installation of one gate (FF 209.U., 210, 263, 275).

A contract is ambiguous if it is reasonably susceptible of more than one interpretation. *Edward R. Marden Corp. v. United States* [33 CCF ¶ 74,652], 803 F.2d 701, 705 (Fed. Cir. 1986). If an ambiguity is patent, the contractor has a duty to inquire of the contracting officer, pre-bid, about the meaning of the contract. Determining if an ambiguity is patent involves an objective judgment as to whether it is so glaring as to raise a duty to inquire. Only if the ambiguity is not patent, is the question reached of whether the contractor's particular interpretation is reasonable. If there is a latent ambiguity, and the contractor's interpretation is reasonable, the rule of *contra proferentem* may apply. *Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647, 649, 650 and note 11 (Ct. Cl. 1982). Even if the ambiguity is latent, however, the contractor still must prove that it relied upon its interpretation at the time of bidding. *Fruin-Colnon Corp. v. United States* [36 CCF ¶ 75,923], 912 F.2d 1426 (Fed. Cir. 1990); *Marden*, 803 F.2d at 705.

Here, assuming *arguendo* that the contract drawings were latently ambiguous and that the contractor's interpretation during performance was reasonable, Hardrives, nevertheless, has not established that it relied upon its one-gate interpretation at the time of bidding. What evidence there is, *i.e.* the unused gate or gates, suggests that the gate-supplier, or the contractor, at the time of bid, had interpreted the drawings to require two gates. That a contractor may have relied upon its own interpretation of an ambiguous portion of a Government contract during performance is immaterial. *Fruin-Colnon*, 912 F.2d at 1431; *ECI Construction, Inc.*, ASBCA No. 40097, 90-3 BCA ¶ 23,143, *aff'd on recon.*, 91-1 BCA ¶ 23,313.

Moreover, the contract called for notice and inquiry by the contractor concerning drawing discrepancies or questions of interpretation. The Drawings clause (FF 17) directed the contractor to check all drawings carefully and to advise the contracting of-

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ficer of any errors or omissions. Under the Specifications and Drawings For Construction clause (FF 25a.), discrepancies in drawings were to be submitted promptly to the contracting officer for a written determination. Action by the contractor without such a determination was to be at its own risk.

Although the one-gate turnouts were installed under the oversight of inspectors, and remained in place for a considerable time, there is no evidence that the inspectors knew that construction had been contrary to FC's and BOR's interpretation of the drawings (FF 210). Farther, the Inspection of Construction clause (FF 25c.) provided that inspections were for the sole benefit of the Government; they did not constitute or imply acceptance; the presence or absence of an inspector did not relieve the contractor from any contract requirement; and the inspector was not authorized to change any specification without the contracting officer's written authorization. The contractor, at no charge, was to replace or correct work that failed to conform to contract requirements unless, in the public interest, the Government consented to accept it with a price adjustment. Hardrives has not even alleged that there was any attempt to convince BOR that one gate turnouts were acceptable.

Based upon all of the foregoing, we have found that appellant is entitled to recover $3,488,260, plus interest under the CDA measured as of April 17, 1987 (FF 276, 277).

Although appellant used a modified total cost approach in establishing its excess costs in connection with IBCA 2375/2475, it asserts that it has applied that approach only to the costs associated with those appeals and that, except for delay costs, the costs claimed in the following appeals are not duplicative. Appellant's CFO also testified several times that duplication of claimed overhead has been scrupulously avoided. BOR has not directed us to any evidence establishing any duplicative costs and we have arrived at our awards accordingly.

IBCA 2518

[10] FC ordered Hardrives to report storm damage without compensation, alleging that the Site Drainage clause (FE 9) required the contractor to handle all flows from natural drainage channels intercepted by the contract work and that the storm damage would not have occurred if Hardrives had completed at least an irrigation V ditch prior to the storm.

BOR now appears to admit full liability and to dispute quantum only (GB at 53). In any case, appellant has established that natural drainage channels were not at issue; the Site Drainage clause did not apply; defective specifications caused the damage and impeded the construction of a V ditch; and that FC and BOR were responsible for any relevant work delays.

We have found that, excluding delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of $27,578, plus interest under the CDA as of February 8, 1988 (FF 295-96).

IBCA 2524

[11] Appellant incurred extra costs in lowering and extending a large siphon at the FCGC crossing, made necessary due to defective specifications. BOR admits a contract change, but contests quantum. Appellant's proposed quantum is based upon conservative cost estimates made by its knowledgeable on-site project manager in the absence of any cost-effective way of segregating extra costs.

We have found that, including delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of $25,063, plus CDA interest as of December 28, 1987 (FF 305).

IBCA 2511

[12] We have found, as FC and BOR appear to concede, that the soil stabilization specifications were defective (FF 314.U., 315). BOR alleges, however, that FC waived both the contract's penetration requirement and the planned amount of soil stabilization solution; that Hardrives did more work than it had to do; that it has not supported its claimed extra costs adequately; and that they are not reasonable.

We need not reach the issue of FC's ability to waive a contract requirement because BOR issued a post-work proposed no-cost modification waiving only the penetration factor and directing use of the contract's planned quantity of solution (FF 321). This reinforces the testimony of Mr. Locke and of inspector Canez, and the record of contemporaneous inspection reports, that Hardrives was directed to apply the planned quantity, which it had on hand. We resolve all credibility issues in favor of appellant.

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Hardrives tracked its costs associated with soil stabilization. We have found those costs to be reasonable and that, after crediting BOR with certain excess water truck rental costs, and with Hardrives' estimate of planned costs, and including delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of $21,780, plus CDA interest as of January 6, 1988 (FF 320.U., 323, 324).

IBCA 2510

[13] Appellant claims costs incurred in connection with the encasement of banded mitered pipe bends. It alleges, alternatively, that: the contract did not require encasement of banded mitered pipe bends; the contract was unclear; it was entitled to submit an alternative design for approval and FC approved the banded mitered pipe bends, estopping BOR from enforcing the encasement specifications; or, banding was "factory-made" encasement, equivalent to what Hardrives describes as the "field encasement" directed by FC.

Regarding the contract's requirements, the pertinent specification leads with the presumption that encasement or blocking will be required "[m]iter bends *shall be encased or blocked with concrete* as shown on the drawings." (Emphasis added.) There are several additional references in the specification to encasement of mitered bends.

Appellant stresses that the drawings did not show any banded mitered pipe bends with encasement; BOR's standard manual does not show how to encase them; and BOR's spokesman had not seen any encased banded mitered bends on BOR projects. As BOR suggests, however, these "absences" likely simply reflect the fact that, when encasement is required, it is not contemplated that a contractor will go to the expense of using banded mitered pipe bends.

Every relevant drawing, that is, every drawing showing pipe bends for pipe 42 inches in diameter or larger—the only pipe at issue—showed the pipe bends as encased. Note 3 to Drawing V-5 provided: "Encase *all* pipe bends when [diameter is greater than or equal to 42 inches]" (FF 332). (Emphasis added.) We conclude that the contract plainly required encasement of the pipe bends.

Even if the contract were deemed to be ambiguous, as appellant suggests at one point, Hardrives has not satisfied the standards for recovery enunciated above for either a patent or latent ambiguity. It neither brought the alleged ambiguity to the attention of FC or BOR pre-bid, nor proved that it had relied upon its interpretation at the time of bidding, respectively. Moreover, as noted, the Drawings and the Specifications and Drawings For Construction clauses called for notice if the contractor found drawing discrepancies or had questions of interpretation. Specifically, the Fittings For Reinforced Concrete Pressure Pipe specification (FE 326) provided that any fabrication or procurement performed before approval of details was to be at the contractor's risk.

Hardrives, though, alleges that BOR is estopped from enforcing the contract because the contractor submitted drawings for banded mitered bends as an alternative to encasement; they did not contain the rebar drawings that would have been necessary for encasement; and FC approved the submitted drawings. We have identified the prerequisites to a finding of estoppel:

> (1) the party to be estopped must know the facts; (2) it must intend that its conduct be acted upon, or must so act, that the party asserting estoppel has a right to believe that it is so intended; (3) the latter must be ignorant of the true facts; (4) it must rely upon the former's conduct to its injury; and (5) when estoppel is sought against the Government, the conduct or representations relied upon must be made by Government officers acting within the scope of their authority. [Citation omitted.]

White & McNeil Excavating, Inc., IBCA No. 2448, 92-1 BCA ¶ 24,534 at 122,440.

At a minimum, Hardrives has not proved elements (1), (2), and (5). Although FC did not reject banded mitered pipe bend drawings and did not inquire about the lack of rebar drawings associated with encasement, this does not mean that FC or BOR was aware that Hardrives did not intend to end the bends in the field when the time came. There is no evidence of any written approval by the contracting officer, or by FC, of a deviation from specification requirements, or of any written, or even oral, alert by Hardrives that its banded mitered pipe bend drawings were intended as alternate designs or that it did not plan to encase the banded mitered pipe bends. In contrast, there is affirmative evidence that FC had not intended to accept the banded bends as an alternative to encased ones. When Hardrives began placing the bends without encasement, FC promptly directed it to cease (FF 339).

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Even if FC were deemed to have approved the drawings, the Fittings clause warned that approval by the Construction Engineer of the contractor's details did not relieve the contractor from specification requirements or from responsibility for the correctness of the drawing details. The Specifications and Drawings For Construction clause also stated that approval of shop drawings did not relieve the contractor from errors in them or from complying with contract requirements unless the contractor described any variations from the contract, in a writing separate from the drawings, at the time of submission, and the contracting officer approved of the variation.

Regarding approval of drawings and of variations, the exact process by which contract drawings were submitted and approved, and whether there was any BOR review following approval by FC, is not clear from the record. Per the Administration Of Specifications And Drawings For Construction clause (FF 25b.), if individuals other than the contracting officer were authorized to approve shop drawings, they, nonetheless, did not have authority to approve shop drawings or other technical data showing variations from the contract requirements that involved a change in price or in time of performance. Hardrives did not seek a contract price or time change when it elected to use banded mitered pipe bends. It expected to save money. However, even if FC had had full authority to approve shop drawings and variations, nothing in this clause relieved the contractor from its duty of notice if any contract variation were intended.

Case law is in accord. When there is no evidence that the Government was on notice, in a sufficiently clear way, that the contractor was deviating from contract requirements, the facts that it submitted drawings different from intended in the contract, and that those drawings were approved, do not establish waiver of a contract requirement. *Vogt Brothers Mfg. Co. v. United States* [9 CCF ¶ 71,991], 160 Ct. Cl. 687, 714 (1963); *A&A Insulation Contractors, Inc.*, VABCA No. 2766, 92-2 BCA ¶ 24,829 at 123,881; *Rivera, supra*, 88-2 BCA at 104,853. Thus, we find no waiver of any contract requirement, or approval of any alternative to encasement.

Hardrives also has alleged that there was no practical reason to require field encasement of banded mitered pipe bends, either because factory-made bands constituted encasement, or because banding served the same function. Although not articulated as such, we deem this to be an economic waste argument. It is well established that, absent economic waste, the Government is entitled to precisely what it specifies, even if that exceeds what is absolutely needed for a satisfactory result. *Ball, Ball, & Brosamer, Inc.*, IBCA No. 2103-N, 93-1 BCA ¶ 25,287 at 125,980 and cases cited. Economic waste finding are the exception to the rule, and the circumstances often are extraordinary. Appellant has not proved any such waste. BOR established at hearing that banding is not the same as encasing, which serves additional important functions (FF 335).

Accordingly, this appeal is denied.

IBCA 2319/2514

[14] Appellant seeks recovery for the cost of placing elastomeric sealant in transverse contraction joints. It vigorously asserts that sealant was not required in those joints, which it formed by tooling. Appellant acknowledges that the pertinent contract drawing depicts sealant in the joints and that this is how its bid estimator first interpreted the contract. It alleges that the estimator later determined, after reading the specifications, that the contract did not require the sealant; or that the contract was ambiguous because the specifications purportedly did not require it and since, in that case, they took precedence over the drawings, no pre-bid inquiry was necessary (FF 356.U.).

In addition to its discrepancy notification requirements, the Specifications and Drawings For Construction clause provided that anything mentioned in the specifications and not shown on the drawings, or vice versa, was deemed included in both. In case of differences, the specifications were to govern. Appellant directs us to *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296, 1299 (Fed. Cir. 1989), where, in considering the same clause, the court of appeals held that "an order of precedence clause may be relied on to resolve a discrepancy between the specifications and drawings even though the discrepancy is known to the contractor prior to bid or is patent." Here, however, there was no conflict or discrepancy between the drawings and the specifications. Both required sealant in the transverse contraction joints.

As we noted above, in order for a contract to be deemed ambiguous, it must be *reasonably* susceptible of more than one interpretation. *Marden supra*. The contract is not reasonably susceptible of more than one interpretation regarding the sealant issue. The

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contraction joint specification, § 5.2.3 (FF 342), began with the direction that the joints be constructed as shown on the drawings. As Hardrives' estimator observed, the pertinent drawing depicted sealant in the joint (FF 344, 352.U.). The bulk of the specification was dedicated to the criteria for, and the Ding and placement of, joint sealant.

Appellant rests its argument upon the one portion of the lengthy specification that provided: "Transverse contraction joints shall be terminated at the top of the side slopes and *a 3/4-inch-minimum-depth groove shall be tooled across the concrete curb from the end of each Transverse joint.* No filler or sealant will be required for *these tooled grooves*" (FF 342 (emphasis added)). The antecedent reference for "these tooled grooves" clearly was to the 3/4-inch grooves to be tooled across the concrete curb. They are the only "tooled grooves" so described in that paragraph. Only those tooled curb grooves did not require sealant. In actual construction, as in the language of the specification, the curb grooves were treated separately from the portion of the contraction joint within the canal proper (FF 348). Appellant's contortions ignore the great remainder of the specification, the applicable contract drawing, and the basic tenets of contract interpretation:

> Contract interpretation begins with the plain language of the agreement. * * * "[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose * * * an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." [Citations omitted.]
>
> *Gould, Inc. v. United States* [37 CCF ¶ 76,108], 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Appellant's arguments that its estimator observed some BOR canals that did not have sealant in transverse contraction joints are irrelevant. He also observed others containing sealant. The specifications in this contract control. Appellant made some effort, albeit not persuasive, to challenge the engineering reasons for requiring the sealant. That attempt similarly fails as irrelevant. Appellant has not directed us to any established engineering rule or industry practice that even arguably might render ambiguous, in the eye of a contractor experienced in the trade, what appear to be unambiguous contract provisions. *See Riley Stoker Corp.*, ASBCA No. 37019, 92-3 BCA ¶ 25,143 at 125,327, and cases cited. As established, BOR was entitled to receive that for which it contracted. There is no evidence that BOR's direction to seal the contraction joints resulted in economic waste. Appellant was not entitled to second guess the engineering determinations underlying the specifications and to substitute its own judgment. *Harold J. Younger & Associates*, ASBCA No. 37523, 93-1 BCA ¶ 25,224, *aff'd on recon.*, 93-1 BCA ¶ 25,549.

Accordingly, this appeal is denied.

IBCA 2519

[15] FC and BOR have admitted from the outset that Hardrives and MRT, which incurred most of the costs, are due compensation for direct "sump and wells" work. Only quantum has been contested. Appellant has proved $5,035 in extra costs and burden not accounted for elsewhere, and is entitled to that amount, plus interest under the CDA as of March 3, 1988 (FF 373).

IBCA 2516

[16] Appellant seeks PPA interest on account of delayed progress payments. BOR long has admitted that some interest is due, but it has disputed the number of delayed payments and the triggering date from which interest begins to run. BOR has declined to pay any amount, however, at one point asserting erroneously that it could not do so until appellant filed a CDA claim. There is no such restriction upon the contracting officer to the extent that underlying progress payments are not in dispute.

A goal of the PPA was to reduce administrative payment delays. The PPA clause in the contract (FF 376) directed that determinations of interest due would be in accordance with the statute and OMB Circular A-125 (FF 377). The applicable OMB circular directed that "[a]gencies will pay interest without the need for business concerns requesting them," unless the payment in question were delayed because of a disagreement over its amount or over contract compliance issues. Even after remand by this Board in early 1988 for a contracting officer's decision within 60 days, no decision issued (FF 394). This was prior to the September 1988, letter from a disgruntled employee alleging fraud and BOR's subsequent fraud referral (FF 154), so we ascertain no reason from the record why the contracting officer did not act. We have taken the mistreatment of payment matters into consideration in connec-

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tion with IBCA 2375/2475, above, and elaborate no further here.

On the other hand, Hardrives' claim for interest was misguided in some respects. Pre-hearing, citing the PPA clause, Hardrives insisted that payment was due no later than the 30th day after the date of delivery of supplies or performance of contract services. Under the PPA clause, however, payments were not due until the *later of* the 35th day after receipt of a proper invoice or the date the supplies or services were accepted by the Government. That *acceptance* was deemed to occur on the 30th day after supplies or services were received. At hearing, again disregarding the contract, Hardrives alleged that the voucher cut-off date was the date from which interest should begin to run.

Despite the 35-day provision in the PPA clause, BOR's own policy was to process payment requests not more than 5 days after receipt (FF 387) and the Administration of Payments clause (FF 375) provided that payments were to be made as close to 30 days as possible after receipt of approved estimates. BOR has stipulated in this appeal to a 30-day payment period (FF 396).

BOR is correct, though, that, under the PPA clause and OMB Circular A-125, the 30-day payment period, after which PPA interest began to accrue, did not begin until a "proper" invoice had been received. Under the PPA clause, in order for an invoice to be "proper," it had to contain substantiating information as required by the contract. FC rejected some of Hardrives' estimates because they did not contain lien waivers for unincorporated on-site materials. Apparently relying upon the Payments clause (FF 374), which provided that the contracting officer "may" authorize materials delivered on site to be taken into consideration, Hardrives disputed the need for such waivers, although it eventually obtained them. Hardrives overlooked the Administration of Payments clause, which stated that material delivered on site could be included in payment estimates "only if" the contractor had furnished satisfactory evidence of title and that the material would be used to perform the contract. Again, acceptance of the materials for payment purposes was optional.

Although BOR agrees that some progress payments were late and that some interest is due, Hardrives has not met its burden to prove interest due in its claimed amount of $17,216.38. We have found the IGE to be the best-supported calculation, and that Hardrives is entitled to $3,868.13, plus interest under the CDA as of December 3, 1987 (FF 398).

IBCA 2414/2515

[17] Hardrives seeks $14,893 for royalties it was required to pay for use of Borrow Area C. The contract plainly required that contractors include the borrow surcharge in their bids: "the Contractor will be charged $0.15 for each cubic yard of material removed from Borrow Area C;" "Payment * * * for 'Excavation from Borrow' will be made at the unit price per cubic yard bid * * *. This price shall include the costs of excavating, hauling, placing embankment, moisture application, plus the $0.15 per cubic yard cost of purchasing only borrow material from Borrow Area C * * *" (FF 14). It is evident that both Hardrives and MRT relied upon this clear contract language in bidding, as both included the royalty charge in their bid prices for borrow (FF 401).

There is no basis for this claim and the appeal is denied.

Decisions

Appeals IBCA 2375/2475 are sustained in the amount of $3,488,260, plus CDA interest as of April 17, 1987; appeal IBCA 2518 is sustained in the amount of $27,578 plus CDA interest as of February 8, 1988; appeal IBCA 2524 is sustained in the amount of $25,063, plus CDA interest as of December 28, 1987; appeal IBCA 2511 is sustained in the amount of $21,780, plus CDA interest as of January 6, 1988; appeal IBCA 2519 is sustained in the amount of $5,035.37, plus CDA interest as of March 3, 1988; appeal IBCA 2516 is sustained in the amount of $3,868.13, plus CDA interest as of December 3, 1987. Appeals IBCA 2510, 2319/2514, and 2414/2515 are denied.

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[¶ 26,268] KRW, Incorporated

DOT BCA No. 2572, May 18, 1993. Contract No. DTFH61-88-Z-00038.

Procedure, Boards—Attorneys—Corporate Officer.—A vice-president with limited duties was entitled to represent the contractor because he had been designated as a corporate officer by the contractor's board of directors. The rule permitting a corporate contractor to be represented by an officer did not define officer. After the vice-president had resigned, he was reappointed with authority to collect only three accounts. This limited authority did not prevent him from being an officer, nor did the fact that he received no remuneration and received his mail at home.

Contract Disputes, Certification—Effective Date of 1992 Amendments—Claim v. Appeal.—A claim certification was within the remedial effect of 1992 amendments of the Contract Disputes Act because the claim was not the subject of an appeal until after the enactment of the amendments. Although the certification may not have been valid when made, the amended Act validated certification by any person duly authorized to bind the contractor with respect to the claim.

Payments—Anti-Assignment Statutes—Agreement to Pay Proceeds.—A contractor's designation of an individual to represent it in its claims did not violate the anti-assignment statutes, because no entity other than the contractor was given a direct right to recover from the government. The contractor could distribute any funds it received from the claim in any manner, and it could enter into an agreement obligating to pay all or a portion of its recovery to another without creating an assignment of the claim.

For the appellant: Russell E. Machol, Vice President. For the government: Vivian A. Philbin and Eric A. Kuwana, Federal Highway Administration, Washington, D.C.

Before ROBERTORY, Administrative Judge.

ROBERTORY, Administrative Judge: KRW, Incorporated ("KRW" or "appellant") appealed from a decision by the Contracting Officer, Federal Highway Administration ("FHWA" or "respondent"). That decision denied KRW's claim for $70,096.78 in its entirety. The FHWA has now moved for dismissal based on an alleged lack of jurisdiction.

The respondent alleges that Mr. Russell E. Machol, who is representing KRW in these proceedings, resigned as Vice-President of KRW, Inc. on November 16, 1990, with Mr. George Earnhart, KRW's Chairman and President, purchasing all of Mr. Machol's stock. The FHWA further alleges that on December 20, 1990, Mr. Machol was given the title of "Senior Vice President" with authority only to collect accounts receivable from four sources, including the amount now claimed from the FHWA. The respondent alleges that Mr. Machol, despite his title, receives no salary, benefits, or other compensation from KRW, and that he has requested that all correspondence be sent to his home address.

Based on these factual allegations, the FHWA argues (i) that Mr. Machol was not authorized to certify KRW's claim, (ii) that the transaction constitutes a violation of the Anti-Assignment Act and the Federal Acquisition Regulations "Assignment of Claims (JAN 1986)" clause, § 52.232-23.

MR. MACHOL'S STATUS

At the heart of respondent's Motion is the allegation that Mr. Machol is not really an officer of KRW. Under Rule 29(a) of the Board's Rules of Procedure, 48 C.F.R. § 6302.29(a), a corporate appellant such as KRW may be represented by an officer of the corporation. Therefore, if respondent's allegations are correct, then it would follow that Mr. Machol is not authorized to represent the corporation in the litigation before the Board. Accordingly, we consider his status first.

The Rule does not purport to define officer. Whether or not a person is, in fact and in law, an officer of a corporation is a matter to be determined by state law and the terms of the corporate charter and by-laws. Neither party has made any presentation regarding the applicable state law. With its reply to the Motion, KRW has submitted a copy of the minutes of a December 20, 1990 meeting of the KRW Board of Directors. The minutes sets forth a Resolution adopted at that meeting, that:

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Russell E. Machol is a Senior Vice President and officer of KRW, Inc. in accordance with Section 13 of the KRW bylaws with authority and duties limited to the collection of the above named accounts receivable . . .

The "above accounts receivable" include the claim now before the Board.

The minutes of the December 20, 1990 meeting of the KRW Board of Directors leave no doubt that the Directors have designated Mr. Machol as an officer of KRW. The fact that he does not have unlimited authority does not necessarily mean that he is not an officer, for most corporate officers have defined functions and those functions need not be all-inclusive of all corporate functions. We are aware of no law or regulation that a corporation may not have a vice-president for accounts receivable or for certain accounts or for other limited purposes.

The Board is also not aware of any legal requirement that a corporate officer must receive any sort of remuneration, regular or otherwise, for performing that office.

Likewise, we are aware of no law or regulation dictating where a corporation must receive its mail.[1] Corporate litigants regularly receive written communications from the Board at addresses other than the corporate address, *e.g.*, at office of their legal representatives.

The Board therefore determines that Mr. Machol is an officer of KRW, Inc. and that as a result of such status Mr. Machol may represent the corporation KRW, Inc., in the present proceedings.

CERTIFICATION

The appellant's claim submitted to the Contracting Officer in the amount of $70,076.98 (AF Tab 107), dated April 22, 1992, was certified by Mr. Machol as "Senior Vice President and Contracting Officer."

Implementing the Contract Disputes Act of 1978, as amended, Federal Acquisition Regulation § 33.207, as in effect on the date the claim was submitted,[2] mandated that when a claimant is a corporation, the claim shall be certified by "(i) A senior company official in charge at the contractor's plant or location involved; or (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."

Section 6(c) of the Contract Disputes Act of 1978, as amended subsequent to the filing of the claim and now in effect, 41 U.S.C. § 605(c), states in pertinent part:

(c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor. . . .

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $50,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

The Board interprets the KRW Board of Directors Resolution as giving Mr. Machol, a Senior Vice-President, the authority to bind KRW in matters relating to the claim against the FHWA and to take all actions needed to prosecute and settle that claim. Thus, his authority satisfies paragraph (7) of 41 U.S.C. § 605(c).

The FHWA argues that paragraph (7) does not apply to this claim because the claim

[1] We are not talking about agents for service of process, an area in which there are precise statutory requirements in the various states.

[2] As indicated below, the regulation has been altered by the effect of a subsequent statute. See also Office of Federal Procurement Policy Policy letter 80-3, Amendment #1, January 11, 1993, published at 58 Fed.Reg 5039, January 19, 1993.

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was pending at the Board prior to enactment of the amendment to the Contract Disputes Act that added paragraph (6) and (7) of § 605(c).[3] This allegation is not factually correct, but we nevertheless consider the issue of the effective date of the statutory amendment.

Paragraphs (6) and (7) were enacted by section 907 of the Federal Courts Administration Act of 1992, Public Law 102-572, October 29, 1992. The Congressional purpose was to mitigate and negate a harsh interpretation of the Federal Acquisition Regulation adopted by *United States v. Grumman Aerospace Corporation,* 927 F.2d 575 (Fed. Cir. 1991). Section 907 establishes the effective date of the amendment:

> (2) The amendment ... shall be effective with respect to all claims filed before, on, or after the date of the enactment of this Act, except for those claims which, before such date of enactment, have been the subject of an appeal to an agency board of contract appeals or a suit in the United States Claims Court.

The appeal from the Contracting Officer's decision denying the claim was received by the Board on November 23, 1992, after the date of enactment of the Federal Courts Administration Act of 1992. Thus, as of the date of the passage of that Act, the claim had not yet been the subject of an appeal to the Board or the filing of a suit in the Claims Court (now the Court of Federal Claims), and the exception set out in section 907 is not applicable. Accordingly, the relief granted contractors by section 907 applies to this claim. While at the time it was filed, the certification may not have passed muster due to the *Grumman* decision, it is within the remedial effect of the Act and 41 U.S.C. § 605(c)(7) applies.

The Board determines the certification to be valid.

THE PURPORTED ASSIGNMENT

The respondent argues that KRW has attempted to assign the contract to Mr. Machol in violation of 41 U.S.C. § 15,[4] citing *John B. Rich (EZ Construction Company, Subcontractor),* DOTBCA NO. 2518, 92-3 BCA ¶ 25,186 (1992).

The contractor is KRW, Inc. The appellant is KRW, Inc., not Mr. Machol. The appeal is being prosecuted under the name of "KRW, Inc." Presumably, if the appellant prevails, the payment check drawn on the Treasury of the United States will be payable to KRW, Inc. Presumably, when that check is received, it will be endorsed in the name of KRW, Inc. A contractor may appoint a person to act as its agent in its name, and such is not an assignment or transfer of a contract. See *United States ex rel. Giant Powder Company v. Axman,* 152 F. 816 (Cir. Ct., N.D. Cal. 1906). Since Mr. Machol is an officer of the corporation, it is reasonable that the corporation should designate him as its agent for the prosecution of the claim.

Once KRW or any of its authorized agents comes into possession of those funds, KRW may distribute them in any manner it sees fit. Respondent has cited us to no precedents that would hold that a contractor may not enter into an agreement, prior to receiving funds from the government, that would have the effect of obligating it to pay all or a portion of those funds to another as part of a separate transaction. The Anti-Assignment Act is only violated if a contractor seeks to create in some other entity a direct right to recover funds from the government in its own name.

The Board concludes that Mr. Machol is pursuing the claim as an agent of KRW and in its name, that there has been no assignment of contract or claim against the government to Mr. Machol, and that having Mr. Machol pursue the claim as the representative of KRW, as he is doing, is not a violation of the Act.

DECISION

The respondent's Motion to Dismiss is denied in its entirety.

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[3] Motion, p. 7.

[4] 41 U.S.C. § 15 prohibits assignments of government contracts. The clause in Federal Acquisition Regulation § 52.232-23 implements both 41 U.S.C. § 15 and 31 U.S.C. § 3727, *infra,* by permitting an assignment to a financing institution under certain conditions, as authorized by those statutes. No financing institutions are involved in the issues placed before the Board.

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[¶ 26,269] CardioMetrix

DOT BCA Nos. 2571, 2591, May 3, 1993. Agreement No. DTCG84-92-A-3KB621.

Contract Types—Blanket Purchase Agreements—Contract as Basis of Jurisdiction.—A blanket purchase agreement for laboratory services was not a contract, because the laboratory had no obligations. A separate contract came into existence whenever the government ordered services and the laboratory undertook to provide them. Even if the government was obligated under the agreement to pay costs in the event of a convenience termination, the laboratory incurred no obligation as a result of the agreement. Thus, consideration, an essential element for contract formation, was lacking.

Convenience Terminations—Noncontractual Agreement—Effect of Termination Clause.—The government's invocation of the Termination clause in a blanket purchase agreement for laboratory services did not entitle the laboratory to recovery under the clause, because the blanket purchase agreement was not a contract. If a contract created by an individual order was terminated for convenience, the contractor could recover up to the price of the terminated contract, but if the government authorized payment for all orders it had issued, there was no contractual authority for recovery of termination costs under the blanket purchase agreement.

Contract Disputes, Jurisdiction—Contract as Basis for Jurisdiction—Blanket Purchase Agreement.—A board had jurisdiction to decide whether a blanket purchase agreement constituted a contract, even though its jurisdiction was contingent on the existence of a contract, because every tribunal has inherent authority to ascertain its own jurisdiction. Thus, the board could determine the existence of a contract even though that determination would effectively dispose of the claim. Because there was no contract, the appeal was dismissed for lack of jurisdiction.

For the appellant: Robert J. Loring, Ph.D., Chief Operating Officer. For the government: Bernard J. Roan, United States Coast Guard, Washington, D.C.

Before ROBERTORY, WARE, and STERN, Administrative Judges.

ROBERTORY, Administrative Judge: These two appeals[1] grow out of the Coast Guard's termination for convenience of the third in a series of Blanket Purchase Agreements. The respondent has filed a Motion to Dismiss on jurisdictional grounds.

BACKGROUND

On January 22, 1990, CardioMetrix and a Coast Guard Contracting Officer at the Maintenance and Logistics Command (Atlantic), Governor's Island, New York, entered into the first of the series of three Agreements, Blanket Purchase Agreement DTCG84-91-A-3KB168, under which CardioMetrix was to provide pathology/laboratory services at the request of Coast Guard medical officers or civilian physicians under contract to the Coast Guard. The Agreement set forth a schedule of prices for various laboratory tests, with estimated quantities for each. The term of the Agreement was January 22-June 1, 1991.

The covering letter which transmitted the executed Agreement to CardioMetrix commenced as follows:

> Enclosed is a Blanket Purchase Agreement (BPA) for *laboratory services.*[2] A Blanket Purchase Agreement is a simplified method of obtaining services. IT IS NOT A CONTRACT. It becomes contractually binding when you accept an eligible U.S. Coast Guard (USCG) patient for care. The Coast Guard is under no obligation to refer personnel for your care and you are under no obligation to accept patients for care . . . (Upper case in original).

On May 28, 1991, the Coast Guard issued the second Blanket Purchase Agreement, DTCG84-91-A-3KB621, similar to the first but for the period June 1-September 30, 1991. CardioMetrix accepted the Agreement on June 3. This Agreement was not accompanied by a letter similar to that accompanying the earlier Agreement (*supra*).[3]

[1] Docket 2571 was an appeal alleging that the Contracting Officer had refused to issue a decision. Docket 2591 is the appeal from the decision that was eventually issued.

[2] Italics so in original.

[3] At least, the Coast Guard did not include one in the appeal file.

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On October 1, 1991, the Coast Guard issued the third Blanket Purchase Agreement, DTCG84-92-A-3KB621, the Agreement now before us. This Agreement called for performance of the same services, but during the period October 1, 1991-September 30, 1992. The Agreement was issued on Optional Form 347 (10-83) "Order For Supplies Or Services." The Schedule of Supplies or Services to be Provided recited that this was a "Blanket Purchase Agreement." This Agreement included another preprinted sheet, "Optional Form 347 Page 2 (10-83)." This sheet was entitled "Purchase Order Terms and Conditions" and read in pertinent part as follows:

> 52.252-2. CLAUSES INCORPORATED BY REFERENCE (APR 84)
>
> This contract incorporates the following clauses by reference with the same force and effect as if they were given in full text. Upon request the Contracting Officer will make their full text available:
>
> FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) CLAUSES . . .
>
> 52.233-1 Disputes (Apr 84)
>
> 52.249-1 Termination for Convenience of the Government (Fixed Price) (Short Form) (Apr 84) . . .

The referenced termination clause simply provides that the Contracting Officer could terminate "this contract" when such would be in the government's interest, in which case the parties' rights and obligations would be in accordance with Federal Acquisition Regulation Part 49, *i.e.*, roughly speaking, the contractor would be reimbursed for its costs of performance and in preparing for performance.

On July 30, 1992, the Contracting Officer unilaterally issued Modification 0001 to the Agreement. Citing the authority of Federal Acquisition Regulation clause "52.249-4 Termination for Convenience of the Government (Services) (Short Form)," the Contracting Officer "cancelled" the Agreement in its entirety, noting that unpaid invoices for services rendered prior to the date of termination would be processed per the original agreement. This Modification contained two errors: *First,* it cited the wrong Agreement number.[4] *Second,* it referenced a termination clause other than the one mentioned in the Agreement, a clause nowhere else referenced, implicitly or explicitly, in the Agreement.

On August 18, 1992, the Contracting Officer unilaterally issued Modification 0002, cancelling Modification 0001 in its entirety but repeating its provisions with the correct Agreement number. It continued to reference the termination clause of Federal Acquisition Regulation § 52.249-4.

By letter of August 27, 1992, CardioMetrix correctly advised the Coast Guard that the termination clause cited in the terminating Modifications was not the termination clause incorporated into the parties' Agreement. The letter requested the Contracting Officer to send CardioMetrix a letter "citing one of the other FAR clauses that would allow cost recovery on the part of a contractor."

On September 23, 1992, CardioMetrix filed a claim seeking $9,961.00 in reimbursement for costs incurred in connection with DTCG84-92-A-3KB621. This included $849.00 in bid preparation costs, $498.00 in "bid followup expense," $5,845.00 for "maintenance of ongoing readiness, 10/1/91-8/10/92," $1,500.00 for termination expenses, and $1,269.00 for general and administrative expense at 30% of $4,230.00.[5] The letter requested a "final decision" on the claim.

In reply, by letter of October 15, 1992, the Chief of the Medical Branch (not the Contracting Officer), acting "for the Commander," denied the claim in its entirety.[6] The letter did not state that it was the requested "final decision" nor did it contain the notice of appeal rights that the Federal Acquisition Regulation requires be included in every contracting officer's decision under the Contract Disputes Act. This letter stated that Federal Acquisition Regulation clause 52.249-4 had been cited erroneously, being used "as a courtesy" to advise that the Agreement would not be renewed beyond its expiration date and that invoices for services performed under the Agreement would be processed for payment. The letter further stated that the costs sought were not payable under the terms of the Agreement.

Thereafter, on November 23, the Contracting Officer issued a formal decision under the Contract Disputes Act, denying

[4] It cited DTCG84-92-A-3KB061 vice DTCG84-92-A-3KB621.

[5] The composition of the base amount for application of the overhead rate is not clear.

[6] Only a person possessing a warrant in his/her own right has authority to execute a document effectively denying a claim. Thus, this letter is without effect.

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CardioMetrix's claim on the grounds that under the Agreement money was due CardioMetrix only for services rendered in accordance with the contract schedule.

DISCUSSION

The Coast Guard argues that the Board has no jurisdiction to consider CardioMetrix's claim because (i) our jurisdiction is limited by the Contract Disputes Act to claims arising out of express or implied contracts, (ii) a blanket purchase agreement is not a contract, (iii) the instant dispute therefore cannot be said to arise out of express or implied contract, and therefore (iv) the instant dispute is beyond our jurisdiction.

The appellant counters that the Blanket Purchase Agreement included a disputes clause and a termination for convenience clause, that CardioMetrix relied on the termination for convenience clause in entering into the Blanket Purchase Agreement, and that CardioMetrix had incurred costs in placing a teleprinter and manuals at the Coast Guard Headquarters Clinic.[7]

The Coast Guard is generally correct in its argument that we do not have jurisdiction over disputes that do not arise out of express or implied contracts. *Coastal Coloration v. United States* [31 CCF ¶ 71,373], 713 F.2d 728 (Fed. Cir. 1983); section 3(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 602(a).[8]

However, it does not necessarily follow that we are without jurisdiction to render any adjudications in regard to this dispute, even if they affect the determinative issue in this case.

Every tribunal has the inherent jurisdiction to ascertain its own jurisdiction, and to find all facts and reach all conclusions of law relating to that limited issue of jurisdiction. *John B. Rich (EZ Construction Company, Subcontractor),* DOTBCA NO. 2518, 93-2 BCA ¶ 25,761 (1993), affd. on recon., slip opinion, March 26, 1993; *Comsat General Corporation,* DOTBCA No. 1226, 83-2 BCA ¶ 16,870 (1983); *Warren Beaves, d/b/a Commercial Marine Services,* DOTBCA No. 1324, 83-1 BCA ¶ 16,232 (1983). In the exercise of this inherent jurisdiction, it is necessary in the instant appeal for the Board to determine whether or not all of the prerequisites for jurisdiction, including the existence of a contract (a determination which involves both questions of fact and questions of law), are present, even though such determination may well be effectively dispositive of the claim.

We recognize that "jurisdictional inquiry must not subsume substantive determination." *B. Inc. v. Miller Brewing Company,* 663 F.2d 545, 550 (5th Cir. 1981). However, it does not follow that the result of a jurisdictional inquiry may not impact the substantive result. In the instant case, it just so happens that the Board's determination on jurisdiction is also dispositive of a key issue in the parties' dispute and, unless our decision is reversed by a court of competent jurisdiction, may collaterally estop the parties from contending otherwise in any other forum.

The Coast Guard is also correct in arguing that a blanket purchase agreement is not a contract. A blanket purchase agreement, also known as a basic ordering agreement, does not create a contract between the United States and the other party to the Agreement. This is because such an agreement lacks an ingredient that is essential for the formation of a contract, namely, mutual consideration. Consideration means that each party either assumes some duty which it does not otherwise have, or gives upon some legal right which it is not required to give up.

In the instant arrangement between the parties, neither party had any obligations: the Coast Guard was not obligated to order any services whatsoever from CardioMetrix, and CardioMetrix could at any time refuse to provide services when called upon to do so by the Coast Guard.[9] The Coast Guard was careful to point this out in the letter which accompanied the first in the series of Agreements, defining that a Blanket Purchase Agreement is not a contract. Absent consideration, there was no contract between the parties. *Ann Riley and Associates, Ltd.,*

[7] CardioMetrix letter of April 27, 1993 responding to the Motion.

[8] **41 U.S.C. § 602. Applicability of law**

(a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract . . . entered into by an executive agency for

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

[9] The Contracting Officer noted this in the covering letter for the original January 22, 1990 Agreement.

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DOTBCA No 2418, 93-3 BCA ¶ 25,963, March 30, 1993; *Stanley F. Horton d/b/a T&H Rental & Snow Removal,* DOTBCA No. 1231, 82-2 BCA ¶ 15,967 (1982).[10] Separate contracts came into being each time the Coast Guard ordered services and CardioMetrix provided the requested services.[11] *Ann Riley and Associates, Ltd., supra.*

The appellant urges the Board to apply the principle espoused in *Aviation Specialists, Inc.,* DOTBCA No. 91-1 BCA ¶ 23,534 (1990). That case held that although the government was not obligated to order services from Aviation Specialists, Inc., when it nevertheless invoked the termination for convenience clause, it thereby obligated itself to pay to that firm the costs spelled out in the termination for convenience clause. *Aviation Specialists* is distinguishable from the instant situation in one vital respect: in that case, there was a valid contract in existence prior to the termination. Both the government and Aviation Specialists, Inc. had given valuable consideration for their mutual promises. In the instant case, the lack of consideration means that no contract ever existed.

The appellant also argues that the incorporation by reference into the Agreement of a termination for convenience clause dictates a different result. As can be seen from the above quotation from page 2 of Optional Form 347, that form uses the words *"This contract* incorporates the following clauses . . . ", (emphasis added), rather than stating that any contracts that come into existence pursuant to the Agreement would contain such clauses. Thus, the Agreement as drafted creates unclarity. Arguably, the only reasonable interpretation is the latter, that contracts to be created will contain those clauses. However, rather than address the question of interpretation, we prefer to resolve this issue on another basis. Assuming that the Agreement included the referenced termination for convenience clause obligating the Coast Guard to pay the costs described in the clause in the event of termination, and assuming that such obligation constituted sufficient legal consideration being given by the Coast Guard, there would still be no legal obligation on the part of CardioMetrix as the result of entering into the Agreement. Nowhere did CardioMetrix promise to perform the services upon order; it retained the right to decline to do so. Hence, the Agreement could not rise to the level of a binding contract and the Coast Guard still would not be obligated to comply with the termination clause.

Thus, we conclude that there was no express or implied contract in existence and, under the provisions of the Contract Disputes Act, the Board lacks jurisdiction to consider CardioMetrix's claim.

DECISION

The appeal is dismissed for lack of jurisdiction.

[¶ 26,270] Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration

GSBCA No. 10000-C(9835-P), December 23, 1992.

Protests, GSBCA—Costs of Protest and Attorney Fees—Connection of Costs.—A protester's motion for costs was granted, despite the government's refusal to respond to a show cause order on the ground that the issue of attorney fees was on appeal to a court of appeals, because the appeal involved entitlement to additional amounts not included in the instant costs. Not 1 cent of the costs awarded was the subject of an appeal.

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[10] A contract came into existence each time the Coast Guard ordered services and CardioMetrix undertook to provide them. Thus the Coast Guard is obligated to pay at the Agreement rates for the services actually performed. *Ann Riley and Associates, Ltd., supra.* The Coast Guard's letter makes clear it is not disputing this obligation.

[11] As we read the termination, it appears that the Contracting Officer was authorizing payment for all services that had been requested by the Coast Guard before the termination; *i.e.,* that none of the separate contracts were being terminated during performance. If this is not correct, then of course the Coast Guard would be liable under each of the separate contracts, in an amount that, by terms of Federal Acquisition Regulation Part 49, would be limited to the price of the separate contract.

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For the appellant: Saltman & Stevens, P.C., Washington, D.C., by Alan I. Saltman. For the government: David Forbes, Office of the Associate General Counsel (Contracts), Washington, D.C., and Rosamond M. French, Ames Research Center, Moffett Field, California.

Before HENDLEY, PARKER, and WILLIAMS, Administrative Judges.

HENDLEY, Administrative Judge: For the reasons outlined in our decision of May 22, 1992, we award to Sterling Federal Systems, Inc. the amount of $517,436.30 (which includes $457,016.17 in attorney's fees and disbursements and $4,046 in witness' fees, which was the subject of our decision of May 22, 1992, and $56,374.13 in attorney's fees and disbursements for pursuit of the cost case itself).

On August 7, 1992, we issued a Show Cause Order as to why the Board should not award Sterling $514,752.67. The additional $2,683.63 set forth herein represents the amounts identified in Sterling's Third Amendment to its Motion, dated September 16, 1992, for expenses incurred in pursuit of this cost case up to that date.

The respondent did not respond to our Show Cause Order, but instead informed us on December 22, 1992, that its reason for not responding was that the matter is on appeal to the Court of Appeals for the Federal Circuit. That is not, however, so. Our decision of May 22, 1992, which the protester, Sterling Federal, has appealed, denied the protester's claim of entitlement to additional amounts not involved or included in the costs herein granted. Not one cent of the costs herein awarded are the subject of an appeal. The appeal involves costs we declined to award to the protester.

The award, $517,436.30, is to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988) 40 U.S.C. § 759(f)(5)(C) (1988).

[¶ 26,271] Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration

GSBCA No. 10000-C-R(9835-P), March 23, 1993.

Protests, GSBCA—Reconsideration—Arguments Already Considered.—A board of contract appeals declined to reconsider its previous decision awarding a protester attorney fees and disbursements for pursuit of its costs case, because the government did not direct the board's attention to any new basis for changing the decision.

For the protester: Saltman & Stevens, P.C., Washington, D.C., by Alan I. Saltman. For the government: David Forbes, Office of the Associate General Counsel (Contracts), Washington, D.C., and Rosamond M. French, Ames Research Center, Moffett Field, California.

Before HENDLEY, PARKER, and WILLIAMS, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 26,270 denied.

HENDLEY, Administrative Judge:

Order

We decline to reconsider our decision of December 23, 1992, awarding Sterling Federal Systems, Inc., the amount of $517,436.30 (which includes $457,016.17 in attorney's fees and disbursements and $4,046 in witness' fees, which was the subject of our decision of May 22, 1992, and $56,374.13 in attorney's fees and disbursements for pursuit of the cost case itself).

In our decision of December 23, 1992, we stated the basis of that decision. The respondent has not directed our attention to any new basis on which we should change that decision. We therefore decline to do so. The respondent's motion for reconsideration is DENIED.

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[¶ 26,272] Telcom Systems Services, Inc. v. Department of Health and Human Services; Fortran Corporation, Intervenor

GSBCA No. 12488-P, July 30, 1993. Solicitation No. HCFA-RFP-93-001/CR.

Protests, GSBCA—Procedure—Similar Issues.—A government motion to dismiss several counts of a protest complaint on the ground that the counts were resolved by the dismissal of an earlier protest was granted in part because the protester sought to pursue nearly identical counts in this protest as it had presented in the earlier protest. Unlike in the earlier protest, however, one count in this complaint asserted a conflict between a response to a vendor question and a section of the solicitation. The board dismissed all of the complaint, except to the extent that it alleged such a conflict.

For the protester: Sam Zalman Gdanski, Montebello, New York. For the government: Lyman Goon, Office of the General Counsel, Department of Health and Human Services, Baltimore, Maryland, and Dalton H. Phillips, Office of the General Counsel, Department of Health and Human Services, Washington, D.C. For the intervenor, Fortran Corporation: Cohen & White, Washington, D.C., by Victor G. Klingelhofer and Nikki Koulizakis.

Before DEGRAFF, DANIELS, and LABELLA, Administrative Judges.

DEGRAFF, Administrative Judge: In this protest, filed July 8, 1993, Telcom Systems Services, Inc. (Telcom), challenges the terms of a solicitation concerning a telecommunications system. Telcom's amended protest complaint, filed July 15, 1993, contains eleven counts.

On July 23, 1993, the Department of Health and Human Services (HHS) filed a motion to dismiss counts 7, 10, and 11 of the amended protest complaint. HHS asserts that these counts present claims that were resolved by the dismissal of an earlier protest. The earlier protest was dismissed on April 21, 1993, without prejudice to reinstatement within ten days. *Telcom Systems Services, Inc. v. Department of Health and Human Services*, GSBCA 12383-P, 1993 BPD ¶124 (Apr. 21, 1993). The ten days passed without the earlier protest being reinstated and so, HHS argues, Telcom cannot present claims in this protest that were presented in the earlier protest.

On July 28, 1993, Telcom responded to HHS's motion to dismiss. The response was prepared and filed by Telcom, even though an attorney has entered an appearance on Telcom's behalf. As best we understand the response, Telcom asserts that it seeks to challenge two amendments to the solicitation that were issued after the earlier protest was dismissed.

We grant HHS's motion to dismiss, in part.

Background

On November 25, 1992, HHS issued solicitation HCFA-RFP-93-001/CR, which seeks proposals for the design, engineering, furnishing, site preparation, installation and maintenance of an integrated telecommunications system. Protest File, Exhibit 1.

On April 15, 1993, Telcom filed a protest with the Board concerning the solicitation. The portions of the April 15, 1993 protest complaint that are relevant to the pending motion to dismiss are counts 2 and 7. Protest File, Exhibit 21.

Count 2 of the April 15 protest complaint reads, in its entirety, as follows:

> 2. Amendment of C8.1.1.1.1
>
> Requiring Project Manager and Technician with experience installing communication systems with at least 10,000 ports and maintaining approximately 5,000 active ports.
>
> ISSUE
>
> This is a competency issue to be addressed by the contracting officer and the SBA for small business. The requirement is arbitrary and capricious per answer to A227 at occupancy the number of work stations to be wired with modular connections is 3,800. Based on the building prints, the building won't support 10,000 stations.
>
> Protest File, Exhibit 21.

Related to count 2, at page 13 of the April 15 protest complaint, Telcom complains that, "by requiring a project manager of the scope set forth, the procuring activity is superceeding [sic] and converting any question of responsibility into a question of technical capability impermissibly." Telcom adds, "[I]t is restrictive of competitions [sic] to require a project manager who has done 10,000 ports, since this merely requires add-

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ing additional ports to the system." Protest File, Exhibit 21.

In count 7 of the April 15 protest complaint, Telcom states, "It is our position that the specification for ISDN BRI has always been either ambiguous, restrictive of competition and/or exceeding the government's minimum need." Telcom then lists, at great length, the sections of the solicitation to which Telcom objects. In summary, Telcom alleges that the requirements of sections C3.2.1, C3.2.2, C3.2.4, and C3.2.5 violate 48 CFR 10.0004(a)(3); violate 48 CFR 10.004(a)(1) and (a)(2); contain "incomplete, unrealistic, or flawed evaluation criteria"; and include "mandatory requirements and mandatory options that go beyond the minimum needs of the government." Protest File, Exhibit 21.

The April 15 protest was dismissed on April 21, 1993, without prejudice to reinstatement within ten days. *Telcom Systems Services, Inc. v. Department of Health and Human Services*, GSBCA 12383-P, 1993 BPD ¶124 (Apr. 21, 1993). No action was taken to reinstate the protest.

On June 9 and July 1, 1993, HHS issued amendments 15 and 16 to the solicitation. These amendments respond to numerous vendor questions (numbered 238 to 282), including questions and issues raised by Telcom in the April 15 protest. Protest File, Exhibits 16, 17.

Telcom filed the present protest on July 8, 1993, and filed its amended complaint on July 15. The counts of the amended complaint that are relevant to the pending motion to dismiss are counts 7, 10, and 11.

Count 7 of the amended complaint filed in this protest reads as follows:

Amendment #15, Question 254

Amendment of C8.1.1.1.1—Requiring Project Manager and Technician with experience installing communication systems with at least 10,000 ports and maintaining approximately 5,000 active ports.

This is a competency issue to be addressed by the contracting officer and the SBA for small business. The requirement is arbitrary and capricious per answer to A227 at occupancy the number of workstations to be wired with modular connections is 3,800. Based on building prints, the building won't support 10,000.

Answer 254

Sections C3.10 lists approximately 7,000 active ports at cutover. Our port requirements at cutover are for 3,800 workstations including 3,800 voice equipment sets, 1,000 voice mail ports, 2,000 data ports, and 190 modem pool ports. In addition, we will need ports for 21 elevators, 8 pay telephones as well as any port required for switch diagnostics. Please note that this total number is 40 percent higher than the 5,000 active ports now specified in the RFP experience provision.

ISSUE

Question 254 was related to Section C8.1.1.1.1 On-Site Project Manager qualifications not Section C3.10. Do we amend Section C3.10 to include workstations, elevator phones, pay phones and ports for switch diagnostics as they are not part of Section C3.10.

At occupancy the number of workstations to be wired with modular connections is 3,800. Based on building prints, the building won't support 10,000 stations.

The Project Manager and technician requirements are excessive in that Health Care Financing Administration requires less than 5,000 ports. This is unfair to small businesses and, therefore, does not allow fair and open competition.

Amended Protest Complaint, at 5.

Count 10 of the amended complaint filed in this protest reads as follows:

Answer to Question 254

In the Health Care Financing Administration's Answer to Question 254, they referred to a requirement of 1,000 voice mail ports as being part of their 10,000 ports.

ISSUE

A voice mail address *is not* voice mail ports, they are merely software programmable addresses (extensions) referred to as mail boxes. All vendors could easily set up a data base for thousands of voice mail addresses at little or no additional hardware cost. Are vendors to assume they may identify these software addresses as ports and, therefore, avoid equipping the switch with hundreds of thousands of dollars of hardware for ports?

Amendment #15, Answer/Question 253

The wired and ready to operate requirement means that the switch must be equipped and wired at cutover (as delivered) such that the Health Care Financing Administration could simply connect cables directly to any of the 10,000 ports to operate a piece of equipment.

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ISSUE

What piece of equipment? Are the ports for voice mail or ISDN telephones, staff phones, digital sets—it is not defined. Again, if the Health Care Financing Administration does not know—how can a vendor?

Amended Protest Complaint, pages 6-7.

Count 11 of the amended complaint filed in this protest reads as follows:

Amendment #15, Question 253

This requirement is inconsistent with the requirement of the RFP and all of the amendment.

This statement is correct.

Question 260

The vendor protests that the solicitations violate FAR 10.004(a)(3), which requires that standards be "selectively applied" and "tailored" in the following RFP sections: C.3.2.1, C3.2.2, C3 .2.4, C3.2.5.

Question 261

The vendor protests that the solicitations are vague and ambiguous and thus violate FAR 10.0004(a)(1) and (a)(2) and FIRMR in the following RFP sections: C3.2.1, C3.2.2, C3.2.3, C3.2.4, C3.2.5.

Question 262

The vendor protests that the solicitations violate FAR and FIRMR since they contain incomplete, unrealistic evaluations in the following sections: C3.2.1, C3.2.2, C3.2.4, C3.2.5.

Question 263

The vendor protests that the solicitation violates FAR and FIRMR by including mandatory requirements and mandatory options that go beyond the minimum needs of the government in the following areas: C3.2.1, C3.2.2, C3.2.4, C3.2.5.

All vendors should bid the same system, even if Section C3.10 lists approximately 7,000 active ports (which they claim). How should the vendor equip and wire the remaining ports? How can the Health Care Financing Administration properly evaluate vendors fairly for technical and pricing when the minimum needs are not defined? Each vendor must make assumptions on a minimum of 30 to 50 percent of the switch.

Frankly, it is difficult to believe the Health Care Financing Administration can fairly evaluate vendors when they can't identify their minimum needs and they fail to recognize the difference between ports and lines and voice mail address.

Amended Protest Complaint, at 7-8.

Discussion

HHS asserts that counts 7, 10, and 11 of the amended complaint filed in this protest are "identical" to counts 2 and 7 contained in the April 15, 1993 protest complaint. HHS Motion to Dismiss, at 1. "Claim preclusion, where found, operates to bar subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief." *Young Engineers v. International Trade Commission*, 721 F.2d 1305, 1314 (Fed. Cir. 1983). The doctrine of claim preclusion operates by virtue of a final judgment, whether the judgment results by default, consent, dismissal with prejudice, or otherwise. *Id.* at 1314. If, as HHS asserts, Telcom seeks to pursue the same claims in counts 7, 10, and 11 of this protest as it presented in counts 2 and 7 of the earlier protest, we will grant HHS's motion to dismiss.

A comparison of count 7 of this protest with count 2 of the earlier protest establishes that the two counts are nearly identical. There is, however, one distinction: Count 7 of the amended complaint filed in this protest asserts that there is a conflict between section C.3.10 of the solicitation and the response to vendor question 254, which is contained in amendment 15 to the solicitation. This claim was not made in count 2 of the earlier protest—nor could it have been, since that amendment was issued after the earlier protest was dismissed. Therefore, we grant HHS's motion to dismiss count 7 of this protest, except to the extent that count 7 alleges that there is a conflict between HHS's response to vendor question 254 and section C.3.10.

We do not see how count 10 of this protest resembles count 2 of the earlier protest. Count 10 of this protest is based upon HHS's responses to vendor questions 253 and 254, which are contained in amendment 15 to the solicitation, which was issued after the earlier protest was dismissed. HHS's motion simply declares that count 10 of this protest is the same as count 2 of the earlier protest. The motion does not explain how the two counts are related, much less establish that they are the same. Therefore, we deny HHS's motion to dismiss count 10 of this protest.

A comparison of count 11 of this protest with count 7 of the earlier protest estab-

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lishes that the two counts are nearly identical. There is one distinction: In count 11 of this protest, Telcom asserts that the solicitation fails to state HHS's minimum needs because it does not state how 3,000 ports should be equipped and wired. This claim was not made in count 7 of the earlier protest. Therefore, we grant HHS's motion to dismiss count 11 of this protest, except to the extent that count 11 alleges that the solicitation does not state how 3,000 ports should be equipped and wired.

Decision

As set forth above, HHS's motion to dismiss is granted, in part.

[¶ 26,273] Integrated Systems Group, Inc. v. Department of the Army; SYSCON Corporation, Intermec Corporation, and Federal Computer Corporation, Intervenors

GSBCA No. 12417-P, July 9, 1993. Solicitation No. DAHC94-93-R-0002. (The text below is the redacted version issued to the public on July 22, 1993.)

Requests for Proposals and Quotations—Restrictiveness—Minimum Needs.—A protest against the award of a solicitation for hand-held computers alleging that the solicitation unduly restricted competition by requiring an MS-DOS® 5.0 or later operating system for the computers was denied because the protester failed to show that the agency's requirements overstated the government's actual minimum needs. The fact that the protester was not able to compete in the procurement as a result of the solicitation's requirements did not make the requirements restrictive. The MS-DOS® requirements of the solicitation avoided the conversion problems experienced in past acquisitions and would establish a new base line promoting technological flexibility and standardization in this procurement and future acquisitions.

Requests for Proposals and Quotations—Restrictiveness—Reasonable Basis.—A protest against the award of a solicitation for hand-held computers that specified an MS-DOS® 5.0 or later or a fully compatible MS-DOS® 5.0 operating system was denied, despite the protester's contention that the government did need such an operating system, because the government showed that the procurement sought to acquire a system that afforded compatibility for existing program applications and those associated with future procurements. The evidence indicated that most of the government's personal computers used an MS-DOS® 5.0 or compatible operating system and that one of the procurement's goals was to have the hand-held computers interface with the personal computers. The government also showed that an MS-DOS® 5.0 or compatible operating system would enhance the use of peripherals and would enable programmers and users to develop applications on their personal computers and download to their hand-held computers. The government presented evidence detailing the rationale for specifying MS-DOS® 5.0, rather than an earlier version, even if all of the memory management advantages could not be utilized as a result of the hand-held computer's architecture.

Selection of Contractor—Change in Requirements—Relaxation of Requirements.—A protest against the award of a solicitation for hand-held computers that required an MS-DOS® 5.0 operating system was denied, despite the protester's contention that the government's relaxation of the requirement for a limited number of intrinsically safe hand-held computers indicated that the government overstated its minimum needs, because the government relaxed the requirement only after discovering that there were no MS-DOS® 5.0 intrinsically safe devices available on the commercial market. The government's relaxation of the operating system requirement for the intrinsically safe computers was rationally based and designed to enhance competition.

Brand Name or Equal—Salient Characteristics—Description Adequacy.—A protest against the award of a solicitation for hand-held computers requiring an MS-DOS® 5.0 or compatible operating system that alleged that the government's failure to list the brand-name system's salient characteristics violated statutes, regulations, and its delegation of procurement authority was denied because the specification was clear and did not require

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further elaboration. The protester contended that the specification required it to guess at the desired essential qualities of the brand-name software. Whether the MS-DOS® 5.0 compatibility specification was viewed as a salient characteristic of the hardware or of the software or as a brand-name or equal specification, the protester did not need to guess as to the functional characteristics of an MS-DOS® 5.0 or fully compatible operating system. MS-DOS® 5.0 or fully compatible operating system is self-defining to any knowledgeable vendor.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Col. Riggs L. Wilks, Jr., Maj. Charles R. Marvin, Jr., Maj. Karl M. Ellcessor III, Maj. Roger D. Washington, and Maj. Rose J. Anderson, Office of the Chief Trial Attorney, Department of the Army, Arlington, Virginia. For the intervenor, SYSCON Corporation: Arthur M. Rayman. For the intervenor, Intermec Corporation: John W. Sobba. For the intervenor, Federal Computer Corporation: David S. Kovach.

Before GOODMAN, BORWICK, and HYATT, Administrative Judges.

GOODMAN, Administrative Judge: Protester, Integrated Systems Group, Inc. (protester or ISG), has protested the terms of a Department of the Army (respondent or Army) solicitation no. DAHC94-93-R-0002 (the solicitation) for the purchase of Automatic Identification Technology (AIT), which includes Portable Data Collection Devices (PDCDs), commonly known as hand-held computers. Protester filed its protest on May 5, 1993, before the time established in the solicitation for receipt of proposals that same day. Three offerors—SYSCON Corporation, Intermec Corporation, and Federal Computer Corporation—have intervened in the instant protest.

The ground of protest which remains to be resolved is whether the Army exceeded the Government's minimum needs and unduly restricted competition by including MS-DOS® requirements for the PDCDs.[1]

Protester argues that the Government's minimum needs are specific functions and capabilities that can be fully satisfied by PDCDs operating systems other than MS-DOS® 5.0 or compatible. According to protester, similar needs have been fully satisfied by the two prior contracts that acquired PDCDs with proprietary operating systems. Even if the Government's minimum needs are for an open system, rather than a proprietary system, protester believes there is no justification to exclude earlier versions of MS-DOS® prior to MS-DOS® 5.0 for the operating system of the PDCDs and MS-DOS® 3.31 for the operating system for the intrinsically safe PDCDs.

According to protester, earlier versions of MS-DOS® provide open system compatibility and, when used in conjunction with third party software, provide the increased functions of memory management that were introduced in MS-DOS® 5.0.

Finally, protester argues that even if MS-DOS® or compatible reflects respondent's minimum requirement for the operating system of the PDCDs, the specification which describes the operating system for the PDCDs is a "brand name or equal" specification which requires the solicitation to list the salient characteristics so that an offeror can select an acceptable operating system.[2]

Respondent's position is that through the AIT procurement, the Government seeks to establish a technological baseline and create a more "open systems" architecture for hand-held computer equipment, thereby taking advantage of the benefits associated with such an environment. Respondent argues that the proprietary operating systems which were provided on PDCDs in two prior procurements cannot now meet the Government's AIT needs, and that a concerted and rational effort was made by the Government to arrive at the decision to include the MS-

[1] Several grounds of protest were withdrawn by protester during discovery, and respondent's motion for partial summary relief with respect to count 2 of the protest, specifically, the part of count 2 which challenges the Army's evaluation methodology as being "unclear," and any similar issue incorporated by reference from protester's agency protest, was granted by the Board's decision of June 9, 1993.

[2] The specification requires the operating system to be "MSDOS® 5.0, or later, or an operating system that is fully MS-DOS® 5.0 or later version compatible, with the exception of the intrinsically safe PDCDs. The intrinsically safe PDCDs' operating system shall be at least MS-DOS® 3.31, or later, or an operating system that is fully MS-DOS® 3.31 or later version compatible." This will be referred to in this decision as the "MS-DOS® 5.0 compatibility specification" or the requirement for "MS-DOS® 5.0 compatibility."

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DOS® 5.0 compatibility specification for the operating system as minimum requirement.

Respondent further avers that there are many reasons for including the minimum requirement of the MS-DOS® 5.0 compatibility specification for the operating system, rather than a previous version of MS-DOS®, and that the lack of 386 or higher microprocessor in the PDCD does not limit the memory management functions as alleged by protester.

With regard to the "brand name or equal" argument raised by protester, respondent argues that the MS-DOS® 5.0 compatibility specification for the operating system is itself a salient characteristic of the hardware (or software) to be procured, or that it is self defining and no further explanation is required.

For the following reasons, we deny the protest.

Findings of Fact

Previous Procurement of AIT

1. The AIT, procurement pursuant to the instant solicitation is the third in a series conducted over the past ten years. The two previous procurements acquired AIT which included bar code scanners and related items over a period of five years each. These procurements, known as Non-Tactical (NT) I & II, or the Logistics Applications of Automated Marking and Reading Symbols (LOGMARS) I & II, acquired technology with different proprietary operating systems and programming languages in 1983 and 1988. The requirement to program applications in a vendor-unique language, and then re-code from one vendor-unique language to a completely different user-unique language for use with the LOGMARS II equipment, caused significant problems in the Government user community with respect to personnel re-training, re-programming difficulties, equipment utilization delays, and other transition costs. For example, in 1988, the difficulties encountered by the Navy in re-coding applications were so significant that the agency was forced to delay using the NT II equipment by nine months. Transcript at 232-33, 262-64.

Development of Requirements for the Instant Procurement

2. The LOGMARS Acquisition Working Group (LAWG) was formed to develop the requirements for the instant procurement. The LAWG was staffed with members representing the General Services Administration, the Defense Logistics Agency, the Defense Mapping Agency, the Army, Air Force, Navy, Marines, Coast Guard, and Army Information Systems Selection and Acquisition Agency (ISSAA). Transcript at 258-59.

3. A "data call" was sent out to the using community to obtain user input as to the types of functionality and characteristics required by the users' applications, environments, and growth projections. Responses reflected concern over the possibility of receiving proprietary hardware and software from yet another vendor of bar code systems, and a need for a standardized operating system which would allow greater portability of the applications code. Transcript at 161-70; Protest File, Vol. 9, Exhibit 47.

4. As a result, the LAWG sought to avoid in this procurement the need to translate the existing inventory of application software into yet another proprietary language, and to avoid retranslation in future procurements. The LAWG recognized that retranslation would be repeated every five years, unless the incumbent contractor was selected in the subsequent contracts. Transcript at 199-200.

5. After studying responses from the data calls and analyzing government needs, program management personnel conducted extensive market surveys to determine the existence and scope of competition in the relevant portion of the PDCD marketplace. As a result of these surveys, they determined that there were several manufacturers who could compete, offering PDCDs with at least two operating systems, providing the standardization necessary to prevent the need for re-coding and retraining. Transcript at 112-13, 207, 249-50.

The Disk-Based Operating System (DOS) Requirement of the Instant Procurement

6. Before release of the solicitation in the instant procurement, ISSAA released a draft request for proposals (RFP) in November 1992, requesting comments from industry. Transcript at 366, 395. The draft RFP contained a requirement for MS-DOS® 5.0 or WINDOWS- 3.1 for the PDCDs' operating system. Of the approximately 600 comments received in response to the draft RFP, only one questioned the MS-DOS® requirement. *Id.* at 208. That question did not challenge the requirement for MS-DOS® compatibility, but only wanted to know whether the operating system would be resident on the PDCDs or the PCs. *Id.* at 207.

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The Solicitation

7. The solicitation was issued by ISSAA on March 5, 1993, Protest File, Vol. 1, Exhibit 1 at A-I, accompanied by a letter from the contracting officer informing offerors that the RFP, and responses to clarifying questions from potential offerors, could be accessed electronically through a bulletin board service established by ISSAA for that purpose. The date for receipt of proposals was established originally as April 5, 1993. This date was subsequently extended to May 5, 1993, at the request of vendors. *Id.*, Vol. 2, Exhibit 2, Amendment 0001 at 2.

8. The solicitation is for the acquisition of hardware, software, maintenance, training, technical engineering services, and documentation to establish and utilize automated identification systems throughout the Department of Defense and certain civilian agencies. The solicitation is for a firm, fixed-price, indefinite delivery, indefinite quantity contract structured to provide a basic year and nine option years. The guaranteed minimum amount is $4,000,000; the maximum amount is $249,370,000. Protest File, Vol. 1, Exhibit 1 at B-1, C-1.

9. The MS-DOS® compatibility requirement in the draft RFP was incorporated into the solicitation. Protest File, Vol. 1, Exhibit 1 at C-22. After release of the solicitation, ISSAA amended the solicitation to clarify further that the operating system requirement was a "DOS" (disk-based operating system) requirement, not an MS-DOS® requirement, to allow competition from other DOSbased operating systems compatible at the MS-DOS® 5.0 level or higher. *Id.*, Vol. 2, Exhibit 4, Amendment 0003 at C-22a. For intrinsically safe PDCDs, the MS-DOS® requirement was relaxed to MS-DOS® 3.31 or compatible, after a review of the market prompted by industry comments revealed the unavailability of any PDCDs utilizing an MS-DOS® or compatible operating system at the 5.0 level or higher. Transcript at 204-06; Protest File, Vol. 2, Exhibit 5, Amendment 0004 at 3; Vol. 4, Exhibit 30 at 2.

10. Section M.3 of the solicitation requires that the Army award the contract to the offeror who provides the "best value" to the Government. Section M.3 of the solicitation provides in part:

> M.3 BASIS FOR AWARD ("BEST VALUE" EVALUATION)
>
> An award will be made to that responsible acceptable offeror based on all evaluation criteria described in this section and is deemed to be in the best interest of the government considering technical, management and logistics, and cost, whose prices are otherwise determined to be fair and reasonable.
>
> M.4.3 Evaluation Areas of Consideration. Consideration shall be given to the areas below. Evaluation shall be based upon the criteria stated in Section M as well as the requirements stated in Section C. All mandatory requirements set forth in the specification shall be met.

Protest File, Vol. 1, Exhibit 1 at M-2 to M-3.

11. Mandatory requirements of the procurement were set forth in Section C of the solicitation, and designated as minimum requirements. The solicitation reads, in pertinent part:

> C.3.1.2. Mandatory Requirements. The Contractor shall satisfy all stated technical requirements of this Specification and the referenced Attachments and Exhibit. Requirements are a stated minimum, unless specified otherwise.

Protest File, Vol. 1, Exhibit 1 at C-2 to C-3.

12. The solicitation informs potential offerors of the applications and objectives of the AIT program:

> C.1.2 AIT APPLICATIONS. Some anticipated applications of AIT are in the areas of personnel identification, health care, food service, inventory management, logistics, retail sales, access control, transportation, and personnel management.
>
> C.1.3 AIT OBJECTIVES. The objectives of the AIT program are to provide: a common, integrated structure for the automatic collection, storage, retrieval, processing, transmission, and receipt of data; standardization and interoperability among Government users of AIT equipment; and flexible systems and equipment that can grow in size and capability, adapting to the needs of the Government.

Protest File, Vol. 1, Exhibit 1 at C-1.

13. The solicitation states the following requirements:

> C.3.1.1 General. The Contractor shall provide all necessary hardware, software, firmware, cables, connectors, accessories, maintenance, training, and documentation. Because of the diversity of applications, the Government requires the Contractor to provide the technical engineering services to configure, operate, and maintain the appropriate hardware and software to satisfy the specific application. AIT equipment shall be user-friendly,

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commercial-off-the-shelf (COTS) equipment capable of operating worldwide. The Government will require Contractor assistance in completing necessary applications when AIT equipment is installed in foreign countries. All Contractor-supplied operating systems software and firmware shall be installed prior to delivery. AIT equipment shall be capable of supporting operations in both the tactical and non-tactical environment. A tactical environment is defined as similar to a heavy industrial setting that may have a potentially explosive atmosphere. In this rigorous environment, AIT equipment may be subjected to rough handling, operational use, shock, and vibration caused by dropping or transportation over rough terrain. A non-tactical environment is defined as a normal office or light industrial setting, both indoors and outdoors.

. . . .

C.3.1.7 Current Production. All equipment shall be state-of-the-art technology and in current production at the time the Demonstration, C.17, is performed.

a. "State-of-the-art" is defined as the most recently designed components that are in current production, marketed, available, maintained, and supported in accordance with the mandatory requirements specified elsewhere in this document. Prototype or development equipment is not acceptable. Out-of-date or discontinued equipment is not acceptable.

. . . .

C.3.2 FUNCTIONAL INTEGRATION. The Contractor shall provide equipment capable of integrating with other provided AIT equipment into operating configurations necessary to accomplish the automated collection, storage, retrieval, receipt, processing, and transmission of data.

Protest File, Vol. 1, Exhibit I at C-2 to C-4.

14. With respect to the PDCDs being acquired, the solicitation imposes the following requirements:

C.4.4.1 General Requirements. Portable data collection devices (PDCDs) are microprocessor-based, hand-held devices designed to gather source-entry data. The Government has a requirement for a family of PDCDs that meets a variety of operational needs in widely varying environmental conditions. Typical environments include office settings that require PDCDs with no hardening, a tactical environment that requires industrially hardened, intrinsically safe PDCDs, and a warehouse environment where one-handed operations will require bar code scanners embedded in or integral to the PDCDs . . . . The requirements may be met by as few as one or several versions, or models, of PDCDs. . . . The PDCD shall support a wide range of AIT applications. PDCDs shall have memory options for large applications, shall be user-programmable, and shall provide the operator with assistance or prompts to perform required functions. The PDCD shall be reliable and user-friendly. The PDCD shall be able to transmit stored data to a PC or host computer for further processing.

C.4.4.2 Functional Requirements. The PDCD family shall be sufficiently versatile in order to satisfy the following requirements: real-time and batch processing; flexibility in attaching a bar code non-contact scanner or wand; bar code scanner physical integration with the PDCD; interface with peripheral devices used to read/write to integrated circuit cards, and Personal Computer Memory Card International Association (PCMCIA) PC memory cards; interface with a peripheral device used to read magnetic stripe cards; data collection in a location that requires an intrinsically safe device; and data collection for workplaces requiring industrially hardened devices. PDCD memory shall be at least 256 Kbytes of RAM that can be expanded in increments at the user's option, and by the user, to 512 Kbytes and 1 Mbyte of RAM, if less than 1 Mbyte of RAM is provided in the basic configuration. In addition to RAM, a minimum of 64 Kbytes of non-volatile memory modules for storage of applications programs shall be included in the basic configuration and shall use EEPROM technology.

C.4.4.3 interfaces. The PDCDs shall interface with the following peripheral devices: bar code scanners or readers; integrated circuit card reader/writers; PCMCIA PC memory card reader/writers; and magnetic stripe readers. Although the Government requires a family of PDCDs, this requirement could potentially be met by one, or several, PDCD versions that can interface with the peripherals, and are also capable of meeting the following requirements: the PDCDs shall accept data from a bar code scanner or reader, integrated circuit card, PCMCIA PC memory card, magnetic stripe card, or manual data entry by keypad or keyboard; the PDCDs shall write data to integrated circuit cards,

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and PCMCIA PC memory cards; and, the PDCDs shall support various types of bar code scanners, such as wand bar code scanners, hand-held, non-contact, bar code scanners, and badge (or slot) bar code scanners. For portable operation, the ICC and PCMCIA PC card reader/writers, and the magnetic stripe reader interface, shall be integral or attached to the PDCD. When in use with the PDCD, the ICC and PCMCIA PC card reader/writers, and the magnetic stripe reader, shall be as mobile or portable as the PDCD and shall not encumber the operator. The Government recognizes that the PDCD may no longer be intrinsically safe when the ICC and PC card reader/writers, and the magnetic stripe reader, are attached.

Protest File, Vol. 1, Exhibit 1 at C-6 to C-7; Vol. 2, Exhibit 4, Amendment 0003 at 3.

15. The solicitation included the following requirements related to software:

C.5 SOFTWARE REQUIREMENTS.

AIT software is comprised of applications software, diagnostic software, and system utilities. Software shall be capable of being installed on PC-based hosts with minimal degradation in equipment performance. Each provided program shall run under MS-DOS® 5.0 or Microsoft WINDOWS® 3.0, or later. The PDCD operating system shall be MS-DOS® 5.0, or later, or an operating system that is fully MS-DOS® 5.0 or later version compatible, with the exception of the intrinsically safe PDCDs. The intrinsically safe PDCDs' operating system shall be at least MS-DOS® 3.31, or later, or an operating system that is fully MS-DOS® 3.31 or later version compatible. An intrinsically safe PDCD with MS-DOS® 5.0 or compatible, or later version, is desirable.

Protest File, Vol. 1, Exhibit 1 at C-22; Vol. 2, Exhibit 4, Amendment 0003 at C-22a, Exhibit 5, Amendment 0004 at 3.

16. The solicitation also requires the awardee to provide bar code application generation software able to produce source code in ANSI "C" and executable code for the PDCD. In addition, the solicitation states that the "ability to produce source code in BASIC® and/or Ada in addition to C would be desirable." Protest File, Vol. 1, Exhibit 1 at C-23; Vol. 2, Exhibit 4, Amendment 0003 at C-23. Compilers including all necessary libraries to allow for calls activating full functionality of the PDCDs are required for ANSI "C," BASIC®, and Ada programming languages. *Id.*, Vol. 1, Exhibit 1 at C-23.

17. An operating system is a computer program that coordinates the activities of a computer. The operating system is responsible for setting guidelines under which common computer tasks are executed. MS-DOS® stands for Microsoft Disk Operating System, manufactured by Microsoft Corporation. Version 5.0 wad released in 1991. Steven Simirin, *The Waite Group's MS-DOS® Bible* (Sams Publishing, 4th Ed. 1991). MS-DOS® 6.0 was released in 1993.

18. DR-DOS 6.0, a Novell product, is considered by the Government to be compatible, for the purpose of this solicitation, with MS-DOS® 5.0. Transcript at 113, 119, 124, 220.

19. The minimum system requirement for MS-DOS® 5.0 is an 8088 or higher microprocessor and 256K of RAM. *Microsoft MS-DOS® Operating System version 5.0 User's Guide and Reference* (Microsoft Corp. 1991). The minimum system requirement for DR-DOS 6.0 is an 8088 microprocessor and a minimum of 512K of RAM. *DR-DOS Version 6.0* (Novell 1992).

20. Compatibility with MS-DOS® 5.0 is determined in two ways—by running applications which MS-DOS® 5.0 is able to run, and by testing similarity of command functions. Transcript at 118-19.

21. It is extremely difficult to find MS-DOS® versions below MS-DOS® 5.0 on the current commercial market. Transcript at 394.

22. As part of Section C, identified as a minimum requirement, the solicitation required a demonstration of the performance of the offerors' equipment:

C.16 AIT DEMONSTRATION PLAN

C.16.1 GENERAL. As part of the proposal evaluation process, those Offerors determined to be in the competitive range shall demonstrate the hardware and software identified in the Offeror's proposal.

C.16.1.1 Demonstration Objective. The Government shall inspect and observe all COTS AIT equipment proposed by the Offeror to satisfy the requirements of this contract. Using the scenarios in this plan, the Offeror shall demonstrate interoperability of all AIT equipment; complete end-to-end connectivity; and, the minimum functional use of each piece of equipment. The demonstration shall occur in two parts: 1) the Offeror's presentation of the AIT equipment following the scenarios provided in this plan; and 2) the Government's independent observation and operation of the AIT equipment. All par-

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ticipating Offeror's will be given equal opportunity to demonstrate Offeror-proposed AIT equipment and configurations during individually scheduled demonstration periods. The Government reserves the right to schedule additional demonstration periods to review deficiencies noted in any one demonstration. If this right is exercised for any Offeror, it will be exercised for all Offerors with demonstration deficiencies.

. . . .

C.16.2.2

. . . .

f. Portable Data Collection Devices

1. Demonstrate the PDCD's expandable memory feature.

2. Demonstrate the ability of the PDCDs to perform real-time and batch processing of data by interfacing PDCDs with the following equipment:

a) Host Computer. Demonstrate the PDCD's ability to send and retrieve information from a host computer.

(b) Cards. Demonstrate the ability of the PDCD to read and write data to Integrated Circuit cards, PC Memory Cards, and Optical Memory Cards. Demonstrate the ability of the PDCD to read ANSI/ISO Standard magnetic tracks 1 and 2 of the magnetic stripe on the IC Card. The demonstration should include, but not be limited to the following: any unique features, memory capacity, read/write/rewrite functions, card and data tampering protection features, and the connection to an AT-compatible computer via an RS-232C interface.

(c) Software. Demonstrate the use of operating system software and application programs downloaded from a computer. Show a PC screen display that mimics the PDCD display. Download the generated code to a PDCD and demonstrate correct operation on a PDCD. Run the application generator on a PC utilizing the system prompts. Trouble shoot and modify the generated code by changing three lines of code. Demonstrate source code output in BASIC®, ANSI "C", and Ada languages.

(d) Modem. Demonstrate the transfer of data to a host computer using an RF modem.

(e) Port Concentrator. Demonstrate the connection of multiple PDCDs to a host computer using the port concentrators described in C.4.14.

(f) Scanners. Demonstrate interface capability with a bar code non-contact scanner and wand.

Protest File, Vol. 1, Exhibit 1 at C-58 to C-59.

Clarification Questions from Potential Offerors Concerning the MS-DOS® 5.0 Requirements

23. On March 26, 1993, the Army issued RFP amendment no. 0001, which included the answers to questions submitted by prospective offerors. Question 5—pertaining to the MS-DOS® 5.0 requirement in RFP paragraph C.5.2—stated:

> This new requirement (not part of the DRFP) is exclusionary to this contractor. Our operating system is DR-DOS 3.41 and is MS-DOS® 3.3 compatible. Our choice of DR-DOS was made four years ago in order to take advantage of DR-DOS's capability of component shutdown to alleviate unnecessary power consumption during portable operations.
>
> All support PC-based software from this contractor operates under MS-DOS® 5.0 or Microsoft WINDOWS 3.0.
>
> The new mandatory requirement for PDCD MS-DOS® 5.0 operating system is an overly restrictive requirement and is, at this eleventh hour, impossible to satisfy without violating paragraphs 3.1.6 and 3.1.7.
>
> Would the Government consider modifying the requirement to accept MS-DOS® 5.0 *or* DR-DOS 3.41?

The Army's response to question 5 was:

> 1) Your reference above should be to C.5, not C.5.2.
>
> 2) The government requires compatibility with MS-DOS® 5.0. There is no requirement for the solution to be MS-DOS®. The Government believes that is clear in the RFP.

Protest File, Vol. 2, Exhibit 2.

24. RFP amendment no. 0001 also included question 19, which stated:

> Request that the Government rescind the requirement for "full MS-DOS® 5.0, or later compatibility. [sic]" because it severely limits competition and does not appear to be in the Government's best interests. Not all commercially available PDCD's utilize MS-DOS®, and most of those that do, cannot support full MS-DOS® 5.0 because of BIOS and/or memory limitations. Recommend that this requirement be restated as MS-DOS® 3.3 or

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later compatibility in order to enhance the competitive nature of the contract.

The Army's response to question 19 was:

The Government requires compatibility with MS-DOS® 5.0. There is no requirement for the solution to be MS-DOS® as stated in answer #5 in Q&As, Set 1, posted to the ISSAA Bulletin Board System (BBS), 15 March 1993.

Protest File, Vol. 2, Exhibit 2.

Protester's Involvement in the Procurement and Submittal of Agency Protest

25. To act as proposal manager, protester secured the consulting services of Mr. Karl Bendorf

26. During the period April 7-29, 1993, protester submitted several questions to the Government regarding the AIT procurement. These questions sought clarification regarding various technical issues, the evaluation criteria, and the methodology to be utilized for scoring proposals. Protest File, Vol. 4, Exhibits 21-27.

27. On April 26, 1993, protester requested a thirty-day extension of the time for receipt of proposals due to allegedly unclear evaluation criteria. Protest File, Vol. 4, Exhibit 25.

28. On April 29, 1993, protester requested clarification regarding the relaxation of the MS-DOS® requirement for intrinsically safe PDCDs from MS-DOS® 5.0 to 3.31 or compatible. Protester professed an inability to understand the reason for the relaxation, stating that "[w]e were forced to select products with higher prices than we would otherwise have chosen, in order to accommodate the higher requirement for MS-DOS® 5.0 on all units." Protester again requested a thirty-day extension of the closing date for the RFP. Protest File, Vol. 4, Exhibit 26.

29. On May 2, 1993, ISG submitted an agency protest to the Army which included, in part, the following objections to the RFP specifications:

The government is procuring data collection devices which have no intrinsic requirement for a particular operating system. The government stipulates a need for a particular version of MS-DOS®, 5.0. We are aware of no aspect of bar code data collection which requires MS-DOS®, however, assuming some, as yet unspecified, need for MS-DOS® we are unable to identify those salient characteristics which are sought by the government. Since there are many different "DOS's", each endowed with different characteristics, capabilities and features, the government must list the salient characteristics desired.

After resisting all attempts by the vendor community to loosen these requirements for MS-DOS® 5.0, the government, at the last minute, has allowed the use of a version of MS-DOS® (3.31) for those data collection devices designed to be used in hazardous environments. Again, no salient characteristics were stated, nor was any reason given for limiting the intrinsically safe PDCD to MS-DOS® 3.31. We can think of no reason for limiting DOS versions below 3.20.

Protest File, Vol. 4, Exhibit 28.

30. On May 4, 1993, the Army contracting officer issued her final decision on ISG's agency protest. The final decision stated, in part, that:

The initial minimum requirement of the Government was to acquire full compatibility with MS-DOS® 5.0 in *all* PDCDs. However, relative to intrinsically safe PDCDs, the compatibility requirement was lowered to MS-DOS® 3.31 to enhance competition for this item, because of the lack of commercial availability of MS-DOS® 5.0 compatibility.

Protest File, Vol. 4, Exhibit 31.

ISG's Protest

31. On May 5, 1993, protester filed this protest before the GSBCA, specifically incorporating all of the allegations made in its agency protest. One of the grounds for the protest was:

The solicitation remains restrictive (requirement for DOS 5.0 or any version of DOS for that matter) ....

Protest File, Vol. 4, Exhibit 35.

32.

33. Three offerors intervened on the side of respondent: Federal Computer Corporation, SYSCON Corporation, and Intermec Corporation.

34. On May 23, 1993, protester amended its protest to withdraw the allegations relating to the printer speed requirement and the failure to extend the time for receipt of proposals. On June 9, 1993, in response to respondent's motion for partial summary relief, protester's allegations challenging the clarity of the evaluation criteria and methodology were dismissed by the Board.

35. A hearing on the merits was held on June 10-11, 1993. The remaining issues for resolution related to protester's allegations concerning the restrictiveness of the specifi-

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cation with regard to the DOS requirements: the generic requirement for DOS, the MS-DOS® 5.0 compatibility specification, and the propriety of the relaxation of the MS-DOS® version requirement for the intrinsically safe PDCDs.

36. Protester presented the testimony of its vice-president for marketing, Mr. Stephen L. Mills, and consultant, Mr. Karl Bendorf. The following witnesses testified in support of respondent's position: LTC Robert Coxe, the former program manager for AIT, MAJ Valerie Rasmussen, the AIT deputy program manager, Ms. Gloria McGee, the contracting officer, Ms. Christine Pallazza, the contracting specialist, Mr. Frank Murray, a member of the LAWG for this procurement, Mr. Steven Winter of Intermec Corporation, Mr. Robert Kidwell of SYSCON Corporation, and Mr. David Hoyle of Micro Palm Computers, Incorporated, as an expert in market trends in the hand-held computer industry.

The Generic DOS Requirement

37. LTC Coxe, MAJ Rasmussen, and Mr. Murray testified concerning respondent's methodology with respect to determination of its minimum needs. They detailed respondent's experience under the previous AIT procurements, the formation of the LAWG, the responses to the data calls, and the market surveys they conducted in preparation for issuing the draft RFP. Transcript at 85-94, 161-70, 187-88, 214-18, 236-37, 255.

38. LTC Coxe testified as to estimates performed prior to the issuance of the solicitation by the service branches with respect to their software translation costs. As an example, due to previous use of vendor-unique systems, one of the users in the Air Force will incur costs of over $450,000 related to re-coding of software alone, and without a method to allow portability of this software across different manufacturers' devices, these costs would continue to recur. Transcript at 93-94, 164-68; Protest File, Vol. 9, Exhibit 47.

39. Mr. Murray testified as to the need to avoid re-coding costs from the Navy's perspective. Transcript at 236-37. MAJ Rasmussen testified that the open systems approach represented by the MS-DOS® 5.0 or compatible operating system was a choice for the future, which would eliminate the recurring need for software recoding. *Id.* at 199-200.

40. MAJ Rasmussen also testified that the open systems approach represented by the MS-DOS® 5.0 or compatible operating system would eliminate the need for personnel re-training. Transcript at 199-200. Utilization of this approach would also allow the Government to take advantage of the skills of programmers, developers, and applications currently available under that standard. *Id.* at 227.

41. Respondent's market expert, Mr. Hoyle, testified that the market for PDCDs is three-tiered, based on functionality, and that the upper portion of the PDCD market (that portion relevant to this procurement) has already adopted the DOS standard for operating systems for the same reason: increased functionality and competition. He identified five separate producers of PDCDs with products using MS-DOS® 5.0 or compatible operating systems. Transcript at 452. One of the more significant advantages of this category of PDCDs is the inherent flexibility such a device offers to run complex applications or to interface with a vast assortment of peripherals.

At the bottom end of the PDCD market are those devices which can accomplish little more than simple bar code reading and decoding. Above this level are those PDCDs which use a proprietary, vendor-unique operating system. Mr. Hoyle testified that these devices afford some level of flexibility, but are "nowhere near as capable as an MS-DOS®-based system." Indeed, Mr. Hoyle testified that, in his expert opinion, such non-DOS based units are "most definitely" not state-of-the-art equipment. Transcript at 449. According to Mr. Hoyle, perhaps one of the most significant disadvantages associated with such a device is the restricted nature of a vendor-unique operating system:

> Once, for example, a customer had developed an application for a proprietary device, say, in a development environment, he can never take that software and run it on another device. And he can never take other software and run it on the hardware device. So he's very much locked into a hardware and a software platform.

Transcript at 450.

Mr. Hoyle testified that market trend for hand-held computers is moving away from non-DOS based devices and toward PDCDs operating with MS-DOS® 5.0 or compatible operating systems. He stated that the proportion of manufacturers of DOS-based PDCDs in the hand-held computer market has increased dramatically over the past five years. In 1988, only twenty-five percent of manufacturers of PDCD devices produced units using a DOS-based system. By 1992, almost ninety percent of such manufacturers

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produced DOS-based PDCDs. Transcript at 446-47. Mr. Hoyle stated that he personally knew of at least five separate producers of PDCDs using an MS-DOS® 5.0 or compatible operating system. *Id.* at 452. Protester's own proposal manager, Mr. Bendorf, acknowledged that he was aware of six or seven different producers of PDCDs using an MS-DOS® 5.0 or compatible operating system. *Id.* at 289.

42. Mr. Hoyle's market analysis was confirmed by both Mr. Winter of Intermec Corp. and Mr. Kidwell of SYSCON Corp. Transcript at 44-45, 411-12. Mr. Kidwell testified that an MS-DOS® 5.0 or compatible operating system provides a standardized architecture that supports the operation of the wide assortment of peripherals required by the AIT solicitation. specifically, Mr. Kidwell testified that standardizing drivers for PCMCIA cards is a "key example" supporting the use of an MS-DOS® 5.0 or compatible operating system. *Id.* at 427.

43. Evidence was also offered at the hearing concerning the current availability of PDCDs that do not run on a DOS-based operating system. Mr. Bendorf testified that at the current time (i.e., June 1993), to his knowledge there are at least 100 different PDCDs that do not run DOS. *Id.* at 290. According to responses he received from manufacturers, the great majority (more than ninety-eight percent) of the bar code PDCDs in the world are not DOS-based. *Id.* at 346-49.

The DOS Version Requirement

44. The Government demonstrated that the purpose of the solicitation was to acquire a system that afforded compatibility for both existing program applications and those anticipated for future procurements. The evidence presented during the hearing demonstrates that the vast majority of Government PCs use MS-DOS® 5.0 or a compatible operating system. Transcript at 231-33, 262-67. Protester's vice president, Mr. Mills, acknowledged that, based upon his dealings with the Government, the typical procurement usually requires PCs using an MS-DOS® 5.0 operating system. *Id.* at 394-95. Consequently, by virtue of this existing DOS operating system environment, Government programmers and users can readily develop applications from their PCs and download immediately to their PDCDs. *Id.* at 37, 98, 105, 132, 137.

45. The requirement for an operating system at the MS-DOS® 5.0 compatibility level was discussed by LTC Coxe, MAJ Rasmussen, Mr. Murray, and both intervenor witnesses. These witnesses stated that the specific version requirement was determined by various technical requirements for the PDCDs to interface with various peripherals, such as Personal Computer Memory Card International Association (PCMCIA) and Integrated Circuit Card (ICC) devices. Transcript at 31-32, 99-101, 153-54, 176-77.

46. LTC Coxe testified that the PCMCIA card requirement could be met by a lower version of MS-DOS®. Transcript at 122. However, such a solution, while possible, was not desirable. He testified that this solution was analogous to using a spare tire, as it might temporarily achieve a result, but you would not want to rely on the spare tire for your everyday needs. *Id.* at 149-51. Mr. Kidwell testified that PCMCIA cards can be used when third party drivers are added to MS-DOS® 3.3. *Id.* at 430-31.

47. LTC Coxe testified that the SmartDrive function of MS-DOS® 5.0 in conjunction with the HIMEM.SYS device driver would allow the PCMCIA card to function as an extension of RAM, and this function does not exist in lower versions of MS-DOS®. Transcript at 101-03.

48. LTC Coxe testified that the code compiler for MS-DOS® 5.0 is standard and that it allows ease of training and use. Transcript at 146, 181. The Army is currently compiling codes on desktop PCs, mostly using MS-DOS® 5.0 as an operating system.

49. Testimony was offered by respondent and one of the intervenors that an MS-DOS® 5.0 operating system also provides the capability to utilize the maximum amount of the first 640K of random access memory (RAM) for storage of applications programs and data on the PDCDs themselves, by loading MS-DOS® 5.0 and device drivers "higher level" memory. LTC Coxe stated that he is not aware of any operating system below MS-DOS® 5.0 that in and of itself has "an EMM 386 driver, extended memory management driver, or to have a HIMEM.SYS driver or to have any of the drivers" for high memory allocation.[3] Transcript at 29-30, 95-96, 99-103, 106-07, 178-79, 267.

50. Respondent's witnesses testified further that the requirement of accessing upper

[3] These memory management drivers are actually software programs for memory management that come as a standard feature of MS-DOS® 5.0, and whose functions can also be performed by third-party software utilities.

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level memory was essential to the ability of the PDCDs to use assorted peripherals such as the PCMCIA cards and the "smart" ICC Cards. Each of these peripherals requires its own device driver, which allows the PDCD to "talk" to the peripheral. Rather than have these drivers occupying memory addresses in the first 640K of the PDCD's memory, the MS-DOS® 5.0 or compatible operating system loads these drivers onto the device's upper memory (i.e., above 640K). Transcript at 31-32, 99-101, 153-54, 176-77. This allows the "lower 640" to be used for data gathering and collection and for running application programs. *Id.* at 99. Mr. Murray testified that unless the PDCDs used an MS-DOS® 5.0 or compatible operating system, the Government "would effectively be wasting or not have access to approximately 40 percent of the memory (it] just paid for." *Id.* at 267.

51. Mr. Bendorf and Mr. Mills testified extensively as to their knowledge of MS-DOS® in general and MS-DOS® 5.0 and earlier versions. Transcript at 293-316, 369-84. They discussed in detail the system files, the running of programs, and the command functions. *Id.* at 294, 297, 303, 307-08, 310, 325-26, 356-60, 370, 372, 380-81, 386-89, 402. In contrast to respondent's witnesses, Mr. Bendorf and Mr. Mills testified for protester that MS-DOS® 5.0 allows high memory allocation only if a computer has a 386 or higher processor. *Id.* at 295-97, 313, 355-56. Of the six or so PDCDs that run MS-DOS® 5.0, Mr. Bendorf testified that only one PDCD includes a 386 or higher chip. *Id.* at 298.

52. Mr. Bendorf also testified that high memory management can be achieved by adding third party software to versions of MS-DOS® below 5.0. Transcript at 303-05. Three of those third party software products are Quarterdeck, 386 MAX, and RIBS. *Id.* at 370. The Army, through LTC Coxe, was fully aware of the large number of third party vendors. *Id.* at 147-48.

53. Mr. Mills claimed that protester could achieve the requisite functionality of MS-DOS® 5.0 by modifying the MS-DOS® 3.0 version with an assortment of third party software drivers and other programs. Transcript at 403.

54. Mr. Mills, protester's vice president of marketing, while appearing knowledgeable in the general area of memory management and the functional differences between MS-DOS® 5.0 and earlier versions, qualified his testimony, stating that he was not familiar with the specific requirements of the AIT solicitation:

> I'll have to first say that I am not representing myself to be familiar with the specific bid and specific products and what device drivers may or may not be necessary for those specific products.

Transcript at 403.

55. Mr. Kidwell of SYSCON testified that a PDCD with less than a 386 processor could still take advantage of applications compiled on a host computer with an MS-DOS® 5.0 operating system when downloaded from the host to the PDCD. Transcript at 433-34.

56. Respondent's witnesses testified that the term MS-DOS® 5.0 is self defining. Mr. Winter further testified as to the level of specificity necessary for a solicitation to communicate minimum requirements with respect to a DOS operating system. He stated that the specific features of MS-DOS® 5.0 are standard knowledge and that anyone who needs to know the specifics need merely review the manual which is available from Microsoft that comes with the purchase of MS-DOS® 5.0. Transcript at 50, 59-60. LTC Coxe believed the features of MS-DOS® 5.0 were so obvious that the LOGMARS team did not think about specifying them, as those knowledgeable in the industry would be aware of the specific characteristics. *Id.* at 122, 124. He stated that the term is so well used that it is emphasized at trade shows by software vendors to show that their software will run in an MS-DOS® 5.0 environment. *Id.* at III. Mr. Kidwell testified that by requiring that a device operate in an MS-DOS® 5.0 or compatible environment, the computer community has absolutely no difficulty understanding what is required. *Id.* at 426.

The Relaxation of the DOS Version for Intrinsically Safe PDCDs

57. Although respondent originally required an MS-DOS® 5.0 or compatible operating system on all PDCDs, the agency's investigation in response to a question from a vendor discovered that no PDCDs were on the market that offered both intrinsically safe certification, allowing use in potentially explosive environments, and an MS-DOS® 5.0 or compatible operating system. Transcript at 80, 204-06, 221. Such devices are to be used in highly volatile environments—such as fuel points, grain silos, and other sites containing combustible materials. *Id.* at 51-52, 128. Due to the time required to complete the certification process, manufacturers had not yet marketed "5.0" versions of intrinsically safe PDCDs. *Id.* at 55, 416-17.

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Respondent states that it relaxed the requirement "reluctantly," in order to obtain the needed intrinsically safe devices, and not due to any reduction in the scope of the Government's technical needs. *Id.* at 221.

Discussion

The MS-DOS® Requirement

Protester argues that the RFP's MS-DOS® requirements violate the delegation of procurement authority (DPA)[4] that was issued by the General Services Administration (GSA) under authority of the Brooks Act. Protester also alleges that the inclusion of the MS-DOS® requirements in the instant solicitation have eliminated numerous responsible sources from the AIT procurement, including manufacturers of PDCDs with proprietary operating systems, manufacturers of PDCDs with DOS-based operating systems that are not compatible with MS-DOS® 5.0, manufacturers of intrinsically safe PDCDs with DOS-based operating systems that are not compatible with MS-DOS® 3.31, and the plethora of third party vendors that sell special software to add "MS-DOS® 5.0 functions" to earlier versions of MS-DOS® and compatible operating systems. Protester's Post-Hearing Brief at 9-12.

Respondent views protester as contending that virtually any PDCD, no matter how rudimentary and using virtually any operating system can, with the right "homemade" modifications, meet the performance objectives of the AIT procurement. Respondent characterizes protester's position as "backward-looking" philosophy, and states that "Protester hopes to pass on dated equipment with limited flexibility—consistent with the fragmented standards of the hand-held computer market five years ago. AIT is a forward-looking acquisition, however, that seeks to capitalize on current market trends promoting a more open operating systems architecture, enhanced standardization, and, hence, greater competition and flexibility among producers in the PDCD marketplace." Respondent's Post-Hearing Brief at 44-45. Instead, respondent contends that protester's marketing strategy attempts to shackle the Government to the past, offering dated equipment that lacks the functionality and flexibility sought in this new generation of automatic identification technology equipment.

This Board has repeatedly held that the fact that a particular vendor may not be able to compete in a procurement due to certain requirements contained in the solicitation does not necessarily make that requirement restrictive. *Irvin Technologies, Inc.*, GSBCA 11581-P, 92-1 BCA ¶ 24,674, 1991 BPD ¶ 348. We have acknowledged that "[e]very solicitation of necessity involves some restrictions." *International Technology Corp.*, GSBCA 9967-P1 89-3 BCA ¶ 21,917, at 110,278, 1989 BPD ¶ 128, at 6.

In order to prevail on this issue, protester must demonstrate that the requirements for MS-DOS® in the solicitation overstate the Government's actual minimum needs. *Irvin Technologies, Inc.*, 92-1 BCA ¶ 24,674, 1991 BPD ¶ 348; *see also Julie Research Laboratories*, GSBCA 9549-P, 88-3 BCA ¶ 21,076, 1988 BPD ¶ 168.

Protester has failed to meet its burden of proof and has not demonstrated that the AIT specifications overstate respondent's actual minimum needs. The goal of this procurement was to establish a new generational baseline for hand-held computer equipment and future Government procurements involving automatic identification technology. The Government wants to free itself of the restrictive limitations associated with vendor-unique hardware and software of past procurements and move to the state-of-the-art open architecture offered by an MS-DOS® 5.0 or compatible operating system. Findings 1-5, 12.

Respondent has presented evidence detailing the underlying rationale for specifying MS-DOS® requirements for the AIT solicitation. Respondent's and intervenors' witnesses discussed the reasons and benefits for movement to the open architecture afforded by an MS-DOS® operating system.

The AIT equipment obtained under the two previous procurements was limited by the then available technology and used two different vendor-unique operating systems. With the award of the second contract, the Government had two systems that used rad-

[4] The DPA in this procurement reads, in relevant part:

> With respect to competition, the basic procurement objective in satisfying FIP requirements is to obtain full and open competition by using competitive procedures which permit all responsible sources that can satisfy the needs of the agency to submit offers. This requires an acquisition strategy, suitable to the circumstances, in which the statement of the user's requirement is set forth in the least restrictive terms possible to satisfy the needs of the agency without compromising economy or efficiency . . . .

Protest File, Vol. 4, Exhibit 33.

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ically different proprietary languages and, hence, were not compatible with each other. As a consequence, the Government experienced great difficulty in re-programming software applications it had developed under the first contract for use in the second. Consequently, the Government was forced to train programmers in two very different programming languages in order to convert the applications from the first vendor-unique operating system to the second vendor-unique operating system. In 1988, the difficulties encountered by the Navy in re-coding applications were so significant that it was forced to delay using the NT II equipment by nine months. Finding 1.

Respondent presented testimony that re-translating code is not only extremely time-consuming but very costly. Today, the Air Force estimates that it will cost just one of its users about $450,000 to convert its software applications from one vendor-unique system to another.[5] By acquiring a system that uses an MS-DOS® 5.0 or compatible operating system, the Government hopes to free itself from translating vast inventories of software for future procurements. The AIT program manager further determined that only by acquiring an open systems architecture such as that offered by an MS-DOS® 5.0 or compatible operating system could the Government avoid the cycle of coding and then re-translating program codes. Finding 38.

This decision to acquire an open system was the result of the Government's review of a series of data calls, market surveys, the findings of its acquisition working group, and responses to a published draft RFP for the vendor community to accurately determine its minimum requirements. Relying on these extensive resources, the Government promulgated the Section c statement of work contained in the present solicitation. Findings 2-5.

Based upon its experiences with the earlier LOGMARS contracts, the Government is particularly concerned with compatibility of systems for future AIT-related procurements. Additionally, the Government wants to avoid the problems and costs related to training programming personnel on vendor-unique systems and, instead, enhance the ability of users themselves to program their own applications—thereby maximizing user productivity. Finding 40. Therefore, the MS-DOS® requirements of the solicitation avoid the conversion problems experienced in past acquisitions and establish a new baseline that promotes technological flexibility and standardization in this procurement and future acquisitions. Findings 1, 3, 4, 37-40.

Respondent's expert on trends in the PDCD market testified at length as to the three-tiered structure of the market and the advantages of the types of PDCD's sought in this procurement, as well as their availability. Finding 41. Protester's argument that a non-DOS based, proprietary operating system can function just as effectively as a DOS-based operating system ignores the advantages with respect to hardware and software flexibility, and the ability to integrate technologically new components as they are made available.

In *Irvin Technologies, Inc.*, this Board held:

> We cannot take issue with an agency's restrictions on competition in pursuit of legitimate agency requirements where those restrictions are rationally premised and reasonable .... We give more credence to those persons charged with the responsibility for making such discretionary judgments than we give to the opinions of vendors which have not clearly demonstrated greater knowledge of the Government's internal operations and needs.

92-1 BCA at 123,111, 1991 BPD ¶ 348, at 6 (citing *Data General Corp. v. United States*, 915 F.2d 1544, 1551 (Fed. Cir. 1990); *Computervision Corp.*, GSBCA 8744-P, 87-1 BCA ¶ 19,553, at 98,819, 1986 BPD ¶ 227, at 16).

We find that respondent's decision to include the MS-DOS® requirements in the solicitation was rationally premised and reasonable. We give more credence to the testimony of respondent's witnesses, who were charged with the responsibility of making the determination to include the MS-DOS® requirements in this procurement, than we do to the testimony of protester's witnesses, who clearly have not demonstrated greater knowledge of the Government's internal operations and needs.

Protester presented the testimony of two witnesses. Its vice president of marketing disclaimed any specific knowledge of "the specific bid and specific products and what device drivers may or may not be necessary

[5] Protester characterized as speculative the testimony and documentation presented by respondent's witnesses as to the recoding costs that the Government will incur in the future if an open system is not procured. Protester's Post-Hearing Brief at 10-11. While these costs were of necessity estimates, we do not find that they were speculative.

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for those specific products." Finding 54.

as stated above, we give more credence to the testimony of respondent's witnesses.

We therefore find that the MS-DOS® requirements in the solicitation are rationally premised and reasonable, given the Government's desire to avoid the technological and competitive restrictions engendered by continuing to have to procure proprietary operating systems for PDCDs.

The MS-DOS® 5.0 Compatibility Specification for the Operating System

Protester offers the same arguments that it made regarding the choice of MS-DOS® requirement with regard to respondent's determination to specify the operating system of the PDCDs as "MS-DOS® 5.0, or later, or an operating system that is fully MS-DOS® 5.0 or later version compatible, with the exception of the intrinsically safe PDCDs." Protester believes that even if the generic requirement for MS-DOS® does not restrict competition, the Government simply does not need the flexibility, or cannot take full advantage of, an operating system which uses MS-DOS® 5.0 as a baseline.

Protester contends that earlier versions of MS-DOS® used in conjunction with third party software can adequately meet the minimum needs of the Government. Respondent argues that this hybrid approach results in the very problems regarding standardization among AIT hardware and software that the Government hopes to avoid. Also, this approach conflicts with protester's statement that it is extremely difficult to find MS-DOS® versions below MS-DOS® 5.0 on the current commercial market. Finding 21.

The Government demonstrated that the purpose of the procurement was to acquire a system that afforded compatibility for both existing program applications and those associated with future procurements. The evidence presented during the hearing and confirmed by protester demonstrates that the vast majority of Government PCs use an MS-DOS® 5.0 or compatible operating system. Finding 44. One of the major goals of the procurement is to have the PDCDs interface with personal computers so that information can be downloaded from the PC to the PDCD and uploaded from the PDCD to the PC. *Id.* The fact that the majority of Government PCs utilize MS-DOS® 5.0 was a significant reason for the MS-DOS® 5.0 compatibility specification for the PDCD operating system. Because the applications required in the procurement are also specified to be developed and run under MS-DOS® 5.0, such compatibility is desirable with the operating system of the PDCD.

Respondent introduced evidence to demonstrate that an MS-DOS® 5.0 or compatible operating system enhances the use of the numerous peripherals also sought by the Government under this procurement, such as the PCMCIA cards and ICC Cards. Findings 45, 47. Additionally, the code compiler for MS-DOS® 5.0 is standard and it allows ease of training and use. Finding 48. Thus, by virtue of this existing MS-DOS® 5.0 operating system environment, Government programmers and users can readily develop applications from their PCs and download to their PDCD's. Finding 44.

A great deal of testimony was offered concerning the advantage of using MS-DOS® 5.0 for memory management. Respondent offered testimony supporting its decision for requiring an MS-DOS® 5.0 or compatible operating system because of the ability of such a system to allow access to upper level memory to load device drivers in order to have more conventional memory free to run programs. These device drivers are standard features of MS-DOS® 5.0. Findings 45, 49-50. Protester's witnesses testified that the advantages of memory management of MS-DOS® 5.0 is lost if the PDCD does not contain at least a 386 microprocessor running in protective mode. Finding 51. Mr. Kidwell, of SYSCON Corporation, specifically refuted protester's argument that only PDCDs using a 80386-series chip can support an MS-DOS® 5.0 or compatible operating system. Mr. Kidwell testified that it is not whether the PDCD uses an 80386-series chip but whether the chip supporting the PDCD has a 16-bit interface. Finding 55.

This apparent confusion in the testimony concerning the type of microprocessor required for taking advantage of MS-DOS® 5.0's capabilities with regard to memory management arises from the similarity of terminology and concepts used in an admittedly difficult subject area. A 286 microprocessor may access the High Memory Area (HMA), the first 64K above 1.024 megabyte (occupied by conventional memory—the first 640K, and upper memory, from 640K to 1.024 megabyte). A 286 processor accesses the HMA and loads MS-DOS® 5.0 in this area by way of a device driver, HIMEM.SYS, thereby freeing those portions of conventional memory that would be normally occupied by MS-DOS® 5.0. However, a 386 processor or higher is needed to access the upper memory blocks (UMB) (va-

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cant portions of upper memory between 640K and 1.024 megabyte) by using the device driver EMM.386 which acts to map extended memory into these vacant blocks of upper memory. This same result may be achieved with a 286 processor using third party memory management software. *Microsoft MS-DOS®, Operating System Version 5.0 User's Guide and Reference* 315 (Microsoft Corp. 1991). This is further complicated by the fact that the high memory area is often confused with the first 64K of extended memory, which it is not. The first 64K of RAM above 1.024M will either be HMA or extended memory, but it cannot be accessible as both. HMA is accessed in real mode, while the first 64K of extended memory is accessed in protective mode. John M. Goodman,[6] *Memory Management for All of Us* 524 (SAMS Publishing 1992).

The conclusion from the foregoing discussion is that MS-DOS® 5.0's memory management capabilities may not be fully utilized unless the PDCD uses a 386 microprocessor or greater and has extended memory. Even so, MS-DOS® 5.0 can run with an 8088 processor and 256K of RAM, which is the minimum RAM required in the solicitation for the PDCDs, though it may not take advantage of it memory management capabilities due to the architecture of the system on which it is running. Finding 19. DR-DOS 6.0, which respondent has decided meets the MS-DOS® 5.0 compatibility specification, requires an 8088 processor and 512K of RAM. *Id.*

There are at least three versions of a commercially available operating system which would satisfy the MS-DOS® 5.0 compatibility specification for the operating system without using third party memory management software—MS-DOS® 5.0, MS-DOS® 6.0, and DR-DOS 6.0. Findings 17, 18. These products are licensed to vendors and readily available to producers of PDCDs. Respondent's expert in market trends identified at least five different producers of PDCDs using MS-DOS® 5.0 or compatible operating systems. Finding 41.

Protester has failed to meet its burden of proof, and has not demonstrated that the requirement for the operating system to be "MS-DOS® 5.0, or later, or an operating system that is fully MS-DOS® 5.0 or later version compatible" overstates the Government's actual minimum needs. Respondent has cited numerous reasons which justify the choice of MS-DOS® 5.0 rather than an earlier version, even if all the advantages of memory management cannot be utilized as the result of the architecture of the PDCDs.

Respondent has presented evidence detailing the underlying rationale for specifying the MS-DOS® 5.0 operating system requirements for the AIT solicitation. Use of earlier versions of MS-DOS® with third party software may enhance protester's competitive edge, but fails to satisfy respondent's minimum needs. We find that the determination to specify an MS-DOS® 5.0 or later version (or fully compatible) operating system to be rationally premised and reasonable. This determination is not restrictive. Again, we give more credence to the testimony of respondent's witnesses who were charged with the responsibility of making the determination to include the MS-DOS® 5.0 requirements for the operating system in this procurement than we do to the protester, whose witnesses clearly have not demonstrated greater knowledge of the Government's internal operations and needs.

Relaxation of the Operating System for Intrinsically Safe PDCDs Was Rationally Based.

Respondent has detailed the rationale behind the MS-DOS® 5.0 requirements for the AIT procurement. In April 1993, the Government relaxed the operating system requirement for a small portion of the PDCD population—the intrinsically safe PDCDs. The Government took this action only after discovering that there were no MS-DOS® 5.0 intrinsically safe devices available on the commercial market. Thus, to enhance competition, the Government relaxed the operating system requirement for this very limited number of PDCDs. Finding 57.

We do not view this relaxation as an admission by respondent that it has overstated its minimum needs. Rather, having found that the MS-DOS® 5.0 or compatible standard has been established as a minimum requirement for the procurement, for the reasons stated above, the relaxation of the requirement for the intrinsically safe PDCD's, because of the current state of the market, is rationally based. The specification does state that an intrinsically safe PDCD with an MS-DOS® 5.0 operating system or compatible, or later version is desirable. Finding 15.

[6] No relation to the author of this opinion.

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Description of the Operating System

Having determined that respondent's decision to designate MS-DOS® requirements and an operating system of MS-DOS® 5.0 or later version fully compatible was rationally based, we turn to the last issue in this protest. Protester alleges that respondent violated statutes, regulations and/or its DPA by not stating the salient characteristics for the brand name software, MS-DOS® 5.0 and MS-DOS® 3.31, for the PDCDs. In essence, protester argues that the specification is unclear and requires further elaboration. Protester bases its argument on Federal Acquisition Regulation (FAR) 10.001 and 10.004. 48 CFR 10.001, 10.004 (1992).

Purchase description is defined in FAR 10.001 as follows:

> "Purchase description" means a description of the essential physical characteristics and functions required to meet the Government's minimum needs.[7]

FAR 10.004, relied upon by protester, reads in part:

> (a)(1) Plans, drawings, specifications, standards, or purchase descriptions for acquisitions shall state only the Government's actual minimum needs and describe the supplies and/or services in a manner designed to promote full and open competition.
>
> ....
>
> (b)(1) When authorized by 10.006(a), or when no applicable specification exists, agencies may use a purchase description subject to pertinent restrictions on repetitive use. *An adequate purchase description should set forth the essential physical and functional characteristics of the materials or services required.* As many of the following characteristics as are necessary to express the Government's minimum requirements should be used in preparing purchase descriptions:
>
> (i) Common nomenclature.
>
> (ii) Kind of material; i.e., type, grade, alternatives, etc.
>
> (iii) Electrical data, if any.
>
> (iv) Dimensions, size, or capacity.
>
> (v) Principles of operation.
>
> (vi) Restrictive environmental conditions.
>
> (vii) Intended use, including—
>
> (A) Location within an assembly, and
>
> (B) Essential operating condition.
>
> (viii) Equipment with which the item is to be used.
>
> (ix) Other pertinent information that further describes the item, material, or service required (emphasis added).

Thus, protester argues that by failing to include "salient characteristics" (i.e., "essential physical and functional characteristics") for the brand name products, MS-DOS® 5.0 and MS-DOS® 3.31, the Army violated the requirements of FAR 10.004 and the DPA in this procurement, and the Competition in Contracting Act. Protester contends that the MS-DOS® 5.0 compatibility specification requires it to guess at the desired essential qualities of the brand name item, which makes it a defective specification. *See Ciba Corning Diagnostics Corp.*, B-223131, 86-2 CPD ¶ 185 (Aug. 13, 1986). As the Board stated in *CMP Corp.*, GSBCA 8703-P, 87-1 BCA ¶ 19,499, 1986 BPD ¶ 214:

> It is axiomatic that bidders should not have to guess at the essential qualities, features or characteristics of the brand name item they have to equal.

Id. at 98,561, 1986 BPD ¶ 214, at 7.

Respondent poses alternative arguments on this issue. First, it argues that salient characteristics are required to be listed only for features that may be segregated from the central identity of the product to be procured. Since this procurement focuses on the purchase of hardware, i.e., PDCDs, the MS-DOS® and MS-DOS® 5.0 requirements may not be segregated, and therefore no salient characteristics need be listed. Respondent argues further that the specification of an MS-DOS® 5.0 or compatible operating system should be considered a salient characteristic of the hardware to be procured, or alternatively, a salient characteristic of the software. Therefore, there is no need to describe a salient characteristic with additional "granularity."

Respondent's alternative argument is that even if the MS-DOS® 5.0 compatibility specification is deemed to be a brand name specification and not a salient characteristic of the hardware or software, salient characteristics need not be listed because the specification itself, MS-DOS® 5.0, coupled with a

[7] Presumably, protester also relies upon the following portion of FAR 10.001, although it fails to cite it in its briefs:

> "Brand name description" means a purchase description that identifies a product by its brand name and model or part number or other appropriate nomenclature by which the product is offered for sale.

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version level (5.0 or later) denotes a specific set of capabilities, level of functionality, and criterion of performance which should be known to a knowledgeable offeror.

Respondent premises this latter argument on the principle that salient characteristics are by definition those not readily discernable from the identification of the product. *Wordplex Corp.*, GSBCA 8159-P, 86-1 BCA ¶ 18,554, 1985 BPD ¶ 128. Thus, respondent contends that utilization of the phrase "MS-DOS® 5.0 or fully compatible" tells competent offerors exactly what functionality is expected of the operating system. Thus, according to respondent, MS-DOS® 5.0 or fully compatible is self-defining to a knowledgeable vendor, and no further elaboration is necessary. By stating MS-DOS® 5.0, there is no need to list salient characteristics, because such a designation leaves no room for guessing. Thus, the purpose for listing the salient characteristics of the brand name or equal analysis is not present.

We agree with respondent. Whether one considers the MS-DOS® 5.0 compatibility specification a salient characteristic of the hardware or software, or a brand name or equal specification, no further elaboration is necessary. Protester has shown that it does not need to guess as to the functional characteristics of an MS-DOS® 5.0, or later version, or fully compatible operating system.

Respondent's witnesses testified that while the specification may not mean anything to a layman, a knowledgeable vendor would know the functional characteristics of an operating system which is MS-DOS® 5.0 or later version, fully compatible, and that this information is freely available from Microsoft Corporation. Finding 56. LTC Coxe testified that there are two basic approaches to determining compatibility of an operating system—whether applications developed to run under the operating system will do so, and whether commands will execute. Finding 20. The solicitation itself contains a performance demonstration which requires the offeror to demonstrate the operating system by running programs. Finding 22.

Protester's witnesses never disavowed knowledge of the functional characteristics of MS-DOS® 5.0.[8] They testified as to their detailed knowledge of the functional characteristics of MS-DOS® 5.0 and its earlier versions, despite the fact that protester's vice-president of marketing admitted a lack of familiarity with the particulars of this procurement. Findings 51-54. Protester's correspondence before submission of its proposal shows that protester believed it was able to propose an MS-DOS® 5.0 based system. Finding 28. Mr. Mills and Mr. Bendorf both confirm LTC Coxe's testimony that the focus in determining compatibility of an operating system is the running of programs and execution of commands. Finding 51.

In arguing that the advantages of MS-DOS® 5.0 cannot be fully utilized by certain types of microprocessers, and that proprietary operating systems or earlier versions of MS-DOS® 5.0 would suffice, protester's witnesses have demonstrated their understanding of the functions of not only MS-DOS® 5.0 but also earlier versions. Protester has, therefore, demonstrated detailed knowledge to this Board of the very information which protester alleges it lacks—the functional characteristics required by the MS-DOS® 5.0 compatibility specification. Given that the MS-DOS® and MS-DOS® 5.0 requirements of the solicitation are rationally based, protester was certainly aware of at least two commercially available products that would satisfy the specification—MS-DOS® 5.0 and MS-DOS® 6.0.

To require respondent to amend the solicitation to include information detailing the functional characteristics of the operating system would not provide protester with any information additional to that which protester has demonstrated that it already possesses.

Decision

For the foregoing reasons, the protest is **DENIED.** The Board's order of May 7, 1993, suspending respondent's delegation of procurement authority hereby lapses.

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[8] Being software, there was no discussion as to the physical characteristics (other than to mention that a disk operating system resides on a disk) which, together with functional characteristics, protester alleges comprise "salient characteristics."

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[¶ 26,274] Executone Information Systems, Inc. v. Department of Health and Human Services; Government Telecommunications, Inc., Intervenor

GSBCA No. 12402-P, July 21, 1993.

Protests, GSBCA—Interested Party—Direct Economic Interest.—Dismissal of a protest against an award under a negotiated procurement for telephone services was denied, despite an intervenor's contention that the protester's improper response to discovery and alleged inability to comply with the Trade Agreements Act rendered the protester not interested, because neither the government nor the intervenor showed how any alleged lack of direct economic interest required the protester to be ousted from the competition. If the protester prevailed in its protest, the government would require offerors to extend offers or to request another round of best and final offers. Moreover, if the protester prevailed in its protest, it would be a viable offeror in any subsequent negotiations with the opportunity to correct any presumed Trade Agreements Act inadequacies.

Timeliness of Protest, GSBCA—Knowledge of Basis—Supplemental Protest.—A protester's supplemental protest was not untimely filed, despite the government's and an intervenor's contention that the protester knew or should have known of any alleged noncompliance by the intervenor with the contract's mandatory support and maintenance requirements, because the record did not show that these issues were filed more than 10 days after the basis of the protest was known or should have been known. The initial protest generally alleged that the intervenor's proposal was unacceptable. The protester contended that the protest issues expressed in the supplemental protest were refinements of the earlier protest. Moreover, the contracting officer did not show that the protester, through its counsel, knew or should have known of these bases of protest at an earlier date.

Automatic Data Processing Procurement—Evaluation—Mandatory Requirements.—A protest against an award of a contract for state-of-the-art digital telephone systems was denied, despite the protester's contention that the awardee's proposal was technically unacceptable, because the protester failed to present any evidence that showed that the awardee's proposal did not meet the solicitation's mandatory support requirements or that the awardee's proposal did not comply with the solicitation's preventive maintenance requirements. The awardee's proposal included a detailed support plan and a letter from the manufacturer that confirmed its commitment to the awardee. Moreover, the technical evaluation committee and the contracting officer properly recognized that the preventive maintenance requirement did not apply to state-of-the-art digital systems, such as the system involved in this procurement.

Responsibility—Standards—Technical Acceptability v. Responsibility.—A protest against an award of a contract for state-of-the-art digital telephone systems was denied, despite the protester's contention that the government failed to make an independent responsibility determination as part of its technical evaluation of the proposals, because the determination of an offeror's responsibility is not a technical evaluation criterion, but is a distinct requirement to be met before award of any government contract. The solicitation required only that the evaluators determine whether offerors were technically acceptable. An offeror's responsibility is separate from the question of its technical acceptability. Responsibility evaluations are not relative. A more responsible offeror does not outscore a merely responsible offeror in the award selection process.

Responsibility—Procedures—Contracting Officer's Decision.—A protest against an award of a contract for state-of-the-art digital telephone systems was denied, despite the protester's contention that the contracting officer abused her discretion in finding that the awardee was a responsible prospective contractor, because the contractor failed to produce any evidence in support of its position. The record showed that the contracting officer carefully considered all of the requisite factors in making her responsibility determination; she reviewed outside information reflecting the awardee's sales and assets and the awardee's performance record on previous contracts. The contracting officer also considered the awardee's plan to provide installation and support services and the technical evaluation committee's acceptance of the plan. The contracting officer made an informed, committed business judgment in accordance with the regulations and the solicitation.

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For the protester: Elliott, Vanaskie & Riley, Washington, D.C., by Dennis J. Riley, Jared H. Silberman, and Kenneth A. Martin. For the government: Lloyd M. Weinerman and Rodney L. Benson, Office of the General Counsel, Social Security Administration, Baltimore, Maryland. For the intervenor, Government Telecommunications, Inc.: Glenn J. Ballenger, Vice President and General Counsel, and Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., by Kenneth S. Kramer, P.C., and James M. Weitzel, Jr.

Before HENDLEY, NEILL, and VERGILIO, Administrative Judges.

HENDLEY, Administrative Judge: The protester, Executone Information Systems, Inc. (Executone), contends that the intervenor, Government Telecommunications, Inc. (GTI), was improperly awarded the contract. Executone maintains that GTI failed to provide and the agency inappropriately waived two mandatory requirements (dealing with subcontractor support/certification and preventive maintenance). Further it contends that the respondent conducted the responsibility determination contrary to the terms of the solicitation and reached an unsupported affirmative determination regarding GTI's responsibility.

We conclude that Executone is an interested party to pursue the protest—despite presumed violations of the Trade Agreements Act by Executone—because it remains capable of submitting an acceptable proposal. Further, we conclude that the issues of protest relating to compliance with solicitation requirements were timely raised. We deny the protest because protester has failed to establish an agency violation of any statute or regulation.

Findings of Fact

The Award Decision

1. On June 22, 1992, the respondent, the Social Security Administration (SSA), issued solicitations SSA-RFP-93-1200 through SSA-RFP-93-1206 (hereinafter collectively referred to as the "solicitation") requesting proposals for the installation, testing, support, and maintenance of state-of-the-art digital telephone systems at various SSA field offices. Protest File, Exhibit 6. The seven solicitations were identical in all material respects, except that the various field office locations covered by the solicitation required different quantities or combinations of equipment. Hence, the respondent contemplated awarding seven contracts to satisfy its overall needs.

2. Each solicitation contemplated the award of a firm, fixed-price contract with indefinite delivery quantity provisions for additional equipment and services not to exceed a seven-year (eighty-four month) system life. Protest File, Exhibit 6. Each stated that award would be made to the low-priced, technically-acceptable offeror. Each solicitation provided that:

> Proposals will be evaluated as to their technical acceptability and overall system-life cost to the Government. To be technically acceptable, the system must meet all of the mandatory requirements in Section C and be in conformance with applicable laws such as the Trade Agreements Act. In order to be eligible for award, a proposal must be technically acceptable *and* have the lowest evaluated system-life cost.
>
> . . . .
>
> (b) *Selection Basis*
>
> When award is made by the Government, it will be made to that responsible offeror whose offer is technically acceptable and represents the lowest present value cost to the Government over the seven (7) year evaluated system life.

Id. at M-2 (§ M-1(a), (b)).

3. On March 26, 1993, both the intervenor and the protester submitted best and final offers in response to every solicitation. Protest File, Exhibits 19, 46. In response to the requirements of the solicitation GTI proposed the Fujitsu 9600 VS digital telephone system and Executone proposed the Executone IDS system with 228 CPU system. *Id.*, Exhibits 8, 9, 19, 37, 38, 46. Both proposals were found technically acceptable by the respondent's Technical Evaluation Committee. *Id.*, Exhibits 26, 32 at 8, 13. GTI's total evaluated price for the seven solicitations was $26,295,013. Executone's total evaluated price for the seven solicitations was $32,022,187. Respondent's Exhibit 1; Transcript at 170. GTI's total evaluated price was several hundreds of thousands of dollars lower than Executone's for each individual solicitation. Respondent's Exhibit 1; Protest File, Exhibit 32.

4. On or about April 16, the respondent awarded each of the seven contracts to GTI. Protest File, Exhibit 33. On April 23, Executone protested the awards here. Aside from GTI, no other competitor entered an appearance in this protest. We suspended performance under the contracts pending our decision on the merits of the protest. *See*

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Order on Proceedings (Apr. 26, 1993); Order on Further Proceedings (Apr. 29, 1993).

Support Requirements

5. Specification paragraph C.14 of the solicitation stated:

> C.14 *Support Requirements*
>
> The contractor shall provide maintenance and follow-on service throughout the life of the contract. If subcontractors are used, no substitutions to any of the subcontractors, evaluated and approved during negotiations will be permitted without at least 30 days prior notice by the contractor and prior evaluation and written approval by the contracting officer. Support services shall include:
>
> (a) The personnel support shall be provided by manufacturer-trained and certified individuals fully knowledgeable of proposed system components and who will assist Government personnel to ensure the effective continued operation of the system(s).
>
> *Response:*
>
> *Offeror to identify any proposed subcontractors and provide detailed information demonstrating the subcontractors' certification, or certification plan, to provide support services. Information regarding the subcontractor in supporting the make and model of the system offered should include the name, address, telephone number, experience and proof of certification or a comprehensive established plan for obtaining certification. If a plan for obtaining certification is submitted: 1) Certification must be accomplished not later than 40 days from the date of contract award; and 2) plan shall include a written manufacturer's concurrence.*

Protest File, Exhibit 6 at C-25 to C-26.

6. In response to specification paragraph C.14, GTI's proposal stated that:

> GTI has read, understands, agrees to and is fully compliant with these requirements and is proposing to fully satisfy the requirements stated without taking exception to any of these provisions.
>
> . . . .
>
> The primary subcontractor that this contractor is proposing to use is Fujitsu Business Communications Systems. All Fujitsu Business Communications Systems' products are supported by the company's network of over 40 service areas throughout the United States providing service to over 10,000 customer sites. The company's reputation and capability for service have prompted many large end users to contract with Fujitsu to maintain other telecommunication vendor's [sic] equipment.

Protest File, Exhibit 8 at C-50. GTI's proposal also included a detailed subcontractor certification plan and a letter from Fujitsu to GTI affirming Fujitsu's commitment to GTI. *Id.* at C-51 to C-52; Transcript at 121.

7. GTI's technical proposal did not contain a list of other certified subcontractors. GTI's proposal explained:

> a. GTI has a plan for nationwide coverage which has been in effect since 1987.
>
> b. GTI has been implementing this plan for approximately 4 years, and, in fact has recently signed a contract with the USPS to supply similar systems nationwide to potentially over 42,000 sites.
>
> c. This contract will further expand GTI's nationwide support coverage.
>
> d. Historical SSA data and performance verify GTI's growing support coverage.
>
> e. GTI now covers about 300 locations nationwide and has a plan for as many as 45,000.

Protest File, Exhibit 8 at C-51 (§ C.14).

8. Concerning support requirements, GTI's proposal stated that:

> GTI can and will meet the support requirements of this contract, including all preinstallation, installation, and post-installation activities in accordance with the mandatory requirements of the RFP. For the most part, it will be accomplished with GTI resources.

Protest File, Exhibit 8 at C-51 (§ C.14). GTI's proposal set forth the following seven-point field support plan:

> 1. GTI's key personnel will be certified by the manufacturer prior to any SSA support activities.
>
> 2. GTI will train and certify all other GTI and subcontractor personnel, as required. The manufacturer has agreed that this 2nd-tier certification is authorized.
>
> 3. GTI personnel, exclusively, will perform all pre-installation and installation work, whether manufacturer and/or subcontractor personnel are present.
>
> 4. For most all locations, GTI will perform all post-installation work. Final determination will be made based upon site populations within a given area and the ability of GTI to respond within a 100 mile radius, which is guaranteed as responsive to SSA's response time requirements.

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5. For a second choice, GTI will utilize the manufacturer's field personnel for post-installation work.

6. For a third choice, GTI will utilize individual subcontractors for post-installation work. In this case the subcontractor must be present during the installation activities.

7. As a long term goal, GTI will relieve the manufacturer's and subcontractor's personnel when GTI expansion so dictates. It will remain a goal for GTI to perform all field activities with GTI personnel. The manufacturers and subcontractors are aware of this stated goal.

Id. at C-51 to C-52.

9. Respondent's Technical Evaluation Committee reviewed GTI's field support plan, including GTI's certification plan, and found it technically acceptable. Transcript at 121, 132-33, 135, 155; Protest File, Exhibits 20, 32 at 8. The contracting officer concurred in that finding. *Id.*

Remedial Maintenance

10. Specification paragraph C.16(a) of the solicitation stated:

C.16 *Remedial Maintenance*

Remedial Maintenance shall be provided by the contractor as follows:

(a) The contractor shall provide maintenance of the installed system(s) on a preventive (scheduled) and remedial (routine and emergency call-out) basis. Protective Systems as defined in section C.7 and C.24(u) shall also be included in the remedial maintenance. Onsite service shall be provided during the Principal Period of Maintenance (PPM) which is 8:00 a.m. to 5 p.m., Monday through Friday excluding Federally-observed holidays; off-hours service shall be provided on a call-out basis. Additional system installation services, as required, for the term of the contract shall also be provided. A written preventive maintenance schedule shall be provided.

Costs, if any, associated with these maintenance and installation services shall be indicated in the pricing tables and shall include all parts and labor.

Response:

(Offeror to indicate all proposed maintenance schedules and routines.)

Protest File, Exhibit 6. Each solicitation also stated that "[a]ll applicable telecommunications terminology is defined in Newton's TELECOM Dictionary (fourth edition)." *Id.* at C-5; Transcript at 95, 112. Newton's TELECOM Dictionary defines "preventive maintenance" as follows:

> The periodic inspection, cleaning, adjusting and repair to eliminate problems before they affect service. *Usually ignored.*

Protest File, Exhibit 50 (emphasis added). Both the contracting officer and the Technical Evaluation Committee Chief testified that state-of-the-art digital telecommunications systems, such as those offered by GTI and Executone, do not have moving parts and do not require "preventive maintenance," while non-state-of-the-art systems (i.e., analog equipment) may require preventive maintenance. Transcript at 111, 208.

11. GTI's technical proposal stated, in response to specification paragraph C.16(a), that "GTI has read, understands, and agrees to and is fully compliant with these requirements and is proposing to fully satisfy the requirements stated without taking exception to any of these provisions." Protest File, Exhibit 9 at C-59. GTI's technical proposal also stated, "Preventive (scheduled) maintenance is not recommended, required or offered." The GTI proposal contains no preventive maintenance schedule. *Id.* GTI's proposed system, the Fujitsu 9600 VS, is a state-of-the-art, digital system. Transcript at 111-12, 207-08.

12. Executone's technical proposal stated that "EXECUTONE will provide maintenance of the installed system(s) on a preventative (scheduled) and remedial (routine and emergency call-out) basis." Protest File, Exhibit 37. A page captioned "PREVENTIVE MAINTENANCE" contains the following:

> The IDS proposed utilize all modular plug in line/trunk, cards, station cards and common control cards, with no moving parts, fan filters, etc., therefore these systems will require little if any "preventive maintenance".
>
> All ancillary equipments, including the battery-backup system, voice mail system are essentially maintenance free components.
>
> The IDS incorporates extensive built in diagnostics to isolate faults which might occur during call processing.
>
> EXECUTONE will remotely access each system every 30 days to perform a system backup and to perform diagnostic testing of the systems operation. Diagnostics testing routines shall at a minimum be as follows:

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A. System self tests
B. Line tests
C. Card Activity tests
D. Checks for quantities of abandoned calls
E. SMDR devices
F. Alarms stack

Id.

13. Both the contracting officer and the Technical Evaluation Committee Chief stated that neither Executone nor GTI proposed preventive maintenance because their systems required none. Transcript at 111, 208; *see generally id.* at 116, 118-19, 130. Specifically, the Technical Evaluation Committee Chief testified:

> But the technology in the system that GTI proposed is computerized technology, which has no moving parts, does not require any preventative [sic] maintenance. The system that Executone [pro]posed — same thing. Computerized technology. Preventative (sic] maintenance with that technology is not a requirement.

Id. at 208.

The Contracting Officer's Responsibility Determination

14. Pursuant to the terms of the solicitation and the Federal Acquisition Regulation (FAR) Subpart 9.1, the contracting officer was required to make a responsibility determination after identifying the lowest priced, technically acceptable offeror. The solicitations provided in part:

> M-3 *OFFEROR RESPONSIBILITY*
>
> The award of a contract to an offeror is not solely on the basis of the lowest evaluated price. In addition to the technical and cost evaluations performed on each proposal, due consideration shall also be given to those standards for responsible prospective contractors set forth in FAR 9.104-1. Factors to be considered are financial resources, performance record, organizational strength and a satisfactory record of integrity and business ethics. A prospective contractor must also be qualified under applicable laws and regulations to perform on a Government contract.
>
> Also to be considered is the prospective contractor's ability to meet the specific requirements for delivery and maintenance support over the 7-year systems life.
>
> An offeror whose proposal is found to be technically acceptable, with the lowest evaluated system-life cost, but who is determined unable to meet the required deliveries or to furnish the required maintenance support throughout the 84-month system life, may be eliminated from further consideration.

Protest File, Exhibit 6 at M-4 (§ M-3). After determining that GTI had submitted the lowest priced, technically acceptable proposal, the contracting officer determined that GTI was a responsible prospective contractor. Transcript at 101, 139; Protest File, Exhibit 32 at 28-29. In particular, the contracting officer expressly found that:

> The contractor has the financial capacity to fulfill all requirements of the contract and is a major telecommunications dealer. GTI has been awarded many telecommunications contracts with SSA over the past eight years and has recently been awarded a contract for the Kansas City and Chicago Program Service Centers valued at over $1.5 million. A Dun & Bradstreet Report dated March 30, 1993, is Attachment I to this summary.

Protest File, Exhibit 32 at 28.

15. The contracting officer determined that GTI was financially responsible, in part based upon her review of the Dun & Bradstreet report on GTI. Transcript at 151. The Dun & Bradstreet report attached to the Summary of Negotiations indicated that, at the end of fiscal year 1992, GTI had current assets of $1,828,025, annual sales of $6,990,693, and a net worth in excess of $1 million. Protest File, Exhibit 32 at 28; Transcript at 143. The report noted that GTI is a wholly-owned subsidiary of Computer Equity Corp. (Compec) and that Compec had current assets of $5,933,670 and annual sales of $12,200,478 as of February 29, 1992. Protest File, Exhibit 32. In her responsibility determination the contracting officer recognized that GTI was a wholly-owned subsidiary of Compec. The contracting officer stated that the fact that GTI "could possibly borrow personnel from Compec" or turn to Compec in the event of financial problems was "kind of like icing on the cake." Transcript at 140.

16. Consistent with the admonitions in FAR 9.105-1(b) and (c), the contracting officer expressly found that GTI had the requisite performance record and organizational strength and a satisfactory record of integrity and business ethics. In making this finding, the contracting officer considered the content of GTI's proposal and a variety of information outside the four corners of GTI's proposal, including, *inter alia*, GTI's successful past performance of numerous contracts awarded by SSA. *See generally* Protest File, Exhibit 32 at 28-29; Transcript

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at 123-24, 131-36, 138-41, 144, 147, 150-53, 155.

The Technical Evaluation of Proposals

17. In conducting the technical evaluation of proposals, the Technical Evaluation Committee considered only the information submitted by offerors with or as part of their proposals. Transcript at 192-94, 202, 205. The Committee did not evaluate whether offerors were capable of performing the work. *Id.* The Technical Evaluation Committee Chief stated that a determination of whether offerors are *capable* of performing the contract is outside the scope of the Committee's responsibilities. That is, offeror capability is a responsibility determination within the purview of the contracting officer. *Id.* at 139, 202, 217.

18. The Technical Evaluation Committee carefully reviewed each proposal to determine its technical acceptability. Transcript at 192-94, 202-05, 213. The Committee expressly found GTI's technical proposal acceptable. Protest File, Exhibit 26.

Executone's Violation of the Trade Agreements Act

19. The solicitations required offerors to comply with the Trade Agreements Act, 19 U.S.C. §§2501-2582 (1988), by providing that:

> For purposes of this solicitation, the end product is identified as *a telephone system.* The Trade Agreements Act applies to this solicitation. Under the requirements of the Trade Agreements Act, only end products which are domestic, or from designated countries or Caribbean Basin Countries, are permissible. Proposals offering equipment which does not meet the criteria of the Trade Agreements Act will be rejected as being technically unacceptable.

Protest File, Exhibit 6 at M-2 (§ M-1(a)).

20. Offerors that propose end products in violation of the Trade Agreements Act are unacceptable and are ineligible for award of the contracts at issue in this protest. Protest File, Exhibit 6 at M-2 (§ M-1(a)). Based solely on self-certifications, the contracting officer found both offerors to be in compliance with the Trade Agreements Act. She did not conduct an independent investigation as to whether the self-certification was accurate or correct. Transcript at 166-67.

21. Our Order On Further Proceedings (Apr. 29, 1993) established a discovery plan and schedule that, among other things, required the parties to exchange interrogatories and requests for production of documents on May 17, 1993, and to file all objections to discovery requests "no later than COB May 20, 1993." Our order also stated that "[s]anctions will be imposed when a party refuses or obstructs discovery." On May 17, 1993, in conformity with our April 29, 1993 order, GTI served upon Executone "Intervenor's First Set of Interrogatories and Requests for Production of Documents." Executone did not file any objections to GTI's interrogatories and requests for production by close of business on May 20, 1993, as required by our April 29, 1993 order.

22. Executone provided no substantive response to an interrogatory seeking the place of manufacture of the line items Executone would supply. A purpose of GTI's unanswered discovery request was to determine if Executone's proposal complied with the Trade Agreements Act. Transcript at 60. The panel chairman imposed a sanction for Executone's willful refusal to respond to this discovery request by informing Executone that the Board would presume that Executone's products violated the Trade Agreements Act unless Executone showed otherwise; the panel chairman placed the affirmative burden on Executone to show at the hearing that its proposed products come from designated countries or otherwise comply with the Trade Agreements Act. Transcript at 62; *see generally id.* at 55-62.

23. Executone's proposal stated: "Approximately 25 percent of the proposed contract price represents foreign content or effort." Protest File, Exhibit 38 at K-23 (¶ K-24).

24. At the hearing, Executone introduced no evidence to establish the country or countries of origin of its proposed products before closing its case-in-chief. After all parties rested their cases we explicitly gave Executone another opportunity to address the Trade Agreements Act issue. Transcript at 225-28. Nevertheless, Executone introduced no evidence concerning the country of origin of any of its proposed products; rather, it chose to rest its case on the contents of its proposal. *Id.* at 228. However, the actual countries of origin of virtually all of Executone's proposed products are not identified in Executone's proposal, Protest File, Exhibits 37-38, or anywhere else in the record. Although Executone states in its post-hearing brief, at 42, that the "components Executone identified to supply with its systems are all domestically manufactured or derive from eligible designated countries identified by the Trade Agreements Act,"

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the evidentiary record fails to support such an assertion.

Executone's Initial Protest

25. In its initial protest, Executone maintains, in part, "that GTI failed to meet the [agency's] evaluation factors." Protest at 1. In particular, the protester expressly references mandatory requirements concerning certified support personnel and sections C.1.6 and C.14 of the solicitation. *Id.* at 3-4. The protester also references section M of the solicitation, particularly M-2 and M-3 (involving evaluation factors and responsibility). "Executone asserts that, contrary to SSA's stated evaluation criteria, the SSA failed to factor this information [regarding GTI's performance record, financial resources, organizational strength, and qualifications] into their evaluation of the acceptability of GTI's proposal." *Id.* at 10. In addition to referencing section M-3 (offeror responsibility), protester expressly put the "acceptability" of GTI's proposal at issue. *Id.*

26. The protester pursues no other issues of its initial protest (i.e., those alleging GTI's non-compliance with the Walsh-Healey and Service Contract Act). Supplemental Protest at 2.

Executone's Supplemental Protest

27. On May 3, 1993, counsel for Executone spent five hours reviewing the respondent's official procurement files. Transcript at 170-72; Memorandum of Points and Authorities in Support of Respondent's Motion for Dismissal Regarding Issues Raised in Executone's Supplemental Protest, Exhibit 2 (second Declaration of Michelle Y. Burgesen). The contracting officer testified that she had fewer than six contacts with Executone's counsel while they were reviewing the files, which included GTI's proposal. She observed Executone's counsel input data from the files into a laptop computer. Transcript at 172. Executone's counsel requested a copy of another offeror's proposal that submitted Fujitsu equipment. *Id.* at 173. Executone's counsel also selectively clipped for copying the portions of documents being reviewed that were considered relevant. *Id.* at 176. On May 7, respondent delivered to Executone's counsel copies of the materials identified by Executone's counsel and copied in accordance with their discovery agreement.

28. On May 18, Executone filed a "Supplemental Protest and Bench Memorandum Supporting Executone's Protest Under Solicitations SSA-RFP-93-1200 through 93-1206" (hereinafter "Supplemental Protest"). This Supplemental Protest was filed on the eleventh working day after the day the protester's counsel first reviewed respondent's official procurement files, including GTI's proposal. Transcript at 178. In its Supplemental Protest,

> Executone hereby amends its protest to disclose the additional facts it learned through discovery. These facts establish: (1) SSA's failure to evaluate GTI's compliance with mandatory specification requirements; (2) SSA'[s] waiver of requirements for the sole benefit of GTI; (3) SSA's determination of GTI's capabilities based on information GTI failed to disclose as part of its proposal; and (4) SSA's arbitrary evaluation of GTI as incorporating COMPEC, its parent corporation, despite any contractual privity between COMPEC and SSA.

Supplemental Protest at 3. Executone expressly focuses upon the requirements for preventive maintenance found in section C.16, and for certified, trained personnel found in section C.14. *Id.* at 35.

29. The bases for Executone's assertion concerning paragraph C.16 were a statement in GTI's proposal that "Preventive (scheduled) maintenance is not recommended, required, or offered" and deposition testimony by the respondent's project manager (occurring after May 3) that she concurred with the approach, although a mandatory provision of the solicitation required offerors to provide scheduled preventive maintenance. Supplemental Protest at 4. The bases for Executone's assertion concerning paragraph C.14 are statements in GTI's proposal relating to who will be performing work and the absence of a list of certified subcontractors, and deposition testimony by the respondent's project manager (occurring after May 3) that she was unaware of how GTI would perform contractually required post-installation work. *Id.* at 4-7.

30. The entirety of section C is captioned *"MANDATORY SPECIFICATIONS."* Protest File, Exhibit 6 at C-4. The solicitation states: "This specification is divided into two (2) areas, *Mandatory Specification and Mandatory Add-On Features Specification.* Each proposed system must be fully capable of satisfying *all* of the mandatory requirements of both areas of this specification." *Id.* The contracting officer and the chief of the Technical Evaluation Committee testified that they viewed the entirety of the specifications as mandatory. Transcript at 103, 110, 168, 207.

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Discussion

Jurisdiction

GTI asserts that Executone is not an interested party to pursue the protest. Executone submitted proposals, including self-certifications of compliance with the Trade Agreements Act. However, GTI maintains that inferences against Executone's ability to comply with that Act must be drawn in light of Executone's failure to respond properly to discovery and the sanctions imposed by the panel chairman.

Executone failed to abide by discovery orders of the Board. The panel chairman appropriately imposed sanctions. Executone failed to establish that its telephone system complies with the requirements of the Trade Agreements Act. However, neither the respondent nor GTI have established why Executone should be ousted from the competition at this point because of a lack of a direct economic interest in the awards. 40 U.S.C. § 759(f)(9)(B) (1988).

This is a negotiated procurement. Should Executone prevail in its protest, the agency would be required to get offerors to extend offers (they expired on April 30) or to request another round of best and final offers. Should Executone prevail in its protest, it would be a viable offeror in any subsequent negotiations with the opportunity to address or correct any presumed Trade Agreements Act inadequacies. *See CompuAdd Corp. v. Department of the Air Force*, GSBCA 12301-P, et al., 93-3 BCA ¶ 26,123, 1993 BPD ¶ 144 (May 10, 1993).

Accordingly, the Board concludes that the protester is an interested party to proceed with its protest.

Timeliness

The respondent and GTI maintain that Executone untimely raised protest issues in its supplemental protest. They contend that on May 3 Executone, through its counsel, knew or should have known of alleged noncompliance by GTI regarding sections C.14 and C.16. On that date, counsel had access to, and reviewed, respondent's files, which included the GTI proposal. Thus, relying upon Rule 5(b)(3)(ii), they assert that the supplemental protest, filed on May 18, eleven workdays after May 3, is untimely.

A ground of protest not apparent on the face of the solicitation is timely raised at the Board if filed no later than ten working days after the basis for the protest is known or should have been known, whichever is earlier. Rule 5(b)(3). In its initial protest, Executone generally alleged that GTI's offer was unacceptable. Finding 25. Therefore, as protester contends, one could view those issues of protest relating to sections C.14 and C.16 expressed in the supplemental protest as nothing more than refinements of the earlier protest. More importantly, the testimony of the contracting officer, Finding 27, is insufficient to establish that Executone, through its counsel, either knew or should have known of those bases of protest on May 3. The record does not establish that the relevant portions of GTI's proposal were reviewed, or reasonably should have been reviewed, during the initial time available. Moreover, whatever suspicions may have been raised in the mind of counsel of May 3 could not have been readily confirmed until May 7 when the pertinent copies of documents were provided to counsel by respondent pursuant to their working agreement.

The record does not enable the Board to conclude that the issues of protest relating to sections C.14 and C.16 were untimely raised.

Section C.14

With respect to specification paragraph C.14, which relates to support requirements, GTI stated in its proposal, *inter alia*, that GTI:

> has read, understands, agrees to and is fully compliant with these requirements and is proposing to fully satisfy the requirements stated without taking exception to any of these provisions.

Finding 6. GTI included in its response to specification paragraph C.14 a detailed seven-point field support plan, including a detailed subcontractor certification plan. GTI's proposal also included a letter from Fujitsu (which GTI's proposal identified as GTI's principal subcontractor) confirming Fujitsu's commitment to GTI. Findings 6-8.

GTI committed itself or Fujitsu personnel to perform the requisite services. The respondent's Technical Evaluation Committee reviewed GTI's detailed response to specification paragraph C.14 and found it technically acceptable. The contracting officer expressly concurred in the Technical Evaluation Committee's determination of technical acceptability. Finding 9. The Technical Evaluation Committee based its acceptability determination on the statements and certifications contained in GTI's proposal; and the Committee was not required to conduct a "capability" determination, i.e., a responsibility determination as to GTI's organizational strength, staffing, and the like. *See*,

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e.g., Del Net, Inc., GSBCA 9178-P, 88-1 BCA ¶ 20,342, 1987 BPD ¶ 259, *aff'd*, 861 F.2d 728 (Table) (Fed. Cir. 1988).

Executone has not identified, presented, or adduced evidence which persuades us that GTI's proposal, as written, does not meet each and every requirement called for by paragraph C.14 or that the respondent's Technical Evaluation Committee abused its discretion when it found GTI's proposal, including its response to specification paragraph C.14, to be technically acceptable.

Section C.16

Executone's allegation that GTI submitted a technically unacceptable response to specification paragraph C.16 is equally without merit. The gravamen of Executone's complaint with GTI's response to paragraph C.16 relates to the statement in GTI's proposal that "[p]reventive (scheduled) maintenance is not recommended, required or offered." Finding 11. Executone contends that GTI's statement shows that GTI's proposal is technically noncompliant with respect to paragraph C. 16(a).

The respondent's Technical Evaluation Committee and the contracting officer recognized that the preventive maintenance requirement does not apply to state-of-the-art digital systems, such as the Fujitsu 9600 VS system proposed by GTI. Consequently, they found GTI's response to specification paragraph C.16 technically acceptable. Finding 13. Inasmuch as no preventive maintenance was necessary or possible, not proposing any was consistent with the respondent's view of compliance with the specification. *Id.*

In any event, Executone cannot complain that GTI did not comply with section C.16 preventive maintenance requirements. Although Executone contends that it offered preventive maintenance, it did so in words only. What Executone proposed fails to conform to the applicable definition of "preventive maintenance." Findings 10, 12. Accordingly, Executone did not propose preventive maintenance or a schedule compliant with the specification. Its allegations relating to specification paragraph C.16 are, accordingly, without merit.

Responsibility

Executone asserts that GTI lacked a satisfactory performance record, financial resources, organizational strength, and qualifications under applicable laws and regulations to perform the contracts. Protest at 13-15. Executone concludes that the respondent improperly selected the intervenor for award.

At the heart of Executone's protest is a fundamental confusion over the distinction between "technical acceptability" and "responsibility." In its pleadings and throughout the course of the hearing, Executone attempted to show that:

(1) the respondent was required by Section M of the solicitations to make an independent responsibility determination as part of its technical evaluation of each and every aspect of the technical proposals, and

(2) the contracting officer abused her discretion in finding GTI a responsible prospective contractor pursuant to FAR 9.104-1.

Both of these allegations are without any foundation in fact, and are without merit.

Section M-3 of the solicitations reminded offerors that the contracting officer was required to make a responsibility determination in accordance with FAR 9.104-1. Finding 14. A responsibility determination, however, is not made until *after* the low-priced, technically-acceptable offeror has been identified. The determination of the otherwise successful offeror's responsibility is not a technical evaluation criterion, but is instead a separate and distinct requirement to be met prior to the award of any government contract.

This is not a case in which the respondent's evaluators ranked or scored technical proposals based upon subjective, qualitative assessments. Rather, the solicitation required only that the evaluators determine whether offerors were technically acceptable; and offerors received no extra credit for exceeding technical requirements.

An offeror's capability or ability to perform the work, i.e., its responsibility, under this solicitation is quite separate and distinct from the question of whether its offer meets the requirements of the solicitation, i.e., technical acceptability. Responsibility evaluations in the context of this procurement are not relative—a "more responsible" offeror does not outscore a merely "responsible" offeror in the award selection process. As we stated in *Severn Companies:*

> The determination that a bidder is or is not responsible, i.e., whether the bidder is capable of performing the contract can, or usually is, made on the basis of information *de hors* the bid submitted. Such information relates to the bidder's ability to perform, and not to whether it is bound to

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perform in accordance with the material requirements of the solicitation, and thus may be obtained subsequent to bid opening.

GSBCA 9353-P, 88-2 BCA ¶ 20,689, at 104,570, 1988 BPD ¶ 56, at 19. *See also Del Net, Inc.* (offeror's capability to perform computer maintenance is a question of responsibility). Accordingly, Executone's contention that the respondent's technical evaluators were required to take into consideration GTI's capability or ability to perform during their evaluation of GTI's technical proposal is without merit.

Executone's allegation that the contracting officer abused her discretion in finding GTI responsible is also without merit. Protesters challenging a contracting officer's responsibility determination have a real burden because we, as does the Comptroller General, accord a great deal of deference to the sound discretion and business judgment of the contracting officer. *See, e.g., Technology Management & Analysis Corp. v. Environmental Protection Agency*, GSBCA 12082-P, 93-2 BCA ¶ 25,711, 1992 BPD ¶ 406; *Wiltel Communications Systems, Inc. v. General Services Administration*, GSBCA 11854-P, 93-1 BCA ¶ 25,279, 1992 BPD ¶ 195; *Datec, Inc.*, GSBCA 8623-P, 86-3 BCA ¶ 19,264, 1986 BPD ¶ 148. However, in the instant case, Executone not only falls far short of meeting this burden, it has adduced no evidence whatsoever in support of its position. The record amply demonstrates that the contracting officer carefully considered all of the factors set forth at FAR 9.104-1 in making her responsibility determination, and Executone provided no proof whatsoever to rebut the factors upon which the contracting officer based her responsibility decision. *See* Findings 14-16.

FAR 9.104-1 sets forth the applicable responsibility standards. The contracting officer considered all of the standards in finding GTI responsible. Findings 14-16. Among other things, the contracting officer took into account a variety of information outside GTI's proposal, including GTI's Dun & Bradstreet Report, which reflected substantial sales and assets, and GTI's successful past performance record on numerous other contracts with the respondent agency. *Id.; see* 48 CFR 9.105-1(b), (c) (1992) (FAR 9.105-1(b)(c)). She also considered GTI's plan to provide installation and support services and the Technical Evaluation Committee's acceptance of that plan. Findings 14-16. In short, the contracting officer made an informed, considered business judgment in accordance with FAR 9.104-1, and as required by solicitation section M-3, that GTI was a responsible prospective contractor.

Executone purports to challenge the contracting officer's responsibility determination, but it adduced no evidence at the hearing (and there is nothing in the record) that in any way contradicts or undermines the conclusions reached regarding each factor that the contracting officer considered in finding GTI responsible. Further, Executone produced nothing that could lead to the conclusion that GTI is not responsible as a matter of law. *See Wiltel Communications.* Executone, therefore, has failed to meet its burden of showing that the contracting officer abused her discretion, and its allegations challenging her responsibility determination are denied for lack of merit.

In making the determination of responsibility, the contracting officer considered all of the factors set forth in regulation, FAR 9.104-1. The determination evinces an informed, considered business judgment. The record demonstrates that the contracting officer made a responsibility determination consistent with the requirements of the solicitation and regulation.

Contrary to the protester's assertions, the record fails to demonstrate inadequacies in the intervenor's performance record, financial resources, organizational strength, or qualifications. The record does not suggest that the intervenor is non-responsible as a matter of law. The protester has failed to demonstrate any agency violation in the contracting officer's determination.

Decision

For the reasons set forth above, the protest is DENIED. The previously entered suspension of procurement authority lapses by its very terms.

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[¶ 26,275] Cordant, Inc. v. Department of the Navy

GSBCA No. 12226-C(12011-P), July 30, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Lodestar Amount.—A protester was entitled to recover a greater amount of protest costs than a fellow protester, despite the government's contention that the fellow protester's amount served as a lodestar amount, because the protester showed that it acted as the "laboring oar" in the protests. The protester provided counsel for many depositions, worked with consultants to analyze matters relevant to the case, and prepared consultants to serve as expert witnesses.

Protests, GSBCA—Costs of Bid and Proposal Preparation—Wasted Effort.—A prevailing protester was entitled to recover its fully documented wasted proposal preparation costs because the amount proposed by the protester represented reasonable compensation for its wasted efforts, which were direct consequences of the government's improper procurement actions. In the underlying protest, the board found that the weights given various scores for live test demonstrations of offerors' proposed systems were inconsistent with the weights prescribed by the solicitation, that discussions were inadequate, and that the best value analysis used to select the awardee was arbitrary. As a result of these violations and the government's decision to continue the procurement under revised terms, the protester changed its proposal and performed a second live test demonstration. Moreover, the protester was entitled to recover its costs of filing and pursuing the protest and attorney fees incurred in preparing the application for reimbursement.

For the protester: Stephannie A. Wood and Howrey & Simon, Washington, D.C., by William A. Roberts III and Lee P. Curtis. For the government: Ellen D. Washington and Thomas L. Frankfurt, Information Technology Acquisition Center, Department of the Navy, Washington, D.C.

Before DANIELS, LABELLA, and PARKER, Administrative Judges.

DANIELS, Administrative Judge: On November 16, 1992, the Board granted *Centel Federal Systems. Inc. v. Department of the Navy*, GSBCA 12011-P, et al., 93-2 BCA ¶ 25,648, 1992 BPD ¶ 359. One month later, the protester, by then having changed its name to Cordant, Inc., filed a motion for reimbursement of the costs it incurred in filing and prosecuting the case. The motion was filed in accordance with our Rule 35 and seeks an award of costs pursuant to 40 U.S.C. § 759(f)(5)(C) (1988).

Cordant's motion has been amended and supplemented several times. As ultimately constituted, it asks that the Board award the firm $567,706.01 in costs of filing and pursuing the protest and $2,845,463.24 in costs of proposal preparation and services rendered by counsel in constructing the portion of the claim associated with the latter category of costs.[1] More specifically, as to protest costs, Cordant's application requests reimbursement of the following amounts: attorney fees, $398,582.64; disbursements made by attorneys for transcripts, document reproduction, computeraided legal research, long-distance telephone calls, various means of document delivery, and other minor, litigation-related items, $29,842.77; consultant services, $61,265.72; and in-house, non-attorney costs, $78,014.88. Cordant also seeks proposal preparation costs of $2,838,688.97 and associated attorney fees of $6,774.27.

The Department of the Navy, respondent, readily agreed that Cordant was a prevailing party in the underlying protest and thus entitled to an award of costs. The parties then sought from the Board, and received, a period of time in which to attempt to reach an agreement as to the appropriate amount for reimbursement. On July 27, 1993, they filed a Joint Motion for Board Order, which constitutes a request for an order that Cordant receive reimbursement in the amount of $2,598,245.62.

With regard to protest costs, Cordant understands that the Board does not award reimbursement of moneys expended for consultant services and in-house, non-attorney costs. *Sterling Federal Systems, Inc. v. National Aeronautics & Space Administration*, GSBCA 10000-C(9835-p), 92-3 BCA ¶ 25,118, 1992 BPD ¶ 141 (full Board). Protester claimed these amounts only for the purpose

[1] The figures we state are very slightly different from those used by Cordant. The application includes a few computational errors which have no material effect on the total amounts involved.

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of preserving its rights to such an award in the event that the Court of Appeals for the Federal Circuit overturns the cited decision in the appeal now pending. No. 92-1552 (Fed. Cir., docketed Sept. 28, 1992). Eliminating these sums from the total protest costs claimed leaves $428,425.41. This amount is properly documented. The parties have asked that we award $433,245.62.

We note that both of the latter amounts are considerably greater than the sum sought by Cordant's fellow-protester, Federal Computer Corporation, as costs of filing and pursuing the case. *See Federal Computer Corp. v. Department of the Navy*, GSBCA 12221-C (12012-P) (July 14, 1993). We asked Cordant to show cause why the amount awarded to its fellow-protester should not be used as a lodestar against which to measure the reasonableness of the amount sought by Cordant. *See Horizon Data Corp. v. Department of the Navy*, GSBCA 11018-C(10831-P), 92-2 BCA ¶ 24,852, 1992 BPD ¶ 49. Cordant responded persuasively that it had taken the "laboring oar" in the prosecution of the protests, primarily by providing counsel for many depositions at which Federal Computer's counsel had not appeared, and by working with consultants to analyze matters relevant to the case and to prepare some of those consultants to serve as expert witnesses. We are convinced here, as we were not in *Horizon*, that the two protesters appropriately devoted different levels of effort to the case.

With regard to proposal preparation, Cordant used a two-step process to calculate the costs at issue. First, it documented the total costs it actually incurred in constructing the four principal portions of its proposal—technical proposal evaluation sheets, management and support plans, live test demonstration, and pricing. Then Cordant made estimates (supported by affidavits of executives involved in proposal preparation) of the percentage of each category of costs the firm believed were wasted as a result of the Government's violations of law that were identified in the Board's decision in the underlying protest. *See Centel Federal Systems, Inc. v. Department of the Army*, GSBCA 11315-C(11238-P), 92-2 BCA ¶ 25,000, 1992 BPD ¶ 102; *Recognition Equipment Inc.*, GSBCA 9408-C(9363-P), 89-1 BCA ¶ 21,281, 1988 BPD ¶ 228. The Navy did not question Cordant's documentation of costs. Although the parties disagree as to the percentage of some categories of costs that were wasted as a consequence of the Government's improper actions, they were able to agree on a total amount of proposal preparation costs that the Board should reimburse. Of the $2,838,688.97 sought by Cordant, the parties ask us to order reimbursement of $2,165,000. In addition, the Navy agrees that Cordant incurred $6,774.27 in attorney fees in preparing the application for wasted proposal costs; this amount is not included, however, in the parties' joint request for an award.

We conclude that Cordant reasonably incurred, and properly documented, $428,425.41 in costs of filing and pursuing the protest; $2,165,000 in wasted proposal preparation costs; and $6,774.27 in attorney fees associated with preparing the application for reimbursement of the proposal costs. The first of these figures does not include any of the amounts Cordant claims it spent as consultants' fees and expenses or as internal, non-attorney costs relating directly to the protest.

We agree with the parties that Cordant wasted a considerable part of its proposal preparation costs as a direct consequence of the Navy's improper procurement actions. We specifically found in the underlying protest that the weights given various scores attributed to offerors' live test demonstrations of their proposed systems were inconsistent with the weights prescribed by the solicitation; that discussions with the offerors were inadequate; and that the best value analysis relied on to select an awardee was arbitrary. As a result of these violations of law and the Navy's decision to continue the procurement under revised terms, rather than award a contract to the lowest-priced offeror, Cordant and its competitors must make significant changes to their proposals and perform second live test demonstrations. In fixing the precise amount that Cordant wasted consequent to the violations, we are guided by the parties' agreement that the number they have proposed represents reasonable compensation for Cordant's wasted efforts, irrespective of the outcome of the procurement. We would have no way to determine the correct percentage to apply to each of the categories of cost specified in the motion, apart from expert testimony, and because the parties agree on a total, we consider that securing such testimony would be an inappropriate use of resources.

The total of the three amounts set forth above is $2,600,199.60, which is a bit larger than the figure of $2,598,245.62 proposed by the parties. Given this difference, the fact that the amount of protest costs we have

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calculated is slightly smaller than the amount jointly proposed is immaterial; clearly, the total award requested is driven by an estimate, which we honor. We grant reimbursement in the total amount agreed upon.

Decision

Cordant's application for reimbursement of costs incurred in filing and pursuing the underlying protest, and in preparing its proposal in the subject procurement, is GRANTED IN PART. We award to Cordant $2,598,245.62, to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988). 40 U.S.C. § 759(f)(5)(C) (1988).

[¶ 26,276] P.J. Dick Incorporated v. General Services Administration

GSBCA No. 12052, July 22, 1993.

Contract Disputes, Claims—Quantification—Sum Certain.—A contractor's claim for relief from government directions to maintain a fire alarm system was adequate, despite the government's contention that the contractor never sought payment for a sum certain, because the contractor's submittal of an invoice for incurred costs put the amount of payment in dispute. Sporadic negotiations between the contracting officer and the contractor were post dispute and thus did not taint the existence of a dispute.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by John T. Flynn, and Walstad & Babcock, Provo, Utah, by Paul J. Walstad. For the government: Sharon A. Roach, Gerald L. Schrader, Martin A. Hom, Robert C. Smith, and M. Leah Wright, Real Property Division, Office of General Counsel, General Services Administration, Washington, D.C., and Kenneth E. Kendell, Office of Regional Counsel, General Services Administration, Philadelphia, Pennsylvania.

Before BORWICK, DANIELS, and NEILL, Administrative Judges.

BORWICK, Administrative Judge: Respondent has moved to dismiss this appeal for lack of jurisdiction. The appeal, as it has evolved, now concerns interest on the cost of maintaining a fire alarm system in a building undergoing renovation. The claim began with respondent directing appellant to maintain the fire alarm system, a task which appellant performed under protest. Before the filing of the appeal, respondent acknowledged that appellant was entitled to payment for maintaining the fire alarm system as a constructive change. Nineteen days after the filing of the appeal, the Government issued a contract modification for the full amount of quantum sought by appellant.

Respondent argues that appellant never submitted an appealable claim for quantum under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § § 601-613 (1988), or implementing provisions of the Federal Acquisition Regulation (FAR). We conclude that appellant submitted an appealable claim for quantum to the contracting officer in January 1991, when appellant requested a decision of the contracting officer and submitted an invoice for incurred costs of $29,197.01. Appellant continued to submit incurred-cost invoices until November 12, 1991. The negotiations between appellant and the contracting officer that continued sporadically in the summer and fall of 1991 and 1992 were post-dispute negotiations and do not taint the existence of a dispute. We deny the Government's motion.

Background

The contract is for renovation of the first five floors of the United States Court House and Post Office, Pittsburgh, PA. At a job meeting on April 20, 1989, the Government's architect/engineering firm directed P.J. Dick to maintain the existing fire alarm system in the construction areas until the Government accepted the new fire alarm system. Affidavit of Appellant's Project Coordinator Barry A. Bandura (Bandura Affidavit), ¶ 3 (Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit A.)

On April 25, 1989, appellant wrote the contracting officer in pertinent part:

> We are proceeding as directed, but emphasize that we consider this work as "extra" and unless we are notified to *stop work* within 72 hours of the facsimile transmission of this letter, we will presume that

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the G.S.A. recognizes this work as "extra" and that we will be compensated accordingly.

Respondent's Exhibit 1.

On August 1, 1989, appellant wrote the contracting officer:

We are currently providing maintenance of the existing fire alarm system ... in accordance with the direction of the G.S.A. We are doing so under protest, and fully expect to be reimbursed for all related costs.

....

Additionally, we request a Contracting Officer's decision relative to the responsibility for costs of maintaining the existing fire alarm system, including "bagging" and "unbagging."

Appellant also provided detailed suggestions to respondent concerning the procedures for maintaining the existing system during construction. Appellant suggested that it follow then current procedures with the exception of changing the automatic fire department call system to a manual system. Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit B.

On May 21, 1990, appellant wrote again to the contracting officer as follows:

Under previous correspondence we advised you that we were complying with your directive to maintain operation of the existing fire alarm system. We have done so, for more than a year, under protest.

At this time, we request a formal Contracting Officer's decision concerning the responsibility of maintaining this system.

Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit C.

On January 21, 1991, appellant forwarded to the contracting officer an invoice for incurred costs of $29,197.09. Appellant maintained that it had submitted two requests for final decisions, noted that the contracting officer had failed to respond, and urged that the contracting officer "consider this matter one more time." Appellant's Opposition to Respondent's Motion to Dismiss, Exhibits D, E.

On April 4, 1991, the Government advised appellant:

This office has determined that Ferry Electric's [appellant's electrical subcontractor] request for additional compensation for the maintenance of the existing fire alarm initiating devices is valid. Please have Ferry Electric prepare a cost proposal.

Respondent's Exhibit E.

On May 2, 1991, appellant submitted a quotation for $41,811 for "all of the presently known costs for the changes referred to herein," that is, the maintenance of the fire alarm system. Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit F. This figure included incurred costs through May 3 and projected costs through June 28.

Appellant and the Government negotiated the cost of fire alarm maintenance during the late summer of 1991. Negotiations on the cost of maintaining a fire alarm system continued sporadically between September 1991 and late July 1992. Affidavit of Contracting Officer Mark Lewandowski (Lewandowski Affidavit) (March 11, 1993) ¶ ¶ 2-3.

On November 12, 1991, appellant presented another invoice for $43,586, and stated that "this proposal reflects all of the presently known costs for the changes referred to herein." Appellant also stated that it reserved the right to bill for "the full amount of the contract adjustment, whether more or less than the amount proposed above." Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit G.

On September 23, 1992, appellant filed an appeal predicated upon:

[T]he failure of the Contracting Officer to issue a Contracting Officer's final decision within the required time frame, or alternatively, to advise the contractor when such final decision would be issued. More specifically, by letter of August 1, 1989, P.J. Dick submitted a request for Contracting Officer's final decision on P.J. Dick's entitlement to costs of maintaining the existing fire alarm .... No final decision was issued by the Contracting Officer.

Notice of Appeal.

On October 12, 1992, respondent issued Modification AOAU, which increased the contract price by $43,586 for costs incurred for maintenance of existing fire alarm initiating devices during project construction. Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit H. Appellant considered itself in a "claim situation" from April 25, 1989, until paid on March 23, 1993. Bandura Affidavit ¶ 12. Now that the Government has issued Modification AOAU, appellant seeks an "order that Respondent pay [appellant] for all accumulated interest on the principal sum of $43,586.00 (paid under modification no. AOAU.)" Appellant's Oppo-

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sition to Respondent's Motion to Dismiss at 13.

Discussion

The Government argues that appellant never submitted a claim cognizable under the Contract Disputes Act or the FAR. Respondent's Motion to Dismiss at 4. The Government suggests that appellant never sought a "sum certain." *Id.* at 6. The Government suggests that appellant never manifested an intent to seek an equitable monetary adjustment, but was merely negotiating. *Id.* Appellant maintains that the full amount of the claim was in dispute as early as April 25, 1989. Appellant's Opposition to Respondent's Motion to Dismiss at 12.

A claim is defined as a:

> written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract .... A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.

48 CFR 33.201 (1992).

We are to apply a "common-sense" analysis in determining whether the contractor asserted a proper claim, whether the Government disputed the right, and whether the contractor communicated his desire for a contracting officer decision. *Transamerica Insurance Corp. v United States* [38 CCF ¶ 76,374], 973 F.2d 1572, 1579 (Fed. Cir. 1992).

On August 1, 1989, appellant had submitted a claim for relief from the directive of the Government's architect/engineers to maintain the fire alarm system, but that claim addressed entitlement only. Clearly, between August 1989 and April 1991, there existed a dispute about the responsibility for maintaining the fire alarm system. The Government had directed appellant to maintain the system and appellant disputed its contractual responsibility. In January 1991, appellant put the amount of payment in dispute by forwarding the payment request in sum certain to the contracting officer. A reasonable contractor would not send a payment request after the dispute had arisen solely for the contracting officer's information without at least an implicit request that the contracting officer make a decision as to entitlement. *See Transamerica*, 973 F.2d at 1578. Indeed, this case is stronger than *Transamerica*, as appellant explicitly requested that the contracting officer consider the matter in the context of an invoice from the electrical subcontractor stating a sum certain.

The Government's communication of April 4, 1991, resolved the issue of responsibility, but left the dispute of the amount of payment unresolved. The invoices of May and November 1991 merely supplemented the payment request dispute which arose in January 1991.

The Government points to the ensuing negotiations as showing that there was no dispute. The sporadic negotiations between the fall of 1991 and summer of 1992 were post-dispute negotiations, which do not taint the existence either of a claim or a dispute:

> There is no inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work towards a claim's resolution.

Transamerica, 973 F.2d at 1578.

Finally, this case is unlike *Santa Fe Engineers Inc. v. Garrett* [38 CCF ¶ 75,506], 991 F.2d 1579 (Fed. Cir. 1993). There, the Court concluded that the parties had not reached an impasse when appellant first submitted a claim to the contracting officer, as it submitted additional information so the Government could better understand its proposal. *Id.* at 1582. Here, the appellant and the Government had reached an impasse. From the time of the issuance of the directive in April 1989 the Government thought that maintenance of the fire alarm system was the contractor's responsibility. Conversely, the appellant maintained as early as August 1989 that the work was not within the scope of the contract and that the Government was required to reimburse all related costs. These costs were specifically quantified by the contractor in January 1991 and through subsequent submissions as costs continued to be incurred.

Decision

Respondent's motion to dismiss is DENIED. The Board understands that the parties desire to proceed on the record on the merits of this appeal. The parties shall file their record submissions simultaneously with previously scheduled record submissions in other appeal dockets relating to this contract.

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[¶ 26,277] Mauldin Dorfmeier Construction, Inc. v. General Services Administration

GSBCA No. 11068, July 30, 1993.

Contract Disputes, Claims—Statement Adequacy—Existence of Dispute.—A construction contractor's request for payments made to a consultant was dismissed for lack of jurisdiction because the parties were not in dispute when the contractor sent a letter to the government requesting a change order and an adjustment. The consultant's subsequent letter, which was sent before the existence of a dispute, did not convert the contractor's letter into a claim. Moreover, the fact that the government did not act upon the contractor's request for payment within 41 days did not establish that the government failed to act within a reasonable time.

For the appellant: Patrick Mauldin, President, and Kim N. Bethell, Project Manager. For the government: Thomas Y. Hawkins, Office of Regional Counsel, General Services Administration, San Francisco, California.

Before DEGRAFF, PARKER, and NEILL, Administrative Judges.

DEGRAFF, Administrative Judge: Appellant, Mauldin Dorfmeier Construction, Inc. (MDC), entered into a contract with the General Services Administration (GSA) to renovate a building. In this appeal, MDC seeks to recover approximately $130,000, based upon GSA's refusal to reimburse MDC for payments that it made to a consultant during the course of contract administration. Because MDC never submitted a claim to the contracting officer, we dismiss the appeal for lack of jurisdiction.

Findings of Fact

On September 27, 1989, GSA awarded a contract to MDC for the renovation of court facilities in the B.F. Sisk Federal Building and Courthouse in Fresno, California. Appeal File, Exhibits 1, 2. On May 16, 1990, MDC wrote a letter to GSA and explained that MDC had hired Special Systems to Protect the Economy of Contractors, Inc. (SSPEC) in order to minimize or eliminate disputes and claims. MDC described SSPEC as "contracting dispute avoidance and resolution experts." Concerning SSPEC's authority, MDC's letter advises, "SSPEC is authorized to speak for MDC in all matters except price adjustments." MDC's letter also states, "SSPEC fees are compensable under FAR." *Id.*, Exhibit 8.

On September 19, 1990, MDC wrote a letter to GSA's Construction Engineer that states, "We have previously stated that the services of SSPEC So Cal are compensable under the FAR's [sic]. Please find the attached invoices and back-up documentation, and issue a change order for $17,011.00 to reimburse Mauldin-Dorfmeier for services provided through August 1990."[1] Appeal File, Exhibit 15. Apparently, GSA received this letter on September 26, 1990. *Id.*, Exhibit 20.

In a letter to GSA dated October 9, 1990, MDC states that there appears to be "some confusion" concerning MDC's relationship with SSPEC. In the letter, MDC explains that an employee of SSPEC "is authorized to speak for Mauldin-Dorfmeier Construction, Inc., on all issues except change order pricing. It is our intent to use [the SSPEC employee's] services to avoid disputes with the government, as this is his area of expertise." Letter from MDC to the Board (May 24, 1993), Attachment.

On November 6, 1990, SSPEC wrote to the contracting officer concerning the invoices that MDC sent to GSA's construction engineer on September 19, 1990. In its letter, SSPEC asserts that GSA had not responded to MDC within a reasonable time. SSPEC states, "This is a formal request for COFD [Contracting Officer's Final Decision] on this dispute." Appeal File, Exhibit 20.

There is no evidence before the Board to suggest that a dispute existed between the parties on September 19, 1990, when MDC submitted its SSPEC invoices to GSA for payment. Similarly, there is no evidence before the Board to suggest that a dispute existed on November 6, 1990, when SSPEC sent its letter to GSA. In a June 17, 1993 letter to the Board, MDC states that no dispute existed between the parties on Septem-

[1] On April 11, 1991, MDC notified the Board that it wished to revise its request for damages from $17,011 to $61,684. On May 24, 1993, MDC notified the Board that it wished to revise its request for damages from $61,684 to $130,364.58.

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ber 19, 1990, and alleges that a dispute arose at some unspecified time after that date. There is no evidence in the record that the parties exchanged any correspondence, held any meetings, or conducted any discussions concerning MDC's request for payment between September 19, 1990, and November 6, 1990. MDC states that it never received a response to its September 19, 1990 letter to GSA. Appeal File, Exhibit 36. GSA suggests that MDC could have "inferred" from GSA's silence that GSA did not intend to pay MDC. GSA Response to Order on Proceedings, June 22, 1993.

On January 22, 1991, MDC filed this appeal with the Board. On June 27, 1991, GSA filed a motion to dismiss for failure to state a claim or, in the alternative a motion for summary judgment. MDC filed a response to GSA's motion on July 16, 1991, and supplemented that response on February 9, 1993.

On May 21, 1993, the Board issued an order on proceedings that advises the parties that, upon reviewing the appeal file and the documentation provided by the parties during the course of this appeal, we are not certain that we possess jurisdiction to entertain this case. We directed the parties to clarify the jurisdictional facts by providing information concerning whether MDC ever submitted a claim to the contracting officer. In a series of submissions, the parties provided the Board with responses to the Board's May 21, 1993 order.[2]

Discussion

In order for the Board to possess jurisdiction to consider this appeal, the Contract Disputes Act of 1978 provides that MDC must have submitted a claim to the contracting officer. 41 U.S.C. § 605 (1988). The Disputes clause of the parties' contract provides that a "claim" is a written demand by one of the contracting parties seeking the payment of money in a sum certain. The clause also provides that a request for payment which is not in dispute when submitted is not a claim. Appeal File, Exhibit 1.

MDC's September 19, 1990 letter to GSA requests that GSA issue a change order and adjust the contract price by $17,011 in order to reimburse MDC for payment of SSPEC's fee. Although this letter constitutes a written demand by a contracting party seeking the payment of money in a sum certain, no dispute existed concerning the payment of SSPEC's fees at the time this letter was sent. Because the parties were not in dispute when MDC sent its September 19, 1990 letter to GSA, the letter does not constitute a claim. *Dawco Construction Co. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872 (Fed. Cir. 1991).

The Disputes clause of the parties' contract provides that a request for payment which is not in dispute when submitted may be converted into a claim if a dispute develops concerning the request and if the submission requirements of the Disputes clause are then met. Appeal File, Exhibit 1. Based upon this provision, MDC's September 19, 1990 request for payment could have been converted to a claim by SSPEC's November 6, 1990 letter, if a dispute existed by November 6, 1990, and if SSPEC's letter meets the submission requirements of the Disputes clause. After examining all of the evidence, we conclude that no dispute had developed by November 6, 1990. The fact that GSA did not respond to MDC's September 19, 1990 letter does not establish whether GSA intended to pay SSPEC's fee, deny MDC's request for payment, or request additional information concerning MDC's request. Silence does not necessarily establish the existence of a dispute. Because no dispute existed on November 6, 1990, SSPEC's letter does not convert MDC's September 19, 1990 letter into a claim.

The Disputes clause provides one other means by which MDC's September 19, 1990 request for payment could have been converted into a claim by SSPEC's November 6, 1990 letter: If GSA did not take any action concerning the request within a "reasonable time" and if the submission requirements of the Disputes clause were then met, the request would have been converted into a claim. Appeal File, Exhibit 1. Here, forty-one days passed between the date that GSA received MDC's request for payment and the date that SSPEC sent its letter to GSA.

Although the contract does not define "reasonable time," the Contract Disputes Act provides that a contracting officer is entitled to sixty days to consider a claim of $50,000 or less. 41 U.S.C. § 605. This provision serves as a guideline for deciding whether a contracting officer acts within a reasonable time in responding to a request for payment which does not constitute a claim. *Olympic Industries, Inc.*, NASA BCA 66-0292, 92-2 BCA ¶ 24,901. Because the contracting officer would have been entitled

[2] GSA has not filed a motion to dismiss this appeal for lack of jurisdiction. Even so, we are obligated to consider our jurisdiction and to dismiss this appeal if jurisdiction is lacking.

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to sixty days to consider a claim, and because a claim could have been submitted only after the parties had engaged in discussions and reached an impasse, it is reasonable to expect that the contracting officer would have needed at least sixty days to consider MDC's request for payment, given that the parties had not engaged in any discussions concerning MDC's request, much less formulated their positions. The fact that GSA did not act upon MDC's request for payment within forty-one days does not establish that GSA failed to act within a reasonable time.

Because no dispute existed and because GSA did not fail to act within a reasonable time, we do not need to decide whether SSPEC's November 6, 1990 letter fulfills the submission requirements of the Disputes clause. We note, however, that MDC withheld from SSPEC the authority to speak for MDC concerning price adjustments and change order pricing. Thus, it is possible that SSPEC lacked the authority to demand, on MDC's behalf, that GSA issue a change order and make an accompanying contract price adjustment, which is what MDC's September 19, 1990 letter requests. If SSPEC lacked the authority to speak on behalf of MDC with regard to such matters, then SSPEC's November 6, 1990 letter does not fulfill the submission requirements of the Disputes clause.

In summary, we lack jurisdiction to consider this case unless MDC submitted a claim to the contracting officer for decision. MDC's September 19, 1990 letter to GSA does not constitute a claim because no dispute existed between the parties at the time the letter was sent. After a dispute developed or after GSA failed to act within a reasonable period of time, MDC could have converted its letter into a claim by fulfilling the submission requirements of the contract's Disputes clause.

Decision

Because appellant did not submit a claim to the contracting officer as required by the Contract Disputes Act of 1978, the appeal is DISMISSED FOR LACK OF JURISDICTION.

[¶ 26,278] Richerson Construction, Inc. v. General Services Administration

GSBCA No. 11051-C(10653), July 27, 1993. Contract No. GS 07P-89-HUC-0017.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Effect of Stipulation.—The government's position in default terminating a contract for interior space alterations was not substantially justified under the Equal Access to Justice Act, despite the government's contention that pews installed by the contractor failed to conform to specification requirements, because the government was bound by a stipulated agreement between the parties in which it agreed that the pews would be deemed to have been acceptable. In settling the default action, the government completely relinquished its position and granted the contractor the full relief it sought. Noting that a stipulation was a judicial admission binding on the parties, absent special circumstances, the board gave conclusive effect to the stipulation.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Consultation with Surety.—Under its application for attorney fees and expenses under the Equal Access to Justice Act, a defaulted contractor was allowed to recover expenses reflecting consultations with its surety because it was found that the consultations were required in order to obtain documents and information needed in connection with its successful challenge of the default termination of its construction contract. In reviewing the itemized billings, the board found that the time charged to the consultation was appropriately chargeable to the action and that the hours billed were not excessive.

For the appellant: Williams & Jensen, P.C., Washington, D.C., by Robert J. Martinez and Sally B. Pfund. For the government: Marie N. Adamson and M. Leah Wright, Office of General Counsel, General Services Administration, Washington, D.C.

Before HYATT, DANIELS, and LABELLA, Administrative Judges.

HYATT, Administrative Judge: Following the settlement of its appeal of the General Services Administration's (GSA's) decision to terminate for default contract GS-07P-89-HUC-0017, Richerson Construction, Inc. (RCI) filed an application to re-

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cover attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988).[1] GSA does not dispute RCI's status as a prevailing party or its eligibility to recover EAJA costs other than to assert that the Government's actions were substantially justified. We find that the Government's position in terminating the contract for default and defending the ensuing litigation was not substantially justified and that RCI is thus eligible for an award of attorney fees and expenses under EAJA. The application is granted in the amount of $34,984.53.[2]

Background

The events leading to GSA's decision to terminate for default RCI's contract to complete interior space alterations in the Bob Casey Federal Building and Courthouse in Houston, Texas, are chronicled in the Board's decision ruling on the merits of RCI's claim for termination settlement expenses. *Richerson Construction, Inc. v. General Services Administration*, GSBCA 11161, et al., 93-1 BCA ¶ 25,239 (1992). They are briefly summarized here.

RCI was awarded a contract to demolish existing office space and to build two new bankruptcy courtrooms and associated office space, including judge's chambers. The specifications had been prepared by a design architect that was also awarded a management and inspection (M & I) contract to supervise construction of the renovations.

In its decision granting RCI's appeals relating to its entitlement to recover costs under the termination for convenience of this contract, the Board found that RCI's performance was hindered in many respects by the conduct of the M & I contractor, which arbitrarily rejected RCI's proposed subcontractor and basically administered the contract without due regard to the rules and regulations applicable to such contracts. One of the issues raised in connection with the default termination, but not litigated in the subsequent suit, concerned the pews installed in the courtrooms. It is the Government's position in defense of this cost application that the pews installed were never approved by the M & I contractor and that the pews did not comply with the applicable specifications.[3] Respondent relies on the alleged nonconformance of the pews as a primary factor justifying the default termination decision.

In September 1991, the parties stipulated to acceptance of the pews by GSA. This stipulation was entered into the record in *Richerson*. The parties also stipulated that costs incurred by RCI in connection with supplying the pews were allowable termination for convenience costs in accordance with FAR Part 31 and that GSA would not assert a credit against the contract amount for replacement of the pews. *Richerson*, 93-1 BCA at 125,701, n.7.

Discussion

Substantial Justification

The EAJA provides that an eligible, prevailing party under an adjudication conducted by the Government is entitled to an award of attorney fees and expenses unless the Government's position was substantially justified or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1) (1988). It is the Government's burden to prove both that its litigation posture and the administrative actions or omissions forming the basis of the adversary adjudication were substantially justified. *Schuenemeyer v. United States*, 776 F.2d 329, 330 (Fed. Cir. 1985); *Ellis v. United States*, 711 F.2d 1571, 1575 (Fed. Cir. 1983); *Warwick Holding Co.*, GSBCA 8459-C(5070) et al., 88-3 BCA ¶ 21,114, at 106,590. The term "substantially justified" has been construed to connote "'justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565

[1] Pursuant to a stipulation for judgment filed jointly by the parties, the Board granted the appeal and entered judgment converting the termination for default to one for the convenience of the Government. *Richerson Construction, Inc.*, GSBCA 10653 91-1 BCA ¶ 23,538 (Dec. 5, 1990).

[2] The original application, filed shortly after the Board entered judgment based on the settlement of the parties, was in the amount of $37,288.27. This amount was subsequently reduced to correct errors in the billing of certain expenses. After the Board issued its decision in *Richerson Construction, Inc. v. General Services Administration*, GSBCA 11161, et al., 93-1 BCA ¶ 25,239 (1992), it requested the parties to supplement the briefing with respect to this cost application. RCI did so, and revised its application to include attorney fees incurred in responding to the Board's inquiry. Respondent submitted a letter to the Board stating its position that the record developed in the subsequent, related litigation should not be taken into account in ruling on this fee application.

[3] The Government adds that the defective pews issue was compounded by other numerous deficiencies and by RCI's untimely performance. These additional allegations were addressed in *Richerson* and resolved in favor of RCI.

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(1988); *see also Quality Diesel Engines, Inc. v. Department of Commerce*, GSBCA 12385-C(11672-COM) (July 1, 1993), 93-3 BCA ¶ 25,228; *Atlas Construction Co. v. General Services Administration*, GSBCA 11088-C(8653), et al., 92-2 BCA ¶ 24,944, at 124,329.

In assessing whether the Government's position was substantially justified, it is not dispositive that the Government lost (or chose to settle) the case. Nor is the Government required to establish that its decision to litigate was based on a substantial probability of prevailing. Rather, the test is whether the Government's actions had a reasonable basis in fact and law. *See Luciano Pisoni Fabbrica Accessori v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988); *Broad Avenue Laundry and Tailoring v. United States* [30 CCF ¶ 70,546], 693 F.2d 1387, 1391 (Fed. Cir. 1982).

The fact that the relief obtained by RCI in the underlying litigation was derived pursuant to a settlement agreement does not preclude entitlement to an award of attorney fees and expenses under EAJA. *See Austin v. Department of Commerce*, 742 F.2d 1417 (Fed. Cir. 1984); *Bailey v. United States*, 721 F.2d 357 (Fed. Cir. 1983); *Building Services Unlimited, Inc.*, ASBCA 33283, 88-2 BCA ¶ 20,611. At the same time, the fact of the settlement does not conclusively demonstrate that the Government's position was not substantially justified[4]; rather, the Board should evaluate the Government's justification in light of all relevant information in the record, including the degree of relief obtained by appellant. In *Building Services*, the Armed Services Board observed that "[t]he complete relinquishment of the Government's position in the settlement of the dispute reinforces the conclusion that the Government's position that led to the contracting officer's [action] and the ensuing litigation was not substantially justified." 88-2 BCA at 104,152.

GSA asserts that its position in terminating the contract for default was substantially justified, both factually and legally, because, in its view, the pews furnished and installed by RCI in the courtrooms did not conform to specifications. In its opposition to RCI's application, GSA relies on the letter to show cause that preceded the termination for default, which pointed both to RCI's lack of diligence in completing the contract and to the nonacceptability of the pews, which were not approved either by the M & I contractor or by GSA prior to installation. GSA contends that these facts, as set forth in this letter, substantially justified its decision to proceed with the termination and to oppose appellant's appeal of that action.

RCI disputes GSA's interpretation of the specifications concerning the construction of the pews, contending that the pews fully conformed to that specification and should have been approved and accepted by GSA. In addition, RCI disagrees vehemently with GSA's contention that it was unduly dilatory in completing the project. RCI thus urges that none of the contentions raised by the Government in support of its termination decision are factually or legally sufficient to constitute substantial justification either of GSA's administrative or litigation posture.

Ordinarily, in evaluating the validity of arguments concerning substantial justification, only the record before the tribunal as a result of the trial of the case should be consulted, and new evidence, outside of that record, should not be entertained. *See United States v. Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558 (11th Cir. 1988); *Kos Kam, Inc.*, ASBCA 34684, 88-3 BCA ¶ 21,049. When a matter has settled prior to a hearing on the merits, however, it is appropriate to consider evidence that was not in the record of the settled matter in order to make a reasoned determination as to whether the applicant is entitled to an award. *See Kuhns v. Board of Governors of the Federal Reserve System*, 930 F.2d 39 (D.C. Cir. 1991); *Digital Services Group, Inc.*, DOT BCA 1817E, 93-1 BCA ¶ 25,358 (1992). As the court noted in *Kuhns*, the purpose of excluding additional evidence after a hearing on the merits is to avoid wasteful expenditure of resources in relitigating a matter after the parties have already had the opportunity to be fully heard. At the same time, where the existing record is devoid of sufficient information to assess the justification for the Government's position, it would be inappropriate to preclude the opportunity to supplement the record so as to reach a fair and reasoned determination.

[4] As respondent points out, the fact of the settlement does not automatically constitute an admission of lack of justification on the part of the Government. The courts have recognized, in evaluating the Government's justification for litigation, that quite apart from the merits of a dispute, policy reasons may "dictate a premature termination of the litigation." *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985), *judgment vacated on other grounds*, 487 U.S. 1229 (1988).

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In this case, we are in the unusual posture of having a largely complete factual record, developed after the settlement of this matter, as a result of the trial needed to resolve the disputed issues concerning RCI's entitlement to termination for convenience settlement costs. For the most part, the facts and legal issues relevant to supporting the decision to terminate for default were fully aired in this ancillary proceeding. The reasoning in *Kuhns* and *Digital* persuades us that it is appropriate to consider the record in this proceeding in assessing the Government's position. The record as developed therein persuades us that the Government's position as to RCI's alleged dilatory performance had little basis in fact or law.

GSA's primary basis asserted to support the termination action, in contrast, is one for which relatively little evidence of record is available to permit us to assess its factual or legal validity. This relates to the question whether the pews installed in the courtrooms conformed to specifications or not. The parties are diametrically opposed in their arguments pertaining to this issue. The Board does not have a factual record on which to review and resolve this issue. What is available, however, is the fact that the Government entered into a stipulation, after the filing of this application, in which it agreed that the pews would be deemed to have been accepted and that costs would be recovered in accordance with the applicable Federal Acquisition Regulation (FAR) provision. The Board has construed that very stipulation to bind the Government in related litigation with RCI's surety. *Employers Mutual Casualty Co.*, GSBCA 11003, 92-1 BCA ¶ 24,594, *aff'd on reconsideration*, 93-1 BCA ¶ 25,482 (1992). The rationale supporting this conclusion is even more pertinent in this case, involving the same parties that entered into the stipulation. In *Employers Mutual*, the Board, quoting *John McShain, Inc. v. United States*, 375 F.2d 829, 831 (Ct. Cl. 1967), observed that "[a]s a general proposition, '[a] stipulation is a judicial admission binding on the parties making it absent special consideration.'" 92-1 BCA at 122,709. This precedent requires us to give conclusive effect to this stipulation. Thus, we cannot accept the Government's contention that nonconformance of the pews substantially justified its litigation posture.

To summarize, after reviewing the facts and legal arguments pertinent to the Government's administrative and litigation posture, we cannot find that its actions were substantially justified. It is noteworthy that in settling the default action the Government completely relinquished its position, granting RCI the full relief it sought in that proceeding. *Building Services*, 88-2 BCA at 104,152. The proof adduced by appellant in subsequent ancillary litigation and the stipulation accepting the pews further support the conclusion that the termination for default of RCI's contract was clearly improper. GSA has not established that its position in the adversary adjudication was substantially justified. RCI is, therefore, entitled to an award of reasonable fees and expenses.

Entitlement to Claimed Fees and Expenses

Appellant has submitted an application detailing some $34,984.53 in legal fees and expenses stated to be attributable to RCI's defense of the default termination action. GSA challenged the adequacy of RCI's documentation of certain of these expenses;[5] these objections have been satisfactorily addressed, and amounts reduced in appellant's response to the Government's opposition to its application. More significantly, GSA, citing *Oliveira v. United States*, 827 F.2d 735 (Fed. Cir. 1987), questions whether certain of the attorney fees were genuinely attributable to legal representation required in connection with the default proceeding and suggests that the hours spent on certain tasks were excessive.

First, we note that the itemized bills submitted by appellant's counsel in support of the application are fully and properly documented in accordance with applicable case law. *Naporano Iron and Metal Co. v. United States*, 825 F.2d 403 (Fed. Cir. 1987); *Spectrum Leasing Corp. v. General Services Administration*, GSBCA 10902-C(7347), et al., 93-1 BCA ¶ 25,317 (1992). Appellant's bills reflect the specific task performed, by whom, and the number of hours required to perform the task.

GSA also challenges RCI's entitlement to recover legal expenses reflecting consultations with Employers Mutual Casualty

[5] The amount initially claimed was $37,288.27. In response to GSA's objections to certain of the expenses (relating to travel) claimed, RCI reviewed its application and discovered several errors concerning expenses incurred that were not properly attributed to the default termination action. RCI has deleted these charges and has provided additional documentation and explanation to support its expenses, which include courier, legal database searches and telephone charges. We are persuaded that the documentation is adequate and that the expenses now itemized ($1,842.03) are reasonable.

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Company (EMCC), RCI's surety. EMCC took over the work after RCI was terminated for default. GSA suggests that, to the extent that these contacts were for the purpose of providing legal advice to the surety in its dealings with the Government, they are not properly chargeable to the default termination litigation. RCI explains, in response, that the contacts made with RCI's surety were required to obtain documents and information needed in connection with its pursuit of the default action. After reviewing the itemized billings, we are persuaded that the time charged to consultation with EMCC is appropriately chargeable to this action and that the hours billed were not excessive.

GSA also questions the number of hours spent on particular activities, such as drafting pleadings and preparing a supplemental appeal file. RCI responds that the hours drafting the complaint are fully justified given the need to investigate the facts to be alleged and research applicable law so as to properly focus the issues in dispute. Similar justifications exist for time spent reviewing documents and exercising judgments as to which should be included in a supplemental appeal file. Based on our review of the record, we conclude that the hours billed by RCI's attorneys are not only appropriate, but are eminently reasonable given the high quality of work produced and the result achieved.

Decision

The application for fees is **GRANTED.** RCI is awarded $34,984.53 in fees and expenses to be paid in accordance with the provisions of 5 U.S.C. § 504(d) (1988).

[¶ 26,279] Tarlton Construction Company v. General Services Administration

GSBCA No. 10528, July 27, 1993.

Interpretation of Contracts—Construction Contracts—Method of Installation.—A contractor erroneously interpreted its building demolition and construction contract as permitting it to attach electrical metallic tubing to suspended ceiling wires, because the contract explicitly required the metallic tubing to be securely fastened to the building structure and the suspended ceiling wires were not considered part of the building structure. The contractor asserted that the support wires of the suspended ceiling were attached to the building. The contractor's position, however, failed to distinguish between the building structure and the suspended ceiling system. A suspended ceiling is considered an architectural feature rather than a part of the building structure.

For the appellant: Blumenfeld, Kaplan, Sandweiss, Marx, Ponfil & Kaskowitz, St. Louis, Missouri, by Jeffrey L. Michelman, Kay R. Sherman, and William C.E. Goldstein. For the government: Gerald L. Schrader, Real Property Division, General Services Administration, Washington, D.C.

Before VERGILIO, LABELLA, and NEILL, Administrative Judges.

VERGILIO, Administrative Judge: On March 2, 1990, the Board received from Tarlton Construction Company an appeal under a contract it had with the respondent, the General Services Administration. The contractor maintains that the agency prohibited work from proceeding in accordance with the terms of the contract; the contractor seeks to recover additional costs incurred because of the alleged change.

The question of entitlement is before the Board, the parties having reserved consideration of quantum. The contractor asserts that the contract permitted electrical metallic tubing (EMT) to be installed with clips attached to suspended ceiling support wires, a method of installation allegedly accepted in the industry and contract-referenced codes. The agency contends that the EMT had to be attached to the building structure, which the suspended ceiling structure is not, and that the clips utilized were not acceptable support devices under the contract.

The Board concludes that the contract required the EMT to be attached to the building structure and that the suspended ceiling structure is not part of the building structure. The contractor's appeal is premised on an erroneous interpretation of the contract. Accordingly, the Board denies the appeal.

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Findings of Fact

The contract

1. On September 26, 1989, the agency awarded Tarlton a tenant fit-out (selective demolition and construction) contract to furnish labor, equipment, and materials for the modernization of a federal building in St. Louis, Missouri. Appeal File, Exhibits 18, 11. The work to be performed included the installation of EMT. *Id.*, Exhibit 3, Vol. IV at 16110.

2. The general requirements of the contract's specifications contain a section captioned "electrical basic requirements," a subsection of which addresses the support of electrical items:

> A. Unless otherwise indicated, all electrical items and their supporting hardware, including but not limited to conduits, [and] raceways ... shall be securely fastened to the building structure in accordance with Section 16190—Supporting Devices
>
> B. The load applied to any fastener shall not exceed one-fifth of the proof test load. Fasteners attached to concrete ceilings shall be vibration and shock resistant.

Appeal File, Exhibit 3, Vol. IV at 16010-7 (¶ 3.02).[1] Raceways include EMT. *Id.* at 16110-1 (¶ 1.01.B), 16110-2 (¶ 2.01.0). In particular, the contract directs that all fire alarm, security television, and sound system wiring is to be installed in EMT, as is all underfloor 120-volt power distribution. *Id.* (¶ ¶ 3.01.E, F).

3. The "general description of work" found in the contract section dealing with supporting devices, referenced in Finding 2, provides: "Types of supports, anchors, sleeves and seals specified in this section include the following." There follow ten enumerated items (e.g., one-hole conduit straps, round steel rods, lead expansion anchors). Appeal File, Exhibit 3, Vol. IV at 16190-1 (¶ 1.01.B). A "products" part of this same section identifies particular attributes of various types of supports, anchors, sleeves and seals, conduit cable supports, and u-channel strut systems. *Id.* at 16190-2 through 16190-3 (¶ 2.01). Finally, the same section contains a part dealing with the installation of supporting devices:

> A. Install hangers, anchors, sleeves and seals as indicated, in accordance with manufacturer's written instructions and with recognized industry practices to insure supporting devices comply with requirements. Comply with requirements of NECA [National Electrical Contractors Association], NEC [National Electrical Code] and ANSI/NEMA [American National Standards Institute/National Electrical Manufacturers Association] for installation of supporting devices.
>
> ....
>
> C. Install hangers, supports, clamps and attachments to support piping properly from building structure. Arrange for grouping of parallel runs of horizontal conduits to be supported together on trapeze type hangers where possible. Install supports with maximum spacings indicated.

Id. at 16190-4 (¶ 3.01). "Piping" in paragraph C is a generic term encompassing various types of conduit and raceways. Appeal File, Exhibit 30 at 54-55.

4. The contract contains direction on the installation of electrical raceways:

> Install electrical raceways where indicated in accordance with manufacturer's written instructions, applicable requirements of NEC and NECA "Standard of Installation", and complying with recognized industry practices.

Appeal File, Exhibit 1, Volume IV at 16110-3 (¶ 3.01.A).[2]

5. The 1987 version of the NEC[3] contains a section applicable to the installation (securing and supporting) of EMT, NEC § 348:

> **(a) Secured in Place.** Raceways, cable assemblies, boxes, cabinets, and fittings shall be securely fastened in place. Support wires that do not provide rigid support shall not be permitted as the sole support.

Appeal File, Exhibit 38 at 253 (§ 300-11(a)).[4] The NEC Handbook provides commentary:

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[1] These general requirements supersede "industry standards" to the extent that they are more explicit or more stringent than industry standards. Appeal File, Exhibit 2 at 01090-4 (¶ 1.07).

[2] Curiously, despite the express reference in the contract, in response to the contractor's request for admission that the initial method of installation was in accordance with the NECA "Standard of Installation," the agency responded: "Can neither admit nor deny. Respondent does not have referenced copy of NECA." Admission (¶ 3).

[3] The parties have stipulated that the 1987 version is applicable to this contract. Transcript at 83; Appeal File, Exhibit 2 at 01090-5 (¶ 1.07.B).

[4] The 1990 version of the NEC contains the following direction:

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> This section, revised for the 1987 edition, makes it clear that support wires, such as used to hang suspended ceilings, may be used for the support of raceways and cables, but cannot be used as the sole support if the wires do not provide rigid support.

Id.

Performance

6. The contractor, through a subcontractor, installed EMT as part of the building modernization. The initial method of installation utilized clips attached to suspended ceiling support wires which were attached to the concrete slab above. Appeal File, Exhibits 21, 30 at 89. The clips are not one of the types of supports or one of the products enumerated in the contract, Finding 3. While maintaining that the contract expressly requires conduit to be "securely fastened to the building structure," the agency admits "that the installation was in accordance with the edition of the NEC in effect at the time of the installation." Admission (¶ 2).[5]

7. On November 20, 1989, Day & Zimmermann, the construction quality control contractor (QCC) who represented the contracting officer, Appeal File, Exhibit 2 at 01010-2 (¶ 1.02.C), advised the contractor that installing EMT with clips attached to ceiling support wires was inconsistent with the contract because the conduit must be supported from the building structure. Stipulation at 4 (¶ 12); Appeal File, Exhibits 12, 14. In a letter dated November 20, to the contractor, the subcontractor installing the EMT took issue with that conclusion. It expressed a broader view of the phrase "building structure" ("We consider existing walls and ceilings to be structure"), and maintained that its method of installation was in accordance with the NEC and in compliance with standard industry practice. Appeal File, Exhibit 13.

8. Subsequent correspondence and communications involving the QCC, the contractor, and/or the subcontractor occurred into December. The QCC and the subcontractor each held to its view of the contract requirements and permissible EMT installation. The QCC requested that work be corrected to comply with its reading of the contract. Appeal File, Exhibits 14-17; Stipulation at 4 (¶ 13).

9. In response to the contractor's request for a decision, by letter dated December 27, 1989, the contracting officer issued a written decision on the dispute. The contracting officer concludes that the contract is clear—a provision requires EMT to be securely fastened to the building structure; the contractor must comply with applicable codes as well as that provision. Appeal File, Exhibit 19. Further, taking issue with the interpretation of the phrase "building structure" put forward by the contractor, the contracting officer states:

> It is our interpretation that the building structure consists of the elements comprising the load bearing system. If walls were built as part of the load bearing system (i.e., shear walls) then they are considered building structure. However, a suspended ceiling that was installed some time during the life of the building and is easily removed, is considered an architectural feature and not part of the building structure.

Id.

10. The contractor filed an appeal, dated February 26, 1990, with this Board. Appeal File, Exhibit 23.

Testimony and Other Evidence

11. Testimony in support of the contractor's position was not particularly enlightening. For example, regarding the contract language in Finding 2, a witness of the contractor testified: "I don't consider this a specification that's really applicable to this type of work. This looks to be a canned specification that's not really been customized or modified for this building." Transcript at 36-37. Witnesses did not demonstrate familiarity with any particular contracts which clearly utilized language similar to that in Finding 2 (i.e., "securely fastened to the building structure"). E.g., Transcript at 52-53.

12. Deposition testimony of a construction manager involved in the contract for the

(Footnote Continued)

(a) Secured in Place. Raceways . . . shall be securely fastened in place. Support wires that do not provide secure support shall not be permitted as the sole support. Equipment that is located within, supported by, or located below a suspended ceiling shall be permitted to be supplied or controlled by branch-circuit wiring that is supported by the suspended ceiling support wires.

Appeal File, Exhibit 10.

[5] The agency asserts that the 1990 version was in effect at the time of installation, although it has stipulated that the prior version of the NEC (the 1987 version) was applicable to this contract. Finding 5.

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QCC reveals the view that wires hanging from structure are not part of structure. Appeal File, Exhibit 30 at 79. "The ceiling assembly is just that. It is a ceiling assembly. It has to do with the ceiling and only the ceiling and those things that are designed to be part of and made a part of the ceiling only. It is not structural." Appeal File, Exhibit 30 at 80.

13. The decision of the contracting officer, Finding 9, which differentiates between the building structure and ceiling structure, is consistent with the testimony of the QCC and is fully consistent with definitions in the *Dictionary of Architecture & Construction* (Cyril M. Harris ed. 1975):

> **suspended acoustical ceiling** An **acoustical ceiling** which is suspended from the building structure above; usually the acoustical material itself forms a **suspended ceiling,** but it also may be secured to a backing.
>
> **suspended ceiling, dropped ceiling** A nonstructural ceiling suspended below the overhead structural slab or from the structural elements of a building and not bearing on the walls.

Moreover, the wires to which the clips were attached become and remain rigid only when the ceiling structure is in place; that is, the wires themselves do not provide rigid support. Transcript at 90-91.

14. Lacking is a credible factual basis supporting the conclusion that under industry practice in the St. Louis area, the EMT was attached to the building structure.

Discussion

The contractor maintains that the contract permitted the installation of EMT with clips attached to the suspended ceiling support wires. The agency contends that the contract prohibited such installation.

The contractor largely relies upon the assertion that its interpretation of the contract is reasonable, and must be adopted under the rubric of contra proferentem. Contractor's Brief at 28-41. The contractor's analysis fails to give meaning to the explicit requirement that the EMT and supporting hardware "shall be securely fastened to the building structure." Findings 2, 3.

The contractor maintains that the initial method of installation fully complies with the contract—the support wires of the suspended ceiling are attached to the building structure, and the support clips and EMT were attached thereto. This argument fails. First, the support wires themselves did not provide a means of rigid support required by the contract language. Finding 13. Second, the contractor fails to distinguish between the building structure and the suspended ceiling system. The clips and EMT were attached to supporting wires which became rigid only with the suspended ceiling system in place. The record establishes that the suspended ceiling system, to which the EMT, through clips, was attached, is not part of the building structure. Findings 12-14. Hence, the initial method of EMT installation failed to comply with an explicit requirement of the solicitation.

The contractor inappropriately reads the referenced codes and industry practice as superseding the specific requirement to fasten the EMT to the building structure. The contract requires the opposite order of precedence—the explicit requirement restricts otherwise acceptable methods of performance under the stated codes and industry practice. Hence, whether or not the NEC permitted EMT to be attached to suspended ceiling wires, the explicit general provisions of the contract must be given meaning. In short, the contractor's asserted interpretation is contrary to the terms of the contract and is not reasonable.[6] No ambiguity exists; there exists no basis, therefore, to resort to the principle of contra proferentem.

Decision

The contractor has failed to establish that the agency's actions constituted a change in the terms of the contract. Accordingly, the Board DENIES the appeal.

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[6] The contractor maintains that its subcontractor relied upon the asserted interpretation in pricing the work in question. Assuming arguendo that the contract was priced with such an interpretation, the stated interpretation does not become more reasonable. More importantly, the contractor has not asserted that the agency should have been aware of the interpretation underlying the contractor's price.

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[¶ 26,280] Amcel Corporation v. General Services Administration

GSBCA No. 9643, July 23, 1993. National Stock No. 8105-01-183-9768.

Defaults, Grounds—Delivery Failure—Refusal to Fill Orders.—A contract to supply plastic bags was properly terminated for default because the contractor refused to fill orders. Although the contractor objected to the government's testing methodology, its own test of a sample also showed that the sample failed to meet specification requirements.

For the appellant: Friedman & Atherton, Boston, Massachusetts, by Lee Kozol. For the government: Tenley A. Carp, Office of General Counsel, General Services Administration, Washington, D.C.

Before DEVINE, HENDLEY, and HYATT, Administrative Judges.

DEVINE, Administrative Judge: Appellant's contract to supply plastic bags to the Government was terminated for default when certain bags failed to pass Government strength tests. Appellant, fearing additional failures, refused to make further shipments. Appellant challenges the accuracy of the tests upon which the Government relied to justify its termination for default.

Findings of Fact

On June 5, 1987, Amcel Corporation (Amcel) and the General Services Administration (GSA), an agency of the United States Government, entered into a contract whereby Amcel would supply to the Government a large number of light, medium, and heavy duty general purpose plastic bags for the sum of $3,265,009.57. Appeal File, Exhibits 1, 2. Only the heavy duty bag bearing National Stock Number 8105-01-183-9768, and referred to by the parties as the "9768 bag" is in issue. Appellant had furnished the 9768 bags under earlier contracts in large quantities without complaint. Transcript at 190-91. Under the earlier contracts Amcel had had its bags tested by an independent testing laboratory. Transcript at 160, 283. Under the contract at issue, Amcel could test its own bags, although the Government had the right to make discretionary tests at its own facilities at any time. Appeal File, Exhibit 1. As a result of this provision Amcel eventually acquired and installed the necessary test equipment. Transcript at 224-25. Government personnel assisted Amcel personnel in learning the test procedures. Transcript at 245-46.

At the outset of production, Amcel had difficulty attaining the required seam strength in several of its bags including the 9768 bags. Appeal File, Exhibits 7, 8. A change in production methods apparently cured the problem. Appeal File, Exhibit 12. Amcel also had difficulty producing 9768 bags that met the contract specification for tear strength. Appeal File, Exhibits 13, 14. On September 23, 1987, at the invitation of the Government, appellant applied for a specification deviation in tear strength from 491 grams to 350 grams. Appeal File, Exhibit 13. The request was approved within the week. Appeal File, Exhibit 14. On December 12, 1987, however, appellant's bags tested well below the new standard. Government's Exhibit 4. Appellant asked for and received the return of several bags from the failed lot for the purpose of running its own tests. *Id.* On these bags the specified tear resistance minimum was 491 grams in the machine direction and 514 grams across the machine direction. The Government's tests showed values of 186 and 190 respectively on the bags it tested. Appellant's tests on the same bags produced values of 266 and 292 respectively. Appeal File, Exhibit 15.

On December 22, 1987, the Government issued a letter entitled "Show Cause Notice" which listed eleven delinquent delivery orders. Appeal File, Exhibit 16. The letter asked for an explanation as to why they were late and warned of termination for default. *Id.* Some of these delivery orders had already been shipped prior to the issuance of the notice, and some were shipped thereafter. *Id.* Four purchase orders, Nos. AWE 90981, CWE 90991, SWE 94011, and FWE 94011, were not shipped. These four were the largest individual orders and totalled 271,035 boxes of 125 count plastic bags. Appeal File, Exhibit 21. The total of these orders was one and one half times larger than the total of all of the other purchase orders combined. Appeal File, Exhibit 2. Appellant sought a further modification of the specifications on January 26, 1988, to apply to the remaining four delivery orders. Appeal File, Exhibit 19. It sought to reduce both the tensile strength requirement (in the machine direction), and the bottom seam strength requirement from a value of 5.7 grams to 4.8 grams. *Id.* The Government denied the re-

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quest on March 8, 1988, on the ground that the asked-for changes were incompatible with the heavy duty bag the Government required, and directed Amcel to deliver the four delinquent orders by April 29, 1988, or face a termination for default. Appeal File, Exhibit 21. On April 13, 1988, the Government sent another letter to Amcel. Appeal File, Exhibit 22. This one was entitled "Cure Notice." *Id.* It recited the April 29, 1988, due date for the four orders in question; advised Amcel that it considered performance to be endangered; and requested an explanation for Amcel's tardiness in delivering the bags, by April 25, 1988; and again threatened termination. *Id.* Amcel did not ship the bags within the required time frame, nor did it give an explanation satisfactory to the Government for its failure to do so, although it did write a letter to the contracting officer on January 4, 1988, stating that it agreed not to produce" the four orders in question. Appeal File, Exhibit 18.

On May 11, 1988, the contracting officer terminated the contract for default because of non-delivery. Appeal File, Exhibit 24.

At hearing appellant produced evidence to show that the lot sizes from which the test samples were taken varied greatly since both parties accepted the purchase orders as lots, and the numbers of bags in the various purchase orders differed widely. Appeal File, Exhibit 16. Appellant complained that a single failure in a small lot would result in the rejection of but a small number of bags while a similar failure in a large lot would result in the rejection of a much larger number of bags. However, appellant did not produce any evidence that it had objected to the varying lot sizes prior to termination. Appellant's evidence that the Government's test procedures were unreliable consisted principally of showing that its own tests of the same bags yielded different results. The example in evidence, however, though it showed different results than the Government's tests of the same sample, also showed that even by appellant's figures the sample failed to meet specification by a large margin. Appeal File, Exhibit 15; Government's Exhibit 8. Appellant had earlier blamed the inconsistent quality of its bags on the resin that it was using to produce them. Government's Exhibit 3. Amcel had calculated its bid based on a bag wall thickness of 1.2 mils. *Id.* The specifications on the bags were of the performance type. Bag wall thicknesses were not specified. Amcel was told at a meeting on September 18, 1987, by the Government's experts that a bag of that thickness would probably not consistently meet specifications *Id.* Amcel replied that future bids would be based on a thicker bag wall, but that Amcel could not afford to increase bag wall thickness under the present contract. *Id.*

Discussion

Within days of contract award appellant had asked for and received an extension of its delivery schedules. It also asked for and received a relaxation of the tear strength requirements on 9867 bags, and a further extension of its delivery schedules. However, samples of the 9867 bags taken in October 1987 and tested by the Government in December 1987 showed very low values in the tear resistance tests. Appellant could not or would not solve the problem. Some of appellant's 9867 bags passed and some did not. At hearing appellant spent a great deal of time and effort attacking the Government's test methodology and test results but even its own tests showed that one lot of bags was far below specification requirements even though the Government's test figures and appellant's test figures did not agree. Appellant produced no evidence at all as to why the bags failed, although it produced a great deal of evidence tending to show that it had made thousands of the same bags under prior contracts without complaint by the users. Apparently the walls of the heavy duty 9867 bag were not thick enough to meet test requirements consistently, and appellant was not willing to spend the money to put more resin into the manufacturing process. The size of the undelivered orders may have had something to do with it. They totalled more than three million bags.

When appellant refused to fill the four orders in question it gambled that the possible excess reprocurement costs it might thereby be required to pay would be less than the cost of upping the resin quality and resin content of three million heavy duty plastic bags. It must now await events.

Decision

For the reasons stated the appeal is **DENIED.**

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[¶ 26,281] **Bobby A. Edwards**

PSBCA No. 3408, July 29 1993. Contract No. HCR 27057.

Defaults, Grounds—Postal Contracts—Availability of Carrier.—A highway transportation contract was properly terminated for default because the contractor failed to perform services and was unavailable for contact by the Postal Service. The contractor alleged that during a suspension for equipment defects, he was called out of town for a family emergency, with the result that he failed to present his equipment for a required reinspection and was not able to resume performance at the end of the suspension. However, he failed to show that his nonperformance was excusable under the contract, and he gave no reason for failing to contact the Postal Service or to provide a phone number at which he could be reached.

For the appellant: Bobby A. Edwards. For the government: D.D. Anna, United States Postal Service, Washington, D.C.

Before MENEGAT and COHEN, Administrative Judges.

MENEGAT, Administrative Judge: Appellant, Bobby A. Edwards, has appealed the default termination of his highway transportation contract with the United States Postal Service, Respondent. At Appellant's request, this appeal is being processed under the Board's Accelerated Procedure, 39 C.F.R. § 955.36, and is being decided on the record. Appellant was afforded an opportunity to file supplemental evidence and a brief, but did not do so.

Findings of Fact

1. On June 30, 1992, Respondent renewed Appellant's contract, HCR 27057, for transport of mail, two trips per day, six days per week, between Greensboro and Lawsonville, North Carolina, for the period July 1, 1992, through June 30, 1996 (Appeal File Tab ("AF") A, "Statement of Service and Schedule").

2. The contract included the Basic Surface Transportation Contract General Provisions, PS Form 7407T, March 1989. General Provision 4(a) requires the contractor to "carry all mail tendered for transportation under this contract, . . . with certainty, celerity, and security, in accordance with the operating schedule and between the points fixed in the solicitation . . . ." (AF A).

3. The contract called for use of one vehicle, but the contractor was required to have readily available sufficient standby equipment . . . to perform extra trips, to permit vehicle maintenance and to prevent delays in emergencies such as mechanical failures and poor weather conditions." (AF A, section 15.B).

4. Under the contract, Appellant was liable for "ordinary repairs to and maintenance of equipment furnished by the contractor" (AF A, section 16.B(1)).

5. The contract provided:

> The contractor must provide either personal or representative supervision over the operation of the route. The contractor or his route supervisor must maintain a phone and be easily contacted in the event of unexpected problems on the route. (AF A, section 18.A)

6. Among the grounds stated in General Provision 16(a) of the contract for terminating the contract for default are the contractor's "failure to perform service according to the terms of the contract" (General Provision 16(a)(1)) and "[i]f the Contractor's transportation equipment is insufficient, inadequate, or otherwise inappropriate for the service" (General Provision 16(a)(10)) (AF A).

7. If, after a termination for default, it is determined that the contractor was not in default or that the default was excusable, under General Provision 16(c) the termination will be considered as one under the termination for convenience provision of the contract, General Provision 17 (AF A).

8. On Saturday, November 28, 1992, the brakes on Appellant's truck failed causing his driver to terminate the first trip of the day without completing it (AF D). Respondent arranged for another contractor to complete the morning run, perform the second required trip on November 28 and perform the route on the following Monday (AF D). When further inspection of Appellant's truck revealed a number of other equipment deficiencies, Respondent suspended Appellant's performance of service on the route until December 7 and directed Appellant to present an acceptable truck for inspection

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before that date (AF D). Although some repairs were made to Appellant's truck, it was not found acceptable when inspected by Respondent on December 4; the rear door was broken and the driver side window was missing (AF D; Declaration of George Whitworth dated June 24, 1993). Appellant did not present the truck to Respondent for reinspection (AF D).

9. On December 7, Appellant left town without advising Respondent that he would be unavailable and without leaving a telephone number where he could be reached. He did not perform or arrange for the performance of the route from December 7 through December 11 (AF D; Complaint; Declaration of George Whitworth dated June 24, 1993).

10. Using the number Appellant had previously supplied, Respondent's employees made several attempts to reach Appellant by telephone during the week of December 7. They left messages on his answering machine asking that he return their calls, but Appellant had not contacted Respondent by December 11 (AF D).

11. By letter dated December 11, 1992, the contracting officer terminated the contract for default, basing the termination on Appellant's failure to comply with General Provisions 16(a)(1) and (10) (AF C). This appeal followed.

Decision

Appellant argues that by December 7 he had repaired the mechanical defects identified by Respondent except for the driver's window and that the missing window did not interfere with use of the truck on the route. He contends that the termination was unwarranted because his failure to present the vehicle for reinspection, to be reachable by Respondent and to carry the route from December 7 through 11 stemmed from a family emergency that required him to leave town. Respondent argues that the failure to carry the route and to have acceptable equipment justified the termination and that Appellant has failed to present excusable reasons for not performing.

Respondent has the burden of proving that the termination was justified, but once Respondent shows that Appellant failed to perform in accordance with the contract, the burden shifts to Appellant to present evidence to demonstrate that the failure to perform was excusable under the contract. *Pamela J. Sutton,* PSBCA No. 1622, 88-3 BCA ¶ 21,031 at 106,237.

There is no dispute that Appellant, without explanation to Respondent, failed to perform the route when, on December 7, the suspension of service expired and Appellant was expected to resume his contractual duties. Appellant could not be "easily contacted" (Finding 5) as he had not left a telephone number at which he could be reached, and he did not respond to messages left at the telephone number he had previously provided to Respondent. Respondent has demonstrated that the termination was justified by Appellant's failure to perform the service under the contract after December 7 and his unavailability to contact by Respondent.

Appellant has not met his burden of demonstrating that his failure to perform and to maintain contact with Respondent was excusable. He has not demonstrated that Respondent's rejection of the truck was unreasonable or that his reasons for not performing the route from December 7 to December 11 were excusable under the contract. Moreover, Appellant has presented no reason for failing to contact Respondent to explain his absence and to provide a telephone number at which he could be reached.

The appeal is denied.

[¶ 26,282] Mike Albert Leasing, Inc.

PSBCA No. 3342-3369, March 4, 1993. Contract No. 114382-86-V-A135.

Contract Types—Vehicle Rentals—Wear and Tear.—A contractor was not entitled to recover for damage to the interior of rental vehicles, because it provided no evidence and made no argument that the damage was either outside ordinary wear and tear or was caused by the act or negligence of government personnel. The contractor contended that the dents from the inside of the vehicles should not be considered normal wear and tear, because the damage was cargo damage, caused by mail trays being stacked too high. However, the government noted that the standard for normal wear and tear should take into account the fact that the vehicles were in commercial service for a period of six years. The contractor

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also failed to introduce evidence to support its contention that similar damage to other vehicles under this contract was paid for by the government.

Contract Types—Vehicle Rentals—Government Negligence.—A contractor was entitled to recover for rental vehicles that suffered "outward dings," because the nature of the damage indicated that it had occurred while the vehicles were in use by government personnel, and the government did not provide evidence with respect to the cause of the damage. Because the damage most likely occurred while the vehicles were in motion or being loaded or unloaded by government personnel, the burden of proof shifted to the government to come forward with evidence as to the cause of the damage.

For the appellant: Tim A. Graham, Cincinnati, Ohio. For the government: William A. Campbell, Jr., United States Postal Service, Atlanta, Georgia.

Before BROCHSTEIN, Administrative Judge.

BROCHSTEIN, Administrative Judge: Appellant, Mike Albert Leasing, Inc., has appealed from the denial, in whole or in part, of its claims for the cost of repairing damage to vehicles leased to Respondent, United States Postal Service. These appeals are being decided on the record in accordance with the Board's Small Claims (Expedited) procedures. 39 C.F.R. §§955.12 and 955.36. Only entitlement is at issue in these appeals.

FINDINGS OF FACT

1. Contract No. 114382-86-V-A1 35 was awarded to Appellant on May 29, 1986, and covered the lease of 87 mini-van type vehicles to be used for "Park & Loop" service in Fort Lauderdale, Florida. The term of the contract was June 21, 1986, through June 20, 1992. In March 1992 the lease period for 38 of the vehicles was extended to July 19, 1992. (PSBCA 3342-3369 Appeal Files, Tabs (AF) 6, 7).

2. The contract contained the July 1980 version of PS Form 7476, General Provisions for Vehicle Hire Contracts. Clause GP-6 of the general provisions contained the following language relevant to these appeals:

"LIABILITY PROVISIONS.

(a) *Contractor's Vehicles.* The Postal Service shall be responsible for loss of, or damage to, the Contractor's vehicles while in its custody only when caused by the act or negligence of any officer or employee of the Postal Service acting in the scope of his employment.... In no event shall the Postal Service be responsible for ordinary wear and tear...." (AF 6).

3. Through a series of claims dated August 18 and September 2, 1992, Appellant sought to recover costs of repairing damage to a number of vehicles leased under the contract. Each claim was accompanied by two estimates, the lower of which reflected the amount of the claim. In decisions dated October 6, 1992, the Contracting Officer denied the claims in whole (PSBCA Nos. 3342-3350) or in part (PSBCA Nos. 3351-3369).

PSBCA No. 3342—Vehicle No. 67823

4. In this appeal, a PS Form 4577, "Hired/Borrowed Vehicle Condition Report," noted damage at the time the vehicle was returned consisting of a dent or dents "from inside" on the left side of the vehicle. The estimates accompanying Appellant's claim, in the amount of $158.40, noted the same damage. (3342 AF 3-5). In his decision, the Contracting Officer denied the claim in full on the basis that the damage constituted "normal" wear and tear (3342 AF 1).

PSBCA No. 3343—Vehicle No. 67838

5. In this appeal, the Form 4577 showed a dent or dents from the inside on the left side at the time the vehicle was returned. Appellant's claim, in the amount of $197.40, also noted outward dents[1] on the left side. In his decision, the Contracting Officer denied the claim in its entirety, concluding that the damage constituted normal wear and tear. (3343 AF 1, 3-5).

PSBCA No. 3344—Vehicle No. 67608

6. In this appeal, the Form 4577 noted a dent or dents on the right side of the vehicle at the time it was returned. Appellant's claim, in the amount of $198.60, included costs for repairing and refinishing the cargo door, located on the right side. The Contracting Officer denied the claim in its entirety, concluding that the damage to the

[1] The terms "dents from the inside," "outward dents," and "outward dings" are used in the various documents in the record of these appeals to represent the same type of damage—*i.e.*, dents on the vehicle which protrude outward and appear as bumps when viewed from the outside.

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cargo door constituted normal wear and tear. (3344 AF 1, 3-5).

PSBCA No. 3345—Vehicle No. 67844

7. The Form 4577 in this appeal showed dents on the right and left doors and a dent or dents from the inside on the left side of the vehicle. Appellant's claim was in the amount of $380.20 and included the cost of repairs to the same three areas. The Contracting Officer denied the claim in its entirety, concluding that the damage constituted normal wear and tear. (3345 AF 1, 3-5).

PSBCA No. 3346—Vehicle No. 67893

8. The Form 4577 for this appeal showed dents and scratches on the right side and right door. Appelant's claim, in the amount of $314.20, included the cost of repairing and refinishing damage in the same areas. In his decision, the Contracting Officer denied the claim, concluding that the damage was normal wear and tear. (3346 AF 1, 3-5).

PSBCA No. 3347—Vehicle No. 67894

9. In this appeal the Form 4577 showed dents on the right side door and cargo door. Appellant's claim, in the amount of $358.60, covered repairs to dents at the same locations. The Contracting Officer denied the claim in its entirety on the basis that the damage constituted normal wear and tear. (3347 AF 1, 3-5).

PSBCA No. 3348—Vehicle No. 67927

10. The Form 4577 in this appeal noted dents from the inside on the right side cargo door and on the rear of the left side. Appellant's claim, for $380.80, covered the cost of repairing and refinishing dents in the same areas. The Contracting Officer denied the claim in full, concluding that the damage was normal wear and tear. (3348 AF 1, 3-5).

PSBCA No. 3349—Vehicle No. 67939

11. In this appeal the Form 4577 noted dents from the inside on the right and left sides and a missing jack. Appellant's claim, in the amount of $369.40, covered repairs to the left quarter panel and the right cargo door. In his decision, the Contracting Officer denied the claim in its entirety, stating that the damage constituted normal wear and tear. (3349 AF 1, 3-5).

PSBCA No. 3350—Vehicle No. 67977

12. The Form 4577 in this appeal noted several dents on the left side of the vehicle. Appellant's claim, for $197.40, covered repairs of dents in the same area and indicated that some of the dents were outward. The Contracting Officer denied the claim in its entirety, stating that the dents constituted normal wear and tear. (3350 AF 1, 3-5).

PSBCA No. 3351—Vehicle No. 67945

13. In this appeal, the Form 4577 noted dents from the inside on the left side and at the approximate location of the cargo door on the right side. The form also showed other dents at the rear of the right side. Appellant's claim, in the amount of $659.03, reflected repairs and refinishing of dents at those locations as well as parts and labor in connection with repairs to a light assembly. The Contracting Officer denied those portions of the claim related to outward dents in the left quarter panel and right cargo door as normal wear and tear. He also denied the portion of the claim related to the light assembly because it was not shown on the Form 4577. Payment in the amount of $248.60 was authorized for the remaining damage. (3351 AF 1, 3-5).

PSBCA No. 3352—Vehicle No. 67899

14. The Form 4577 in this appeal showed a series of dents along the left side of the vehicle, a dent in the right door, and a crack in the rear hatch. Appellant's claim, in the amount of $818.40, included costs of repairing and refinishing dents on both sides of the vehicle, including outward dents in the left rear quarter, and repairing and refinishing damage to the rear "liftgate." In his decision, the Contracting Officer denied the portion of the claim related to the rear hatch [liftgate], stating that Appellant had filed a claim for the same damage several years earlier and that the claim had been denied. The Contracting Officer also denied the portion of the claim related to the "outward dings" in the left quarter panel, stating that this constituted normal wear and tear. Payment in the amount of $388.40 was authorized for the remaining damage. (3352 AF 1, 3-5).

PSBCA No. 3353—Vehicle No. 67917

15. In this appeal, the Form 4577 noted dents on the right side of the vehicle, including the right door and the area below the door, and dents from the inside on the left side of the vehicle. Appellant's claim, for $712.60, included costs for repairing outward dents in the left rear quarter panel,

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and damage to the right front door, right rocker panel, and right front fender. The Contracting Officer denied the portion of the claim related to right front fender damage because the damage had not been shown on the Form 4577. He also denied the part of the claim related to outward dings on the left quarter panel, concluding that such damage was normal wear and tear. Payment of $394.00 was authorized for the remaining damage. (3353 AF 1, 3-5).

PSBCA No. 3354—Vehicle No. 67895

16. The Form 4577 in this appeal showed dents from the inside on the right side, in the vicinity of the cargo door. It also showed dents at the rear of the left side. Appellant's claim, in the amount of $680.20, covered repairs to the left front door, outward dents in the left rear quarter, and outward dents in the right cargo door. The Contracting Officer denied the portion of the claim related to the outward dings in the right cargo door, stating that such damage was normal wear and tear. Payment of $514.20 was authorized for the remaining damage. (3354 AF 1, 3-5).

PSBCA No. 3355—Vehicle No. 67900

17. In this appeal, the Form 4577 showed dents from the inside on the left side of the vehicle and dents on the right side door and cargo door. Appellant's claim, in the amount of $497.40, covered the cost of repairs to outward dents on the left rear quarter, and dents on the right side door and cargo door. In his decision, the Contracting Officer denied the portions of the claim related to the outward dings on the left side and damage to the cargo door, concluding that the damage was normal wear and tear. The Contracting Officer authorized payment in the amount of $154.60 for the remaining damage. (AF 3355 1, 3-5).

PSBCA No. 3356—Vehicle No. 67897

18. The Form 4577 in this appeal does not contain the record of any vehicle inspection performed at the time the vehicle was returned. Appellant's claim, in the amount of $553.20, covers the cost of repairing damage to the left front fender, left rear quarter panel, and right cargo door. The Contracting Officer denied the portion of the claim related to damage to the cargo door, contending that the damage was normal wear and tear. Payment in the amount of $346.20 was authorized for the remaining damage. (3356 AF 1, 3-5).

PSBCA No. 3357—Vehicle No. 67901

19. The Form 4577 in this appeal showed dents, at least some of which were from the inside, on the left side and left door and dents on the right door and right front fender. Appellant's claim, for $664.40, included the costs of repairing dents in the same locations. In his decision, the Contracting Officer denied those portions of the claim related to dents on the left quarter panel and left door, but authorized payment in the amount of $328.60 for the remaining damage. (3357 AF 1, 3-5).

PSBCA No. 3358—Vehicle No. 67903

20. In this appeal, the Form 4577 showed dents and scratches on the left side, numerous dents on the right side, and scratches and a damaged lens on the rear of the vehicle. Appellant's claim, in the amount of $1139.77, included estimated costs of repairing damage in the same locations. The Contracting Officer denied those portions of the claim related to damage to the right quarter panel, left and right front doors, and the cargo door, concluding that such damage was normal wear and tear. Payment in the amount of $453.77 was authorized for the remaining damage. (3358 AF 1, 3-5).

PSBCA No. 3359—Vehicle No. 67907

21. The Form 4577 in this appeal showed dents from the inside and a scrape on the left side, a dent on the left front fender or door, and dents on the cargo door. Appellant's claim, for $535.40, covered the repair of dents on the left front fender, and cargo door, and an outward dent on the left rear quarter. In his decision, the Contracting Officer denied, as normal wear and tear, the portions of the claim related to the outward dings and scrape on the left quarter panel and the dents on the cargo door. Payment in the amount of $166.00 was authorized for the remaining damage. (3359 AF 1, 3-5).

PSBCA No. 3360—Vehicle No. 67891

22. In this appeal the Form 4577 showed dents from the inside on the left side, dents on the left door, and dents in the right front fender. Appellant's claim, for $591.80, covered repairs to the left front door, dents (outward and inward) in the left rear quarter, and a dent in the right front fender. The Contracting Officer denied, as normal wear and tear, that portion of the claim related to outward dings on the left quarter panel and authorized payment in the amount of $334.20 for the remaining damage. (3360 AF 1, 3-5).

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PSBCA No. 3361—Vehicle No. 67731

23. In this appeal the Form 4577 showed dents and scratches on the cargo door and a dent on the right front fender. The notations on the Form 4577 are unclear as to whether the dents were from the inside or outside. Appellant's claim, in the amount of $328.20, covered repairs to the cargo door and a dent in the right front fender, with no notation as to the nature of the dents. A photograph of the right fender area shows what appear to be dents caused by an impact from the outside. A photograph of the cargo door is inconclusive as to the existence or nature of the damage. The Contracting Officer denied the portion of the claim related to repairs to the cargo door, referring to the dents as outward dings. Payment in the amount of $153.00 was authorized for the remaining damage. (3361 AF 1, 3-5).

PSBCA No. 3362—Vehicle No. 67845

24. In this appeal the Form 4577 showed dents on the left door and near the left rear wheel. Appellant's claim, in the amount of $365.00, covered repairs to dents in the same locations. The Contracting Officer denied the portion of the claim related to left door damage, concluding that the damage was normal wear and tear. Payment in the amount of $192.80 was authorized for the remaining damage. (3362 AF 1, 3-5).

PSBCA No. 3363—Vehicle No. 67889

25. The Form 4577 in this appeal showed damage to the edge of the left door, and dents on the right cargo door and on the right quarter panel. Appellant's claim, for $503.40, covered repairs to damage in the same areas. The Contracting Officer denied the portions of the claim related to damage to the right quarter panel, which damage he characterized as outward dings, and damage to the cargo door, concluding that the damage was normal wear and tear. Payment in the amount of $133.40 was authorized for the remaining damage. (3363 AF 1, 3-5).

PSBCA No. 3364—Vehicle No. 67978

26. In this appeal, the Form 4577 showed dents from the inside on the left quarter panel, dents on the left door and front fender, and damage to the turn signal lens and headlight ring. Appellant's claim, in the amount of $858.92, covered repairs to the same damage in the same areas. The Contracting Officer denied, as normal wear and tear, that portion of the claim related to outward dings on the left quarter panel and authorized payment in the amount of $601.32 for the remaining damage. (3364 AF 1, 3-5).

PSBCA No. 3365—Vehicle No. 67902

27. The Form 4577 in this appeal showed dents on the left side of the vehicle and scratches and dents on the right side cargo door and right quarter panel. Appellant's claim, in the amount of $702.00, covered the cost of repairs to damage in the same areas. The Contracting Officer denied those portions of the claim related to what he characterized as outward dings on the left and right rear quarter panels, contending that such damage was normal wear and tear. He authorized payment of $237.00 for the remaining damage. (3365 AF 1, 3-5).

PSBCA No. 3366—Vehicle No. 67610

28. In this appeal, the Form 4577 showed dents from the inside on the left and right sides and dents in the right cargo door. It also showed scratches and dents on the rear of the vehicle. Appellant's claim, for $576.00, covered the repair of outward and inward dents on the left rear quarter, chips in the "rear deck lid," dents in the right rear quarter, and damage to the cargo door. The Contracting Officer denied, as normal wear and tear, those portions of the claim related to outward dings in the left and right quarters. Payment in the amount of $252.40 was allowed for the remaining damage. (3366 AF 1, 3-5).

PSBCA No. 3367—Vehicle No. 67605

29. In this appeal the Form 4577 showed dents on the right and left sides of the vehicle on or adjacent to the front doors. Appellant's claim, in the amount of $328.80, reflected the repair of dents in the same two doors. The Contracting Officer denied the portion of the claim related to the right front door as representing normal wear and tear. Payment in the amount of $171.60 was authorized for the remaining damage. (3367 AF 1, 3-5).

PSBCA No. 3368—Vehicle No. 67904

30. The Form 4577 in this appeal showed dents on the right and left sides of the vehicle. Appellant's claim, in the amount of $387.80, covered repairs to the left rear quarter and right cargo door. The Contracting Officer denied the portion of the claim related to what he characterized as outward dings in the right cargo door, concluding that such damage was normal wear and tear. Payment in the amount of $186.20

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was authorized for the remaining damage. (3368 AF 1, 3-5).

PSBCA No. 3369—Vehicle No. 67940

31. In this appeal, the Form 4577 showed dents from the inside on the left and right sides and dents on the left front door. Appellant's claim, in the amount of $548.40, covered repairs to the left front door, multiple inward and outward dents in the left rear quarter, and outward dents in the cargo door. The Contracting Officer denied the portion of the claim related to outward dings in the left quarter panel. An examination of the claim and supporting documents indicates that the *amount* deducted by the Contracting Officer in his decision also included the portion of the claim related to outward dents in the cargo door. Accordingly, it is concluded that the Contracting Officer also denied that portion of the claim. Payment in the amount of $144.60 was authorized for the remaining damage. (3369 AF 1, 3-5).

DECISION

In its Complaints, Appellant argues that it submitted claims on 87 leased vehicles (including the 28 at issue here) but that the decisions made by Respondent with respect to the payment of claims were inconsistent. Appellant argues that the damage for which payment was denied in the 28 claims in these appeals is the same type of damage for which payment was made in 59 other claims under this contract which were paid in full. Appellant contends that the definition of normal wear and tear was applied inconsistently.

In particular, with respect to the 28 claims at issue here, Appellant argues that "outward dings," or dents from the inside of the vehicle pointing out, should not be considered normal wear and tear because the damage is cargo damage, caused by mail trays being stacked too high. Appellant argues that it has vans leased to the Postal Service "all over" but that this type of damage is rarely seen.

Respondent argues that Appellant has failed to offer evidence that the damage to its vehicles exceeded normal [ordinary] wear and tear or that the damage was caused by the negligence of Postal Service employees. Respondent notes that the standard for normal wear and tear should take into account the fact that the vehicles were in commercial service for a period of six years. Finally, Respondent argues that the fact that payment was made in other claims (not at issue here) should not give rise to a presumption that the claims under consideration here should have been paid.

As the party seeking recovery, Appellant has the burden of proving that an act or negligence on the part of Respondent's personnel was the proximate cause of the damage to each vehicle and that the damage was in excess of ordinary wear and tear. *E.g., Jake Sweeney Auto Leasing, Inc.*, PSBCA Nos. 2784-2788, 2791-2798, 91-3 BCA ¶ 24,278. However, where the nature of the damage or other evidence in the record persuaded us that it was reasonable to require Respondent to come forward with evidence that damage was not caused by the act or negligence of its employees, we have shifted that burden to Respondent. *E.g., Jake Sweeney Auto Leasing, Inc.*, PSBCA No. 2899, 1991 WL 62357 (April 9, 1991; *Postal Vehicle Supply Service*, PSBCA No. 775, 1980 WL 2295 (June 16, 1980).

With respect to damage other than "outward dings," Appellant has provided no evidence and made no argument that the damage complained of but not allowed by the Contracting Officer was either outside ordinary wear and tear or was caused by the act or negligence of Postal Service personnel. The record also contains no evidence that the nature of the damage or other circumstances were such that the burden of coming forward with evidence should be shifted to Respondent. Appellant has also failed to introduce evidence to support its contention that similar damage to other vehicles under this contract was paid for by Respondent. Therefore, Appellant has failed to meet its burden of proof with respect to this damage and the portions of its appeals related to such damage are denied.

As to those vehicles which suffered "outward dings," the nature of the damage is such that it is reasonable to conclude that the damage most likely occurred while the vehicles were in motion or being loaded or unloaded—*i.e.*, while they were actually in use by Postal Service personnel. Under these circumstances it is appropriate to shift to Respondent the burden of coming forward with evidence with respect to the cause of the damage. Respondent has failed to offer any such evidence. Accordingly, it is concluded that Respondent is liable for the costs of repairing such damage, and the applicable portions of these appeals are sustained. Since quantum is not at issue in these appeals, negotiation of the amount of the damages to which Appellant is entitled is left to the parties. In the event the parties are unable to reach agreement on the

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amount due Appellant, the Contracting Officer should issue further decisions, from which Appellant may file appeals.

The appeals are denied in part and sustained in part, as described above.

[¶ 26,283] Electronic Systems and Associates, Inc. v. National Aeronautics and Space Administration; Lockheed Space Operations Company, Intervenor

GSBCA No. 12492-P, July 28, 1993. Solicitation No. 10-O-0017-2.

Protests, GSBCA—Interested Party—Amendment of Solicitation.—A protest against an amended solicitation was dismissed because the protester had not submitted an offer under the original solicitation. Although the solicitation was amended as a result of protests by parties that did submit offers, the protester here remained outside the boundaries of interested party status because there was no resolicitation. FAR 15.606 permits the government to settle the prior protest by amending the existing solicitation and providing copies only to companies that had submitted offers within the time allowed under the original solicitation.

For the appellant: Lemuel Kinney, President/CEO. For the government: Sumara Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C. For the intervenor, Lockheed Space Operations Company: Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., by Stuart B. Nibley and James M. Mesnard.

Before DEGRAFF, WILLIAMS, and GOODMAN, Administrative Judges.

DEGRAFF, Administrative Judge: On July 9, 1993, Electronic Systems & Associates, Inc. (ESA) filed this protest. ESA seeks to challenge several decisions made by the National Aeronautics and Space Administration (NASA) in connection with a solicitation for a support services contract at Kennedy Space Center. Because ESA is not an interested party as defined by 40 U.S.C. § 759(f)(9)(B) (1988), we dismiss this protest for lack of jurisdiction.

Findings of Fact

On February 24, 1992, and on April 24, 1992, NASA published in the Commerce Business Daily notices of its intent to solicit proposals for providing automatic data processing services at Kennedy Space Center. The first notice announces that NASA intended to release a draft solicitation in March 1992, and it invites potential offerors to request the solicitation and to submit proposals. The later notice states that NASA had issued the draft solicitation and that NASA would issue a final solicitation in May 1992. Like the first notice, the later notice invites potential offerors to request the solicitation and to submit proposals. NASA's Motion to Dismiss, Exhibit G.

On May 26, 1992, NASA issued its request for proposals, solicitation 10-O-0017-2, which provides that proposals were due to be submitted not later than July 15, 1992. NASA's Motion to Dismiss, Exhibits H, I. Four offerors submitted proposals in response to the solicitation. NASA's Motion to Dismiss, Exhibit J. One of the offerors, Lockheed Space Operations Company (Lockheed), intended to utilize ESA as a subcontractor. On November 23, 1992, NASA notified Lockheed that, in NASA's view, ESA was not an acceptable subcontractor. On November 24, 1992, Lockheed notified ESA of NASA's decision. NASA's Motion to Dismiss, Exhibits A, B.

NASA selected Lockheed for negotiations, and this selection was the subject of three consolidated protests filed here by the three remaining offerors. *EG&G Florida, Inc. v. National Aeronautics and Space Administration*, GSBCA 12204-P, et al., 1993 BPD ¶ 23 (Jan. 28, 1993). The *EG&G* protests were dismissed on January 28, 1993, based upon a joint stipulation that was signed by the parties and filed with the Board. In summary, in their stipulation, the parties agreed that NASA would amend the solicitation in order to permit Lockheed and the three other offerors to submit revised proposals and that NASA would evaluate the revised proposals and make its award. The stipulation also provides that NASA would amend the solicitation in order to provide additional workload indicators, to provide additional historical staffing data, and to clarify instructions concerning offerors' small business/small disadvantaged business/woman-

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owned business plans. NASA amended the solicitation as provided in the stipulation. NASA's Motion to Dismiss, Exhibits C, D.

ESA filed this protest on July 9, 1993, and its amended complaint contains eight counts. In counts 1 and 2, ESA alleges that NASA failed to advertise the solicitation properly, failed to notify ESA of the "new" solicitation, and failed to justify the use of non-competitive procedures.[1] In counts 3, 4, 5, and 6, ESA complains that NASA acted arbitrarily and capriciously when it "debarred" ESA. In count 7, ESA complains that NASA failed to secure full and open competition when it issued the amended solicitation only to those companies which had submitted proposals in response to the solicitation. In count 8, ESA asserts that NASA should have referred the determination of ESA's responsibility to the Small Business Administration and should have specified the basis for finding ESA non-responsible.

NASA filed a motion to dismiss on July 16, 1993. NASA argues that ESA fails to state a valid basis for protest, that ESA is not an interested party, that ESA's protest is not timely, and that ESA fails to state a claim upon which relief can be granted. On July 23, 1993, ESA filed its opposition to NASA's motion. ESA's opposition focuses entirely upon NASA's failure to refer the matter of ESA's responsibility to the Small Business Administration.

Discussion

Pursuant to 40 U.S.C. § 759 (1988), the Board possesses jurisdiction to consider a protest filed by an interested party in connection with a procurement. In order to resolve this case, we must identify the procurement at issue by deciding whether NASA conducted one procurement or whether, as ESA believes, NASA conducted two procurements. After we identify the relevant procurement, we must determine whether ESA is an interested party.

Contrary to ESA's belief, NASA properly conducted only one procurement. NASA issued its solicitation on May 26, 1992, after NASA advertised the solicitation as required by regulation. 48 CFR 5.101 (1991). When NASA settled the *EG&G* protests, it was not required to readvertise or to issue a new solicitation. Instead, the applicable regulation permits NASA to amend the existing solicitation and to provide copies of the amendment only to the companies that had submitted offers in response to- the solicitation. 48 CFR 15.606 (1991). Thus, there is only one procurement relevant to this protest, and it is the subject of the May 26, 1992 solicitation.

ESA is not an interested party in connection with the procurement at issue here. The term "interested party" is defined at 40 U.S.C. § 759(f)(9)(B) as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." In *MCI Telecommunications Corp. v. United States* [35 CCF ¶ 75,677], 878 F.2d 362 (Fed. Cir. 1989), the Court considered whether MCI was an interested party. Although MCI did not submit a proposal in response to a solicitation, MCI was a proposed subcontractor for one of the offerors. MCI asserted that it would be an offeror in response to a resolicitation. The Court held:

> Since the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends, MCI's stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status. By the close of the proposal period, MCI had placed itself outside the boundaries of interested party status. That is where it must remain unless, owing to the acts of an interested party which actually submitted a proposal or filed a timely protest, a resolicitation results.

Id. at 365.

Like MCI, ESA "placed itself outside the boundaries of interested party status" by not submitting a proposal in response to the May 26, 1992 solicitation. ESA must remain outside these boundaries because the *EG&G* protests did not result in a resolicitation. ESA only participated as a subcontractor in the procurement at issue here. For this reason, ESA is not an interested party and we lack jurisdiction to consider the protest.

[1] It is clear from ESA's complaint that its reference to the "new" solicitation is a reference to the amended solicitation.

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Decision

Because ESA is not an interested party, the protest is **DISMISSED FOR LACK OF JURISDICTION.**

[¶ 26,284] Lanzen Fabricating, Inc.

ASBCA No. 44998, June 3, 1993. Contract No. N00163-88-C-0256.

Reprocurement—Assessment of Excess Costs—Improper Termination.—An appeal from the assessment of reprocurement costs was sustained because a separate appeal from the underlying default termination had been sustained (93-3 BCA ¶ 26,079).

For the appellant: Richard P. Diehl, Troy, Michigan. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Donald J. Sherfick, Trial Attorney, Naval Avionics Center, Indianapolis, Indiana.

Before GROSSBAUM, RUBERRY, and SPECTOR, Administrative Judges.

GROSSBAUM, Administrative Judge: This appeal is taken from a contracting officer's decision asserting a government claim against the contractor in the amount of $13,169.80 as the excess costs of repurchasing the supplies ordered under the captioned contract, which had been terminated for default. Proceedings under the appeal had been suspended pending resolution of an appeal from the default termination, ASBCA No. 40328.

In our 24 May 1993 decision in *Lanzen Fabricating, Inc.*, ASBCA No. 40328, we sustained the contractor's appeal from the termination of the contract for default and converted the default termination into a termination for the convenience of the Government.

The validity of the excess cost assessment that is the subject of this appeal was predicated on the propriety of the default termination. When a default termination is found to have been improper and is converted into a termination for the convenience of the Government, excess reprocurement costs may not be charged against the contractor. *Bogue Electric Mfg. Co.*, ASBCA Nos. 26214, 26350, 86-3 BCA ¶ 19,051, *see* Federal Acquisition Regulation (FAR) 49.402-6(a).

Accordingly, the appeal is sustained.

[¶ 26,285] Maitland Bros. Co.

ASBCA No. 43088, August 10, 1993. Contract No. F08602-83-C-0080.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Nonappropriated Fund Activity.—The contract of a Morale, Welfare, and Recreation Fund was not subject to the Contract Disputes Act, because the only nonappropriated fund instrumentalities mentioned in the Act are military exchanges. Consequently, there was no authority for allowing interest on a convenience termination claim. A decision holding that the Navy Resale and Service Support Office was within the waiver of sovereign immunity of the Tucker Act amendments of 1970 was not controlling (*McDonald's Corp. v. U.S.*, 37 CCF ¶ 76,036). That case did not involve the Contract Disputes Act.

Procedure, Boards—Reconsideration—Timeliness.—A motion for reconsideration of a recent decision was dismissed in part as untimely because it raised an issue that had been decided in a prior decision. The recent decision did not address the applicability of the Equal Access to Justice Act except to find as a fact that the board had dismissed the contractor's EAJA claim in a prior unpublished decision. The time for challenging that prior decision had long since expired.

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For the appellant: McCormick & Maitland, Norfolk, Massachusetts, by Edward J. McCormick III. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Mark E. Landers and Jean Love, Trial Attorneys.

Before AXELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

Affirming on reconsideration 93-3 BCA ¶ 26,007.

AXELMAN, Administrative Judge: Appellant has moved that we reconsider the decision dated 30 April 1993 in which we sustained its appeal in the amount of $13,009.74 for convenience termination and other costs.

Accordingly, we have reviewed the record in this appeal and considered the arguments advanced by appellant in its motion and in the memorandum submitted in support thereof.

Our conclusions, upon reconsideration, and the reasons therefor remain the same as those set forth in our prior decision. Appellant has simply not met its burden of proving entitlement to the costs claimed, beyond those which we have allowed, with sufficient certainty that they could be justified by other than mere speculation. Consequently, those costs are not recoverable. *Williams Indus., Inc. v. United States,* 295 F.2d 822, 831 (Ct. Cl. 1961), *cert. denied,* 370 U.S. 903 (1962); *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759, 767 (Fed. Cir. 1987).

The only new argument raised by appellant in connection with its present motion is that the Board erred in ruling that the contract in this matter was a non-appropriated fund contract and that appellant therefore was "not entitled to interest or relief pursuant to the Equal Access to Justice Act" or otherwise (Memorandum in Support of Appellant's Motion for Reconsideration at 2-7).

Appellant contends in its motion that "while the Board ruled that the instant matter was a non-appropriated fund contract, the Air Force failed to offer any evidence to establish the character of the funding for the instant contract." However, appellant in this regard, ignores the following specific finding in our initial decision *(Maitland Bros. Co. et al.,* ASBCA Nos. 30089 *et al.,* 90-1 BCA ¶ 22,367 at 112,367):

> 3. Although the Standard Form 23 contract was executed by the contracting division of MAFB, the project was financed as a non-appropriated fund activity by the MAFB Morale, Welfare and Recreation (MWR) Fund (R4, tabs 1, 25, 27, 77).

The decision which is the subject of appellant's present motion for reconsideration made no mention of the Equal Access to Justice Act other than to recite the following among our findings of fact:

> 7. On 4 May 1990, in an unpublished decision (R4, tab 5), we dismissed appellant's Equal Access to Justice Act (EAJA) claim since EAJA is not applicable to non-appropriated fund contracts which are not subject to the Contract Disputes Act of 1978.

Appellant did not challenge that decision by way of motion for reconsideration or appeal, and the time for either such challenge has long since expired. Consequently, insofar as appellant's present motion seeks reconsideration of our 4 May 1990 decision, it is dismissed as untimely.

Significantly, in pursuing its EAJA application, appellant had conceded that its appeals were not subject to the CDA, but nevertheless had contended that EAJA was applicable to its application because Congress intended that statute to include all appeals to the Board in situations where the Government's conduct was unreasonable or unfair (4 Nay 1990 decision, appended hereto).

Appellant bases its present position upon the decision of the United States Court of Appeals for the Federal Circuit in *McDonald's Corp. v. United States* [37 CCF ¶ 76,036], 926 F.2d 1126 (1991). However, its reliance on that case is misplaced. *McDonald's Corp.* involved neither the Contract Disputes Act of 1978 (CDA) nor EAJA and merely held that the Navy Resale and Service Support Office, which was responsible for Navy exchanges and stores, was included within the waiver of sovereign immunity for contract claims against certain non-appropriated fund instrumentalities under the 1970 amendment to the Tucker Act (28 U.S.C. § 1491) even though not specifically listed in the amendment, as were its subsidiary exchanges.

Although contracts of military exchanges are subject to the CDA by specific reference therein, the contracts of other non-appropriated fund instrumentalities like the Morale, Welfare and Recreation Fund, which financed the subject contract, are not described in Sections 1346 or 1491 of the

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United States Code, Title 28, and therefore that Act is not applicable to them.

In any event, appellant's claim for interest on the balance due under the contract was rejected by us not only because interest was not allowable under the terms of the contract or by statute, but also because appellant received payment of that balance prior to the filing of its appeal disputing the amount of award; and we denied appellant's claim for interest on direct cost expenses to finance contracting officer's field directives and delays for the additional reason that appellant had not established that such costs had actually been incurred. Thus, appellant's interest claims would not be allowable under the prevalent facts even if its contract had not been financed by a nonappropriated fund instrumentality.

Our prior decision is, upon reconsideration, affirmed.

[¶ 26,286] Danac, Inc.

ASBCA No. 33394, August 13, 1993. Contract No. F17600-82-C-0028.

Procedure, Boards—Reconsideration—Evidence Previously Available.—The government's motion requesting the board to change its prior position on the basis of testimony at trial was denied because the evidence could have been adduced with the exercise of due diligence when the board issued its previous ruling. Furthermore, nothing in the government's motion to declare a contract void as a result of newly discovered evidence warranted the relief requested.

For the appellant: Pettit & Martin, Washington, D.C., by Thomas C. Wheeler and Eric B. Kantor. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Mark E. Landers and Peter M. Ditalia, Trial Attorneys.

Before YOUNGER, SPECTOR, and THOMAS, Administrative Judges.

Affirming on reconsideration 93-2 BCA ¶ 24,873.

YOUNGER, Administrative Judge: Respondent has again moved to have the contract declared void *ab initio*, contending that evidence adduced at the trial on the merits warrants the relief requested in the motion. Familiarity with the voidness issue is assumed. *See Danac, Inc.*, ASBCA No. 33394, 93-2 BCA ¶ 25,708; *Danac, Inc.*, ASBCA No. 33394, 92-2 BCA ¶ 24,873; *Danac, Inc.*, ASBCA Nos. 30227, 33394, 92-1 BCA ¶ 24,519; *Danac, Inc.*, ASBCA Nos. 30227, 33394, 90-3 BCA ¶ 23,246; *Danac, Inc.*, ASBCA Nos. 30227, 33394, 88-3 BCA ¶ 20,993.

By its present motion, respondent "requests that the Board again reconsider its position in reference to Appellant's status as a non-responsible contractor due to the testimony of Mr. Sondergaard at subject trial, which constitutes newly discovered evidence and therefore provides the basis for the Board to reconsider its position." The motion does not contain even the remotest showing that the evidence could not, in the exercise of due diligence, have been adduced previously or that it is anything other than cumulative. *E.g., Sunshine Cordaxe Corp.*, ASBCA No. 38904, 90-1 BCA ¶ 22,572 at 113,277. In any event, we have concluded that neither Mr. Sondergaard's cited testimony, nor any other material referred to in the motion, warrants the relief requested.

Accordingly, respondent's motion to declare the contract void *ab initio* as a result of newly discovered evidence is denied.

[¶ 26,287] Swan Wooster Engineering, Inc.

AGBCA No. 89-203-1, August 13, 1993. Contract Nos. AG41scs00306, 53-0436-9-9.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Dissolved Corporations.—A board of contract appeals had jurisdiction over a dissolved corporation, which had been the contractor in connection with a contract for the design of a marina,

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because the dissolved corporation continued its corporate existence for the limited purpose of discharging its liabilities. Moreover, dissolution did not prevent commencement of a proceeding by the contractor in its corporate name.

Procedure, Boards—Summary Judgment—Laches.—A contractor's motion for summary judgment based on laches was denied because the record raised disputed material facts regarding the existence of any undue government delay in connection with the repair of a defective bulkhead under a contract for architectural and engineering services in the design of a marina. The contractor asserted generalized facts and attempted to shift the burden of sorting them out to the government. It failed to prove specific prejudice or that any prejudice was proximately caused by the government's undue delay. Moreover, the record did not support the contractor's contention that elapsed time and inflation, rather than different repair methods, resulted in the price escalation.

Breach of Contract—Damages—Burden of Proof.—Under a contract for architectural and engineering services in the design of a marina, a contractor was not entitled to summary judgment of its appeal from a final decision that awarded breach of contract damages to the government for a defective bulkhead, despite the contractor's contention that the government's lack of any incurred repair costs indicated that there was no claim, because repair of the bulkhead was not a condition precedent to recouping damages. The government was required only to prove the extent of the damage.

Procedure, Boards—Parties—Privity of Contract.—Under a contract for architectural and engineering services in the design of a marina, a contractor was not entitled to summary judgment of its appeal from a final decision that held that the government was entitled to damages for a defective bulkhead, despite the contractor's contention that the government was not the real party in interest, because the government had privity with the contractor as a result of the contract between the parties. Although the port helped fund the contract, only the government and the contractor were parties to it. Neither the port nor the government was required to ignore the contractor's negligent bulkhead design and to bear the costs of repairing the flawed bulkhead. The fact that the port might benefit from the contractor's repair of the bulkhead was irrelevant. The benefit after correction would be no greater than if the contractor's initial bulkhead design were proper.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—A government motion for summary judgment on the issue of the contractor's liability for a defective bulkhead under a marina design contract was granted because there were no disputed fact issues regarding the government's contention that sand migrated from behind the bulkhead and damaged the parking lot and dry moorage building. The contractor's refutation of the government's evidence that a knowledgeable marine contractor would not have used the concrete panel tieback system that the contractor used did not present a material factual dispute. The tieback system had nothing to do with the problem regarding fill migration, and resolution of any issues regarding the tieback system was not essential to the outcome of the appeal. The board's original decision that addressed the fill migration problem and concluded that the contractor's design was negligent controlled the question of liability in the present appeal.

For the appellant: Schwabe, Williamson & Wyatt, Portland, Oregon, by Daniel F. Knox. For the government: Jim Kauble, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before HOURY, DOHERTY, and SETO, Administrative Judges.

HOURY, Administrative Judge: This appeal arises under contracts No. AG41scs00306 and 53-0436-9-9 between the Soil Conservation Service (SCS), U. S. Department of Agriculture and Swan Wooster Engineering, Inc. (Appellant). The former contract was for architectural and engineering services to design the South Beach Marina located in Newport, Oregon. The latter contract was for architectural and engineering services to supervise construction of the marina. The marina was constructed primarily from funding contributed by the SCS and the Port of Newport (Port), Oregon.[1]

[1] *See* Finding of Fact (FF) 1 *infra*.

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The parties were involved in related prior appeals before the Board. *Swan Wooster Eng'g*, AGBCA Nos. 83-104-1 and 83-124-1, 87-2 BCA ¶ 19,894. Appeal AGBCA No. 83-104-1 pertained to the design contract and involved 17 Government claims based upon defective design by Appellant, as follows:

1.	Manholes	$ 154.00
2.	Catchbasins	4,397.00
3.	Soldier Pile Bulkhead	
	a. Grouting	69,752.00
	b. Excavation	14,925.74
	c. Other Work	2,357.00
4.	a. Outdoor Lighting and Wiring	425.00
	b. Gangway Flexible Conduit	748.00
	c. Relocation of Light	482.00
5.	a. Water Line and Sewer Line	164.00
	b. Sewage Pump Station	3,716.00
	c. Fire Hydrant Relocation	1,487.00
6.	Fishing Pier	220.00
7.	Dry Moorage Building	
	a. Plumbing	642.00
	b. Fire Suppression System	45,743.00
8.	a. Building Shower Floors	642.00
	b. Restroom Door	1,409.00
	c. Landing Floats	11,371.00

Appeal AGBCA No. 83-124-1 pertained to the construction supervision contract and involved a $1,607 claim for alleged negligent inspection services requiring refabrication of the float guides.

Claim 3a, the most significant claim, was for grouting the soldier pile bulkhead. The bulkhead was allowing sand fill to wash out through it into the bay. The fill loss caused subsidence of the land behind the bulkhead damaging a parking lot and the dry moorage building. Grouting was ineffective and did not solve the problem. The Board held that Appellant's bulkhead design had been negligently prepared and denied Appellant's appeal. The Board also denied (at least in part) the appeals for claims 1, 3b, 3c, 4a, 4b, 5a, 5b, 5c, 6, 7a, 7b and 8b. *Swan Wooster, supra.*

Since the Board accepted the parties' agreement to bifurcate the appeals, the bulkhead claim, along with the other claims for which the appeal was denied, was remanded to the parties for negotiation of the amounts owed. No agreement was reached.

In December of 1988, an engineering study indicated that $988,750 would be needed to correct problems with the bulkhead. By Contracting Officer (CO) final decision dated May 11, 1989, the Government sought $1,129,331 in damages from Appellant because of the defective design. This figure included the $988,750, the claims set forth above which had been remanded and remained unresolved, and other damages. *(See* FF 15, below.)

Appellant filed a timely appeal. By September 1989, the Complaint, Answer and Appeal File (AF) had been filed. Since that time, the parties have filed Stipulations and Cross Motions for Summary Judgment along with supporting evidence. The latter process was completed with receipt of the Government's opposition to the Appellant's Motion on May 21, 1993.

The Government relies on Stipulation (Stip.) 20, indicating that sand migrates from behind the bulkhead into the bay and that such migration includes material from beneath the floor of the dry moorage building *(see* FF 5). The Government further relies on the Declaration of William Gunderson, P.E., that the bulkhead problems are inherent in the concrete panel tieback system used by Appellant, and on a report by a marine design firm, Peratrovich, Nottingham & Drage, Inc. (PN&D), that concludes the only practical remedy for the bulkhead problem will cost $988,750. The Government asserts there are no material facts in dispute and seeks summary judgment on these bases.

Appellant advances three reasons why it should be granted summary judgment, the first being laches. Appellant asserts that the Government conducted many studies offering far less expensive solutions to the bulkhead problem. Appellant was not advised of these studies. At the end of 1986, Appellant sold its assets, ceased doing business, maintained no offices or agents of any kind, and became defunct. Appellant asserts that the delay by the SCS has increased the cost of repairs, prejudiced Appellant's ability to defend itself because witnesses and records are simply unavailable, and precluded Appellant from bringing claims against third parties

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for contribution or indemnification against contractors or subcontractors who might have been responsible for the defects.

Second, Appellant asserts that because no money has yet been spent for repairs, the SCS has no claim to bring, relying on *United Aero, Inc.*, ASBCA No. 26967, 83-1 BCA ¶ 16,268.

Finally, relying on *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), Appellant asserts the United States is not the real party in interest because the Government is not obligated to repair the marina. Appellant contends repair and maintenance are solely the responsibility of the Port, and that the Government lacks a stake sufficient to permit it to proceed with the claim.

FINDINGS OF FACT

1. Pursuant to 16 U.S.C. § 590a-f, the SCS is authorized to prevent soil erosion and maintain the navigability of rivers and harbors, as well as to enter into agreements and contribute money and services to accomplish these goals. In May 1977, the SCS and the Port signed an agreement known as the South Beach Marina Resource Conservation and Development Measure Plan. The plan called for construction of a breakwater protected marina on the south shore of Yaquina Bay at Newport, Oregon. The total installation cost was estimated at $7,122,600, with $2,596,700 to be funded by the SCS, $3,384,417 by the Port, $1,136,483 by the Corps of Engineers, and $5,000 by the Coast Guard. (Stip. Exhibits (Exs.), Tab S.)

In pertinent part, the plan also provided as follows:

C. *Responsibilities for Installation*

The Port of Newport will be responsible for installation of all works of improvement except for the breakwater and access channel which will be the responsibility of the Corps of Engineers and the navigation aids which will be the responsibility of the Coast Guard.

The Port of Newport will obtain the land rights for all works of improvement.

D. *Financing*

Financial assistance provided by the Soil Conservation Service described in this measure plan will be provided with RC&D funds under the authority of the Food and Agriculture Act of 1962 (Public Law 87-703) as amended, the Soil Conservation Act of 1935 (Public Law 46), and Public Law 91-343. The Corps of Engineers' assistance will be provided under authority of the 1960 River and Harbor Act, as amended. The Coast Guard's assistance will be provided as a special budget item of ongoing program authorities.

Part of the installation will be provided by the Port of Newport. The Port of Newport is legally organized under state law and has all necessary authorities to obtain and expend funds for their share of the proposed project measure costs. The local sponsors' costs for installation will be financed by a Farmers Home Administration community facility loan supported by a general obligation bond authorized by vote of the residents in the Port District. A loan application has been made to FmHA and preliminary approval received. Funds for annual payments will be obtained from user fees.

E. *Cost Sharing*

The Port will provide 50 percent of the construction and engineering services costs for all items cost-shared with the Soil Conservation Service, and 100 percent of the land rights costs. The Soil Conservation Service, with RC&D funds, will bear 50 percent of the construction costs, and 50 percent of the engineering services cost.

The Corps of Engineers will bear 73.1 percent and the Port of Newport 26.9 percent of the costs of constructing the breakwater and access channel including associated engineering and administrative costs.

The Coast Guard will pay all costs for installation of the navigational aids.

All organizations will be responsible for project administration costs which they incur on their cost-shared construction work. Since the Port of Newport does not have staff available to do the needed engineering and architectural services for those facilities cost shared with RC&D funds, they will be done by A&E contract, with the contract cost shared 50 percent each by the Port and the Soil Conservation Service. If the Corps of Engineers does work for others they will be reimbursed for the project administration costs they incur.

F. *Method of Installation*

Construction will be accomplished by competitive bid contracts. The Corps will let the contract for the breakwater, shoreline protection, and dredging. The Soil Conservation Service will, with assistance from the Port of Newport, let and administer all other contracts including an A&E

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contract for design and construction inspection (except for the navigation aids which will be installed by the Coast Guard with their own forces).

* * * * *

IV. OPERATION AND MAINTENANCE

The Port of Newport will be responsible for the operation and maintenance of the improvements installed, with the exception of the breakwater and access channel which will be maintained by the Corps of Engineers, and the navigational aids which will be maintained by the Coast Guard. Prior to the execution of a project agreement, an operation and maintenance agreement will be entered into between the Port of Newport and the Soil Conservation Service, and between the Port of Newport and the Corps of Engineers setting forth O&M requirements.

2. On June 21, 1977, pursuant to clause IV, Operation and Maintenance, the SCS and the Port entered into an Operation and Maintenance Agreement, which provided that the Port would operate and maintain the marina after its acceptance from the contractor at no cost to the SCS (Stip. Ex. C, clause I, II, V C).

3. On December 8, 1977, the SCS awarded contract No. AG41scs00306 to Appellant in the amount of $251,800. This contract was for design of the marina facilities. The design services were completed in 1978 (Stip. 5). On February 22, 1979, the SCS awarded contract No. 53-0436-9-9 to Appellant in the amount of $164,611.15. This contract was for resident engineering, including establishment of baseline and elevation control, inspection, testing, and other services regarding the first construction increment of the marina. Both contracts were signed by Appellant's president and the CO for SCS. The Port was not a party to the contracts, although as indicated above it provided a portion of the funding (AF AGBCA Nos. 83-104-1, 83-124-1, Contract Tabs.)

4. On January 27, 1981, the SCS accepted Appellant's design work under contract No. AG41scs00306. Construction of the marina was completed in early 1981 (Stip. 6). The construction was performed by Morse Bros., Lincoln Rede-Mix, under SCS contract No. 50-0436-0-12. Final inspection was completed February 6, 1981, with acceptance on April 7, 1981 (Stip. Ex. D, E).

5. Problems with the bulkhead became evident in a matter of weeks after the backfilling was completed. Sinkholes began appearing behind the bulkhead at the wide flange section locations. Also, sand could be seen coming through the front face of the bulkhead (AGBCA Nos. 83-104-1, 83-124-1 Transcript (Tr.) 41-42; AF #1, item 24, pictures 3-6). There were many more sinkholes than indicated by the photographs in the Appeal File, which were merely illustrative (Tr. 44-45). An excessive amount of sand was being lost and subsidence of the land behind the bulkhead was occurring (Tr. 45). An inspection report dated April 27, 1982, item 12, also indicated problems with the bulkhead (Stip. Ex. Q). The parties stipulated that sand migrates from behind the soldier pile bulkhead and that such migration includes material from beneath the floor of the dry moorage building (Stip. 20).

6. On August 31, 1982, the CO filed claims against Appellant which Appellant appealed to the Board. Appellant elected consideration under the Contract Disputes Act. (Stip. 3, 9, 10.)

7. In November 1983, the SCS at the request of the Port conducted an investigation of the bulkhead problems. The report of the investigation, dated March 1, 1984, recommended certain general measures to prevent further damage to the dry moorage building caused by subsidence due to loss of the fill material. (Stip. 11; Stip. Ex. J.) An August 1985 report by a private engineering firm, Moffatt, Nichol & Bonney, Inc. (MN&B), included seven alternative solutions, ranging from an interim grout and filter system costing $694,000 to a "maintenance only" system requiring a $75,000 one-time repair plus $29,000 every 3 years to replace lost fill (Stip. 12; Stip. Ex. K). The investigation leading to this report indicated the bulkhead wall included broken concrete panels and misplaced concrete panels that were not contained within the flanges of the pilings, and that the filter cloth did not provide a continuous filtering boundary (Stip. Ex. J, K, pages (pp.) 1, 2). Appellant asserts it was not made aware of the report, and was not aware of broken concrete panels or misaligned pilings caused by contractors who had built and installed the bulkhead.

8. In the fall of 1986, Appellant's parent corporation sold all Appellant's assets and discharged all professional and lay staff. Appellant has since been an inactive corporation, and there is no surviving corporate entity (Stip. 14).

9. By decision dated May 17, 1987, the Board, among other things, denied Appellant's appeal of the Government's soldier pile bulkhead grouting claim, concluding

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that Appellant's design had been negligently prepared. *Swan Wooster, supra.* More than 5 years had elapsed between the time the appeals were filed and the Board's decision. A review of the Correspondence Files indicates that neither party prosecuted the appeals with due diligence. The parties requested cancellation of a hearing the Board had scheduled in 1984 and were unable to reschedule until 1986. Other continuances by the parties were requested and extended. But for the Board's prodding, several more years would have been needed. The parties also contemplated another claim by SCS as of July 1984. (Correspondence Files, AGBCA Nos. 83-104-1, 83-124-1.)

10. Also in May 1987, MN&B completed a Phase II, Final Design Report for the bulkhead repair which incorporated a new 10-inch concrete wall on the bay side, attached to the present wall, for an estimated cost of $423,270 (Stip. 16; Stip. Ex. N).

11. The Port paid $10,000 to the marina design firm of PN&D for an inspection of the bulkhead and an estimate for repairs. PN&D issued its report in December 1988. The firm's inspection revealed that after a period of time, the bulkhead could fail at the tieback rods and bulkhead connection, where three separate metals had been used, because this area was saline, damp, and highly corrosive.

12. PN&D's below-the-water examination of the bulkhead wall revealed that material from behind the wall was migrating through holes in the wall or filter fabric. The migration rate of the fill, estimated at 3 cubic feet-per-month, was causing top side slumping with resulting settlement damage. The proposed solution was to build a new wall, constructed of sheet pilings, on the bay side of the present bulkhead at an estimated cost of $988,750. (Stip. Ex. P; Yazbeck Declaration.)

13. The lead engineer for PN&D declared that this was the most practical and cost effective solution to the bulkhead problem and that other repair options of equal longevity would be more expensive. He also declared that the problems encountered are inherent in the "concrete panel tieback system" and that knowledgeable marine engineers would not have used this system. (Gunderson Declaration.) The lack of suitability of "soldier piles and precast concrete lagging for a marine bulkhead" was controverted by Appellant (Freas Opinion Letter, Ex. 1 to Appellant's (App.) Reply Brief).

14. By letter dated January 23, 1989, the Port filed a certified claim against the SCS in the amount of $988,750 to—repair the bulkhead wall (Ex. 2 to App. Reply Brief). The Fort does not have funds to perform the repairs without recovery (Rayburn Declaration).

15. By letter dated May 11, 1989, because of the defective design, the SCS filed a claim against Appellant in the amount of $1,129,331. Of this, $86,309 was based upon the Board's May 19, 1987 decision.[2] The balance was for new claims to correct the bulkhead problems, as set forth below:

A.	Application of the decision of liability to the claim amounts.	
	1. Manholes	$ 121.00
	3. Soldier Pile Bulkhead	
	a. Grouting	69,620.00
	c. Other work	2,357.00
	4. Electrical	
	a. Outdoor lighting wiring	131.00
	b. Gangway flexible conduit	103.00
	5. Sewer and Water	
	a. Waterline and sewer line	131.00
	b. Sewage pump station	3,593.00
	7. Dry Moorage Building	
	a. Plumbing	152.00
	b. Fire Suppression System	8,692.00
	8. Buildings	
	b. Rest room door	1,409.00
	TOTAL	$ 86,309.00

[2] Some of the amounts vary forth those set forth in the introduction because the Board denied Appellant's appeal of certain of the Government claims only in part.

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B.	Design of bulkhead repair works by Moffatt, Nichol & Bonney Inc.	$ 44,272.00
C.	Engineering overview report by Peratrovich, Nottingham & Drage.	$ 10,000.00
D.	Estimated cost of repairs (copy of report attached).	$ 988,750.60
	TOTAL CLAIM	$1,129,331.00

(Stip. Ex. O.)

16. Appellant's former president and former counsel received the CO's May 11, 1989 decision (Hjort Affidavit, paragraph 5; Stip. Ex. O). Appellant's former counsel is "defending this case on assignment from the errors and omissions carrier for ... (Appellant) for the periods covering the events in question in this matter" (Counsel's letter of Feb. 14, 1992, Correspondence File).

17. The Complaint, Answer and Appeal File had been submitted by September 25, 1989. By letter dated November 7, 1989, the Board advised the parties:

> This will confirm the agreements and understandings reached during the telephone conference call of November 7, 1989. The parties will attempt to achieve a comprehensive stipulation of facts and file motions for summary judgment based upon such stipulations.

More than 25 months later, by letter dated December 11, 1991, the Board stated:

> By letter dated November 7, 1989, the Board confirmed the agreements and understandings reached during a telephone conference call of November 7. Parties were to attempt to achieve a comprehensive stipulation of facts and file motions for summary judgment based upon such stipulations. The Board has yet to receive any motions for summary judgment. Therefore, the parties are requested to provide the Board a joint status report within 30 days from the receipt hereof.

By letter dated May 14, 1992, the parties filed their stipulations. Seven months later, by letter dated December 11, 1992, the Board further stated:

> The last filing of record was the May 4, 1992 letter from (Appellant's counsel). The parties were to have agreed upon a schedule for motions and briefings to present to the Board. This has not been accomplished. This appeal is the oldest inactive case on [chief judge's] docket. Please endeavor to make the required submittals as soon as possible.

DISCUSSION

Jurisdiction

Although neither party has raised a question regarding jurisdiction, the Board must assure itself that jurisdiction does in fact exist. Section 7 of the Contract Disputes Act, 41 U.S.C. § 606, provides that "the contractor" may appeal the CO's decision to the agency board of contract appeals. The Act defines the "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4).

The Board has no jurisdiction over an appeal from a subcontractor, *Erikson Air Crane Co. v. United States* [32 CCF ¶ 72,392], 731 F.2d 810 (Fed. Cir. 1984); *United States v. Johnson Controls, Inc.* [31 CCF ¶ 71,374], 713 F.2d 1541 (Fed. Cir. 1983), or an assignee. *Produce Factors Corp. v. United States* [18 CCF ¶ 81,750], 199 Ct. Cl. 572 (1972); *United California Discount Corp. v. United States* [35 CCF ¶ 75,804], 19 Cl. Ct. 504 (1990); *Twin City Shipyard and Packer River Corp. v. United States* [36 CCF ¶ 75,952], 21 Cl. Ct. 582 (1990). However, a Miller Act surety may appeal to the extent the Government improperly disbursed funds to the contractor. *Balboa Ins. Co. v. United States* [33 CCF ¶ 74,051], 775 F.2d 1158 (Fed. Cir. 1985).

Appellant was dissolved in 1986 and no longer exists as a corporate entity (FF 8). In 1989, the CO's decision was served on Appellant's former president and on Appellant's former counsel. Appellant's former counsel, who appealed the CO's decision, now represents Appellant's "errors and omissions carrier" for the periods and events in question for this appeal (FF 16).

Because Appellant no longer exists, there is a question as to whether Appellant is "the contractor" within the meaning of 41 U.S.C. § 606. The SCS contracting office and the marina are in the State of Oregon. Title 7, Chapter 60.637, *Effect of Dissolution*, of the Oregon Revised Statutes, provides in pertinent part:

> **60.637 Effect of dissolution.** (1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up

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and liquidate its business and affairs, including:

* * * * *

(c) Discharging or making provision for discharging its liabilities;

(2) Dissolution of a corporation does not:

* * * * *

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name . . . .

Therefore, in accordance with applicable state law, notwithstanding its dissolution, Swan Wooster Engineering, Inc., continues its corporate existence for the limited purpose of discharging its liabilities. Moreover, dissolution does not prevent commencement of a proceeding by Appellant in its corporate name. Accordingly, under the present circumstances, we conclude Appellant, Swan Wooster Engineering, Inc., is "the contractor" for purposes of 41 U.S.C. § 606 and that the Board has jurisdiction over this appeal.

The Board's Basis for Considering the Parties' Motions for Summary Judgment

The parties seek summary judgment for their respective positions. The considerations for granting or denying summary judgment were set forth in *Stephen Owen Dickhoener*, AGBCA Nos. 85-104-1, 85-105-1, 85-1 BCA ¶17,804, where the Board stated:

> The Board's rules do not provide for summary judgment and therefore the Board looks to Federal Rule [of Civil Procedure] 56, Summary Judgment, for guidance in determining whether the Government's Motion should be granted. The last two sentences of Rule 56(e) are of particular relevance and are set forth below:
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> These sentences were added by a 1963 amendment to the Rules. The Notes Of Advisory Committee On Rules are set forth below in pertinent part:
>
> The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied at least if the averments are "well pleaded," and not supposititious, conclusory, or ultimate.

The Board's procedure differs from the Federal Procedure in that the Board's procedure permits submission of the Appeal File and consideration of its contents as evidence during the pleading stage of the proceeding, thereby obviating the need to some extent for the parties to develop a record upon which the Board will base its ruling. In order to deny the Government's Motion under Rule 56(e), there must be relevant facts which are not only controverted but which have at least some reasonable probability of proof, not merely a possibility of proof. To hold otherwise would limit the granting of summary judgment to appeals that can be decided purely as a matter of law. This is contrary to the intent of the amendments to Rule 56(e). As was stated in *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir., 1972):

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. Summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

In *Anderson v. Liberty Lobby*, 477 U.S. 242 at 248-252, the Court held only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment (at 248) . . . There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. (249-250.) If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed (250-251) . . . The mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient. There

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must be evidence on which a jury could find for the [nonmovant]. (252.)

Appellant's Motion for Summary Judgment: Laches

Relying on *Travelers Indemnity Co. v. United States* [35 CCF ¶ 75,607], 16 Cl. Ct. 142, 154 (1988), the parties agree that the defense of laches is available to either party. However, the parties disagree whether the present facts allow the Board to conclude that laches exists. In order to prevail, Appellant must show undue prejudice stemming from unreasonable delay. *Id.* Conversely, if liability was not increased and litigation no more difficult than if the claim had been brought earlier, there is no prejudice. *Cornetta v. United States*, 851 F.2d 1372 (Fed. Cir. 1988); *Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992).

Appellant asserts prejudice claiming:

> A problem which might have been fixed for something in the neighborhood of $350,000 in 1984 or 1985 has allegedly escalated now to a full million dollars. [H]ad these claims been made earlier, [Appellant] ... might have been able to bring third-party claims or claims for contribution or indemnity against the contractors who, as noted in the government's own engineering reports [FF 8], evidently were responsible for manufacturing, construction and installation defects ... [A]ll the issues might have been resolved in a single hearing, presumably 7 years ago ... The active engineering staff once available to a thriving [Appellant] no longer exist ... [and] is not available for defense of the claims. Finally, consider that the owner of this project is ... the Port of Newport, not the SCS. The [Port] might have brought suit against [Appellant] ... [b]ut by 1989 ... the [Port's] right ... had long expired. The statute of limitations completely barred the real owner from bringing any claim. Why, then, should the SCS be permitted to bring a claim that the actual owner and operator of the marina cannot bring?

(App. Motion for Summary Judgment, pp. 11-12.)

Appellant's Motion based upon laches is on inherently weak ground because laches by its very nature retires the evaluation and weighing of the evidence prior to concluding whether laches exists. Moreover, Appellant has not helped its cause because Appellant has not asserted or cited specific facts supporting a conclusion of undue delay by the Government. Rather, Appellant has asserted generalized facts and has attempted to shift the burden of sorting them out to the Board. Finally, Appellant has not adequately proven specific prejudice or that any prejudice asserted was proximately caused by the Government's undue delay.

The evidence indicates that the Government was aware of the defective bulkhead in April 1982 (FF 5). A claim for an aborted attempt to repair the bulkhead by grouting was filed against Appellant in August 1982. Delay by the parties was the cause for the more than 5-year period between the time the appeal was filed and the time the Board rendered its decision denying Appellant's claim on the bulkhead (FF 9). Appellant has not proven or even alleged that any of the delay was Government-caused.

After receiving a detailed study to repair the bulkhead for $988,750 in December 1988 (FF 11), the Government filed a claim against Appellant in May 1989 (FF 15). Delay by the parties was the cause of the 4-year time period taken to process the present appeal (FF 17). Again, Appellant has not proven or even alleged that any of the delay was Government-caused.

There were 7 years between the time SCS was aware of the defective bulkhead in April 1982 and the time the present appeal was filed in May 1989. However, Appellant ceased doing business in the fall of 1986 (FF 8), and four studies were conducted thereafter (FF 7, 10, 11, 12). We are not in a position to conclude as a matter of law based upon the record before us that there was undue delay.

Appellant attributes for the escalation in the cost of repairing the bulkhead from $350,000 to a "full million dollars" to the elapsed time between 1984 or 1985 and 1989. Even a cursory review of the studies indicates that the disparate cost may be due to different methods proposed to repair the wall, rather than inflation. We cannot conclude based upon the present record that the 4 or 5-year time period was responsible for the price escalation.

Appellant asserts an inability to bring third-party claims because of the alleged long delay by the Government. Appellant's liability is based upon negligent design, not negligent construction supervision. Appellant has not specified which third-party claim could be brought against whom, or for what. In any event, Appellant was awarded a contract for resident engineering including inspection and test of the first construction

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increment of the marina (FF 3). Accordingly, there is a strong presumption that Appellant should have been aware of the manufacturing, construction and installation defects of the construction contractor and the subcontractors. We cannot conclude based upon the present record that Appellant has shown any prejudice.

The fact that "all the issues might have been resolved in a single hearing, presumably seven years ago," does not entitle Appellant to have its Motion sustained. Appellant must show that liability has increased and litigation made more difficult as a consequence of undue delay. *Cornetta v. United States, supra; Aukerman Co. v. R.L. Chaides Constr. Co., supra.* Appellant has not done so. Appellant asserts that it's engineering staff is no longer available to defend against claims. Again, Appellant has not shown undue Government delay, or that such delay was the proximate cause of the dissolution of Appellant.

Appellant asserts that because the Port can no longer sue Appellant because of the statute of limitations (an asserted fact not in evidence) that SCS should not be allowed to recover from Appellant. The viability of the Port's right to sue Appellant is irrelevant to SCS's right to claim damages under the Contract Disputes Act. The Port has no privity with Appellant. The SCS has privity with Appellant as a consequence of the contracts between the parties (FF 3), and can therefore maintain the present action.

In conclusion, Appellant has failed to adequately make a *prima facie* case for undue delay or that such delay was the proximate cause of prejudice to Appellant. Even if Appellant had made such a case, the record indicates disputed material facts which preclude granting Appellant's Motion for Summary Judgment on the basis of laches.

Appellant's Motion for Summary Judgment: The Government Has No Claim

Appellant, relying on *United Aero, Inc., supra.* asserts "Because no money has been spent on repairs, there is no claim to bring." We agree with the Government's position that the facts in *United Aero* are readily distinguishable from those in the present appeal.

United Aero involved a Government claim for the excess cost of reprocurement. It is settled law that the reprocurement contract must be completed and paid for prior to the Government's being entitled to recoup the excess costs. Under the present appeal, the damages are based upon breach of contract, and recovery is predicated on proof of damages. There is no requirement that the SCS repair the bulkhead as a condition precedent to recouping damages. The SCS need only adequately prove the extent of the damage.

Accordingly, we also deny Appellant's Motion for Summary Judgment on the basis that the Government has not incurred the costs of repair.

Appellant's Motion for Summary Judgment: The United States Is Not the Real Party in Interest

Appellant relies on *United States v. San Jacinto Tin Co., supra,* contending that the Government is not the real party in interest and may not collect from Appellant. In *San Jacinto,* the United States attempted to set aside a conveyance of land which had ultimately found its way to San Jacinto. San Jacinto asserted that since the Government would acquire no interest in the land, even if successful, the United States could not maintain the cause of action. The Court held that:

> If there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person.

Appellant asserts that maintenance and repair are solely and exclusively the responsibility of the Port *(see* FF 1, 2). The operation and maintenance agreement relied upon by Appellant imposes a duty on the Port to operate and maintain the marina bulkhead without cost to the Government. However, the agreement does not require the Port or the SCS to bear increased and extraordinary operating and maintenance expenses arising as a direct consequence of a flawed marina bulkhead, in turn resulting from Appellant's negligent design. Appellant's position would require the Port and/or SCS to ignore Appellant's negligent design and bear the cost of restoring the marina bulkhead and the buildings it supported as operation and maintenance expenses. Nothing in the operation and maintenance agreement requires such a result.

Moreover, unlike *San Jacinto,* where the Government lacked privity with the defendant, the Government has privity with Appellant as a result of the contract between the parties. Although the Port helped fund the contract, only the SCS and Appellant were parties to it (FF 3).

Appellant did not question the source of funding when it was paid to design the ma-

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rina under its contract with the SCS. The fact that the Port may benefit from Appellant's repair of the bulkhead is irrelevant. Indeed, the Port's benefit after correction of the bulkhead will be no greater than if the bulkhead had been properly designed by Appellant in the first instance.

Also, unlike *San Jacinto,* the Government here has an obligation to the Port and to the public to carry out its statutorily mandated obligation to prevent soil erosion and maintain the navigability of rivers and harbors (FF 1). The SCS attempted to carry out these obligations through the agreements with the Port and through the contracts with Appellant. Appellant's contract performance was unsatisfactory, and the SCS is simply enforcing its contract rights, as it is both authorized (and obligated) to do under the Contract Disputes Act.

We deny Appellant's Motion for Summary Judgment on the basis that the Government is not the real party in interest.

The Government's Motion for Summary Judgment

Liability

The Government, citing *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), recognizes that the moving party has the initial burden of establishing recovery and an absence of any genuine issue of material fact. The Government asserts it has met this burden by Stipulation 20 which establishes that sand fill was migrating from behind the bulkhead and causing damage to the parking lot and dry moorage building (FF 5).

The Government provided evidence that the concrete panel tieback system used by Appellant would not have been used by knowledgeable marine engineers. Appellant refuted this evidence. (FF 13.) This is not a material factual dispute because it is not essential to the outcome of the appeal. *Anderson v. Liberty, supra.* While the tieback system might reduce the useful life of the bulkhead because of the corrosion, the design has nothing to do with the present problem pertaining to fill migrating from behind the bulkhead causing subsidence (FF 11, 12).

The fill migration problem was addressed by the Board in its original decision, which stated:

> *Claim 3(a)—Soldier Pile Bulkhead—Grouting ($69,752)*
>
> The facts pertaining to this claim are adequately set forth in the Findings and will not be repeated here. The filter cloth was the proverbial "Achilles Tendon" of the bulkhead and the structures and adjacent area which relied on the bulkhead to keep back the water and to prevent a subsidence of the land behind the bulkhead. The filter cloth was supposed to keep the sandfill from passing through the filter cloth because of tide and wave action. The filter cloth specified was suitable for such a purpose. Nevertheless sandfill was lost and ground subsidence behind the bulkhead did occur. The filter cloth, because of gaps and/or tears, did not fully cover the underwater portion of the bulkhead, and that the substantial portion of the sandfill loss occurred in these areas, particularly in the WF sections (FF 1, 2, 4, 5-7).
>
> Notwithstanding the importance of the filter cloth and its installation, there was only one short note on one drawing in all the plans and specifications that referred to it. Taken literally, the note only required application of the cloth to the concrete filler panel portions of the bulkhead. It did not require application to the WF sections or indicate it should be tucked in and around the WF sections to form a continuous barrier to prevent the loss of the sandfill (FF 1). The testimony of the Government expert corroborates the fact that Appellant should have provided more detail and should have been more explicit with the design of the filter cloth installation (FF 1, 9).
>
> Contrary to Appellant's position, we do not find that a delay in the award of the construction contract was the cause of the problems with the filter cloth. Indeed, the evidence does not establish that a delay occurred in that the award of the construction contract occurred within the initial 60-day period set forth in the bid package as the time within which the award would be made (FF 8).
>
> Appellant alleges that the design was adequate and that any knowledgeable marine construction contractor should have known the purpose of the filter cloth and the fact that it should have fully covered the underwater portion of the bulkhead including the WF sections. On this issue we agree with the testimony of the Government's expert that construction by even a knowledgeable marine construction contractor does not relieve the A&E of the responsibility to provide adequate specifications (FF 9). Further, Appellant, under the follow-on contract between the parties, supervised the construction contractor's installation of the filter cloth (FF 5). It is apparent that it was not possible to

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install the cloth tucked around the WF sections and have enough cloth left to overlap with the next section (FF 5-7). There were several different methods for installing the cloth. However, neither the method of installation nor any special care or warnings with respect to the installation were provided by the design.

We conclude that the specifications relating to the design of the bulkhead were defective because they were not specific or detailed enough to indicate an application or installation of the filter cloth which would adequately retain the sandfill against erosion because of tide or wave action. Indeed, the design contained so little detail and specificity that insistence by the Government on a proper application or installation could have been construed as a direction under the Changes clause of the construction contract entitling the construction contractor to additional compensation and time to perform the changed work. We conclude the level of care for this aspect of the design was less than the degree of ordinary and reasonable care, skill and diligence which would be expected from an average member of the profession. On this basis we conclude that Appellant's design was negligent.

(*Swan Wooster, supra.*)

This decision is *res judicata* on the question of Appellant's negligence pertaining to the defective bulkhead design and the resulting fill migration and parking lot and building subsidence. Accordingly, this holding controls the question of liability in the present appeal. We grant the Government's Motion for Summary Judgment, but only on the issue of Appellant's liability.

Costs

The Government seeks $1,129,331 in damages including $988,750 to repair the bulkhead wall by constructing a new wall of sheet pilings on the bay side of the present bulkhead (FF 12, 13, 15). The parties are of the opinion that if they can resolve the bulkhead damages issue, they can resolve the other damages, which are minor by comparison.

Notwithstanding the opinion of the lead engineer, who states that the repair solution offered is the most practical and cost effective, a review of the record indicates other less expensive solutions may be available (FF 7, 10, 13). The record has not been fully developed on this issue.

While we have denied Appellant's Motion for Summary Judgment based on laches, it is not out of the question that there was delay by the SCS that increased the costs to repair the bulkhead in a quantifiable amount. If so, the recovery by SCS could be reduced.

Finally, the parties could agree to offset the costs of the failed attempt to repair the wall by grouting, or a portion of such costs, against a recovery based upon the present appeal. Accordingly, we reserve ruling on the question of costs.

RULING

Appellant's Motions for Summary Judgment are denied. The Government's Motion is granted as to liability only, since there are questions of fact affecting the outcome of any recovery of costs. The appeal is remanded to the parties for a period of 30 days for purposes of effecting a settlement. The parties shall advise the Board no later than 30 days regarding the status of their negotiations. If settlement is not achieved within 30 days, the Board will set a date for hearing limited to the question of damages.

[¶ 26,288] Solar Foam Insulation

ASBCA No. 46278, August 6, 1993. Contract No. NAS9-18546.

Contract Disputes, Claims—Submission to Contracting Officer—Claim Not Presented.—A board of contract appeals lacked jurisdiction to decide a roofing contractor's claims for unilateral mistake in bid and inadequate bid verification because the contractor raised its claims for the first time in its complaint. The portion of the contractor's appeal relating to mistake in bid was dismissed without prejudice to the subsequent filing of a proper claim with the contracting officer.

Modifications—Bar to Claims—Accord and Satisfaction.—A roofing contractor's claims for an equitable adjustment were not barred by accord and satisfaction, because the government raised the defense for the first time in its final prehearing actions, rather than

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as an affirmative defense in its answer. The government also failed to meet its burden of proving the elements of an effective accord and satisfaction.

Acceleration Claims—Government Pressure—Proof.—A contractor was not entitled to an equitable adjustment for the costs of increasing its crew size allegedly as a result of directions to accelerate performance of a roofing contract, because the contractor increased its crew size before receiving the acceleration directive. The contractor did not show that it increased crew size as a result of any verbal directions or in anticipation of the written directive. Moreover, the contractor did not actually accelerate work after receiving the directive.

For the appellant: Sullivan & Worcester, Washington, D.C., by Richard D. Lieberman. For the government: Harold B. Dantone, Office of Counsel, Johnson Space Center, Houston, Texas.

Before TODD, RUBERRY, and RIISMANDEL, Administrative Judges.

TODD, Administrative Judge: This appeal arises from the denial of a claim for increased costs incurred in the performance of a roofing contract at the Johnson Space Center of the National Aeronautics and Space Administration (NASA). Appellant seeks an equitable adjustment of $107,291.85 for an alleged direction to increase crew size, or reformation of the Contract on the ground of mistake in bid. A one-day hearing was held. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On April 10, 1991, NASA issued Solicitation No. IFB 9BG3-15-1-9B (the RFP) for roofing repair work on two buildings at NASA's Johnson Space Center in Houston, Texas. The statement of work provided for the removal of existing roofing material and replacement with a built up roofing system. (R4, tab 1) The RFP included precipitation information in the clause, "52.236-4 PHYSICAL DATA (APR 1984)," which stated in pertinent part:

(b) Weather conditions

The weather conditions at the site of the work are approximately as listed below, but each bidder should satisfy himself before submitting his bid as to the hazards likely to arise from weather conditions .... Following summary in Table I is from Houston Hobby Airport from 1930 until the weather station moved in 1969. For the purpose of determining average weather conditions at the Johnson Space Center, this data is used. (R4, tab 1, p. I-16) Table I, referred to as the "weather chart" showed by month the inches of rain recorded and stated the average number of days with 0.01 inch or more, which thus specified 63 "rain days" normal for the anticipated six-month period of performance July 1991 to January 1992 (R4, tab 1, at I-17).

2. Appellant's bid was prepared and signed by Ralph Overturf, Manager, Government Contracts (R4, tab 1; tr. 29, 60, 134). Mr. Overturf had thirty years experience in built-up roofing, the specialized type of roofing work called for in the subject RFP (tr. 29-30). A built-up roofing system consists of multiple barriers of glass felt which are mopped with hot asphalt, covered with insulation installed with hot asphalt and then covered by four more plies of glass felt laminated with asphalt between each ply (tr. 67). Before preparing this bid Mr. Overturf had worked for appellant two to three months organizing his office and bidding 10-15 other jobs. None of these jobs were awarded because appellant was not the low bidder. (Tr. 50) Appellant did not have experience in installing built-up roofing before hiring Mr. Overturf (tr. 88, 183, 257).

3. The amount of appellant's bid was $276,598, including $128,722 stated in the bid for Material and $147,876 for Other (R4, tab 1). Appellant believes it was mistaken in the amounts included for labor in the Other category. Wally Scoggins, appellant's president, made a review of the estimate and found items were omitted (tr. 82). The results of this review, which was made in August 1992, were forwarded to appellant's counsel in this appeal, by letter dated August 17, 1992 (app. exh. 1). Appellant identified items apparently left out of the estimate as equipment, supervision, fuel, inspection fees, warranty fees, sod replacement, general liability insurance, bond, and overhead in a total amount of $92,531 (*id.*). Mr. Overturf did not, in estimating the number of manhours that would be required, take into consideration the anticipated number of rain days stated in the weather chart in the RFP (tr. 30, 48-49, 52). During performance of the

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contract, Mr. Overturf did not identify to the Government any mistakes in the bid.

4. At the bid opening on May 17, 1991, the amounts bid were as follows:

BIDDER	TOTAL	MATERIAL	OTHER
Elder Roof Syst.	$390,267	$109,000	$281,267
F.W. Walton, Inc.	421,757	125,757	296,000
Solar Foam Insulation	276,598	128,722	147,876

The Government estimate was $413,725. (R4, tab 30) Only the total amounts bid are shown on the bid abstract (R4, tab 5). At the bid opening, which was attended by Mr. Overturf, only the total amounts bid were read (R4, tab 30; tr. 31-32, 47-48).

5. Stephen C. Cleland, the contracting officer who signed the letter requesting bid verification, was concerned about the discrepancy in the total costs bid (tr. 130, 242-43). A contract specialist prepared the letter on the day of the bid opening according to normal procedures and using a standard format (tr. 130, 162, 235, 243, 252). Mr. Cleland was responsible for reviewing the component parts of the bid to determine why there was a discrepancy, but did not do so. He relied on staff support without making his own evaluation, instructing how his staff was to make an evaluation, or checking the accuracy of the letter before he signed it (tr. 244, 252-53). The Government made a significant error in the letter, dated May 17, 1991, sent to appellant requesting bid verification in stating that the difference between appellant's bid and the next low bid was $32,669, and the difference between that bid and the Government estimate was $137,127 (R4, tab 7). The actual difference between bids was $113,669 (R4, tab 5). There was no statement in the letter of why the Government believed there was a discrepancy. The categories of costs bid shown in finding 4 above were not stated (R4, tab 7). The mistake was not intentional, and Mr. Cleland was not aware that the numbers were incorrect when he signed the bid verification letter (tr. 132-33, 236). The contracting officer did not later correct the mistake and ask appellant to reverify its bid (tr. 245-46).

6. Appellant verified its bid after review of Mr. Overturf's take-off sheets by letter, dated 30 May 1991, to the contracting officer (R4, tab 7, tr. 33-34, 51, 80-81).

7. On June 13, 1991, the Government met with appellant to assess appellant's ability to perform the Contract. Mr. Overturf represented appellant and the Government representatives were Mr. Cleland, Ronald Stone, Richard Clingan, Bill Roeh, Vincent Johnson, and Charles Lauritzen (tr. 27-28). Mr. Overturf did not remember being told that appellant's bid was more than $100,000 lower than the next low bidder, but there was discussion at the meeting that appellant's bid was low by over $100,000 (tr. 56, 148, 165A-166, 171, 185-87, 223, 253, 259, 273). The Government understood that appellant wanted this contract to establish a history of working with NASA in built-up roofing (tr. 177, 186, 223, 260). Appellant did not bid for a loss or attempt to buy in (tr. 39, 159).

8. On June 24, 1991, contract No. NAS9-18546 (the contract) was awarded by the Government to appellant in the amount of $276,598. The contractor was required to complete the project not later than 180 calendar days after the receipt of the notice to proceed. (R4, tab 1, at 2, F-1). On 24 June 1991, George M. Moran, the contracting officer reassigned to the contract, issued a notice to proceed. The notice stated that changes affecting the drawings, specifications, or other terms of the contract could be effected only upon the written order of the contracting officer or his duly appointed representative (R4, tab 15).

9. Appellant could not work on some days because of rain (R4, tab 12; tr. 75, 138). If there was a chance of rain, decisions were made on a daily basis whether or not to work in discussions with Mr. Luther Keefer, one of the Government inspectors. They considered the weather reports and observed how cloudy conditions were. Brian Collins, appellant's superintendent on the job, was responsible for deciding not to work based on a chance of rain. (Tr. 113, 122)

10. There was conflicting testimony at the hearing as to whether appellant was prevented by any Government representatives from working when there was a thirty percent or more chance of rain. Appellant's witnesses testified that there was a rule to this effect (tr. 43-44, 75-79, 291-94; app. exh. 2). There is no contemporaneous reference in the Government logs or diaries to such a standard (R4, tabs 11, 12; tr. 99, 112, 194, 272). Appellant did not make any complaints about being prevented from working (tr. 87-88, 194, 271-72). Appellant did not refer to this issue in writing in any of its claims for weather delays (R4, tabs 23 through 26).

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Although it was important that roofing not be torn off when the building would be exposed and the inside could be damaged by rain, Government witnesses did not testify to any "30% chance of rain" rule or actions that could have interfered with appellant's job performance (tr. 79, 87, 111, 138, 145, 193, 271). Based on our review of the documentary record and an assessment of the witnesses' credibility, we find that appellant was not prevented by any Government representatives from working when there was a thirty percent or more chance of rain.

11. Appellant's witnesses who testified that verbal directives were given to appellant to increase manning were not persuasive (tr. 74, 294). Mr. Overturf did not remember being told to increase crew size (tr. 43, 60). Mr. Collins, who was subpoenaed to testify but did not appear at the hearing, in his deposition stated that appellant was directed by Mr. Keefer, and Richard Clingan later verified that appellant was required to hire more people (app. exh. 2; tr. 105, 120-21, 136). Messrs. Keefer and Clingan were both inspectors employed by Brown & Root to provide services for this Contract (tr. 106, 254-55). Mr. Keefer did not have authority to issue a directive to increase manning and did not do so (tr. 109-10, 121). Mr. Clingan also was without authority to direct increased manning and did not issue such a directive (tr. 261, 266). Based on an assessment of the witnesses' credibility, we find that appellant was not directed to increase manning by the Government inspectors.

12. Beginning 26 August 1991, appellant requested extensions for 25 days during the period from 16 July to 19 September 1991, on the ground of excusable delay for weather when the roofing crew could not work because of rain (R4, tabs 19, 20, 22; tr. 39). By Modification No. 1 to the contract, dated 9 December 1991, the Government extended the contract completion date by eight days that were additional to the rain days allowed in the contract for July, August and September (*ibid.*; R4, tab 2).

13. As of 29 August 1991, appellant increased the size of its crew. The Government log shows the number of employees on the job on given days increasing from a maximum of 12 to between 21 and 32 on most days worked up to 23 October 1991. There were no changes in the numbers after 19 September 1991. (R4, tab 12) There was inefficiency with increasing the number of persons working on the job by approximately doubling the size of the crew (tr. 86, 197, 266, 294).

14. Other causes of inefficiencies were the inexperience and lack of training of the crew, poor supervision, lack of teamwork and coordination, and lack of quality control (tr. 88, 115-17, 125-27, 139, 191, 197-203, 225, 262-65, 275). The finished project was of acceptable, if not superior quality (tr. 117, 190).

15. On 17 September 1991, Ronald Stone, the contracting officer's technical representative responsible for inspection of appellant's work, sent a letter to appellant stating that its rate of progress on the Contract was not acceptable. The letter said that appellant's performance was approximately 20 percent behind its approved schedule of 50 percent and directed submission of a revised progress schedule showing all steps necessary to "regain the agreed rate of progress." (R4, tab 16) Mr. Stone did not take into account that appellant had requested extensions for weather delays when he determined the contractor was behind schedule (tr. 211, 277-79). Mr. Stone signed the letter as "Authorized Representative of the Contracting Officer" and had authority to issue a change in contract terms (R4, tab 16; tr. 136, 158, 212, 261). The letter was received by appellant on 19 September 1991 (R4, tab 16).

16. In response to the letter, appellant submitted a revised progress schedule, but Mr. Stone had no recollection of its receipt (tr. 49, 268). The schedule could not be found by either party (tr. 63). The Government expected a response in the form of a schedule submission (tr. 137, 195-96). The letter did not specify the method that should be used to expedite the job (tr. 120, 136, 196). Appellant interpreted the letter as requiring an increase in productivity by increasing the crew size (tr. 43, 93). Appellant did not make complaints about any directive to increase manning (tr. 110, 145, 197-98, 266).

17. The total number of days requested by appellant for weather delays was 138 (R4, tab 30). By modifications to the contract, the Government granted a total of 71 days of time extensions for weather delays (R4, tabs 2, 30). Appellant understood that the grant of extensions was for those days in excess of the anticipated number of rain days shown in the weather chart in the contract (tr. 102, 193, 267-68).

18. On 25 February 1992, the Government took beneficial occupancy of the buildings repaired under the contract (R4, tab 17).

19. On 15 April 1992, appellant submitted a claim for additional funds based on alleged

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written direction to increase crew size when the job was not behind schedule and being prevented from work on the project when there was a thirty percent chance of rain or greater. By letter dated April 23, 1992, the contracting officer returned the claim with no action taken because the claim did not meet requirements of certain clauses of the Federal Acquisition Regulation, copies of which were enclosed for appellant's information. The letter referenced meetings held to discuss appellant's low bid and stated that appellant was asked to verify its bid because of the Government's concern that a mistake may have been made in the bid. (R4, tab 9)

20. By letter dated 11 May 1992, appellant submitted a certified claim in the amount of $107,291.85 for increased labor costs, overhead and profit resulting from a Government direction to make adjustments to bring the contractor's progress back on schedule. The letter stated that appellant was not behind schedule because there were weather delays for which extensions of time were later granted. Appellant claimed that it had increased its crew size in response to the direction. (R4, tab 13)

21. The contracting officer's final decision, dated 16 July 1992, denied the claim on the grounds that no Government personnel directed an increase in manning and appellant did not increase its job manning numbers. The decision included a history of contract events that stated the circumstances of bid verification and that no mistake in bid had been made by appellant. (R4, tab 14)

22. On 23 July 1992, appellant filed its notice of appeal to initiate these proceedings at the NASA Board of Contract Appeals. The appeal was docketed NASA BCA No. 77-0792 prior to the merger of the NASA BCA and ASBCA that was effective 12 July 1993.

23. In its complaint appellant, filing *pro se*, alleged entitlement to compensation for weather associated losses from directives to increase crew size and not tear off any existing roofing material if the chance of rain exceeded 30 percent. Appellant also alleged in the complaint that it had been fraudulently misled by the contracting officer concerning the disparity of bids.

DECISION

We have considered whether we have jurisdiction to decide appellant's claim for unilateral mistake in bid and inadequate bid verification, which was not presented by appellant until it made allegations in its complaint. Contractor claims against the Government must be submitted in the first instance to the contracting officer for decision. Contract Disputes Act (CDA), 41 U.S.C. § 605(a). The proper scope of an appeal process under the CDA is circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom. *Service Engineering Company*, ASBCA No. 40274, 93-1 BCA ¶ 25,520, at 127,126; *Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951, at 84,315. Since appellant's claim that it was misled by the Government's bid verification request was never submitted to the contracting officer for decision, we have no jurisdiction to decide the claim.

The portion of the appeal relating to mistake in bid is, therefore, dismissed without prejudice to the subsequent filing of a proper claim with the contracting officer.

In its final prehearing actions the Government raised for the first time the defense of accord and satisfaction stating that Modifications 1, 2, and 3 to the Contract contained release language which covered a minimum period from 16 July 1991 to 27 December 1991. The Government is obligated to raise accord and satisfaction as an affirmative defense in its answer. Rule 6(b); *Brooks Lumber Company*, ASBCA No. 40743, 92-1 BCA ¶ 24,572.* Appellant made a motion at the hearing to strike the defense, and we deferred ruling until issuance of this opinion. We cannot accept the defense of accord and satisfaction because it should have been raised earlier, and the Government has failed to meet its burden of proving the elements of an effective accord and satisfaction. *Infotec Development, Inc.*, ASBCA Nos. 31809, 32235, 91-2 BCA ¶ 23,909. The Government provided no briefing on the point stating that the defense was not relevant because it relates only to quantum. We have no basis to consider whether the accord and satisfaction doctrine applies to the modifications in this appeal and conclude that the doctrine is not a bar to appellant's claims.

*The Memorandum of Agreement, dated June 28, 1993, for merger of the NASA BCA and the ASBCA provides that NASA appeals will be decided using the rules, regulations, and procedures applicable to the operation of the ASBCA. The NASA BCA Rule was substantially the same as this ASBCA Rule. 14 C.F.R. § 1241.106(b).

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C.L. Fairley Construction Co., Inc., ASBCA No. 32581, 90-2 BCA ¶ 22,665.

In order to receive compensation from the Government for increased costs resulting from acceleration, a contractor must generally establish (a) the existence of excusable delay, (b) contractor notice to the Government of the excusable delay and a request for a performance time extension, and (c) an express or implied Government order to overcome the excusable delay or to complete performance by a date earlier than that by which the contractor was entitled to perform due to the excusable delay. *Intermax, Ltd.*, ASBCA No. 41828, 93-2 BCA ¶ 25,699; *Trepte Constr. Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. An additional essential element of a successful acceleration claim is actual acceleration of the work. *T.H. Taylor, Inc.*, ASBCA No. 27699, 86-2 BCA ¶ 18,743, and cases cited therein.

We have considered whether the required elements are present here. The Government found excusable delay due to the weather and granted extensions of time for days prior to the issuance of Mr. Stone's letter on 17 September 1991. Appellant had experienced weather days and requested time extensions, but the Government did not grant the extensions until the first modification to the contract in December 1991. It was reasonable to interpret Mr. Stone's statement to provide schedule information that would "regain the agreed rate of progress" as an acceleration directive. The Government was requiring the contractor to complete performance in less time than would have been available had the time extensions been considered.

However, appellant had increased its crew size before receiving the directive, and we have not found that any changes were made in response to the letter (finding 13). There is no evidence that actions to increase crew size were taken by appellant as a result of any authorized verbal direction or in anticipation of the directive as appellant has alleged (finding 11). Appellant did not actually accelerate the work after receiving the Ron Stone letter and has not, therefore established its entitlement to an equitable adjustment.

Appellant also claims it was prevented from performance by the Government's application of the "30 percent chance of rain" rule. Appellant has failed to sustain its burden of proof with documentary evidence of Government interference with its performance or sufficient credible evidence from witnesses that there was such a rule and, accordingly, we deny this claim.

With the exception of the claim dismissed for lack of jurisdiction, the appeal is otherwise denied.

[¶ 26,289] Franklin L. Hassell

ASBCA No. 45242-697, August 16, 1993. Contract No. N00181-90-C-0152.

Contract Disputes, Claims—Quantification—Sum Certain.—Under a contract for civilian employee assistance services, a contractor's request for an order directing the contracting officer to issue a decision was denied because the contractor's previous letter requesting interpretation of a contract term was not a properly quantified monetary claim in a sum certain. Although the contractor attempted to present a monetary complaint as a dispute over contract interpretation, the essence of the disagreement was monetary.

For the appellant: Holmes & Edmonds, Virginia Beach, Virginia, by Doris L. Edmonds. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Robert E. Lieblich, Trial Attorney, Naval Sea Systems Command, Washington, D.C.

Before RUBERRY, SPECTOR, and STEMPLER, Administrative Judges.

RUBERRY, Administrative Judge: The contractor has filed a Rule 1(e) request for an order directing the contracting officer to render a decision on a "claim" filed with the contracting officer. The Government objects, arguing that the contractor has not filed a claim cognizable under the Contract Disputes Act, 41 U.S.C. § § 601-613 (CDA).

On 20 September 1990 the Norfolk Naval Shipyard (NNSY) awarded contract No. N00181-90-C-0152 for civilian employee assistance services with the contractor, Franklin L. Hassell. The contract was awarded for a base year with options for second and third years. The contract incorporated by reference the FAR 52.233-1 Disputes clause. In a letter dated 8 August 1991, the contractor

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was informed by the contracting officer that the Government did not intend to exercise the second year option under the contract.

On 18 September 1991, the contractor protested the Government's failure to award him the option years. It stated, in part, as follows:

> I am filing a protest in reference to your inability to award me the option years. Please be advised that during my initial submission of the bid packet, the other bidders had the option to bid on the option years. Further, they were aware that the RFP specifically indicated that they include the prices for those years. Surely, I was not the only bidder who submitted option year data.
>
> I am further requesting that the specific acquisition regulations that require synopsis and evaluation of options prior to the award be forwarded to my office.

No CDA certification accompanied this letter.

The Government asserts that the contractor's letter of 18 September 1991 is insufficient as a claim because if it is a monetary claim, he failed to state a sum certain. Additionally, the Government argues that if the contractor seeks other relief, he seeks relief beyond the jurisdiction of the contracting officer and beyond the scope of the CDA unless he is seeking an interpretation affecting his future contractual performance obligations. For those reasons, the Government argues, his claim should be dismissed for lack of jurisdiction.

Contractor's attorney asserts that the 18 September 1991 letter requested "adjustment or interpretation of a contract term" and therefore was a proper claim. In a subsequent letter to the Board, the contractor's attorney "clarified" that the amount of relief sought was $72,136.65. This was the first assertion of a sum certain by the contractor.

DECISION

Where the essence of a disagreement is monetary, we have declined to take jurisdiction over a claim presented as a dispute over contract interpretation. *International Creative and Training, Ltd.*, ASBCA No. 42833, 93-3 BCA ¶ 26,009 21 April 1993; *Winding Specialists Co., Inc.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737; *Shirley Construction Corporation*, ASBCA No. 35868, 89-2 BCA ¶ 21,590.

Just as in *International, supra*, the appeal before us is an attempt to present a monetary complaint as a dispute over contract interpretation. Indeed, counsel has advised the Board that the contractor seeks relief "in the amount of $72,136.65." Consequently, we hold that the essence of the contractor's claim was monetary, and his failure to present the claim in a sum certain to the contracting officer (and certify it) is fatal to this appeal.

Contractor's Rule 1(e) request for an order directing the contracting officer to render a decision is denied. The appeal is dismissed without prejudice to submission of a quantified, certified claim to the contracting officer.

[¶ 26,290] Sal Esparza, Inc.

ASBCA No. 45582, August 17, 1993. Contract No. F41620-90-D-0002.

Interpretation of Contracts—Grounds Maintenance Services—Emergency vs. Routine.—Under a contract for grounds maintenance services, a contractor was not entitled to an equitable adjustment for tree limb removal following a snowstorm, because it failed to show that the removal work was emergency work, rather than routine work under the contract. The contractor did not notify the government that it considered the tree limb removal work as emergency action until three months after receipt of a work order that designated such removal work as routine. Although the government used the phrase "storm damage" in its work order, "storm damage" is not the contractual equivalent of "emergency action" to protect government property damaged by a natural disaster. Moreover, the record did not refer to any contractual course of dealing as to whether the tree limb removal work was mutually understood to be a routine or emergency action.

For the appellant: Sal Esparza, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Maj. Jonathan A. Basten, USAF, Trial Attorney.

Before JAMES and PAUL, Administrative Judges.

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JAMES, Administrative Judge: This appeal arises from the contracting officer's final decision denying appellant's $5,299.08 claim for removing tree limbs and debris pursuant to work order No. F-1429 under the captioned contract. The parties dispute whether such work was "emergency" or "routine." The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* Appellant elected the Rule 12.3 accelerated procedures. The parties agreed to submit the appeal for decision on the record pursuant to Board Rule 11. Only entitlement is before us for decision. Neither party submitted a brief.

SUMMARY FINDINGS OF FACT

On 1 March 1990 the U.S. Air Force awarded contract F41620-90-D-0002 to the U.S. Small Business Administration (SBA) for grounds maintenance services at Reese Air Force Base, Texas, from 1 March to 30 September 1990 for a total estimated amount of $480,000, with four yearly option periods. SBA subcontracted the entire performance to Sal Esparza, Inc. (SEI), under the "8(a) Program" (15 U.S.C. § 637(a)). (R4, tab 1)

Contract Section C-1, provided:

> 1.6.2. *Repair of Government Property Damaged By Natural Disaster*
>
> 1.6.2.1. In the event government property is damaged by causes of disastrous nature, such as a tornado, flood, windstorm, hail, or fire and the contracting officer determines emergency action is necessary to protect government property, he/she may direct the contractor to do emergency work to the extent necessary to protect government property. Such work shall be subject to separate negotiation for reimbursement.

Section C-5, ¶ 5.1.4, required SEI to perform 42 types of ground maintenance services as stated in "Work Orders" issued by respondent within the time set forth by the work order. Section C-5, ¶ 5.1.4.5 specified one of those 42 maintenance services types:

> Remove tree limbs and debris from improved grounds, selected improved grounds, occupied and unoccupied Military Family Housing units, and semi-improved grounds within 2 days of receiving job order.

Section C-2, DEFINITIONS, ¶ 2.2.13 provided: "*Wind and Storm Damage.* Fallen trees, limbs and debris deposited on roads, streets, sidewalks, fence lines, improved and semi-improved grounds." The phrase "*Wind and Storm Damage*" is an isolated definition which appears neither in Section C-1, ¶ 1.6.2.1, Section C-5, ¶ 5.1.4.5, nor elsewhere in contract 0002, and whose intended meaning was not explained by either party.

Effective 1 October 1990, contract modifications P00003 and P00004 respectively exercised respondent's option to extend contract services for one year through 30 September 1991 and fixed $54,166.66 per month for the period October-December 1990 for performance of the 42 ground maintenance services types. (R4, tab 1)

On 7 November 1990 at Reese Air Force Base there were freezing rain, sub-freezing temperatures and two to four inches of snow, creating hazardous driving conditions. Early on the morning of 8 November 1990 at Reese Air Force Base, SEI's Project Manager Mike Tatum observed elm trees covered with ice with broken tree branches hanging in trees, over electric power lines and fallen on the ground. Tatum met with respondent's representatives LT Robert E. Howland, Chief of Contract Management which was responsible for issuing work orders under contract 0002, and Howland's subordinate, Joe Rosendo, quality assurance evaluator (QAE), to determine a course of action. Howland and Rosendo said that respondent would issue an appropriate work order. (Complaint & answer)

Tatum's undated, unsigned and unsworn handwritten notes attached to SEI's complaint state that Howland and Rosendo decided to remove tree limbs over electric power lines by Government personnel and equipment, Tatum had read the contract provision about "storm damage" and Tatum asked Rosendo and Howland "if this wots [sic] covered and would we get a WO to that effect. The answer was yes." They do not say that Tatum mentioned "emergency" to Howland and Bosendo.

Rosendo's and Howland's affidavits state that at no time on 8 November 1990 did Tatum say that SEI's tree limb clean up was an "emergency action" and that neither Rosendo nor Howland stated that SEI's work would be "emergency" work under "natural disaster" conditions to protect Government property. Rosendo's affidavit states that "When a work/order is issued for clean up of Base and HFH of debris, down limbs, and limbs hanging from trees a routine work/order is issued." Affiant Lisa Gardill submitted a list of the work orders issued under contract 0002. None was for removing damaged tree limbs after ice storms except

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order F-1429. The record evinces no course of dealing between the parties with respect to ordering of tree limb removal after storms.

SEI commenced removing tree limbs before issuance of a written work order (complaint & answer). At about 9:00 A.M. on 8 November 1990 respondent issued written work order F-1429 requiring SEI to "Pick-up limb [sic] from storm damage" on the base and military family housing areas, with an "X" entered in the box designated "routine" (R4, tab 2). SEI completed work order F-1429 on 19 November 1990 (complaint & answer).

SEI's invoice No. 04440 dated 31 December 1990 for work order F-1429 requested payment of $5,299.08 for "storm damage clean up," cited 454.25 direct labor hours incurred between 14 and 21 November 1990, and did not expressly characterize such services as "emergency" (R4, tab 3).

On 29 January 1991 respondent declined to pay SEI's invoice 04440 on the ground that such work was included in the services under contract Section C-5, ¶ 5.1.4.5, and the contracting officer had never authorized performance of services requiring payment in addition to the fixed monthly cost (R4, tab 3). SEI's 5 February 1991 letter to the contracting officer argued that work order F-1429 services were of an "emergency nature" (enclosure 6 to SEI's complaint), but respondent denied receipt of that letter (complaint & answer, ¶ 14). At no time before February 1991 did SEI dispute the "routine" (rather than "emergency") designation entered on work order F-1429.

Respondent verbally declined to pay invoice 04440 at a 14 June 1991 meeting with SEI (R4, tab 5). SRI resubmitted its claim and invoice 04440 on 19 August 1992 (R4, tab 6). The contracting officer's 23 October 1992 final decision denied that claim and SEI timely appealed (R4, tabs 10, 11):

DECISION

Appellant has the burden of proving its claim. Aside from the evidentiary niceties of unsworn, unsigned, undated notes versus affidavits, the undisputed facts dictate the correct interpretation of the parties' actions on 8 November 1990 with respect to work order F-1429.

First, the task in work order F-1429 most nearly approaching protection of Government property damaged by natural disaster was removal of Reese Air Force Base tree limbs broken by ice which endangered electric power lines over military family housing, which work respondent performed. SEI's work removing other tree limbs was not to protect government property (but presumably to protect unwary passers-by below).

Second, had SEI's Tatum clearly notified Messrs. Howland and Rosendo that SEI's tree limb removal work was an "emergency action," surely he would have immediately questioned their designation of that work as "routine" in the written work order Tatum received approximately two hours after the oral discussion. SEI did not notify respondent that it considered such work to be an "emergency action" until nearly three months later at the earliest.

Third, Tatum's notes say that he had read the contract section on "storm damage" before his 8 November 1990 oral conversation with Messrs. Howland and Rosendo; they do not say that he mentioned "emergency" to Howland and Rosendo. Respondent used the phrase "storm damage" in work order F-1429. But "storm damage" is not the contractual equivalent of "emergency action" to protect Government property damaged by a natural disaster, but rather is an isolated definition nowhere appearing in Section C-1, ¶ 1.6.2.1, or Section C-5, ¶ 5.1.4.5, or elsewhere in the contract provisions. The statements of both parties' representatives on 8 November 1990 were not inconsistent and appear to be truthful.

Fourth, the record contains no contractual course of dealing by which we can determine whether the tree limb removal in work order F-1429 was mutually understood to be a "routine" or "emergency" action.

We hold that SEI's tree limb removal work was ordered properly under ¶ 5.1.4.5 of Section C-5 and there was no enforceable agreement to designate work order F-1429 as "emergency." We deny the appeal.

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[¶ 26,291] Neossolutions, Inc.

ASBCA No. 45997, August 12, 1993.

Contract Disputes, Claims—Submission to Contracting Officer—Claim Not Presented.—A board of contract appeals lacked jurisdiction to hear a contractor's claim for compensation for furnishing food wash to the government, despite the contractor's contention that it provided the product at the request of an unidentified representative who contacted the contractor by telephone and claimed that the product was necessary to support the military effort in Saudi Arabia, because the contractor never submitted a proper claim to the contracting officer under the Contract Disputes Act. During a telephone prehearing conference, the board explained the disputes process to the contractor, and the contractor indicated that it had never filed a claim with the contracting officer.

For the appellant: Dr. P.J. Adams, Owner. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Mitchell R. Chitwood, JAGC, Trial Attorney.

Before DELMAN, SPECTOR, and VAN BROEKHOVEN, Administrative Judges.

DELMAN, Administrative Judge: Under this appeal, Neossolutions, Inc. seeks $70,000 for furnishing a certain quantity of "food wash" to the Department of the Army. The contractor contends that it provided this product to the Government at the request of some unidentified representative from Fort Hood, Texas, who contacted appellant by telephone and claimed that the product was needed to support the military effort in Saudi Arabia. According to appellant, the Government "representative" promised to send documentation confirming the order. Appellant never received any documentation.

The Government has moved to dismiss this appeal, contending that the Board is without jurisdiction. The Government contends, *inter alia*, that Neossolutions failed to submit a proper claim to a contracting officer under the Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq.* The Board convened a telephone prehearing conference to discuss the matter. The Board explained to appellant's owner the disputes process under the CDA, and asked whether appellant ever filed a claim with the contracting officer. Appellant agreed with the Government that no such claim had ever been filed.

The CDA requires a contractor to file its claim with the contracting officer for decision under the Act. 41 U.S.C. § 605(a). Absent the submission of such a claim, we do not have jurisdiction. *See Paragon Energy Corporation v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). *Checker Moving*, ASBCA No. 32654, 87-1 BCA ¶ 19,357.

Accordingly, we dismiss this appeal without prejudice to the submission of a claim to the contracting officer. If the claim is in excess of $50,000, it should also be certified. 41 U.S.C. § 605(c)(1).

[¶ 26,292] Engineered Maintenance Services

ASBCA No. 45261, August 16, 1993. Contract No. DAAH03-89-C-3050.

Contract Disputes, Certification—Authority—Recertification.—The Federal Courts Administration Act of 1992, which amended the Contract Disputes Act's certification requirements by providing that a defect in certification did not deprive a board of contract appeals of jurisdiction, applied to a contractor's appeal under its contract for the installation of fire protection systems, because the postmarked date, which was presumed to be the mailing date, indicated that the amendment was in effect when the appeal was filed. The government contended that under the Federal Acquisition Regulations, the certifier was not qualified to certify the contractor's claim. The board held that it was not required to determine whether the certifying official qualified under the FAR provision and that the contractor was required to submit a revised certification complying with the amendment's requirement that the certification state that the certifier was duly authorized to certify the claim. After the contractor submitted a revised certification, the government would advise the board as to whether the certifier was qualified under the amended standards.

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For the appellant: Leo & Associates, Huntsville, Alabama, by Karl W. Leo. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Timothy M. Connelly, JAGC, Trial Attorney.

Before RUBERRY, SPECTOR, and FREEMAN, Administrative Judges.

RUBERRY, Administrative Judge: The Government, arguing appellant's claim was not properly certified, moves to dismiss the appeal. Appellant contends that the Federal Courts Administration Act of 1992 permits the Board to exercise jurisdiction over its appeal.

STATEMENT OF FACTS

Appellant was awarded contract DAAH03-89-C-3050 for the installation of Halon fire protection systems in various buildings at Redstone Arsenal, Alabama (R4, tab 1). On 7 July 1992, appellant filed a claim with the contracting officer for $61,142.00 for delays and additional work (R4, tab 39). Appellant's claim included a certification executed by James D. Trapane, appellant's Vice-President.

The contracting officer denied appellant's claim in its entirety on 8 September 1992 (R4, tab 41). Appellant filed a timely notice of appeal with the Board. The envelope containing appellant's notice of appeal, dated 28 October 1992, was postmarked 29 October 1992.

The Government filed a motion to dismiss asserting that Mr. Trapane was not a proper individual to certify appellant's claim under Federal Acquisition Regulation 33.207(c)(2).* Appellant asserts that Mr. Trapane satisfies the FAR requirements, but that, in any event, its appeal was filed after the effective date of the Federal Courts Administration Act which provides that proper claim certification is no longer a jurisdictional requirement. It also has submitted an affidavit of its president which states, in pertinent part, as follows:

> 2. Since January 1, 1991, James D. Trapane has been Vice President of EMS. During 1989 and 1990, James D. Trapane was Corporate Treasurer of EMS. James D. Trapane is the senior company official in charge of the Halon Systems project designated Contract No. DAAH03-89-C-3050 ("Contract") which is the subject of the current appeal ("Project"). James D. Trapane has overall responsibility for the conduct of EMS's affairs for the Project. In addition, James D. Trapane has general authority to bind EMS with respect to any of its legal and financial affairs, including all power and authority necessary to authorize the appeal of any decision of the Contracting Officer with respect to any federal government contract which EMS is performing.
>
> 3. The authority described in Paragraph 2 above has been in place at all times relevant to the Project, including July 7, 1992 when he executed the Certification of Claims....

The Government disputes application of the Federal Courts Administration Act, arguing that the 29 October 1992 postmark did not nullify the possibility that appellant's notice of appeal was in the control of the United States Postal Service on 28 October 1992.

DECISION

The Federal Courts Administration Act of 1992 amended the certification requirements of the Contract Disputes Act, 41 U.S.C. §605(c), to provide that a defect in the certification of a claim does not deprive a court or board of contract appeals of jurisdiction over the claim. P.L. No. 102-572, 29 October 1992 §907(a), 106 Stat. 4506. This amendment applies to those claims filed before, on, or after 29 October 1992. Excluded from the amendment's coverage are those claims which were the subject of an appeal to an agency board of contract appeals or a suit in the United States Court of Federal Claims before 29 October 1992.

Appellant's notice of appeal was dated 28 October 1992 but postmarked on 29 October 1992. There is a presumption that the postmarked date is the date of mailing—not the date of the letter or notice. *Hugo Auchter GmbH*, ASBCA No. 39642, 91-2 BCA ¶23,777. The Government has not rebutted this presumption. Therefore, the 29 October 1992 postmark on appellant's notice of ap-

* Federal Acquisition Regulation 33.207(c) defines those individuals who may execute the claim certification on behalf of a corporate contractor:

> (2) If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

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peal is controlling and the appeal was not filed before the effective date of the CDA amendment.

Thus, the Federal Courts Administration Act of 1992 applies to this appeal and we need not determine if Mr. Trapane qualified under the FAR provision, *supra*. Pursuant to this statute, a certification "may be executed by any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 605(c)(7). Accordingly, within 30 days from receipt of this decision: appellant shall submit a revised certification complying with the amendment's requirement that the certification state that "the certifier is duly authorized to certify the claim," and the Government shall advise the Board whether it contends that Mr. Trapane is not qualified to certify appellant's claim under the revised standard and file its answer.

[¶ 26,293] Source AV Inc.

ASBCA No. 45192, August 6, 1993. Contract No. F07603-89-D-4000.

Contract Disputes, Claims—Submission to Contracting Officer—Claim Not Presented.—Dismissal of those counts of a contractor's complaint regarding a Department of Labor classification in connection with a contract for audio-visual services was proper because matters raised in several counts of the complaint were not contained in the claim presented to the contracting officer.

For the appellant: Sweeney & Yetman, Mount Holly, New Jersey, by John P. Yetman, Jr. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Maj. William M. Lackermann, Jr., USAF, Trial Attorney.

Before RUBERRY, RIISMANDEL, and AXELMAN, Administrative Judges.

RUBERRY, Administrative Judge: Appellant seeks damages for alleged Government interference with contract performance related to increased costs associated with a Department of Labor (DOL) classification of workers. The Government moved to dismiss for lack of jurisdiction, and appellant responded. Both parties also responded to the Board's invitation to address the legal implications, if any, of the recent decision of the U.S. Court of Appeals for the Federal Circuit in *Burnside-Ott Aviation Training Center, Inc. v. United States* [38 CCF ¶ 76,479], No. 92-5034, 17 February 1993, 12 FPD ¶ 14.

STATEMENT OF FACTS

In 1989 the Air Force (hereinafter referred to as the Government) awarded appellant contract No. F07603-89-D-4000 for audio-visual services at Dover Air Force Base, Delaware (R4, tab 1). The contract was subject to the Service Contract Act (SCA) of 1965, 41 U.S.C. § 351, *et seq.*, and included two DOL Wage Determinations, 86-1029 and 86-1034 (Rev. 2, dated 17 September 1987). Included in the contract also was a "Statement of Wage and Fringe Benefit Rates Applicable To Federal Wage Board (Blue Collar) Employees ... (*For Information Only*)," which contained the statement that: "The rates cited on this sheet are not to be used in calculating bids. The rates on this form merely indicate rates that are paid to federal employees for the services called for herein." The rates recited were for four classifications of Government employees: Supervisory Visual Information Specialist, GS-9, Illustrator, GS-7, Photographer, GS-5, and Audio Visual Clerk-Typist, GS-4.

The contract included Defense Acquisition Regulation (DAR) clause 7-1903.41(a), "Service Contract Act (SCA) of 1965, as amended" (January 1984) and DAR clause 7-1905(b), "Fair Labor Standards Act and Service Contract Act—Price Adjustments (Multi-Year and Option Contracts)" (September 1979) (R4, tabs 7, 8) which required that all employees be paid not less than the minimum wage and furnished fringe benefits specified by the relevant DOL wage determinations. The contractor was also required to classify employees not listed in the wage determination so as to provide a reasonable relationship between unlisted classifications and classifications listed in the wage determination.

The contract also included a "Disputes Concerning Labor Standards" provision, which identified the DOL procedures for resolving disputes concerning labor standards requirements and noted that such disputes were subject to DOL procedures and not the Disputes clause of the contract. In

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addition, the contract provided: "[d]isputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, The U.S. Department of Labor, or the employees or their representatives." The contracting officer was also required to withhold funds, if requested by the DOL, to pay underpaid contractor employees (R4, tab 7).

The contract was modified on several occasions in 1989 and 1990 to incorporate revisions to the two wage determinations in the original contract (R4, tabs 2-6). In October 1990, the Government contract administrator noted "discrepancies" contained in payroll information appellant had previously submitted in support of claimed increases in the contract price resulting from the new wage determinations in that two of appellant's four hourly employees had not received wage increases which had been previously incorporated into the contract. This information was forwarded to the DOL (R4, tabs 11-13).

The resulting DOL investigation revealed $34,672.57 in alleged SCA violations resulting from appellant's failure to pay required fringe benefits and to properly classify and pay six employees (including the two originally identified by the contract administrator). On 5 August 1992, DOL directed the contracting officer to withhold those funds from contract payments otherwise due appellant (R4, tab 23).

It should also be noted that on 29 March 1991, appellant submitted two conformance requests through the contracting officer for DOL authorization of additional classifications for new audio-visual positions. The contracting officer agreed with one proposal and disagreed with the other (R4, tabs 15, 16).

On 12 August 1992, appellant submitted a "protest" to the contracting officer in which it challenged the validity of the information provided to DOL and asserted that the erroneous Government information had resulted in $29,546 in "direct damages" and $8,323 in "additional damages" for "alternative" contract performance. Appellant stressed that it was not challenging the actions of DOL in directing the withholding of funds or utilizing the Disputes clause for that purpose. Rather, it claimed that it had been misled into relying on the "Statement of Federal Wage and Fringe Benefit Rates" in determining the complexity of the work and classifying employees under the SCA. Specifically, appellant objected to the inclusion of the Illustrator and Photographer GS classifications. However, the "direct damages" claimed corresponded to the amount DOL had notified appellant was due for misclassification violations. (R4, tab 25)

On 3 September 1992, DOL informed the contracting officer, that as a result of negotiations with appellant, funds currently being withheld could be released, but that the final contract payment (for September 1992) should be withheld until further notice (R4, tab 27). Apparently, DOL has not made a final determination in the matter.

The contracting officer rejected appellant's contention that Government misinformation had harmed appellant by final decision, dated 16 September 1992. The contracting officer indicated that any reliance by appellant on Wage and Fringe Benefit Rates attached to the contract (for informational purposes) had been misplaced and that any questions regarding proper employee classification should be directed to DOL (R4, tab 29). On 3 October 1992, appellant appealed this matter to the Board.

Appellant, in its formal complaint, dated 23 December 1992 and divided into seven counts, reiterated its position that the contracting officer had provided DOL false information (first count). In addition, it claimed that the Government had failed to negotiate in good faith (third count) and held appellant to a different standard of performance than called for in the contract (second count); that the Air Force subsequently used personnel with grades lower than or equivalent to the grades appellant had used (fourth count); and that it had been wrongfully denied a contract extension (sixth count) and the opportunity to bid on a successor contract (seventh count). Appellant sought $14,440 (fifth count) for contract performance (final payment withheld at DOL direction) and $8,500 for "alternative" contract performance (not explained), and for fees and costs. The complaint does not mention any alleged ambiguity.

DECISION

The Government contends that DOL has exclusive jurisdiction over this matter because appellant's complaint is related to a DOL classification determination. Appellant responds that the Board retains jurisdiction because this is a contract dispute arising out of contract ambiguity.

The matters raised in the second, third, fourth, sixth and seventh counts of appellant's complaint were not contained in the

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claim presented to the contracting officer and, therefore, must be and are dismissed. *See, Freeman General, Inc.*, ASBCA No. 34611, 89-2 BCA ¶ 21,809. In addition, this Board is without authority to grant relief for denial of an opportunity to bid on a solicitation. *See Coastal Corp. v. United States* [31 CCF ¶ 71,373], 713 F.2d 728, 730 (Fed. Cir. 1983).

With respect to the first count (the contracting officer's provision of allegedly false information to DOL) and the fifth count (the claim for the final payment which was withheld), it appears that a final DOL decision has not been issued as to the alleged misclassification violations. *Cf. Burnside-Ott, supra.* Accordingly, this remaining aspect of the appeal is premature and is dismissed without prejudice to its reinstatement when DOL has issued its decision. *See M.A. Mortenson Company*, ASBCA No. 45584, 93-3 BCA ¶ 26,238, 22 July 1993.

[¶ 26,294] L. A. Downey & Son, Inc.

ASBCA No. 45180-693, August 5, 1993. Contract No. DACA54-90-C-0001.

Contract Disputes, Certification—Adequacy—Scope of Certification.—A contractor's revised certification of its aggregated claims was proper, despite the government's contention that the certification was defective, because the word "claim" in the contractor's transmittal letter, preceding the revised certification, referred unambiguously to the total package and the certification applied to all four claims included in the package. The transmittal letter referred to the package as a single "request" and stated the aggregate total of the individual claims in the request.

Contract Disputes, Certification—Authority—Federal Courts Administration Act of 1992.—A contractor's revised certification of its aggregated claims was proper, despite the government's contention that the contractor's certifying official was not authorized to execute the certification on the contractor's behalf, because the certifier was authorized to bind the contractor with respect to the claim, as required by the Federal Courts Administration Act of 1992. Although the Act was enacted after the contractor submitted its claims, it applies to all claims submitted before or after enactment, except those appealed or on which suit was filed before enactment. An application for an order under the Act is not an appeal, and no appeal or suit was brought on the contractor's claims before enactment. The contractor submitted an affidavit stating that the certifier was duly authorized to bind the contractor with respect to the claims asserted. Moreover, the certifier signed the bid for the contract on the contractor's behalf.

For the appellant: Anderson, Broadfoot, Johnson, Pittman, Lawrence & Butler, Fayetteville, North Carolina, by T. Alan Pittman. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Caroline J. Struthers, Engineer Trial Attorney, U.S. Army Engineer District, Wilmington, North Carolina.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: This application was submitted by L.A. Downey & Son, Inc. (Downey) for an order pursuant to 41 U.S.C. § 605(c)(4) directing the contracting officer to issue a decision on four claims. After the application was submitted, the contracting officer decided two of the claims which were in amounts less than $50,000. Two claims in amounts greater than $50,000 remain undecided, allegedly for lack of proper certification.

All four claims were submitted to the contracting officer on 28 May 1992 as a certified package in the aggregate amount of $200,839.09. Upon advice of the contracting officer that the certification was defective, Downey submitted a revised certification on 29 June 1992. The letter containing the revised certification was signed by Robert E. Bittner, Vice President, and read as follows:

> In accordance with Federal Acquisition Regulation, FAR 52.233-1 DISPUTES (Apr 1984), L.A. Downey and Son, Inc., hereby submits its request to the Contracting Officer for a Written Decision.
>
> The accompanying Request for Equitable Adjustment of Contract Cost Increase is supported by four (4) separately identified

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claims which are in the aggregate amount of TWO HUNDRED THOUSAND EIGHT HUNDRED THIRTY NINE AND 09/100 ($200,839.09) DOLLARS.

L.A. Downey, Inc., certifies that—

(1) The claim is made in good faith;

(2) Supporting data are accurate and complete to the best of the contractor's knowledge and belief; and

(3) The amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

The Government contends that the foregoing certification is defective because (i) the word "claim" is ambiguous as to which of the four claims is being certified; and (ii) Mr. Bittner was not a proper person to execute the certification on the contractor's behalf. Both contentions are without merit.

Downey's four claims were submitted as a package. The paragraph in the 29 June 1992 transmittal letter immediately preceding the revised certification referred to the package as a single "request" and stated the aggregate total of the individual claims in the request. In this context, the word "claim" referred unambiguously to the total package in the amount of $200,839.09 and the certification applied to all four claims therein.

Pursuant to 41 U.S.C. § 605(c)(7), a claim certification "may be executed by any person duly authorized to bind the contractor with respect to the claim." Section 605(c)(7) was enacted after Downey's claims were submitted. However, it applies to all claims submitted before or after its enactment, except those appealed or on which suit was filed before enactment. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a)(2), 106 Stat. 4506 (29 October 1992). An application for an order under 41 U.S.C. § 605(c)(4) is not an appeal, *Honeycomb Co. of America, Inc.*, ASBCA No. 33936-246R, 88-1 BCA ¶ 20,284, and no appeal or suit was brought on Downey's claims before section 605(c)(7) was enacted. Accordingly, that section is applicable to the certification of Downey's claims.

Downey has submitted the affidavit of its President stating that Mr. Bittner is duly authorized to bind Downey with respect to the claims asserted. This affidavit is further supported by evidence that the bid for the contract was signed on Downey's behalf by Mr. Bittner. We find on this evidence that Mr. Bittner meets the requirements of section 605(c)(7).

The revised certification submitted 29 June 1992 being valid, the contracting officer is directed to decide the two undecided claims within 60 days of receipt of this decision. Since this order completes all necessary action by the Board, the case is dismissed. If the contracting officer should fail to comply with this order, such failure will be deemed a decision by the contracting officer denying the claim and the contractor may appeal to this Board or sue in the U.S. Court of Federal Claims.

[¶ 26,295] Carlson Construction Group, Inc.

ASBCA No. 42532, August 11, 1993. Contract No. N62467-85-C-0631.

Contract Disputes, Certification—Authority—Overall Responsibility.—Certification of a contractor's appeal by its president was valid, despite the president's use of the wrong letterhead, because the certifier was the contractor's president at the time he executed the certification and he intended to and did sign as president of the contractor. Certification by a corporate officer without explanation implies that the contractor is representing that the certifier has the requisite overall authority.

Procedure, Boards—Parties—Successor in Interest.—An appeal filed on behalf of an alleged successor contractor under a construction contract between the government and a prime contractor was properly dismissed for lack of privity of contract between the appellant corporation and the government because the appellant was not a successor in interest to the prime contractor. The appellant did not contend that the government impliedly recognized it as the successor in interest to the prime contract.

For the appellant: Holbrook, Akel, Cold, Akel & Holbrook, P.A., Jacksonville, Florida, by John R. Stiefel, Jr. For the government: Arthur H. Hildebrandt, Navy Chief Trial

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Attorney, and Anthony Dowdle, Trial Attorney, Chesapeake Division, Naval Facilities Engineering Command, Washington, D.C.

Before DICUS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: Respondent has filed a Motion to Dismiss alleging lack of standing and the Board, *sua sponte,* has questioned its jurisdiction in this appeal. The Board has raised the propriety of both the certification and the sponsorship of the underlying claim. Appellant has filed supplements to the record in response to each of these issues.

STATEMENT OF FACTS

Contract No. N62467-85-C-0631 was awarded to Carlson Florida Construction Services, Inc. (Carlson Florida) on 2 February 1989 (R4, tab 3). By letter of 4 September 1990 Carlson Florida filed a claim certified by its secretary, James A. Morrison, on behalf of its second tier subcontractor, Atlantic Insulation Inc. (Atlantic), in the amount of $171,912.00 (R4, tab 12). As the claim was addressed to the Resident Officer In Charge of Construction, respondent advised Carlson Florida that the claim should be sent to the contracting officer in a 2 October 1990 letter. Respondent also questioned whether Mr. Morrison was an appropriate official to certify the claim (R4, tab 13). Thereafter, by letter dated 17 October 1990 addressed to the contracting officer and on Carlson Constructors of NC, Inc. (CCNC) stationery, the claim was certified under signature of Nick Cawood, President (R4, tab 14). The claim was denied in a final decision dated 28 November 1990 (R4, tab 15). A Notice of Appeal dated 25 February 1991 was filed by George D. Wenick on behalf of Carlson Construction Group, Inc. (Carlson) "successor of Carlson Florida Construction Services, Inc." (R4, tab 16). The Notice of Appeal identifies the amount in controversy as $153,647.00 and attached the contracting officer's final decision. Mr. Wenick, attorney for Carlson, withdrew thereafter in favor of Mr. Stiefel, Jr. (letter of 4 March 1991).

Respondent filed a Motion to Dismiss on 9 March 1992, asserting that, as the contract was awarded to Carlson Florida, Carlson has no privity of contract with respondent and thus no standing to appeal. The Motion is supported by a Declaration stating that Carlson Florida is a corporation in good standing in the state of Delaware, that the contract has never been modified to change the contractor's name, and that a novation agreement has never been executed (Declaration of Gordon Ivins). Accordingly, we find respondent has not expressly recognized a successor in interest to Carlson Florida.

On 2 April 1992 the Board issued a letter directing Mr. Stiefel to state his position with respect to whether Mr. Morrison or Mr. Cawood satisfy the requirements of FAR 33.207 regarding claim certification, and whether Carlson Florida or its successor consent to sponsor the claim. As to the latter point, the Board requested evidence that Carlson Florida or its successor authorized the appeal, and consented to continued sponsorship, Mr. Stiefel's representation, and to be bound by the Board's decision.

In response, appellant provided a copy of a Cooperation Agreement between Carlson, Seaboard Surety Company, CNF Constructors, Inc. (the first tier subcontractor), and Atlantic. The Agreement identifies Carlson as the party entering into the underlying contract with the Navy, establishes that Carlson filed the instant appeal on behalf of Atlantic, that Atlantic and its attorney will conduct the appeal, and Carlson and CNF agree to assist Atlantic "in every reasonable manner in connection with the ASBCA Appeal [sic]." We conclude, therefore, that the appeal predates the Agreement. Although the copy of the Agreement is signed only by Atlantic's president, the letter from counsel with which it was enclosed states that the Agreement was signed and dated by all parties. The letter also represents that Carlson Florida, while still in existence, is no longer operational and has no employees or bank accounts. Carlson Florida's business affairs, according to the letter, are handled by Carlson (letter of 5 May 1992).

Enclosed with the letter are affidavits from Mr. Cawood and Mr. Morrison. Mr. Morrison affirms that he was Secretary of Carlson Florida when he executed the claim certification on 30 August 1990 (Morrison affidavit). Mr. Cawood states:

> 1. At the time I executed the October 17, 1990 [certification] letter at the request of Phil Robbins, ... Resident Officer in charge of construction.
>
> 2. At the time I signed on the letterhead of Carlson Constructors of N.C., Inc., my signature, Nick Cawood, President was in the capacity of President of Carlson Florida Construction Services, Inc.
>
> 3. The relationship between Carlson Florida Construction Services, Inc. and

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Carlson Construction Group, Inc. was that Carlson of Florida Construction Services, Inc. is a wholly-owned subsidiary and division of Carlson Construction Group, Inc.

4. The Notice of Appeal, signed the [sic] February 25, 1991 by George Wenick, accurately reflects that Carlson Construction Group, Inc. is successor in interest to Carlson Florida Construction Services, Inc. and did give permission to CNF and Atlantic Insulation to perfect the appeal and pursue it on behalf of Carlson Construction Group, Inc.

5. On October 17, 1990, I intended to sign the certification as Nick Cawood, President of Carlson Florida Construction Services, Inc., and, in fact, sign [sic] as President and on behalf of that corporation.

(Cawood affidavit)

At the Board's request, the affidavit of Patricia O'Donnell was filed, stating that she has knowledge of the books and records of Carlson Florida and Carlson, and asserting:

2. On January 1, 1990, Carlson Construction Group, Inc. (which subsequently changed its name to SAE Americon Construction Group, Inc. on December 13, 1990) purchased all of the stock of Carlson Florida Construction Services, Inc.

3. On January 1, 1991, the Carlson Group, Inc. (Delaware) purchased all of the stock of Carlson Florida Construction Services, Inc. from SAE Americon Construction Group, Inc. (formerly Carlson Construction Group, Inc.)

(O'Donnell affidavit)

DECISION

Respondent argues that the certification was invalid because it was filed by the wrong corporation. Further, it is argued that Carlson lacks standing because respondent has never recognized Carlson as successor in interest to Carlson Florida and is not in privity of contract with respondent. Appellant argues that it has cured any impediments to proceeding and points out that respondent has offered no case law supporting its arguments.

The Contract Disputes Act requires that for a claim against the Government totalling more than $50,000:

> the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(41 U.S.C. § 605(c)(1))

The Federal Acquisition Regulation ("FAR"), which implements the Act, limits the corporate officials who may certify a claim to:

> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(FAR 33.207(c)(2), 48 C.F.R. § 33.207(c)(2) (1990)) Failure to comply with section 605(c)(1) of the Act and its implementing regulations deprives the Board of jurisdiction to hear the claim. *Grumman Aerospace* [36 CCF ¶ 76,013], 927 F.2d 575 (Fed Cir. 1991); *see Ball, Ball & Brosamer, Inc. v. United States* [35 CCF ¶ 75,681], 878 F.2d 1426, 1428 (Fed. Cir. 1989) (certification requirement is a jurisdictional prerequisite).

Mr. Cawood asserts that he was president of Carlson Florida at the time he executed the certification and that, notwithstanding the use of the wrong letterhead, he intended to and did, in fact, sign as president of Carlson Florida. In *United States v. Newport News Shipbuilding and Dry Dock Co.* [37 CCF ¶ 76,095], 933 F.2d 996 (Fed. Cir. 1991), the Court held that "certification by a corporate officer, without explanation, necessarily implies that the contractor is representing that he has the requisite 'overall authority,' at least where his title is not inconsistent therewith." *Id.* at 998, n. 2. We thus conclude that Mr. Cawood's 17 October 1990 execution was a proper certification of appellant's claim.

As to the issue of Carlson's standing, the evidence of record provides a convoluted trail. However, it is established that Carlson purchased the stock of Carlson Florida on 1 January 1990. Thus, Carlson owned Carlson Florida at the time the claim was properly certified on 17 October 1990. However, Carlson was divested of its interest in Carlson Florida on 1 January 1991 when all of Carlson Florida's stock was purchased from Carlson by The Carlson Group, Inc. (Carlson Group). When the appeal was filed on 25 February 1991, Carlson held no stock in Carlson Florida. As far as this record is concerned, there was no connection between Carlson and Carlson Florida at the time of the appeal. Further, the Cooperation Agreement was executed after filing of this appeal and Carlson Florida is not mentioned therein. Accordingly, the record does not establish a basis for the assertion in the Notice of Appeal that Carlson was at that time successor in interest to Carlson Florida. To the

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contrary, the record establishes that Carlson Group owned the stock of Carlson Florida and was on 25 February 1991 the most likely candidate for Carlson Florida's successor in interest among the entities identified.

Respondent argues that the Anti-Assignment Act, 41 U.S.C. § 15, generally prohibits transfer of Government contracts. Although there are exceptions for financial institutions in the statute, none apply here. Respondent notes that FAR 42.1204 permits the Government to recognize a successor in interest when that party's interest arises from transfer of all assets or the entire portion of the assets involved in performing the contract. Here, the Government has not recognized a successor in interest. Moreover, there is no evidence of transfer of assets, only sale of stock. The two actions have decidedly different consequences. *The Kellogg Bridge Company v. United States,* 15 Ct. Cl. 111 (1879). Appellant does not argue that respondent has impliedly recognized Carlson as successor in interest to Carlson Florida.

Although not raised by either party, we believe as the contract has been performed, it is the Assignment of Claims Act, 31 U.S.C. § 3727, that is most applicable here. *Tuftco Corp. v. United States* [27 CCF ¶ 80,097], 614 F.2d 740 (Ct. Cl. 1980). While the Cooperation Agreement gives credence to Carlson's ownership of the claim, that Agreement also identifies Carlson as entering into the underlying contract with the Navy. As Carlson Florida was the prime contractor, the genesis of Carlson's interest in the claim is erroneously stated in the Agreement. Finally, while there is serious doubt that purchase of the stock of Carlson Florida is adequate to support Carlson's right to pursue the claim in any event, *The Kellogg Bridge Company, supra,* the factual record here establishes that Carlson did not own Carlson Florida's stock at the time of the appeal. Thus, the admonition to apply the anti-assignment statutes pragmatically cannot overcome the evidence in the record that Carlson is not successor in interest to Carlson Florida. *Cf. United International Investigative Services v. United States* [38 CCF ¶ 76,369], 26 Cl. Ct. 892 (1992).

The Contract Disputes Act of 1978, 41 U.S.C. § § 601-613 (CDA), provides at § 601(4) "the term 'contractor' means a party to a Government contract other than the Government." For the Board to have jurisdiction, we must conclude that Carlson was lawfully substituted for Carlson Florida as the "contractor." *CBI Services, Inc.,* ASBCA No. 34983, 88-1 BCA ¶ 20,430. For the reasons stated above, we cannot do so. The appeal is dismissed.

[¶ 26,296] Construcciones Electromecanicas S.A.

ASBCA No. 41413, August 17, 1993. Contract No. F66501-87-C-0026.

Procedure, Boards—Evidence—Settlement Offers.—A government motion to strike documents that referred to a settlement agreement was denied because the purpose of the evidence was to show that the settlement agreement was breached, rather than to show the merits of the underlying dispute. Evidence of a settlement agreement is admissible to prove the parties' undertakings in the agreement in connection with the contention that a party broke the agreement.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—A contractor's motion for summary judgment was denied, despite the contractor's contention that the dispute had been settled by agreement of the parties, because the contractor failed to show that the existence of an enforceable settlement agreement was undisputed. The government's affidavit indicated that there was a factual dispute concerning whether the government signed such an agreement. Moreover, a government memorandum asserted that the agreement was subject to approval of a directorate, and the record did not establish such approval.

For the appellant: De Obaldia & Garcia De Paredes, Panama City, Republic of Panama, by Carlos A. De Obaldia. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Mary L. Broerman, Trial Attorney.

Before DICUS, SPECTOR, and VAN BROEKHOVEN, Administrative Judges.

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DICUS, Administrative Judge: Appellant has filed a Motion for Summary Judgment alleging that the dispute in this appeal was settled by agreement of the parties. Respondent denies that the agreement was consummated and has filed a Motion to Strike, alleging that certain documents submitted by appellant are inadmissible under Fed. R. Evid. 408.

We deal first with respondent's Motion to Strike, as it would have us exclude certain evidence in deciding appellant's Motion for Summary Judgment. Respondent seeks the exclusion of certain documents and portions of documents which reference settlement negotiations, include specific dollar figures presented during settlement negotiations, or both. Respondent cites Fed. R. Evid. 408, which provides:

> RULE 408. Compromise and Offers to Compromise
>
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

We agree that Rule 408 is broad enough to cover the documents and portions of documents to which respondent objects. However, where the purpose of the evidence is to establish that the settlement agreement was breached, and not the merits of the underlying dispute, the evidence may be admissible. "Obviously, a settlement agreement is admissible to prove the parties' undertakings in the agreement, should it be argued that a party broke the agreement." *Cates v. Morgan Portable Building Corp.*, 780 F.2d 683, 691 (7th Cir. 1985). Similarly, in *Central Soya Company, Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982), the Court found error in excluding testimony on settlement negotiations under Rule 408:

> Rule 408 excludes evidence of compromises and offers to compromise, and of 'statements made in compromise negotiations.' Although this language is broad enough to cover Haack's testimony, the purpose of the rule must be considered. It is to encourage settlements. The fear is that settlement negotiations will be inhibited if the parties know that their statements may later be used as admissions of liability. But Haack's testimony was not offered for the purpose of demonstrating that Central Soya was or was not liable to Aquarium Farms for breach of its contract to supply a complete catfish feed. The purpose was to demonstrate what the terms of the settlement of Aquarium Farms' claim were. 'Where the settlement negotiations and terms explain and are a part of another dispute they must often be admitted if the trier is to understand the case.' 2 Weinstein & Berger, Weinstein's Evidence ¶ 408[5], at 27 (1981). That is this case.

Appellant's summary judgment motion is based on appellant's allegation that an enforceable settlement agreement was negotiated by the parties. For the Board to understand this issue fully, we need to consider the alleged agreement. Because there is no executed bilateral agreement in the record, documentary evidence relating to negotiations and the fruits of negotiations, including evidence as to the consummation, or the failure to consummate, the alleged agreement, is material to the issue of whether an enforceable agreement ever came into being. Consideration of the evidence is therefore within Rule 408's purpose, which is to encourage settlements. *Central Soya Company, Inc., supra.* Accordingly, for purposes of this Motion for Summary Judgment only, respondent's Motion to Strike is denied.

FINDINGS OF FACT

1. Contract F66501-87-C-0026 was executed between appellant and respondent on 18 September 1987 (R4, tab 1). The contract included the Secretarial Approval of Contract (APR 1984) clause, requiring approval of the contract by the Secretary or a duly authorized representative. Appellant filed a claim in the amount of $235,134.61 on 14 May 1990 (R4, tab 77). When a final decision was not issued within 60 days, this appeal was filed by letter of 19 July 1990 (R4, tab 86). The claim was amended 21 September 1990 to $267,934.07 (R4, tab 91).

2. By letter of 22 October 1990 respondent requested a meeting to discuss settlement on

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26 October 1990 (R4, tab 96). The parties thereafter jointly requested a stay of proceedings, which was granted (R4, tab 95). Discussions continued into November and the following memorandum was sent from the contracting officer to counsel on 16 November 1990 with a copy to appellant:

> 1. On 16 Nov 90 a settlement agreement of $294,135 was reached for subject claim. This settlement agreement settles all associated costs under the Contractors claim dated 14 May 90 and its update of 21 Sept 90. Additionally, it settles all associated costs including extended overhead and unabsorbed home office overhead up to the current contract completion date of 05 Feb 91. The settlement agreement also includes the cost to definitize Modification P00012 and the Contractor's waiving of all interest under subject claim.
>
> 2. Due to the dollar amount of the settlement agreement, the Directorate of Contracting Headquarters Tactical Air Command approval is required. The Contracting Officer Officer [sic] anticipates issuance of final settlement agreement by 15 Dec 90.

(R4, tab 101)

3. Appellant maintains the agreement was subject only to legal approval, and that it was signed (Motion at 6). The contracting officer asserts that "no bilateral documents were signed consummating a settlement agreement," and that all negotiated costs were subject to higher review (affidavit of Archibald D. Black (Black aff.)).

4. On 29 November 1990 appellant sent a letter to the Board stating "As you can see from the documents enclosed herewith, the appeal has been settled, and is only pending of approval." Attached was a copy of the 16 November 1990 memorandum at finding 2. Respondent's counsel sent a 13 December 1990 letter to the Board stating she had been advised the dispute was settled and would provide copies of settlement documentation as soon as she received them.

5. By letter of 25 December 1990 the contracting officer informed appellant of miscalculations in the negotiated costs and the period of delay to which extended overhead had been applied. A meeting was scheduled for 28 December 1990 (R4, tab 106). Appellant claims that at the meeting appellant was shown a letter signed by respondent's counsel confirming the validity of the settlement agreement subject only to independent audit (Motion at 3). The contracting officer denies this (Black aff.).

6. By letter of 14 January 1991 the contracting officer requested that appellant provide the results of an independent audit performed on the company in 1988 (R4, tab 108). By letter of 25 January 1991 appellant's auditor provided the results of its 1988 audit to appellant who, in turn, provided it to respondent (R4, tab 109; Black aff.). By letter of 15 February 1991 respondent iterated to appellant the terms it understood to constitute their settlement agreement "subject to verification by independent audit" (R4, tab 110).

7. By Order of 19 February 1991 the appeal was dismissed, subject to reinstatement if the settlement was not consummated. This followed an Order of the Board dated 9 January 1991 giving the parties 20 days to show cause why the appeal should not be dismissed as settled, subject to reinstatement as above.

8. Thereafter respondent conducted an audit, during which time discussions continued. The contracting officer reevaluated the terms of the agreement and determined that appellant was entitled to a lesser amount. By letter of 23 March 1992 the contracting officer informed appellant that a final decision was in preparation (R4, tabs 129, 130, 132). By letter of 10 April 1992 appellant asserted "We have always sustained our rights on the basis of the settlements, notwithstanding our availability to hear any reasonable offer." (R4, tab 131) The final decision denying the claim was issued 30 April 1992 (R4, tab 134).

DECISION

Appellant argues there was a signed settlement agreement executed by an authorized official, and subject only to an independent audit. Further, appellant asserts the audit failed to show anything "incorrect" in the settlement figure. Respondent argues there can be no enforceable agreement unless it was executed by the contracting officer, and there is no evidence the contracting officer ever did so.

Under Rule 56 of the Federal Rules of Civil Procedure summary judgment shall be rendered if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The nonmoving party is entitled to the benefit of the doubt on factual issues. *Barth v. United States*, 24 Cl. Ct. 836 (1992). The moving party bears the burden of establishing there is no genuine dispute over material facts and that it is entitled to judgment as a matter of law. *Balboa Insurance Company v.*

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United States [33 CCF ¶ 74,051], 775 F.2d 1158 (Fed. Cir. 1985). Moreover, as appellant bears the burden of proof at trial, it must make a showing "sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 488 (1948).

In order for the Board to grant appellant's Motion, we must find there was an enforceable settlement agreement. Thus, the existence of an enforceable agreement is material to the outcome of this appeal. There is a dispute of fact, supported on respondent's side by an affidavit, as to whether respondent ever signed such an agreement (findings 3, 5). Moreover, respondent's 16 November 1990 memorandum, prepared the same day an "agreement" was reached, asserts the agreement was subject to approval of the Directorate of Contracting Headquarters Tactical Air Command (finding 2). Appellant received a copy of this memorandum and referred to it in its letter to the Board advising that the case was settled "only pending of approval" (finding 4). On this record the approval of that Directorate is not established (finding 3). Summary judgment is not, therefore, appropriate. Appellant's Motion is denied.

[¶ 26,297] Computer Valley International, Ltd.

ASBCA Nos. 39658, 40496, August 13, 1993. Contract No. NAFSAC-86-C-0006.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Nonappropriated Fund Activity.—The board had jurisdiction over an appeal by a concession contractor because the contract contained a Disputes clause that authorized decision by the board. The board's charter gives it jurisdiction to decide appeals under contracts that have such a requirement. The board did not have Contract Disputes Act jurisdiction, however, because the nonappropriated fund activity that issued the contract was not among the activities named in the Act. The contract itself also provided that the Act was inapplicable.

Interpretation of Contracts—Concessions—Location of Store.—A contractor was not entitled to additional compensation for costs resulting from moving the location of its computer concession, because the government's obligation to provide facilities was only to provide a specified amount of space in a particular market building. The contract did not assure the contractor of a permanent location, and the new location to which the contractor moved was suitable. The contractor's expenses incurred in renovating the new location were undertaken voluntarily. Similarly, there was no understanding that expenses incurred in renovating the original location would be amortized through utilization of that location for the term of the contract.

Interpretation of Contracts—Concessions—Inventory Security Interest.—The government's release of concession inventory in which the concession contractor allegedly had a security interest was not a breach of the concession contract, because the government did not have notice of the alleged interest. The contractor had a private, internal agreement with the purchaser of the related firm that had been operating the concession. Under the law of the District of Columbia, applicable under the contract's Choice of Law clause, a secured creditor must take action to give effective public notice of its interest.

Payments—Authority—Contractor's Directions.—Government payments to a firm that had been operating a computer concession store on behalf of the contractor were proper because the payments represented the firm's percentage of sales made from inventory that it owned and sold. Furthermore, most of the payments were made before the government received the contractor's rescission of its prior instruction to make payments to that firm. After the operating firm was purchased from the contractor's owner by another company, the operating firm, rather than the contractor, continued to operate the concession.

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For the appellant: James A. Langemak, Vice President, and Michael J. Lyon, Director. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. E. Michael Chiaparas, JAGC, Trial Attorney.

Before YOUNGER, SPECTOR, and THOMAS, Administrative Judges.

YOUNGER, Administrative Judge: In these consolidated appeals, a concession contractor with a non-appropriated fund activity seeks relief under its contract to operate a computer store, as well as damages for breach. Appellant claims the coats of remodeling, renovating and moving its store, as well as the value of inventory and concession payments that respondent tendered to a third party, along with lost profits and punitive damages. The contract is governed by District of Columbia law. Appellant elected to submit its case on the record but respondent appeared at the hearing. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

A. *The Contract*

1. By date of 12 December 1985, the Army's Non-appropriated Fund Supply, Acquisition and Contracting Agency, Europe (NAFSAC) awarded contract no. NAFSAC-86-C-0006 to "Bear Valley Computers, c/o Computer Valley International, Ltd." We find, and the parties do not dispute, that "Bear Valley Computers" was a trade name employed by Computer Valley International, Ltd., the entity to which the contract was awarded and the appellant here. We further find that appellant was a Delaware corporation that was not registered to do business in the Federal Republic of Germany.

2. The scope of work required the contractor to operate a computer concession in the Video, Audio, Photo Mart (VAP Mart) in Mainz-Kastel, Federal Republic of Germany. The VAP Mart was itself operated by the Wiesbaden Community Morale, Welfare and Recreation Fund (the Fund), one of several such funds for which NAFSAC performed contracting functions.

3. The contract contained various clauses employed in non-appropriated fund supply and service contracts, including clause I-2, "NON-APPROPRIATED FUND INSTRUMENTALITY (SEP 1984)," which provided as follows:

> The Non-appropriated Fund Instrumentality (NAFI) which is a party to this contract is a non-appropriated fund instrumentality of the Department of the Army. NO APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR BE PAID THE CONTRACTOR OR CONCESSIONAIRE BY REASON OF THIS CONTRACT. This contract is not subject to the Contract Disputes Act of 1978.
>
> (Capitalization in original)

4. The contract also included clause I-24, "ASSIGNMENT OF CLAIMS (SEP 1984)," which provided that "[t]he contractor cannot assign any rights or delegate any obligations under this contract without the prior written permission of the Contracting Officer."

5. The contract also contained clause I-25, "DISPUTES (SEP 1984)," which provided in part that "[t]he contract is *not* subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-603)." (Emphasis in original) The clause then set forth a procedure for disputes resolution similar to that set forth in FAR 52.233-1. However, the clause also provided:

> The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and not subject to further appeal.

6. The contract also included clause I-4, "CHANGES (SEP 1984) FIXED PRICE SUPPLY," which was similar to the clause appearing at FAR 52.243-1; clause I-28, "TERMINATION FOR CONVENIENCE OF THE FUND (SEP 1984)," which was similar to the clauses set forth in FAR 52.249-1 and 52.249-4; and clause I-29, "TERMINATION FOR DEFAULT (SEP 1984)," which was similar to the clause appearing in FAR 52.249-8.

7. The contract also contained clause I-40, "CHOICE OF LAW," which provided that "[t]his contract will be construed and the rights and obligations thereunder will be governed by the laws of the District of Columbia, ... as interpreted by the United States Federal Courts, regardless of the place of execution or performance."

8. The contract obligated appellant, in Part I, Section C of the schedule, to "provide and maintain in stock" specified types of computer equipment and to "provide per-

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sonnel to operate concession at own expense."

9. The contract contained provisions regarding space for the concession. In Part I, Section C of the schedule, it required appellant to operate the concession "in the area designated by the manager of Video, Audio, Photo Mart." Section C further provided that "[t]he Fund will provide to the concessionaire approximately 100qm of room space." The contract also provided in Part I, Section F, that performance was to be accomplished "in areas assigned by the COR (contracting officer's representative)." The contract contained no provisions requiring appellant to remodel or renovate the space provided, or allocating the cost of doing so. We further find that the contract contained no provision allocating the cost if appellant's assigned space were moved.

10. The contract also specified the financial arrangements between the parties. Clause I-20, "PAYMENTS (SEP 1984)," provided in part that "[t]he NAFI [*see* finding 3] shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated ... for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract." Under Part I, Section G of the schedule, appellant was to "deposit with the Video, Audio, Photo Mart cashier all funds collected at the close of each business day" and to invoice the Fund monthly for specified percentages of the gross receipts. Thereafter, the Fund would verify appellant's sales figures and make payment "to the concessionaire." Thus, for total monthly sales of computer hardware, software and accessories ranging from $0 to $100,000, appellant was entitled to payment for 90 percent of gross receipts. We find that, under this arrangement, no Federal funds were disbursed; if appellant had no receipts, it received no payments under the contract.

11. While the contract provided in Part I, Section F of the schedule that performance "will begin [in the] later part of November 1985," it did not specify a termination date.

B. *Contract Performance*

12. Contract performance began in November 1985. Appellant's president, James A. Langemak, and its secretary-treasurer in 1985, Michael J. Lyon, were often present in the store, together with sales personnel.

13. When it began performance, the facilities assigned to appellant consisted of the store itself, which was located on the third floor of the three-story VAP Mart, and a warehouse on site. The store had previously been used as a retail outlet. Appellant redecorated the store at or about the time that it began performance. In its discovery responses, appellant has asserted that "it was understood at such time that the costs of remodeling the area would be amortized through utilization." We find no credible evidence of such an understanding between the parties or of any other agreement by respondent to pay the cost of this redecoration. We further find no evidence that respondent ordered the redecoration.

14. In the Summer or Fall of 1986 (both periods appearing in the record), appellant moved its store from the third to the first floor of the VAP Mart, following respondent's advice that it would terminate the contract for convenience if appellant did not move. The first floor area to which appellant moved had previously been used for administrative purposes. We find that the first floor location was not inadequate for contract performance. We further find that it did not have a satisfactory appearance to appellant, and appellant chose to perform renovations. Appellant removed walls and carpeting, lowered the ceiling, installed wainscoting, wallpaper and shutters, and replaced a steel door with glass doors. The parties discussed whether respondent would pay for this renovation. We find that respondent did not agree to pay any of the cost of renovating the first floor store. We find credible the testimony of the contracting officer's representative that he advised appellant that "[i]f the concessionaire wished to do that [renovating], then they would need to do that at their own cost." We find that this testimony is not inconsistent with appellant's assertion in its Rule 11 submissions that the contracting officer's representative advised appellant to "hold any request for compensation ... until the new outlet was finished and functioning."

15. Appellant has asserted that, when it moved the store from the third to the first floor, it was also compelled to move its warehouse. We find the evidence of record fragmentary regarding this claimed move. We find insufficient evidence that the warehouse was moved. Appellant points to a 12 December 1986 letter that it sent to the contracting officer's representative. In the letter, appellant makes no express statement that it has moved the warehouse. Appellant recites that "the German government will now ... authorize this warehouse as tax- and customs free" and requests permission to erect walls and doors "at our expense." The

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original contracting officer's representative responded in the negative to the compound question of whether, during his tenure, appellant was "asked or forced or in any way did they move that warehouse?" His successor testified that appellant did not move the warehouse. We find no credible evidence that respondent agreed to assume any costs relating to the warehouse.

16. In January 1987, respondent issued a cure notice. In his 12 January 1987 letter, the contracting officer advised appellant that "[i]t has come to our attention that your agency is not registered in Germany under any given name or address." He asked appellant to advise him of the "measures which you will take to ensure that proper registration procedures have been completed." He also asserted that appellant had failed to maintain contractually-required inventory levels. In its 14 January 1987 response, appellant referred the contracting officer to a 20 March 1986 letter in which it had advised that "[o]ur legal agent and representative in West Germany is Bits 'N Bytes, a partnership (BGB) that is fully registered in Wiesbaden with the German authorities." Respondent subsequently accepted appellant's explanation.

17. By letter dated 23 February 1987, appellant advised respondent that "Scope GmbH [Scope] . . . is the new agent for Computer Valley International, Ltd." under the contract. Appellant assured respondent that Scope was "registered in the Handelsregister in Wiesbaden." One Doris Henkelman, the mother of Lyon (*see* finding 12), was at this time the nominal majority shareholder of both appellant and Scope. Appellant has characterized Scope as its "facilitating agent and supplier." We find that from February 1987 through June 1988, Scope: (a) ordered and paid for inventory sold in the store; (b) staffed the store with sales personnel; (c) paid the salaries of store employees; and (d) paid insurance on the store.

18. We find that, during 1987, Lyon directed respondent to make payments under the contract to Scope. We accept the affidavit of Scope's former general manager that "[i]n 1987, LYON told Mr. Garrison, the chief of the Central Accounting Division of the Wiesbaden Moral[e] Welfare and Recreation Fund to make checks in payment under the VAP Computer Mart contract out to SCOPE. I was there and heard him." The affidavit finds some corroboration in appellant's 28 February 1989 letter to the contracting officer stating that, although Garrison refused, "Mr. Lyon did at one time request of Mr. Garri(s)on a change in the designated payee for contract NAF-SAC-86-C-0006." The affidavit also finds corroboration in an 11 April 1989 memorandum from Martha E. Quinton of the Central Accounting Division to the contract specialist reciting that "[i]n late December 1987 Mr. J.R. Garrison was approached by one of the managers of the computer concession and asked to change the payee on the concession checks from only Scope to Scope/Computer USA . . . ."

19. We find that, beginning in the Fall of 1987, the presence of Langemak and Lyon (*see* finding 12) at the store began to diminish. Thereafter, neither they nor appellant operated the store at any time in 1988. While appellant points to a June 1988 meeting with respondent as evidence of its continuing operation of the store, we find that that meeting related to a proposal for a new computer sales venture. In addition, we find no credible evidence to support appellant's assertion that it "continued to operate the computer store at the VAP Mart until 2 Feb 90."

20. By date of 23 December 1987, Omni Holding AG (Omni), a Swiss firm, through its German affiliate, Augusten-Passage Immobilien GmbH (Augusten-Passage), acquired Scope. We find that, as part of this transaction, Omni acquired all stock and fixtures of the store. We further find that, at the time of this transaction, the store was Scope's sole or principal source of income.

21. The record contains two documents purportedly advising respondent to discontinue payments to Scope. The first document is a letter addressed to respondent dated 5 January 1988, in which appellant stated that its

> agent in West Germany, Scope GmbH, was sold to a West German firm, Augustenpassage GmbH of Hamburg, on 23 December 1987.
>
> * * *
>
> With the sale of Scope GmbH, the two companies are no longer owned by the same person. It now becomes very important that you instruct the [contract administration office) to use Computer Valley International, Ltd as sole payee on all checks paid under [the contract].

The second document is a letter addressed to respondent dated 15 February 1988, in which appellant stated that it "has not been associated with Scope GmbH since 2 February 1988 and since that date Scope GmbH is

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not acting as agent for" appellant. We find, however, that respondent did not receive either the 5 January 1988 letter, or the 15 February 1988 letter, until December 1988, when they were attached to another letter that appellant then sent to respondent. We accept the consistent testimony of the contracting officer, the contracting officer's representative, and the contract specialist (to whom the letters were addressed) to this effect.

22. We find on the present record that, after January 1988, respondent paid at least six checks, aggregating $114,515.71, to Scope, either as sole payee or as co-payee with "Computer/USA." By letter dated 5 December 1986, appellant had advised respondent that "[w]e are now using the trade name 'Computer USA', instead of 'Bear Valley Computers' [see finding 1], for the store." These checks are as follows:

Date	Payee	Amount
2 February 1988	Scope	$ 187.59
22 February 1988	Computer USA/Scope	$33,409.67
2 March 1988	Scope/Computer USA	$ 5,283.74
10 March 1988	Scope GmbH/Computer USA	$28,004.31
23 December 1988	Scope	$17,904.50
11 April 1989	Scope	$29,725.90

We find that these checks represented concession payments for Scope's percentage of gross sales made from inventory that it owned and sold. We further find no credible evidence that appellant owned any of the inventory for which these checks represented concession payments.

23. The contracting officer's representative testified that, in February 1988, he noticed unusual activity in the store and sought an explanation from those who appeared to be in charge:

> A When I approached them and asked them in what capacity—they identified themselves as the new owners of the store, and at which time I was immediately alarmed as well as concerned, and said, "We need to discuss that in greater detail," and asked them to join me in my office, ... at which time I made detailed inquiry as to elaboration on new ownership.
>
> Q So back in your office what transpired?
>
> A Well, ... they explained to me that there had been a sale of Scope GmbH, and that they had bought it, and that they were the new owners, and that there was no longer an affiliation with Mr. Langemak and Mr. Lyon.
>
> * * *
>
> THE WITNESS: And I asked if they could elaborate on the issue of the sale of Scope and their no longer having any affiliation with Mr. Langemak and Lyon, at which time they had stated that they had purchased the rights to the contract, at which time I retorted immediately, "You cannot purchase rights to a Government contract" ....

24. On 22 February 1988, respondent's chief of contracting, as well as the contracting officer and the contract specialist, all met with Scope's new managing director and his predecessor. Langemak and Lyon were not invited because, according to the contracting officer's representative, "they weren't there" and the only telephone number that he had for them was at Scope's offices, and because of Scope's representations that it had purchased the rights to the contract in any event. At the meeting, the chief of contracting testified, "the discussion was more or less exploratory. In other words, I let [the Scope representatives] present whatever they had to state and also asked for documentation to support what they were saying" regarding Scope's claimed acquisition of the contract, as well as of the store and the inventory.

25. Following the meeting, Scope's managing director furnished respondent, by letter dated 26 February 1988, documentation to support its claims and undertook to perform the obligations in appellant's contract. She furnished

> sales agreements [and] also copies of the insurance policies which cover both the warehouse and store at Mz-Kastel .... Additionally, I have enclosed a copy of the sales agreement which transfers ownership of Scope GmbH and subsequently the computer store at Mz-Kastel to Mrs. Henkelman. Numerous invoices and documents on file with our accountants, Arthur Anderson [sic] & Co. GmbH, demonstrates [sic] further proof of the intent to transfer ownership of the store at

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Mz-Kastel to Scope GmbH. All stock and fixtures in this store are the absolute property of Scope GmbH, according to the documentation. Further, Mr. Michael Lyon has personally directed the staff at [the Fund's Central Accounting Division) to issue all checks payable to Scope GmbH.

I hereby certify that Scope GmbH is willing to assume all contractual obligations. Additionally, I certify that Scope GmbH will uphold all warranty repair for equipment sold after 26 February 1987. I further certify that Scope GmbH is willing to uphold the regular system of returns as determined by the VAP Mart for advertising or returns will be promptly paid. I further agree to keep the store stock levels at "fully stocked" as supply of merchandise allows.

Scope also produced a balance sheet indicating the value of inventory in a warehouse, together with a 15-page computer list of inventory.

26. We find that the parties to the contract did not at any time enter into a novation agreement substituting Scope as the contractor in lieu of appellant. (*See* finding 4) In March 1988, the Fund initiated a purchase request that "NAFSAC modify the present concession contract NAFSAC-86-C-006, Bear Valley Computers, to reflect the new owners of the concession. Scope, the new concessionaire, shall complete the current contract period (and) the Fund requests that we retain the option to extend this contract should this be advantagious [sic] to the Fund." Respondent took no final action on the request, however, because Scope shortly sought to close the store.

27. By letter to respondent dated 18 April 1988, Scope's managing director advised respondent that "[u]pper management of Scope has made the decision to close the retail computer outlet at Mainz-Kastel .... [I]t is our intention to vacate the premises both in the VAP Mart and the allotted warehouse not later than 30 April 1988." Scope thereafter vacated the premises.

28. After its decision to close the store, Scope claimed the remaining inventory. We find that Scope or its parent owned the inventory. In its interrogatory answers, appellant stated that "[t]he stock in the warehouse on-post in Scope's name prior to December 23, 1987 ... was sold to [Augusten-Passage] along with the rest of Scope on December 23, 1987" (see finding 20), and we find no credible evidence that any other inventory was not included in the sale.

29. Nonetheless, the contracting officer afforded appellant the opportunity to assert a claim to the inventory. By letter dated 26 May 1988 to "Bear Valley Computers" (*see* finding 1) at the residence address for Langemak and Lyon, the contracting officer advised that respondent had received "[d]ocumented evidence of claim to assets" in both the store and warehouse. He stated that the claim appeared "valid and warrants release action on the part of the Government." He offered appellant the opportunity to present contrary evidence by 16 June 1988 and stated that failure to do so "will result in the release of the subject assets" to the claimant on that date. We find that appellant did not respond to the letter. We further find that, on or about 14 June 1988, respondent released the inventory to Scope. In so doing, respondent checked the inventory to be released against the 15-page computer listing of inventory that had been furnished as part of Scope's substantiation of its claim to ownership of the store (*see* finding 25).

30. We find no credible evidence that appellant had a lien or other enforceable interest in the inventory at the time that it was released to Scope. We further find that whatever interest that appellant had in the inventory derived from a "private, internal agreement" between it and Omni. In its Rule 11 submissions (*see* finding 34), appellant has asserted that "NAFSAC need not be notified of said lien, as this was a private, internal agreement between [the former chief financial officer] of Omni Holding AG and Appellant."

31. Respondent did not at any time terminate the contract for convenience or for default. (*See* finding 6)

C. *Claims and Appeals*

32. By date of 8 June 1989, as amended by date of 13 June 1989, appellant submitted a certified claim to the contracting officer for $325,360, which was said to represent monies paid to Scope, lost profits, and interest and administrative costs. By decision dated 11 September 1989, the contracting officer denied the claim. We docketed the appeal as ASBCA No. 39658.

33. By date of 26 September 1989, appellant submitted a second certified claim to the contracting officer for $260,354, which was said to represent the value of inventory released to Scope, the costs of remodeling, renovating and moving the store and warehouse, and interest, administrative and legal costs. By decision dated 11 December

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1989, the contracting officer denied the claim. We docketed the appeal as ASBCA No. 40496.

34. By letter to the Board dated 5 May 1992, appellant elected that "pursuant to Board Rule 11, the case be submitted on the record." Appellant repeated that election in a conference call with the Board on 14 May 1992. Respondent declined to elect Rule 11 disposition, and the Board accordingly held a hearing at which respondent presented testimony from eight witnesses. Respondent also offered, and the Board received in evidence, its first set of interrogatories and requests for admissions and appellant's responses thereto.

35. In its supplement to the Rule 4 file, and in its Rule 11 submissions, appellant adduced evidence regarding: (a) Scope's "lockout" of appellant "from its contractually guaranteed office in the Scope GmbH building" in February 1988; (b) "the Scope February 3, 1988 break-in of the Appellant's office;" (c) "perjurious responses" to Freedom of Information Act requests; and (d) respondent's "persistent cover-up." We find no connection between this evidence and claims within our jurisdiction.

DECISION

A. *Jurisdiction*

We conclude that we have jurisdiction over these appeals pursuant to the Disputes clause. (*See* finding 5) Under our Charter, we have jurisdiction to decide appeals "pursuant to the provisions of contracts requiring a decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board." 48 C.F.R. § 271, Appendix A, ¶ 1. Plainly, the Disputes clause (finding 5) calls for a decision here.

We also conclude that we do not have jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* Under 41 U.S.C. § 602(a), the Act applies to the contracts of "the nonappropriated fund activities described in [28 U.S.C.] sections 1346 and 1491." We cannot conclude that the Fund (*see* finding 2) falls within the categories set forth in those sections. *See McDonald's Corp. v. United States* [37 CCF ¶ 76,036], 926 F.2d 1126, 1132 (Fed. Cir. 1991) (noting that "an organization serving the recreational needs of servicemen might not" fall within 28 U.S.C. § 1491) We have long treated such non-exchange funds as outside our Contract Disputes Act jurisdiction. *E.g., Recreational Enterprises*, ASBCA No. 32176, 87-1 BCA ¶ 19,675 at 99,599 (base recreational fund). In addition, while not conclusive, the contract itself twice provides that the Act is inapplicable. (Findings 3, 5)

B. *Merits*

In its complaint, appellant seeks eleven different forms of relief. These forms of relief find expression in appellant's voluminous Rule 11 submissions. We group these prayers for relief into six broad categories that generally track appellant's claims to the contracting officer. (See findings 32, 33) Those categories are: (a) costs associated with moving and renovating the store and supporting warehouse in 1985 and 1986; (b) the value of appellant's interest in inventory transferred to Scope; (c) funds that respondent paid to Scope after 5 January 1988; (d) lost profits from May 1988 to the present; (e) punitive damages; and (f) claim and appeal costs, as well as attorney fees and interest. We discuss each category of relief in turn below.

1. *Remodeling, Renovating and Moving Costs.*

As alleged in the complaint, appellant's claim for moving and renovating costs has three components. Appellant seeks the costs of: (a) "remodeling the original retail outlet and supporting warehouse in 1985;" (b) "completely renovating the second location for the computer retail outlet, in the Fall of 1986;" and (c) "moving the retail outlet and supporting warehouse to the second locations."

This claim presents both factual and legal issues. The factual issues relate to whether respondent's representatives agreed, at the time of the remodeling, renovating and moving, that respondent would bear any of the costs. We have resolved these factual issues against appellant with regard to all three aspects of the claim. (Findings 13, 14, 15) The legal issues fall under the rubric of contract interpretation. They relate to whether the contract itself affords a basis for imposing the claimed costs on respondent. We conclude that it does not.

While appellant's legal theory regarding the remodeling and renovating costs is not articulated in its brief, it did set forth two theories in response to interrogatories admitted into evidence. (*See* finding 34) With respect to the 1985 remodeling costs, appellant asserted that it originally "accepted responsibility" for the costs because "it was understood" that it could amortize them through utilization of the store. Respondent is said to have breached this understanding

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by requiring that appellant move the store in 1986. We have, however, found no credible evidence of such an understanding. (Finding 13) From all that appears in the record, appellant undertook to redecorate its third floor location entirely as a volunteer to satisfy its own notions of the most presentable retail outlet.

With respect to the 1986 renovation costs for the first floor location, the theory is different. In its discovery responses (*see* finding 34), appellant asserts that it is entitled to recover because of a "non-compensated change to and/or breach of the contract by requiring Appellant to move ... the store and warehouse to unsuitable facilities." Appellant also argues unjust enrichment. We do not accept any of these arguments. The contract did not impose an obligation upon respondent to furnish appellant with a store area that was fully renovated to appellant's taste. (*See* finding 9) Instead, respondent's obligation was limited to providing appellant with "100qm of room space" in the VAP Mart. (Finding 9) We have been unable to find that the first floor location was inadequate for contract performance before appellant undertook the renovation. (Finding 14) We have found that respondent did not direct appellant to renovate the first floor, but that appellant chose to do so. (*Id.*)

With respect to moving costs, appellant's theory is also expressed in its discovery responses (*see* finding 34) as "noncompensated change and/or breach of the contract." We cannot agree that the claimed costs are recoverable under either rubric. As to the store itself, we conclude that the contract did not assure appellant of any permanent location. The contract provided, in Part I, Section C, that the store would be "in the area designated by the manager" of the VAP Mart. (Finding 9) It also provided, in Part I, Section F, that the store would be "in areas assigned by the COR." (*Id.*) Given these provisions, we cannot conclude that respondent made an undertaking that the store would remain on the third floor for the life of the contract, so that a move would constitute either a change or a breach. As to the warehouse, we have found against appellant on the factual issue of whether the record shows that it was moved at all (finding 15), but we believe in any event that the same legal considerations would be dispositive.

Accordingly, appellant is not entitled to recover remodeling, renovating and moving costs.

2. *Value of Appellant's Interest in Inventory.*

Appellant contends that, by releasing the inventory to Scope (*see* findings 28-30), respondent breached the contract by "interfering on Scope GmbH's behalf in a German civil legal matter and ... without notifying Appellant." According to appellant, the inventory "was obligated to Appellant by Omni" to guarantee performance of a separate contract that Omni is said to have breached in manifold ways.

We reject these contentions. The premise of all of them is that appellant had an interest in the inventory. Relying upon appellant's own characterization, we have found that this interest was the product of a "private, internal agreement" of which respondent was unaware. (Finding 30) This characterization runs headlong into District of Columbia law. (*See* finding 7) "[B]asic to the law of secured transactions is the principle that 'the secured creditor must do something to give effective public notice of his interest.' " *First Savings Bank of Virginia v. Barclays Bank, S.A.*, 618 A.2d 134, 138 (D.C. 1992) *quoting* 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 14.1 at 438 (1965). In addition, we reject, as contrary to our findings, appellant's assertion that respondent released the inventory "without notifying appellant." (*See* finding 29)

Accordingly, appellant is not entitled to recover for any interest that it may have had in inventory.

3. *Funds Paid to Scope.*

While appellant's brief does not articulate a legal theory for recovery of funds paid to Scope after January 1988, appellant's interrogatory answers (*see* finding 34) do. Appellant's stated theory is "[b]reach of contract as the Appellant is the payee on the contract .... Improper contract termination by the Government and a change to the contract."

We cannot accept these contentions. We recognize that the contract required respondent to make payments "to the Contractor" or "to the concessionaire" upon compliance with invoicing requirements. (Finding 10) Ordinarily, these requirements would be dispositive, but appellant's argument also rests on two broad factual premises that we have rejected. The first rejected premise is that, while appellant advised respondent in 1987 to make payments under the contract to Scope (finding 18), it rescinded that advice in January 1988, and again in February 1988. We have found, however, that respon-

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dent did not receive these two letters until December 1988. (Finding 21) In addition, we have found that the disputed payments to Scope represented its percentage of gross sales on inventory that it owned and sold. (Finding 22) The second rejected premise lies in appellant's assertion in its discovery responses that it "functioned in the same manner after January 5, 1988 as it had" since contract award in 1985. To the contrary, we have found that appellant did not perform its obligations under the contract in 1988 but that Scope did instead. (Findings 17, 19)

With respect to appellant's argument that there was an "[i]mproper contract termination," we have found that respondent did not at any time terminate the contract for convenience or for default. (Finding 31) We cannot conclude, however, that this circumstance entitles appellant to the funds paid to Scope.

Accordingly, appellant is not entitled to recover funds paid to Scope.

4. *Lost Profits.*

While District of Columbia law permits the recovery of lost profits if they are "'fairly certain and can be ascertained," *Garcia v. Llerena,* 599 A. 2d 1138, 1143 (D.C. 1991), appellant has failed to establish the prerequisite of a material breach by respondent. In any event, we could not conclude that lost profits "from sales at the . . . store, from May 1988 to the present" are anything other than speculative under the evidence presented. (*See* Findings 10, 17, 19)

Accordingly, appellant is not entitled to recover lost profits.

5. *Punitive Damages.*

While "[u]nder District of Columbia law, punitive damages for breach of contract may be assessed in certain, narrowly defined circumstances, where a breach of contract merges with, and assumes the character of, a willful tort," *Kuwait Airways Corp. v. American Security Bank, N.A.,* 890 F.2d 456, 466 (D.C.Cir. 1989) (internal quotations omitted), appellant has not established a material breach of contract, much less willful conduct by respondent.

Accordingly, appellant is not entitled to recover punitive damages.

6. *Claim and Appeal Costs, Attorney Fees, and Interest.*

Appellant's prayers for claim and appeal costs, as well as attorney fees and interest, all presuppose favorable determinations of entitlement on some or all of its other claims. We have not made such determinations.

Accordingly, appellant is not entitled to recover claim and appeal coats, attorney fees, and interest.

CONCLUSION

The appeals are denied.

[¶ 26,298] Cocoa Electric Co., Inc.

ASBCA No. 33921R, July 30, 1993. Contract No. F08650-83-C-0100.

Pricing of Adjustments—Proof—Government Estimates.—Although a contractor failed to prove its damages with any certainty, it was entitled to an equitable adjustment because government estimates were sufficient to support an award at a fair approximation of the damages. Expenses for claim preparation were not allowable, and alleged expenses for design engineering work were not allowable as a direct cost. No design engineering was performed, and the claimed expenses included functions normally performed by a project manager but allegedly in this instance performed by a corporate officer, who was compensated by a weekly draw against his share of the profits.

For the appellant: Frederick D. Sarkis, Merritt Island, Florida. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Diana S. Dickinson, Trial Attorney.

Before SHACKLEFORD, RUBERRY, and RIISMANDEL, Administrative Judges.

SHACKLEFORD, Administrative Judge: This decision resolves the quantum aspects of the subject appeal. We issued a decision on entitlement on 24 September 1990 (91-1 BCA ¶ 23,442) in which we granted 25 parts of a 56 part claim. Of that 25, liability had been conceded by the Government in 17 of them. We denied a motion for reconsideration on 15 February 1991 (91-2 BCA ¶ 23,780). After the parties unsuccessfully sought to settle

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the claims on which appellant had prevailed, a quantum hearing was held. Both parties have filed briefs addressing the quantum issues. In addition to the transcript of the quantum hearing and documents associated therewith, the record includes the documents, transcripts and decisions made in conjunction with the entitlement portion of this appeal. Familiarity with the prior decisions in this appeal is presumed.

FINDINGS OF FACT

1. Following the entitlement decision, Cocoa Electric prepared a cost analysis of the 25 claims granted and submitted it to the contracting officer. Although the parties negotiated this revised claim, no agreement was reached.

2. In its claim of October 1985, Cocoa sought a specified number of hours for design engineer on each of the claim items at $27.50 per hour. In the revised claim the amount for design engineer is lumped with hours claimed for electricians and is reduced to the electrician rate of $16.28 per hour. In the original submission Cocoa claimed consulting expenses of $65,438. This amount represented the actual billed amount for a consultant to prepare the claim. In the revision, the amount claimed was reduced to $23,694.15 to reflect an allocation to the 25 claims approved by the Board, and was removed from the G&A pool and claimed as a separate cost element.

3. A summary of the revised claim is set forth below. Each category will be discussed in turn.

Cost Element	Requested Amount
Burdened Labor	$30,223.79
Direct Material	5,045.53
Fisher-Robinson (Subcontract)	1,101.00
Total Job Cost for 25 Claims	36,370.32
G&A	3,736.72
Consulting Fees	23,694.15
	63,801.19
Profit @ 10%	6,380.12
Performance bond at 2.0408%	1,432.26 *
Total	71,613.57

4. The burdened labor component of the claim essentially consists of three items. The first is design engineer hours. The second is the totality of hours claimed for skilled workers and laborers to perform the additional work. The third item is the direct labor overhead applied to the labor costs.

5. Appellant originally claimed a total of 735 hours for design engineer for the 25 claims granted. In this quantum case, the 735 hours have been charged at the electrician rate of $16.28 per hour, reduced from $27.50 per hour. The great majority of these hours are alleged to have been performed by Mr. Elkins, who is not an engineer. Mr. Elkins is an owner and officer of Cocoa Electric. His compensation was a weekly draw against his share of any annual profits. During the times that Mr. Elkins claims he performed these functions, he employed both a project manager and an assistant project manager to process change orders and manage the work on site. On several occasions in the original decision on entitlement we expressed disbelief at the number of hours claimed for design engineer. The Government's expert witness, Mr. Clinchard, saw no necessity for the incurrence of costs for design engineer.

6. Based upon our review of the record, including a determination that the testimony of Mr. Elkins on the subject of design engineer hours was not credible, we find as a fact that no design engineering work was performed, and no costs were incurred for that function. To the extent this category includes functions such as coordination with subcontractors and shop drawing review, these functions are normally performed by a project manager.

7. In attempting to prove the amount of skilled worker and labor hours incurred for the 25 items on which appellant prevailed, appellant offered the testimony of Mr. Elkins. Mr. Elkins testified that after completion of the contract, he met with a claims consultant and estimated the number of labor hours incurred to perform the additional work. The Government attempted to prove the amount of skilled worker and labor hours incurred for the 25 items on which appellant prevailed through the testimony of Mr. Clinchard, an architect and an experienced estimator. Mr. Clinchard had no responsibilities for the work during performance and prepared his estimate after the work was complete and the claim had been filed. In our original decision on entitlement we found the man-hours claimed for the condenser pad extension (Claim No. 3.3.1) to be incredibly high and found the number of hours incurred for Additional

* Cocoa has consistently based its computation of bond on 2.0408 percent while rounding its assertion of the bond rate to 2 percent. The actual rate is 2.0408 percent.

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Circuits (Claim No. 3.3.9) to be *de minimis*, totalling no more than one hour, where seven were claimed, Moreover, Mr. Elkins testified to only one item on direct and two or three others on rebuttal, leaving no proof of hours for the great majority of the claims. Based upon our view of the record, including a determination that Mr. Clinchard's testimony was more complete and more credible than Mr. Elkins', we find the Government estimate to represent a better estimate of the actual number of hours needed to perform the additional work.

8. Based upon the foregoing, we find the labor hours proved along with rates (which are not disputed) as follows:

DIRECT LABOR FOR 25 APPROVED CLAIMS

Para.	Claim Description	Electrician	Sheet Metal	Carpenter	Painter	Mason	Laborer
2.4	P00003/P00004	1	2	35			25
3.2.4	Coffer Ceiling			2			
3.2.5	Carpet Removal						13
3.2.6.	Addit. Circuits	14					
3.3.1	Cond. Pad Ext.			3		4	13
3.3.4	A/C Duct Ext.		8				
3.3.6	Wall Extension			13	1		5
3.3.8	Conduit Repl.	28½					
3.3.9	Addit. Circuits	½					½
3.3.10	Jnct. Box Removal	2					
3.4.2	Tile vs Paint			9			12
3.4.5	Double Doors			6			7
3.4.6	AC Refrig. Lines			9	4		2
3.4.7	Hot Water Lines			6			1
3.5.1	Door Hdwr Specs			32			
4.2.1	Commun. Cabinet		16			2	
4.2.2	Alcove Mods.			10			2
4.2.3	Phase III Power	13					
4.2.5	Window Trim			11			2
4.2.7	Misc. Elect.	86					
5.6	Remove Ink						2
5.7	Rpl Sound Soak						
7.2.4	Wall Extension			8			
7.2.7	Sound Soak (Sub)			9			
Total Hours by Trade		145	26	153	5	6	84½
Hourly Rate by Trade		$16.28	15.63	13.17	12.13	11.95	9.11
Hours times rate		$2,361	406	2,015	61	72	770
Total Direct Cost of Labor		$5,685					

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9. The final portion of burdened labor is the direct labor overhead rate or labor burden. Appellant claims 16.2 percent for "wage fringe" and 43.8 percent for other Direct Labor Overhead. The Government used an approximate rate of 35 percent in its calculations. A Government audit reveals that Cocoa's bid was based upon a labor overhead rate of 41 percent and that is the rate we allow. The total allowance for labor, therefore, is $5,685 plus 41 percent of $5,685, or $8,016.

10. Appellant claims $1,101 for subcontract costs and $5,046 for the cost of direct materials. The Government agrees with these figures. We find as a fact that appellant incurred subcontract and material costs of $6,147 incident to the 25 claims on which it prevailed.

11. Mark-ups of 10 percent for overhead and 10 percent for profit are considered fair and reasonable. Cocoa's fair and reasonable bond rate for the contract was 2.0408 percent.

DECISION

Although appellant has not proven its damages with any certainty, we find the Government estimates to be sufficient to support an award at a fair approximation of the damages. See *S.W. Electronics & Mfg. Corp. v. United States* [29 CCF ¶ 81,726], 655 F.2d 1078, 1088-89 (Ct. Cl. 1981). However, the expenses for claim preparation, although incurred, are not allowable. *Owen L. Schwam Construction Co., Inc.*, ASBCA No. 22407, 79-2 ¶ 13,919. Moreover, the alleged expenses for design engineer, performed by Mr. Elkins, are not allowable as a direct cost in an equitable adjustment when performed by a corporate officer. *J.M.T. Machine Co., Inc.*, ASBCA Nos. 23928, 24298, 24536, 85-1 BCA ¶ 17,820.

Based upon our findings, we award for the 25 items on which Cocoa prevailed as follows:

Labor (including burden)	$ 8,016
Materials and subcontracts	6,147
Total direct costs	14,163
overhead (G&A) at 10%	1,416
	15,579
Profit at 10%	1,558
	17,137
Bond at 2.0408%	350
Total award	17,487

This and our prior entitlement decision tracked the individual claim items using the format and nomenclature set forth in the 28 October 1985 consultant-prepared claim. Although earlier claim submissions were made that might have included some of the items on which appellant has prevailed, Cocoa has failed to demonstrate with any certainty the precise date on which specific claims were presented to the contracting officer earlier than the 28 October 1985 claim package. Consequently, we decide that interest on amounts recovered herein is to be measured from 31 October 1985, the presumed date of receipt of the claim by the contracting officer, until paid.

The appeal is sustained in the amount of $17,487 plus interest under the Contract Disputes Act from 31 October 1985 until paid. In all other respects the appeal is denied.

[¶ 26,299] Apex International Management Services, Inc., by Trustee in Bankruptcy

ASBCA Nos. 37813, 38178, 38224, 38278, 38297, 38354, 38514, August 6, 1993. Contract No. DAKF10-85-C-0464.

Indefinite Delivery Contracts—Estimates by Government—Historical Workload.—A record of the maintenance workload of the prior contractor, included in a solicitation for the operation of a motor pool, was prepared with adequate care. Government personnel spent two weeks counting individual maintenance work orders before placing totals in the solicitation document. Historical workload figures have been approved for use as bases for estimates used for bidding invitation purposes. In any event, the contractor's actual workload did not differ markedly from the number of maintenance events shown.

Indefinite Delivery Contracts—Estimates by Government—Burden of Proof.—The government did not have the burden of persuasion to prove the reasonableness of its estimating procedures under a solicitation for the operation of a motor pool, because the maintenance workload experienced by the contractor did not differ markedly from the

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events shown in the historical record included in the solicitation. Furthermore, the contractor could gain no benefit from board precedents for shifting the burden when actual orders vary significantly from estimates, because such reasoning was effectively overruled by the U.S. Court of Appeals for the Federal Circuit in *Medart Inc. v. Austin*, 38 CCF ¶ 76,349.

For the appellant: Marks, Gray, Conroy & Gibbs, Jacksonville, Florida, by Nicholas V. Pulignano, Jr. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Karl M. Ellcessor III, JAGC, Trial Attorney.

Before PAUL, RIISMANDEL, and RUBERRY, Administrative Judges.

PAUL, Administrative Judge: These are timely appeals of contracting officer's decisions denying appellant Apex International Management Services, Inc.'s (Apex) claims for equitable adjustments in a total amount of $390,931.75. The Contract Disputes Act (CDA), 41 U.S.C. § § 601 *et seq.*, is applicable, and only issues of entitlement are before us for decision. A prolonged, two-day hearing was held in Jacksonville, Florida, and each party later filed two sets of post-hearing briefs.

GENERAL FINDINGS OF FACT

1. On 5 September 1985, the Army awarded contract No. DAKF10-85-C-0464 to Apex. This was a firm fixed-price contract requiring the management, operation, and maintenance of the Transportation Motor Pools (TMPs) located at Fort Stewart, Georgia, and Hunter Army Airfield, Georgia (JSF-1).[1]

2. The contract contained option clauses to extend contractual performance for two additional years, and the Army exercised these options. As a result, Apex's total contractual performance period extended from 1 October 1985 to 30 September 1988. The base contractual year was Fiscal Year (FY) 1986, and the optional years were FY 1987 and FY 1988 (JSF-2).

3. The contract incorporated by reference FAR 52.243-01, "Changes-Fixed Price-Alternate I APR 1984." In addition, it contained a host of clauses which are pertinent to the underlying disputes. Among them are the following:

C.1.1. *Introductions* [sic]: This statement of work consists of motor vehicle operations, fleet management, bus and taxi service, and NTV maintenance functions of the Transportation Motor Pool at Fort Stewart/HAAF, Georgia.

C.1.2. *Scope:* The work involves all phases of the Transportation Motor Pool, vehicle management, operations, and maintenance. The NTV fleet under this contract consists of approximately 500 vehicles, of which approximately 290 are located at Fort Stewart and approximately 100 at HAAF. Approximately 110 vehicles are hand receipted and on recurring dispatch to off post USAR, ROTC, and active duty users in Florida. This fleet consists of a wide variety of vehicles, to include sedans, buses, ambulances, light, medium, and heavy cargo type vehicles, (including tractor/trailers) and wreckers. The maintenance function is responsible not only for the vehicles assigned but shall provide support to satellited and transit vehicles as outlined in para C.5.11.1.1 and C.5.11.1.2 of this statement of work. The Transportation Motor Pool will be operated by the Contractor, on a user-driver concept. This concept requires the requesting activity to furnish drivers for assigned NTV provided by the TMP with the exception that the Contractor shall furnish drivers for buses, taxi, tractor/trailer combinations, cargo trucks, as specified herein and wrecker support provided under this contract, or as required on one-time transportation requests.

C.1.2.1. The Contractor shall furnish all personnel, equipment, repair parts and supplies, except as specified herein as Government furnished to manage and operate vehicle operations, fleet managment [sic], and maintenance at Ft. Stewart/HAAF, Georgia and off post hand receipted vehicles. Performance shall be according to the standards contained herein and meet the intent of AR 58-1, AR 700-88, TM 38-600 and other directives listed in Section C-6.

C.1.2.2. *Operating Hours:* The Contractor shall operate the Transportation Motor Pools 24 hours per day, 7 days per week. The working hours for work shifts will be established by the Contractor to meet re-

[1] "JSF-__" refers to the "Joint Stipulation of Facts and Issues" submitted by the parties prior to the hearing held in this matter.

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quirements of the contract and to ensure that the following functional areas are adequately staffed and operational during the time frames specified below:

Management/Administration/Driver Testing: Regular duty hours 0730 a.m.—1600 p.m. (Monday—Friday) excluding holidays set forth in Para H. Management/Administration shall be staffed to a minimum during lunch period.

Taxi Operations: 0730 a.m.—1600 p.m. (Monday—Friday) including lunch period. During the remaining hours, not specifically cited above, the Contractor shall schedule sufficient number of personnel to perform all services covered in the contract.

* * *

C.3.1. *General:* The Government will provide facilities and equipment as set forth in Technical Exhibits 3 and 4. Repair or replacements will be made as necessary due to fair wear and tear. Vehicle replacements will depend on Army procurement.

C.3.1.1. All required Department of the Army, Department of Defense and local forms, regulations and directives, and official letterhead paper will be furnished by the Government. Initial supplies of these items will be available at contract start. The Contractor shall establish requirements through the COR to local publications distribution office for follow-on needs.

C.3.1.2. The Government shall furnish pickup and disposal service for all garbage and trash placed in Dempsey Dumpster located in the area.

C.3.2. *Facilities:* The Government will furnish or make available the facilities described in Technical Exhibit 3.

C.3.3. *Vehicle and Vehicular Equipment:* The Government will furnish vehicles and vehicular equipment as set forth in Technical Exhibit 4. Technical Exhibit 4 is current as of 30 Apr 85. The total number of vehicles may vary during the term of the contract because of budgetary constraints and lead time in replacing uneconomically repairable vehicles or changes in authorizations. The Government will make every effort to replace vehicles within the constraints of the procurement process. If failure to replace a vehicle renders the Contractor unable to meet commitments, the Contractor shall inform the COR immediately. See Special Provision No. H-7 for price adjustment clause.

C.3.4. *Tools and Equipment:*

C.3.4.1. The Government will furnish equipment as set forth in Technical Exhibit 4. The Contractor shall be responsible for all maintenance, to include repair parts and labor required to repair equipment listed in Technical Exhibit 4, up to the one-time repair limit IAW applicable publications set forth in paragraph C-6, for the item.

C.3.5. *Utilities:* The Government will furnish utilities including maintenance of those utilities as required for the proper and effective operation of the facilities provided. These utilities include gas, electricity, water, sewage disposal, fuel oil, and on-post phone service. Contractor shall carefully conserve all utilities furnished. The Contractor shall comply with installation regulations and/or directives with respect to use of the heating and air conditioning system, and/or other systems.

C.3.6. *Mobility Fuel:* The Government will furnish all MOGAS and Diesel fuel required in the execution of this contract. The contractor shall furnish all other fuel, oil, and lubricants required.

* * *

C.4.3. *Materials and Supplies:* The Contractor shall furnish all parts, materials, office furniture, supplies, tires, lubricants, batteries, toll tickets, license plates, tools and clothing, except government furnished items as defined herein, required to meet the terms of the contract.

* * *

C.5.1.2 *Files:* The Contractor shall maintain sufficient files to document information contained in all reports required under this contract.

The Contractor shall make all records and files applicable to this contract available for review by any agency or individual authorized access by the Contracting Officer or his representative during the term of this contract.

C.5.1.3. *Required Reports:* The Contractor shall furnish the Government the required reports listed in Technical Exhibit 7 or as otherwise required. Format and frequency will be as outlined. Additional information for the Cost and Performance data report is described in paragraph C.5.13 of this contract.

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* * *

C.5.8. *Wrecker Service:* The Contractor shall provide wrecker service for all NTV assigned to or satellited on TMP, Fort Stewart and HAAF. Service shall be provided within a distance as outlined in Technical Exhibit 13. The Contractor shall dispatch all wrecker calls within 20 minutes during normal duty hours (0730-1600) Monday thru Friday and 45 minutes from time of receipt of request after hours (1600-0730), and Saturday, Sunday, and holidays. The Contractor shall provide qualified drivers to operate the TMP wreckers. For information purposes, after duty wrecker service was required approximately 31 times a year in the past for HAAF and 86 for Fort Stewart. The Contractor shall also provide wrecker service deemed necessary by the Provost Marshal to transport vehicles obstructing traffic on the installation or similar emergency requirements or to remove abandoned civilian vehicles. (Approximately 38 times a year at HAAF and 34 times at Fort Stewart). The Contractor shall maintain a monthly log of all wrecker calls to include time call received, time wrecker dispatched, and name or activity of requestor.

C.5.9. *Fuel and Oil Dispensing Facility:* The Contractor shall operate an automotive fuel and oil dispensing facility at Fort Stewart and HAAF. All MOGAS and Diesel fuel will be furnished by the Government. The Contractor shall be responsible for issuing automotive fuels and oil to all authorized users listed in Technical Exhibit 11. The facility will be attended and operational from 0730 to 1600 hours Monday through Friday, except for a period not to exceed 15 minutes per day for daily inventory. Provisions will exist for on call service for after hours, weekends, and holidays. The Contractor shall respond to these requests for after duty service within 10 minutes of request. Issues an average of approximately 82 during normal duty hours and 39 after duty hours daily at Fort Stewart. Issues at HAAF average approximately 30 during duty hours and 17 hours daily.

* * *

C.5.9.2. *Daily Issuance Records:* All automotive fuel and oil issued shall be recorded by the Contractor on DA Form 3643 (Daily Issues of Petroleum Products) at the time of issuance. The Contractor shall obtain the signature and grade of the recipient and complete the DA Form 3643 in accordance with FM 10-69 (petroleum Supply Point Equipment and Operations), for each business day. The Contractor shall take dispensing pump meter readings and dipstick readings at the beginning and ending of each day of operation. The beginning reading will be entered at the top of the DA Form 3643 using stamps provided. The closing reading will be entered immediately after the last issue of the day. The Contractor shall then forward the original form and any receipt documents to the COR by 1000 hours the following day.

C.5.10.4.1. *Off Post Hand Receipted Vehicles:* The Contractor shall receive requests from authorized off post activities for vehicles to be retained at the user's location for extended periods, due to either (a) continuing mission requirements after normal duty hours, or (b) being located at such a distance from the TMP that return of the vehicle to the TMP on a more frequent basis would not be practical. Such requests will be processed IAW procedures outlined in para C.5.10.3 and C.5.10.4. The Contractor shall hand receipt vehicles to authorized users. The Contractor shall ensure the user provides utilization and cost data required, that the user is provided US Government credit cards, toll tickets, turnpike toll cards, as required, with instructions for their use, and that the user does not misuse/abuse the vehicle. The Contractor shall maintain and service all vehicles on hand receipt the same as all other vehicles. Maintenance and services shall be performed on location. Only those vehicles within a 50 mile radius of the TMP at Fort Stewart or HAAF on official business shall be maintained or serviced in the TMPs. The Contractor shall be responsible for transportation of inoperable vehicles to maintenance location. When US Government credit card is used for towing expense, the Contractor shall reimburse the Government in accordance with procedures outlined for roadside repair in paragraph C.5.5.2. Vehicles requiring major repairs may be transported (not driven) to Fort Stewart/HAAF at the Contractor's expense for repairs. The vehicle may be driven for return to it's [sic] usual place of use. All scheduled maintenance services shall be accomplished within the prescribed schedules and tolerances. The Contractor shall not extend either time or mileage intervals for scheduled maintenance to take advantage of scheduled vis-

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its to Fort Stewart/HAAF by the user. All vehicles located in Key West, Florida, shall be rotated every six months due to rust deterioration. A list of vehicles on hand receipt to units/activities located off post is at T.E. 12, which also contains the existing letter of instructions to off post vehicle users. The Contractor shall update this document to provide his instructions to users and submit it to the COR for approval 30 days prior to contract commencement. The Contractor shall be responsible for distributing letter of instruction to all users of off post vehicles.

* * *

C.5.11.1.9. *Accident Repair:* The Contractor shall make repairs necessary as a result of accidents up to the one-time repair limit as specified in AR 700-88 and FORSCOM Supplement 1. Repairs above the limit will be processed IAW paragraph C.5.11.1.6 above. Accident damage shall include only that damage incurred in an accident. Minor maintenance, scheduled service, and extensive drive train repairs shall not be included in order to exceed the one-time repair limit. The Contractor shall be totally responsible for repairs without regard to repair limitations when the accident is the result of negligence by the Contractor or it's [sic] employees. The cost of accident repairs during FY 84 was $16,730.51.

C.5.11.2. *Maintenance Functions:*

C.5.11.2.1. The Contractor shall perform management, supervisory, and administrative functions to accomplish service and repairs for all assigned NTV and equipment. The minimum services and repairs required are user/operator, inspection service, scheduled maintenance, unscheduled maintenance, accident repairs, and warranty maintenance to maintain NTV and equipment within manufacturer's specifications IAW the manufacturer's service manual applicable to each vehicle as specified by TM 38-600. All vehicles shall be maintained at all times IAW safe and serviceable criteria as defined by TM 38-600 and AR 58-1.

C.5.11.2.2. *Scheduled Maintenance:*

C.5.11.2.2.1. The Contractor shall follow established scheduled maintenance programs outlined and scheduled on monthly Maintenance File Listing PCN: AGV-351, AGV-361, and perform preventive maintenance on all assigned vehicles and equipment in accordance with manufacturer's specifications and the requirements outlined in TM 38-600.

Intervals of scheduled maintenance are generally specified by the vehicle or equipment manufacturer, however, the Government may specify intervals which take precedence over the manufacturer's recommended interval. Presently the Government specifies the following intervals for two service items: (a) oil and filter change: The engine oil (crankcase) shall be changed at intervals established by the vehicle maunufacturer [sic] until the provisions of the warranty have expired. After expiration of warranty provisions of TM 38-600 will apply. The tolerance for scheduled maintenance is 10 days or 100 miles before or after scheduled due date. Appendix D, TM 38-600, provides a guide for preventive maintenance service and inspection guides. (b) Antifreeze: The antifreeze shall be changed at intervals established by the maunufacturer [sic] until the provisions of the warranty have expired. After expiration of the warranty, antifreeze shall be changed when inspection indicates it is contaminated and no longer performs the service for which it was intended.

C.5.11.2.3. *Unscheduled Maintenance:* Contractor is responsible for:

C.5.11.2.3.1. All maintenance and repairs required to maintain vehicles in a safe and serviceable condition IAW TM 38-600.

C.5.11.2.3.2. Vehicle modifications authorized in TM 38-600 or modifications when approved by the Major Command Headquarters.

C.5.11.2.3.3. Preparation of Technical Inspection, DA Form 461-5, as required.

* * *

C.5.12. *Administration:*

C.5.12.1. The Contractor shall provide daily reports (see Technical Exhibit 7) regarding the maintenance status, VDT of vehicles in the fleet and additional reports as required.

C.5.12.1.2. The Contractor shall maintain a Maintenance Request Register IAW DA Pam 738-750. The Contractor shall issue all work order numbers in numerical sequence developed locally using DA Form 2405.

C.5.12.1.3. The Contractor shall assure the safety inspection and schedule preventive maintenance programs are accomplished on time as shown in AGV 351 and

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AGV 361, Preventive Maintenance Schedule, output monthly from IAVMS.

C.5.12.1.4. The Contractor shall prepare Quality Deficiency Reports (SF 368) per instructions outlined in DA Pam 738-750, TM 38-600, and AF 700-88.

C.5.12.1.5. Historical workload is in Technical Exhibit 22. Annual mileage driven is contained in Technical Exhibit 4.

(ASBCA No. 37813, R4, tab 1)

4. Subsection C-6 of the contract incorporated by reference several Governmental publications relating to vehicular maintenance, including TM 38-600 (September 1979). Paragraph 6-7b of this manual, entitled "Preparation of New Equipment for Operation," provided:

Each new vehicle assigned to an installation or activity will be inspected and serviced only to the extent necessary to insure acceptability and proper operation until the initial scheduled service. Particular attention will be given to the detection of deficiencies eligible for correction under the warranty provisions of the contract.

(ASBCA No. 37813, R4, tabs 1, 104)

5. Technical Exhibit No. 4 of the contract, which was referred to in subsection C.3.3., detailed the number, type, model, mileage, and age of the vehicles which comprised the TMP. This listing was prepared by the Army on 30 April 1985, approximately two months prior to issuance of the solicitation, and it provided information with respect to 523 vehicles as of that date (ASBCA No. 37813, R4, tab 1). By July 1985, two months before Apex commenced performance under the contract, the fleet size of the TMP had dropped to 497 vehicles (ASBCA No. 37813, R4, tab 144).

6. Technical Exhibit No. 22 of the contract, which was referenced in subsection C.5.12.1.5., contained "Historical Maintenance Workload" data compiled by Army personnel based upon records supplied by the prior contractor. It stated the following workload:

	TMP SHOP		COMMERCIAL SHOPS	
	TMP VEH	NON TEMP VEH	TMP VEH	GRAND TOTALS
A Maintenance	469	14	103	586
B Maintenance	323	9	93	425
C Maintenance	319	0	85	404
Other Repairs	3031	48	303	3382
Major Repairs	28	0	5	33
Maintenance and Other	560	9	68	637
Inspection Only	26	0	0	26
Accident	21	0	3	24
Warranty	0	0	25	25

The second page of Technical Exhibit No. 22 provided a "Definition Of Services" as follows:

A, B, & C Maintenance—Maintenance scheduled at regular intervals as specified in TM 38-600 or Operator's Manual.

Other Repairs—Repairs performed due to breakdown or other malfunction occurring between scheduled maintenance.

Major Repairs—Repairs performed involving major components of a vehicle, to include repair or replacement of engine, transmission, transfer case, differential.

Maintenance and Other—Repairs performed at the same time that a scheduled maintenance is performed.

Inspection Only—Involves inspection of a vehicle to determine cost of repairs, serviceability, etc.

(ASBCA No. 37813, R4, tab 1)

7. Regarding "A" and "B" maintenances, the parties concur with these more detailed definitions:

An "A" Maintenance is due 12 months or 12,000 miles from the last "A" service done and consists of the following:

Oil and Oil filter change

Lubrication

Air Filter Change

Check differential and transmission fluid levels

Pull one wheel and check brakes

A "B" Maintenance is due 6 months or 6,000 miles from the last "A" service and consists of the following:

Oil and Oil filter change

Lubrication

Check air filter (change if necessary)

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Check differential and transmission fluid levels

Check PCV

(ASBCA No. 37813, R4, tabs 90, 104) [2]

8. The maintenance category of "Other Repairs" was contrasted in Technical Exhibit No. 22 with the category of "Major Repairs" and, accordingly, encompassed "very quick," low cost repairs such as replacements of nuts, bolts, screws, light bulbs, or windshield wiper blades. Appellant's employees colloquially referred to such "Other Repairs" as "Quick Fixes" (tr. 1/172).[3]

9. A dispute has arisen between the parties regarding both the manner in which Technical Exhibit No. 22 was prepared and the degree of care which Army personnel exercised during its preparation. Relying strictly upon hearsay, Apex's project manager surmised that the Army had utilized internal computerized summaries in compiling the historical workload data (tr. 1/156-63). However, the Army presented several witnesses whose testimony directly conflicted with this account. Specifically, Mr. Henry S. O'Neal, Mr. James D. Rowe, and Ms. Shirley Collins all testified upon personal knowledge that they prepared Technical Exhibit No. 22 over a period of several weeks using DA Form 2407s provided by the predecessor contractor. These forms were very detailed and listed every maintenance event performed during the final year of the prior contract (tr. 2/320-41; exh. A-4). Having weighed this testimony, the Board finds that the Army used DA Form 2407s in preparing the exhibit at issue.

10. Apex also alleges that the Army did not exercise due care in its preparation of Technical Exhibit No. 22. It bases this conclusion upon statements made by Ms. Patsy W. Warnock, a former Governmental employee, in her discovery deposition. But a close reading of the passages relied upon by Apex demonstrates that Ms. Warnock's memory concerning the development of the exhibit faded. For example, she testified that the exhibit had been prepared by the predecessor contractor and that the Army's personnel had failed to verify the underlying information. But Ms. Warnock's deposition testimony in this regard was flatly contradicted by the live, credible testimony of the Army's witnesses. Mr. O'Neal, Mr. Rowe, and Ms. Collins testified that they personally spent at least two weeks counting individual, maintenance work orders as they appeared on DA Form 2407s before placing the totals on the exhibit (tr. 2/88-89, 320-41).

11. Two other contractual provisions are pertinent to this dispute. Paragraph H-7, entitled "Price Adjustments For Variations In Quantity Of Vehicles," provided:

> In the event the number of vehicles controlled and maintained by the Contractor under this contract varies by more than 7% of [sic] above or below the current authorization, 562 (526 for NTV and 36 for satellited and transient vehicles) for continuious [sic] period of 90 days or more an equitable adjustment in contract price shall be made upon demand by either the Government or the Contractor. The equitable adjustment shall be based on any increase or decrease in costs due solely to the variation above 575 vehicles or below 499 vehicles. No adjustment shall be made for variations in fleet size of less than the above stated range.

During the life of the contract, the number of vehicles controlled and maintained by Apex never varied more than seven percent "above or below the current authorization." Further, the contract did not contain a clause providing for an equitable adjustment due to a variation from the historical workload data contained in Technical Exhibit No. 22 (ASBCA No. 37813 R4, tab 1).

12. Finally, the contract incorporated FAR 52.215-02, "Audit-Negotiation (APR 1984)," which stated in pertinent part:

> (d) *Availability.* The Contractor shall make available at its office at all reasonable times ....
>
> * * *
>
> (2) Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are disposed of.

[2] Except for minor maintenance to motor scooters, the parties did not use the "C" maintenance category in their dealings under the contract.

[3] The definitions contained in Technical Exhibit #22 for the "Major Repairs" and "Maintenance and Other" categories are sufficient for purposes of this opinion. The Board simply notes that, of necessity, the "Major Repairs" category involved high cost maintenance.

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(ASBCA No. 37813, R4, tab 1)

13. Work proceeded under the contract; and, on 9 February 1988, Apex filed its first certified claim for "work performed beyond the estimated work load in the amount of $446,948.71." Apex broke its claim down as follows:

	Estimate	1st yr.	2nd yr.	Diff.	Price each	Total
A. Maint.	586	655	749	232	85.76	19,896.32
B. Maint.	425	634	682	466	85.76	39,964.16
C. Maint.	404	655	749	232	included in A above	
Other Repairs	3,382	6,216	6,233	5,685	47.34	269,141.49
Major Repairs	33	41	54	29	included in other repairs	
Maint. and Other	637	1,289	1,431	1,466	included in A & B	
Inspection only	26	136	163	247	$ 50.00	12,350.00
Accident	24	27	71	50	$697.10	34,855.00
Warranty	25	6	63	19	$ 14.00	266.00
						$376,472.97
					G&A—12%	45,176.76
					Profit—6%	25,298.98
					TOTAL	$446,948.71

(ASBCA No. 37813 R4, tabs 62, 117) However, Apex did not include any underlying documentation to support is claim.

14. On 11 April 1988, the contracting officer, Ms. Glenda W. Geiger, responded to Apex's submission. She wrote:

> Reference is made to your claim, dated February 9, 1988, concerning work load estimates.
>
> While your claim is understandable; [sic] it is not supported by sufficient documentation. The cost claimed appears to be based on your estimated costs at the time of bid preparation. This is not a sufficient basis for a determination of quantum. You need to submit actual cost data to demonstrate that you actually incurred additional costs over and above what you estimated.
>
> Also request you submit copies of all work orders (DA Forms 2407) for all repairs, maintenance, acccidents [sic] and warranty work performed, and parts invoiced to substantiate any repair parts shown on the work orders. These copies are needed in order for this office to adequately evaluate your claim.
>
> I appreciate your offer of a briefing but feel that at this point it would be a nonproductive exercise.
>
> Your letter also stated that the price of A and B maintenance was determined by totalling the cost and dividing the number of services during November 1987. The month of November 1987 is not included in the period of your claim, which you state covers the period of 1 October through 30 September 1986, therefore your pricing should be based on the period covered.
>
> Your claim is herewith returned for the additional information requested above.

(ASBCA No. 37813, R4, tab 116)

15. After receiving the contracting officer's letter, Mr. Perc Jones, Apex's project manager, initiated several telephonic conversations with her. He indicated that Apex intended to resubmit its claim by job categories, and Ms. Geiger responded by stating that she "had no problem with how he wanted to submit it, just to be sure he sent the documentation to back up" the claim (tr. 2/127-29).

16. On 10 June 1988, Mr. Jones forwarded a memorandum to Ms. Geiger in which he stated, in pertinent part:

> Reference is made to the above described contract and our recent discussions concerning the workload claim.
>
> Attached please find the copies of the work order logs (DA Form 2405) covering work at Ft. Stewart and Hunter Army Airfield. As you can see these logs list the work order numbers, vehicle numbers, manhours and parts cost for each job order.

(ASBCA No. 37813, R4, tab 74) Apex did, indeed, attach several hundred pages of DA Form 2405s to its letter. These forms, which Apex was required to maintain pursuant to subsection C.5.12.1.2 of the contract, were summaries of information derived from the aforementioned PA Form 2407s. The latter forms, which we have already discussed, were the basic work orders which contained a wealth of detailed information concerning the maintenance performed by Apex which, of necessity, was not included in the DA Form 2405s (exh. A-4, -5).

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17. The contracting officer, who had repeatedly requested that Apex provide the Government with "copies of all work orders (DA Forms 2407) for all repairs, maintenance, accidents [sic] and warranty work performed, and parts invoices to substantiate any repair parts shown on the work orders," consulted with her technical staff to determine if the summary sheets were adequate substitutes for the work orders. The conclusion of the Governmental personnel was that the DA Forms 2405s did not constitute a proper basis for analyzing Apex's claim because they were simply summaries which did not describe the maintenance events in sufficient detail. Ms. Geiger gave as an example the fact that, in the logs, Apex simply referred to maintenance under the contract's "Other Repairs" category as "Quick Fixes" without providing any detail concerning the type of work performed (tr. 2/129-32).

18. Ms. Geiger registered her disappointment with Mr. Smith who, once again, promised that Apex would forward the work orders to support its claim; however, the DA Form 2407s were not forthcoming (tr. 2/132-33). Instead, on 5 July 1988, Apex submitted an amended, certified claim for "A" and "B" maintenance events for the first two years of the contract which was supported not by work orders but by internal computerized summaries. Through its amended claim, Apex alleged that it had performed a total of 2,335 "A" and "B" maintenance events for the first two years of the contract whereas Technical Exhibit No. 22 had stated a total number of 1,011 for such maintenance events for the last year of the prior contract. Accordingly, Apex contended that it was entitled to an equitable adjustment in a total amount of $29,252.49. (ASBCA No. 37813, R4, tab 77)

19. At some point during the summer of 1988, Apex forwarded work orders to the contracting officer to support its claim that it had performed "A" and "B" maintenance events during the first two years of the contract which exceeded the number of such events specified in Technical Exhibit No. 22. Ms. Geiger forwarded these materials to Mr. John Brinson, the contracting officer's representative (COR) under the contract, who examined them in detail (tr. 2/134-35). On 23 September 1988, Ms. Geiger issued a final decision which incorporated Mr. Brinson's analysis of Apex's claim. She stated, in pertinent part:

> Reference is made to your claim, dated July 5, 1988, on workload estimates.
>
> Your claim asserts that you are entitled [sic] additional compensation for schedule A and B preventive maintenance services as provided for in the contract. You indicate specifically that this work was "performed over and above the estimated workload" for the foregoing services.
>
> In accordance with Technical Exhibit #22, Definition of Services, it states that "A, B, and C Maintenance is maintenance scheduled at regular intervals as specified in TM 38-600 or Operator's Manual". It also states that "Maintenance and other repairs are performed at the same time that a scheduled maintenance is performed." There were 401 job orders that should not be considered as A and B Maintenance. These include work orders for tire replacement, engine overhauls, air conditioner repairs, battery replacement, and etc. Consequently, these 401 job orders can not be properly considered as schedule A and B Maintenance and any additional compensation could only be evaluated in the category of "Maintenance and other" services.
>
> Also, of these 401 job orders, 189 were for initial processing of new or leased vehicles. Processing of new vehicles should not need maintenance at that time, but required bumper numbers, trip tickets, tags, etc., which is considered a function of the operation section not the maintenance section.
>
> Furthermore, if the total number of job orders submitted are reduced by 401, the actual total of A and B Maintenance does not exceed the historical levels provided in TE#22.
>
> Your reference to an "estimated number of services" is also incorrect. Paragraph C.5.12.1.5 of the contract states in part, that "Historical Workload is in Technical Exhibit #22." This historical data is not considered a government estimate. You may have relied on this in formulating your bid, however, there is no presentation that those services, properly considered to be A and B maintenance, ever exceeded the historical levels in TE#22. Based on the above your claim is hereby denied.

(Tr. 2/135-39, 267-71; ASBCA No. 37813, R4, tab 79)

20. At the hearing held in this matter, the parties disputed whether the initial processing of new vehicles should be considered an "A" or "B" maintenance event. Such processing did not constitute such mainte-

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nance but rather comprised an administrative task designed to incorporate vehicles into the fleet. This conclusion is bolstered by a plain reading of paragraph 6-7b of TM 38-600 which was referenced in subsection C-6 of the contract. This paragraph stated, in pertinent part: "Each new vehicle assigned to an installation or activity will be inspected and serviced only to the extent necessary to insure acceptability and proper operation until the initial scheduled service." Accordingly, the contracting officer acted correctly in declining to consider the inprocessing of a new vehicle as a scheduled "A" or "B" maintenance event.

21. Apex appealed the contracting officer's decision, and the appeal was docketed as ASBCA No. 37813.

22. On 18 November 1988, Apex filed a similar claim for purportedly excessive "A" and "B" maintenance events for the third year of the contract in a total amount of $13,581.07 (ASBCA No. 38278, R4, tab A). Because the Army did not have access to the original work orders which supported the claim, the contracting officer declined to issue a final decision (ASBCA No. 38278, R4, tab B). On 24 January 1989, Apex appealed the deemed denial of its claim, and the appeal was docketed as ASBCA No. 38278.

23. On 8 August 1988, Apex forwarded a certified claim to the contracting officer in a total amount of $14,278.57 for "Accident Repairs" which occurred during the first and second years of the contract allegedly in excess of the number of such repairs set forth in Technical Exhibit No. 22. Apex contended that it had performed 91 accident repairs during this two-year period, whereas the exhibit listed only 24 such repairs for the last year of the preceding contract. Apex did attach copies of the pertinent work orders to this claim (ASBCA No. 38512, R4, tab 4); however in formulating its claim, Apex ignored paragraph C.5.11.1.9 of the contract, which stated, in pertinent part, that the "cost of accident repairs during FY 84 was $16,730.51." FY 1984 was, of course, the last year of the preceding contract, and Apex's "Accident Repairs" expenditures for each of the first two years of its contract were far below this figure.

24. On 13 January 1989, the contracting officer denied Apex's claim in its entirety. She stated, in pertinent part:

> Reference is made to your claim in the amount of $14,278.57 for accident repairs based on workload estimate, dated August 8, 1988.
>
> This claim is hereby denied. In this claim you have included other type repairs which are not accident related, such as brake repairs, air conditioning, etc. There are no accident reports to show what was involved in the repairs.
>
> There is no justification to support the cost of the parts, or damages as you are showing the estimated cost of damages, not the actual cost.
>
> Paragraph C.5.11.1.4, Repair Sources, states that vehicle maintenance requirements which exceed the inhouse capability of the contractor shall be obtained from other sources that the contractor may choose, at no additional cost to the Government, therefore, the additional labor hours added to the job orders is not justified cost under this claim.
>
> Paragraph C.5.11.1.9 gives the cost of accident repairs as being $16,730.51 for FY84. Based on your figures presented in your claim, you are $8,008.32 below the estimated dollar amount for a two year period. It appears that the claim, as presented, did not consider the additional information in this paragraph.

(ASBCA No. 38514, R4, tab 5)

25. Apex appealed this decision, and the appeal was docketed as ASBCA No. 38514.

26. On 1 December 1988, Apex filed a certified claim for purportedly excessive "Accident Repairs" for the contract's third year in an amount of $1,201.83. It contended that it had performed 27 such repairs whereas Technical Exhibit No. 22 listed only 24 repairs as having been performed during the last year of the preceding contract (ASBCA No. 38354, R4, tab A).

27. In a decision dated 16 February 1989, the contracting officer denied Apex's claim. She stated:

> Reference is made to your claim for Accident Repairs—3rd year in the amount of $1,210.83.
>
> This claim is hereby denied based on the following reasons.
>
> a. Exceeding the historical data workload by only 3 repairs in a year's period is not excessive and does not warrant compensation. The standards applied are normally plus 15%.
>
> b. You have also incorporated work orders into this claim that list tire replacement, brake repairs, hose repairs and others. These repairs should not be included unless you can show that these damages occurred during an accident.

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c. The work orders and your computation show labor hours for Apex were added when work was accomplished in commercial shops.

d. Paragraph C.5.11.1.9 shows an amount of $16,730.51 that may be expected annually for accident repairs. In your claim you show that you expended only $9,110.88 which is far below the cost shown in subject paragraph.

(ASBCA No. 38354, R4, tab C)

28. Apex appealed the contracting officer's decision, and the appeal was docketed as ASBCA No. 38354.

29. On 25 October 1988, Apex filed a certified claim for an equitable adjustment in an amount of $94,140,38 for purportedly excessive maintenance events performed with respect to the contract's category of "Other Repairs" during FY 1986. On 28 October 1988, Apex filed a similar claim in an amount of $214,443.47 for the contract's second year; and, on 17 November 1988, Apex submitted a claim for allegedly excessive "Other Repairs" for FY 1988 in an amount of $112,686.15 (ASBCA No. 38178, 38224 and 38297, R4, tabs A, B, C).

30. Despite the contracting officer's repeated requests that Apex provide copies of work orders to support its claims, the contractor simply enclosed internal computerized lists which, *inter alia,* served to exaggerate the volume of "Other Repairs" by tabulating individual entries on repair orders rather than computing the numbers of repair events themselves. To use an example stated by Apex's project manager himself, Apex's clerical personnel had separately counted the installations of a distributor cap and a rotor as "Other Repairs" whereas common sense would dictate that these installations comprised elements of one repair event, *i.e.,* a tuneup. As Mr. Smith admitted in his testimony, because of this erroneous practice, "the number of events might be less than [Apex] thought when this was prepared" (tr. 1/209-10).

31. Another problem generated by the computerized lists was that they contained entries which were wholly unrelated to the category of "Other Repairs," such as maintenance which Apex performed on its own equipment, the issuance by Apex's personnel of small amounts of oil or other lubricants to "top off" fluid levels, and requisitions of hand cleaner (ASBCA Nos. 38178, 38224 and 38297, R4, tabs A, B, C; tr. 2/273-81).

32. Having examined the pertinent computerized lists, the Board concludes that Apex erred by separately tabulating individual entries on repair orders as "Other Repairs." Instead, in formulating its claims in this category, it should simply have computed the numbers of repair events. Further, the Board concludes that the issuance of small amounts of oil and other lubricants for the purpose of "topping off" fluid levels does not constitute "Other Repairs," as defined in the contract. Finally, the Board finds that Apex should not have included repairs of its own equipment and such items as requisitions of hand cleaner in its claims as "Other Repairs" under the contract.

33. On 30 December 1988, the contracting officer wrote the following letter to Apex:

Reference is made to your claims in the amount of $94,140.38, $112,686.15, and $214,443.47 for "Other Repairs."

It appears that there may be a basis for entitlement for an adjustment, however, it cannot be determined based on the computer reports. In order to determine adjustment, you must submit actual substantiated cost to include copies of all DA Form 2407s and parts invoices applicable to these claims.

If you resubmit the above claims with supporting documentation it [sic] will be evaluated and a decision issued as soon as possible.

(ASBCA Nos. 38178, 38224 and 38297, R4, tab D)

34. The work orders were not forthcoming; and, in January 1989, the contracting officer issued a decision denying Apex's claims for excessive "Other Repairs" in their entirety (ASBCA Nos. 37818, 38224 and 38297, R4, tab H). Apex filed three notices of appeal, and the appeals were docketed as ASBCA Nos. 38178, 38224 and 38297, respectively (ASBCA Nos. 37818, 38224 and 38297, R4, tab I).

35. Sometime in the winter of 1989, Apex forwarded three boxes of disorganized work orders to the contracting officer for her review. Ms. Geiger described the condition of the boxes as a part of her testimony at the hearing. She testified:

It looked like something someone would have put in the trash can. Three boxes of totally just papers picked up and dropped in the boxes. Had I not been expecting 2407's I would not have been able to identify what the things were for. I had no idea.

(Tr. 2/157-58) Rather than return the boxes, Ms. Geiger employed three or four of

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her subordinates for a period of three months in an effort to organize, to segregate by job category, and to count the various work orders (tr. 2/159-65). During the spring of 1992, while discovery was ongoing in these appeals, Apex inexplicably produced six additional boxes of work orders. Over a one-month period, the contracting officer directed her staff to count the new work orders and to add the sums to the previous totals (tr. 2/175-77).

36. The result of the Government's efforts was the following exhibit:

GOVERNMENT COUNT OF WORK ORDERS SUBMITTED BY APEX

JOB CATEGORY	TE #22	CLAIMED BY APEX FY 86 [YR 1]	ACTUAL COUNT BY GOVT [YR 1]	CLAIMED BY APEX FY 87 [YR 2]	ACTUAL COUNT BY GOVT [YR 2]	CLAIMED BY APEX FY 88 [YR 3]	ACTUAL COUNT BY GOVT [YR 3]
A-MAINT	586	*	393	*	442	*	435
B-MAINT	425	*	359	*	518	*	461
TOTAL	[1011]	1043	752	1292	960	1145	896
C-MAINT	44	N/A	11	N/A	0	N/A	0
OTHER REPAIRS + ("QUICK FIXES")			1324 + 2620		733 + 3923		1840 + 1671
TOTAL	3382	8063	3944	8889	4656	5528	3511
MAINT & OTHER	637	NONE RCVD	168	NONE RCVD	186	NONE RCVD	141
MAJ RPRS	33	N/A	9	N/A	2	N/A	3
WRNTY	25	N/A	13	N/A	80	N/A	28
ACCIDENTS	24	***	***	91	91	27	27
INSPCTNS	26	N/A	27	N/A	32	N/A	30

LEGEND

*: Appellant did not segregate its claim by type of maintenance service.

***: Accident Repairs for Years 1 & 2 [FY 86-87] combined for a total of 91. See corresponding entry for Year 2 [FY 87].

(Exh. G-1) (Bracketed information in original) Based upon its review of the record, the Board finds the Government's count of repair events to be accurate and credible. In tabulating "A" and "B" events, the Government properly declined to include the processing of new vehicles. Moreover, in computing the number of "Other Repairs," which included minor repair events which could be accomplished in a few minutes at most, the Government correctly decided to count repair events rather than separately to tabulate installations of multiple parts which comprised single repairs. Finally, the Government properly declined to count as "Other Repairs" the issuance by Apex's personnel of small amounts of oil or other lubricants to "top off" fluid levels.[4]

DECISION

A preliminary issue which we must decide relates to the degree of care exercised by the Army's personnel in preparing Technical Exhibit No. 22. As the United States Court of Claims held in *Womack v. United States* [12 CCF ¶81,795], 182 Ct. Cl. 399, 412-13, 389 F.2d 793, 801 (1968), "in promulgating an estimate for bidding-invitation purposes, the Government is not required to be clairvoyant but it is obliged to base that estimate on all relevant information that is reasonably available to it." The Army complied with this requirement. Its personnel spent at least two weeks counting individual, maintenance work orders for the last year of the preceding contract as they appeared on DA Form 2407s before placing the totals on the exhibit. Several tribunals, including this

[4] In an apparent attempt to rebut the Government's exhibits, Apex presented at the hearing a series of handwritten calculations performed by an unnamed paralegal. Many of these sums were derived from documents other than the original work orders and, accordingly, we decline to give them credence.

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Board, have endorsed the use of historical workload figures for prior years as bases for such estimates. *Accord Medart v. Austin* [38 CCF ¶ 76,349], 967 F.2d 579 (Fed. Cir. 1992); *Integrity Management International, Inc.*, ASBCA Nos. 34802, 35412, 36149, 37140, 89-3 BCA ¶ 21,996. Accordingly, absent any credible evidence to the contrary, we conclude, as matter of law, that the Army exercised due care in preparing Technical Exhibit No. 22.

Turning to Apex's actual experience under the instant contract, we simply note a line of precedent from this Board which holds that when actual orders vary significantly from estimates the burden of persuasion shifts to the Government to prove the reasonableness of its estimating procedure. *Huff's Janitorial Service,* ASBCA No. 26860, 83-1 BCA ¶ 16,518; *Viktoria Fit International Spedition,* ASBCA No. 39703, 92-2 BCA ¶ 24,968. However, this reasoning was effectively overruled by the Federal Circuit's recent decision in *Medart,* 967 F.2d at 581, and is, therefore, of no avail to Apex.

The *Medart* decision notwithstanding, Apex's workload under the contract did not, as a whole, differ markedly from the number of maintenance events set forth in Technical Exhibit No. 22. For example, with respect to "A" and "B" maintenance, the Government's credible count demonstrates that Apex actually experienced fewer events than were listed in the exhibit. Hence, viewed in conjunction with our holding that the Army exercised due care in preparing Technical Exhibit No. 22, we conclude that Apex is not entitled to any recovery under ASBCA Nos. 37813 and 38278.

We reach a similar result concerning Apex's claims for "Accident Repairs." It is true that the number of repairs performed by Apex during each of the three years of the contract exceeded the number of such repairs set forth in the technical exhibit. But in formulating its claim, Apex ignores paragraph C.5.11.1.9 of the contract which stated a historical sum for "Accident Repairs" of $16,730.51 for the last year of the preceding contract. Apex never approached, much less exceeded, this figure for any of the contractual years. Based upon this fact, we must deny any relief in ASBCA Nos. 38514 and 38354.

Apex's claim for excessive "Other Repairs"—or "Quick Fixes"—must also fail. Although Apex is correct in pointing out that, even by the Government's count, the number of such repairs exceeded the figure set forth in Technical Exhibit No. 22 for all three years of the contract, we have already held that the exhibit was prepared with due care. Further, many of these so-called "Quick Fixes" could be accomplished in a few minutes at most. Therefore, any discrepancies that appear on the Government's count are *de minimis* and do not rise to a level whereby Apex could recover damages. Accordingly, we deny relief with respect to ASBCA Nos. 38178, 38224 and 38297.

CONCLUSION

The appeals are denied.

[¶ 26,300] M.V.I. Precision Machining, Ltd.

ASBCA No. 37393, August 3, 1993. Contract No. N00383-84-C-2673.

Attorney Fees and Costs Under Equal Access to Justice Act—Statutory Fee Rate—Accountant's Fees.—A contractor was not entitled to recover its accountant's full $80 per hour charges for services necessary in presentation of the contractor's successful appeal, because fees allowable under the Equal Access to Justice Act are limited to no more than $75 per hour. The contractor recovered $2,675 for 32 hours of accounting services plus 11 hours of travel time at $25 per travel hour. The contractor's recovery of attorney fees billed at $100 per hour was also limited to the statutory $75 per hour.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Employee as Consultant.—A contractor was not entitled to recover amounts billed by a purported consulting firm for services in connection with a successful appeal, because the billing firm was the alter ego of the contractor's vice president. The contractor contracted with the vice president's firm for time spent in selling and marketing its products and for advice. The value of employee time and effort for presentation of an appeal is not recoverable under the Equal Access to Justice Act. However, a billing by the vice president for the cost of obtaining a copy of the hearing transcript was allowable.

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Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Legal Work.—A contractor was not entitled to recover amounts paid to its vice president for work ordinarily performed by an attorney, because the vice president was not an attorney. A nonattorney is not entitled to an award of fees under the Equal Access to Justice Act for performing legal work.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Alternative to Actual Expenses.—Meal and lodging expenses for the contractor's attorney and accountant in connection with a successful appeal were allowable, in the absence of specific charges, at the maximum daily rate allowable for federal employees at the time of the hearing. In addition, the accountant's fee included 11 hours of travel billed at $25 per hour. That rate was a fair and reasonable alternative to the actual costs of travel and compensation for the accountant's time spent during travel.

For the appellant: William F. Long, Executive Vice President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Kevin J. Malloy, Trial Attorney, Navy Aviation Supply Office, Philadelphia, Pennsylvania.

Before HARPER, RUBERRY, and SPECTOR, Administrative Judges.

HARPER, Administrative Judge: Appellant, M.V.I. Precision Machining, Ltd. (hereinafter "MVI") has requested our assistance in determining the amount of attorney's fees and other expenses to which it is entitled per our prior decision in this appeal reported at 93-1 BCA ¶ 25,376.

In *M.V.I. Precision Machining, Ltd.*, ASBCA No. 37393, 91-2 BCA ¶ 23,898, we held that Government's decision to terminate a contract was improper and that the termination had to be considered as a termination for the convenience of the Government. MVI was the prevailing party in such adversary adjudication.

In *M.V.I. Precision Machining, Ltd.*, ASBCA No. 37393, 93-1 BCA ¶ 25,376, we held that MVI is entitled to attorney's fees and other expenses it reasonably incurred in connection with the aforesaid adversary adjudication with certain specified limitations. We directed the parties to determine the amount of award and, in the event they could not agree, to submit the matter to the Board for resolution. The parties have been unable to agree upon the amount to which MVI is entitled.

As part of its application for attorney's fees and other expenses MVI submitted an itemized bill from its attorney, Dennis D. Del Cotto, listing 320.2 hours of services rendered to MVI to initiate, prepare and present its appeal to the Board. We have carefully reviewed such bill and have determined that the services provided and the time consumed were fair and reasonable considering the effort needed to properly present the appeal. Mr. Del Cotto charged for his services at the rate of $100 per hour which exceeds the $75 per hour limit imposed by the Equal Access to Justice Act (EAJA), 5 U.S.C.A. § 504. Accordingly, we award attorney's fees in the amount of $24,015.

MVI also submitted as a part of its application a bill, fully itemized, from Charles A. Deluzzio, C.P.A., for his services. Mr. Deluzzio's bill lists 32 hours spent by Mr. Deluzzio in preparation, testifying, assisting, and attending the MVI hearing. His efforts concerned MVI finances essential to the proof of MVI defenses to the termination for default. Mr. Deluzzio charged for such time at the rate of $80 per hour. He also charged for 11 hours spent travelling from his office in Monroeville, Pennsylvania to the place of hearing in Falls Church, Virginia, and return at the rate of $25 per hour. Government does not object to Mr. Deluzzio's charges.

We deem the services provided by Mr. Deluzzio to have been necessary and reasonable to present the appeal. We, likewise, consider the cost of 11 hours at $25 per hour as a fair and reasonable alternative to the actual costs of travel involved and compensation for Mr. Deluzzio's time consumed during such travel. Mr. Deluzzio's charges, however, must be limited to no more than $75 per hour. See *PetroElec Construction Co., Inc.*, ASBCA Nos. 32999, et al., 87-3 BCA ¶ 20,111. Accordingly, we award in the aggregate $2,675 for Mr. Deluzzio's services.

Also included with its EAJA application were claims for reimbursement by MVI for sums paid to nine of its employees for preparation and assisting with the presentation of the appeal. Among the nine employees was William F. Long, Executive Vice President of MVI. The total sought for the eight employees, other than William F. Long, amounts to $17,013.51. The amount of

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$40,283.75 was sought for William F. Long. Such amount was manifested by an itemized bill from Executive Consulting, Inc. Executive Consulting, Inc. is the alter ego of Mr. Long. MVI contracts with Executive Consulting, Inc. for Mr. Long's time spent in selling and marketing MVI's products and for his advice. MVI pays for Mr. Long's services at the rate of $65 per hour, plus expenses, plus a commission of 5% of each purchase order, and plus a sum of $1,000 each month.

We previously decided that the time spent by MVI's nine employees are not compensable under an EAJA award. We have repeatedly held that the value of employee time and efforts spent for the presentation of an appeal are not recoverable under EAJA. See *Goetz Demolition Company,* ASBCA No. 39129, 91-2 BCA ¶ 23,836.

Even if Mr. Long performed tasks ordinarily performed by an attorney such as research, preparation of a complaint, and establishing arguments, such does not entitle MVI to be compensated for such effort as part of an attorney's fee. A non-attorney is not entitled to an award of fees for performing legal work. *Union Precision & Engineering,* ASBCA No. 37549, 93-1 BCA ¶ 25,337.

MVI also submitted as a part of its claim for EAJA relief an Expense Statement for $1,722.09 from Mr. Long to MVI. Such statement was indicated by Mr. Long to cover all hotel expenses, meals, telephone charges, and automobile rental of Michael R. Vucish, President of MVI, William F. Long, Executive Vice President of MVI, Dennis D. Del Cotto, Attorney for MVI, and Charles A. Deluzzio, C.P.A. for MVI during the five days of the hearing. The Expense Statement did not differentiate as to how much of each expense item was attributable to each of the named parties. Moreover, MVI failed to provide any further information as to such expenses.

As previously mentioned the expenses of employees such as Michael R. Vucish, President and William F. Long, Executive Vice President are not allowed as part of an EAJA award. *P-B Engineering Company,* ASBCA Nos. 39041, 39042, 91-3 BCA ¶ 24,361. However, we recognize that the reasonable meal and lodging expenses of MVI's attorney and of MVI's accountant may be included as a part of an EAJA award. In the absence of the specifics of such expenses we allow for five days the per diem rate allowable to federal employees at the time of the hearing as being reasonable which amounts to $121 per each person or $242 in the aggregate to cover the lodging and meals of Mr. Del Cotto and Mr. Deluzzio. We make no award for automobile rental as there was no showing that such was reasonably necessary for either the attorney or the accountant.

Lastly we award the sum of $1,025 to cover the cost of obtaining a copy of the hearing transcript which was shown on the itemized bill of "William F. Long, Agent."

In summary we award to MVI under EAJA as follows:

Attorney's fee	$24,015
Accountant's fee	$ 2,675
Meals and Lodging for Attorney & Accountant	$ 1,210
Copy of Transcript	$ 1,025
Total	$28,925

[¶ 26,301] Sermor, Inc.

ASBCA Nos. 32824, 32984, 33173, August 16, 1993. Contract No. F09603-81-C-4921.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Discretionary Relief.—Under a contract for the production of gun parts that was terminated for default, the board lacked jurisdiction to decide a contractor's claim seeking award of a government loan, despite the contractor's contention that the government improperly denied the contractor's request for guaranteed financing, because the relief sought was discretionary and not available under any contract clause or regulation imposing a contractual duty. Even if the board had authority to award a loan, the evidence did not show that the contractor filed an application with the financing institution as required by the regulations.

Pricing of Adjustments—Actual Costs—Mitigation.—Under a contract for the production of gun parts that was terminated for default, a contractor was not entitled to an equitable adjustment for the losses incurred in selling castings for scrap to obtain funds to keep working, despite its contention that it was improperly denied a guaranteed government

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loan, because the decision to sell equipment at a loss was not a reasonable business decision and ultimately violated the contractor's duty, as an injured party, to exercise reasonable care in mitigating damages. The contractor did not show that its need to sell scrap at a loss was a direct and foreseeable consequence of any alleged government delays in disapproving the contractor's first article.

Pricing of Adjustments—Actual Costs—New-for-Old Damages.—Under a contract for the production of gun parts that was terminated for default, a contractor was not entitled to recover the difference between the scrap price and original purchase price of castings that the contractor sold as scrap to obtain funds to keep working, because it did not show that it suffered any monetary injury. The contractor failed to provide any probative evidence that the value of the castings was greater than the price for which they were sold. Moreover, allowing the contractor to recover the original purchase value of the castings would be tantamount to furnishing new castings for castings that had been used and depreciated.

Defaults, Grounds—Failure to Progress—Ability to Perform.—Default termination of a contract for the production of gun parts was proper, despite the contractor's contention that the government made sure that the contractor lacked the funds needed to complete the contract, because the government met its burden of proof in showing that the contractor failed to perform the contract in accordance with the delivery schedule. The contractor did not show that any delay in approving progress payments or that any alleged *de facto* debarment or alleged denial of fair and equitable treatment excused its failure to complete the contract.

Delays—Adjustment—Proof.—A contractor, under a contract for the production of gun parts, was not entitled to an equitable adjustment for an alleged increase in plating costs owed its plating subcontractor as a result of government-caused first article approval delays, because the contractor failed to provide any evidence in support of its claim, other than brief testimony from its president. The president did not indicate when prices went up or whether the contractor was liable to the subcontractor for the increased price. The contractor did not provide any bills, invoices, or letters or any testimony regarding oral demands.

For the appellant: Sergio Morsani, Jr., President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Kenneth J. Murray, Jr., Trial Attorney.

Before DICUS, WILLIAMS, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: These appeals arise from a default termination and the denial of claims by the contracting officer under the captioned contract for the production of parts for a Gatling gun. ASBCA No. 32824 is taken from denial of claims for Government financing in the amount of $2,900,000.00 and additional costs totalling $90,977.33, ASBCA No. 32984 is taken from the default termination of Contract No. F09603-81-C-4921 (hereinafter 4921), and ASBCA No. 33173 is taken from denial of a claim for $2,978.84.

FINDINGS OF FACT

1. Contract 4921 was awarded to appellant on 1 October 1981. The contract called for 2 first articles and 2473 production items priced at $8.49 each for a total fixed price of $21,012.75. First article delivery was due within 120 days from receipt of the contract, with production items due within 150 days from Government approval. The Government had 150 days to approve or disapprove the first articles. The contract contained the Disputes (JUN 1980), Default (AUG 1969), Government Delay of Work (SEP 1968), and First Article Approval—Government Testing (with Optional Paragraph (i)) (SEP 1969; APR 1974) clauses (R4, tab 1).

2. The part to be produced is called a track rotor (R4, tab 1; exh. G-51). The rotors are part of the mechanism in the M61/M61A1 and GAU-4A Gatling gun which allows the bolts to ride back and forth as rapidly as 6000 times per minute (tr. 158-59; exh. 5).

3. Appellant did not meet the first article delivery date and on 25 August 1982 a new date of 28 December 1982 was proposed by respondent. Appellant agreed to the new date by letter of 14 September 1982 (R4, tabs 4, 5). By letter of 13 October 1982 appellant was advised as follows:

> Drawing No. 7268552 is clarified below as requested:

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a. Depth of counterbore in Section A-A is not given; .148-.010 refers to the thickness of material left on top of the counterbore.

b. The .310 + .005 radius should be referenced for four places instead of only two.

c. Phantom lines in bottom view on Drawing #7268552 stop at the point where the .188 + .003 radius runs into the .310 + .005 radius.

d. Finish should be in accordance with 1.7.1 of MIL-STD-171.

(R4, tab 6)

4. Appellant did not meet the new delivery schedule and by letter of 18 July 1983 proposed first article delivery by 30 August 1983 and production items by 25 February 1984 (R4, tab 9). Thereafter first article delivery date was changed to 26 September 1983 and the contract price reduced by $150.00 by bilateral Modification No. A00003 (R4, tab 10). First articles were examined at appellant's facility on 27 September 1983 and delivered to respondent's facility 3 October 1983 (R4, tab 11). By letter of 23 January 1984 respondent disapproved the first articles, stated a second submission was not authorized, and advised appellant that its failure to timely deliver a conforming article was grounds for default. Appellant was afforded 10 days to respond. The following specific deficiencies were listed, referencing the relevant contract drawing:

Drawing Requirement	First Article Checked
Dwg. No. 7268552	
30° - 4 Places	20°
30° - 2 Places	20°
30° - 2 Places	Range 13° - 17°
30° - 2 Places	Range 13° - 18°
.2195 - .0010	.2211
.38 Min 2 Places Both ends	F/A not as depicted on dwg.

(R4, tab 13)

5. When appellant failed to respond to the 23 January 1984 letter the contracting officer sent a 25 April 1984 letter advising appellant the contract was terminated for default by Modification P00001, which was executed 2 May 1984 (R4, tab 15). Affecting the contracting officer's action was appellant's filing for bankruptcy on 14 March 1984 (tr. 220, 594). The default termination was set aside under 11 U.S.C. § 362 (the automatic stay provision) by the United States Bankruptcy Court for the Southern District of Florida ("bankruptcy court") (R4, tabs 16, 17). The bankruptcy court subsequently lifted the automatic stay to allow respondent to attempt to terminate contract 4921 (R4, tab 18).

6. Respondent chose to reinstate the contract and negotiations ensued. The termination contracting officer sought a first article resubmission, 120-day delivery, a $475.00 price decrease, a pre-award survey establishing responsibility, and a release from any claims arising from the default termination (R4, tabs 20, 21, 30, 31). Appellant sought progress payments and a reservation of claims arising from the default termination. It offered to deliver in 45 days if progress payments were included (R4, tabs 23, 26).

7. Modification No. P00002, which reinstated the contract, provided for 120-day delivery. It did not include progress payments, but contained the following provision:

> The contractor hereby waives and releases the Government from any and all claims, demands, or suits arising out of the previous default termination.

(R4, tab 33)

8. Appellant signed Modification No. P00002 on 18 January 1985. However, the 18 January 1985 forwarding letter, which acquiesced in pursuing progress payments separately, contained the following reservation:

> Sermor's release does not cover any of the actions of the government that led up to the Default Termination of 25 April 1984.

(R4, tabs 31, 33)

9. Notwithstanding the reservation, the termination contracting officer executed the modification on 31 January 1985 (R4, tab 33). By letter of 8 February 1985 he responded to appellant's 18 January letter. He noted that 5 June 1985 was the delivery date for the first article and directed appellant to the procurement contracting officer for progress payments or "other matters." No mention was made of appellant's reservation of claims from the default termination (R4, tab 34).

10. For the first time, appellant took exception to the test results on which the January 1984 disapproval of appellant's first article submission was based. While conceding that the 30 degree chamfer requirement was not met (*see* finding 4), appellant asserted in a 21 February 1985 letter that it presented no serious technical difficulty in

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production (R4, tab 35). At a meeting on 9 May 1985 it was conceded that the drawing that governed the track rotor's dimensions had no plus or minus tolerance for the 30 degree chamfer. Thus, the drawing was considered deficient and the chamfer angles of 13 to 20 degrees on appellant's first articles which were correctable in production were not considered grounds for outright disapproval. Moreover, the part's plating thickness was calculated to permit an allowable maximum of .2211 (*cf.* finding 4; tr. 1/7-8, 5 June 1990 Simpson memorandum). As it was determined the part otherwise met specifications, conditional approval was granted (R4, tab 40; tr. 812; exh. G-20, 21). Appellant agreed to a tolerance of plus or minus 1 degree on the chamfer angle at no price increase, and bilateral Modification No. P00003, executed by the contracting officer on 17 June 1985, incorporated that change into the contract (R4, tabs 42, 43).

11. By letter of 21 June 1985 appellant requested that contract 4921 be amended to include progress payments (R4, tab 44). Appellant maintains that in a conversation with Lt. Colonel Eugene Bates on 9 May 1985 it was agreed that progress payments would be provided as part of the consideration for appellant agreeing to the tolerance for the chamfer angle at no cost (tr. 733). Col. Bates denies this (tr. 813). Appellant made no mention of such an agreement in contemporaneous correspondence until 3 September 1985 (R4, tabs 42, 44, 46, 50, 61; *cf.* findings 14, 15). We conclude no such agreement was made.

12. Appellant maintains that the procurement contracting officer informed appellant in a telephone conversation on or about 2 July 1985 that appellant's request for progress payments had been approved (tr. 2/45-46). The procurement contracting officer denies this (tr. 2/77-81). Contemporaneous documents establish that respondent was gathering information about appellant's financial condition in early July 1985 and no decision had been made (R4, tab 51). On balance, we conclude appellant was not told in July 1985 that its request for progress payments had been approved.

13. Modification No. P00004, executed by respondent on 8 July 1985, acknowledged acceptance of the first article after the 9 May 1985 meeting and rescinded the $475.00 price reduction imposed by Modification No. P00002 (R4, tab 45).

14. Respondent determined it was not in its interest to include progress payments in the contract and communicated its decision to appellant on 14 August 1985 (R4, tab 49). Appellant had, on that date, advised respondent by letter that its ability to produce was affected by the lack of progress payments (R4, tab 48). On learning that its request had been denied appellant sent a 19 August 1985 letter asserting that respondent was in breach of contract, that appellant was relieved of the obligation to perform, and that it would file a request for an equitable adjustment (R4, tab 50). By letter of 22 August 1985 appellant informed respondent that it was unable to make a payment on a piece of equipment allegedly valued at $220,000.00 and that it would file an equitable adjustment claim against respondent for replacement cost of the equipment (R4, tab 52).

15. By letter of 22 August 1985 appellant contended that it had stopped all activity not related to contract 4921 and that, in effect, respondent would be held accountable for resultant damages (R4, tab 53). Further allegations of resultant damage were contained in a 23 August 1985 letter (R4, tab 54). Thereafter, a 27 August 1985 meeting was held between the parties to further discuss the issue, but again the decision to deny progress payments was made and communicated to appellant on 29 August 1985 (R4, tab 57).

16. Appellant sent various letters asserting potential claims, asserting among other things that no contract existed as a result of denial of its request, that labor costs were increased due to management personnel running machines, and that contract 4921 was responsible for its financial problems (R4, tabs 62, 63, 69, 72). On 22 October 1985 respondent informed appellant of a default investigation arising from its failure to deliver and requested a response in 10 days (R4, tab 77).

17. Bilateral Modification No. P00005 dated 31 October 1985 incorporated progress payments into the contract. Deliveries of 350 items were scheduled monthly from 18 November 1985 to 18 February 1986 with a final delivery of 23 items 5 March 1986 (R4, tab 82). Progress Payment Request No. 1 was presented 1 November 1985 in the amount of $18,473.00 and paid 11 November 1985 in the amount of $16,164.00 (R4, tab 84). The administrative contracting officer explained in a letter of 7 November 1985 that he had applied a loss ratio to the payment, citing FAR 32.503-6(g)(1) and appellant's certification of costs incurred ($61,501.00), costs to complete ($10,000.00), and the contract price ($20,862.75) (R4, tab 85). Loss ratios were

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thereafter applied to all progress payments (tr. 564-69).

18. Progress payments of $1,737.00 and $390.00 were made in December 1985 and January 1986, also applying the loss ratio (R4, tabs 98, 111). Progress payments reflected in the record total $18,291.00 (*id.*; finding 17).

19. In a letter dated 12 November 1985 appellant demanded the $2,390.00 difference between the request and payment for Progress Payment No. 1, requested a final decision on alleged delays, and asserted various grievances against respondent, including a failure to issue a final decision from a 1 November 1985 meeting, the minutes of which indicate nothing was presented that was identified as a claim and no final decision was requested (R4, tabs 84, 87).

20. The contracting officer responded on 20 November 1985, advising appellant that she did not consider there to be an existing dispute. She also briefly outlined the procedure for submitting a claim (R4, tab 93). By letter dated 10 December 1985, identified as Claim No. 1 and certified appropriately, appellant sought a $2,900,000.00 loan or loan guarantee (R4, tab 100). By letters dated 11 December 1985 and presented at a 13 December 1985 meeting, Appellant claimed $76,316.38 (Claim No. 2) and $14,658.95 (Claim No. 3) for delays allegedly caused by respondent (R4, tabs 101, 102). Claim No. 2 seeks damages for the cost of castings and claim preparation. Invoices are attached without explanation. The basis of the claim is that appellant sold the castings for scrap "to keep producing." (Tr. 652). The castings were purchased from Unexcelled Castings for another contract (tr. 652). Appellant owed Unexcelled Castings $110,000.00 (tr. 800). Other than the sale price as scrap, there is no probative evidence of the value of the castings at the time of sale. Claim No. 3 seeks costs related to sale of two Bridgeport milling machines, claim preparation and reacquisition costs (R4, tab 102). The claim does not explain the relationship of the machines to the contract. Appellant's president testified of the sale price "We were getting as much as we could but we couldn't get the true value from it." (Tr. 652).

21. Respondent requested a unitary claim on 18 December 1985 (R4, tab 107). This request was repeated 14 January 1985 (R4, tab 112).

22. Appellant declined to combine claims, but increased Claim No. 2 by $16,054.57 and Claim No. 3 by $211.56 on 29 January 1986 (R4, tabs 113, 115). Appellant also submitted Claim No. 4 dated 28 January 1986, asserting that delays caused by respondent resulted in increased costs for plating of $.60 per item, using the August 1981 price of its vendor as a baseline (R4, tab 115). The claim is unsupported by invoices or other evidence. There is no probative evidence to indicate the timing of the increases. Appellant's president testified "We got a request for an increase in price, and we happen to agree with him that he deserves it." (Tr. 771). Claims 1, 2 and 3 were denied in a 30 January 1986 final decision in which Claim No. 1 is not granted because it seeks relief not available under the Disputes Clause (R4, tab 116). Appellant considered the denial of its claims a breach of contract (tr. 775-76).

23. Appellant stopped shipments in January 1986 because it ran out of money (exh. G-40; tr. 776-77). A total of 1841 units had been shipped, leaving 634 units due (exh. G-44). By letter of 7 March 1986, 2 days after the final delivery date, appellant was given 10 days to show cause why it should not be default terminated for failure to deliver (R4, tab 118; *see* finding 17).

24. Appellant responded to the show cause letter by letter of 18 March 1986. The letter stated that 345 parts were at its plating subcontractor and the rest were complete, awaiting shipment to the plating subcontractor. Appellant also asserted that it was not delinquent because respondent's denial of its claims had relieved appellant of any duty to continue performance. Appellant further stated it "stands ready to successfully complete this contract when (respondent) treats us fairly, impartially and equitable [sic] as required by the contract or when we can generate funds apart from referenced contract to meet our commitments to Orlando Plating and thereby make final shipment." (R4, tab 119).

25. In a final decision dated 27 March 1986 respondent denied appellant's Claim No. 4 (R4, tab 123).

26. Although appellant had suspended manufacturing operations and was liquidating equipment, it offered in a letter of 29 April 1986 to proceed with the plating of 634 pieces. The offer was conditioned on a modification giving appellant 40 days to deliver and with the understanding that appellant had no equipment to correct improper plating. Respondent was given 5 days to reply (R4, tab 125).

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27. On 1 May 1986 appellant filed its appeal from the 30 January 1986 final decision (R4, tab 126).

28. Notice of default termination of contract 4921 was provided to appellant in a final decision dated 23 May 1986 (R4, tab 128). An appeal was filed 30 May 1986 (R4, tab 130). By letter dated 25 June 1986 an appeal was taken from the 27 March 1986 denial of Claim No. 4.

DECISION—ASBCA No. 32824

Appellant argues that respondent delayed performance improperly by its disapproval of the first article submission in January 1984. It seeks a $2,900,000.00 Government loan to be put back to its original position and costs it attributes to the delay. Appellant also argues it did not receive fair and equitable treatment. Respondent argues the Board has no jurisdiction to award a Government loan, that rejection of the first article submission was proper, and that the claim is barred by the release in Modification No. P00002.

For reasons set out more fully below under ASBCA No. 32984, we conclude that appellant has not established entitlement to recovery for allegedly unfair and inequitable treatment. We reach a similar result with other allegations regarding respondent's role in appellant's inability to perform. However, we conclude respondent is responsible for the delay arising from first article disapproval.

We have found that appellant's original submission met specifications and was conditionally acceptable (finding 10). Of the deficiencies that resulted in first article rejection, subsequent review of the specifications by respondent's technical personnel led to the conclusion that all but the chamfer angle were met (finding 10). As no tolerance was provided for the chamfer angle in the drawings and specifications, that was considered an inadequate basis for disapproval (*id.*). Accordingly, the outright disapproval of the first article in January 1984 was not justified. *Dunrite Tool & Die, Inc.*, ASBCA No. 27538, 83-2 BCA ¶ 16,830.

Moreover, we are not persuaded by respondent's argument that claims arising from the events leading to the 25 April 1984 termination for default are barred by Modification P00002. Appellant forwarded that modification with an 18 January 1985 transmittal letter reserving claims from actions that led up to the default termination (finding 8). Notwithstanding the reservation, the contracting officer signed the modification. Although other matters were addressed in a letter responding to the 18 January letter, the contracting officer did not comment on the reservation (finding 9). Under similar circumstances we have rejected the argument that appellant released its claim. *Farnsworth & Chambers Co., Inc.*, ASBCA No. 7130, 1962 BCA ¶ 3499. We find that appellant did not waive claims arising from actions leading to the 25 April 1984 default termination. Likewise, appellant's failure to appeal the default termination does not divest the Board of jurisdiction. This is because of the automatic stay provision at 11 U.S.C. § 362, under which the bankruptcy court rendered the default termination null and void (finding 5). *Communications Technology Applications, Inc.*, ASBCA Nos. 41573, 42993, 92-3 BCA ¶ 25,211.

Although appellant was delayed by the improper rejection of the initial first article submission and did not waive claims from actions leading to the default, the specific claims at issue present other problems. We do not interpret the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (CDA), the Disputes Clause, or the FAR provisions on loan guarantees at Subpart 32.3 to provide Board jurisdiction with respect to Claim No. 1.

The CDA defines the jurisdiction of the boards of contract appeals as follows:

> (d) Jurisdiction
>
> Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

The Tucker Act, 28 U.S.C. § 1491, grants jurisdiction to the United States Court of Federal Claims on claims against the United States "founded ... upon any regulation of an executive department, or upon any express or implied contract with the United States." The Tucker Act thus distinguishes between the Court's jurisdiction on contract claims and that based solely on regulations. The Board can only grant relief available in the Court on contract claims. In *Paragon Energy Corp. v. United States* [28 CCF ¶ 81,290], 645 F.2d 966 (Ct. Cl. 1981), the Court reviewed the genesis of the language

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in Section 7 of the CDA regarding the relief available before the boards. The Court concluded the CDA denies jurisdiction to grant the discretionary relief only authorized by Public Law 85-804. The relief sought under Claim No. 1—granting a guaranteed loan—is just such discretionary relief.

In *Thompson Numerical, Inc.*, ASBCA No. 41327, 91-3 BCA ¶ 24,169, we refused to take jurisdiction over an appeal where the requested relief was a loan or advanced payment that cited Public Law 85-804 but included a CDA certification. Here, appellant does not refer to Public Law 85-804, but nonetheless seeks the same relief, which is not available under any contract clause or regulation imposing a contractual requirement. We can find no enforceable duty in Subpart 32.3 of the FAR. Moreover, even if we did believe we had such authority, FAR § 32.304-1 requires the filing of an application by the contractor with a financing institution. We have no evidence this was done. Appellant's Claim No. 1 for financing in the amount of $2,900,000.00 is dismissed for lack of jurisdiction.

With respect to Claim No. 2, appellant claims that it was forced to sell castings for scrap to obtain funds to keep working. On its face, the decision to sell equipment at an alleged $76,316.38 loss to finance production on a $21,012.75 contract is not a reasonable business decision and ultimately violates the general rule that the injured party is bound to exercise reasonable care and diligence in mitigation of the resulting damage. *John S. Doane Co. v. Martin*, 164 F.2d 537, 541 (1st Cir. 1947). Appellant's financial difficulties and the contributions thereto of appellant's management were established in *Sermor, Inc.*, ASBCA No. 29046, 87-1 BCA ¶ 19,568. Here, there were also delays preceding disapproval of the first article for which respondent's responsibility is not established (findings 3, 4). We are not persuaded this was a direct and foreseeable consequence of the first article delay and thus appropriate for the award of damages. "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong ...." *Joseph Pickard's Sons Co. v. United States* [22 CCF ¶ 80,210], 532 F.2d 739, 743 (Ct. Cl. 1976).

In any event, appellant must show it has suffered monetary injury to recover. *Assurance Co. v. United States* [33 CCF ¶ 75,181], 813 F.2d 1202 (Fed. Cir. 1987). The castings were used on another contract and appellant has established their original purchase price. It is the value at time of loss, however, that is essential to a determination of damages, and the only evidence as to the value of the castings at the time of loss is their sale price as scrap. If they were not worth more, appellant has suffered no monetary injury and may not recover. If they were worth more, it is incumbent on appellant to establish that value. *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 296 (Ct. Cl. 1977). Here, appellant fails. Appellant has simply not provided probative evidence that the value of the castings was greater than the price for which they were sold. We cannot, therefore, find monetary injury. Moreover, allowing appellant to recover original purchase value would be tantamount to furnishing new castings for castings that had been used and depreciated, which is precluded by the "new for old" rule. *Midwest Industrial Painting of Florida, Inc. v. United States* [31 CCF ¶ 71,962], 4 Cl. Ct. 124, 134-35 (1983). Accordingly, Claim No. 2 is denied.

Claim No. 3 for the sale of Bridgeport milling machines is similarly lacking. Appellant claims it had to sell its machines at a loss because of financial difficulties precipitated by the Government. All the reasons for denial of Claim No. 2 apply here, except that appellant establishes replacement value instead of purchase value, while alleging its loss is the difference between sale and replacement value (finding 20). As the only evidence of value at the time of loss is the sale price, and appellant offered testimony that they were sold for as much as it could get, awarding appellant the replacement cost is precluded by the "new for old" rule. *Midwest Industrial Painting of Florida, Inc., supra.* Once again, there is no evidence of value greater than the sale price of the used machines. The burden of proof is on appellant and the claim is not proof of disputed facts. *Peterman, Windham, and Yaughn*, ASBCA No. 21147, 77-2 BCA ¶ 12,674. Claims 2 and 3 fail for lack of proof.

The appeal is denied.

DECISION—ASBCA NO. 32984

Appellant argues that respondent "made sure that Appellant lacked the monies needed to complete this contract," and the lack of money was the result of actions denying fair and equitable treatment. Respondent argues the default termination was proper.

It is undisputed that appellant did not complete the contract. Appellant concedes the reason for this is that it ran out of money (finding 23). A Show Cause letter was

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sent on 7 March 1986, two days after the final delivery date. Appellant's response denied it was delinquent, but conditioned further performance on fair, equitable, and impartial treatment or obtaining sufficient funds to complete the contract from other sources (finding 24). A reasonable reading of the letter is that appellant was out of money, as we have found. While appellant offered to complete the contract in April 1986, it was without equipment to correct errors (finding 26). In any event, there is no probative evidence appellant did any further work after its last delivery in January 1986, and the contract was default terminated 23 May 1986 (findings 26, 28). We conclude that respondent has met its burden of proof in establishing that appellant had failed to perform the contract in accordance with the delivery schedule.

Appellant would have us find its default excusable because of respondent's role in its deteriorating financial condition. Appellant's argument about respondent's role in its financial condition appears centered on other contracts and the alleged delay in granting progress payments. We are unpersuaded that circumstances existed which permit the consideration of other contracts. *General Dynamics Corp. v. United States* [25 CCF ¶ 82,730], 585 F.2d 457 (Ct. Cl. 1978). As to the delay in granting appellant's request for progress payments, we have found there was no agreement to include them as part of Modification No. P00003 (finding 11). Similarly, we have found the contracting officer did not tell appellant that progress payments had been approved in July 1985 (finding 12).

As to the 4 months between appellant's request for progress payments and inclusion of the Progress Payments (APR 1984) clause by Modification No. P00005, respondent was under no obligation to include the clause, particularly since the contract was for less than $100,000 and no consideration was offered. FAR 32.501-4, 32.502-1. Moreover, Modification No. P00005 also extended the delivery schedule. Appellant made deliveries thereafter until it ran out of money. We cannot conclude, therefore, that appellant's inability to perform the contract was somehow the result of the 4-month approval period, or that the approval period constitutes an excusable delay. Even if the delay in granting progress payments was a breach, and we do not so find, appellant lost the right to stop work after it was cured. *Parkway Distributor and Building Services, Inc.*, ASBCA No. 36190, 89-3 BCA ¶ 22,199.

Although a loss ratio was applied to payments in accordance with FAR 32.503-6(g), appellant received $18,291.00 in payments against a contract price of $20,862.75, or 87 percent, as compared to the maximum contract rate of 90 percent (findings 17, 18). It delivered 1841 of the 2475 track rotors, or approximately 75 percent of the contract requirement (finding 23). Thus, even with application of the loss ratio, appellant had received payment at a rate in excess of the contract value of 100 percent of its deliveries. Respondent was not, therefore, in breach of the contract. *Cf. Consumers Oil Company,* ASBCA No. 24172, 86-1 BCA ¶ 18,647.

Appellant argues on brief it was systematically denied the award of numerous contracts for which it was low bidder. Appellant contends this constituted a "de facto debarment," a contention which it apparently includes among the factors contributing to its financial difficulties and therefore excusing its inability to perform. In *Sermor, Inc., supra,* we rejected this argument as totally speculative. Moreover, this is not within the jurisdiction of the Board under either the CDA or the Disputes clause. In the absence of an express contract, Board jurisdiction may arise from a contract implied-in-fact. *Vec-Tor, Inc.*, ASBCA No. 25807, 26128, 84-1 BCA ¶ 17,145. Here, however, appellant's argument is based on allegations that respondent violated a legal requirement to award contracts to appellant where appellant was the low bidder. Any resulting contractual obligation would be a contract implied-in-law over which the Board would have no jurisdiction. *Fincke v. United States,* 675 F.2d 289 (Ct. Cl. 1982).

Appellant also argues that it was denied fair and equitable treatment. We interpret this argument as addressing various actions of respondent that contributed to appellant's deteriorating financial condition. We have considered these issues here and in our decision on ASBCA No. 32824, *supra.* While we have found that respondent erred in denying conditional first article approval, we have also denied the specific claims filed by appellant arising therefrom. The contracting officer's denial of those claims was, therefore, neither a breach of contract, nor unfair, nor inequitable, as appellant would have us find. Similarly, we have rejected arguments based on other contracts and "de facto debarment." We also note the Board's finding in *Sermor, Inc., supra,* that appellant's management and not the Government's treatment of progress payments, led to its default

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termination in that appeal. Accordingly, we are unable to identify actions of respondent that would excuse appellant's failure to complete the contract.

Appellant maintains that it agreed to the contract reinstatement effected by Modification P00002 under duress, specifically the threat of another default termination. Appellant, at the time of execution, reserved its right to file claims arising from actions leading to the 25 April 1984 default termination, but did not otherwise object to the modification at the time. It also agreed to deliver in 45 days if progress payments were included in the contract, although the final version provided for first article delivery in 120 days and did not include progress payments (finding 7). Appellant's forwarding letter can only be read as acquiescing in dealing with progress payments as a separate issue (finding 8). While appellant was under economic pressure, it is insufficient to establish duress. *Louisiana-Pacific Corp. v. United States* [29 CCF ¶ 81,737], 656 F.2d 650, 653 (Ct. Cl. 1981).

Having considered the arguments of the parties, we conclude the default termination was proper.

DECISION—ASBCA No. 33173

Appellant claimed that its plating costs went up because of Government-caused delays. Neither party offers argument directly on this claim.

In addition to offering no direct argument on this claim, appellant has offered no evidentiary support for the claim but brief testimony from its president. We do not know when prices went up, and thus cannot determine whether the increase is attributable to the first article delay. Moreover, even the testimony of appellant's president leaves a significant question as to whether appellant was bound to pay the increased price—"We got a request for an increase in price, and we happen to agree with him that he deserves it." (Finding 22). In order to recover in behalf of a subcontractor, appellant must first show that it is liable to the subcontractor for that amount. *Barnard-Curtiss Co. v. United States* [8 CCF ¶ 71,689], 301 F.2d 909, 913 (Ct. Cl. 1962). We are provided no bills, invoices, letters, nor even testimony on oral demands. We have a claim and testimony of a *request* for an increase which appellant thought its subcontractor deserved. This falls short of establishing that appellant was liable. The appeal is denied.

[¶ 26,302] Sermor, Inc.

ASBCA Nos. 30576, 33176, 33179, August 16, 1993. Contract No. F41608-81-C-2322, F42600-81-C-6026.

Defaults, Procedure—Bankruptcy of Contractor—Automatic Stay of Termination.—A contractor's appeal under its contracts for the production of jack assemblies and engine mount pins that was filed more than 90 days after default terminations of the contracts was timely because the default terminations, which were filed after the contractor's bankruptcy action, were voided by the automatic stay provisions of the Bankruptcy Code. The appeal notice, which was filed after the stay was lifted, was timely.

Procedure, Boards—Prior Decisions—Estoppel.—A contractor, under contracts for the production of jack assemblies and engine mount pins, was collaterally estopped from litigating issues regarding alleged improper withholding of progress payments under other contracts, because the board had previously decided the same issues for the same parties in an appeal of the default terminations of the contracts.

Defaults, Government Acts Excusing—Other Contracts—Exceptional Circumstances.—The default terminations of contracts for the production of jack assemblies and engine mount pins was proper, despite the contractor's contention that improper government actions under other contracts excused the terminations, because the contractor did not prove the requisite exceptional circumstances justifying relief. The contractor did not provide any probative evidence of its contention that the government's actions were intended to put the contractor out of business, nor did it identify any government actions that exceeded the boundaries of the government's legal rights.

Defaults, Grounds—Delivery Failure—Effect of Unilateral Extension.—The default termination of a contract for the production of jack assemblies was proper, despite

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the contractor's contention that no true delivery date existed at the time of default termination, because the government's unilateral modification following the contractor's failure to meet the initial delivery date established a reasonable and specific new delivery date. The reasonableness of the new delivery date was shown by the contractor's abandonment of performance and by the length of the extension, which was consistent with the most recent extension requested by the contractor. The contractor's closure of its plant four days after failing to meet the extended delivery date did not constitute the reliance needed to show the government's waiver of the delivery date. The government's receipt of consideration for the extension did not indicate that time was not of the essence.

Defaults, Grounds—Delivery Failure—Waiver of Delivery Date.—The default termination of a contract for the production of engine mount pins was proper, despite the contractor's contention that the government waived the delivery date, because the contractor's admission that it lost its capacity to produce the pins months before the termination indicated that the contractor did not rely on the delivery date. The contractor's failure to deliver the pins was not excused by the government's failure to promptly terminate the contract for default. Moreover, the government acted reasonably in suspending a progress payment while considering whether to terminate the contract for default.

Pricing of Adjustments—Proof—Records in Support.—Under a contract for the production of engine mount pins, the contractor was not entitled to recover additional costs incurred in meeting the contract's coating requirements, because the contractor did not provide probative evidence in support of its claim. The contractor contended that various improper government actions rendered the contractor financially unable to use a coating subcontractor that would have paid delivery costs and charged less for coating than the subcontractor that completed the requirements. The contractor did not present any evidence in support of the claimed original per-item-coating price. The contractor's failure to show that the original vendor would have delivered the items for free precluded the contractor's recovery of any direct labor costs incurred in delivery of the items.

For the appellant: Sergio Morsani, Jr., President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and David C. Barnett, Trial Attorney.

Before DICUS, WILLIAMS, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: These appeals arise under two contracts with the United States Air Force. ASBCA No. 30576 is an appeal from the default termination of Contract No. F41608-81-C-2322 (hereinafter 2322). ASBCA No. 33176 is an appeal from the default termination of Contract No. F42600-81-C-6026 (hereinafter 6026) and ASBCA No. 33179 is an appeal from denial of a $6,130.40 claim for additional costs under that contract.

FINDINGS OF FACT—ASBCA NO. 30576

1. Contract No. 2322 between appellant Sermor, Inc. and respondent United States Air Force was awarded 10 September 1981. The contract, which contained the standard Default (AUG 1969) and Disputes (JUN 1980) clauses, was for manufacture of 95 jack assemblies at a fixed-price of $23,315.85, with delivery scheduled for 30 April 1982 (R4a, tab 2).*

2. The original delivery date was not met due to rejection of castings by appellant, who forecast a new delivery date of 30 September 1982 (tr. 1/82-83; R4a, tab 41). By letter of 6 January 1983 appellant asked for copies of a specification and advised it had changed its casting supplier, which caused it to seek an extension to April 1983 (R4a, tab 6). By letter of 20 January 1983 respondent advised it was evaluating its request, promised a response by 9 February 1983, and requested an offer of consideration to extend the delivery date (R4a, tab 7).

3. Appellant, in a 9 February 1983 telephone conversation, explained that it could not offer consideration for an extension because it was financially pressed (tr. 2/88). However, after further correspondence, appellant executed Modification No. A00001, which extended delivery to 15 August 1983 and in which appellant agreed to attempt completion of all its government contracts

* The Rule 4 file in ASBCA No. 30576 is designated "R4a." The Rule 4 file for ASBCA Nos. 33176 and 33179 is designated "R4b."

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ahead of schedule at no increase in price (R4a, tab 13).

4. When appellant failed to meet the 15 August 1983 schedule, respondent issued a show cause letter dated 17 August 1983 (R4a, tab 16). Appellant responded by letter dated 8 September 1983 in which it alleged that suspension of progress payments on other contracts had caused the delay. An extension to 31 October 1983 was requested (R4a, tab 18). By Mailgram dated 3 October 1983, appellant offered $200.00 for an extension to 31 October 1983 (R4a, tab 21). The attempt to modify the contract went awry because it was sent to appellant's old address (R4a, tabs 14, 22).

5. After further delays and discussions the parties executed Modification No. P00002, which extended the delivery schedule to 9 December 1983 and decreased the contract price by $200.00 (R4a, tab 27). On 3 January 1984 (the same day respondent signed Modification No. P00002), respondent issued unilaterally Modification No. P00003, extending the delivery schedule to 30 January 1984 (R4a, tab 28; tr. 1/157). Appellant stopped all work and laid off its employees on 3 February 1983 (tr. 1/174-75). It reopened at the end of February 1984 with 3 persons returning in addition to 3 family members (tr. 2/9). Appellant was prepared to start production of a contract other than 2322 or 6026 (*id.*). Appellant filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court, Southern District of Florida (hereinafter Bankruptcy Court) (R4a, tab 36).

6. Respondent terminated the contract for default by Modification No. P00004 dated 15 March 1984 (R4a, tab 30). The modification was not received by appellant until 8 May 1984 (R4a, tab 32). The Bankruptcy Court set the default termination aside by Order of 27 August 1984 as in violation of the automatic stay provisions at 11 U.S.C. § 362(a), declaring it null and unenforceable (tr. 1/159-60; app. R4, tab 73). Relief from the 27 August Order was granted to respondent with respect to contracts 2322 and 6026 by the Bankruptcy Court on 4 September 1984 (R4b, tab 2).

7. Modification No. P00005, dated 2 October 1984, was issued affirming the 15 March 1984 termination (R4a, tab 36). Appellant filed its notice of appeal 28 December 1984 (R4a, tab 39).

FINDINGS OF FACT—ASBCA NOS. 33176 and 33179

8. Contract 6026, for the manufacture of 930 engine mount pins for the F4 aircraft, was awarded to appellant on 2 October 1981 at a fixed price of $33,331.20. It included the Default (AUG 1969) and Disputes (JUN 1980) clauses. The contract called for first article delivery in 300 days, with 624 production items due 365 days after first article approval and 306 items 30 days thereafter. First article delivery was changed to 15 June 1983 (R4b, tab 1).

9. When appellant failed to meet the first article date, a Show Cause Notice dated 12 July 1983 was issued (R4b, tab 34). Appellant responded by letter of 18 July 1983 in which it was asserted that the "illegal" suspension of progress payments on other contracts and appellant's move to a new location at Palm Coast, Florida, were responsible for the delay. From October 1982 to May 1983 appellant's president averaged 1 day per week away from the plant in conjunction with the move, which took place in late June and early July of 1983. Appellant proposed the delivery schedule be changed to 30 August 1983 for first article and 30 March 1984 for the 930 production items (R4b, tab 35; tr. 2/39-40).

10. By Modification No. A00004 the parties extended the delivery schedule as proposed by appellant to 30 August 1983 for first article and to 30 March 1984 for the 930 production items, and reduced the contract price by $200.00 (R4b, tab 1). On 30 September 1983 appellant advised respondent that the first article was ready for inspection and acceptance. The first article was submitted on 3 October 1983. Respondent had 45 days under the contract to approve or disapprove (R4b, tab 1; app. R4, tabs 130, 131).

11. During the period from October to December 1983 respondent visited appellant's plant and assessed its condition, culminating in a 16 December 1983 Report of Adverse Development in which appellant was characterized as being financially unstable due to cash flow problems (app. R4, tabs 65-66, 68).

12. Respondent did not approve the first article until 19 December 1983, more than a month longer than the 45 days allowed by the contract. Appellant did not receive the letter of approval until 27 December 1983 (app. R4, tab 142).

13. Appellant shut down its plant on 3 February 1984. On 6 February 1984 an update to the 3 December 1983 Report of Ad-

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verse Development was issued reporting the plant shutdown and the award to another company of a contract appellant had hoped to obtain. Appellant's financial capability was considered "critical" (app. R4, tab 68; tr. 1/177-78).

14. Respondent sent cure notices to appellant on 13 February and 1 March 1984 (R4b, tabs 37, 38). In a letter dated 2 March 1984 appellant asserted that the delay in delivery was due to actions of the Army and Navy, not itself or respondent, and requested $27,000.00 in progress payments from respondent (R4b, tab 39).

15. Appellant filed for bankruptcy on 14 March 1984 (finding 5). On 16 March 1984 a Show Cause letter was sent (app. R4, tab 150). There is no evidence that appellant ever responded. Modification No. P00001 terminating the contract for default was issued on 2 April 1984 (R4b, tab 1). After proceedings in the Bankruptcy Court (findings 5, 6) the contract was reinstated on 18 October 1984 by Modification No. P00002. Delivery of 930 production items was set for 17 January 1985 and DAR Clause 7-104.35(b), Progress Payments for Small Business Concerns (SEPT 1982), was added to the contract (R4b, tab 1).

16. After receipt of Modification No. P00002 appellant attempted to obtain the material necessary to complete the contract from its subcontractor. Although the subcontractor had sold the material several days before, appellant continued to work with the material it had on hand using its SMT horizontal turning center ("SMT") (tr. 1/184-85, 2/72). The delivery date was extended to 28 February 1985 for the first 346 items and 30 August 1984 for the final 584 items in consideration for a $150.00 price reduction (R4b, tab 1).

17. when appellant did not meet the 28 February 1984 date a Show Cause letter dated 15 March 1985 was issued (R4b, tab 3). Appellant sent a letter dated 18 March 1985 complaining that progress payments had been suspended and stating that it had the parts ready for heat treatment. Because of being on a cash on delivery basis appellant did not ship the parts, asserting "we could not run the risk of having the parts done and not paying for them immediately." (R4b, tab 4)

18. By letter dated 5 April 1985 appellant responded to the 15 March 1985 Show Cause letter in which it stated that more than 350 items were ready for heat treatment on 26 February 1985 but appellant held them until 2 March 1985 to review the quality of the parts. Appellant further stated that Progress Payment No. 4 had been suspended (R4b, tab 5). Progress Payment No. 4 was not processed at that time because respondent was considering whether appellant's contract should be terminated for default (tr. 2/194).

19. In a letter dated 14 April 1985 appellant reiterated that it had 356 items awaiting heat treatment and plating at Rex of Florida and Orlando Plating, respectively. Appellant asserted again it was on a cash basis with vendors and that it needed Progress Payment No. 4 to continue production (R4, tab 6).

20. In a meeting on 2 May 1985 the parties were unable to resolve their differences. On 8 May 1985, an Industrial Specialist visited appellant's facility and reported to respondent that the estimated cost to complete of the contract was $29,218.00 and the cost to complete the first shipment was $3,813.00. Appellant stated it needed $3,018.00 to complete the first shipment. Thereafter, Progress Payment No. 4 was released (app. R4, tab 78).

21. Modification No. A00007, dated 14 May 1985, changed the delivery schedule. As a result, 355 items were due 10 June 1985 and 575 were due 31 December 1985 (R4, tab 1). Appellant shipped 341 items on 31 July 1985. However, the materials to complete the contract were not ordered (tr. 1/188, 191, 2/146). As a result of appellant's decision to spend its money accelerating production under another contract rather than pay the finance charges on the SMT, the machine was repossessed in the fall of 1985 (tr. 2/51, 66-69). With the loss of the SMT, appellant's capability to produce the remaining items under the contract was effectively gone (tr. 1/189-90).

22. Respondent issued Modification No. P00003 unilaterally on 31 October 1985, extending delivery for all remaining items to 31 December 1985 (R4b, tab 1). At that point appellant had received 94 percent of the contract price, or $31,212.00 (R4b, tab 42). On 18 December 1985 respondent learned that appellant had not yet ordered the material necessary to complete the contract (R4b, tab 43). Another Show Cause letter was issued 7 January 1986 (R4b, tab 19; tr. 2/152). Appellant responded by letter of 17 January 1986, in which it recounted various contractual problems between itself and the Federal Government, asserted that it did not have the money for the material to finish the contract because of various actions of re-

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spondent, and cited the delay in receiving Progress Payment No. 4 as a particularly crucial matter. Appellant also asserted that late first article approval affected ordering materials, because by late December 1983 appellant no longer had sufficient cash flow to authorize delivery (R4b, tab 20).

23. By letter of 27 January appellant submitted a claim for $6,139.40 in additional costs incurred to meet the coating requirements of the contract. Appellant asked for a final decision within 60 days. The claim letter states:

> Enclosed find Sermor's Claim #2, with supporting documentation. During July 1981, Sermor quoted the coating requirements of referenced contract with a coating vendor from Broward County, Florida. The original quote, as we discussed in June 1985, was for $2.50 each. In addition our sub-contractor had pick-up and delivery service at no extra charge. Because of many government improper actions, such as four different Progress Payment suspensions (without substantial evidence), as well as a six month refusal to pay any other monies that could become due on other government contracts, (referenced contract). Sermor's financial condition was then effectively destroyed. This left Sermor open to continual government harassment, such as, improper Termination for Defaults, defective government specifications, delays in approval of First Article testing by the government, refusal to provide contract financing as required, defacto-debarment. These factors contributed to the long delay in producing this referenced contract as well as the severe escalation of costs.
>
> This claim is for the increase in costs, above what was originally contemplated by Sermor. Sermor also expended direct labor in delivering these parts to the coater, via freight companies. Upon each of these two categories of costs, applicable overhead rates have also been applied. The third category of the costs incurred is for preparation of this claim with applicable rates.

(R4b, tab 21)

24. A second claim under the contract was submitted by letter dated 28 January 1986, seeking $1,130.75 for costs incurred responding to show cause letters and preparing the claim (R4b, tab 22). By letters dated 26 March 1986 respondent advised appellant that it lacked sufficient information to evaluate the 27 and 28 January 1986 claims (R4b, tab 24).

25. On 4 April 1986 Modification No. P00004 was issued terminating the contract for default. As the address was wrong, Modification No. P00005 was issued on 22 April 1986 correcting the address and forwarding a copy of Modification No. P00004 (R4b, tab 1). By letter dated 25 June 1986 appellant appealed from the termination for default and respondent's 26 March 1986 letter, which appellant treated as a denial of its 27 January 1986 claim.

DECISION

Appellant lists 9 bases for recovery, as follows: fair and equitable treatment from the government; progress payment problems; first article testing; prior course of dealing; defective government specifications; improper termination for default; de-facto debarment; unconscionable acts; and time of the essence. Respondent argues that appellant's appeals from the default terminations were untimely; that the terminations were proper; and that respondent is not liable for delay damages.

Respondent contends that since no appeal was filed within 90 days of either termination, ASBCA Nos. 30576 and 33176 were untimely. Respondent ignores the effect of the automatic stay provision at 11 U.S.C. § 362, which rendered the two default terminations filed after the bankruptcy action null and void. *Communications Technology Applications, Inc.*, ASBCA Nos. 41573, 42993, 92-3 BCA ¶ 25,211. The appeal notices filed after the stay was lifted were timely (findings 7, 25). Respondent's argument that the appeals are untimely is without merit.

The focus of appellant's arguments in the 9 bases argued is not the contracts at issue in these appeals, but past actions under other contracts. Particular emphasis is placed on progress payments under other contracts which appellant alleges were improperly withheld. The issues raised were previously tried between the parties in *Sermor, Inc.*, ASBCA No. 29046, 87-1 BCA ¶ 19,568. Under the doctrine of collateral estoppel, we may not retry those issues. *Sequal, Inc.*, ASBCA No. 30838, 86-3 BCA ¶ 19,230.

Appellant similarly argues improper government actions under its other contracts on the panoply of issues referred to above. However, only in exceptional circumstances will actions under other contracts provide a basis for relief. In *General Dynamics Corp. v. United States* [25 CCF ¶ 82,730], 585 F.2d 457 (Ct. Cl. 1978), the Court said at 465-66:

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Where the extra costs result from the "impact" of one contract on another, the situation appears to be different.

* * * *United States v. Beutas,* 324 U.S. 768, 65 S.Ct. 1000, 89 L.Ed. 1354 (1945), sets forth the "established rule" of nonliability in such circumstances and mentions, without adopting, a possibility of government liability for intentionally and knowingly hindering plaintiff or culpably increasing its costs. * * *

In *Allied Paint Mfg. Co. v. United States* [18 CCF ¶ 81,895], 470 F.2d 556, 200 Ct.Cl. 313 (1972), plaintiff supplied paint under numerous small orders. Defendant suddenly changed its inspection procedure, without being able at once to perform its new inspection requirements, but it was held entitled to make the change it did. The change impeded plaintiff by disrupting its operations to the extent that paint under 31 orders was not even tendered for inspection. It was held that defendant was entitled to terminate those 31 orders for default.

In *Specialty Assembling & Packing Co. v. United States* [11 CCF ¶ 80,242], 355 F.2d 554, 568, 174 Ct.Cl. 153, 175 (1966), it is held that the "impact" of the breach of one contract on costs under another is not compensable unless the adverse effect is "reasonably foreseeable." See also *Ramsey v. United States,* 121 Ct.Cl. 426, 433-34, 101 F.Supp. 353, 357-58 (1951), *cert. denied,* 343 U.S. 977, 72 S.Ct. 1072, 96 L.Ed. 1369 (1952), and *Myerle v. United States,* 33 Ct.Cl. 1, 27 (1897), as to general adverse effects of a government breach on the contractor's business not being compensable.

The cases seem to lead to the conclusion that only in exceptional circumstances can an equitable adjustment be made for extra cost in performing one contract, caused by the government doing things it has a right to do, respecting other contracts. Such rare cases will be those of concealment from the plaintiff, when it bids, of already formulated plans and intentions respecting other contracts, which plans and intentions the plaintiff needs to know to estimate its costs, possibly some instances of intentionally and knowingly hindering the plaintiff in doing the contract work, and perhaps other instances where some degree of government culpability and "proximate cause" exist.

We find no such exceptional circumstances here. While appellant has characterized various actions by respondent as, in effect, intended to put appellant out of business, we find no probative evidence of such an intent. Indeed, however badly the parties' relationship may have deteriorated, on this record we are unable to identify actions by respondent that exceeded the boundaries of respondent's legal rights. If appellant suffered economic loss in the process, it is a burden appellant must bear. *Sermor, Inc., supra.* The disposition of these appeals must rest on the actions of the parties under contracts 2322 and 6026.

ASBCA NO. 30576

Appellant argues that no true delivery date existed when the contract was default terminated on 15 March 1984, that respondent was more interested in receiving consideration than delivery, and never treated time as of the essence. Respondent argues that the default termination was proper.

Appellant's argument is apparently based on there being no delivery date agreed to by the parties. However, valid delivery dates can be established by means other than a bilateral agreement. The binding effect of the schedule is not abrogated because it was never the subject of a formal contract modification. When the contract delivery date has not been met and the contract is not default terminated, the Government's subsequent exercise of its rights under the Default clause requires the establishment of a new delivery date that must be reasonable and specific. *DeVito v. United States* [13 CCF ¶ 82,319], 413 F.2d 1147, 1154 (Ct. Cl. 1969). The new schedule may be established by various means short of a contract modification. *Simplex Manufacturing Corp.,* ASBCA Nos. 13897, 14380, 71-1 BCA No. ¶ 8814; *Max M. Goldhaber,* ASBCA Nos. 8277, 8370, 65-2 BCA ¶ 5083. Here the contract date was 9 December 1983. When it was not met respondent on 3 January 1984 unilaterally issued a modification extending the delivery date to 30 January 1984 (finding 5). Thus, the new date was specific.

While there is no bright line between forbearance and waiver, the elements to be considered in determining the reasonableness of the new delivery date include whether the contractor continues to work or abandons performance. *DeVito, supra.* Appellant closed its plant on 3 February 1984 (finding 5). Moreover, the length of the extension was consistent with the most recent extension requested by appellant (finding 4). Accordingly, we find it was reasonable.

The plant closure is significant from another viewpoint. Before respondent can be found to have waived a delivery date, the

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record must demonstrate reliance by appellant. *A.B.G. Instrument & Engineering, Inc. v. United States* [25 CCF ¶ 83,025], 593 F.2d 394 (Ct. Cl. 1979). Appellant laid off its employees and closed its facility 4 days after missing the 30 January delivery schedule. It intended to start production on another contract upon reopening in late February (finding 5). We cannot, therefore, find the requisite reliance.

Referring to respondent's obtaining consideration for extensions (findings 2, 4, 5) appellant argues this is proof that time was not of the essence. However, it is an established rule that where consideration is not obtained the resulting agreement may not be binding. *Institutional and Environmental Management, Inc.*, ASBCA Nos. 32924, 34948, 90-3 BCA ¶ 23,118. Therefore, it was entirely appropriate for respondent to obtain consideration for the extensions.

We find the termination for default of contract 2322 was proper. The appeal is denied.

ASBCA NO. 33176

As appellant correctly argues, respondent exceeded the contract period for first article approval. However, the termination of 2 April 1984 was rescinded and the contract reinstated by mutual agreement on 18 October 1984 by Modification P00002, which established a new delivery date of 17 January 1985 (finding 15). In agreeing to that date, appellant eliminated from consideration whether the termination for default was excusable due to the causes of delay occurring prior thereto. *Environmental Devices, Inc.*, ASBCA Nos. 37430, 39308, 39719, 93-3 BCA ¶ 26,138.

Appellant argues that time was not of the essence to respondent. Unlike ASBCA No. 30576, *supra*, appellant does not argue that no valid delivery date existed. By Modification No. A00007, executed by both parties, the delivery date was 31 December 1985 (finding 21). Unilateral Modification No. P00003 merely extended the delivery date for 14 overdue items to 31 December 1985 (finding 22). Respondent issued a Show Cause letter on 7 January 1986, received a response on 17 January 1986 and two claims 11 days thereafter (finding 22-24). The contract was default terminated by Modification No. P00005, dated 4 April 1986, reissued with a correct address as Modification No. P00005 on 22 April 1986 (finding 25). In order for the Board to find respondent waived the delivery date, we must find reliance by appellant. *A.B.G. Instruments & Engineering, Inc. v. United States, supra.* However, appellant's president testified that appellant did not have the capability to perform after repossession of the SMT horizontal turning center in the fall of 1985 (finding 21). This came about because of appellant's decision to pursue other contracts instead of paying finance charges (*id.*). Thus, appellant, by its own admission, had lost its capacity to produce the engine mount pins called for by the contract months before the termination. As it could not have continued to work on the contract, we cannot find that appellant in some way relied on respondent's 95-day analysis of appellant's response to the 7 January Show Cause letter and continued to perform. Appellant's production on contract 6026 had ceased. We find that appellant's failure to deliver is not excused by respondent's failure to promptly terminate the contract for default. *Olson Plumbing & Heating Co. v. United States* [26 CCF ¶ 83,506], 602 F.2d 950 (Ct. Cl. 1979) (13 months held not to be a waiver where contractor did not resume performance).

Appellant argues that suspension of Progress Payment No. 4 was improper and adversely affected its ability to perform, as the money was badly needed to pay a plating subcontractor. However, the parties have stipulated that Progress Payment No. 4 was suspended to allow respondent time to consider whether appellant, having missed a delivery date, should be default terminated (finding 18). We have found it reasonable to suspend a progress payment while considering whether a contract should be default terminated. *Sermor, Inc., supra.* Respondent's actions do not, therefore, excuse appellant's failure to meet the delivery date.

The appeal is denied.

ASBCA NO. 33179

Appellant's 27 January 1986 claim asserts that its coating costs increased because of various actions by respondent. It asserts that its original coating subcontractor would have charged $2.50 per part and picked up and delivered the parts free of charge, but it actually paid $5.23 per part for coating and had to pay for pick up and delivery. While the claim is supported by a copy of an invoice for coating 340 items at $5.23 and invoices purporting to show transportation costs, there is no probative evidence to establish the basis for the alleged bid cost of $2.50. Likewise, there is no probative evidence to establish that the original vendor would have delivered the items without cost. Claim letters are not proof of disputed

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facts. *Peterman, Windham and Yaughn, Inc.*, ASBCA No. 21147, 77-2 BCA ¶ 12,674. Without proof that appellant's original subcontractor would have performed as claimed, the direct labor and administrative costs allegedly incurred as a result could not be sustained even if there were probative evidence in support.

The appeal is denied.

[¶ 26,303] Sermor, Inc.

ASBCA Nos. 29798, 30149, 30423, August 16, 1993. Contract No. DAAA09-81-C-2488.

Defaults, Grounds—Delivery Failure—New Delivery Schedule.—A contract for the production of smoke grenade launchers was properly default terminated for failure to deliver, despite the contractor's contention that no valid delivery dates were in effect at the time of the termination, because the contractor failed to make delivery in accordance with the new schedule that it had proposed and that the government had accepted. The binding effect of the new delivery schedule was not abrogated, because it was not the subject of a formal contract modification. The new delivery schedule did not require a formal modification. In proposing the new schedule and making deliveries in accordance with it, the contractor had agreed that the reestablished completion date was reasonable, and it was thereby obligated to make delivery in accordance with the new schedule.

Defaults, Procedure—Cure Notice—Adequacy of Response.—A defaulted contractor's contention that it remedied a cure notice involving the shutdown of the plant used in its grenade production contract was rejected because the contractor's request that the administrative contracting officer inform the procurement contracting officers that it intended to reopen the plant was not an adequate response to the cure notice. At the time the contractor made its request to the ACO, the contractor was dealing with the administrative contracting officer under another contract for which it had received progress payments. Given the ambiguity involved in this contract situation as well as the administrative contracting officer's uncertain reply to the request, the board refused to conclude that the contractor had adequately responded to the cure notice.

Defaults, Procedure—Bankruptcy of Contractor—Reinstatement of Termination.—Despite an order of the Bankruptcy Court that invalidated the default termination of a production contract for grenades, the board rejected the contractor's contention that the government violated the court order by seeking and obtaining the reinstatement of the default termination, because the contractor neither sought clarification of the order nor contested the government's action in the Bankruptcy Court. The Bankruptcy Court's order lifting the automatic stay provision was clear on its face in granting relief to the government from staying its right to default terminate contracts.

Delay—Causation—Concurrent Delays.—Although the government delayed contract performance by failing to provide resistor packs and paint needed in the production of grenade launchers, the contractor's delay claim was denied because the contractor failed to prove that these delays were not concurrent with other delays for which it was responsible. The contractor's failure to deliver any grenade launchers, even after resolution of the packaging problem and the paint supply problem, was not adequately explained by the contractor. It was clear, however, that the contractor was experiencing difficulties with equipment and in obtaining needed parts and that its financial problems were such that it closed its plant and filed for bankruptcy.

For the appellant: Sergio Morsani, Jr., President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. R. T. Harders, JAGC, Trial Attorney.

Before DICUS, WILLIAMS, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: These appeals arise under a contract for production of smoke grenade launchers. ASBCA No. 28798 is an appeal from the default termination of Contract No. DAAA09-81-C-2488 (hereinafter 2488). ASBCA No. 30149 is an appeal from a contracting officer's final decision denying all but $3,893.22 of appellant's claim

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of $1,305,017.50 for additional costs which appellant alleges resulted from improper government actions. ASBCA No. 30423 is an appeal from denial of a progress payment request.

FINDINGS OF FACT—GENERAL

1. Contract No. 2488 between appellant Sermor, Inc. and respondent United States Army was executed 30 September 1981. Appellant was low responsive, responsible bidder at a fixed price of $689,990.00. Contract 2488 called for production of 1,090 M250 smoke grenade launchers at a price of $521.00 each and 150 M239 smoke grenade launchers at a price of $814.00 each. First article approval was required (R4a, tab 1).*

2. Contract No. 2488 incorporated the Standard Form 32 General Provisions (Supply Contract) APR 1975, amended by inclusion of the Disputes (1980 JUN) clause. Included also was Progress Payment For Small Business Concerns (1976 JUL) which required the contractor to maintain an accounting system adequate for proper administration of the clause. Special Provision H.2 limited progress payments prior to first article approval to 15 percent. The First Article Approval—Contractor Testing (1969 SEP) clause limited progress payments to costs for the first article until approval thereof. The first article was to be delivered within 180 days, and was to be manufactured at the same facility at which the contract was performed (R4a, tab 1).

3. The contract also provided for optional quantities. This provision was exercised 30 September 1981 by Modification P00001, which increased the quantity of M239 grenades by 180 at the contract price of $814.00 each (R4a, tab 1a). Delivery was to commence 28 May 1982 and continue through 24 December 1982 for the M250. For the M239, delivery was to commence 28 May 1982 and continue through 24 November 1982, including option quantities (R4a, tabs 1, 1a).

4. Supplemental Agreement A00001, dated 27 July 1982, extended the delivery schedule at no increase in price by mutual agreement. First Article delivery was extended to 16 August 1982, with monthly deliveries commencing 17 October 1982 and continuing through 14 May 1983 (R4a, tab 1g).

5. Modification P00006 dated 24 February 1982 incorporates Engineering Change Proposals (ECPs) CIL2476 and CIL3048 into the contract (R4a, tab 1f). Modification P00007 (undated) incorporates 3 ECPs into the contract. The ECPs are COC2831 Resistor Park [sic] Improvement, CIL3051 Dimensional Changes, and CIL2434 Protective Finish Change. The Modification contains the following handwritten note: "not sent to Kr because he did not reply to ltrs requesting ceiling price and delivery changes." The DD Form 1692 for COC2831 is dated 28 July 1980. CIL2434 and 3051 are dated 8 October 1981 and 6 August 1981 (R4a, tab 1i).

6. Modification P00008, executed 8 July 1982 only by appellant, was intended to provide 250 gallons of camouflage paint to appellant at $18.00 per gallon (R4a, tab 1j). This was withdrawn by Modification P00009 dated 2 December 1982, which was executed by both parties and in which appellant agreed to furnish paint. The Modification also withdrew a 13 October 1982 termination for default, established 4 January 1983 as the delivery date for the first article with appellant to provide 15 days advance written notice prior to beginning first article tests, and revised the delivery schedule to provide for monthly deliveries commencing 4 April 1983 and completion by 29 March 1984 (R4a, tab 1k).

7. Modification P00012, signed only by respondent on 12 April 1984, accepted appellant's 13 October 1983 offer to change the packaging of the M239 pursuant to ECP 2488-001 for a price increase of $3,890.45 (R4a, tabs 1p, 43, 43a).

8. At the pre-award survey 24 September 1981 appellant was told that respondent had surplus green camouflage paint it wanted to sell (tr. 3/32). In response to a telephone call from respondent advising of the availability of the surplus camouflage paint, appellant sent a 3 December 1981 letter expressing interest in purchasing a quantity of the paint (R4a, tab 2). Aberdeen Proving Ground had 250 gallons available (R4a, tab 3). By letter of 17 February 1982 appellant agreed to purchase 250 gallons at $18.00 per gallon (R4a, tab 6). Modification P00008 was forwarded to appellant in March 1982 (tr. 3/72). Appellant subsequently agreed to accept 200 gallons by letter of 19 July 1982, although none was ever delivered (R4a, tab 11; finding 6).

9. Respondent erroneously believed it had incorporated two ECPs in the solicitation. By letter of 21 December 1981 respondent

* The Rule 4 files for ASBCA Nos. 29798, 30149 and 30423 are designated a, b and c, respectively.

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forwarded copies of the ECPs. ECP CIL2476 changes a casting drawing. ECP CIL3048 makes certain dimensional changes (R4a, tabs 4, 4a). These were incorporated into the contract on 24 February 1982 by Modification P00006 (finding 5). ECPs COC2831, CIL3051, and CIL2434 were forwarded 19 February 1982 (R4a, tab 7, 7a-7c), although Modification P00007 was never executed (finding 5). An ECP correcting errors in the technical data package, CIC3007, was forwarded 4 March 1982, but not incorporated into the contract (R4a, tabs 1a-1p, 9, 9a). Although requests for cost information on the ECPs were sent to appellant, the information was not provided (R4a, tabs 5, 7, 8; tr. 12-13).

10. A Delay in Delivery form was forwarded to the administrative contracting officer (ACO) on 29 July 1982, noting "Contractor has presently placed contract on a 'hold' status due to problems on other contracts. Date of resumption of work not presently known." The result was Supplemental Agreement A00001, which extended first article delivery to 16 August 1982 and commencement of monthly deliveries to 17 October 1982 (R4a, tab 12; finding 4).

11. Respondent had not provided the promised paint to appellant by 13 August 1982. Appellant telephoned the contracting officer to inquire about delivery and was told to submit the first article without paint. Appellant did not do so because of concern about rejection of an unpainted first article (tr. 3/75-78). When the 16 August 1982 first article date passed without a submission, respondent sent a show cause letter dated 18 August 1982 asserting that respondent was considering terminating the contract for default (R4a, tab 13). Appellant responded by letter of 3 September 1982 in which it cited respondent's failure to deliver the camouflage paint as the reason for non-delivery (R4a, tab 14).

12. Respondent terminated the contract for default by telegram dated 13 October 1982, confirmed by letter of 15 October 1982 stating the appellant's "reply dated 3 September 1982 provided no acceptable reasons for your firm's failure to perform . . ." (R4a, tabs 15, 16).

13. Appellant set out to have the termination overturned and was ultimately successful, with the result being Modification P00009 (tr. 3/83-88; finding 6). The necessary paint was determined to be available commercially (tr. 19) and appellant submitted a first article test report that was conditionally accepted 18 January 1983. One of the conditions was resolution of a resistance test which appellant believed to be the result of the insulating properties of the Anodic coating on the discharger body (R4a, tab 23; tr. 3/94-95).

14. Appellant advised respondent that it could not meet the 4 April 1983 first production delivery date without an engineering change to the Anodic coating, the proposal for which had been submitted to respondent. Respondent told appellant to ship with the old coating (tr. 3/94-96, 100). Although aware of appellant's position that the engineering change was necessary before delivery could begin, the contracting officer issued a 12 April 1983 show cause letter (R4a, tabs 26). Appellant requested the change again by letter of 14 April 1983, and respondent forwarded the change, which had been approved 22 February 1983, by telegram of 19 April 1983. The change was conditioned on "no increase in contract price as agreed" and delivery changes were to be included in the reply to the show cause letter (R4a, tabs 27, 28).

15. Appellant answered the show cause letter in a 29 April 1983 letter, pointing out the delay in issuance of the change from Anodic coating, accusing respondent of intentionally creating circumstances to justify issuance of a show cause letter, and advising respondent of difficulties in obtaining armor plate which had slipped delivery to 1 June 1983 (R4a, tab 28). Appellant, by telegram of 5 May 1983, proposed a delivery date of 15 June 1983 which respondent accepted by telegram of 6 May 1983 (R4a, tab 31).

16. After further discussion the delivery date was again extended to 20 June 1983 and respondent on 16 June 1983 requested that appellant execute Modification P00010, formalizing that date and, *inter alia*, a second delivery on 15 July 1983 (R4a, tabs 11, 33). That modification was cancelled and Modification P00011 was forwarded (R4a, tabs 1i, 1m). Although P00011 shows 15 June 1983 as the date signed by the contracting officer, it was not received by appellant until 19 July 1983 (R4a, tab 1m; tr. 254-55). On 20 June 1983 appellant delivered 25 M250s (exh. G-1).

17. When appellant failed to meet the 15 July 1983 delivery date for 50 M239s another show cause letter was sent (R4a, tab 35). By telegram of 25 July 1983 appellant advised respondent of equipment problems (R4a, tab 36). By letter of 1 August 1983, appellant responded to the show cause and proposed deliveries for the M250s to begin 24 August 1983, with M239 deliveries to be-

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gin 30 August, continuing through 30 September 1983 (R4a, tab 38). In a letter of 17 August 1983 appellant proposed deliveries on the last day of each month as follows (0001AB is the M250, the other numbers refer to the M239):

0001AB:	25 units Jun 83	50 units Aug
	50 units Sept	75 units Oct
	100 units Nov	100 units Dec
	100 units Jan 84	100 units Feb
	125 units Mar	125 units Apr
	125 units May	115 units Jun
0002AB:	25 units Sep 83	25 units Oct
	25 units Nov	25 units Dec
	25 units Jan 84	25 units Feb
0004AB:	35 units Feb 84	35 units Mar
0005AB:	35 units Apr	35 units May
	40 units Jun	

(R4a, tab 39)

18. The delivery schedule was accepted by respondent by telegram of 25 August 1983 (R4a, tab 40). By telegram of 15 September 1983 appellant, having delivered 75 M250s (exh. G-1, -2), advised respondent of a packaging problem with M239s and proposed a correction (R4a, tab 41). The contracting officer requested a cost and delivery proposal (R4a, tab 42). Appellant by letter of 13 October 1983 proposed a price increase of $3,890.45 based on 330 M239s at $11.79 per unit, but provided no specific delivery dates (R4a, tabs 43, 43a).

19. The M239 is an M250 with an armored box and other refinements (tr. 3/127, 132). The packaging problem affected only the M239 (tr. 37). On 19 October 1983 respondent forwarded ECPs intended to solve the packaging problem (R4a, tabs 44, 44a, 44b). However, appellant believed the ECPs went too far. In a letter dated 28 October 1983 appellant claimed that the new packaging made the packaging purchased for both the M239 and M250 obsolete, that its costs were increased because the old boxes were rendered useless, and that delivery of the M250s scheduled for October could not be met because of the packaging changes (R4a, tab 45).

20. Respondent had, on the same day, sent a telegram rescinding the ECPs, accepting the change proposed by appellant, and disputing appellant's proposed cost increase (R4a, tab 46). This was acknowledged in a 1 November 1983 letter in which appellant defended its cost increase (R4a, tab 47). Referring to a telephone conversation, appellant asked for clarification of respondent's position and asked for written confirmation of its cost proposal in a 16 November 1983 letter. The letter also stated that, upon receipt of respondent's confirmation, it would propose a new delivery schedule for the M239s (R4a, tab 48).

21. Also referring to contemporaneous telephone conversations, the contracting officer by letter of 17 November 1983 confirmed acceptance of appellant's proposed change, promised to negotiate a fair price increase upon funds becoming available, and agreed to revise the delivery schedule for the M239s. However, the letter suggested that appellant continue to ship M250s (R4a, tab 49). This was followed by a 25 November 1983 letter that repeated the essence of the 17 November letter (R4a, tab 51).

FINDINGS OF FACT—ASBCA NO. 29798

22. By letter of 6 January 1984 appellant stated it would shut down its facility forthwith unless it received financial help from the United States government. Appellant blamed actions of respondent for its condition (R4a, tab 53). At that point appellant had delivered 300 M250s consistent with the schedule in its 17 August 1983 letter, including deliveries in November and December 1983 (exh G-1 to -5; finding 17). No further deliveries were ever made (tr. 42; 1/61). However, negotiations on appellant's cost proposal were continuing (R4a, tabs 52, 54). By letter of 10 January 1984 appellant restated its financial plight and sought a meeting with the commanding general as soon as possible (R4a, tab 55). The commanding general responded in a 23 January 1984 letter advising that cessation of production could not be permitted under appellant's contract, referring appellant to the procedures for a Government Guaranteed Loan, and advising that the Small Business Administration's refusal to issue a Certificate of Competency had eliminated appellant from consideration for award of another contract (R4a, tab 56).

23. Appellant's cost proposal on packaging was accepted 3 February 1984 (R4a, tab 57). The production facility was closed down that same day (tr. 512, 516).

24. By letter of 6 February 1984 appellant again sought action on its request for financial assistance (R4a, tab 58). On the same day the ACO prepared a memorandum on adverse developments in appellant's financial condition, which was described as critical (exh. G-6). In a letter of 7 February 1984, Unexcelled Castings Corp., a supplier to appellant, advised respondent that it was owed

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$89,355 by appellant for work under contract 2488, not counting in process inventory (R4a, tab 59).

25. On 16 February 1984 appellant was sent a 10-day cure notice, received by appellant on 22 February 1984, in which termination for default was asserted as a consequence of failure to cure the shutdown of its plant and non-payment of subcontractors (R4a, tab 60). There is no probative evidence of record that appellant made payments thereafter to subcontractors.

26. Under another contract appellant received a modification authorizing a progress payment of $64,000 on 24 February 1984 (exh. A-33). Appellant told the ACO that operations would begin the following Monday, 27 February 1984, and asked that the ACO so inform appellant's procurement contracting officers. The ACO stated he would inform "the appropriate people." (Tr. 524, 525).

27. Appellant opened its plant thereafter and on 2 March 1984 a team representing respondent visited appellant's plant to review inventory (tr. 2/87-88). Appellant's president testified that it had 5 of the 18 production employees working, and work was done on contract 2488 and at least one other contract on 2 March (tr. 525). However, in response to the termination, appellant's president told the contracting officer on 9 March 1984 that it began work on contract 2488 on 5 March 1984 (R4a, tab 63a). The team reported to the ACO that appellant was not working on 2 March (tr. 2/132). As the 9 March conversation was within 4 days of the event, we find it more reliable and conclude that appellant did not begin work on contract 2488 until 5 March 1984. One of the inventory team told appellant on 2 March that he was there to determine how many trucks would be necessary to take the materials and equipment, which respondent was prepared to do to recoup its progress payments (tr. 525-26).

28. Having had no response from appellant on the 16 February cure notice, appellant was default terminated by telegram on 7 March 1984 (R4a, tab 62). Appellant telephoned respondent on 9 March 1984 and objected to the termination stating, among other things, that the cure notice did not require it to respond, only to take action to cure. Appellant maintained it met the requirements of the cure notice when it reopened its plant (R4a, tab 63). By letter of 14 March 1984 appellant also advised it considered respondent's "lack of direction in furnishing delivery dates" to be a Government-caused delay of work (R4a, tab 64).

29. The 16 March 1984 letter confirming the termination, setting out the detailed reasons therefor, and providing appeal rights was received by appellant on 26 March 1984 (R4a, tab 65). Appellant had, however, filed for bankruptcy on 14 March 1984 (exh. A-30). Appellant filed its notice of appeal by a mailgram received by the Board 6 June 1984 (R4a, tab 66). By Order of the United States Bankruptcy Court, Southern District of Florida (hereafter "Bankruptcy Court"), dated 10 August 1984, the termination was declared null and unenforceable, but without prejudice to a motion from respondent for relief from the order "to proceed with actions affecting the contract." (Exh. A-30)

30. Respondent filed a Motion for Relief from Automatic Stay with the Bankruptcy Court. By Order of 29 November 1984 the court granted respondent's "request for relief from the automatic stay provisions of 11 U.S.C. § 362 to terminate contracts DAAA09-81-C-2488 and DAA J09-81-C-1455 for the reasons set forth at the conclusion of the hearing." (R4a, tab 67) The termination was reinstated "Nunc Pro Tunc" the next day (R4a, tab 68). Appellant did not thereafter contest the termination as contrary to the Order of the Bankruptcy Court or seek clarification of that Order (tr. 567).

DECISION—ASBCA No. 29798

Appellant argues there were no valid delivery dates in effect at the time of the termination, that the termination violates the Order of the Bankruptcy Court, and that various actions of respondent are the real cause for appellant's failure to deliver. Respondent contends the termination was proper.

At the outset we hold that, to the extent appellant's arguments are based on allegations of impropriety with respect to withholding of progress payments, those issues were addressed in *Sermor, Inc.*, ASBCA No. 29046, 87-1 BCA ¶ 19,568. In that decision, the Board found the Government's actions in suspending progress payments to be proper. The Board also found that appellant had received $505,862.00 in progress payments by August 1983 under contract 2488, and that audits had found payments under the contract to be excessive. The doctrine of collateral estoppel precludes the retrial of issues previously litigated between the same parties. *Sequal, Inc.*, ASBCA No. 30838, 86-3 BCA ¶ 19,230. Given that this record estab-

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lishes that only 75 M250s and no M239s had been delivered at a point where appellant had received over $500,000 in progress payments, there is nothing in this record to support appellant's contention that respondent's issuance of progress payments on contract 2488 violated appellant's contract rights. As to appellant's argument that actions under other contracts somehow give rise to a remedy, it is only in exceptional circumstances that relief is based on the Government's actions under other contracts. In *General Dynamics Corp. v. United States* [25 CCF ¶ 82,730], 585 F.2d 457 (Ct. Cl. 1978), the Court observed at 466:

> The cases seem to lead to the conclusion that only in exceptional circumstances can an equitable adjustment be made for extra cost in performing one contract, caused by the government doing things it has a right to do, respecting other contracts. Such rare cases will be those of concealment from the plaintiff, when it bids, of already formulated plans and intentions respecting other contracts, which plans and intentions the plaintiff needs to know to estimate its costs, possibly some instances of intentionally and knowingly hindering the plaintiff in doing the contract work, and perhaps other instances where some degree of government culpability and "proximate cause" exist.

No such circumstances have been established here. The only evidence of an impact on contract 2488 by other contracts has been the financial impact issues which were decided against appellant under *Sermor, Inc.*, ASBCA No. 30838, *supra*.

We also find appellant's argument that no valid delivery dates existed contrary to the evidence of record. Indeed, it was appellant's letter of 17 August 1983 which proposed a schedule with deliveries commencing 24 August 1983 (finding 17), and it was that schedule to which respondent agreed by telegram of 25 August 1983 (finding 18). Appellant delivered M250s in accordance with that schedule (finding 22). The binding effect of the schedule is not abrogated because it was never the subject of a formal contract modification. When the contract delivery date has not been met and the contract is not default terminated, the Government's subsequent exercise of its rights under the Default clause requires the establishment of a new delivery date that must be reasonable and specific. *DeVito v. United States* [13 CCF ¶ 82,319], 413 F.2d 1147, 1154 (Ct. Cl. 1969). The new schedule may be established by various means short of a contract modification. *Simplex Manufacturing Corp.*, ASBCA Nos. 13897, 14380, 71-1 BCA No. ¶ 8814; *Max M. Goldhaber*, ASBCA Nos. 8277, 8370, 65-2 BCA ¶ 5083. Appellant proposed the schedule under which it was default terminated and had made deliveries in accordance with it. "Thus, by word and conduct, Appellant agreed that the re-established completion date was reasonable." *Geomar Engineering, Inc.*, ENG BCA No. 5569, 90-1 BCA ¶ 22,425 at 112,636. Accordingly, we conclude that appellant was obligated to deliver in accordance with the schedule proposed in its 17 August 1983 letter and accepted in respondent's 25 August 1983 telegram.

While appellant contends that the packaging problems prevented deliveries, we find this contention without support in the record. Appellant's proposed solution to the problem was accepted by respondent after a misstep that was corrected on 28 October 1983 (findings 19, 20). Packaging of M250s was not affected (finding 19) and appellant's argument to the contrary is mortally wounded by its continued delivery of M250s during the period when the problem would have affected operations (finding 22). Moreover, the record persuades us that delivery of M239s should not have been affected after 28 October 1983. Thus, failure to deliver is not excused by the packaging change. Appellant's failure to deliver after December 1983 is not in dispute (finding 22).

Appellant's actions in threatening to suspend operations in January 1984 unless it received financial help from respondent and the subsequent closing of the plant on 3 February 1984 (findings 22, 23) led to issuance of a cure notice on 16 February 1984. In addition to the plant shutdown, respondent cited appellant's failure to pay subcontractors as a reason for the cure notice (findings 24, 25). Appellant argues that it cured the deficiencies for which the notice was sent. According to appellant, the plant re-opened 27 February 1984. However, we have found, based on appellant's 9 March 1984 telephone conversation with the contracting officer, that appellant did not begin work on contract 2488 until 5 March 1984 (finding 27), the tenth day after the cure notice was received. Even by appellant's testimony, only 5 production employees were working on at least two contracts on 2 March 1984 (finding 27). Appellant maintains that he had informed the ACO on 24 February 1984 that he would reopen the plant the following Monday. According to appellant, this satisfied his obligation to respond to the cure notice.

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This argument fails. Appellant was dealing with the ACO under another contract for which it had received progress payments, not 2488. The ambiguity of the situation and the ACO's reply (finding 26) were such that we cannot find appellant's request that the ACO inform the procurement contracting officers that appellant was reopening the plant an adequate response to the cure notice. Most significantly, however, we have found that work on contract 2488 did not begin until 5 March, which is consistent with information the ACO received from the inventory review team (finding 27). Thus, the information that appellant would reopen the plant on 27 February was of limited significance to contract 2488 and did not remedy the failure to make progress. As respondent argues, the failure of appellant to provide adequate assurances that it had begun to perform on contract 2488 gave the contracting officer the right to terminate. *Tubular Aircraft Products, Inc. v. United States* [23 CCF ¶ 81,327], 213 Ct. Cl. 749 (1977); *International Verbatim Reporters, Inc. v. United States* [34 CCF ¶ 74,323], 9 Cl. Ct. 710, 723 (1986).

Moreover, on 2 March 1984 appellant was informed by an inventory review team that respondent was prepared to take appellant's equipment to recoup progress payments (finding 27). This should have alerted appellant to the precarious position it was in and that the cure notice was still in effect. Appellant's failure to respond more fully to the cure notice or at least inquire as to respondent's intentions in the face of such information is difficult to fathom. Further, one of the bases for default termination named in the cure notice and the final decision terminating the contract was failure to pay subcontractors. We have found that nothing was done to correct the situation (finding 25). This failure to take corrective action further reinforces respondent's right to terminate. *International Verbatim Reporters, Inc., supra.*

While we have found, based on a conversation 4 days later, that work on contract 2488 did not begin until 5 March 1984, even by appellant's subsequent testimony only 5 production employees, or less than one-third of the production staff of 18, were working on 2 March 1984 (finding 27). Assuming, *arguendo*, that some were working on contract 2488, the size of appellant's workforce is an appropriate consideration in determining whether it has effectively remedied the failure to make progress. *Cox & Palmer Construction Corp.*, ASBCA Nos. 38739, 38746, 92-1 BCA ¶ 24,756. Thus, even were we to give appellant the fullest benefit of the doubt on when production began on contract 2488, we could not conclude that this action would make performance at levels reasonably commensurate with contract requirements possible and, as appellant suggests, that the contracting officer abused his discretion in terminating the contract.

As is painfully clear from the record, appellant was experiencing severe financial difficulties which had a profound effect on its ability to perform and deliver the required items. As stated previously, the issue of whether respondent was responsible for appellant's financial situation was litigated under *Sermor, Inc.*, ASBCA No. 30838, *supra*, and appellant is bound by its outcome. In any event, appellant filed for bankruptcy on 14 March 1984 and by Order of 10 August 1984, the termination was declared null and unenforceable by the Bankruptcy Court. However, respondent filed for relief and by Order of 29 November 1984 respondent was granted relief from stay provisions preventing termination of contracts. The next day, the termination was reinstated "Nunc Pro Tunc." Appellant maintains respondent's actions were contrary to the Bankruptcy Court's Order. However, appellant did not seek clarification of the Order or contest respondent's action in the Bankruptcy Court (finding 30). The Order is clear on its face in granting relief to respondent from staying its right to terminate contract 2488 (finding 30). Additionally, we note that precedent exists to support the Bankruptcy Court's action. In *In re West Electronics, Inc.*, 853 F.2d 79 (3d Cir. 1988), the Court held that the Nonassignment Act, 41 U.S.C. § 15, prevents a third party such as a debtor-in-possession from assuming a defense contract without Government consent. It lifted the automatic stay and allowed the Government to terminate the contract. Accordingly, we reject appellant's argument that the reinstatement of the termination violated the Order of the Bankruptcy Court.

The appeal is denied.

FINDINGS OF FACT—ASBCA No. 30149

31. The bid package did not contain an ECP changing the requirements for the resistor pack used in both the M239 and M250 (tr. 343). This was disclosed to appellant at the preaward survey on 24 September 1981, and respondent told appellant a correction would be issued. Appellant expected the correction within a month (tr. 3/29-31; exh. A-28). On or about 14 January 1982 appel-

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lant brought this matter to respondent's attention (tr. 340). The resistor pack change was forwarded by letter dated 19 February 1982. The change re-routed wires, changed molding compound and clamps, added a washer, reduced certain tolerances, eliminated tests, and added "Class 1" to the material call out for the grenade box (R4b, tabs 7, 7a). After the change it took 16 weeks to get delivery on the item (tr. 343-44). Appellant was asked to submit any additional costs for implementing the change (R4b, tabs 7, 8). The record contains no evidence that any such submission was ever made.

32. The first article test was conducted 3 January 1983. The test report noted several deficiencies, including the resistance test (R4b, tab 22; finding 13). Conditional acceptance by the contracting officer, by letter of 18 January 1983, was subject to deletion of certain tolerances, corrective action on an out of tolerance threaded hole, and submission of a waiver request for a hole in the casting surface (R4b, tab 23). The resistance test was to be resolved as well (finding 13).

33. By letter dated 7 March 1984 appellant filed a certified claim in the amount of $1,305,017.50 for "Government interferences that have led to the delay of this contract ...." The letter presents the elements of the claim as follows:

1. Failure of AMCCOM to timely furnish resistor pack changes which forced the delay in First Article testing. (Available since 28 Jul 1980)

2. A renegotiated date which was then missed due to the pre-meditated withholding of Government furnished paint which Sermor allowed the Government to furnish at *THEIR SPECIFIC REQUEST.*

3. The illegal termination of Contract DAAA09-81-C-2488, October 1982.

4. The incomplete conditional acceptance of Sermor's First Article of 4 January 1983 which included the pre-meditated withholding of engineering changes necessary for first production shipment.

5. Additional delays caused by fraudulently issued Show Cause letter, April 1983.

6. Illegal Progress Payment suspension, 27 October 1982 through 12 April 1983, and the refusal of the PCO to grant Sermor interim financing arrangements as written and verbally requested.

7. Illegal action taken during July-August 1983. (Suspension of Progress Payments)

8. Delay in receiving packaging correction to the tech data package which included the pre-meditated withholding of approved changes from 15 April 1983.

(R4b, tab 67)

34. The contracting officer issued a final decision dated 30 July 1984 granting appellant's claim in the amount of $3,893.22 for the increased cost of resistor pack manufacture and otherwise denying the claim (R4b, tab 69). An appeal notice was filed 11 September 1984 (R4b, tab 70).

DECISION—ASBCA No. 30149

Appellant has filed a $1,305,017.50 claim for delay damages. The record establishes that, at least with respect to the resistor pack and the Government furnished paint, appellant was delayed by respondent. In *Cox & Palmer Construction Corp.*, ASBCA Nos. 43438, 43439, 43440, 43441, 43442, 93-3 BCA ¶ 26,005, 30 April 1993, we said:

> [w]e note here the longstanding interpretative approach that we have followed in reviewing bilateral modifications granting time extensions. Namely, the action of the contracting parties in agreeing to a new performance schedule eliminates from consideration the causes of delay occurring prior to the extension. *Taylor Corporation*, ASBCA Nos. 37139, 38351, 90-2 BCA ¶ 22,693, *aff'd on recon.* 90-3 BCA ¶ 22,958; *Sierra Blanca, Inc.*, ASBCA Nos. 30943, 32286, 34838, 91-2 BCA ¶ 23,990; *RFI Shield-Rooms,* ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714; *Winder Aircraft Corporation of Florida*, ASBCA Nos. 4364 and 4733, 58-2 BCA ¶ 2044. Moreover, where the modification fails to include a waiver or release of claim, the failure to reserve a claim for delay costs is not fatal to a later claim when the circumstances do not indicate the parties' intention to include the delay costs. *See, e.g., Chantilly Construction Corp.*, ASBCA No. 24138, 81-1 BCA ¶ 14,863; *JDV Construction, Inc.*, ASBCA No. 37937, 89-3 BCA ¶ 22,012; *Beaty Electric Company, Inc.*, EBCA No. 408-3-88, 90-2 BCA ¶ 22,829.

Thus, although for purposes of the default termination, appellant is held to the new dates, the remedy of delay costs could be available if the Board were persuaded that the parties did not intend to include such costs in the various modifications. However, even if we find that delay costs were not included, appellant must establish that the delays were caused by respondent and the overall completion date was delayed as a result. *Cox & Palmer, supra.* In this regard

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appellant must also show the delays were not concurrent with other delays or there can be no recovery. *Commerce International Co. v. United States* [9 CCF ¶72,781], 338 F.2d 81, 90 (Ct. Cl. 1964). It is here that appellant falters. Appellant placed the contract on a "hold" status as early as July 1982, it experienced difficulties with equipment and in obtaining armor plate, its inability to deliver a single M239, even after resolution of the packaging problems, is not satisfactorily explained on the record, and its financial difficulties throughout the contract period were such that it closed its plant in February 1984 and filed for bankruptcy in March 1984.

Appellant has not presented proof or even argued its case in such a way that we can distinguish between events so as to identify with particularity the consequences of the specific actions addressed in the claim. The claim itself is not proof of disputed facts. *Peterman, Windham, and Yaughn*, ASBCA No. 21147, 77-2 BCA ¶12,674. We are not, for example, provided with a satisfactory explanation as to why M250s could not be delivered in October 1983 even though the packaging correction was relevant only to M239s. Since we know that armor plate affected the M239s, we know that another matter not related to packaging also delayed delivery. Further, since the resistor pack affected both M239s and M250s it could not have been a continuing obstacle to delivery of M239s, or else M250s could not have been delivered either. Insofar as the delays are attributed to respondent's actions related to progress payments, that issue has been litigated and resolved against appellant. *See* ASBCA No. 29798, *supra*. As to the M250s, appellant's plant closure was indisputably a significant cause of delay, as was appellant's earlier "hold" on contract performance. Even where there has been a material breach by the Government, the burden of proof is on appellant to establish that circumstances existed which gave it the right to refuse to perform. *Brenner Metal Products, Inc.*, ASBCA No. 25294, 82-1 BCA ¶15,462 at 76,620. Appellant, on this record, has not established that such circumstances existed. In addition, the record establishes equipment problems. In the face of these concurrent delays, we cannot find that appellant has established the right to recovery. *Commerce International Co. v. United States, supra*.

While appellant has not provided the proof necessary to sustain the claim, we observe that respondent's actions throughout performance of contract 2488 contributed to appellant's difficulties. Unfortunately for appellant, in the give and take of contract performance appellant's own actions as portrayed in this record left its legal rights eroded to the point where we are unable to find a basis for recovery. In this regard, although neither party has argued the doctrine of mutual fault, we have considered whether the facts here make that doctrine applicable.

In *Ascani Construction and Realty Co., Inc.*, VABCA Nos. 1571, 2304, 85-3 BCA ¶18,272, the Board found mutual fault where a contractor had been terminated for default with a delay claim for which the Government was found partly responsible still pending after 11 months. Here, however, respondent adjusted the delivery schedule numerous times, usually acquiescing in appellant's proposals. This resulted in establishment of new schedules which we have found the parties agreed to and imposition of the rule stated in *Cox & Palmer, supra*. We are precluded from consideration of progress payment issues by collateral estoppel and the last specification issue had been resolved months before the February 1984 plant closure. *Cf. Dynalectron Corp. v. United States* [21 CCF ¶84,115], 518 F.2d 594 (Ct. Cl. 1975). The matters appellant raises may persuade us that respondent's contract administration here was flawed, but the nature of the flawed administration has not been shown to be such that legal remedies are available to appellant as a result. The appeal is denied.

FINDINGS OF FACT—ASBCA NO. 30423

35. By letter dated 15 October 1984, received by respondent 19 October 1984, appellant submitted Progress Payment Request No. 23 (R4c, tab I, L). By letter dated 31 October 1984, confirming a telephone conversation the same day, respondent informed appellant that progress payments were suspended pending the outcome of motions filed in the Bankruptcy Court for relief from the stay on termination and to convert the bankruptcy from Chapter 11 to Chapter 7 (R4c, tab M). Appellant objected, stating in a letter dated 5 November 1984 that it considered the failure to pay Progress Payment No. 23 an abuse of discretion and asking respondent to review its actions "to reach a final decision" (R4c, tab N).

36. By letter dated 9 November 1984 respondent reiterated its intention not to pay progress payments until the Bankruptcy Court had ruled on the pending motions

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(R4c, tab P). On 21 November 1984 appellant filed an appeal from the failure to pay Progress Payment No. 23 with the Board. On 29 November 1984 the Bankruptcy Court granted respondent relief from the stay (R4c, tab T). On 30 November 1984 the termination for default was reinstated (R4c, tab U).

DECISION—ASBCA NO. 30423

Appellant argues, in effect, that when the termination for default is converted to a termination for convenience, the Board should order respondent to pay Progress Payment No. 23. As we have upheld the default termination, appellant is entitled to recover only for deliveries made. *Century Hone Division of Desert Laboratories, Inc.*, ASBCA No. 18360, 78-1 BCA ¶ 12,990 at 63,360, affirmed on recon. 78-2, BCA ¶ 13,343, *aff'd* 229 Ct. Cl. 493 (1981). Thus, appellant's claim for Progress Payment No. 23 is rendered moot. The appeal is denied.

[¶ 26,304] Potomac Computers Unlimited, Inc.

DOT BCA No. 2603, August 16, 1993. Agreement No. 2XTBPA-7013.

Awards—Existence of Contract—Purchase Agreement.—A business firm's claim for the cost of preparing to teach computer classes under a contract allegedly arising out of a blanket purchase agreement was denied because there was no indication that the authorized ordering agent placed a call upon the firm to conduct the computer courses. A blanket purchase agreement is a collection of provisions that will mature into a contract at such time as individual purchase orders are issued by the government through authorized ordering officers and are accepted by the contractor. Although the firm received a letter from a government official stating that the government intended to use the business firm to present the computer programs, the board concluded that no contract came into existence because the government official who wrote the letter was not authorized to place orders under the purchasing agreements. The firm's execution of the form at the bottom of the letter, therefore, did not constitute an acceptance creating a contract that legally obligated the firm to teach the classes.

For the appellant: Augustine Fendrock, President. For the government: Richard P. Theis, United States Department of Justice, Washington, D.C.

Before ROBERTORY, Administrative Judge.

ROBERTORY, Administrative Judge: This appeal arises out of a self-styled "Blanket Purchase Agreement" entered into between Potomac Computers Unlimited, Inc. ("Potomac Computers" or "appellant") and the United States Department of Justice ("Justice Department" or "respondent") under which the former was to provide computer training courses. The claim seeks $2,819.80, stated to be the costs of preparing to teach two classes in dBase III+. The appellant would also have the Board declare the Agreement null and void. (Tr. 11).[1]

FINDINGS OF FACT

1. On June 24, 1991, the respondent issued a Request For Quotations (Standard Form 18) soliciting prices for conducting various microcomputer training courses. (AF Tab 1). Packaged with the solicitation were (i) a Statement of Work (Finding 2), (ii) Enclosure 1 to the Statement of Work (Finding 3), and (iii), as Enclosure 2, a reproduced "Optional Form 347—Order For Supplies Or Services" with Continuation Sheets (Standard Form 35) on which appeared certain provisions, as described in Finding 4.[2] This Optional Form 347 was to be the actual award

[1] The appellant also requested that the Board order the Contracting Officer to restore it to the "bidders' list" for software training courses. From the Bench, the Board ruled that it does not have jurisdiction to grant this relief. (Tr. 113). An off-the-record discussion with the parties, aimed at resolving any dispute they might have in this regard, indicated that there may have been a misunderstanding between the parties as to the appellant's desire to be on that list.

[2] This Form is not included with the Request For Quotations that the Contracting Officer included in the appeal file as Tab 1. However, the record indicates that, with somewhat different

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document. The reproduction of the Optional Form 347 in the solicitation did not include the second page of that Form (the contents of which page are described in Finding 9).

2. The Statement of Work in the solicitation included the following provisions regarding performance:

a. The contractor shall furnish all necessary equipment, materials and personnel and shall perform all services necessary to conduct ADPE training courses as outlined in Enclosure No. 1. The courses will be presented over a twelve (12) month period beginning in FY 1992. The dates of the courses are outlined on Enclosure No. 1 and subject to change by the Department of Justice. No minimum or maximum number of courses is guaranteed for any one fiscal year. (Opening paragraph).

b. Minimum number of students will be eight (8); maximum will be twelve (12). (Paragraph I.b.).

c. If the minimum number of participants is not met, the course will be cancelled unless a smaller number of participants is mutually agreed upon. It should be noted that every attempt will be made to make a determination as to course presentation within 24 hours prior to its commencement. The Government will not be responsible for any costs incurred as a result of course cancellations. (Paragraph I.e.).

d. The Government contemplates awarding a Blanket Purchase Agreement for these services. A sample package is enclosed for your review. (Enclosure No. 2). (Section III "Type of Contract").

e. Proposals will be evaluated and the prospective Contractor will be selected based principally on the following criteria ... (Section IV Evaluation Factors For Award).

The Request for Quotations did not advise interested parties that more than one blanket purchase agreement would be issued, and it was not apparent in the solicitation package that this could happen. In fact, blanket purchase agreements were awarded to six vendors. (Tr. 57).

3. Enclosure 1 to the Statement of Work listed several courses to be given and multiple dates for each. Next to each were blanks in which interested quoters were to insert prices per student per course. Among the courses were a course in basic dBase III+ to be given on September 18 and 21, 1992 and a course in Advanced dBase III+ and Programming on September 24 and 25, 1992. These dBase III+ courses are the courses over which the parties' dispute has arisen. The Contracting Officer testified that these were dummy dates, included in the solicitation solely to provide a basis for estimating and pricing purposes. (Tr. 61, 63). However, the solicitation did not indicate that these were dummy dates or that they were other than real, contemplated dates for the respective courses. (Tr. 63; AF Tab 1). In fact, all of the dates for courses that Potomac Computers was ultimately selected to conduct (see Finding 12) did appear in the solicitation.[3]

4. The first page of the Optional Form 347 as it appeared in the solicitation included the following provisions:

a. Under the heading "I. Description Of Agreement" appeared:

This is a Blanket Purchase Agreement (BPA) for the following supplies or services for which the contractor ... may be in a position to deliver to the Government if and when requested by the Contracting Officer or authorized representative for an indefinite period commencing the effective date ... and until termination by either party.

b. In section II. "Extent Of Obligation" appeared:

The Government is obligated under this BPA only to the extent of call orders placed by authorized individuals against this Agreement. The Contractor is cautioned that acceptance of calls from personnel other than those authorized herein, acting within the scope of their authority, may jeopardize payment.

c. Behind the Optional Form 347 were several Continuation Sheets, Standard Form 36, on which were typewritten various provisions, including an incorporation of certain clauses by reference in the following words:

This Blanket Purchase Agreement incorporates the following clauses by reference, with the same force and effect as if they were given in full text ... These clauses are in addition to those previously incorporated hereunder: ... The following addi-

(Footnote Continued)

content, it was in fact a part of the solicitation package. (Tr. 55).

[3] Compare AF Tab 1 and the respondent's December 17, 1991 letter, AF Tab 5 quoted in Finding 12. Also see Tr. 101.

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tional Terms and Conditions are applicable to Purchase Orders for services.... [Federal Acquisition Regulation §] 52.249-4 APR 84 Termination for Convenience of the Government (Services) (Short Form).[4]

5. This incorporated clause "Termination for Convenience of the Government (Services) (Short Form) (April 1984)" of Federal Acquisition Regulation § 52.249-4 is prescribed for use in contracts

> when the Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and carrying out the contract, and would, if terminated for the convenience of the Government, limit termination charges to services rendered before the date of termination.

The clause itself, as set out in the Federal Acquisition Regulation, reads in its entirety as follows:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

6. Mr. Augustine Fendrock, appellant's president, reviewed this solicitation and raised with Mr. David Lamb, a Potomac Computers employee, the question of what appeared to be an unlimited right in the respondent to terminate on negligible notice without any liability. Mr. Fendrock testified that he had expected Mr. Lamb to raise this with the Contracting Officer. However, Mr. Fendrock also testified that he did not know if this other employee raised the matter with the respondent. Potomac Computers did not raise any objection in its response to the solicitation. (Tr. 17-18). The Contracting Officer testified that two other firms, but not Potomac Computers, had raised this issue. (Tr. 57). The Board therefore finds that, prior to submitting a proposal, Potomac Computers was aware of the possibility that Potomac Computers might expend time and effort in preparing to teach a course for which it might not receive recompense in the event of a Justice Department decision not to proceed with the course but, nevertheless, did not object or otherwise raise this matter with the Contracting Officer.

7. On July 11, 1991, Potomac Computers submitted its prices for conducting the various courses listed, filling in the blanks on the Enclosure 1 described in Finding 3. (AF Tab 2). Potomac Computers's price for each dBase III+ course was $125 per student per course.

8. On October 1, 1991, the Contracting Officer issued "Blanket Purchase Agreement" 2XTBPA-7013 (AF Tab 3), on Optional Form 347 with the Standard Form Continuation Sheets previously described in Finding 4. Also included was the Statement of Work previously described (Finding 2) which continued to reference Enclosure 1 (described in Finding 3) by stating, "The contractor shall furnish all necessary equipment, materials and personnel and shall perform all services necessary to conduct ADPE training courses as outlined in Enclosure No. 1." However, Enclosure 1 itself was not a part of the award. The Contracting Officer testified that it was not intended that the Blanket Purchase Agreement contain pricing. (Tr. 48-50). The Agreement as awarded did not contain any schedule of dates or prices for the various courses; in fact, it did not even list the courses or give any description of them. But the Agreement as issued by the Contracting Officer contained an additional document, a preprinted second page to Optional Form 347.

9. Mr. Fendrock testified (without contradiction, and we find his testimony to be correct) that this page 2 of Optional Form 347 had not been included in the solicitation package. (Tr. 15). This page 2 *inter alia* states,

> 52.252-2 CLAUSES INCORPORATED BY REFERENCE (JUN 88).—This contract incorporates the following clauses by reference ...

On the list of incorporated clauses that follows is the clause entitled "Termination for Convenience of the Government (Fixed Price) (Short Form) (Apr 84)" of Federal Acquisition Regulation § 52.249-1. This clause is quite different from that incorporated by the provisions typewritten onto the Continuation Sheets (Finding 5). It states:

> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is derminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with Part

[4] Many other clauses were incorporated, but only this is of immediate relevance.

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49 of the Federal Acquisition Regulation in effect on the date of this contract.

10. The Agreement as awarded authorized only Patricia Raines, Pat Ciuffreda, and Alex Bartning to place calls under the Agreement. (Tr. 60; AF Tab 3).

11. The Blanket Purchase Agreement did not provide that the respondent would procure all of its needs for such training from the appellant. Although the solicitation which led to the award had stated that "The Government contemplates awarding a Blanket Purchase Agreement for these services," which implies a single Blanket Purchase Agreement would be awarded, six such Agreements were awarded as a result of this solicitation. (Tr. 57). Potomac Computers was not advised by the Contracting Officer that multiple awards were being made, although it may have learned such from conversations. (Tr. 59).

12. On December 17, 1991, Mr. Richard Kubic, whose title was "Assistant Director for Career Management, Personnel Staff, Justice Management Division,"[5] of the respondent wrote to Potomac Computers. Mr. Kubic was not an authorized ordering officer under the Agreement (see Finding 10). After referring to Potomac Computers's proposal, the letter stated:

> Please refer to your response to Blanket Purchase Agreement (BPA) No. 2XTBPA 7013. The Department of Justice is pleased to inform you of its intention to use the services of your organization to present the program(s) listed below ...
>
> If the minimum number of eight students is not met, the program will be cancelled unless a smaller number of students is agreed upon. The maximum number of students will be 12. It is understood that you will provide all instructional services and training materials necessary for the successful presentation of the program. You will subsequently receive a purchase order with appropriate fiscal and billing information authorizing you to bill the Department at the end of the program for the services rendered and setting forth the rights of all parties concerned. The Justice Department retains the right to cancel a program at any time prior to the date of performance at no cost to the Government.

There followed a list of courses and dates therefor, among which were the two courses in issue. Specifically, it called for a course in dBase III+ on September 18 and 21, 1992 and a course in Advanced dBase III+ on September 24 and 25, 1992. The price for both courses was $125 per student per course, the per student price bid by Potomac Computers if it had to furnish hardware.[6] Near the end of the letter, appeared the following:

> Please indicate your acceptance of this schedule by signing in the space provided below and returning one copy to the undersigned.

Mr. Fendrock executed the document for Potomac Computers in the designated blank.

13. Calls for services under the Blanket Purchase Agreement were made by Mr. Bartning at various times during 1992. (AF Tab 6). The dates of these calls and the dates on which the courses were to be conducted were as follows:

Date of Call	Course	Dates of Course
March 5	Introduction to DOS	March 9-10
March 9	Wordperfect5.1	March 11-12
March 12	Advanced Wordperfect 5.1	March 13, 16
March 16	Lotus 1-2-3	March 17-18
March 17	Harvard Graphics	March 19-20
March 21	Overflow	March 23-24
March 23	Overflow	March 25-26
September 11	Introduction to DOS	September 14-15
September 13	Wordperfect 5.1	September 16-17
September 15	Harvard Graphics	September 22-23

These courses were given and Potomac Computers duly paid. The courses entitled "Overflow" were additional sessions given by Potomac Computers when more than 12 persons[7] were seeking to take a particular course. (Tr. 21).

14. Acting in reliance on the December 17 letter, and in order to be able to prepare the dBase III+ courses sufficiently in advance of their commencement dates, Potomac Computers made two purchases. On August 26, 1992, it ordered twelve training guides at $12.00 each ($144.00) and one instructor's kit at $395.00, a total (with Virginia sales tax) of $569.25. On September 2, 1992, it purchased a copy of the dBase III+ program on which the students were to be trained, for $522.39, including sales tax. (AF Tab 4; Tr. 24). To prepare for the course, the appellant opened the packages in which these products came, and as a consequence was not able to return them for credit. (Tr. 26-27).

15. Under the Blanket Purchase Agreement, Potomac Computers was also obliged

[5] This is the title he used in signing the letter.

[6] Finding 7.

[7] See Finding 2b.

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to provide the computers and peripheral equipment on which the training was to be conducted. Therefore, on August 27, it ordered twelve sets of that hardware from a rental firm, for the period September 11 through 28, 1992. (AF Tab 4; Tr. 28, 31-32). The price was $3,695.36. The rental period was intended to cover the several courses which Potomac Computers would be running during this period.[8] (Tr. 27, 31-32). In addition to the two courses in issue, Potomac Computers gave a course in Introduction to the Microcomputer and DOS on September 14 and 15,[9] a course on WordPerfect 5.1 on September 16 and 17, and a course on Harvard Graphics on September 22 and 23. As noted earlier, the course in basic dBase III+ had been scheduled for September 18 and 21 (Friday and the following Monday, respectively) and in Advanced dBase III+ for September 24 and 25.[10]

16. No calls were placed by any authorized ordering officer (see Finding 10) or by the Contracting Officer for either of the two dBase III+ courses in issue.

17. Mr. Bartning was the only one of the authorized ordering officers who placed formal calls with Potomac Computers for services. (Tr. 60). On September 8, he advised Potomac Computers that only two students had expressed interest in the Advanced dBase III+ class. The parties were in mutual agreement that it would not be practical for Potomac Computers to conduct a course for only two students. (Tr. 23, 95). This communication was Mr. Bartning's first communication with Potomac Computers regarding the September courses. (Tr. 91).

18. On September 15, a Tuesday, Mr. Bartning advised Potomac Computers that only six persons had expressed an interest in taking the basic two-day dBase III+ course, scheduled to commence on Friday, September 18. Although on occasion Potomac Computers had agreed to teach a course when only seven students were interested (Tr. 89, 92), it declined to teach a course for only six; this declination was in accordance with the Blanker Purchase Agreement (see Finding 12). Mr. Bartning thereupon advised that the course would not be held. (Tr. 91).

19. On October 1, 1992, Potomac Computers wrote to the Justice Department, submitting a claim in the amount of $2,819.80, said to have been the costs that it had incurred in preparing to perform the dBase III+ classes. Potomac computers cited Federal Acquisition Regulation, Part 49 as the legal grounds for the claim. Part 49 is the portion of the Regulation addressing the "Termination of Contracts." The costs claimed include the $522.39 for the purchase of the dBase III+ program and the $569.25 for the purchase of dBase III+ courseware (cf. Finding 14). The claim also included $1,478.16 for the rental of computers and $250.00 for lost profit. The rental claim was calculated by taking the $3,695.36 rental for the computers and dividing it by the total number of course days in September (10 days) to obtain a daily rental of $369.54. For the four days of dBase III+ courses, this yielded the $1,478.16 sought. The profit figure was calculated at an average of 10 students at $125.00 each for two classes ($2,500.00), on which there would be a 10% profit. The claim included copies of suppliers' invoices to support the amounts claimed. The respondent has not questioned the fact that the amounts claimed (other than profit) had actually been paid out, and we find the amounts claimed were actually expended. See also Findings 14 and 15.

20. On January 28, 1993, the Contracting Officer issued her decision. She noted that Federal Acquisition Regulation Part 49 governs terminations and that Part 33 governs claims for payment, and that she would treat the claim under the latter. Citing the Statement of Work provision regarding cancellations (set out in Finding 2.c), the Contracting Officer determined that under that provision the cancellation did not give rise to any liability of the government. The Contracting Officer stated that while the Statement of Work spoke of 24-hour notice, in fact the respondent had given three days notice of cancellation of one course and "more than two weeks" notice of the cancellation of the other.

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[8] See Finding 13.

[9] The Board takes judicial notice of the days of the week on which various dates fall. September 14 was a Monday. Potomac Computers had the rental period commence on the preceding Friday, September 11, so that it could have the computers up and running and the software loaded prior to the start on class on Monday morning.

[10] September 25 was a Friday. September 28, the last day of the rental term, was the next workday, the following Monday.

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DISCUSSION

That a blanket purchase agreement, rather than a firm contract, was intended was clear from the terms of the solicitation and its recurring use of that term "blanket purchase agreement." See Findings 2.d and 4.a. That term appears sufficiently often that a reasonable prospective proposer would have been obligated to make inquiry if it had any doubts as to the respondent's intent to award something other than a firm contract.

A blanket purchase agreement is not a contract. It is merely a collection of provisions that will only mature into a contract or contracts at such time or times as individual purchase orders may be issued by the government through authorized ordering officers and accepted by the contractor. *CardioMetrix,* DOTBCA Nos. 2571, 2591, 94-1, BCA ¶ 26,269, (May 3, 1993). In the context of the instant dispute, a contract would come into being only after an authorized ordering officer would place a call upon Potomac Computers to teach a course and Potomac Computers accepted that call. *CardioMetrix, supra; Ann Riley & Associates, Ltd.,* DOTBCA No. 2418, 93-3 BCA ¶ 25,963 (1993).

The only post-award document referencing the two dBase III+ courses in issue was the December 17, 1991 letter. (Finding 12). But the author, Mr. Kubic, was not an authorized ordering officer under the Agreement. Therefore, no contract came into existence at the time Mr. Kubic sent his letter or at the time Mr. Fendrock accepted the schedule by executing the bottom of the letter and returning it. As of that time, Potomac Computers was not legally obligated to teach these two dBase III+ courses and the Justice Department was not obligated to Potomac Computers.

The record contains nothing that would indicate or even imply that Mr. Bartning, the only authorized ordering officer who had communication with Potomac Computers, ever placed a call upon the appellant io conduct the dBase III+ courses. The only communications between Mr. Bartning and Potomac Computers relative to these courses appear to have been the conversation of September 8 (Finding 17) in which Mr. Bartning advised that the Advanced Course, previously scheduled for September 24 and 25, would not be held and the conversation of September 15, in which he advised that the basic course, scheduled for September 18 and 21, would also not be held.

Thus, the Board must determine that no contract ever came into existence for the teaching of the two dBase III+ courses.

The Board agrees with Mr. Fendrock's argument that, in order to present a course properly, a teacher would require more time than elapsed between the calls and the respective course dates (see Finding 13). However, prior to participating in the procurement Mr. Fendrock recognized the problems inherent in having to prepare to teach courses with no assurance of recouping the costs of preparation (Finding 6), but nevertheless elected to submit prices, to accept the Blanket Purchase Agreement, and eventually to incur expense in anticipation of presenting the courses. By so doing, he assumed the risk of not receiving the formal call to provide services and the associated opportunity to recoup costs of preparation. We note the converse of the instant situation: when the Justice Department issued the last-minute formal call for a vendor to conduct a previously scheduled course, that vendor could refuse to accept the call, leaving the Justice Department with a classroom of students and no teacher.

If a call for services had been placed and the Justice Department had then cancelled the course, we would be facing an issue of ascertaining which of the three termination provisions (described in Findings 9,[11] 5,[12] and 2.b [13]) would be applicable. However, since no contract ever came into existence for either of these two dBase III+ courses, there is nothing to terminate and we do not consider this question. *Ann Riley & Associates, Ltd., supra.*

There being no contract in effect between the Justice Department and Potomac Computers for the latter to give the dBase III+ courses, the appellant is not entitled to recover the costs it incurred in preparing for those courses.

With regard to the appellant's request to have the agreement declared null and void, the Board is unable to see what that action would accomplish or upon what legal basis we could ground such a determination. Inasmuch as the respondent has not accepted

[11] The Federal Acquisition Regulation § 5.2.249-I clause.

[12] The Federal Acquisition Regulation § 52.249-4 clause.

[13] "The Government will not be responsible for any costs incurred as a result of course cancellations."

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any dBase III+ instructional services, it has received no benefit from Potomac Computers's efforts and recovery on a *quantum meruit* basis would not be available. In addition, *quantum meruit* does not lie when there is an agreement between the parties regarding the work performed and in consequence of which work was performed. See *John B. Rich (EZ Construction Company, Subcontractor),* DOTBCA No. 2518, 93-3 BCA ¶ 25,990 (1993) and *Undersea Engineering and Construction Company, Inc. v. International Telephone & Telegraph Corporation,* 429 F.2d 543, 552 (9th Cir. 1970).

DECISION

The appeal is denied.

[¶ 26,305] American Telephone & Telegraph Company, Federal Systems Advanced Technologies

DOT BCA No. 2479, August 24, 1993. Contract No. DTFA01-86-C-00034.

Procedure, Boards—Discovery—Depositions.—The government's motion to compel further deposition of an inactive witness who performed management consulting services on behalf of the contractor was granted because the attorney for the witness inappropriately directed the witness not to answer questions propounded by the government during the deposition. If an attorney objects to questions posed during a deposition, the objection will be noted in the record, but the witness must then proceed to answer the question. Only when a question involves the attorney-client privilege or the attorney-work-product privilege and the witness's response to the question would vitiate that privilege may the witness refuse to answer. There was no allegation, in the instant case, that the question sought to probe privileged matters. In fact, the board concluded that the questions to which the attorney took objection were proper questions.

For the appellant: Loretta A. Cecil and Debra L. Whited, and McKenna and Cuneo, Washington, D.C., by E. Sanderson Hoe, David M. Eppsteiner, Andrew N. Patrakes, James P. Lamoureux, and Richard A. Feinstein. For the government: John R. McCaw, James T. Waters, Nathan Tash, Gregory C. Carter, Christian Jordan, and Robert Zuckerman, Federal Aviation Administration, Washington, D.C. For the deposition witness: Bromley, Greene & Walsh, Falls Church, Virginia, by Cleveland Thornton.

Before ROBERTORY, Administrative Judge.

ROBERTORY, Administrative Judge: The respondent Federal Aviation Administration ("FAA") has filed a Motion to Compel deposition testimony from Mr. Gerald Thompson, who is neither a party to the action nor an employee of a party, and for leave to recall Mr. Thompson as a deposition witness. Mr. Thompson through counsel opposes so much of the Motion as seeks to compel further deposition.

The appellant, American Telephone and Telegraph Company ("AT&T"), is not an active party to this Motion. Mr. Thompson was not an AT&T employee at the time of the deposition and was not under its control.

The background of this litigation is set forth in several published decisions.[1] AT&T held a contract for the design and production of certain equipment intended for air traffic control purposes, known as the "Radio Control Equipment." The FAA terminated AT&T's contract for default and AT&T has appealed. During pretrial discovery, the FAA subpoenaed Mr. Thompson to give his deposition. His direct contact with the terminated contract is described below.

The Motion states as grounds for the relief sought that Mr. Thompson's counsel, Cleveland Thornton, Esq. at the deposition "raised so many inappropriate objections, often directing the witness not to answer, that the FAA's ability to discover relevant facts was extremely prejudiced." Counsel's directing the witness not to testify is by far more serious than the allegation of inappropriate objections; apart from minor delay,

[1] See earlier decisions in this appeal, reported at 93-1 BCA ¶ 26,087 (May 17, 1993) and 93-3 BCA ¶ 26,088 (May 24, 1993) as well as decisions on an earlier appeal under this contract, *AT&T Technologies, Inc.,* DOTBCA No. 2007, 89-3 BCA ¶ 22,104 (1989), affirmed on reconsideration 90-1 BCA ¶ 22,380 (1989).

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the latter did not materially impede the FAA's ability to proceed with the deposition.

The transcript of the deposition was furnished with the Motion. The transcript reflects that the tenor of the deposition was established at its commencement, when Mr. Thornton announced,

> "I have an objection with Mr. Tash and the agency for which he works, and I have worked for DOT before, and I want to object to the facilities."

This objection appears on the first page of the transcript, immediately after Mr. Thompson had been sworn and before Nathan Tash, Esq., respondent's counsel, had said anything on the record. The transcript does not reflect the nature of Mr. Thornton's objection "with Mr. Tash and the . . ." FAA. The Board does not comprehend the meaning of an objection to another Member of the Bar personally or to an opposing party personally, as opposed to their conduct. The Board determines this to be an invalid objection, not supported by the record.

Mr. Thornton also objected to Mr. Tash asking Mr. Thompson to state his background and experience, on the grounds that this was not relevant and was "wasting time." (Tr.[2] 8). It is unquestionably proper in deposition to inquire into a witness's experience and background, be he/she a fact or an expert witness. In addition, an alleged lack of relevancy is not a valid basis for a deposition witness to refuse to answer a question. *Drew v. International Brotherhood of Sulphite and Paper Mill Workers,* 37 F.R.D. 446, 450 (D.D.C. 1965). This is in keeping with the general rule that, regardless of whether a matter would be excluded from the record at trial due to lack of relevancy, the test in discovery is whether the material sought may lead to the uncovering of admissible evidence. Fed. R. Civ. P. 26(b)(1).[3] On several occasions, this Board has announced that it follows Rule 26(b)(1) in determining the permissible scope of discovery.[4] The Board determines that this objection was also groundless, and an unwarranted intrusion into the conduct of the deposition.

At least two statements by Mr. Thornton that he characterized as objections (Tr. 38, 57-58) were in fact attempts to instruct Mr. Tash on how to pose questions. On another occasion, Mr. Thornton in effect tried to testify. (Tr. 47). These were not appropriate.

Mr. Thornton on two occasions objected that Mr. Tash's questions to Mr. Thompson were tantamount to seeking expert opinion without payment. (Tr. 52 and 64). While Mr. Thornton is correct when he says that a deposition is not an appropriate place to obtain expert advice from a nonexpert witness, the transcript does not support the assertion that this is what was occurring. On both occasions, it appears that the questions were designed to pinpoint factual matters relating to Mr. Thompson's involvement with this contract and came in a context where the witness had just indicated a possible misunderstanding or vagueness. When a fact witness has been involved in some technical aspect of a contract's performance, deposition questions which are designed to ferret out the depth of his/her technical ability or to probe his/her understanding of technical concepts which will be involved in that person's testimony regarding factual events, are valid questions.

The transcript gives some indication that Mr. Thompson was personally involved in technical matters during contract performance. At the time of the deposition, he was president of Jerry Thompson Associates, Inc. His deposition testimony indicated that he had previously been employed by the FAA, eventually becoming Director of Airway Facilities, a post he held until 1982. He

[2] References to the transcript ("Tr.") are to Mr. Thompson's deposition transcript.

[3] "(b) **DISCOVERY SCOPE AND LIMITS.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

[4] "The standards which this Board applies in determining whether a document is subject to discovery are set forth in Rule 19(c) of our Rules of Procedure and in Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Roebbelen Engineering, Inc.*, DOTBCA Nos. 1591 *et al.*, 87-3 BCA ¶ 20,163 (1987); *Southwest Marine, Inc.*, DOTBCA Nos. 1497, *et al.*, 86-2 BCA ¶ 18,773 (1986); *Time Contractors, J.V.*, DOTBCA Nos. 1669, 1691, 85-3 BCA ¶ 18,412 (1985)." *Aerospatiale Helicopter Corporation,* DOTBCA Nos. 1905 *et al.*, 89-2 BCA ¶ 21,770 (1989) at 109,542.

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then became involved with the preparation of a National Airways Plan for the FAA.

Mr. Thompson left the FAA in March, 1984 and formed Jerry Thompson Associates, Inc. (Tr. 19). That firm subsequently undertook work on behalf of AT&T in connection with the terminated contract, performing what appears to have been essentially management consultant services. (Tr. 22-23). Mr. Thompson participated in AT&T's proposal preparation efforts for that contract. (Tr. 24-26).

Subsequently, Jerry Thompson Associates, Inc. assisted AT&T in reviewing scheduling and software problems (Tr. 27-28) and became involved with an "assessment" or "audit" of AT&T's problems and progress at a time when problems were developing with regard to contract performance.

Mr. Thompson was included by AT&T in its prospective witness list filed with the Board on March 1, 1993. That filing did not indicate that he was other than a fact witness, a person who would be called to recite facts with which he was familiar due to contact with some portion of the AT&T-FAA dispute. His deposition testimony regarding his background indicates that Mr. Thompson is a fact witness who had some expertise in the areas of policy planning for the airways system of the United States and of management techniques, and who had applied that expertise in analyzing AT&T's management policies during contract performance. For him to now give testimony relating to this exercise of expertise during contract performance does not render him an expert witness, nor does his testifying in deposition as to what he found in the exercise of that expertise constitute an effort by the respondent to obtain the benefits of an expert witness without the cost.

Accordingly, the Board determines that the questions to which Mr. Thornton took objection (Tr. 52, 64) were proper questions.

We turn to the respondent's allegations regarding Mr. Thompson's refusal, at direction of his counsel, not to respond to certain questions posed to him.

During the deposition, FAA counsel showed three documents to Mr. Thompson. These were identified as deposition Exhibits 1, 2, and 3.

Exhibit 1 was represented [5] as being a document that Jerry Thompson Associates, Inc. had itself provided the FAA in response to a subpoena. (Tr. 33). Deposition Exhibit 1 was an assessment of the Radio Control Equipment Program that Jerry Thompson Associates, Inc. had prepared for AT&T. Mr. Tash presented it to Mr. Thompson for the latter to review before posing questions. Initially, Mr. Thompson testified that the first time he had seen it was the day before the deposition. (Tr. 33). Thereupon, before Mr. Tash stated anything further or posed any questions referencing the documents, Mr. Thornton stated,

> Well, let me tell you now that he only saw it and he has not read it and the first time he saw it was yesterday.
>
> So that we're real clear, what you're not going to do is ask him questions off this document that he did not write and has not seen. (Tr. 33-34).

Although he had just testified that he had never seen the document until the day before the deposition, Mr. Thompson then testified that he had signed a letter sending this document to Mr. Don Smith of AT&T well prior to the day before the deposition and apparently about October, 1990, but had never given it more than cursory review. (Tr. 34, 35). This testimony that he had signed the letter sending it to Mr. Smith is inherently inconsistent both with his testimony that he had not seen it until the day before the deposition and with Mr. Thornton's representations[6] to the same effect.

Furthermore, as noted above, Exhibit 1 was produced by Jerry Thompson Associates, Inc. Mr. Thompson was and is the founder and president of Jerry Thompson Associates, Inc. Mr. Thornton argued strenuously that this was a small firm and Mr. Thompson "the key man" in the firm. (Tr. 64). Exhibit 1 was transmitted to AT&T by means of a letter signed by Mr. Thompson.[7] Regardless of whether or not Mr. Thompson has previously seen the document (which as noted above is questionable), pointing out specific portions of the document and asking him if he has knowledge of the veracity of those statements is a valid line of questioning.[8] This is not a document with which he has had no prior connection; as president of the company which created it, he must an-

[5] The deponent or his counsel did not dispute this representation.

[6] Set out *supra* (referencing Tr. 33-34) and *infra* (referencing Tr. 34 and 36).

[7] The covering letter itself is not in the record, but we have Mr. Thompson's testimony that he signed the transmittal.

[8] When a response is not forthcoming, one may assume that the responses which a deposition wit-

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swer for its contents. As founder of the company which bears his name, and as the "key man" in a small firm, one would expect Mr. Thompson to be familiar with a report his firm produced for a major client. Mr. Thompson's testimony has raised issues of credibility, justifying further questioning with regard to Exhibit 1 *and its contents.*

The FAA's counsel then stated his intent to pull out several comments from Exhibit 1 and to ask Mr. Thompson, independent of the document, if he knew whether each such statement was accurate:

> MR. TASH: Then what I would propose to do is there are several comments in this document and I would like for you to pull out those comments and ask whether you, independent of this document, have a recollection whether or not that was an accurate statement as of the time of the audit,[9] to the extent that you know. (Tr. 34).
>
> Q. Mr. Thompson, as I stated, I would like to pull out several of the comments located in this document and ask you, independent of this document, whether you have knowledge of whether this was an accurate statement as of October 1990 ... (Tr. 35).

In this passage, Mr. Tash did not state that Mr. Thompson should read the document and then answer questions that would require a detailed knowledge of the document's contents or an attempt to read the minds of its authors. Rather, Mr. Tash said he would point to specific statements and ask if, to Mr. Thompson's knowledge, such was a correct statement. Mr. Thornton responded:

> No sir. He didn't write it and he ain't going to review it. [sic] He had never seen it until yesterday and he didn't read it then. He just said I haven't seen this before. (Tr. 34).

and subsequently he reiterated his position:

> No, sir. We're not looking at a document. You can read him stuff and you can ask him a question about something that you've read, but he is not going to look at this document because he didn't write it and he hasn't seen it before. That is not going to happen. I'll instruct him not to answer and you can get an order if you think you can....
>
> This is not learn-while-you-earn time. This is to get information that he knows of his own knowledge. It is not for him to read documents which speak for themselves and interpret them for you when he has not written it nor has he seen it. That's the end of this....
>
> I'm instructing him not to answer a question where it involves him reading the document. If you want to ask him a question, I will listen to the question and decide if I'm going to object then, but he is not going to look at the document. You can remove it from in front of him. (Tr. 36).
>
> I'm instructing him not to answer a question where it involves him reading the document.... (Tr. 37).

Thereafter, Mr. Thompson proceeded to answer questions regarding what was found during the assessment, thereby illustrating his personal involvement with the assessment which gave rise to Exhibit 1. There is no way to ascertain from the record what questions Mr. Tash would have asked but for Mr. Thornton's limiting Mr. Thompson's testimony. We accept as factually correct Mr. Tash's statement that he did not reach the full breadth of examination he desired, which was the respondent's right under the rules of discovery.

The document marked as Deposition Exhibit 2 is an outline entitled "Software Evaluation Outline." Neither party's brief has identified what this document is or by whom it was prepared. Mr. Thompson testified that he did not recognize the document. Mr. Tash stated his intent to ask questions "referencing the document and see if you agree with the statements contained therein." Again Mr. Thompson directed the witness not to look at the document. (Tr. 54-56). Mr. Thompson then testified regarding software structure and what was found during the assessment regarding AT&T's engineering of software systems. Once again, his testimony indicated familiarity with the subject of AT&T and software systems used in the Radio Control Equipment. Once again, there is no way to ascertain from the

(Footnote Continued)

ness would have given would have been beneficial to the questioning party, either by constituting relevant admissible evidence or by pointing towards the discovery of admissible evidence. *Ralston Purina Company v. McFarland,* 550 F.2d at 973.

[9] A reference to the assessment of AT&T's management capabilities mentioned above. (Note by the Board.)

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record what questions Mr. Tash would have asked but for Mr. Thornton's limiting Mr. Thompson's testimony and again we accept Mr. Tash's statement that he did not reach the full breadth of examination he desired.

The document marked as Exhibit 3 is a Trip Report for a Mr. Max Robinson[10] for the period June 1-5, 1987. Mr. Robinson is not further identified. Mr. Thompson testified that he did not "think" he had seen it before, and would be surprised if he had. (Tr. 62). The Report states that Mr. Robinson attended a "walk-through" at AT&T on the "Cost/Schedule Status Report." It also sets forth criticisms of the Cost/Schedule Status Report system in effect at AT&T, the capabilities of AT&T's data collection system, the status of the knowledge possessed by AT&T personnel assigned to the project, and the use made by AT&T management of reports generated by the Cost/Schedule Status Report system. Once again Mr. Tash expressed an intent to ask questions regarding the document and asked Mr. Thompson to refer to the document, and once again Mr. Thornton instructed Mr. Thompson not to comply or respond. (Tr. 62-63).

Neither party in their filings on this Motion have referred the Board to any precedents addressing the question of whether a deposition witness can be requested to review documents and answer questions based thereon. It is to be noted that the Board does not have before it a situation where the person conducting a deposition has asked a witness to review a mass of documents and then submit to questioning thereon. Rather, the situation is simply that Mr. Tash intended (see Tr. 34-35) to refer the witness to statements in the documents and then ask the witness to state whether, to his knowledge, such statements were accurate. This is a proper approach, especially considering Mr. Thompson's involvement in AT&T's contract performance.

The overwhelming weight of authority is that it is not appropriate for counsel to direct a witness not to answer a question propounded during a deposition. *Ralston Purina Company v. McFarland,* 550 F.2d 967, 973 (4th Cir. 1977); *Mendenhall v. American Booksellers Association,* 1991 US DIST LEXIS 50513 (S.D.N.Y. 1990) at 3-4; *Coates v. Johnson and Johnson,* 85 F.R.D. 731, 733 (N.D. Ill. 1980); *Shapiro v. Freeman,* 38 F.R.D. 308 (S.D.N.Y 1965).

When counsel has an objection to a question posed during a deposition, that objection should be noted on the record and the witness should then proceed to answer the question. Fed. R. Civ. P. 30(c); *Ralston Purina Company v. McFarland,* 550 F.2d at 973; *Hearst/ABC-Viacom Entertainment v. Goodway Marketing, Inc.,* 145 F.R.D. 59, 61, 63 (E.D. Pa. 1992); *Shapiro V. Freeman, supra.*

The only exception to this rule is the situation where a privilege is involved, such as the attorney-client privilege or the attorney-work-product privilege, so that any response to the question would vitiate the protection of the privilege. *Eggleston v. Chicago Journeymen Plumbers' Local Union No.* 130, 657 F.2d 890, 903 (7th Cir. 1981), cert. den. 455 U.S. 1017 (1982); *Coates v. Johnson and Johnson,* 85 F.R.D. at 733. There are no allegations in this case that the questions sought to probe privileged matters and, indeed, the record indicates that such a contention does not lie.

When, and only when,[11] an objection is based on privilege, or upon a belief that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent," [12] the procedure is to briefly recess (not terminate) the deposition and communicate with a judge to obtain a ruling. Fed. R. Civ. P. 30(d); *Kelvey v. Coughlin,* __ R.I. __, 625 A.2d 775 (1993).

The Board therefore determines that Mr. Thompson could not refuse to answer the questions which the FAA counsel sought to put to him, in the format that FAA counsel elected to use: pointing out passages and asking if he knew whether or not the statements made were accurate, to the best of his knowledge.

The respondent's Motion to Compel further deposition testimony by Mr. Thompson is granted. An Order in implementation of this decision is set forth below.

ORDER

IT IS HEREBY ORDERED THAT Mr. Gerald Thompson present himself for further deposition by the Federal Aviation Administration at a time and place designated

[10] The copy attached to the Motion is not wholly legible.

[11] If such an allegation is made, but is not proved, the objecting party may subject himself/herself to sanctions. *Hearst/ABC-Viacom Entertainment Services v. Goodway Marketing, Inc.* 145 F.R.D. at 62.

[12] Quoting from Fed. R. Civ. P. 30(d).

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in a *Subpoena ad testificandum* to be issued by the Recorder of the Board contemporaneous with the issuance of this Opinion and Order, and to respond fully and completely to questions posed by the counsel for the Federal Aviation Administration.

IT IS FURTHER ORDERED THAT counsel for the said Mr. Gerald Thompson shall not order or direct or advise Mr. Thompson not to answer or respond to any such questions and shall comport himself in strict accordance with the legal principles governing the conduct of depositions as set forth above. *Provided, however,* that this Order shall not be construed as precluding counsel for Mr. Thompson from noting objections on the record or, if he is of the opinion that a question seeks to inquire into otherwise privileged matter or such request is justified pursuant to Fed. R. Civ. P. 30(d) and Board Rule 18(a),[13] he may request a recess in the deposition and the parties, during such recess, may communicate with the judge issuing this order or, if he should be unavailable, any judge of the Board, for a ruling on whether or not a privilege applies.

[¶ 26,306] Tri-Comm, Inc. v. Department of Veterans Affairs

GSBCA No. 12505-P, August 4, 1993. RFP 548-02-93.

Timeliness of Protest, GSBCA—Apparent Improprieties—Solicitation Defects.—A protest based upon alleged improprieties in a solicitation for a telephone and paging system was dismissed as untimely because it was not filed before the closing time for receipt of initial proposals. Protests based upon improprieties in the solicitation must be filed before the date for receipt of proposals in order to be considered timely.

Timeliness of Protest, GSBCA—Jurisdictional Considerations—What Constitutes a Protest.—A corporate firm's assertion that a letter the firm had sent to the government was a protest concerning the requirements for the timely submittal of proposals under the solicitation was rejected, because a plain reading of the letter indicated that the letter was not a protest but a request for an extension of the response date. The letter was not characterized by the firm as a protest, and it contained no allegation that the time allowed for responding to the solicitation violated any statute or regulation. Nor did the letter allege that the response time precluded any offeror from responding to the solicitation. The letter simply stated the difficulties that the firm anticipated in gathering information and meeting the closing date.

For the appellant: Mychal H. Walker, President. For the government: Paul Grabelle, Dennis Foley, and Philip Kauffman, Office of General Counsel, Washington, D.C.

Before GOODMAN, DEVINE, and NEILL, Administrative Judges.

GOODMAN, Administrative Judge: On July 26, 1993, Tri-Comm, Inc. (Tri-Comm or protester) filed a protest concerning the requirements of RFP 548-02-93 (the solicitation) for a telephone and paging system for the Veterans Administration Medical Center to be constructed in West Palm Beach, Florida, by the Department of Veterans Affairs (VA or respondent).

Respondent has moved to dismiss the protest as untimely. For the reasons stated below, we grant respondent's motion and dismiss the protest.

Background

The solicitation was issued June 16, 1993, for the supply and installation of a telephone and paging system for the Veterans Administration Medical Center to be constructed in West Palm Beach, Florida. Exhibit 1.[1] The solicitation required offerors to furnish a bid guarantee and the awardee to furnish a performance bond. Exhibit 2. The original closing date for receipt of initial proposals was July 20, 1993. Exhibit 1. Amendment 1 to the solicitation, issued July 6, 1993, extended the closing date for receipt of initial offers to July 22, 1993, at 3:00 p.m. local time. Exhibit 3.

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[13] 48 C.F.R. § 6302.18(a).

[1] References to exhibits are to those attached to respondent's motion to dismiss.

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Tri-Comm sent a letter dated July 13, 1993, to the contracting officer which stated, in relevant part:

> [D]ue to the enormous detail and information required to ensure an appropriate response, we respectfully request a (30) day extention [sic] to appropriately respond.
>
> We are quite capable of providing the required information that is requested in The RFP as well as, we are capable of performing all of the tasks necessary to complete the project, but the time frame required for the proposal submission is very ambitious.
>
> The fact that the site visit was on July 6, 1993 and the submission date is scheduled only twelve (12) days later, in addition, with the requirement for a bid bond it does not allow ample time to review the proposal, make corrections, or get sub-contractors coordinated and allow our bonding company enough time to prepare the bid bond for submission on July 20 or July 22.

Exhibit 4.

The remainder of Tri-Comm's letter noted the level of detail required in the proposal, that the proposal was required to be submitted in triplicate and on a computer disk, and that an offeror would be required to mail the proposal no later than the fifth calendar day before the date specified for receipt of offers if it intended to respond by mail.

By letter dated July 15, 1993, the VA contracting officer responded to Tri-Comm's letter dated July 13, 1993, and denied Tri-Comm's request for an extension of time for submission of proposals, stating that offerors had thirty-six days from the date of issuance of the RFP to submit proposals, which the VA considered "ample time for preparation and well within the guidelines of the Federal Acquisition Regulations and the Veterans Administration Acquisition Regulations." Exhibit 5.

The contracting officer also replied to the other concerns raised by Tri-Comm in its letter by stating that obtaining subcontractors and bonds are part of normal business practices, the level of detail required in the offerors' proposals was necessary so that the VA could be assured the offeror understood the solicitation requirements, and the requirement for submission of the proposal on a computer disk is common practice today. The contracting officer also stated that the method of delivery of the proposal was the responsibility of the offeror. The contracting officer's letter dated July 15, 1993, was telecopied to Tri-Comm that same day. Exhibit 5.

Amendment 2 to the solicitation, issued July 20, 1993, stated that "[t]he hour and date specified for receipt of Offers is not extended. Proposals are due July 22, 1993 at 3:00 PM local time." Exhibit 7.

Protester submitted a proposal in response to the solicitation on July 22, 1993, and filed this protest on July 26, 1993. The protest complaint reads in relevant part:

> [T]he contracting officer . . . constructed a RFP that required enormous detail and information for submission as well as a bid bond in an extremely short time frame. The Veterans Administration in the past two (2) years since MIRMO (Medical Information Resource Management Office) has taken over the procurement process of telephone systems have [sic] not required bid bonds nor performance and payment bonds. Most notably, on the past nine (9) VA Medical Centers won by small businesses and 8(a) firms bonds were not required [the letter listed nine previous solicitations which Tri-Comm alleges did not contain bonding requirements] . . . .
>
> Due to the enormous information requested in RFP 548-02-93, the unrealistic time frame set for the response and the fact that bid bonds were required for submission on RFP 548-02-93 and (bonds) not required in the previous submissions, we respectfully request that RFP 548-02-93 . . . be re-bid without bonding requirements.

Complaint at 1-2.

During a prehearing conference with the Board on July 28, 1993, respondent's counsel informed the Board that Tri-Comm's proposal was received by respondent after the closing time for receipt of proposals. Tri-Comm's president stated that the proposal was delivered by commercial airline, and that he had received a written statement from the airline that the airplane had arrived later than scheduled.

Respondent's counsel also stated during the prehearing conference that respondent would file a motion to dismiss the protest as untimely, as the protest is based upon alleged improprieties in the solicitation which were apparent before closing time for receipt of proposals and, therefore, should have been filed before the closing time for receipt of initial proposals. Protester's president stated that he had sent a letter to the contracting officer on or about July 13, 1993, concerning the solicitation requirements

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before the date for receipt of proposals, and had received a written response.

As the issue of timeliness was raised in the prehearing conference, the Board directed respondent to file its motion and address the issue of whether the contracting officer construed protester's letter of July 13, 1993, as a protest to the agency. Respondent filed its motion to dismiss, which we grant as discussed below.

Discussion

Respondent's motion to dismiss alleges that this protest is based upon alleged improprieties in the solicitation which were apparent to the protester before the closing time for receipt of proposals. Protests based upon improprieties in the solicitation must be filed before the date for receipt of proposals. Thus, according to respondent, the protest is untimely.

Protester maintained in the prehearing conference that its letter to the contracting officer dated July 13, 1993, was a protest which raised the issues addressed in its protest to this Board. Thus, protester contends that the protest to this Board is timely, as it was filed within ten working days of its receipt of the contracting officer's denial of its agency protest.[2]

We must first review protester's July 13, 1993, letter to determine whether it was a protest, as the determination as to whether a document constitutes a protest is one to be made by this Board. *Electronic Systems & Associates, Inc.*, GSBCA 11883-P, 93-1 BCA ¶ 25,278, 1992 BPD ¶ 187.

A "protest" is defined as "a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services . . . ." 40 U.S.C. § 759(f)(9) (1988). Both the Federal Acquisition Regulation (FAR) and VA Acquisition Regulation (VAAR) require that a protest contain: (1) the name, address, and telephone number of the protester; (2) the solicitation or contract number; (3) a detailed statement of the legal and factual grounds for the protest, including copies of relevant documents; (4) a request for a ruling by the agency; and (5) a statement as to the form of relief requested. 48 CFR 33.103(b)(3) (1992) (FAR 33.103(b)(3)); 48 CFR 833.103(b)(4) (1992) (VAAR 833.103(b)(4)).

Respondent considered Tri-Comm's letter of July 13, 1993, a request for additional time to prepare a proposal, and not a protest of the terms of the solicitation. A plain reading of Tri-Comm's letter supports respondent's interpretation. The letter was not characterized by Tri-Comm as a protest. While Tri-Comm noted the detailed response required and described the difficulties it believed it would encounter in preparing a response in the time allowed (coordination of subcontractors, obtaining bid bond, submission on floppy disk, and timely delivery), it stated that "[w]e are quite capable of providing the required information that is requested in The RFP as well as, we are capable of performing all of the tasks necessary to complete the project . . . ."

Tri-Comm's letter contained no allegation that the time allowed for response to the solicitation violated any statute or regulation, nor did it allege that the response time precluded any offeror, including Tri-Comm, from responding to the solicitation. Rather, Tri-Comm only stated difficulties which it anticipated in gathering information and meeting the closing date. The contracting officer did not construe this letter as a protest because the letter stated no legal or factual grounds challenging any term of the solicitation and emphasized Tri-Comm's ability to meet the solicitation requirements. In response, the contracting officer noted that the response time was not in violation of the FAR and the VAAR.[3] Despite the difficulties Tri-Comm anticipated in preparing a proposal, it did submit a proposal to respondent to be delivered on the date for receipt of proposals.

We agree with respondent that Tri-Comm's July 13, 1993, letter was a request for an extension of the response date, and not a protest.

In its protest to this Board, Tri-Comm again notes the amount of detail required in the proposal, references what it considers the "extremely short time frame" for response, protests the inclusion of bonding requirements in the solicitation, and requests the procurement be re-bid without the bonding requirements. The bonding requirements were clearly apparent to Tri-Comm before the closing time for receipt of proposals. Tri-

[2] Protester did not file a response to respondent's motion.

[3] FAR 5.203(b) requires that solicitations allow thirty days for response. The VAAR, which is to be utilized in conjunction with the FAR (VAAR 801.101) does not modify this requirement for procurements by the VA.

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Comm's letter of July 13, 1993, indicates Tri-Comm was concerned about its bonding company having enough time to prepare the bid bond for submission before the date for receipt of proposals, but did not protest the inclusion of the bonding requirements.

Board Rule 5 [4] reads, in relevant part:

(3) *Protests.* A protest will be considered by the Board if it includes the information required by Rule 7(b)(2) and is timely filed.

(i) A protest based upon alleged improprieties in any type of solicitation which are apparent before bid opening or the closing time for receipt of initial proposals shall be filed before bid opening or the closing time for receipt of initial proposals.

. . . .

(iii) If a protest has been filed initially with the agency, any subsequent protest to the Board filed within 10 days of formal notification of, or actual or constructive knowledge of, initial adverse agency action will be considered, provided that the initial protest to the agency was filed in accordance with the applicable time limits in subparagraphs (b)(3)(i) and (ii) of this rule.

As this protest is based upon alleged improprieties in the solicitation which were apparent to Tri-Comm before the closing time for receipt of proposals, and no prior protest had been filed with the agency, pursuant to Rule 5(b)(3)(i) such a protest must be filed before the closing time for receipt of initial proposals. This protest was filed four days after the closing time and was, therefore, untimely.

Decision

Respondent's motion to dismiss this protest as untimely is **GRANTED.** The protest is **DISMISSED.** The suspension order dated July 29, 1993, hereby lapses.

[¶ 26,307] Sterling Services, Inc.

ASBCA Nos. 45885, 45886, August 20, 1993. Contract No. F08651-89-D-0003.

Pricing of Adjustments—Proof—Government-Furnished Equipment.—Under a contract to provide medical transcription services, a contractor was not entitled to recover costs in excess of the amount already provided by the contracting officer for malfunctioning government-furnished equipment, because the contractor presented no evidence to support its claim. Further, the government provided sworn affidavits, at least two of which effectively rebutted the contractor's allegations.

For the appellant: Michael D. Melle, Division Manager. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Capt. Patrick E. Tolan, USAF, Trial Attorney.

Before PAUL and JAMES, Administrative Judges.

PAUL, Administrative Judge: These are timely appeals of a contracting officer's decision on remand which granted a portion of appellant Sterling Services Inc's (SSI) claim for an equitable adjustment. SSI opted to proceed under the accelerated procedures provided by Board Rule 12.3, and the parties agreed to submit the case on the record pursuant to Board Rule 11. Both parties provided documentary materials, and the Air Force filed two briefs; however, SSI declined to file any briefing materials. The Contract Disputes Act (CDA), 41 U.S.C. § § 601 *et seq.*, is applicable. We have already ruled on entitlement; accordingly, only issues of quantum are before us for decision.

SUMMARIZED FINDINGS OF FACT

1. On 15 March 1989, the United States Air Force awarded contract No. F08651-89-D-0003 to SSI to provide medical transcription services at Eglin AFB Hospital in Florida. The contract had a base period extending from 1 June 1989 through 31 May 1990 and three option periods encompassing the following three years. The Air Force eventually exercised the first two options in accordance with the contractual terms, and the total estimated payment for the first year of the contract was $78,061.20. (R4, tab 1)

2. The contract contained an extensive Performance Work Statement (PWS) which defined the parties' responsibilities in great

[4] 48 CFR 6101 (1992).

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detail. For its part, SSI was required to perform "listed services," consisting of completed transcripts of various lengths, at an "Acceptable Quality Level" (AQL). In addition to providing the contractor with the necessary electronic equipment to perform its transcriptions, the Government was required under the PWS to monitor SSI's performance through random sampling techniques. If the Air Force determined that SSI was not performing at an AQL, it could issue a Contract Discrepancy Report (CDR) and deduct amounts which would otherwise be due to SSI. (R4, tab 2)

3. The Air Force did not issue any CDR's to SSI during June of 1989, the "phase-in period" of the contract. On 25 July 1989, the Air Force's contracting officer informed SSI in writing that "several records have been sent back because of errors which should have been caught before they got to the QAE." The contracting officer also wrote: "A deviation higher than the maximum allowable deviation from perfect performance for each listed service could result in the Government invoking a payment computation formula resulting in a payment of less than 100% of the maximum payment for the listed service." (R4, tab 7)

4. On 11 August 1989, the contracting officer issued six CDR's to SSI relating to work which it had performed during the prior month. As a result, she withheld a total of $599.75 from SSI's payment. On one of the CDR's the contracting officer wrote, in pertinent part: "Majority of errors were due to lack of proper review prior to submission; for example, 1000 WBC rather than 10,000; four instead of floor, hemorrage [sic] instead of hemorrhoids." (R4, tab 10)

5. SSI replied to the CDR's in a letter of 12 September 1989 in which it gave various explanations for the discrepancies. However, SSI did not deny that it had in fact made the grammatical and procedural errors brought to its attention by the contracting officer. (R4, tab 12)

6. From July 1989 through October 1990, the Air Force issued CDR's for all months under the contract except for December 1989 and July 1990. As stated by Ms. Gentile, the Air Force's Quality Assurance Evaluator (QAE), in her sworn affidavit: "[I]t was clear to me that adequate proofreading would have eliminated many of the problems encountered with the transcripts when I reviewed them" (exh. G-16). Based upon our review of the evidence, we find that SSI did make the errors on the transcripts attributed to it by the Air Force's QAE.

7. Although SSI did not deny that it had made the errors attributed to it by the QAE, it did point out to the Air Force that the electronic transcribing equipment furnished to it by the Government pursuant to the contract frequently malfunctioned. Because of these difficulties, backlogs developed and SSI's transcribers were forced to work quickly to bring their workload up to date. As a result, SSI contended, its employees' work product was not flawless. (R4, tab 59)

8. On 11 December 1990, SSI filed a claim in a total amount of $4,087.65 for payments withheld from July 1989 through September 1990; and on 21 December 1990, it filed a claim for $192.99 for payments withheld for October 1990 (R4, tab 60).

9. The Air Force reviewed all of the CDR's issued to SSI and concluded that it had erred in its calculations of amounts withheld for the months of June, September, and October 1990. Accordingly, the Air Force determined that it owed SSI a total amount of $270.89 with respect to these months. (R4, tabs 60, 61)

10. On 8 February 1991, the contracting officer issued a decision in which she granted in part and denied in part SSI's two claims. As part of the decision, the contracting officer implicitly admitted that the Air Force had erred in withholding an excess amount of $270.89 from SSI. In addition, the contracting officer wrote:

> The Government acknowledges there were problems with the Sony Management System and the telephone system. In consideration of the equipment problems, the Government proposes to offer an equitable amount of 15% of the amount claimed. Documentation from your company will be required if there is a continuance of malfunctioning equipment in the future.

(R4, tab 65)

11. SSI declined the Air Force's offer of settlement and appealed to this Board. In a published decision issued on 7 November 1991, *Sterling Services, Inc.*, ASBCA Nos. 42892, 42893, 92-1 BCA ¶ 24,541, the Board sustained SSI's appeals in part and remanded to the parties for a determination of quantum. We held:

> Based upon the Board's review of the evidence, we conclude that SSI did make the errors on the transcripts attributed to it by the Air Force's QAE. Hence, it is clear that under the contract the Govern-

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ment is entitled to recover for these errors. However, our conclusion in this regard is tempered by the contracting officer's admission that the Air Force erred in withholding a total amount of $270.89 for three months in 1990. Further, we hold, based upon the Government's concession, that SSI is entitled to recover an equitable adjustment for the difficulties caused by malfunctioning, Government-furnished electronic equipment.

12. After receiving our remand order, SSI increased its claim from $4,087.65 to $23,645.54. However, SSI did not provide the contracting officer with any evidentiary materials which served to substantiate its claim. The contracting officer issued a final decision on quantum on 4 December 1992. He stated, in pertinent part:

> 5. Based upon the Board's decision and upon my review of the facts surrounding your claims, I have determined that you not are [sic] entitled to any amount in excess of the amount set out below:
>
> $270.89 - Amount that the Air Force mistakenly withheld for three months of 1990.
>
> $613.15 - 15% of the amount of your claims due to the malfunctioning government-furnished electronic dictation equipment. This amount is based solely on the Contracting Officer's previous offer which was incorporated into the final decision dated 8 February 1991 and not upon any other evidence. I note that you have not presented any evidence of entitlement in excess of this amount.
>
> $182.04 - You are also entitled to interest under the Contract Disputes Act from the date of your claim through the date of payment.

(R4, tab 83)

13. SSI appealed the contracting officer's decision, and the appeals were docketed as ASBCA Nos. 45885 and 45886. As we have stated, the Air Force submitted two briefs and a host of evidentiary materials, including several sworn affidavits from witnesses who had direct involvement with the contractual undertaking. SSI declined to submit any briefing materials or affidavits. Indeed, its only submission consisted of a letter signed by its division manager, Mr. Michael D. Melle, to which were attached several financial documents purportedly relating to travel undertaken by corporate executives of SSI in connection with the instant contract. There is no record evidence demonstrating that Mr. Melle had any personal knowledge of the contract at issue.

14. SSI apparently contends that its corporate executives were required to travel to Eglin Air Force Base in order to resolve problems caused by malfunctioning Government-furnished equipment. But SSI has not submitted any evidence to substantiate this contention. Moreover, the Air Force has forwarded sworn affidavits from two of the individuals allegedly involved in this undertaking which rebut SSI's apparent contention. Mr. Ernest E. Sisneros, a former project manager for SSI, stated, in pertinent part:

> 5. While at Eglin AFB, I remembered that the transcriptionists would complain that the QAE's standards were too demanding. I remember that they said the Government was too precise regarding medical terminology. I don't remember transcriptionists ever complaining that the government-furnished equipment was malfunctioning causing them to work in a more hurried fashion.

(Exh. G-32) Similarly, another project manager for SSI, Ms. Anna B. McPherson, stated, in part:

> 3. I remember that the QAE at Eglin was marking down SSI for every error. The home office felt that the QAE was unduly harsh. I felt that there was no sense in the mark downs as long as the doctors were happy with the dictation and approved the transcription.
>
> 4. I don't remember any problems with Government furnished equipment. I don't think the topic was ever brought up while I was at Eglin.

(Exh. G-26)

15. As part of the quantum phase of these appeals, SSI has not presented any evidence to support its claim that it incurred additional costs as a result of malfunctioning Government-furnished equipment. Indeed, the only credible, positive evidence in this regard is the contracting officer's admission that such problems occurred and his offer, communicated through a final decision, proposing to grant SSI 15 percent of its original claim.

DECISION

In *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759, 767 (Fed. Cir. 1987), the United States Court of Appeals for the Federal Circuit cited with approval an earlier decision of the Court of Claims in *Willems Indus., Inc. v. United States* [8 CCF ¶ 71,693], 295 F.2d 822, 831, 155 Ct. Cl. 360 (1961), *cert. denied,* 370 U.S.

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903, 82 S.Ct. 1249, 8 L.Ed. 400 (1962), in which its predecessor court stated: "The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." Except for the amount to which the contracting officer conceded SSI was entitled in the original proceeding before this Board, SSI has failed to meet this burden. It has not presented any evidentiary materials supporting its claim. Further, the Air Force has submitted several sworn affidavits, at least two of which effectively rebut SSI's allegations. Therefore, the Board is unable to award SSI any sums in addition to those which the contracting officer has already granted it.

CONCLUSION

The appeals are denied.

[¶ 26,308] B.L.I. Construction Co., Inc.

ASBCA No. 45560, August 17, 1993. Contract No. 200-89-0096.

Procedure, Boards—Pleadings—Matters Pending Elsewhere.—Portions of a contractor's complaint were stricken by the board because they involved matters pending in other appeals. The contractor had included in its complaint reference to many of its other pending claims in order to place the appeal in a comprehensive context.

Site Conditions—Notice—Prejudice.—The government's assertion that portions of an appeal were barred on the basis of the contractor's failure to give notice under the Differing Site Conditions clause and other provisions of the contract was rejected because the failure to give notice did not require dismissal of the appeals. The government asserted that the requirement for notice, as incorporated in the contract provisions, was a condition precedent to the government's waiver of its sovereign immunity against suit. In noting the government's contention, the board stated that it was unwilling to depart from the general rule that a failure to comply with a notice requirement will not lead to an automatic denial of a claim unless the government can demonstrate that the late notice prejudiced it in some way. In any event, the board denied the government's motion for summary judgment because disputed issues of facts remained regarding the adequacy of notice and the government's knowledge or waiver of notice.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Hubert J. Bell. For the government: Elise Harris and Julie Ann Sammons, Trial Attorneys, Department of Health and Human Services, Atlanta, Georgia.

Before YANNELLO, SPECTOR, and THOMAS, Administrative Judges.

YANNELLO, Administrative Judge: The subject contract, awarded by the Department of Health and Human Services (HHS), has given rise to a number of disputes, claims, and appeals. The Government's motion presently before the Board addresses portions of the appeal docketed as ASBCA No. 45560, and the complaint filed therein.

ACCORD AND SATISFACTION

Pursuant to the motion, both parties agree that paragraphs 130 to 134 of the complaint in ASBCA No. 45560 relate to contract Modification 34, deleting a ceiling light fixture and wiring, which was the subject of an appeal docketed as ASBCA No. 42828 which in turn, pursuant to the parties' settlement, was dismissed with prejudice. Accordingly, paragraphs 130 to 134 of the complaint in ASBCA No. 45560 are stricken and, to this extent, the Government's motion is granted.

DUPLICATION

Appellant has included in its complaint in ASBCA No. 45560 reference to many of its other pending claims in order to provide a comprehensive context; appellant has also requested that, for discovery and trial purposes, all its pending claims under the subject contract be consolidated.

The parties agree that: (*a*) the subject of paragraph 15 of the complaint in ASBCA No. 45560, appellant's weather claim, is pending before the Board in ASBCA No. 41727; (*b*) the subject of paragraphs 45 to 57, the slab deflection claim, is pending in ASBCA No. 42128; (*c*) the subject of para-

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graph 97, the fuel oil tank leak detection system, is pending in ASBCA No. 42991; (*d*) the subject of paragraphs 96 and 98, the freeze protection pump, is pending in ASBCA No. 43513; (*e*) the subject of paragraphs 107 to 112, Modification 22, is pending in ASBCA No. 44028; (*f*) the subject of paragraphs 113 to 116, the Triad Unit, is pending in ASBCA No. 44028; (*g*) the subject of paragraphs 117 to 121, Modification 23, is pending in ASBCA No. 43976; and (*h*) the subject of paragraphs 122 to 129, Modification 32, is pending in ASBCA No. 42923.

Inasmuch as these portions of the complaint in ASBCA No. 45560 are duplicative, they are stricken and to this extent the Government's motion is granted. The Board will subsequently consider the manner in which the various pending claims should be consolidated.

NOTICE

The Government also asserts that various portions of ASBCA No. 45560 are barred on the grounds that appellant failed to provide requisite notice under the standard Changes, Differing Site Condition, and Suspension of Work clauses in the contract.

The claims sought to be dismissed include the following paragraphs of the complaint in ASBCA No. 45560: *paragraphs* 4 to 7, benchmark pins and survey markers; *paragraphs* 16 to 20, clarifications of Structural and Mechanical drawings; *paragraphs* 21 to 23, clarification of Beam TB-14; *paragraphs* 24 to 26, RFI No. 44; *paragraphs* 27 to 34, foundation of shearwall B; *paragraph* 35, second floor slab 2A; *paragraphs* 36 to 39, shearwall C and column B.1/1.5; *paragraphs* 40 to 44, finish samples; *paragraphs* 58 to 61, acceptance of building; *paragraphs* 65 to 66, jobsite delay costs; *paragraphs* 67 to 70, finish testing on aluminum storefront windows and lightpoles; *paragraphs* 71 to 73, gravel; *paragraph* 74, overtime; *paragraphs* 75 to 76, scheduling costs; *paragraph* 77, soil compaction testing; *paragraph* 80, asphalt and sealant; *paragraphs* 96, and 102 to 103, claims of mechanical subcontractor "Ragan"; and *paragraphs* 149 to 158 and 161 to 164, claims of electrical subcontractor "Dyco."

In support of its motion, the Government relies primarily upon the doctrine of Sovereign Immunity, as well as the Appropriations Clause of the Constitution, with numerous case citations provided. In essence, the Government argues that the requirement for notice, as incorporated into the contract provisions pursuant to various provisions of the Federal Acquisition Regulation, is a condition precedent for the Government's waiver of its sovereign immunity against suit; without such notice, the Government's immunity precludes prosecution of appellant's claims here. In discussing various court and board decisions (concerning notice, knowledge, waiver, and prejudice) under standard contract provisions, the Government "urges the Board to break from a line of ill-considered cases, and follow the Supreme Court's reasoning in [*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)] and its progeny."[1]

Appellant asserts, essentially, that the boards and courts have not applied the provisions concerning notice to act as a technical bar to suit; that notice requirements may be satisfied even without written notice; that the Government's actual knowledge and/or waiver of notice may act so as to eliminate any bar to suit; and that the Government must show prejudice as a result of any alleged lack of notice or knowledge. Also, appellant asserts that notice was given and/or that the Government had knowledge of the circumstances, waived the requirement for notice, and/or was not prejudiced.

We need not discuss the parties' contentions in detail here. Suffice it to say that, with respect to the Government's reliance on the doctrine of Sovereign Immunity or the Appropriations Clause, we are reluctant to depart from the well-established applications of the contract's notice requirements

[1] The Government's discussion, particularly of existing caselaw, does not make clear what, if any, distinctions exist between (1) jurisdictional statutes in which the Government has waived its immunity from suit so long as suit, or appeals, are initiated within stated limitations periods; (2) statutory, regulatory, or contractual provisions, if any, governing the time periods in which "claims" must be asserted (*see, e.g., Do-Well Machine Shop Inc. v. United States* [35 CCF ¶ 75,633], 870 F.2d 637 (Fed. Cir. 1989) re: submission of settlement proposals under the termination for convenience clause; *Stone Forest Industries, Inc. v. United States* [38 CCF ¶ 76,341], 26 Cl. Ct. 410 (1992) re: claims for refund under timber sales contract); and/or (3) contractual provisions requiring that the contractor give notice to the Government whenever it believes, for example, that a change, changed condition, suspension of work, or other circumstance exists for which the contractor may be entitled to an equitable adjustment. It would appear that the present appeal raises questions only as to the third category noted above. However, given our decision here, it is not necessary to further differentiate between these various provisions.

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(*see, e.g., Central Mechanical Construction*, ASBCA Nos. 29431, *et al.*, 85-2 BCA ¶ 18,061; and *Big Chief Drilling Co. v. United States*, 15 Cl. Ct. 295 (1988)).

More importantly, we conclude that facts, such as those discussed in the aforementioned cases, including notice, knowledge, waiver, and prejudice, are in dispute here and that the Government has not shown that it is entitled to summary judgment.[2]

For the foregoing reasons, the Government's motion, to this extent, is denied.

CONCLUSION

Based on the foregoing discussion, the Government's motion is granted to the extent of striking from the complaint paragraphs 15, 45 to 57, 97, 96, 98, 107 to 112, 113 to 116, 117 to 121, and 122 to 129, and paragraphs 130 to 134, and is otherwise denied.

[¶ 26,309] COLSA, Inc.

ASBCA No. 45505, August 16, 1993. Contract No. DAAD07-87-C-0020.

Cost Limitations—Overruns—Basis of Denial.—Although the amount a contractor billed for work items did not exceed the total amount of funds allocated to the contract, the contractor was not entitled to reimbursement for invoiced costs that exceeded estimates for work assignment orders, because the government was not obligated under the Schedule section of the contract to reimburse the contractor for such costs. The Limitation of Funds clause and the Schedule section both allow the contracting officer to deny reimbursement of costs, but in different cost situations. The Limitation of Funds clause provides that the government is not obligated to reimburse the contractor for costs incurred in excess of the total amount allotted by the government in funding. The Schedule section provides for the disallowance of costs incurred in excess of the total estimated amount of work orders. The contractor's contention regarding total funding limits was relevant to the issue of whether costs were properly disallowed under the LOF clause, but it was not relevant to whether the costs had been properly disallowed under the Schedule section, the basis for the government's disallowance of billed costs.

Cost Limitations—Overruns—Fee Calculation.—The government's calculation of provisional fee payments under a cost-plus-fixed fee contract was proper because the government was not shown to have either reduced the amount of the fixed fee specified in the Schedule or prevented the contractor from receiving the specified fixed fee upon completion of the contract work. In contending that fees to be paid were fixed and could not be altered in the absence of a change, the contractor confused the Fixed Fee clause and the Schedule. The Fixed Fee clause provided that for performing the contract, the government was to pay the contractor the fixed fee specified in the Schedule. The Schedule both specified the amount of the fee and provided that the fee was payable provisionally in installments upon certification by the contractor of the effort expended. In accordance with the Schedule, the contracting officer calculated the installment fee payments on the basis of adjusted costs for work orders in which the cost ceiling had been exceeded. The contractor cited no reduction in the specified fixed fee.

Cost Limitations—Overruns—Government Benefit.—A contractor was not entitled to reimbursement for its billed costs that exceeded estimates for work assignment orders under its cost-plus-fixed-fee contract, even though the contractor contended that the government benefited from the effort expended, because the contractor's benefit argument provided no basis for concluding that the contracting officer acted improperly in disallowing the contractor's overruns. The contractor failed to give the required notice of anticipated cost overruns relating to estimated work orders. The contract provided that the government need not reimburse the contractor for any amount that the contractor incurred above the

[2] See also the parties' contentions with respect to "final payment" and/or final settlement of a contract and timeliness of claim submission, as discussed in *H.H.O. Company v. United States* [34 CCF ¶ 75,256], 12 Cl. Ct. 147, 162-64 (1987); *see also Pembroke Machine Co., Inc.*, ASBCA No. 39028, 90-1 BCA ¶ 22,528.

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estimated work order costs if the contractor failed to give notice of anticipated overruns. The fact that the government may have received a benefit for the contractor's continued performance did not affect the government's contractual right to disallow the overruns.

Cost Limitations—Waiver of Limitations—Intention to Induce Performance.—A contractor's contention that the government waived any notice requirements for cost overruns with respect to work assignment orders under its cost-plus-fixed-fee contract was rejected because the government's payment of vouchers could not be construed, under the circumstances of the case, to have been intended to induce the contractor's continued performance. The vouchers were mistakenly paid to the contractor by a government office that was unaware both that the contracting officer had questioned the costs and that the parties were in discussion as to the allowability of the costs. The contractor incurred all the disputed costs before submission of the vouchers and was engaged in discussions over the allowability of these costs before it became aware that the vouchers had been paid.

For the appellant: Gary L. Rigney and Henry L. Brown, Huntsville, Alabama. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Scott E. Lind, JAGC, Trial Attorney.

Before HARTMAN and VAN BROEKHOVEN, Administrative Judges.

HARTMAN, Administrative Judge: This is a timely appeal from a final decision disallowing $46,553.62 in costs, which were billed by and paid to appellant under a cost-plus-fixed-fee contract, because appellant had "overrun" the estimated work cost set forth in three work assignment orders by that sum without notifying the contracting officer and obtaining approval to do so. Pursuant to Rules 11 and 12.3, the parties have elected to follow the Board's accelerated procedure, waive a hearing, and submit the case for decision on the record. Only the issue of entitlement is before us for decision.

SUMMARY FINDINGS OF FACT

In 1987, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), the Department of the Army entered into a five-year, level-of-effort, cost-plus-fixed-fee contract, No. DAAD07-87-C-0020 ("contract 0020"), with the Small Business Administration ("SBA") for the provision of engineering support to the anti-tank guided missile simulation facility at White Sands Missile Range ("WSMR"), New Mexico. SBA then entered into a subcontract, No. 4-87-1-0083, with appellant, COLSA, Inc. ("COLSA"), for the performance of that contract work. (R4, tab 1)

Contract 0020 incorporated by reference standard allowable cost and fixed fee clauses (R4, tab 1 at 31). The former (FAR 52.216-7) provided that the "Government shall make payments to the Contractor . . . as work progresses . . . in amounts determined to be allowable" by the contracting officer ("CO") in accordance with the FAR and "[a]ny payment [made] may be (1) reduced by amounts found by the [CO] not to constitute allowable costs or (2) adjusted for prior overpayments." The latter (FAR 52.216-8) provided that "[t]he Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule" and "[p]ayment of the fixed fee shall be made as specified in the Schedule."

Contract 0020 also incorporated the standard Limitation of Funds ("LOF") clause (R4, tab 1 at 32). That clause (FAR 52.232.22) stated: "the parties estimate that performance . . . will not cost the Government more than [ ] the estimated cost specified in the Schedule;" "[t]he Contractor shall notify the [CO] in writing whenever it has reason to believe that the costs it expects to incur . . . in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of [ ] the total amount so far allotted to the contract by the Government" and "state the estimated amount of additional funds required to continue performance;" the Contractor is not obligated to continue performance . . . until the [CO] notifies [it] in writing that the amount allotted by the Government has been increased and specifies an increased amount;" "to the extent that the amount allotted . . . is increased, any costs the Contractor incurs before the increase that are in excess of [ ] the amount previously allotted . . . shall be allowable to the same extent as if incurred afterward" unless the CO issues a special notice; and "[t]he Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted" absent a specific exception set forth elsewhere in the contract.

The Schedule for contract 0020 specified "total estimated productive labor hours" of

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29,788, an "estimated total cost" of $2,346,915.00, and a "fixed fee" of $146,357.00. Section B.5 of the Schedule provided that:

> The fixed fee shall be payable provisionally in installments . . . upon certification by the Contractor of the effort expended and the Government's acceptance of the technical quality of performance. Each such payment shall be in an amount which shall bear the same proportion of the total amount of the fixed fee as the effort expended during the billing period bears to the total level of effort of the contract.

(R4, tab 1 at 2, 6)

Section H.21 of the Schedule set forth procedures for the assignment of contract work, whereby the CO's representative ("COR") would issue a "work assignment order" ("WAO") requesting an estimate to perform specific tasks, the contractor would furnish a detailed estimate to perform the tasks, the COR and CO would review the estimate and, if necessary, "conduct discussions [with the contractor] to assure a mutual understanding . . . concerning all elements of the WAO," and the CO would thereafter execute the WAO if it was to "be officially assigned" the contractor. Section H.21.6 expressly provided that, if a contractor anticipated exceeding its original estimate while completing a WAO, a "change to the WAO must be accomplished and approved by the [CO]" in the "same manner as the original order." (R4, tab 1 at 28-29)

Schedule Section H.16 stated, with respect to modification of the contract, that "[n]o oral statement by any person, whomsoever in any manner or degree, shall modify or otherwise affect the terms of this contract" and "all changes shall be incorporated by written modification" (R4, tab 1).

Between March of 1987 and October of 1989, the CO assigned COLSA 9 WAOs and made 10 modifications to the contract to reflect funding changes (R4, tabs 2 through 18, 21, 22). By letter dated 9 November 1989, the CO reminded COLSA that "increases over the currently approved cost estimate for a task order may not be exceeded without the approval of the [CO]" and "[f]ailure to obtain the required approval could result in unallowability of the excess costs" (R4, tab 23).

In February 1990, the parties executed contract modification No. P00013. That modification substituted a new Schedule section H.21 requiring written notice, which provided, in part, as follows:

> H.21.6 The WAO will be officially assigned when the [CO's] signature has been obtained .... The contractor shall exert no effort under the WAO until the official assignment has been made. *Performance initiated by the Contractor in anticipation of formal assignment of a WAO is at the Contractor's own risk if the work has not been authorized by the Government pursuant to the terms of the contract.*
>
> * * *
>
> H.21.10 *The contractor shall notify the [CO] and the COR, in writing, if at any time the contractor has reason to believe that the costs which he expects to incur in the performance of the WAO in the next succeeding 15 days, when added to all costs previously incurred, will exceed 85% of the total estimated amount of the WAO.* If the remaining funds are estimated to be insufficient to complete the WAO, this notice shall also include a detailed estimate to complete. *The Government shall not be obligated to reimburse the contractor for costs incurred in excess of the total estimated amount of the WAO. Increases to WAO estimates shall be accomplished by written modification of the WAO. Approval of WAO modification by the [CO] is required.*

(R4, tab 24) (emphasis supplied)

Between February of 1990 and December of 1991, the CO assigned COLSA five additional WAOs (Nos. 10 through 14) and made nine modifications to the contract to reflect funding changes (R4, tabs 25 through 32, 35 through 37, 39, 40). By letter dated 12 December 1991, COLSA advised the CO that: it had incurred more labor hours than invoiced for some WAOs; "[d]uring a recent internal audit . . . our billing department discovered that we have failed to invoice the government in accordance with instructions in Section B.5 of the contract;" we "previously invoiced using the cost incurred as a basis for determining fee;" in "estimating fee [we also] used the cost as a basis to determine fee instead of Direct Productive labor hours;" and "[t]he Government funded the WAO's based on our estimates but [we] and the Government should have realized this method of fee calculation was not in compliance with contractual requirements." Enclosed with COLSA's letter were vouchers purportedly correcting COLSA's "prior billing errors." (R4, tab 41; see R4, tab 42)

In the vouchers submitted, COLSA sought reimbursement of the cost of labor hours, which exceeded the number of labor hours it had estimated and been authorized to incur

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for some WAOs. COLSA also sought a portion of the fixed fee, which was calculated by dividing the amount of the fixed fee ($146,357.00) by the total estimated productive labor hours (29,788), as specified in section B.5 of the contract Schedule, and then multiplying that sum ($4.91) by the number of productive labor hours "expended" for the WAO, regardless of whether the latter number exceeded the number which had been estimated by COLSA for the WAO. The following chart sets forth the hours, fees, and costs COLSA invoiced, the hours, fees, and costs COLSA had estimated ("Est."), the fees COLSA should have estimated pursuant to Schedule section B.5, and the difference ("Diff.") between some of those sums:

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
WAO No.	Est. Hours	Est. Cost	Est. Fee [1]	Est. Total[2]	Est. Fee Per Sec. B.5 [3]	Est. Total Per Sec. B.5 [4]	Hours Billed	Fee Billed [5]	Total Billed [6]	Col. I & Col. F Diff.[7]
1	407	19,231.71	1,250.06	20,481.77	1,998.37	21,230.08	369	1,813.00	19,639.57	--
2	2337	91,029.34	5,856.85	96,886.19	11,474.67	102,504.01	2348	11,536.40	84,473.36	--
3	1221	51,352.19	3,337.88	54,690.07	5,995.11	57,347.30	1741¼	8,555.26	58,974.48	1,627.18
4	5609	289,108.69	18,792.06	307,900.75	27,540.19	316,648.88	7223½	35,491.13	349,717.97	33
5	1342	50,117.57	3,257.64	53,375.21	6,589.22	56,706.79	1560	7,664.73	58,507.86	1,801.07
6	2136	131,912.60	5,436.40	137,349.00	10,487.76	142,400.36	3014½	14,811.10	147,431.89	5,031.53
7	3696	219,279.56	9,345.44	228,625.00	18,147.36	237,426.92	3174½	15,597.23	186,418.62	--
8	2240	111,236.19	5,463.69	116,699.88	10,998.40	122,234.59	1664½	8,178.17	92,931.87	--
9	2240	117,198.00	1,999.00	119,197.00	10,998.40	128,196.40	2325½	11,425.85	124,073.69	--
10	780	28,910.00	1,879.16	30,789.16	3,829.80	32,739.80	829	4,073.12	37,939.70	5,199.90
11	906	46,999.97	3,055.00	50,054.97	4,448.46	51,448.43	1765½	8,674.41	86,684.10	35,235.67
12	1540	63,498.82	3,968.68	67,467.50	7,561.40	71,060.22	1636½	8,040.59	77,178.27	6,118.05

NOTES

1 Column ("Col.") calculated using following formula: 6.5% × (labor cost + other direct cost + overhead + G&A)

2 Col. D = Col. B + Col. C

3 Calculated using following formula: $\frac{\$146,357 \text{ (fixed fee)}}{29,788 \text{ (total est. productive labor hours)}} \times$ WAO hours authorized

4 Col. F = Col. B + Col. E

5 Col. H = Col. G (hours billed) × $4.91 (fixed fee ÷ total est. productive labor hours)

6 Col. I = Col. H + (costs billed)

7 Sum by which Col. I exceeds Col. F

(R4, tabs 2, 5, 6, 8, 10, 12, 16, 18, 21, 26, 27, 32, 41, 48)

By letter dated 1 April 1992, the CO advised COLSA that: he agreed COLSA had been invoicing incorrectly, *i.e.*, "billing at a rate of 6.5% of cost rather than $4.91 per productive labor hour;" it appeared COLSA also had "incorrectly proposed the WAO estimates using a percentage of cost rather than $4.91/productive labor hours;" correction of COLSA's billing errors reflected COLSA had "overrun" WAO Nos. 3 through 6, 10, 11, and 12; COLSA had "failed to notify the Government that 85% of the funded WAO amounts had been expended, as required . . ." and not obtained CO authorization to exceed the estimated cost for the WAOs; and it thus "appears that . . . [the extra] amounts are unallowable" (R4, tab 48). In a letter to the CO dated 30 April 1992, COLSA stated that: because "the WAO is only an administrative tool for directing effort under the contract line items," we do not agree with your interpretation that "the government is not obligated to reimburse . . . for cost incurred in excess of the total estimated amount of the WAO;" "COLSA has never exceeded the authorized funding level of this contract;" and "[t]here is no reference in the Schedule stating that section H 21 [concerning WAOs] takes precedence" over other contract terms (R4, tab 49).

On 17 June 1992, the CO advised COLSA that: Schedule section "B.3 limits the total effort that can be performed under the con-

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tract to the total amount actually funded;" Schedule section "H.21.6 (revised as H.21.10 by Mod P00013) further limits the effort that can be performed under the contract to actual amounts authorized by the WAOs;" "[t]he net effect is that the costs expended under a WAO cannot exceed the amount authorized by the WAO and the total amount expended under all the WAOs cannot exceed the amount funded under the contract;" COLSA's "failure to provide accurate completion notices and ... timely cost and performance reports ... prevented the Government from detecting the overruns;" and therefore "the Government is not obligated to reimburse [COLSA] for any amount (including fee) in excess of the approved WAO estimate," but COLSA will be "granted a final opportunity to provide additional information on the cause of the overruns and sound reasoning on why any portion of the overruns should be allowed" (R4, tab 50). In a letter to the CO dated 14 July 1992, COLSA stated that "[o]ur failure to provide the required notice in the individual WAO's resulted from a conversation we had with one of the contracting officers, which led us to believe that as long as the overall funds allotted to the contract were sufficient to cover the costs, it was not necessary to modify the individual WAO" (R4, tab 52).

On 11 August 1992, COLSA advised the CO that, because the fixed fee for the contract was established at the inception of the contract and payable provisionally in installments, it believed that, at a minimum, it should be paid "the fee earned as part of the overrun costs associated with WAO's 10, 11, and 12" (R4, tab 56). On 15 September 1992, COLSA further advised the CO that it recently discovered the December 1991 "corrected" vouchers had been paid by the Government and, thus, although COLSA had been prepared to submit a claim to the CO for payment of services provided, it no longer had a dispute with the Government (R4, tab 57).

In a final decision dated 25 November 1992, the CO determined that: the overruns, after correction of COLSA's error in billing fee, on WAOs 10, 11, and 12 of $5,199.90, $35,235.67 and $6,118.05, respectively, which total $46,553.62, were disallowed; the finance and accounting office had been unaware of negotiations regarding the allowability of the overruns and mistakenly disbursed the overrun amounts billed by COLSA; the Government was offsetting the amount of COLSA's September 1992 invoices ($21,588.25) against the overrun amount determined owing; and $24,965.37 thus remained due. As support for these determinations, the CO stated that: special contract provisions concerning issuance and modification of WAOs expressly required that no effort be exerted by the contractor prior to approval of a WAO and that increases over a WAO estimate be approved by the CO prior to any effort being exerted; COLSA never notified the Government its expenditures had reached 85 percent of a WAO estimate as required; no revisions to WAOs for overruns had been approved by the CO; and allowing fee on the excess hours would be equivalent to allowing a portion of the overrun. (R4, tab 58)

By letter dated 28 December 1992, COLSA appealed the CO's decision to this Board. In support of its appeal, COLSA submitted an affidavit by its contract manager, Michael Lamb, providing as follows:

> During the year 1990, COLSA had two contracts with the [WSMR]. They were contracts DAAD07-87-C-0020 and DAAD07-89-C-0024. Both contracts were modified in ... 1990, to include a clause in the ... (WAO) procedures ... which required the contractor to notify the [CO] when it appeared that the estimated funds stated in the WAO would not be sufficient to complete the WAO....
>
> Sometime after March 1990, I had a telephone conversation with Ms. Jill Schrecongost, the contracting officer for DAAD07-87-0024. The conversation was necessary because I had realized that the projected cost to complete the work required by one of the WAO's was in excess of the original estimate. I asked Ms. Schrecongost for a modification to the WAO and I was advised that the procedures pertaining to the WAO's were placed in the contract to provide a means of assigning work to the contractor. She stated that if sufficient funds had been obligated to the overall contract, *no modification of the contract was required.* Subsequent to this conversation, COLSA followed the advice received and *did not seek changes to individual WAO's when the amounts stated in the WAO's were in an overrun condition.* [Emphasis added]

COLSA also submitted an affidavit by one of its contract administrators, stating: she had participated in the telephone call, Ms. Schrecongost had said, "if sufficient funds had been obligated to the overall contract, *no modification of the contract was required;*" and, based "upon the representa-

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tions of Ms. Schrecongost, *we did not ask for modification of WAO's* when the actual amount necessary for completion exceeded the original estimate" [Emphasis added].

In response to COLSA's affidavits, the Government submitted affidavits by a CO and two contract specialists. The CO stated in his affidavit he "did not authorize, verbally or in writing, the overrun of costs on [WAOs] issued under WSMR Contract DAAD07-87-C-0020 while serving as [CO] for the contract." A contract specialist stated in her affidavit that she did not make any statement to COLSA that modification of a WAO was not necessary where COLSA would exceed the WAO estimate and overall funds allotted to the contract were sufficient to cover the costs. Ms. Schrecongost, the other specialist, stated in her affidavit as follows:

> I was employed as a *Contract Specialist* ... for the period 31 Dec 84 through 23 Jan 93. In Aug 1988, I was assigned to the Services Contracting Branch ... and given pre-award *responsibility for ... Contract Number DAAD07-89-C-0024.* ... After award I administered the contract for approximately 6 months pending transfer of the contract to the Contract Administration Branch for post award administration. [Emphasis added]
>
> I interfaced with Mike Lamb of COLSA and do recall a conversation regarding estimated amounts. I advised Mr. Lamb the individual cost elements in a Work Assignment Order (WAO) could be exceeded as long as the total estimated amount of the WAO was not exceeded.... I had over two years of experience with administration of WAO type contracts. I would not have advised Mr. Lamb that exceeding the WAO estimated cost was permissible.

DECISION

In its briefs, COLSA acknowledges that it failed to comply with the provisions of Schedule section H.21.10, but contends that it is entitled to reimbursement for the sums billed, which exceed the estimates for WAO Nos. 10, 11, and 12, because: (1) the costs billed do not exceed the "amount [of funds] allotted to the contract;" (2) a portion of the sums billed is "fee," the payment of which is "fixed" under the contract and not subject to the LOF clause; (3) the Government benefitted from the costs billed; and (4) the Government waived any notice and written authorization requirements with respect to the sums billed. As discussed below, however, COLSA's first three contentions are each premised upon a misunderstanding of the contract provisions and the last contention is not supported by the record.

1. *Amount Of Funds Allotted Contract*

COLSA devotes part of both its briefs to arguments concerning "funding" allotted the contract. Essentially, COLSA argues its "requested payments were not in excess of the [funding] amount allotted to the contract" and, even if they were, the LOF clause "provides that any costs the contractor incurs before [an] increase [in funding] that are in excess of the amount previously allotted by the Government to the contract ... shall be allowable to the same extent as if incurred afterward ...." However, in making such an argument, COLSA confuses the contract's LOF clause with Schedule section H.21.10.

The CO disallowed the costs invoiced which exceed those estimated and authorized for WAO Nos. 10, 11, and 12 based upon Schedule section H.21.10, not the LOF clause. While Schedule section H.21.10 and the LOF clause are similar in that they both allow a CO to decline reimbursement of costs, they authorize such action with respect to "different" costs. Schedule section H.21.10 provides that "[t]he Government shall not be obligated to reimburse the contractor for costs incurred in excess of the *total estimated amount of the WAO.*" The LOF clause provides that "[t]he Government is not obligated to reimburse the Contractor for costs incurred in excess of the *total amount allotted* by the Government" in funding. Arguments concerning the funding "amount allotted" to a contract, thus, are relevant to whether costs have been properly disallowed under the LOF Clause, but not to whether costs have been properly disallowed under Schedule section H.21.10, the basis proffered by the CO for disallowing the costs here and subject of this appeal.

2. *Mandated Fixed Fee*

COLSA also devotes part of both its briefs to arguments that contract 0020 mandates payment of a "fixed" fee. Essentially, COLSA contends that the fee to be paid it was "fixed" at the inception of the contract and cannot be altered under any contract clause, absent a change in the scope of contract work. However, in making such an argument, COLSA confuses the Fixed Fee clause with the provisions of Schedule sections B.5 and H.21.

While the Fixed Fee clause and Schedule sections all relate to the contractor's receipt of a "fixed" fee, only the latter is of import here. The Fixed Fee clause incorporated in

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contract 0020 simply provides that the "Government shall pay the Contractor for performing ... the fixed fee specified in the Schedule." The Schedule sections set forth the procedures by which the contractor may obtain provisional payment of the specified fixed fee in "installments." Pursuant to the Schedule sections, the CO calculated the "installment" fee payments deemed due with respect to WAO Nos. 10, 11, and 12. COLSA has not cited anything in the record indicating that the CO ever reduced the amount of fixed fee specified in the Schedule or suggested COLSA was precluded from receiving upon completion of all contract effort the total fixed fee specified. Rather, COLSA simply has pointed to the CO's calculation of the "installment" fee payments, *i.e.*, determination under the Schedule sections of the "portion" of fixed fee to be paid provisionally for a WAO.* COLSA's arguments concerning the "fixed" nature of the total fee thus are also of no relevance to the actions of the CO which are the subject of this appeal.

3. *Government Benefitted*

Throughout both its briefs, COLSA repeatedly states that the Government benefitted from the monies expended and therefore should reimburse COLSA for those monies. Essentially, COLSA argues that cost reimbursement contracts are employed only where parties cannot be certain of the costs that will have to be incurred and it is unfair to penalize a contractor for not being able to accurately forecast its costs where both parties recognize a lack of certainty with respect to the costs which will be incurred. However, in making such an argument, COLSA fails to comprehend Schedule section H.21 and similar contract provisions.

Schedule section H.21, like the LOF and Limitation of Cost clauses, provides that, when the contractor has reason to believe costs incurred in performance will exceed or "overrun" an estimated performance cost, it must furnish the CO with written notice to that effect and a revised estimated performance cost to allow the CO to determine whether the Government should approve continued funding of the work, and if the contractor fails to give such notice to the CO the Government need not reimburse the contractor any amount the contractor incurs above the estimated performance cost. *See 3C Systems, Inc.*, ASBCA No. 41463, 91-2 BCA ¶ 23,916 at 119,817; *Systems Engineering Associates Corp.*, ASBCA Nos. 38592, 38593, 38594, 38595, 38596, 38626, 38750, 91-2 BCA ¶ 23,676 at 118,577; *Vehicle Research Corp.*, ASBCA No. 26581, 83-2 BCA ¶ 16,721 at 83,171. It is well established that, where a cost reimbursement contract contains such a provision, the contract does not require the CO to fund an overrun and, in the absence of the prescribed formal written notice, a contractor's overrun claim may properly be denied. *Software Research Associates*, ASBCA No. 33578, 88-3 BCA ¶ 21,046 at 106,304; *Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,336-37, *aff'd*, 831 F.2d 1056 (Fed. Cir. 1987). The fact that the Government may have received a benefit from continued performance of work and incurrence of costs does not, by itself, alter these principles. *See, e.g., 3C Systems, supra; George G. Sharp, Inc.*, ASBCA Nos. 32338, 32339, 89-3 BCA ¶ 22,103 at 111,146, *aff'd*, 899 F.2d 1227 (Fed. Cir. 1990) (table). Thus, even if it is assumed the Government benefitted, as COLSA asserts, COLSA's benefit argument provides no basis for concluding that the CO acted improperly in disallowing the overruns.

4. *Notice And Written Authorization Requirements Waived*

Finally, COLSA argues in its briefs that the Government waived any notice and written authorization requirements with respect to costs exceeding those estimated for WAO Nos. 10, 11, and 12. According to COLSA, it

* In determining WAOs where an overrun had occurred, the CO "corrected" a WAO's total cost, which had been estimated by COLSA and authorized by the CO, to reflect calculation of the fixed fee in accordance with Schedule section B.5, *i.e.*, multiplication of a WAO's estimated productive labor hours by $4.91 (fixed fee divided by total estimated productive labor hours), rather than by 6.5%, as COLSA mistakenly had done. COLSA's error in calculating fixed fee when estimating and invoicing WAOs, which was first raised by COLSA in its letter of 12 December 1991, thus had no effect upon the CO's findings of WAO overruns and COLSA received the greater portion of fixed fee it was entitled as a fee installment under Schedule section B.5 for productive labor hours authorized and actually incurred with respect to WAO Nos. 10, 11, and 12. The CO simply declined to adopt COLSA's practice of using labor hours incurred, but not authorized, in allocating fee for the installment payments. In its brief, the Government correctly suggests that granting COLSA its requested higher fee with respect to WAO Nos. 10, 11, and 12 would, in effect, be authorizing retroactively the labor hours exceeding the WAO estimate for one purpose (allocation of fixed fee), but not another (reimbursement of costs).

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did not have to comply with the provisions of Schedule section H.21 because Ms. Schrecongost advised with respect to another WSMR contract that it was not necessary to abide by the requirements, and the Government is precluded from objecting to the excess costs because it paid the vouchers for the costs shortly after their submission.

The Government may destroy its right of refusal to fund a cost overrun not approved in advance of incurrence. In order to do so, however, the Government must know there will be an overrun and then induce continued performance, *i.e.,* further incurrence of cost, through the conduct of an authorized official that is intended, or that reasonably could be construed as being intended, to be acted upon by a contractor unaware of the true facts. *E.g., American Electronics Laboratories, Inc. v. United States* [33 CCF ¶ 73,973], 774 F.2d 1110, 1113 (Fed. Cir. 1985); *George G. Sharp, supra,* at 111,145-46; *Falcon Research, supra,* at 98,339-41. COLSA has not shown such actions by the Government here.

The payment of COLSA's vouchers, which were submitted after incurrence of all the excess costs, while the parties were discussing whether the CO should disallow the costs, by an office unaware the CO had questioned the costs, in no way induced, or could even be construed reasonably as being intended to induce, "continued performance" by COLSA. COLSA incurred all the disputed costs *before* submission of the vouchers and was engaged in discussions with the CO over the allowability of those costs for several months before it became aware the vouchers had been paid. Further, the Allowable Cost clause incorporated in contract 0020 expressly provides that, before final payment is made, "[a]ny payment may be (1) reduced by amounts found by the [CO] not to constitute allowable costs ...." Such circumstances foreclose a finding of inducement with respect to payment of the vouchers. *See, e.g., Law Mathematics and Technology, Inc. v. United States* [33 CCF ¶ 74,148], 779 F.2d 675, 678-79 (Fed. Cir. 1985); *Dynamic Concepts, Inc.,* ASBCA No. 44738, 93-2 BCA ¶ 25,689; *3C Systems, supra,* at 119,818; *Hughes Aircraft Corp.,* ASBCA No. 24601, 83-1 BCA ¶ 16,396 at 81,517-20.

In addition, while two officials of COLSA state that they "did not seek changes to individual WAO's when the amounts stated in the WAO's were in an overrun condition" due to a telephone conversation they had with Ms. Schrecongost, a WSMR employee, the information they claim Ms. Schrecongost provided them in no way induced, or could even be construed reasonably as being intended to induce, "continued performance" of contract 0020 without adherence to Schedule section H.21. Contract 0020 expressly provides that "[n]o oral statement by any person ... shall modify or otherwise affect the terms of th[e] contract." Moreover, even if the restriction against oral modification is ignored, a statement by Ms. Schrecongost that, "if sufficient funds had been obligated to the overall contract, no modification of the *contract* was required" [emphasis added] cannot justify a failure by COLSA to obtain a modification of a *WAO.* As discussed above, Schedule section H.21 imposes the notice and authorization requirements regarding modification of "WAOs." A different provision, the LOF clause, sets forth notice and authorization requirements regarding modification of the "contract" to increase funding. Also, there has been no showing that Ms. Schrecongost had authority to excuse COLSA from complying with Schedule section H.21. The affidavits of COLSA's officials identify Ms. Schrecongost as a Government official with responsibility for administering a contract other than contract 0020. Ms. Schrecongost's affidavit confirms that she was not the CO for contract 0020. It states that she was a contract "specialist" assigned to contract no. DAAD07-89-C-0024 when she participated in the telephone conversation with COLSA's two officials. Such circumstances foreclose a finding of inducement with respect to the claimed statement by Ms. Schrecongost. *See, e.g., Mater Manufacturing, Inc.,* ASBCA No. 37499, 90-2 BCA ¶ 22,777 at 114,401; *George G. Sharp, supra,* at 111,146; *Hughes, supra,* at 81,517-19. Accordingly, COLSA has failed to cite evidence in the record, which would support a determination that the Government had lost its right of refusal to fund a cost overrun not approved in advance of incurrence, or proffer any other basis which would allow a conclusion that the CO had erred in disallowing the overrun costs and fee billed and paid for WAO Nos. 10, 11 and 12.

CONCLUSION

The appeal is denied and remanded to the parties for resolution of quantum.

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[¶ 26,310] PAE GmbH

ASBCA No. 45456, August 20, 1993. Contract No. DAJA37-87-C-0262.

Procedure, Boards—Parties—Representation Before Board.—A government motion to dismiss an appeal filed on behalf of a foreign business association was denied, despite the government's contention that the business failed to comply with a board rule requiring the business to be represented before the board by one of its officers, because the general manager of the business had delegated in writing to the representative the authority to represent the business in all contract matters involving the United States. Even if the representative were not found to have been a corporate officer, the board determined, in view of the delegation, that this did not constitute a jurisdictional defect mandating dismissal.

Procedure, Boards—Pleadings—Complaint Sufficiency.—Although a contractor failed to style its pleadings as a complaint, the government's motion to dismiss the appeal on the basis of the complaint's nonconformity with board rule requirements was denied because the contractor's pleadings had been recognized as a complaint, and there was no requirement that the complaint conform to a particular form. The board rules expressly provide that a complaint must fulfill the generally recognized requirements of a complaint, but no particular form is required.

For the appellant: Heinz D. Bertram, Director of Contracts. For the government: Ralph Lohmann, Associate Counsel, Office of Counsel Europe (DLA).

Before PAUL and JAMES, Administrative Judges.

PAUL, Administrative Judge: This is a timely appeal of a contracting officer's decision denying appellant PAE GmbH's (PAE) claim for an equitable adjustment. PAE opted to use the accelerated procedures provided by Board Rule 12.3. Subsequently, the Government filed a motion to dismiss the appeal with prejudice. First, it alleged that PAE had failed to comply with Board Rule 26 because its representative was not a corporate officer; and, second, the Government contended that PAE's initial pleading did not conform to the requirements for a complaint which are set forth in Board Rule 6.

We deny the motion to dismiss and grant the Government's accompanying motion for an enlargement of time in which to file its answer.

FACTUAL BACKGROUND

It is undisputed that PAE is a *Gesellschaft mit beschraenkter Haftung, i.e.,* a German business association which corresponds to a close corporation under American law. The pertinent German statute, the Close Corporation Act, provides for the appointment by a close corporation of one or more individuals, denominated *Geschaeftsfuehrers* or business managers, who would be responsible to the stockholders for the overall management of the corporation. In this instance, PAE's *Geschaeftsfuehrers* are Messrs. Edward A. Shay and Allen E. Shay; and, in this capacity Mr. Allen E. Shay delegated in writing to Mr. Heinz D. Bertram, PAE's director of contracts, the following authority:

> Effective immediately, you are hereby delegated authority to represent PAE GmbH in all contractual matters vis-a-vis the US Government including, but not limited to, signing RFPs, proposals, contracts and contract modifications, requests for payment, claims against the US Government (except for the certification of claims exceeding $50,000), appeals of contracting officer final decisions, and other related actions. Your actions are subject to review and concurrence by the *prokurist(s).*
>
> This authority is valid until the end of your employment with PAE GmbH, or until withdrawn by the *Geschaeftsfuehrer,* whichever is sooner.

It is true, as the Government points out, that the Board's Rule 26 provides, in pertinent part, that "a corporation [may appear before the Board through] one of its officers." However, even if we were to find that Mr. Bertram was not a corporate officer, that fact would not constitute a jurisdictional defect leading us to dismiss the appeal with prejudice. Mr. Allen E. Shay, in his capacity as *Geschaeftsfuehrer,* has delegated to Mr. Bertram the authority to file "appeals of contracting officer final decisions." Accordingly, the appeal was properly filed, and we possess jurisdiction to review it.

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The Government's second ground for dismissal is also not well taken. On 6 January 1993, PAE filed a seven-page, single-spaced document entitled *"TITLE OF PLEADING"* to which it attached seven lengthy exhibits. PAE did not style the pleading a "complaint"; however, Board Rule 6 clearly states that "no particular form is required." In addition, our Recorder recognized the pleading as a complaint and accepted it for filing. This Board functions as an informal forum for resolution of appeals. Accordingly, it is not our province to penalize unrepresented contractors because they do not conform to procedural niceties in formulating their pleadings. Therefore, we reject this basis for the Government's motion.

The Government's motion to dismiss was accompanied by a motion for extension of time to file its answer. The latter motion is granted, and the Government will file its answer within 20 days after receipt of this decision.

CONCLUSION

The motion to dismiss is denied.

[¶ 26,311] Flight International, Inc.

ASBCA No. 45300, August 17, 1993. Contract No. N00019-91-C-0190.

Procedure, Boards—Pleadings—Adequacy of Statement.—The government's motion to dismiss an appeal for failure to state a claim upon which relief could be granted was denied because the allegations of improper government delay in awarding the contract and the contractor's resulting increased costs were sufficient to state a claim for compensation. Although the facts alleged in the complaint related to preaward matters, it was clear that the contractor was seeking to recover under its express contract. The asserted basis for recovery for delay in award and start-up was an unreasonable government delay in the initiation of the contract work, which could be viewed, according to the contractor, as a constructive change or possibly a breach of contract.

For the appellant: Vandeventer, Black, Meredith & Martin, Norfolk, Virginia, by Daniel R. Weckstein and Howard W. Roth III. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Ronald L. Fouse, Trial Attorney.

Before TODD, RUBERRY, and VAN BROEKHOVEN, Administrative Judges.

TODD, Administrative Judge: Appellant Flight International, Inc. (Flight) has appealed the denial of its claim alleging bad faith of the Navy in delaying award of a contract for the Undergraduate Naval Flight Officer (UNFO) training program. The Government has moved that the Board dismiss the appeal for failure to state a claim upon which relief can be granted. We deny the motion.

STATEMENT OF FACTS

The Government's initial award of the UNFO contract was made to Sabreliner Corporation on 3 March 1990, but that award was held improper by the Comptroller General in a decision issued 28 September 1990, which stated that "award to any offeror other than Flight International would be an abuse of discretion."

In April 1989, appellant had purchased a prototype Learjet for delivery in October 1989, the Navy's initially stated contract award date, for $3,445,000. Appellant retained the aircraft pending the outcome of the protest.

By letter dated 4 October 1990, the Navy informed Flight that it would follow the Comptroller General's recommendation.

The Navy delayed award of the contract to Flight from 28 September 1990 pending a pre-award survey regarding Flight's capability to perform the contract, the provision of performance guarantees by Flight, the issuance of a Certificate of Competency (COC) to Flight by the Small Business Administration (SBA) on 7 January 1991, initiation by the Navy of a size protest at SBA with respect to Flight's status as a small business, Navy requests to the SBA to reconsider its issuance of the COC to Flight, reissuance of the COC to Flight on 8 February 1991, a third reissuance of the COC, and repeated appeals of the SBA determination made 4 February 1991, that Flight was a small business.

Appellant believes that the purpose of the Navy's actions was solely to delay contract

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award to Flight and destroy the company and has asserted that the Navy acted in bad faith.

In May 1991, appellant sold the Learjet aircraft to mitigate costs associated with the delay in award.

On 11 June 1991, Flight filed an action in United States District Court for the Eastern District of Virginia for an injunction to obtain award of the contract. The lawsuit was settled with an agreement by the Navy to award the contract to Flight.

On 9 July 1991, the Navy awarded contract N00019-91-C-0190 for the UNFO training services to appellant. The contract called for services to assist in radar and navigation training, including airborne training service hours on contractor-furnished aircraft. The initial training capability was scheduled to begin 18 months after award. (R4, tab 1, pp. 2-1, 5-1) This was a short delivery schedule for appellant to prepare to meet.

In order to comply with the delivery schedule, appellant was required to have a prototype Learjet aircraft available immediately upon contract award to make necessary modifications to the aircraft and to begin flight testing.

On 12 September 1991, Flight submitted a certified claim for an equitable adjustment in the amount of $2,865,504.98 on the grounds of failure to make timely award of the contract and bad faith. Flight claimed compensation for costs associated with the prototype aircraft from March 1990 until May 1991, including facilities cost of capital, depreciation, sales commission costs, costs of modifications required by the buyer of the aircraft, insurance costs, and hangar costs. An additional amount of $754,970 was claimed for the increased replacement cost of the aircraft required to be purchased after award. Other claims were for costs incurred prior to award for consultants who provided assistance in bid revalidation, responding to the Navy's pre-award survey, and the SBA COC process. Appellant claimed employee costs for three individuals assigned to the UNFO project during the period 1 October 1990 to 30 June 1991. In addition, Appellant also claimed entitlement to recover certain miscellaneous costs, indirect costs, and an amount for profit or fee.

The Contracting Officer issued a final decision denying the claim on 14 August 1992 (R4, tab 20).

DECISION

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all facts alleged by the non-moving party must be accepted as true. *Robert K. Adams,* ASBCA No. 34519, 89-2 BCA ¶ 21,699. We have stated the facts above on the basis of appellant's complaint and solely for purposes of deciding the motion. Whether the facts alleged or proved support the relief requested remains to be seen. As a general rule, a motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted. *Bird-Johnson Company,* ASBCA No. 30592, 86-1 BCA ¶ 18,707, at 94,096.

The Government argues that Flight has not identified a legal theory under which it can recover, but allegations of improper delays by the Government in awarding the contract and resulting increased costs are sufficient to state a claim for compensation. The asserted basis for recovery for delay in award and start-up is an unreasonable Government delay in initiation of the contract work, which, according to appellant, may be viewed as a constructive change or possibly a breach of contract. *Hoosier Lawn Pro,* ASBCA No. 43742, 92-3 BCA ¶ 25,097. Every contract imposes on each party a duty of good faith and fair dealing in its performance. *S & S Equipment,* ASBCA No. 36681, 89-1 BCA ¶ 21,469. Where the contractor was led to maintain its bid price by improper acts of the Government, the equitable remedy of reformation, which appellant also asserts, may also be available. *LaBarge Products,* ASBCA No. 33593, 93-2 BCA ¶ 25,630.

Although the alleged facts relate to pre-award matters, Appellant is seeking to recover under its express contract. *LaBarge Products,* ASBCA No. 33593, 91-3 BCA ¶ 24,110. This is not a claim seeking recovery of bid preparation costs on the grounds of bad faith evaluation of proposals for a new contract on an implied contract theory for which there would be no Board jurisdiction. *See Coastal Corporation v. United States* [31 CCF ¶ 71,373], 713 F.2d 728 (Fed. Cir. 1983); *Kirk Brothers Mechanical Contractors, Inc.,* ASBCA No. 35771, 90-3 BCA ¶ 23,052. We have concluded that we have jurisdiction to hear and decide appellant's claim.

Respondent's motion to dismiss with prejudice is denied.

Respondent also filed a Motion for More Definite Statement on which the Board sus-

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pended action pending the disposition of the Motion to Dismiss. The Government requests that the Board order appellant to file a proper complaint, setting forth numbered paragraphs containing direct, concise allegations in accordance with Board Rule 6(a). Flight's complaint is 27 pages of narrative, taken largely verbatim from its claim. In its Response to the Government's Motion to Dismiss, appellant noted that its complaint was filed *pro se* and suggested that amendment of the complaint under Board Rule 7 would be appropriate. Accordingly, appellant is hereby ordered to file an amended complaint within 20 days of receipt of this decision.

[¶ 26,312] Tomahawk Construction Co.

ASBCA No. 45071, August 18, 1993. Contract No. DACA45-88-C-0071.

Pricing of Adjustments—Interest—Incorporation of Cost Principles.—Interest paid upon funds borrowed by a contractor to finance contract modification work was not reimbursable, because there was no contractual or statutory basis for the contractor's recovery of such interest. The contract contained the Pricing of Adjustments clause, which makes Federal Acquisition Regulation cost principles applicable to equitable adjustments. FAR expressly provides that interest on borrowings and costs of financing are unallowable. The decisions cited by the contractor to support its position that such interest is recoverable involved contracts that did not contain a Pricing of Adjustments clause.

For the appellant: Rebecca L. Campbell, Kansas City, Kansas. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Willie J. McAlister, Jr., Engineer Trial Attorney, U.S. Army Engineer District, Kansas City.

Before HARTMAN, RUBERRY, and PAUL, Administrative Judges.

HARTMAN, Administrative Judge: This is a timely appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.*, from a contracting officer's final decision denying a claim by appellant, Tomahawk Construction Company ("Tomahawk"), for interest paid upon funds allegedly borrowed to finance contract modification work. Pursuant to Rule 11, the parties have elected to waive a hearing and submit the case for decision on the record. Only the issue of entitlement is before us for decision.

FINDINGS OF FACT

On 2 May 1988, the Army Corps of Engineers ("Corps") awarded to Tomahawk a fixed-price contract, No. DACA45-88-C-0071, in the amount of $5,733,657 for construction of the B-2 Support Facilities, Security Police Complex at Whiteman Air Force Base, Missouri (R4, tabs 3, 4). The parties' contract contained a standard Pricing of Adjustments clause (DFARS 52.243-7001), which states:

> When costs are a factor in any determination of a contract price adjustment pursuant to the Changes clause or any other clause of this contract, such costs shall be in accordance with Part 31 of the Federal Acquisition Regulation and the DoD FAR Supplement in effect on the date of this contract.

(R4, tab 6)

More than 40 modifications were made to the parties' contract after award. The following chart sets forth the number, authority, executions, dollar amount, alleged notice to proceed ("NTP") date, and execution ("Ex.") date for the seven modifications at issue in this appeal:

Number	Authority/Clause	Executions	Amount	NTP Date	Ex. Date
P00007	Changes Clause	Bilateral	$ 16,499	11/09/88	10/13/89
P00010	Changes Clause	Bilateral	$ 23,733	12/28/88	10/26/89
P00011	Differing Site	Unilateral	$ 53,823	10/21/88	11/28/89
P00019	Changes Clause	Bilateral	$ 48,508	04/10/88	10/16/89
P00030	Changes Clause	Unilateral	$ 24,699	06/07/89	05/04/90
P00034	Changes Clause	Unilateral	$ 57,462	02/14/89	07/26/89
P00041	Changes Clause	Unilateral	$434,087	03/29/89	01/20/90

Tomahawk has stated it refused to execute some of these modifications because "of the interest it had accrued due to the Corps' failure to timely and promptly pay for the

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extra work." (R4, tab 5; app. supp. R4, tab 1; app. br. at 5, 6)

On 9 April 1992, Tomahawk submitted a certified claim to the Corps' contracting officer seeking an equitable adjustment in the amount of $65,306 for "interest expense on borrowed capital" which "was a direct and proximate result of having to ... perform those contract modifications authorized and ordered by the Corps" (app. supp. R4, tab 1). In a final decision dated 12 June 1992, the contracting officer denied Tomahawk's claim because interest expense is not an allowable cost under the Pricing of Adjustments clause contained in the parties' contract (R4, tab 1). Thereafter, on 11 September 1992, Tomahawk noticed this appeal (R4, tab 2).

DECISION

Tomahawk contends in its briefs that it is entitled to fair and reasonable compensation for increased costs attributable to contract modifications, and it should be awarded reimbursement for interest paid on borrowed funds "associated with the performance of extra work." According to Tomahawk, the Court of Claims held that interest on borrowings to perform contract modification work was an allowable cost in *Bell v. United States* [13 CCF ¶ 82,406], 404 F.2d 975, 186 Ct. Cl. 189 (1968), and various tribunals have recognized the "continued vitality" of that holding. Tomahawk, however, misconstrues *Bell* and its progeny.

In *Bell,* the Court of Claims simply determined that the allowance of interest on borrowings as a cost under an equitable adjustment was not in conflict with 28 U.S.C. § 2516(a) (1964) or the decisions which implemented that Congressional policy. 404 F.2d at 984, 186 Ct. Cl. at 205. For many years, the Department of Defense, as a matter of policy, had denied interest as a cost under an equitable adjustment. The Department, however, altered its policy in November of 1954 "to allow interest on borrowings, as part of equitable adjustments under fixed-price contracts." *Id.* Based upon the Department's change in policy, this Board began allowing such costs in certain cases. *E.g., Kaman Aircraft Corp.,* ASBCA No. 10141, 66-1 BCA ¶ 5581 at 26,085-87. The Court of Claims subsequently held in its 1968 *Bell* decision that the Board's practice regarding recovery of interest on borrowings, which was by then "long-standing," was "allowable." 404 F.2d at 984, 186 Ct. Cl. at 205.

During 1970, the Department of Defense again altered its policy concerning interest on borrowings by making its standard cost principles applicable not only to determination of allowable costs under cost-reimbursement contracts, but to the pricing of all equitable adjustments under fixed-price contracts through the inclusion of a "Pricing of Adjustments" clause in its fixed-price contracts. *Blue Cross Association and Blue Shield Association,* ASBCA No. 25778, 89-2 BCA ¶ 21,840 at 109,903-04; *R.L. Spencer Construction Co.,* ASBCA No. 18450, 75-2 BCA ¶ 11,604 at 55,424; Defense Procurement Circular No. 79; ASPR 7-103.26. The Department's cost principles (ASPR 15-205.17) expressly provided that interest on borrowings, however represented, was not allowable. *E.g., International Equipment Services, Inc.,* ASBCA Nos. 21104, 23170, 83-2 BCA ¶ 16,675 at 82,925; *R.L. Spencer, supra,* at 55,424. Based upon the Department's 1970 change in policy, *i.e.,* inclusion in contracts of the Pricing of Adjustments clause (ASPR 7-103.26), this Board subsequently held on various occasions that a contractor could not recover interest on borrowings as part of an equitable adjustment. *E.g., G P Construction & Development Corp.,* ASBCA No. 33121, 91-3 BCA ¶ 24,302 at 121,439-40; *E.L. David Construction Co.,* ASBCA Nos. 29225, 34387, 89-3 BCA ¶ 22,140 at 111,436.

The United States Court of Appeals for the Federal Circuit, one of the successors to the Court of Claims, when presented with the issue of whether the cost of interest on borrowings could be allowed as part of an equitable adjustment under a contract containing the Pricing of Adjustments clause, reached the same conclusion as this Board, that it could not. *Servidone Construction Corp. v. United States* [36 CCF ¶ 75,797], 931 F.2d 860, 863 (Fed. Cir. 1991), *aff'g,* 19 Cl. Ct. 346 (1990). The cases cited by Tomahawk in its briefs as standing for the opposite proposition and reaffirming *Bell* all involve contracts which did not contain the Pricing of Adjustments clause (ASPR 7-103.26, DAR 7-103.36, or DFARS 52.243-7001)* and which clause thus did not apply to the pricing of equitable adjust-

* In 1978, Department of Defense ("DOD") Directive No. 5000.35 redesignated the Armed Services Procurement Regulation ("ASPR") as the Defense Acquisition Regulation ("DAR"). *Lincoln Services, Ltd. v. United States* [25 CCF ¶ 82,506], 678 F.2d 157, 162 n.11, 230 Ct. Cl. 416, 425 n.11 (1982). Today, the Pricing of Adjustments clause can be found in the DOD Federal Acquisition Reg-

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ments, ASPR 15-205.17 or one of its successors (DAR 15-205.17 and FAR 31.205-20). *See, e.g., Gevyn Construction Corp. v. United States* [34 CCF ¶ 75,350], 827 F.2d 752, 753 (Fed. Cir. 1987) (1963 DOD contract); *S.S. Silberblatt, Inc. v. United States* [29 CCF ¶ 81,610], 228 Ct. Cl. 729 (1981) (Postal Service contract); *Fischbach & Moore Int'l Corp. v. United States* [27 CCF ¶ 80,268], 617 F.2d 223, 224, 223 Ct. Cl. 119, 122 (1980) (USIA contract); *Dravo Corp. v. United States* [25 CCF ¶ 82,542], 594 F.2d 842, 843, 219 Ct. Cl. 416, 420 (1979) (1969 DOD contract); *N.Y. Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979 at 57,402 (pre-1964 DOD contracts).

Tomahawk's contract with the Corps contains the Pricing of Adjustments clause (DFARS 52.243-7001) which makes standard cost principles, such as FAR 31.205-20, applicable to equitable adjustment pricing. FAR 31.205-20 expressly provides that "[i]nterest on borrowings (however represented), ... [and] costs of financing and refinancing capital ... are unallowable ...." Thus, this appeal is governed by *Servidone* and similar cases, rather than by *Bell* and its progeny, and Tomahawk is precluded from recovering interest on borrowings as part of an equitable adjustment to its contract. *Servidone Construction*, 931 F.2d at 863; *COMSI, Inc.*, 88-1 BCA ¶ 20,245 at 102,477.

Tomahawk asserts in its briefs that denial of reimbursement for interest expense on borrowings would arbitrarily deprive it of the time cost of money and contravene the spirit of the FAR, Prompt Payment Act, and Fifth Amendment, which Tomahawk states is to make "whole" individuals who suffer expense due to Government action. However, the Supreme Court has stated that:

> "[T]he immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy."

Library of Congress v. Shaw, 478 U.S. 310, 321 (1986), *quoting United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 663 (1947). Moreover, although Tomahawk also asserts that, in attempting to recover its cost of interest on borrowings, it is not seeking " 'interest per se," but a "business expense" or "enhanced rate of profit," the prohibition against the allowance of interest cannot be circumvented by recharacterizing one's claim as seeking something other than "interest." *See, e.g., J.D. Hedin Construction Co. v. United States* [17 CCF ¶ 81,001], 456 F.2d 1315, 1330, 197 Ct. Cl. 782, 807 (1972); *Servidone*, 19 Cl. Ct. at 383. Accordingly, the bar against interest (FAR 31.205-20) applicable to Tomahawk's contract (DFARS 52.243-7001) precludes, as part of an equitable adjustment, the recovery of reimbursement for interest expense on borrowings "associated with the performance of extra work" which Tomahawk seeks here.

CONCLUSION

The appeal is denied.

[¶ 26,313] C.M. Lowther, Jr.

ASBCA No. 44624, August 17, 1993. Contract No. N62467-87-C-4346.

Pricing of Adjustments—Total Cost Method—Subcontractor's Billing.—A subcontractor's demand for total hauling services was not a proper basis for determining a contractor's equitable adjustment for damage caused by the malfunction of a government-owned and -operated sump pump, because the contractor failed to present a reasonable basis for the computation of the amount attributable to the malfunction. The contractor attempted to isolate the increased cost of hauling wet soil by deducting the amount that it asserted was the hauling subcontractor's bid cost estimate for its services. However, there was no corroboration of that amount or any breakdown of the component costs. On the other hand, the government's proposed equitable adjustment had independent support in the record, and the contractor produced no evidence showing that the amount was insufficient.

Attorney Fees and Costs Under Equal Access to Justice Act—Application Procedures—Accompanying Documentation.—A contractor's claim for attorney fees

(Footnote Continued)

ulation Supplement ("DFARS"). *Blue Cross, supra*, at 109,904 n.38.

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under the Equal Access to Justice Act was held in abeyance, pending the contractor's furnishing information and documents as described in the board's procedures for claims under EAJA. The decision that the government was liable for an equitable adjustment was sufficient to establish the contractor as a prevailing party. Thus, the submission of the claim was treated as the filing of an application under the EAJA.

Pricing of Adjustments—Claim Preparation Costs—Proposal for Equitable Adjustment.—A contractor was not entitled to recover the cost of preparing its equitable adjustments proposal, because there was no direction by the government to prepare the proposal. The contractor voluntarily prepared an equitable adjustment proposal in aid of its claim for additional compensation under the contract. Reimbursement of such costs of prosecuting a claim is prohibited by federal acquisition regulations.

For the appellant: C.M. Lowther, Jr., Owner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Alan R. Caramella, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before MOED, SPECTOR, and RUBERRY, Administrative Judges.

MOED, Administrative Judge: In an earlier decision (hereinafter the "Entitlement Decision"), we held that appellant was entitled to recover for added expense caused by the malfunction of a Government-owned and operated sump pump. The parties have not been able to agree on the amount due appellant and have referred the matter back to the Board. By agreement, the determination of that amount will be made on a documentary record pursuant to Rule 11. Familiarity with the Entitlement Decision is presumed. Findings from that decision are referred to herein as "EF _"

FINDINGS OF FACT

1. In conjunction with removal of asbestos insulation around pipes in Building 111, Marine Corps Recruit Depot, Parris Island, SC, the contract required the excavation and disposal of the upper six inches of soil in the crawl space of the building which had become contaminated with asbestos fibers that had fallen from the insulation. In the course of this work, which was performed by appellant's subcontractor, Industrial Insulation Co. (IIC), a sump pump located in a mechanical room adjoining the crawl space malfunctioned, causing water to overflow into appellant's work area in the crawl space. Appellant subsequently submitted a claim in the amount of $90,042.17 for added performance costs resulting from the overflow. (ET 1-4, 19)

2. The claim was denied by the contracting officer, resulting in a timely appeal to the Board under ASBCA No. 38407. The appeal was sustained in a decision dated 12 August 1991, published at 91-3 BCA ¶ 24,296. We held that appellant was entitled to an equitable adjustment for added costs of the overflow. The only damage identified in the findings was the added cost of transportation of water-saturated soil removed from the areas of the crawl space affected by the overflow (EF 20). The quantum of the equitable adjustment was referred back to the parties for negotiation. They have not been able to agree on that amount and have returned the issue to the Board for determination.

3. Appellant's proposal, dated 20 March 1993, seeks an equitable adjustment in the amount of $143,532. In that document, appellant claims that the overflow into the crawl space caused damages as follows:

CLAIM A. "[E]xtra disposable materials (used for safety purposes) ... used during the 56 days it took to remove the asbestos and contaminated soil from the crawl space." *Ibid.* at 4. These materials included: disposable coveralls, respirators, asbestos bags, gloves, filter bags, etc.—$8,569.61.

CLAIM B. The rental cost of the HEPAVAC machine that could not be used for soil removal in the crawl space—$5,966.40.

CLAIM C. Additional air quality sampling and air monitoring as required by OSHA regulations for 56 days—$16,705.

CLAIM D. Additional labor cost for removal of asbestos and contaminated soil from crawl space, consisting of 1 supervisor and 6 laborers for 56 days actually required *vice* 1 supervisor and 2 laborers for 24 days planned—$34,438.

CLAIM E. Additional transportation expense resulting from added weight of wet soil removed from crawl space—$9,677.

4. The amounts above include overhead and profit of IIC at the rates of 13 percent and 10 percent, respectively. In addition, the

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claim includes: attorney fees pursuant to the Equal Access to Justice Act (EAJA) ($2,550); appellant's overheads (15 percent), profit (10 percent), and added bond premiums (3 percent) (totalling $24,440); and interest under the Contract Disputes Act ($38,715).

5. Appellant also seeks payment of $2,770 disbursed to T.A. McMullen Consultants, Inc. for preparation of its present equitable adjustment proposal. The proposal is a reworking of appellant's previous claim which we dealt with in our entitlement decision.

6. The premise of Claims A, B, C, and D, *supra,* is that in bidding the contract, appellant expected to complete soil removal in the crawl space in 24 working days using a HEPAVAC machine with one supervisor and two laborers. Appellant alleges in the proposal, at 2, that:

> Due to the wet conditions caused by the overflow, the Hepa Vac [sic] method was impossible to use. Consequently, IIC was forced to use manual labor in the crawl space to remove asbestos and contaminated soil by hand. This took an average of 1 supervisor and six laborers 56 days to accomplish the intended scope of work. Consequently, IIC has used the difference of 32 days to establish the additional labor cost and letters from vendors to establish other cost.

7. Appellant's decision to discontinue use of the HEPAVAC machine and to resort to the hand method of removing soil in the crawl space was not occasioned by the overflow. That decision was prompted, instead, by moisture normally prevailing in the environment of the crawl space which rendered the HEPAVAC machine unsuitable for use. The moisture gave the soil a thick, pasty consistency which caused the vacuum hoses of the machine to become clogged and constantly needing to be cleared. Because of this problem, appellant abandoned use of the machine after only four days and changed to hand removal of the soil. (EF 11-17) It has not been established that any of the 32 additional days allegedly expended for hand removal of soil from the crawl space was due to the condition of the soil in the areas affected by the overflow.

8. Moreover, the overflow could not have caused or contributed to the malfunction of the HEPAVAC machine because the machine was never used in areas of the crawl space that received the overflow (EF 11, 13).

9. The added expense of hauling soil removed from the affected areas of the crawl space to the disposal site was proximately caused by the overflow. Because of the added weight of the water in the soil, the containers could only be partially filled in order to avoid violating weight limits on the state roads. This required more trips and, thus, an increased expense (EF 20).

Quantity of Crawl Space Soil Affected By Overflow

10. In the Entitlement Decision, we found that the area of standing water measured approximately 76 feet long and 19 feet wide. The adjacent area of water-saturated soil was depicted on a drawing in the record (exh. G-1). As so depicted, that area was approximately one and one-half times the size of the standing water area. The contract required removal of soil in the crawl space to a depth of six inches. The volume of soil required to be removed from these two areas, accordingly, is as follows:

Standing water area: (76 feet × 19 feet × .5 feet)	—	722 cubic feet
Saturated soil area: (150% of Standing water area)	—	1,083 cubic feet
Total Volume		1,805 cubic feet
Total Volume		66.85 cubic yards

11. The soil excavated from the crawl space was placed in dumpster containers for removal. These containers had a capacity of 24 cubic yards when full. ATS, Inc. the hauler hired by IIC to remove soil excavated from the crawl space, had priced its offer to IIC on the basis of hauling full containers. The wet soil removed from the crawl space, however, was heavier than the dry soil that ATS anticipated would be carried. The added weight made it necessary to cut each load in half (*i.e.,* 12 cubic yards per load) in order to stay within state road weight limits.

12. Under conditions of full containers, approximately 2.8 loads would have been employed to carry away the 66.85 cubic yards of soil in the areas affected by the overflow. When the containers could be transported only half full, an additional 2.8 loads were required in order to carry away the same volume of soil.

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Parties' Proposals for Equitable Adjustment

13. *Appellant's Proposal*—The amount of $9,677 claimed by appellant for the increased transportation expense consists of an added cost to the third tier haulage subcontractor, ATS, Inc., of $7,785 plus $1,892 overhead and profit mark-ups for IIC. The added cost of the ATS subcontract was arrived at by subtracting the amount that appellant states was included in IIC's subcontract bid for transportation of the excavated soil ($16,865) from the amount demanded by ATS for the entire operation after completion of the services ($24,650). That demand, set forth in a letter to IIC dated 29 January 1993, reads in pertinent part as follows:

> We hereby request payment for the hauling of contaminated soil from Parris Island to Appleton Landfill in the amount of $24,650. The amount of loads hauled was higher than anticipated due to the weight of each load. We were only able to haul approximately 12 yards in each load. Below is a breakdown of charges:
>
> | | |
> |---|---|
> | 35 loads @ 650 per load | $22,750.00 |
> | Rent: 2-20 yd for 4mo @ $75/mo | 600.00 |
> | Service Charge: 2 trips—unable to get cans | 500.00 |
> | Delivery Charge: 3-20 yd @ $250.00 | 750.00 |
> | 1 hour wasted time waiting for paperwork | 50.00 |
> | TOTAL AMOUNT DUE | $24,650.00 |

14. The record does not indicate the composition of IIC's subcontract bid amount for transportation of the excavated soil or how ATS' demand breaks down between services included in the original agreed price and extra services due to the higher than anticipated weight of the soil. As to the latter, only a portion of that greater weight was attributable to wetness caused by the overflow. Moisture causing added weight was present in the crawl space soil caused by conditions, such as hot and humid air, that normally prevailed in that area (ET 16). The record does not show how much of ATS' demand represents added costs for the overflow consequences alone.

15. *Government's Proposal*—The Government offered an equitable adjustment of $5,000 consisting of $3,000 for added transportation cost of containers of wet soil and $2,000 for any additional costs incurred for removal of the wet soil (affidavit of Dewayne Roby, dated 26 May 1993). Providing for the latter contingency was reasonable since there may have been added costs for movement of the wet soil from the crawl space to the containers.

16. The record contains a cost estimate in support of the Government's offer. The estimate includes overhead and profit for IIC at the rates of 13 percent and 7.31 percent. As to appellant, rates of 8 percent for overhead, 2 percent for added bond premium, and 7.10 percent for profit have been used.

17. The amount included in the Government's offer for added transportation cost is consistent with an estimate of that cost based on other information in the record. Because of the added weight of the moist soil, an additional 2.8 loads were necessary for carrying away the 66.85 cubic yards of soil in the areas affected by the overflow. Applying the rate of $650 per load shown in ATS' bill, which has not been challenged by the Government, and the rates for overhead, added bond premium, and profit set forth in the Government estimate (finding 16), the amount of the equitable adjustment for the added transportation cost would be computed as follows:

Added transportation expense ($650× 2.8)	$1,820.00
IIC overhead (13 percent)	236.60
	2,056.60
IIC profit (7.31 percent)	150.34
	2,206.94
Appellant's overhead (8 percent)	176.55
	2,383.49
Appellant's profit (7.10 percent)	169.23
	2,552.72

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Additional bond premium (2 percent)	51.05
Total	$2,603.77

18. The Government's offer was formalized in a written contracting officer's decision dated 26 May 1992. Thereafter, the contracting officer issued unilateral contract modification P00002, dated 24 March 1992, determining that the amount of $5,000 was "a fair and equitable adjustment" for the additional transportation expense and authorizing invoicing and payment of that amount.

DECISION

As claimant, appellant had the burden of "establishing the fundamental facts of liability, causation, and resultant injury." *Wunderlich Contracting Co. v. United States* [11 CCF ¶ 80,069], 351 F.2d 956, 968 (Ct. Cl. 1965). In the entitlement phase, we addressed the matter of liability and decided that appellant had been damaged by the overflow of water into the crawl space and that the Government was responsible for such overflow. In the present quantum phase, we address the remaining elements, namely, the types of damage proximately caused by that event and the amount due from the Government therefor.

Appellant claims that the overflow caused five types of damage. The record, however, shows that only the added cost of transporting wet soil removed from the standing water and water-saturated soil areas of the crawl space (Claim E) was proximately caused by the overflow. The other four categories of claimed damage (Claims A-D) were caused by the unsuitability of the HEPAVAC machine for use under the conditions normally prevailing in the crawl space.

While appellant was not obliged to prove the amount of that additional transportation expense with "absolute exactness or mathematical precision" *Electronic & Missile Facilities v. United States* [14 CCF ¶ 83,109], 416 F.2d 1345, (Ct. Cl. 1969), it was required to present, at least, "a reasonable basis for computation even though the result [was] only an approximation of damages." *L.B. Samford, Inc.*, ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660.

The amount put forward by appellant as the added transportation expense (exclusive of overheads and profit) is based on the haulage subcontractor's demand for $24,600 for the total quantity of services rendered. While the demand speaks of a "higher than anticipated" number of loads due to the weight of each load, it does not break out any resulting increased cost.

Appellant attempts to isolate that increased cost by deducting, from the demand, an amount which it asserts to be IIC's bid cost estimate for these services. However, there is no corroboration of that amount from IIC's records nor has any breakdown of the component costs been provided. Given these deficiencies in the underlying information, appellant's basic figure is simply not credible and does not afford the "reasonable basis for computation," *supra*, needed for serving as the basis of the equitable adjustment.

The increased transportation cost proposed by appellant would not be acceptable, even if it were credible. It represents the entire increased cost of transportation of the crawl space material. Appellant is entitled to recover only the portion of increased cost attributable to the overflow.

The Government has proposed an equitable adjustment which has independent support in the record (findings 15, 17). Appellant has produced no evidence showing that the amount is insufficient and has failed to substantiate its own proposal. In that state of the record, we conclude, and so hold, that the Government's offer of $5,000 constitutes an adequate equitable adjustment for the increased costs that appellant is entitled to recover. *L.B. Samford, supra* at 125,661.

Claim for Attorney Fees

Appellant claims attorney fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, in the amount of $2,550. The decision that the Government is liable for an equitable adjustment for the effects of the overflow is sufficient to establish appellant as a prevailing party in this appeal, authorizing the filing of an application for an award under EAJA. *Aqua-Fab, Inc.*, ASBCA Nos. 34283, 36258, 91-1 BCA ¶ 23,655. The submission of the claim, accordingly, will be treated as the filing of said application. Further processing, however, will be held in abeyance pending appellant's furnishing the information and documents described in the Board's Interim Procedures for Claims under EAJA.

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Claim for Proposal Preparation Costs

Appellant also seeks to recover $2,770 expended for preparation of its present equitable adjustment proposal. There was no direction by the Government to prepare the proposal. It was an action voluntarily undertaken by appellant in aid of its claim for additional compensation under the contract. Under these circumstances, there was no obligation on the part of the Government to pay for preparation of the proposal. Indeed, reimbursement of such costs of prosecuting a claim is prohibited by FAR 31.205-33.

Conclusion

For the added work that was required as the result of the overflow into the crawl space, appellant is entitled to recover $5,000 plus interest pursuant to section 12 of the Contract Disputes Act (CDA), 41 U.S.C. § 611, from 13 August 1990.

[¶ 26,314] CS&T General Contractors, Inc.

ASBCA No. 43657, August 24, 1993. Contract No. F49642-89-C-0212.

Procedure, Boards—Reconsideration—Clarification.—The government's motion to clarify a board holding that did not expressly exclude the recovery of costs for unabsorbed or extended fixed overhead costs was granted, even though the contractor contended that the board's power to correct a decision is limited to ministerial, arithmetic, or other nonjudgmental mistakes that do not affect the award, because board rules authorize the board to correct an error, including corrections changing a party's recovery. The board determined that there was no inconsistency between the board's initial holding that the record did not establish the elements of proof of unabsorbed and extended overhead costs and the final holding that the contractor was entitled to recover any increased costs incurred as a result of differing site conditions and suspensions of work. However, the decision was clarified to state that the contractor was entitled to recover any increased costs other than unabsorbed or extended fixed overhead costs incurred as a result of differing site conditions and suspensions of work.

Procedure, Boards—Reconsideration—Timeliness.—A government motion to clarify a board holding was timely, even though it bore a postage meter stamp dated on the 29th day after the government received the board's decision, because an uncanceled postage meter date stamp on an envelope containing a motion for reconsideration, together with a supporting affidavit that the envelope was mailed on the same date as the postage meter date stamp, constituted the filing of the motion on that date. Although the contractor contended that the date of physical receipt, rather than a postmark date, governs the timeliness of a motion for reconsideration, it is well established under the Contract Disputes Act of 1978 that a postmark date on a motion for reconsideration constitutes *prima facie* proof of the date of filing the motion.

For the appellant: Sadur, Pelland & Rubinstein, Washington, D.C., by Francis J. Pelland. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Diana S. Dickinson, Trial Attorney.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge:

Findings

The Board decided the appeal of *CS&T General Contractors, Inc.*, ASBCA No. 43657, 93-3 BCA ¶ 26,003, on 28 April 1993. Our certified mail receipts establish that on 3 May 1993 respondent received its copy of that decision. On 3 June 1993 we received respondent's 1 June 1993 motion styled "RESPONDENT'S MOTION TO CORRECT ERROR IN THE DECISION" pursuant to Rule 5(b) of the Board's Rules, whose second paragraph states:

> Should the Board determine it more appropriate that this Motion be styled a Motion for Reconsideration under the Board's Rule 29, Respondent requests that the Board consider this Motion to be Respondent's Motion for Reconsideration.

According to respondent, our holdings that appellant (i) "may not recover unabsorbed overhead costs for any delay during the original 210-day contract performance period"

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(slip op. at 9), which 210 days included the 44 day suspension in 1989 and the nine day suspension in April 1990, and (ii) "cannot recover extended overhead costs for the 176 days of delay in 1990" (slip op. at 10), which included the 12 day suspension in July 1990, conflict with (iii) our final holding that appellant is "entitled to recover any increased costs incurred as a result of the differing site conditions and suspensions of work for 44 days in 1989 and 21 days in 1990."

The Board's 3 June 1993 letter noted that respondent mailed said motion in an envelope on which it affixed a 1 June 1993 postage meter stamp, but which envelope bears no postmark dated by the U.S. Postal Service, and ordered appellant to respond to the respondent's 1 June 1993 motion.

Appellant's 10 June 1993 Motion to Dismiss argues that "Respondent's Motion to Correct Error in the Decision" presents no new facts or law or matters of special significance not already in the record and seeks to reduce the award to appellant; accordingly, it must be treated as a "Motion for Reconsideration"; and such motion was untimely because filed at the Board on 3 June 1993. The 1 June 1993 metered date on the envelope in which respondent's motion was mailed is the 29th day after respondent received our decision. Appellant argues that the date of physical receipt, rather than a postmark date, governs the timeliness of a motion for reconsideration.[1]

Respondent's 9 July 1993 opposition to appellant's motion to dismiss submits affidavits attesting that sometime after 4:00 p.m. on 1 June 1993 respondent's trial attorney gave the ASBCA No. 43657 motion to her clerk who placed the motion in envelopes addressed to appellant and the ASBCA and went to obtain proper postage thereon from respondent's mailroom; the mailroom personnel applied postage meter date stamps on those envelopes; the clerk returned the metered mail envelopes to the trial attorney; and at 6:30 p.m. the trial attorney placed those envelopes in the U.S. Postal Service receptacle outside the West Carrollton, Ohio, post office.

Respondent argues that (a) its motion to correct error is not a motion for reconsideration, because it does not question the Board's factfinding or legal holdings, request clarification or consideration of new evidence, but rather requests correction of "an apparently inadvertent but obvious inconsistency between the last two conclusory paragraphs of the decision and the specific holdings of fact and law," citing various precedents for the rule that the Board may vacate or correct a decision even after the 30 day period for filing a motion for reconsideration, which is inapplicable to respondent's motion; (b) if considered a motion for reconsideration, the postal meter date stamp establishes that the motion was timely filed; and (c) a letter mailed on 3 June 1993 in Dayton, Ohio, cannot be delivered to Falls Church, Virginia, that same day, so it must have been mailed no later than 2 June 1993, the 30th day after respondent received our decision.

Appellant's 21 July 1993 response to respondent's opposition argues that the principal decisions on which respondent relies for the rule that the postmark date is the date of filing of a motion for reconsideration, *Union Precision & Engineering*, ASBCA No. 37549, 92-1 BCA ¶ 24,662, and *Hugo Auchter GmbH*, ASBCA No. 39642, 91-2 BCA ¶ 23,777, were erroneously decided because not supported by the decisions they cited. Appellant also argues that the Board's power to correct a decision is "limited to ministerial, arithmetic or other non-judgmental, non-discriminatory mistakes that do not affect the award itself," but does not include reversing its holding and ordering appellant to repay 62 days of compensable costs to respondent. Appellant also requests the Board to eliminate its remand of the appeal for the parties to determine quantum, because the "parties have stipulated, and the Board so found, that for all purposes Appellant's per diem compensable delay costs were $632."

Respondent's 27 July 1993 letter urges us to disregard appellant's 21 July 1993 request to eliminate remand, which is really a belated motion for reconsideration. Appellant's 9 August 1993 letter denies that its request to eliminate remand is a motion for reconsideration.

DECISION

Appellant's arguments about the limits of a motion for correction of a decision and what constitutes the filing of a motion for reconsideration are untenable.

[1] Appellant further states that its Motion to Dismiss does not address the merits or the substance of respondent's motion, and hence, in the event its motion to dismiss is not granted, requests 21 days to file a substantive response. Neither the Board's 3 June 1993 letter nor its Rules provide for seriatim responses first to the timeliness and next to the merits of an opponent's motion.

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Rule 60(b), Federal Rules of Civil Procedure, authorizes a court to correct an error, ambiguity or lack of clarity in its judgment, *Knox v. Lichtenstein*, 654 F.2d 19, 22, (8th Cir. 1981), including corrections changing a party's recovery, *Meadows v. Cohen*, 409 F.2d 750 (5th Cir. 1969) (trial court judgment awarding Social Security Act disability benefits commencing in June 1960 modified to award benefits commencing in December 1964, one year prior to filing of claim, where trial court was unaware of statutory limitation). By analogy to Rule 60(b), we have done the same. *Kos Kam, Inc.*, ASBCA No. 34681 (slip op., unpub., 11 Feb. 1993) (appeal previously sustained in part corrected to denial in entirety).

It is well established under both the Contract Disputes Act of 1978 and the pre-CDA Disputes clause that the postmark date on a notice of appeal or motion for reconsideration constitutes *prima facie* proof of the date of filing of such notice or motion. *Hugo Auchter, supra; American Abrasive Metals Co.*, ASBCA Nos. 35198, 35410, 88-1 BCA ¶ 20,287; *Clyde P. Thomas*, ASBCA No. 28296, 87-2 BCA ¶ 19,692; *Northwest Technical Industries, Inc.*, ASBCA No. 19024, 74-1 BCA ¶ 10,623, and precedents cited therein. Moreover, an uncancelled postage meter date stamp on an envelope mailing a notice of appeal or motion for reconsideration, together with a supporting affidavit that the envelope was mailed on the same day as the postage meter date stamp, constitute the filing of that appeal or motion on such date. *Dawson Construction Co., Inc.*, ASBCA No. 29447, 85-1 BCA ¶ 17,862 at 89,415 (timely notice of appeal); *Union Precision & Engineering*, ASBCA No. 37549, 92-1 BCA ¶ 24,662 at 123,029 (timely motion for reconsideration). We conclude that respondent's 1 June 1993 motion was timely, whether considered as a motion to correct error, akin to F.R.C.P. Rule 60(b), or as a motion for reconsideration under Board Rule 29.

The holdings in our 28 April 1993 decision are not inconsistent.[2] We did not deny unabsorbed and extended overhead costs in one breath and award unabsorbed and extended overhead costs in the next breath. We found that differing site conditions delayed commencement of work for 44 days in 1989 (finding 10), respondent suspended work for 21 days in 1990 (finding 15), and appellant signed no release for the initial 44-day suspension or the 21-day suspension in 1990 (findings 13, 15). The parties do not question the accuracy of such findings. Those findings amply support our final conclusion that appellant is entitled to compensation under the contract's Differing Site Conditions and Suspension of Work clauses, which compensation may include direct costs and variable indirect costs other than unabsorbed and extended fixed overhead costs, if substantiated.

There is no inconsistency between our initial holdings that the record did not establish the elements of proof of *unabsorbed and extended overhead costs*, and our final holding that appellant is entitled to recover any increased costs incurred as a result of differing site conditions and suspensions of work. Perhaps our decision should have stated that appellant "is entitled to recover any increased costs *other than unabsorbed or extended fixed overhead costs* incurred as a result of differing site conditions and suspensions of work." To this extent, we clarify our 28 April 1993 decision.

In the litigation context of disputed unabsorbed and extended overhead costs, the stipulated "daily rate of $632.00 for all purposes in connection with this appeal" does not address, much less automatically quantify, any direct costs and variable indirect costs appellant may have incurred, and profit to which it could be entitled, due to suspensions and differing site conditions. In resolving quantum, the parties may find that appellant incurred more or less than 65 times $632 = $41,080.

Respondent's motion to correct error is granted to the extent of the clarification set forth two paragraphs above, and is otherwise denied. Appellant's motion to dismiss is denied.

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[2] Considering the three opportunities appellant has taken to argue these motions and the substantive result we reach, no useful purpose would be served by allowing appellant to submit still another response on the "merits or the substance" of respondent's motion.

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[¶ 26,315] R&B Bewachungsgesellschaft mbH

ASBCA No. 42221, August 20, 1993. Contract No. DAJA76-88-C-0272.

Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Invalid Regulation.—In response to a motion for reconsideration, the board affirmed its earlier decision, 93-3 BCA ¶ 26,010, that although the contractor was a prevailing party otherwise eligible under the Contract Disputes Act, it was not entitled to attorney fees and costs, because the government's position was substantially justified. The government successfully argued that its decision not to pay interest relied on a promulgated regulation that forbade it from paying the contractor's claim for interest and that its position was, therefore, substantially justified. The board remained convinced that although the government's regulation was not reasonable, because it was inconsistent with the legislative intent, the government's position was justified.

For the appellant: von Maur & Partners, Sulzbach, Germany, by Michael J. Murphy. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Gregory O. Block, JAGC, Trial Attorney, Headquarters, U.S. Army Europe & 7th Army.

Before PAUL, RUBERRY, and RIISMANDEL, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 26,010 denied.

PAUL, Administrative Judge: In a slip opinion dated 23 April 1993, we denied appellant R&B Bewachungsgesellschaft mbH's (R&B) application for attorneys' fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Although we ruled that R&B was a prevailing party otherwise eligible as defined in the Act, we concluded that the Government's position was substantially justified.

With respect to the merits, the Army had argued, based upon FAR 32.901, that the "interest payment provisions of the Prompt Payment Act" (PPA) did not apply to contracts awarded to foreign vendors outside the United States for work performed outside the United States. Because the underlying contract involved such work, the Army concluded that it could not pay R&B's claim. Analyzing the legislative history of the PPA, as well as the position of OMB—the agency charged with prescribing regulations to effectuate the PPA—we ruled that FAR 32.901 was inconsistent with the intent and purpose of the PPA. Accordingly, in a decision dated 27 January 1992, 92-1 BCA ¶ 24,752, we held that the regulation did not apply to appellant's contract and sustained its appeal.

In our decision denying R&B's application under EAJA, we ruled that the Government had demonstrated substantial justification for its position. We stated, in pertinent part:

> ... As the Corps of Engineers Board held in *Hill Brothers Construction Co.*, ENGBCA No. 5685-F, 91-3 BCA ¶ 24,146:
>
> A decision on an EAJA Application requires an examination of the Government's actions in view of the prevailing general legal rule as it existed prior to the decision and as applied to the specific facts of a case. A proper judgment on the issue of substantial justification may not be made by applying new or expanded legal principles announced by the Board in the underlying decision.
>
> Here, the Army based its decision upon a promulgated regulation which forbade it from paying R&B's claim for interest under the PPA. In ruling that the regulation was inapplicable, we announced a new legal principle which, in effect, changed the existing law as it applied to R&B. Thus, we altered "the prevailing general legal rule that had existed prior to the decision"; and, in evaluating the Government's position, we conclude that the Army was substantially justified in relying upon a promulgated regulation.
>
> We derive support for this holding from our decision in *Zinger Construction Co.*, ASBCA No. 31858, 88-2 BCA ¶ 20,661. There, we denied Zinger's request for fees and expenses under EAJA although we had previously sustained its appeal for interest on progress payments pursuant to the PPA. In reaching this decision, the Board stressed the Government's reliance on Army regulations which forbade it from making such interest payments. Finding that the Government's position was not "inconsistent with the express provisions of the statute or the implementing regulations in effect at the time," we ruled that it was substantially justified under 5 U.S.C. § 504(a)(1). Because this

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case presents a factual and legal situation which is substantially identical to that in *Zinger,* we adopt our reasoning in that appeal and deny R&B's application.

In its motion for reconsideration, R&B argues that this case is readily distinguishable from *Zinger, supra.* It contends:

> Unlike in Zinger where the issue was whether the Army had adopted a correct interpretation of the PPA as that act concerned progress payments, in this case the Army's interpretation was not based on any part of the PPA. There is nothing in the PPA that could have reasonably been seen to have indicated that contractors of a foreign country were not to enjoy the benefits of the Act. The difference between Zinger and the case at bar is that in Zinger there was a something in the PPA upon which to base an interpretation. Here, the Army had nothing more than its desire not to pay PPA interest abroad; on the basis of that desire, it took the position that because the Act does not mention foreign contractors specifically, they were excluded.

(Br. at 2)

R&B is mistaken. After further review of our decision in *Zinger, supra,* we remain convinced that the two cases present factual and legal situations which are substantially identical. In *Zinger, supra,* just as in this appeal, we held that the Government's regulation was not reasonable because it was inconsistent with the legislative intent of the PPA. However, as here, we held that the Army's *position* was substantially justified. Based upon these crucial holdings which are common to both cases, we, once again, conclude that the Government's position in this case was substantially justified.

CONCLUSION

We have reconsidered our initial decision and affirm it.

[¶ 26,316] Ross & McDonald Contracting, GmbH

ASBCA Nos. 38154, 38155, 38156, 38717, 38718, 38719, 38720, 38722, 39415, 40121, 40122, 40123, 40124, 42528, 42529, 42530, 42531, August 24, 1993. Contract Nos. DAJA76-86-C-0478, DAJA76-86-C-0506, DAJA76-86-C-0507, DAJA76-86-C-0509, DAJA76-87-C-0519, DAJA76-87-C-0625.

Payments, Prompt—Disputes—Repudiation.—A contractor was not entitled to interest under the Prompt Payment Act, because before the contractor's invoices came due, the contractor notified the government that it was stopping performance. Although the government could not assess reprocurement costs until it awarded a reprocurement contract and paid the reprocurement contractors, it was not obligated to pay for accepted services without regard for its right to set off. On the date the contractor notified the government that it would not perform, there was an existing disagreement between the parties concerning the contractor's compliance with the contracts, which tolled the payment due date for outstanding invoices. For invoices submitted after the government terminated the contracts for default, there was an existing disagreement at the time the invoices were submitted, so that the interest penalty did not start to accrue.

Reprocurement—Duty to Mitigate—Award to Next in Line.—In light of the urgency of reprocurements for custodial services, the government acted reasonably and in accordance with the regulations and the Default clause when, in seeking to reprocure the services, it contacted those firms that submitted offers in response to the initial solicitations rather than issuing a new solicitation.

Reprocurement—Duty to Mitigate—Option Exercise.—The government's entitlement to excess reprocurement costs under a defaulted contract was limited to costs incurred during the unexpired portion of the base or option period because the government did not carry its burden of proving that it mitigated its reprocurement costs when it exercised the option. The award of the reprocurement contract was made to an offeror other than the second low offeror because the second low offeror had been found to be nonresponsible. There was no evidence that the contracting officer had reviewed the prior determination of nonresponsibility to determine if the second low offeror was still nonresponsible at the time the contracting officer exercised the option to extend the reprocurement contract for additional years.

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For the appellant: O'Haire & Fiore, Frankfurt am Main, Germany, by Daniel F. Crowley. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Robert Terrence Harders, JAGC, Trial Attorney.

Before VAN BROEKHOVEN, RUBERRY, and HARTY, Administrative Judges.

VAN BROEKHOVEN, Administrative Judge: The Government terminated the above cited contracts for default. The contracting officer issued final decisions assessing excess reprocurement costs against appellant and withholding amounts due appellant as setoffs for the excess reprocurement charges. Appellant timely appealed these decisions. Appellant contests only the Government's assessments of the reprocurement costs and withholdings and does not contest the propriety of the terminations for default. Therefore, we do not address in detail that portion of the record relating to the events surrounding the terminations except to the extent that they are relevant to the determination of these appeals. Both entitlement and quantum are before the Board for decision.

FINDINGS OF FACT

1. Following competitive solicitations, the U.S. Army Regional Contracting Office, Frankfurt, Germany awarded the subject contracts to appellant in July 1986 and June 1987. The contracts were for custodial services to be performed in all of the military installations in the Frankfurt area, except the dependent schools, and all the dependent schools in the Wiesbaden area. Therefore, these contracts covered most custodial requirements for the military community in the greater Rhein Main area. All the contracts were for a fixed term of one year, with two one-year extension options.

2. All of the contracts contained the standard clauses for service contracts, including the DEFAULT (Fixed-Price Supply & Service) clause (FAR 52.249-8, APR 1984), the PAYMENTS clause (FAR 52.232-1, Apr 1984), the DISCOUNTS FOR PROMPT PAYMENT (FAR 52.232-8, Apr 1985), and the LIMITATION ON WITHHOLDING OF PAYMENTS clause (FAR 52.232-9, Apr 1984). The contracts provided for the contractor's submission of monthly invoices for services performed and Government payment at the end of each month. Discounts offered for prompt payment ranged from 1 percent for payment in 10 days in contract no. DAJA76-87-C-0625 to 2 percent for payment in 20 days for most of the other contracts. In addition to the foregoing, the solicitations contained a provision, EVALUATION OF OPTIONS, which provided, in pertinent part, that the Government would evaluate offers for award purposes on the basis of total price proposed for the base year and all options. However, evaluation of the options would not obligate the Government to exercise the option(s).

3. On 13 January 1988, appellant's principals met with contracting officials of the Regional Contracting Office, Frankfurt. The purpose of their visit to the Regional Contracting Office was to deliver to the contracting officer a letter dated 13 January 1988 notifying the Chief of the Regional Contracting Office of their immediate termination of all services under the subject contracts, such services to be discontinued after midnight, 15 January 1988. Appellant experienced significant cash flow problems and was unable to meet the Friday, 15 January 1988 payroll of approximately DM 208,000. Moreover, the stated reasons in appellant's 13 January 1988 letter for the termination of contract services were the alleged interference by the contracting officer's representatives in the performance of inspections, alleged Government delays in making contract payments, and alleged Government delays in issuing contract modifications exercising the options. In addition to these stated reasons for terminating their contract services, appellant's principals had experienced significant personal health problems, which led to hospitalization in December 1987 and ultimately to death of one of the principals shortly after the termination of the contracts. Therefore, according to appellant, the failing health of its principals adversely affected their ability to administer the contract services. Because of the critical Government requirement for these custodial services, appellant desired a meeting with Government contracting officials to present its letter terminating contract services and to offer assistance to the Government and to the replacement contractor or contractors during the transition of custodial services.

4. During this meeting, Government contracting officials attempted unsuccessfully to encourage appellant to complete contract performance. However, appellant specified certain conditions for returning to work, including payment of approximately DM 400,000 claimed by appellant to be due and placement of DM 200,000 in an escrow account as advance payment, which, according

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to the Government officials, were unacceptable and beyond the authority of the contracting officer. The meeting ended in an impasse when it became clear to the Government that appellant had no intention of continuing the work. The Government contracting officials informed appellant of the possible consequences of appellant's termination of its performance, including termination of the contracts for default and assessment of excess reprocurement costs. Earlier in that week, on or about 11 January 1988, appellant's principals had directed appellant's employees to return all major items of equipment and keys to appellant's offices. Appellant had informed Government officials during the meeting that it was considering bankruptcy. On 15 January 1988, appellant declared bankruptcy. Government contracting officials also understood that the German Arbeitsampt would pay appellant's employees their outstanding pay on Friday, 15 January 1988. Appellant ceased performance of all contract work under the six contracts on 15 January 1988.

5. On 15 January 1988, the contracting officer issued notices under each of the contracts terminating the respective contracts for default and informing appellant that the terminated services would be reprocured against appellant's account and that appellant would be liable for any excess reprocurement costs. These notices of default termination included the standard contracting officer final decision language and appellant's appeal rights. The same day, the contracting officer issued contract modifications to the respective contracts reducing the contract price for the services not performed and deobligating the funds resulting from the terminations for default. Appellant does not dispute the propriety of the terminations for default. According to appellant, appellant breached its contracts by anticipatory repudiation (app. brief, p. 1).

6. The contracting officer determined that there was an urgency of the requirement for custodial services for the entire Frankfurt area military community and the schools in the Wiesbaden area which would have been without such services as a result of appellant's abandonment of the work under all its contracts. Therefore, the Government's contracting officials decided that there was insufficient time to solicit new offers in order to provide for the continuing uninterrupted custodial services. The contracting officials, further, decided that the Government should evaluate the offers submitted during the initial solicitations and contact only those offerors who had submitted the lowest responsive offers, as evaluated in accordance with the EVALUATION OF OFFERS provision of the solicitation, during the initial solicitations, to determine if they were willing to perform the remaining services under these contracts at their originally proposed prices. According to FAR § 49.405, "the contracting officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications." The regulation further provides in this section that, "[t]he new contract may be the result of sealed bidding or any other appropriate contracting method or procedure," but that the contracting officer "shall exercise reasonable diligence to obtain the lowest price available for the completion."

7. Accordingly, the Government did not solicit new or additional competitive offers for the reprocured work. Rather, it contacted the original low offerors submitting offers during the initial solicitations leading to the above referenced contracts to appellant and awarded the contracts to the lowest, responsible offerors agreeing to perform the reprocured services at their originally bid prices.

8. The contracting officer computed the excess reprocurement costs for all terminated contracts in accordance with a procedure developed to provide a reasonably accurate comparison of the costs attributed to appellant's contract performance had the contracts not been terminated and the costs invoiced and paid under the reprocurement contracts. The bases for the cost comparisons were the prices, quantities, and square meter amounts as reflected on the last amendment to appellant's contracts issued prior to appellant's default. No increases in services required under the reprocurement contracts were included in the computation of excess reprocurement costs on the theory that appellant theoretically may not have accepted these changes to the contract requirements and pricing therefor. Decreases in contract requirements and contract prices were reflected for their effective date and included as decreases in contract requirements and prices for appellant's defaulted contracts as of that date. In accordance with this procedure, the actual cost comparisons were established separately for each month of contract performance. Prompt payment discounts were considered to the extent that, if offered by the reprocurement contractors and taken for prompt payment, it was assumed that payments to appellant would have been made in the same time

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frames. In a number of instances, appellant offered higher prompt payment discounts than the reprocurement contract, and the amount calculated in the assessments of excess reprocurement costs was based on the lower prompt payment discount offered by the reprocurement contractor.

9. The custodial services required under contract no. DAJA76-87-C-0625 covering the Abrams complex in Frankfurt were the most time critical because of an unperformed work order for certain specific scheduled services and an impending high-level meeting of NATO officials scheduled for 19 January 1988 in the Abrams complex. Twelve firms had submitted proposals in response to the initial solicitation. Adlatus-Alpha Reinigungs GmbH (Adlatus-Alpha), the second low offeror in the prior solicitation for this work, was contacted by the contract specialist and agreed to perform the work in accordance with its previous offer and proposed price. Based on the agreement by Adlatus-Alpha to perform the work in accordance with its previously proposed prices and the good competition in response to the initial solicitation, the contracting officer determined that the prices proposed by Adlatus-Alpha were fair and reasonable. Accordingly, on 15 January 1988, the contracting officer awarded contract no. DAJA76-88-C-0179 to Adlatus-Alpha for the performance period of 16 January 1988 to 30 June 1988, the remaining unexpired period of performance for the base period under appellant's terminated contract. This contract awarded to Adlatus-Alpha, consistent with the original solicitation, contained option provisions and prices for the option years that authorized the Government to extend the contract for two additional years at the prices quoted by Adlatus-Alpha in response to the initial solicitation.

10. Prior to appellant's abandonment of the work on 15 January 1988, the contracting officer's representative (COR) had requested the contracting officer to delete several areas of custodial services, which had not been performed by appellant due to construction activities in the Abrams complex, the effective date of the requested contract modification to be 1 February 1988. Moreover, since appellant had not performed custodial services in areas affected by the construction, the COR recommended that appellant's contract price be reduced, that a total of DM 22,692.24 be deducted from appellant's contract payments resulting from overpayments for work not performed, and that appellant be advised to reduce its monthly invoices by additional amounts for work not performed.

11. The proposed contract modification to appellant's contract was not issued prior to the termination of appellant's contract for default and the deleted work was not deleted from the reprocurement contract requirements as awarded to Adlatus-Alpha. On 17 March 1988, the contracting officer issued a modification to contract No. DAJA76-88-C-0179 decreasing the total floor space for custodial services and correcting a typographical error in the award of that contract resulting in the firm, fixed priced amount of DM 432,013.40.

12. On 30 September 1988, the contracting officer issued a final decision assessing excess reprocurement costs against appellant in the amount of DM 80,657.01 for the services performed and invoiced by Adlatus-Alpha under contract no. DAJA76-88-C-0179. As of 30 June 1988, payments under that contract to Adlatus-Alpha had totaled DM 431,703.01. Payments to appellant under the defaulted contract had appellant completed performance of the base period would have been DM 351,046.00. According to the contracting officer's final decision, the amount of excess reprocurement costs assessed therein applied only to the period of 15 January 1988 to 30 June 1988, and the Government reserved the right to assess additional excess reprocurement costs for the costs incurred during the two option years. Appellant timely appealed this decision, which appeal was docketed as ASBCA No. 38156.

13. By modification P00006 dated 30 June 1988, the Government exercised its option under contract no. DAJA76-88-C-0179 extending the contract for an additional one year term, from 1 June 1988 to 30 June 1989. There was general testimony from two contracting officers to the effect that prior to executing the options to extend the contract terms for all the contracts in dispute, the contracting officers acted on the reprocurement contracts in a manner consistent with the Federal Acquisition Regulation, namely that the Government determined that the services were still required and that the costs for obtaining the services through the exercise of the options would be the most advantageous to the Government, which determination was generally made on the basis of an informal survey. Neither of these contracting officers recalled whether this was done in the exercise of the options in these reprocurements, or indeed, if they were even involved in the exercise of these options. However, they testified that

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there should be documentation in the contract files reflecting the actions, and reasons therefor, that were taken to establish compliance with the Federal Acquisition Regulation. See tr. 1/63-65, 68-73. There is no evidence that the Government performed any price survey of potential offerors prior to exercising the option to extend this particular contract (C-0179) for an additional year or performed other determinations required by FAR § 17.207. There was no documentation in any of the appeal files for the respective contracts to establish the fact that the Government did perform such surveys or made any of the determinations required by FAR § 17.207. The testimony of the two contracting officers in this regard is general and tentative and, therefore, of little persuasive weight. Consistent with Adlatus-Alpha's initial proposal for the first option year, adjusted to reflect the deleted work, the firm, fixed price was increased by DM 962,365.60 to a revised total contract price in the total amount of DM 1,400,739.00. On 16 January 1989, the contracting officer issued a final decision assessing excess reprocurement costs against appellant in the amount of DM 49,503.93 for services invoiced by Adlatus-Alpha during the first quarter of this option period. As of 30 September 1988, Adlatus-Alpha had invoiced and been paid a total of DM 217,890.40 for this first quarter of the first option year. Had appellant completed performance of the same work under the defaulted contract for this period, the Government would have paid appellant DM 168,256.07 for those services. Appellant timely appealed this decision, which appeal was docketed as ASBCA No. 38722.

14. On 19 January 1989, the contracting officer issued a final decision assessing excess reprocurement costs against appellant in the additional amount of DM 41,025.08 for services invoiced by Adlatus-Alpha under contract no. DAJA76-88-C-0179 for the second quarter of the first option year. As of 31 December 1988, payments to Adlatus-Alpha had totaled DM 263,462.08 for services performed during the period of 1 October 1988 to 31 December 1988. Had appellant completed performance of the same work under the defaulted contract for this period, the Government calculated that it would have paid appellant DM 222,437.00. Appellant timely appealed this final decision, which appeal also was docketed as ASBCA No. 38722.

15. By final decision dated 15 May 1989, the contracting officer assessed excess reprocurement costs against appellant in the additional amount of DM 50,276.19 for services invoiced by Adlatus-Alpha under contract no. DAJA76-88-C-0179 for the third quarter of the first option year. As of 31 March 1989, payments to Adlatus-Alpha had totaled DM 218,010.90 for services performed during the period of 1 January 1989 to 31 March 1989. Had appellant completed performance of the same work under the defaulted contract, the total payments to appellant for this period would have been DM 166,676.79. Appellant timely appealed this decision, which appeal was docketed as ASBCA No. 39415.

16. The contracting officer issued a final decision dated 26 September 1989 assessing excess reprocurement costs against appellant in the additional amount of DM 42,901.80 for services invoiced by Adlatus-Alpha under contract no. DAJA76-88-C-0179 for the fourth quarter of the first option year. As of 31 July 1989, payments to Adlatus-Alpha for services performed during the period of 1 April 1989 to 30 June 1989 under this contract totaled the amount of DM 278,447.49. During this period, Adlatus-Alpha performed additional services not covered by appellant's defaulted contract. Accordingly, the contracting officer calculated the amount of excess reprocurement costs claimed by the Government by adjusting the amount invoiced by Adlatus-Alpha to delete amounts attributed to those additional services. Had appellant completed the work under the defaulted contract for that period, the Government calculated that its payments to appellant for this period would have totaled DM 218,672.68. Appellant timely appealed this decision, which appeal was docketed as ASBCA No. 40121.

17. The contracting officer exercised the option to extend contract no. DAJA76-88-C-0179 for a third year on 27 June 1989. The term under this option ran from 1 July 1989 to 30 June 1990. There was no evidence that the Government performed a price survey of the potential offerors prior to exercising the option to extend the contract for this additional year or made other determinations required by FAR § 17.207. See also finding 13, *supra*. The contract modification, in the amount of DM 1,028,855.54, increased the total contract price to a new fixed price amount of DM 2,441,163.33. On 28 September 1989, the contracting officer modified the contract further to incorporate additional services through the increase of floor space, carpet

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space, and glass area and increasing the contract price by DM 458.71.

18. The contracting officer issued a final decision on 26 November 1990 assessing appellant excess reprocurement costs in the amount of DM 80,374.40 for services performed by Adlatus-Alpha during the period of 1 January 1990 through 30 June 1990. Adlatus-Alpha invoiced and was paid under contract no. DAJA76-88-C-0179 for services performed during this period a total amount of DM 510,765.87. This amount included additional services under the contract modifications which were not a part of appellant's defaulted contract. Therefore, the contracting officer adjusted the amount paid Adlatus-Alpha for excess reprocurement cost calculations resulting in a recalculated amount of DM 477,246.98. Had appellant successfully completed performance of the work under its defaulted contract for this period, the amounts due appellant would have been DM 396,872.58. Appellant timely appealed the contracting officer's final decision assessing excess reprocurement costs for this period, which appeal was docketed as ASBCA No. 42530.

19. Under contract no. DAJA76-86-C-0478, appellant was required to perform custodial services in the EUD headquarters and north Frankfurt areas. The contracting officer had exercised the option to extend the contract for the first year option period on 24 August 1987. Appellant, therefore, abandoned performance of this contract in the middle of the first option year. The Government had previously issued a solicitation to 21 firms and had received 11 offers in connection with the original procurement of these services. The Government contracting officials decided that the pricing review and evaluation for the award of the reprocurement contracts would be based on the applicable base or option period prices offered by the offerors to this particular solicitation and that any modifications to appellant's defaulted contract would not be considered in the repurchase decision but would be negotiated after award of the reprocurement contract and incorporated in a contract modification after award.

20. On Friday, 15 January 1988, a Government contract specialist began to contact the offerors submitting offers in the original solicitation for this requirement, beginning with the second low offeror and proceeding up the list according to the prices offered. The contracting officer determined that the second low offeror in the initial procurement was non-responsible because it had a continuing record of unsatisfactory performance of its contracts and had been determined non-responsible several months earlier in connection with the award of an unrelated custodial services contract. Adlatus-Alpha was the third low offeror in the initial solicitation and agreed to perform the services at its originally offered prices. Based on Adlatus-Alpha's agreement to perform the work in accordance with its previously proposed prices and the fact that there had been good competition in response to the initial solicitation, the contracting officer determined that the proposed prices were fair and reasonable.

21. The contracting officer awarded the reprocurement contract, contract no. DAJA76-88-C-0178, to Adlatus-Alpha in the amount of DM 162,072.50 for custodial services to be performed during the period of 18 January 1988 through 31 August 1988, the period remaining on appellant's first option year. This contract to Adlatus-Alpha contained option provisions and prices for the option periods that authorized the contracting officer to exercise an option to extend the contract for one additional year, the sole remaining option year authorized under the initial solicitation. The contracting officer modified this contract on 17 March 1988 reducing some of the services and reducing the contract price to a new fixed price amount of DM 156,270.44.

22. Following additional contract modifications with minor changes to the required services, on 30 August 1988, the contracting officer issued a contract modification exercising the option to extend the contract for the period of 1 September 1988 through 31 August 1989 and increasing the contract price by DM 265,342.06. There is no evidence that the Government performed a price survey of potential offerors prior to exercising the option to extend the contract for this additional year or made the determinations required by FAR § 17.207, or that it reviewed its prior determination of nonresponsibility of the second low offeror in the original solicitation to determine if that firm continued to be nonresponsible at the time of the exercise of the option. See also findings 13 and 20, *supra*.

23. The contracting officer issued a final decision on 22 February 1989 assessing excess reprocurement costs against appellant in the amount of DM 876.56 for the period of 15 January 1988 through 30 November 1988. Adlatus-Alpha had invoiced and been paid for services performed during this pe-

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riod DM 228,716.52. As a result of the various contract modifications issued by the contracting officer changing the performance requirements, the contracting officer adjusted this amount for excess reprocurement costs computations by reducing the amount for the decreases in work requirements and ignoring any increases in prices due to increased services. Accordingly, the contracting officer determined that for purposes of cost comparisons for excess reprocurement cost assessment, the computed amount of payments to Adlatus-Alpha totaled DM 215,320.53. According to the contracting officer's computations, had appellant performed the services during this period, payment to appellant for services during this period would have been DM 214,445.97. Appellant timely appealed the contracting officer's decision, which appeal was docketed as ASBCA No. 38717.

24. Adlatus-Alpha's contract payments for services performed during the period of 18 January 1988 to 31 August 1988 totaled DM 168,042.35. This amount was adjusted for excess reprocurement cost comparison purposes to reflect the decrease in services effected by modification P00001 issued on 17 March 1988 to DM 154,650.36. According to the contracting officer's calculations, had appellant performed this work during this period, appellant would have been paid a total of DM 155,204.52. Therefore, the calculated costs under appellant's defaulted contract exceeded the calculated costs of the reprocurement contract for the unexpired period of 18 January 1988 to 31 August 1988 by DM 554.16. Payments to Adlatus-Alpha for the period of 1 September 1988 through 30 November 1988 totaled DM 60,674.17. Had appellant completed performance of this work for this period under the defaulted contract, payments to appellant would have totaled DM 59,241.45. Therefore, excess reprocurement costs for this period totaled DM 1,432.72.

25. The contracting officer issued a final decision on 26 September 1989 assessing excess reprocurement costs against appellant in the amount of DM 188.73 for the period of 1 December 1988 through 30 June 1989, the last seven months of the final option period. Adlatus-Alpha had invoiced and been paid for services performed during this period DM 148,770.57. As a result of the various contract modifications issued by the contracting officer changing the performance requirements, the contracting officer adjusted this amount for excess reprocurement costs computations by reducing the amount for the decreases in work requirements and ignoring any increases in prices due to increased services. The contracting officer determined that for purposes of cost comparisons for excess reprocurement cost assessment, the computed amount of payments to Adlatus-Alpha totaled an amount of DM 146,979.81. According to the contracting officer's computations, had appellant performed the services during this period, payment to appellant for the services during this period would have been DM 146,821.08. Using the contracting officer's calculations, we have calculated the excess reprocurement costs for this period as DM 158.73 rather than the DM 188.73 assessed by the contracting officer. Appellant timely appealed the contracting officer's decision, which appeal was docketed as ASBCA No. 40122.

26. Under contract no. DAJA76-86-C-0506, appellant was required to perform custodial services in the north Frankfurt Drake and Edwards Kasernes areas. The contracting officer issued a contract modification on 14 August 1987 exercising the option which extended the contract for the period of 1 September 1987 through 31 August 1988. Following appellant's notification of 13 January 1988 that it was terminating contract performance on all the above referenced contracts, appellant abandoned performance of this contract on 15 January 1988.

27. Following the procedure which had been established for the reprocurement of all contract requirements to avoid, as much as possible, a significant lapse of required custodial services, the Government contracting officials began contacting the offerors submitting the low offers in response to the initial solicitation for this requirement. Nine firms submitted responses to the initial solicitation. The second low offeror, Weichelt Gebaeudereinigung GmbH, had been performing unsatisfactorily on eight contracts in various areas in Germany and had been previously determined non-responsible. The third low offeror, Gebaeude-Service Dr. Zimmermann GmbH, also had a record of unsatisfactory performance on its current contracts and was determined to be non-responsible. Adlatus-Alpha was the next low offeror and agreed to perform the services at its originally proposed prices, beginning its performance on 19 January 1988. Because Adlatus-Alpha agreed to perform the work in accordance with its previously proposed prices and due to the fact that there had been good price competition in

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response to the initial solicitation, the contracting officer determined that Adlatus-Alpha's proposed prices were fair and reasonable.

28. The contracting officer, therefore, awarded contract no. DAJA76-88-C-0177 to Adlatus-Alpha for the custodial services in the north Frankfurt Drake and Edwards Kasernes areas for the period of 18 January 1988 through 31 August 1988. This contract awarded to Adlatus-Alpha contained option provisions and prices for option periods that authorized the contracting officer to exercise the option to extend the contract for an additional one year period, the remaining option year available under the original solicitation. The contracting officer issued a contract modification on 30 August 1988 exercising an option to extend the contract for a year, extending from 1 September 1988 to 31 August 1989. There is no documentary evidence that the Government performed a price survey of potential offerors prior to exercising this option to extend the contract for an additional year or made the determinations required by FAR § 17.207, or that it reviewed its prior determinations of nonresponsibility of the two lower offerors in the initial solicitation to determine if they were still nonresponsible at the time the contracting officer exercised the option. See also findings 13 and 27, *supra*.

29. The contracting officer issued a final decision dated 17 October 1988 assessing excess reprocurement costs against appellant under contract no. DAJA76-87-C-0506 for excess reprocurement costs in the total amount of DM 21,027.43 incurred during the period of 15 January 1988 through 31 August 1988. As of 31 August 1988, Adlatus-Alpha had invoiced and been paid an amount of DM 182,209.66 for services performed during this period under its contract no. DAJA76-88-C-0177. Had appellant performed the same work under its defaulted contract, payments to appellant for this period would have totaled DM 161,182.23. Although the contracting officer's final decision stated that the amount of excess reprocurement costs asserted therein applied only to the period of 15 January 1988 to 31 August 1988, the contracting officer stated therein that the Government reserved its right to assert further excess reprocurement costs for the period after 31 August 1988. Appellant timely appealed this final decision, which decision was docketed as ASBCA No. 38155.

30. On 15 February 1989, the contracting officer issued a final decision assessing further excess reprocurement costs against appellant under contract no. DAJA76-87-C-0506. The amount asserted by the Government in this final decision was DM 10,444.75 for the excess reprocurement costs incurred during the period of 1 September 1988 through 30 November 1988. As of 30 November 1988, Adlatus-Alpha had invoiced and been paid DM 79,904.34 for services performed during the period of 1 September 1988 through 30 November 1988. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled DM 69,459.59. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 38718.

31. The contracting officer issued a final decision on 26 September 1989 assessing additional excess reprocurement costs against appellant under contract no. DAJA76-87-C-0506. The amount asserted by the Government in this final decision was DM 22,724.21 for the excess reprocurement costs incurred during the period of 1 December 1988 through 30 June 1989. As of 30 June 1989, Adlatus-Alpha had invoiced and been paid DM 164,768.30. Had appellant completed the same work under its defaulted contract for this period, payment to appellant under the defaulted contract would have totaled DM 142,044.09. Appellant timely appealed this decision, which appeal was docketed as ASBCA No. 40123.

32. Under contract no. DAJA76-86-C-0507, appellant was required to perform custodial services in the north Frankfurt areas of Camp King, Oberusel, and Weisskirchen. The contracting officer issued a contract modification on 5 September 1987 exercising the option to extend the contract for the period of 1 September 1987 through 31 August 1988. Following appellant's notification of 13 January 1988 that it was terminating contract performance on all the above referenced contracts, appellant abandoned performance of this contract on 15 January 1988.

33. Following the procedure which had been established for the reprocurement of all contract requirements to avoid, as much as possible, a significant lapse of required custodial services, the Government contracting officials began contacting the offerors submitting the low offers in response to the initial solicitation for this requirement. Nine firms submitted responses to the initial solicitation. The second low offeror, Weichelt Gebaeudereinigung GmbH, had

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been performing unsatisfactorily on eight contracts in various areas in Germany and had been previously determined non-responsible. The third low offeror, Gebaeude-Service Dr. Zimmermann GmbH, also had a record of unsatisfactory performance on its current contracts and was determined to be non-responsible. The fourth low offeror was Uniputz, which was no longer in existence. The fifth low offeror was ICS GmbH & Co. KG, and had a record of unsatisfactory performance on its contracts and was, at the time, subject to a cure notice. ICS GmbH was, therefore, determined to be non-responsible and was not considered for award of the reprocurement contract. Adlatus-Alpha was the next low offeror and was the only contractor within the zone of competition with the necessary work force and equipment to perform the work in a satisfactory manner. Adlatus-Alpha agreed to perform the services at its originally proposed prices, beginning its performance on 19 January 1988. Because Adlatus-Alpha agreed to perform the work in accordance with its previously proposed prices and due to the fact that there had been good price competition in response to the initial solicitation, the contracting officer determined that Adlatus-Alpha's proposed prices were fair and reasonable.

34. The contracting officer awarded contract no. DAJA76-88-C-0180 to Adlatus-Alpha for the custodial services for Camp King, Oberusel, and Weisskirchen areas for the period of 19 January 1988 through 31 August 1988, the time remaining unexpired under appellant's terminated contract for the first option year. This contract contained option provisions and prices for the option years that authorized the contracting officer to exercise the option to extend the contract for an additional year, the remaining option year available under the original solicitation. The contracting officer issued several modifications incorporating certain changes, adding and reducing services under the contract. The contracting officer issued a contract modification on 8 August 1988 exercising an option to extend the contract for a year, extending from 1 September 1988 to 31 August 1989. There is no evidence that the Government performed a price survey of potential offerors prior to exercising the option to extend the contract for this additional year or made the determinations required by FAR § 17.207, or that it reviewed its prior determinations of nonresponsibility of the three lower offerors in the initial solicitation to determine if they were still nonresponsible at the time the contracting officer exercised the option. See also findings 13 and 33, *supra*.

35. On 31 January 1989, the contracting officer issued a final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0507. The amount asserted by the Government in this final decision was DM 33,054.46 for the excess reprocurement costs incurred during the period of 15 January 1988 through 31 August 1988. As of 31 August 1988, Adlatus-Alpha had invoiced and been paid DM 113,383.54 for services performed during the period of 15 January 1988 through 31 August 1988. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled DM 80,329.08. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 38719.

36. The contracting officer, on 25 November 1990, issued a further final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0507 in the amount of DM 51,774.26 for the period of 1 September 1988 through 31 August 1989. As of 31 August 1989, Adlatus-Alpha had invoiced and been paid DM 210,783.12 for services performed during the period of 1 September 1988 through 31 August 1989. As a result of the contract modifications issued which increased work requirements, the contracting officer, consistent with the procedure described above in finding 8, adjusted the amount calculated for excess reprocurement assessment purposes to DM 193,906.73. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled DM 142,132.47. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 42528.

37. Under contract no. DAJA76-86-C-0509, appellant was required to perform custodial services in the Roedelheim/Hausen areas. The contracting officer issued a contract modification on 5 September 1987 exercising the option to extend the contract for the period of 1 September 1987 through 31 August 1988. Following appellant's notification of 13 January 1988 that it was terminating contract performance on all the above referenced contracts, appellant abandoned performance of this contract on 15 January 1988.

38. Following the procedure which had been established for the reprocurement of all contract requirements to avoid, as much

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as possible, a significant lapse of required custodial services, the Government contracting officials began contacting the offerors submitting the low offers in response to the initial solicitation for this requirement. Eleven firms submitted responses to the initial solicitation. The second low offeror, Weichelt Gebaeudereinigung GmbH, had been performing unsatisfactorily on eight contracts in various areas in Germany and had been previously determined non-responsible. The third low offeror, Gebaeude-Service Dr. Zimmermann GmbH, also had a record of unsatisfactory performance on its current contracts and was determined to be non-responsible. The fourth low offeror was Uniputz, which was no longer in existence. The fifth low offeror was Deutsche Industrie-Wartung, which declined to accept any reprocurement contract for this work. Adlatus-Alpha was the next low offeror and was the only contractor within the zone of competition with the necessary work force and equipment to perform the work in a satisfactory manner. Adlatus-Alpha agreed to perform the services at its originally proposed prices, beginning its performance on 19 January 1988. Because Adlatus-Alpha agreed to perform the services at its originally proposed prices and due to the fact that there had been good price competition in response to the initial solicitation, the contracting officer determined that Adlatus-Alpha's prices were fair and reasonable.

39. The contracting officer awarded contract no. DAJA76-88-C-0181 to Adlatus-Alpha for the custodial services in the Roedelheim/Hausen areas for the period of 18 January 1988 through 31 August 1988, the period remaining to be completed under appellant's terminated contract for the first year option period. This contract contained option provisions and option year prices that authorized the contracting officer to exercise the option for an additional one-year period, the remaining option year available under the original solicitation. On 7 September 1988, the contracting officer issued a contract modification exercising the option to extend the contract for the period of 1 September 1988 through 31 August 1989. There is no evidence that the Government performed a price survey of potential offerors prior to exercising the option to extend the contract for this additional year or made the determinations required by FAR § 17.207, or that it reviewed its prior determinations of nonresponsibility of two of the lower offerors to determine if they were still nonresponsible at the time the contracting officer exercised the option. See also findings 13 and 38, *supra*. Moreover, there was no evidence that the Government contacted the fifth low offeror in the initial solicitation to determine if it was interested in submitting an offer for the work covered by the option.

40. On 10 February 1989, the contracting officer issued a final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0509. The amount asserted by the Government in this final decision was DM 28,550.73 for the excess reprocurement costs incurred during the period of 18 January 1988 through 31 August 1988. As of 31 August 1988, Adlatus-Alpha had invoiced and been paid DM 199,698.73 for services performed during the period of 15 January 1988 through 31 August 1988. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled DM 171,148.00. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 38720.

41. The contracting officer, on 25 November 1990, issued a further final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0509 in the amount of DM 53,382.90 for the period of 1 September 1988 through 31 August 1989. As of 31 August 1989, Adlatus-Alpha had invoiced and been paid DM 384,999.97 for services performed during the period of 1 September 1988 through 31 August 1989. As a result of the contract modifications issued which increased work requirements, the contracting officer, consistent with the procedure described above in finding 8, adjusted the amount calculated for excess reprocurement assessment purposes to DM 358,180.31. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled for this period DM 304,797.41. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 42529.

42. Under contract no. DAJA76-87-C-0519, appellant was required to perform custodial services in the Wiesbaden schools. Following appellant's notification of 13 January 1988 that it was terminating contract performance on all the above referenced contracts, appellant abandoned performance of this contract on 15 January 1988.

43. Following the procedure which had been established for the reprocurement of

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all contract requirements to avoid, as much as possible, a significant lapse of required custodial services, the Government contracting officials began contacting the offerors submitting the low offers in response to the initial solicitation for this requirement. The second low offeror which responded to the initial solicitation declined to participate in the reprocurement solicitation. The third low offeror, Ferd. Ruegamer, Gebaude u. Machinenreingung (Ferd. Ruegamer), agreed to perform the services in accordance with the originally proposed price proposal.

44. On 15 January 1988, the contracting officer awarded contract no. DAJA86-88-C-0022 to Ferd. Ruegamer for the custodial services for the dependent schools in the Wiesbaden area for the period of 19 January 1988 through 31 May 1988, the unexpired period remaining in the base year of appellant's terminated contract. This contract contained option provisions and option year prices that authorized the contracting officer to exercise the options for two additional one-year periods, the remaining option years available under the original solicitation. On 21 May 1988, the contracting officer issued a contract modification exercising the option to extend the contract for the period of 1 June 1988 through 31 May 1989. The contracting officer issued a further contract modification on 2 June 1989 exercising the option to extend the contract for an additional year, for the additional period of 1 June 1989 through 31 May 1990. There is no evidence that the Government performed price surveys of potential offerors prior to exercising these options to extend the contract for these additional periods or made the determinations required by FAR § 17.207, or that it contacted the lower offeror to determine if it was interested in submitting an offer for the work covered by the option. See also findings 13 and 43, *supra*.

45. By letter dated 26 September 1989, the contracting officer issued a final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-87-C-0519. The amount asserted by the Government in this final decision was DM 78,210.54 for the excess reprocurement costs incurred during the period of 18 January 1988 through 31 May 1989, the remaining portion of the basic year awarded to appellant and all of the first option year. As of 31 May 1988, the reprocurement contractor, Ferd. Ruegamer had been paid DM 323,197.74 for services performed during the period of 18 January 1988 through 31 May 1988. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled DM 315,515.00. The total amount of excess reprocurement costs for this period was DM 7,682.74.

46. Payments to Ferd. Ruegamer totaled DM 860,267.30 for the first option year running from 1 June 1988 through 31 May 1989. According to the contracting officer's computations, had appellant performed the same work under the defaulted contract for this period, payments to appellant would have totaled DM 731,373.20. According to our computations based on the record provided by the Government, payments to appellant for this period would have totaled DM 794,510.20. The contracting officer's computations, based on the calculated monthly differences of payments made to Ferd. Ruegamer and calculated payments to appellant had appellant performed the work during this period resulted in a total difference of DM 70,527.80 between the calculated payments to Ferd. Ruegamer and calculated payments to appellant. Our calculations of the total difference between the total monthly amounts paid Ferd. Ruegamer and the deemed total monthly amounts payable to appellant had appellant performed the work totaled an amount of DM 65,757.10. Appellant timely appealed the final decision of 26 September 1989 (finding 45), which appeal was docketed as ASBCA No. 40124.

47. The contracting officer, on 17 April 1990, issued a further final decision assessing excess reprocurement costs against appellant under contract no. DAJA76-87-C-0519 in the amount of DM 33,689.42 for the period of 1 June 1989 through 31 December 1989. As of 31 December 1989, Ferd. Ruegamer had invoiced and been paid DM 488,782.00 for services performed during the period of 1 June 1989 through 31 December 1989. As a result of the contract modifications issued which increased work requirements, the contracting officer, consistent with the procedure described above in finding 8, adjusted the amount calculated for excess reprocurement assessment purposes to DM 482,359.42. Had appellant performed the same work under the defaulted contract for this period, payments to appellant under its contract would have totaled for this period DM 448,670.00. Appellant timely appealed this final decision, which appeal was docketed as ASBCA No. 42531.

48. By letter dated 18 February 1988, the Volksbank Gelnhausen, submitted to the

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Chief of the Regional Contracting Office, Frankfurt, a listing of outstanding invoices submitted by appellant under the six custodial contracts that remained unpaid as of that date. The total amount identified as due was DM 367,373.30. Following a meeting between the parties on 26 February 1988, appellant, by letter dated 2 March 1988, provided the Government a listing of outstanding unpaid invoices under the six contracts asserting DM 367,373.30 due appellant. On 12 September 1988, appellant submitted to the contracting officer a properly certified claim in the total amount of DM 354,774.41 and requested contracting officer decisions on the reprocurement costs under the six contracts and immediate payment of the outstanding invoices. In its claim, appellant conceded deductions under the contract on three of the invoices. Appellant, in this letter, included a claim for Prompt Payment Act penalties and Contract Disputes Act interest on its unpaid invoices, in addition to its claim for payment of the invoices.

49. The record does not contain appellant's invoices, as identified in the 18 February 1988 letter from the Volksbank Gelnhausen and appellant's letter of 12 September 1988, under the six contracts. However, appellant, in its letter of 12 September 1988, identifies the specific invoices under their related contracts and the dates these invoices were submitted to the Government. Of the total claimed unpaid invoice amount of DM 354,774.41, ten invoices against all contracts were submitted prior to the termination for default and totaled DM 277,552.41. According to appellant's letter, one of these invoices, in the amount of DM 26,527.00, was submitted to the Government on 30 November 1987, and the remaining invoices were submitted on 21 and 31 December 1987. Following the termination for default, according to appellant's letter of 12 September 1988, appellant, on 26 January 1988, submitted seven additional invoices totaling DM 89,430.39, less an amount of DM 12,178.89 for accepted deductions, for a total amount due of DM 77,252.00 [sic, DM 77,251.50].

50. The Government, in a spread sheet setting forth the date of the various final decisions, contract numbers, reprocurement costs, setoffs, appellant's invoiced amounts, and the amount of setoff, does not provide any information concerning the dates appellant submitted the invoices identified by appellant in its letter of 12 September 1988. However, in an attached spread sheet identifying the invoices, the dates of the invoices correspond with those identified by appellant, although the amounts of most of the invoices identified by the Government do not correspond with the amounts asserted by appellant. There is no evidence in the record concerning the dates when the invoices were received or physically arrived in the contractually designated Government payment office. Moreover, there is no evidence in the record that the Government ever notified appellant within 15 days after it received these invoices that it considered them to be improper.

51. On 8 December 1988, the contracting officer responded to appellant's claim in a letter to appellant's attorneys stating that several final decisions on excess reprocurement cost assessments had been issued under two of the contracts and that several additional contracting officer's final decisions under three other contracts would be issued within 30 days. The two final decisions identified by the contracting officer as having been issued under contract no. DAJA76-87-C-0625 and contract no. DAJA76-86-C-0506 asserted excess reprocurement costs only and did not attempt to setoff the amounts claimed by the Government against amounts due appellant under any of appellant's contracts. According to the contracting officer, as stated in this letter, a separate final decision on appellant's claim of 12 September 1988 was not deemed to be necessary.

52. Appellant, by notice of appeal dated 21 December 1988, appealed a deemed denial of its claim for DM 354,774.41 for the unpaid invoices and the contracting officer's final decisions under contract no. DAJA76-87-C-0625 and DAJA76-86-C-0506 asserting excess reprocurement costs. The appeal from the deemed denial of the claim for unpaid invoices was docketed as ASBCA No. 38154.

53. In his letter of 8 December 1988 to appellant's attorneys, the contracting officer stated that final decisions assessing excess reprocurement costs against appellant would be issued under contracts nos. DAJA76-86-C-0478, DAJA76-86-C-0507, and DAJA76-86-C-0509 within thirty days. On 22 February 1989, the contracting officer issued a final decision assessing excess reprocurement costs, in the amount of DM 876.56, under contract no. DAJA76-86-C-0478, and formally asserting a setoff of this amount against three invoices from appellant on amounts due appellant (finding 23). Both the assessment of excess

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reprocurement costs and setoff were included in appellant's appeal docketed as ASBCA No. 38717. On 31 January 1989, the contracting officer issued a final decision assessing excess reprocurement costs, in the amount of DM 33,054.46, under contract no. DAJA76-86-C-0507, and asserting a setoff of this amount against an invoice from appellant on an amount due appellant (finding 35). Both the assessment of excess reprocurement costs and the setoff were included in appellant's appeal docketed as ASBCA No. 38719. On 10 February 1989, the contracting officer issued a final decision assessing excess reprocurement costs, in the amount of DM 28,550.73, under contract no. DAJA76-86-C-0509, and asserting a setoff of this amount against invoices from appellant on amounts due appellant under this and several other contracts (finding 41). Both the assessment of excess reprocurement costs and setoffs were included in appellant's appeal docketed as ASBCA No. 38720.

54. In his final decisions of 16 January 1989, 19 January 1989, 15 May 1989, and 26 September 1989, assessing excess costs against appellant under contract no. DAJA76-87-C-0625, the contracting officer also asserted setoffs of the amounts claimed as excess reprocurement costs against invoices from appellant on amounts due under that contract (findings 13-16). Both the assessments of excess reprocurement costs and the setoffs were included in appellant's appeals docketed as ASBCA Nos. 38722, 39415, and 40121. In addition to these final decisions under contract no. DAJA76-87-C-0625, the contracting officer, on 27 February 1989, issued a further final decision amending his final decision of 19 January 1989, asserting setoffs of the claimed excess reprocurement costs under its 19 January 1989 decision against invoices from appellant on amounts due appellant under contracts nos. DAJA76-86-C-0478 and DAJA76-87-C-0519. Appellant appealed this final decision, which appeal was docketed as ASBCA No. 38722, and consolidated with the appeal docketed as ASBCA No. 38154.

55. In his final decisions of 26 September 1989 assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0478, the contracting officer also asserted setoffs of the amounts claimed as excess reprocurement costs against invoices from appellant on amounts due under contract no. DAJA76-87-C-0519 (finding 25). This final decision and appeal therefrom were included in the appeal docketed as ASBCA No. 40122.

56. In his final decisions of 15 February 1989 and 26 September 1989 assessing excess reprocurement costs against appellant under contract no. DAJA76-86-C-0506, the contracting officer also asserted setoffs of the amounts claimed as excess reprocurement costs against invoices from appellant on amounts due under contract no. DAJA76-86-C-0478 and contract no. DAJA76-87-C-0519 (findings 30-31). The setoffs included in these final decisions were included in the appeals from the assessment of excess reprocurement costs docketed as ASBCA Nos. 38718 and 40123.

57. In his final decision of 26 September 1989 assessing excess reprocurement costs against appellant under contract no. DAJA76-87-C-0519, the contracting officer also asserted setoffs of the amounts claimed as excess reprocurement costs against invoices from appellant on amounts due under that contract and contract no. DAJA76-86-C-0506 (finding 45). The setoffs included in this final decision were included in the appeal from the assessment of excess reprocurement costs, which appeal was docketed as ASBCA No. 40124.

58. During the hearing in these appeals, appellant's sole surviving managing director responsible for the liquidation of appellant firm and his counsel proposed, as settlement of its claim for unpaid invoices and the appeal docketed as ASBCA No. 38154, the amount of DM 350,524.42. The contracting officer and Government trial attorney accepted this proposal and stipulated this amount as the amount due under the subject contracts.

59. The contracting officers assessed a total amount of DM 678,664.40 as excess reprocurement costs against appellant under all six contracts. However, according to our calculations, the total amount of excess reprocurement costs that could have been assessed against appellant under all its terminated contracts, including option periods exercised under the reprocurement contracts, was DM 674,417.88. The difference between our calculation and the amount assessed by the contracting officer resulted from mathematical errors in the contracting officer's calculations, and the contracting officer's totaling the excess costs asserted under the contracts without regard to whether in certain instances, the reprocurement contract costs were less than the calculated costs for appellant had it completed the work, whereas we calculated costs by contract period for each of the contracts and did not include costs in which appellant's

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calculated costs exceeded those of the reprocurement contractor for the like period. Of the amount of excess reprocurement costs asserted under all contracts, the total amount of excess reprocurement costs assessed against appellant under all the contracts for the base periods in the reprocurement contracts was DM 170,972.39. The total amount of excess reprocurement costs attributed to costs incurred during the option periods of the six reprocurement contracts was DM 503,445.49.

DECISION

Appellant contends under ASBCA No. 38154 that it is entitled to Prompt Payment Act interest penalties on its unpaid invoices and entitled to interest under the Contract Disputes Act on its unpaid invoice claim of 12 September 1988. Except with respect to the stipulation between the parties and settlement concerning the amount of unpaid invoices during the hearing, the issues raised in this appeal were not addressed by the parties during the hearing. Moreover, although appellant addressed the appeal and its claim for Prompt Payment interest penalty and Contract Disputes Act interest on the unpaid invoices in its post-hearing brief, the Government did not address any issue raised by this appeal in its post-hearing brief.

The contracts in dispute in these appeals were awarded prior to the 1988 amendments to the Prompt Payment Act. Therefore, we address the law as it existed prior to the 1988 amendments. The Prompt Payment Act (31 U.S.C. § 3901-3906) provides, in pertinent part, that a payment is due 30 days after the receipt of a proper invoice, unless the contract establishes a different date, and that an interest penalty is assessed from that date if payment is not made within a 15-day grace period after the due date (*id.*, at § 3902). However, under both the Act and OMB Circular A-125, interest penalties are not required when payment is delayed because of a dispute over the amount of the payment or other issues concerning compliance with the contract, but may be due under a claim filed under the Contract Disputes Act.

As we found above, there was no evidence in the record concerning the dates the Government received the invoices identified in appellant's claim, or that the Government ever notified appellant that it considered the invoices improper. Nor was there any evidence that the work required by the contracts for which the invoices were submitted was not accepted by the Government. Therefore, although there is no basis for specific findings with respect to when the Government received the invoices and whether or not they were proper invoices, we assume for the purpose of considering the applicability of possible Prompt Payment Act interest penalty to these invoices that the invoices in question were received by the Government on the dates of the invoices, that they were proper invoices, and that the work represented as performed was accepted. Based on these assumptions, the payment date for appellant's invoice in the amount of DM 26,527.00, submitted to the Government on 30 November 1987, was 15 January 1988, which included the 30-day payment date and the 15 days grace period authorized by the Act in which to make payment without incurring the Prompt Payment Act interest penalty (finding 47). The payment date for the invoices submitted by appellant in late December 1987 was 15 February 1988, which included the 30-day payment date and the 15 days grace period authorized by the Act in which to make payment without incurring the Prompt Payment Act interest penalty (*id.*). The payment date for the invoices dated 26 January 1988 was 15 March 1988 absent any dispute concerning these invoices, which date also included the 30-day payment date and the 15 days grace period authorized by the Act in which to make payment without incurring the Prompt Payment Act interest penalty. It is unclear from the record when the Government took the deductions on some of the invoices and which deductions were accepted by the appellant.

Although there is no documentation in the record concerning the invoices in dispute, the parties appear to be in general agreement concerning the amounts of the invoices and the approximate dates they were received by the Government. As a result of the stipulated agreement between the parties as to the total amount due under these invoices, the sole issue before us is whether or not the delayed payments for which appellant claims Prompt Payment Act interest penalty and Contract Disputes Act interest involved disagreements over the amounts due at the time of their submission or other issues of contract compliance.

This raises an issue concerning the possible tolling of the payment due dates because of the terminations for default of the six contracts in question on 15 January 1988 following appellant's 13 January 1988 notifi-

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cation that it was terminating its performance of the contracts on 15 January 1988. In accordance with § 3906(c) of the Prompt Payment Act, the payment period is tolled if a dispute exists concerning the amount of payment or compliance with the contract. 31 U.S.C. § 3906(c) (1982); OMB Cir. A-125, § 8(c); *James Lowe, Inc.*, ASBCA No. 42026, 92-2 BCA ¶ 24,835; *see also*, Michael J. Renner, *Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment*, 21 Pub. Cont. L. J. 177, 215 (Winter 1992). Except with respect to appellant's notice of termination of its contract performance under all the contracts and the subsequent terminations of the contracts for default, there is no evidence that there existed any dispute between the parties concerning the amount of payments or compliance with the contracts. Neither party has addressed this issue, either in the record or in their briefs.

We have not previously directly addressed this issue. However, where, as here, the contractor has defaulted, the Government is entitled, in accordance with its common law right of setoff and with the regulation, to withhold a reasonable amount of the monies due the defaulted contractor. *C.f., Southland Construction Co.*, VABCA Nos. 2217, 2543, 89-1 BCA ¶ 21,548, at 108,456-58; which relied, in part, on FAR § 49.402-6.

Moreover, under the terms of the DEFAULT clause, appellant was subject to liability to the Government for any excess costs for services reprocured similar to those terminated. Appellant does not, in these appeals, dispute the propriety of the terminations of the contracts for default. Indeed, appellant knew, or should have known, on 13 January 1988, when it delivered its letter informing the Government that it was terminating its performance under all the contracts in dispute here that it was subject to liability for excess reprocurement costs.

Although it is clear, under the above cited regulation and the facts of this case, that the Government may not assess excess reprocurement costs against appellant until after the Government awarded the reprocurement contracts and paid the reprocurement contractors, this does not require the Government to pay appellant for its accepted services under its outstanding invoices, without regard to its right of setoff, pending such an assessment to avoid Prompt Payment Act interest penalties. All that is required under the Act is that any questions concerning whether appellant's performance was in compliance with the contract be raised in good faith in order to establish a *bona fide* dispute between the parties. H.R. Rep. No. 461, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. Code Cong. & Ad. News 111, 125; *Arkansas Best Freight System, Inc. v. United States* [36 CCF ¶ 75,905], 20 Cl. Ct. 776, 779 (1990). Moreover, as the court stated in *Arkansas Best Freight System, Inc. v. United States*, at 779, there must be, at the time payment of an invoice is delayed, a "present basis for delaying payment which is related to an objective discernible dispute." The fact that an appellant may ultimately prevail on the merits of the underlying dispute does not defeat an otherwise proper withholding of payment where there is a good faith dispute with respect to whether the appellant's performance was in compliance with the contract at the time of the withholding. *C.f., Toombs & Co., Inc.*, ASBCA Nos. 35085, 35086, 91-1 BCA ¶ 23,403, at 117,428-29. At the time the Government delayed payment of appellant's invoices and initiated withholding action, it was in the process of awarding reprocurement contracts and, on the basis of the prices of those contracts, including prices for the option periods, and in the position of estimating its total reprocurement costs although it was unable to assess such reprocurement costs against appellant until it had paid the reprocurement contractors.

As we found above, appellant submitted ten invoices prior to the terminations of the contracts for default, all except one were for payment due after the termination for default. One of these invoices, in the amount of DM 26,527.00, was submitted to the Government on 30 November 1987, with payment due, on or about 30 December 1987 or, with the 15-day grace period, due 15 January 1988, two days after appellant informed the Government that it was terminating its performance of all contracts, and the day the Government terminated these contracts for default. We hold that on 13 January 1988, there was a disagreement between the parties regarding appellant's compliance with all the contracts and that this disagreement tolled the payment due date on these ten invoices submitted prior to the terminations for default. We further hold that, with respect to the seven invoices submitted under the various contracts on 26 January 1988, after the terminations of the contracts for default, there was an existing disagreement between the parties regarding appellant's compliance with the contracts and that the interest penalty on these invoices did not start to accrue. *Zinger Construction Co., Inc.*, ASBCA No. 41690, 92-1 BCA ¶ 24,652.

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Moreover, we have held that where the contracting officer justifiably withholds payment in accordance with the contract, the Prompt Payment Act interest penalty does not accrue with respect to the amount properly withheld. *Steven E. Jawitz,* ASBCA No. 33610, 87-3 BCA ¶ 20,011. Accordingly, we hold that appellant is not entitled to any Prompt Payment Act interest penalties on these 17 invoices.

Although appellant concedes that it breached all six contracts by anticipatory repudiation, appellant contends that the Government failed to mitigate its damages upon the breach of the contracts. The gist of appellant's position is that the applicable legal standard requires the Government to reprocure services after default using competition to the maximum extent practicable. According to appellant, it was practicable for the Government to obtain competitive offers from numerous firms rapidly during the last week of appellant's contract performance, and to obtain full and open competition to reprocure the services covered by the unexercised options in appellant's contracts.

The Government's basic positions are that its reprocurements of the services were reasonable and that the prices it paid for the reprocured services were reasonable. Although the Government concedes that competitive reprocurement is preferred, it contends that noncompetitive awards of reprocurement contracts have been upheld by the Board where the Government urgently needs the services and the prices for such reprocured services are reasonable.

Under FAR § 49.402-6 and the DEFAULT clause of appellant's contracts, the contracting officer is authorized to reprocure the services still required after the terminations of the contracts for default under "the terms and in the manner the Contracting Officer considers appropriate." As stated by the court in *Cascade Pacific International v. United States* [33 CCF ¶ 73,958], 773 F.2d 287, 293-94 (Fed. Cir. 1985):

> [E]xcess reprocurement costs may be imposed only when the Government meets its burden of persuasion that the following conditions (factual determinations) are met: (1) the reprocured supplies are the same or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default.

The first condition is satisfied by comparison of the services reprocured with the services terminated. *Cascade Pacific International v. United States, supra.* There is no dispute concerning the similarity of the reprocurement services and contracts. Indeed, as our findings set forth, all the reprocurement contracts were awarded under the same terms and conditions as the defaulted contracts inasmuch as awards were made in accordance with the original solicitations. Moreover, as we found above, in those instances in which work was added or deleted by modification to the reprocurement contracts, the contracting officer did not include the additional work in the computation of excess reprocurement costs and made an adjustment to appellant's contracts to delete the costs of the deleted work.

The second condition requires that the Government establish what was spent in the reprocurement. *Id.* There is no dispute concerning the prices paid by the Government to the reprocurement contractors. As set forth in our findings, the contracting officer's assessments of the reprocurement costs against appellant are supported by the respective reprocurement contracts, the invoices received from the reprocurement contractors and paid by the Government, and the Government's computations of the excess costs to be assessed based on the adjustments to the reprocurement costs to account for any contract modifications to the reprocurement contracts, and subject to our mathematical adjustments, so that there is an accurate comparison between the prices paid on the reprocurement contracts and calculated prices that would have been paid appellant had appellant completed contract performance.

As stated by the court in *Cascade Pacific International v. United States,* "The third condition requires that the Government act within a reasonable time of the default, use the most efficient method of reprocurement, obtain a reasonable price, and mitigate its losses." *Id.* Therefore, these appeals raise two essential issues regarding the reprocurements within the context of the Government's obligation to mitigate costs resulting from appellant's defaults of the contracts. Thus, the first issue is the propriety of the Government's reprocurement actions when the Government, rather than issuing new solicitations, merely contacted those firms that submitted offers in response to the initial solicitations, in the order of the previously evaluated low offerors, and sought their agreements as to whether they would accept contracts under the same terms and conditions contained in the initial solicita-

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tion at their previously proposed prices. The second issue is whether once having awarded the reprocurement contracts, the Government acted properly when it exercised the options to extend the contracts under the reprocurement contracts without issuing new competitive solicitations or performing a market survey.

In *Luther Benjamin Construction Co.*, ASBCA Nos. 40401, 40606, 93-1 BCA ¶ 25,459, we held that the Government took all necessary action to proceed with the negotiation and award of the reprocurement contract when, because of the urgency for the completion of the building, negotiated with, and awarded the contract to one of the bidders submitting a bid in response to the original solicitation under which the terminated contract was awarded. Nine bids had been received in response to the original solicitation. Following the termination for default, four offerors were solicited, only one of which submitted a bid in response to the original solicitation and responded to the reprocurement solicitation. The contracting officer obtained an Independent Government Estimate and negotiated the reprocurement price with the offeror submitting an offer on the reprocurement solicitation. We, therefore, sustained the assessment of excess reprocurement costs notwithstanding the fact that the Government did not solicit competitive sealed bids from a larger number of potential bidders and did not advertise the requirement in the Commerce Business Daily.

In *Ronald L. Collier d/b/a Carolina Maintenance Company*, ASBCA No. 26972, 89-1 BCA ¶ 21,328, we denied the appeal challenging the assessment of excess reprocurement costs in which the appellant contended that the contracting officer failed to properly calculate the amount of excess reprocurement costs. The issue arose there because the Government modified an existing contract of the reprocurement contractor for similar services elsewhere in the Charleston, South Carolina area, to include services required under the terminated contract. In upholding the actions of the contracting officer, which effected the modification of the completion contractor's contract within four days after terminating the appellant's contract, we said:

> When a contracting officer is faced with completing contract work which remains undone after a termination action he/she has a large amount of discretion as to how the completion of that work will be obtained. Surely in many situations making a competitive procurement is the preferred method. That is not, however, always possible. Here the work to be completed was maintenance of family housing. The contracting officer concluded, and we have no basis for disagreeing with that conclusion, that the need was so urgent that the preferable approach was to get a contractor then performing identical work in the same general geographic area to add the work to its contract. It was clear that work from the defaulted contract was being added to the completion contract. The Government protected appellant as best it could by obtaining agreement with the completion contractor that appellant's uncompleted work would be charged for at the same prices the completion contractor was charging for identical work under its own contract.

Id., at 107,557-58. We, therefore, held that the contracting officer did all that was required to do in securing the completion of the work after terminating for default the appellant's contract. The contracting officer had acted promptly in awarding the reprocurement work to the completion contractor. He obtained the same type of services required by the terminated contract. He obtained the most fair and reasonable prices under the circumstances of the urgent need.

Although *Luther Benjamin Construction Co., supra*, and *Ronald L. Collier d/b/a Carolina Maintenance Company, supra*, are distinguishable on their facts, the principles contained therein are consistent with the authority granted in FAR §§ 49.402-6 and 49.405 and the DEFAULT clause of appellant's contract and are applicable to the facts in the instant appeals. Moreover, as stated in *Cascade Pacific International v. United States, supra*, "The third condition [for the authorized imposition of excess reprocurement costs against the terminated contractor] requires that the Government act within a reasonable time of the default, use the most efficient method of reprocurement, obtain a reasonable price, and mitigate its losses," a condition we hold has been satisfied in these appeals with respect to the awards of the reprocurement contracts.

The contracting officer awarded the reprocurement contracts on 15 January 1988, two days after appellant notified the contracting officer on 13 January 1988 that it was terminating performance of all the contracts two days later on 15 January 1988, the date the contracting officer terminated

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appellant's contracts for default. The reprocurement contracts were awarded for the same services in the same geographic areas, and under the same terms, conditions, and specifications as those contained in appellant's terminated contracts. The contracting officer determined that the services terminated were still required after termination of appellant's contracts for default, that the need for such services was urgent, and that the most efficient method of reprocurement under these circumstances was to solicit the agreements of the unsuccessful low offerors under the original solicitations to perform the work at their originally proposed prices in order to obtain reasonable prices for these services and, therefore, mitigate its losses. Appellant has presented no persuasive evidence or argument, nor have we found any, that would justify a conclusion that the Government did not satisfy its obligation to mitigate its losses in the awards of the reprocurement contracts. In light of the urgency of these reprocurements and the need for uninterrupted custodial services in the Frankfurt and Wiesbaden military communities, we, therefore, hold that the contracting officer acted reasonably and in accordance with the regulations and DEFAULT clause of appellant's contract when the contracting officer, rather than issuing new solicitations for the reprocurement contracts, contacted those firms that submitted offers in response to the initial solicitations, in the order of the previously evaluated low offerors, and sought their agreements as to whether they would accept contracts under the same terms and conditions contained in the initial solicitation at their previously proposed prices.

With respect to the second issue presented by these appeals, namely, whether once having awarded the reprocurement contracts, the Government acted properly when it exercised the options to extend the contracts under the reprocurement contracts without issuing new competitive solicitations or performing a market survey, appellant contends that a total of DM 508,246.18 excess reprocurement costs assessed resulted from the payments of invoices for performance of services by the reprocurement contractors during the option periods, whereas the total amount of excess reprocurement costs assessed against appellant was DM 678,664.40. As indicated in our findings, we have calculated the total amount of excess reprocurement costs as DM 674,417.88, of which amount a total of DM 503,445.49 were assessed for the performance of services by the reprocurement contractors during the option periods (finding 59). Appellant contends that the exercise of these options cannot be justified under FAR § 17.207 "in light of the restricted procedures used to award the reprocurement contracts in January 1988." Citing *General Optical Limited,* ASBCA No. 23835, 84-1 BCA ¶17,026, appellant contends that there was a failure to mitigate costs where the Government reprocured through the exercise of an option under another contract without having first solicited offers to determine if competitive market prices would be lower. The Government did not address this issue either during the hearing or in its post-hearing brief.

As a general rule, we have held that the Government is entitled to reprocure for the period of the defaulted contract, including additional option years, that the defaulted contractor had originally contracted to perform. *Lewis Management & Service Company,* ASBCA Nos. 24802, 24803, 24804, 26180, 26182, 85-3 BCA ¶18,416, at 92,467; *Advance Building Maintenance Company,* ASBCA Nos. 27183, 28219, 85-2 BCA ¶18,076, at 90,750-51. Thus, in *Givens Services, Inc.,* ASBCA No. 28511, 84-1 BCA ¶17,151 and *Givens Services, Inc.,* ASBCA No. 31048, 87-1 BCA ¶19,418, we upheld the assessment of excess reprocurement costs incurred by the Government under the exercise of two options to extend the term of the reprocurement custodial services contracts. Although we made certain adjustments in the amount of excess reprocurement costs based on our calculations in *Givens Services, Inc.,* ASBCA No. 28511, there was nothing in that decision that questioned the assessment of excess reprocurement costs incurred during the option periods. However, the issue was not raised and we did not address the question of whether or not the Government complied with the determination requirements of FAR § 17.207, or whether the failure, if any, to comply with these requirements resulted in the possible failure of the Government to mitigate its costs.

General Optical Ltd., ASBCA Nos. 23835 and 26469, *supra,* cited by appellant is inapposite. That decision involved the exercise of the option for additional quantities under another existing contract and, although a supply contract, is more analogous to *Ronald L. Collier d/b/a Carolina Maintenance Company, supra,* than to the instant appeals. Moreover, in *General Optical Ltd.,* we held that:

> While we have held that the reprocurement may not have been proper, we do not agree with appellant that the Government

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> is not entitled to any excess costs of reprocurement. Just because the Government may have paid more than it might have for the reprocured items does not preclude it from recovering the appropriate amount for excess costs if the basis for computing the amount chargeable to the defaulting contractor can be established.

Id., at 84,785. Although *General Optical Ltd.* is factually distinguishable from the instant appeals, it does underscore the importance we place in reprocurements on testing the market and compliance with FAR § 17.207 before the contracting officer exercises an option.

FAR § 17.207 provides that the contracting officer may exercise an option after determining that funds are available, if the requirement covered by the option fulfills an existing Government need, and the exercise of the option is the most advantageous method of fulfilling the Government need, price and other factors considered. This provision of the regulation requires that the contracting officer shall make the determination to exercise the option based on one of the following factors: a new solicitation fails to produce a better price or a more advantageous offer than offered by the option; an informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer; or the time between award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. Moreover, the regulation provides that the determination of other factors should take into account the Government's need for continuity of operations and potential costs of disrupting operations.

The reprocurement contracts awarded following the terminations of appellant's contracts for default were identical in their terms and conditions, including option provisions, to those included in appellant's contracts. These reprocurement contracts were awarded for the contract periods commensurate with the periods of appellant's contracts at the time they were terminated for default. Therefore, the reprocurement contracts did not provide for performance periods, including option years, beyond those in appellant's contracts had appellant continued its performance under its contracts. Although there was testimony of the two contracting officers with respect to the standard procedures generally followed prior to the exercise of options to extend the contracts for additional terms, which procedures, according to these contracting officers generally complied with the requirements of FAR § 17.207, there was no direct evidence in the documentary record or by testimony to the effect that the Government followed these procedures in connection with the exercise of the particular options of the reprocurement contracts at issue in these appeals.

Moreover, as we found above, there was considerable price competition in response to the initial solicitations. However, except with respect to the award of the reprocurement contract for contract DAJA76-87-C-0625, the awards of the other reprocurement contracts were made to offerors other than the second low offeror because of non-responsibility determinations and lack of interest on the part of a prior offeror in performing the services under a reprocurement contract at the originally proposed prices of these lower priced offerors. As we found above with respect to the Government's exercise of the options to extend the reprocurement contracts, there was no evidence that the contracting officer reviewed these prior determinations of nonresponsibility to determine if the lower offerors were still nonresponsible at the time the contracting officer exercised the options to extend the reprocurement contracts for additional years. In light of the amount of competition evidenced in response to the initial solicitation, the award of the reprocurement contracts to offerors other than the second low offeror (except with respect to the award of the reprocurement contract to Adlatus-Alpha under DAJA76-87-C-0625), the amount of time available to the Government to either solicit new offers for the option periods or to conduct market surveys or to comply with the other requirements of FAR § 17.207 prior to exercising the options under the reprocurement contracts to extend those contracts for additional periods, we hold that the Government did not carry its burden of proof to establish that it mitigated its reprocurement costs when it exercised the options. We, therefore, had no basis for determining what the excess costs should have been for the option periods. *C.f., General Optical Ltd., supra.*

In light of the foregoing, although we hold that the Government is entitled to recover excess reprocurement costs against appellant under all of its terminated contracts, we also hold that such entitlement is limited to re-

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covery of excess reprocurement costs incurred during the unexpired portion of the base or option period of appellant's defaulted contracts in which the terminations for default were issued. Accordingly, the Government is not entitled to recover excess reprocurement costs for the reprocured custodial services performed under the exercised options of the reprocurement contracts.

Based on our calculations, the Government is entitled to excess reprocurement costs in the total amount of DM 170,972.39, which is the amount of excess reprocurement costs for all six contracts for the remaining portions of the base or option periods unperformed by appellant, which portions were covered by those reprocurement contracts. We hold that the Government is not entitled to recover DM 503,445.49 as excess reprocurement costs incurred by the Government during the periods covered by its exercised options extending the contract terms of the reprocurement contracts.

Consistent with the parties' stipulation and agreement during the hearing, we hold that appellant is entitled to DM 350,524.42 for the unpaid invoices. However, we hold that appellant is not entitled to Prompt Payment Act interest penalties, nor is appellant entitled to interest under the Contract Disputes Act on the full amount of the invoices since payment was properly withheld as offset against the anticipated excess reprocurement costs. The amount of DM 350,524.42 due appellant for the custodial services it performed prior to the terminations for default and invoiced the Government in accordance with the parties' stipulation and agreement shall be offset by DM 170,972.39, the amount of excess reprocurement costs to which we hold the Government is entitled. Accordingly, appellant is entitled to DM 179,552.03, the difference between the DM 350,524.42 the Government owes appellant for services performed by appellant under its contracts prior to the terminations for default and the amount of excess reprocurement costs to which the Government is entitled. The appellant is entitled to interest on this amount in accordance with the Contract Disputes Act on the unpaid invoices on the withheld amounts of excess reprocurement costs asserted by the Government for costs incurred during the option periods of the reprocurement contracts, such interest to run from 12 September 1988, the date appellant submitted a claim for the unpaid invoices, until paid.

Accordingly, we sustain the appeal docketed as ASBCA No. 38154, to the extent indicated herein and deny the appeal with respect to appellant's claim for Prompt Payment Act interest penalty. We deny appellant's appeals docketed as ASBCA Nos. 38156, 38155, 38719, 38720, 40124 in part and sustain in part in accordance with findings 45-46, and sustain appellant's appeals docketed as ASBCA Nos. 38722, 39415, 40121, 42530, 38717, 40122, 38718, 40123, 42528, 42529, 42531.

[¶ 26,317] Arctic Corner, Inc.

ASBCA No. 38075, August 24, 1993. Contract No. DAAB07-82-C-Q443.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Related Court Proceedings.—A contractor's motion to dismiss an appeal, arguing that the board lacked jurisdiction to decide the government's claim for excess costs until the Court of Federal Claims decided the surety's related appeal of the default termination of its contract and the assessment of excess costs against it, was denied because there was no legal authority to support the proposition that a tribunal adjudicating the assessment of excess reprocurement costs and liquidated damages against a defaulted contractor lacks jurisdiction if another tribunal is also adjudicating the validity of that assessment.

Reprocurement—Variations from Defaulted Contract—Burden of Proof.—In an appeal that arose from the government's assessment of excess reprocurement costs under a contract for barracks rehabilitation and that included the contractor's assertion of affirmative defenses alleging, among other things, the dissimilarity and unreasonableness of the reprocurement contract, the government met its burden of proving that the reprocured contract work was similar to the terminated work, the reprocured work occurred within a reasonable time, the reprocurement price and mitigated damages were reasonable, final payment on the reprocurement contract was made, and the excess costs assessed were based on the government's liability for a sum certain.

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Liquidated Damages—Amount—Original Contract Price.—Following the default termination of a contract for barracks rehabilitation, the default termination of the surety's takeover agreement, and the award of a reprocurement contract, there was no danger the government would, by recovering liquidated damages from the original contractor, recover duplicate liquidated damages, because the government had assessed liquidated damages against the contractor and the surety jointly and severally, thereby precluding duplicate recovery of liquidated damages. Because the surety takeover agreement required completion of performance within the original contract price, it was not a reprocurement for purposes of measuring excess costs, nor was it a reprocurement for purposes of limiting assessment of liquidated damages. However, a $6\frac{1}{2}$-month delay in awarding the reprocurement contract was unreasonable and was excluded from the assessment.

Reprocurement—Expenses and Deductions—Administrative Costs.—The government's assessment of reprocurement costs against a defaulted contractor was denied because the administrative costs in question were not proven. Such costs are recoverable at common law, a right the government expressly reserved in the Termination for Default—Damages for Delay—Time Extensions clause, if supported by reasonable estimates. the contracting officer testified that the amount assessed was a reasonable administrative cost without further explanation or elaboration.

For the appellant: Pasquale Chiacchio, President, and Albert Rondinelli, Vice President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Robert A. Duecaster, JAGC, Trial Attorney.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: We upheld the 1984 default termination of contract DAAB07-82-C-Q443 (contract Q443) in *Arctic Corner, Inc.*, ASBCA No. 29405, 88-1 BCA ¶ 20,396. This appeal arises from respondent's assessment of excess reprocurement costs, liquidated damages and administrative costs due to the default termination of contract Q443, the 1985 default termination of the Takeover Agreement of appellant's surety, Indemnity Insurance Company of North America (IICNA), to complete performance of contract Q443, and its substantial completion by Sharp Construction Co. in 1986. IICNA appealed the default termination of its Takeover Agreement to the U.S. Claims Court (now renamed the Court of Federal Claims).

Appellant asserts as affirmative defenses the invalidity of the IICNA takeover contract, dissimilarity and unreasonableness of the reprocurement contract and untimeliness of respondent's assessment. A four-day hearing was held in Freehold, NJ. Respondent moved to consolidate this appeal with ASBCA No. 44360-657 (tr. 1/19), redesignated ASBCA No. 45421. Appellant moved to dismiss ASBCA No. 38075, arguing that the Board lacks jurisdiction to decide respondent's claims until the Court of Federal Claims decides IICNA's suits regarding IICNA's default termination and excess reprocurement costs which respondent assessed against IICNA and appellant jointly and severally (tr. 1/164-68). Both parties submitted post-hearing briefs. We decide both the motions and the merits of entitlement and quantum (tr. 1/9).

FINDINGS OF FACT

1. Respondent awarded contract Q443 to appellant on 29 September 1982 for rehabilitation of five troop barracks at Barker Circle, Ft. Monmouth, NJ, for the fixed price of $1,476,750 in accordance with specification PR80-8105 and drawing Nos. 9826-1 through -37. Dynamic Industries Co., Inc. was the second low bidder on contract Q443 at $102,000 more than appellant's low bid price. Trataros Construction Corporation was third low bidder. (R4, tabs 1, 2; exh. A-3)

2. Contract Q443 provides in pertinent part:

> *Termination for Default* (DAR 7-602.4) (1965 JAN) [In the event of default termination] the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.
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Liquidated Damages (DAR 7-603.39) (1965 JAN) In case of failure . . . of the Contractor to complete the work within the time fixed in the contract or any extensions thereof, the Contractor shall pay to the Government as liquidated damages, pursuant to the clause of this contract entitled "Terminations for Default—Damages for Delay—Time Extensions," the sum of $200.00 for each day of delay.

Contract Q443's General Provision No. 5 is the "Termination for Default—Damages for Delay—Time Extensions" clause, which provides in pertinent part:

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed [for default], the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(R4, tab 2)

3. IICNA issued payment and performance bonds to appellant as principal under contract Q443 (R4, tab 2).

4. Bilateral contract modifications added changes and increased contract Q443's price by $216,626 to $1,693,376 (R4, tab 3; exh. G-2; tr. 1/40). Contract Q443 required completion within 365 days, but the parties agreed informally to extend the completion date to 1 March 1984.

5. On 7 February 1984 respondent terminated contract Q443 for default and on 8 February 1984 notified appellant that it would be held liable for excess reprocurement costs (R4, tab 28). Appellant appealed respondent's default termination decision, which appeal we denied. *Arctic Corner, Inc.*, ASBCA No. 29405, 88-1 BCA ¶ 20,396, *aff'd, Arctic Corner, Inc. v. United States*, 862 F.2d 321 (Fed. Cir. 1988) (table).

6. Before termination of contract Q443 respondent paid appellant $738,456 in progress payments, or about 43.6 percent of the contract price (exh. G-2; tr. 1/75, 77, 3/7-12). In a post-termination "walk-through" inspection, respondent determined that (a) appellant had performed about 44.8 percent of the contract work (exh. G-2), (b) left mailboxes on the ground, disconnected water fountains, construction materials in the buildings, ceilings open with wires hanging from them, disconnected electrical boxes on the floors, doors off their hinges and inoperative latrines, and (c) corrective work items remained unperformed, including replacing building 205's front stairs (R4, tab 27; tr. 1/42-43, 81-82, 2/28, 55, 4/152), installing window anchors and removal of debris from balconies (tr. 2/102-03).

7. On 20 March 1984, (a) modification P00005, executed by respondent's contracting officer and by IICNA, but not by appellant, substituted IICNA as contractor and incorporated a 6 March 1984 TAKEOVER AGREEMENT in which IICNA agreed to complete performance of contract Q443 by 1 July 1984, with compensation at IICNA's actual costs, but not more than the available contract Q443 unpaid balance of $954,920, with $200 daily liquidated damages to accrue from 2 March 1984 (R4, tab 4; tr. 1/48); and (b) modification P00006 added rear stair replacement and radiator relocations and extended IICNA's completion date to 20 July 1984 (R4, tab 6).

8. By October 1984 respondent had paid IICNA $448,340. Appellant's and IICNA's cumulative billed progress payments of $1,318,662 were 77.9 percent of the amended contract Q443 price (exh. A-26). Respondent made a site survey; compared the work actually performed to the total quantity of work set forth in the contractors' payment schedules, the contract specifications and drawings; and estimated that about 59 percent of the interior and 85 percent of the exterior contract Q443 work had been completed by October 1984. (Exh. G-2; tr. 1/78, 2/191, 3/9-10, 102-09, 120-22) Of the amended contract Q443 price, $506,580 (including $131,866 in retainages) was unexpended in October 1984 (tr. 1/78-80) and about $690,000 was unearned.

9. On 12 October 1984 respondent terminated IICNA's TAKEOVER AGREEMENT for default (R4, tabs 7, 31; tr. 1/49). IICNA appealed that decision to the U.S. Claims Court (now the Court of Federal Claims), Docket Nos. 122-85C and 323-85C. At the time IICNA's performance was terminated, the site contained uninstalled and damaged materials, inoperable fire tower doors and missing door glass and hardware (tr. 3/11, 40-41, 83).

10. Completion of the Barker Circle troop barracks remained urgent to respondent (tr. 1/42-49). After prospective architect-engineer firms met on 25 October 1984 with respondent and made a site visit, on 14 November 1984 respondent retained the services of the architect-engineer firm of H.V. Weeks (a) to update the contract Q443 drawings to show the original work performed and work unperformed by appellant and

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IICNA, and new work to be added, (b) to estimate the cost required to complete contract Q443, and (c) to estimate separately the cost of new work not required by contract Q443. Weeks' quantitative estimates were not to be provided to prospective reprocurement contractors. (R4, tabs 32-34)

11. Solicitation DAAB05-85-R-T008 of 28 February 1985 requested offers to reprocure substantially the same work specified in contract Q443 but remaining to be done, based on Weeks' updated drawings. The cost estimate sheets respondent provided to offerors listed site work items without Weeks' unit quantities. On 3 April 1985 Weeks estimated $949,179 for unperformed work, corrective work and work to protect the existing structure identified during the offerors' site visits. (R4, tab 13; exh. A-1; tr. 1/109-11, 2/86-92, 135-37) Respondent received proposals from Sharp Construction Company, Inc. (an affiliate of Dynamic Industries, Inc.), Trataros Construction Corporation (respectively second and third low bidders in 1982 on contract Q443) and G&P Parlamas, Inc., selected to perform Phase II rehabilitation work in the Barker Circle barracks in 1985 (R4, tab 8; tr. 1/51-55, 2/105). Sharp's undated $1,124,311 estimate for buildings 205, 206, 207, 208 and 287 had work item cost estimate sheets with Sharp's estimated quantities and prices; and its $565,757 labor costs included supervision and payroll expenses (exh. A-1).

12. Between 18 March and 9 April 1985 respondent negotiated with the foregoing three offerors and instructed them in submitting best and final offers to disregard any new work shown on the revised drawings to assure identity of the scopes of the terminated and reprocured work (R4, tabs 8, 19, 37-39; tr. 1/58, 2/95-96, 159-60).

13. The best and final offers respondent received on 9 April 1985, compared to the Government's 9 April 1985 estimate, were:

Government estimate	$949,179
Sharp Construction Co.	997,000
G&P Parlamas, Inc.	1,168,525
Trataros Construction Corp.	1,224,895

(R4, tab 15; tr. 2/83). The contracting officer determined that Sharp's low offer was reasonable when compared with the Government estimate and in the context of effective price competition (R4, tab 16; tr. 2/30-31).

14. On 25 April 1985—6 1/2 months after respondent terminated IICNA's Takeover Agreement—respondent awarded Sharp reprocurement contract DAAB08-85-C-R218 (contract R218) for the firm fixed price of $997,000 (R4, tab 19; tr. 1/60, 112-13). The record contains no evidence that contract R218's price increased due to any inflationary cause during February-March 1984 or October 1984-April 1985.

15. Contract R218 required completion of performance within 180 calendar days after notice to proceed (R4, tab 19). Notice to proceed was issued on 14 May 1985, establishing 11 November 1985 as the contract R218 completion date (R4, tab 24).

16. Contract R218 required Sharp to complete the work left unfinished, including replacement of items that were missing, damaged or improperly installed prior to the terminations of appellant and IICNA, in accordance with specification PR80-8105 and drawings "10058-1 through 10058-38, including 10058-8A, -14A, -20A, -26A and -32A (43 sheets) dated 31 JAN 1985" depicting contract Q443 work performed, unperformed and misperformed by appellant and IICNA (R4, tab 19; exh. A-3; tr. 1/142-43, 2/92-95). Appellant stated that the contract R218 and contract Q443 drawings were "basically the same" (tr. 4/48).

17. The $997,000 price for contract R218 included (a) about $50,000 for work not required by contract Q443: sandblasting floors and ceilings; two coats rather than one coat of floor paint; and painting over Thoroseal coating (exh. A-1; tr. 2/142-56) and (b) work appellant and IICNA performed incompletely: fan and water fountain reinstallation; repair of unprotected wallboard; installation of window retainer clips, anchors and caulking at six each per window for 2773 windows; and installation of nine door frames (tr. 2/166-80, 230-34, 3/24-27, 56, 77-82; app. R4 supp., tab 46).

18. In October 1985 respondent learned that fan coils, which had been removed by appellant or IICNA, were not on the work site. Sharp spent two to three months searching for the missing fan coils and required sixteen weeks to reorder and install them. (Tr. 2/104, 4/148-49)

19. Sharp substantially completed contract R218 by 1 April 1986 (tr. 3/209, 4/148). Contract R218 certified payroll reports contain wages payable to employees of Sharp from 1 May 1985 to 2 April 1986 and of subcontractor Modern Iron Works from 9 June 1985 to 1 April 1986, totalling $81,588.94 (exh. A-2). Respondent made final inspection and took beneficial occupancy of the Barker Circle barracks on 1 May 1986 (R4, tab 24).

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20. Bilateral modifications dated 30 September 1986 and 11 March 1987 added six changes to contract R218, including facia and shingle repairs; convector replacements; interior stair repairs; acoustic ceiling, water coolers and carpet reinstallation; and toilet renovation; increased contract R218's price by $144,180; and extended its completion date to 31 March 1987 (R4, tab 23; tr. 2/159-61, 3/136-40, 144-53, 170, 173). Sharp included $2,500 of unpaid original contract R218 work and the $144,180 for the six changes in its invoice 9 of 16 March 1987 (exh. G-5; tr. 3/205-07). In June 1987 respondent paid Sharp's tenth partial payment, leaving an unpaid contract R218 balance of $2,500 for change order work (exh. G-5).

21. Respondent's 12 September 1988 letter assessed appellant and IICNA jointly and severally $513,496 in excess reprocurement costs, exclusive of the costs of changed work; $152,200 for 761 calendar days of liquidated damages (2 March 1984 to 1 April 1986); $757 in administrative costs to process the reprocurement and $18,411 to update the drawings; and gave notice of appellant's appeal rights (R4, tab 25; tr. 1/75).

22. The contracting officer testified that $757 was a reasonable cost without further explanation or breakdown (tr. 1/57). Weeks submitted an $18,411 invoice for services to update the drawings (R4, tab 35).

23. Appellant's 5 December 1988 letter timely appealed respondent's 12 September 1988 final decision.

24. On 10 April 1989 Sharp submitted the eleventh and final contract R218 invoice of $2,500 for change order work; respondent paid it on 20 April 1989 (exh. A-25, G-7; tr. 3/207-10).

25. At trial, respondent eliminated from its excess reprocurement cost assessment against appellant $18,000 arising from Sharp's installation of window clips (tr. 3/125-27).

DECISION

I. MOTIONS

At trial, respondent moved to consolidate ASBCA Nos. 38075 with ASBCA No. 44360-657. Since ASBCA No. 44360-657 (redesignated ASBCA No. 45421), is in the discovery stage and ASBCA No. 38075 has been tried and is ready for decision, we deny respondent's motion to consolidate the two appeals. We will give due consideration to a motion to incorporate the evidence in ASBCA No. 38075 into the record of ASBCA No. 45421, to avoid needless duplication.

Appellant moved to dismiss this appeal arguing that the ASBCA lacks jurisdiction to decide respondent's claims until the Court of Federal Claims (COFC) decides IICNA's default termination and excess reprocurement costs which respondent assessed against IICNA and appellant jointly and severally. Appellant cites no legal authority, and we know of none, that a tribunal adjudicating the assessment of excess reprocurement costs and liquidated damages against a defaulted contractor lacks jurisdiction if another tribunal is to adjudicate the validity of that assessment against the contractor's surety which failed to perform a takeover agreement on the contractor's defaulted contract, or that the possibility of an inconsistent decision by the other tribunal impairs our jurisdiction. *Cf., Employers Mutual Casualty Co.*, GSBCA No. 11003, 91-3 BCA ¶ 24,202, *recon. den.*, 92-1 BCA ¶ 24,442, *aff'd*, 93-1 BCA ¶ 25,482 (notwithstanding conversion of the contractor's default to a convenience termination of a contract, Government had the legal right to terminate the surety's Takeover Agreement for default if the facts justified such termination).

The COFC has not ordered the consolidation of *pro se* appeal No. 38075 with IICNA's Claim Court Docket Nos. 122-85C and 323-85C pursuant to 41 U.S.C. § 609(d). Only if the COFC should decide the assessment of excess costs and liquidated damages issues in advance of the ASBCA might such COFC judgment collaterally estop appellant. The possibility of such future collateral estoppel cannot impair this Board's present jurisdiction. Accordingly, we deny appellant's motion to dismiss for lack of jurisdiction.

II. MERITS

A. *Excess Reprocurement Costs.*

Respondent has the burden of proving that the reprocured contract work was the same as or similar to the terminated work; it reprocured within a reasonable time after the default termination; the reprocurement price was reasonable and respondent reasonably mitigated damages; it made final payment on the reprocurement contract; and the excess costs assessed are based on respondent's liability for a sum certain. *Rayco Inc, et al.*, ENG BCA No. 4792, 88-2 BCA ¶ 20,671 at 104,476.

Appellant argues that (i) the IICNA Takeover Agreement was invalid; (ii) contract

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R218 was dissimilar from contract Q443; (iii) contract R218's price was unreasonable and (iv) respondent did not assess excess reprocurement costs timely.

Appellant adduced no evidence to substantiate that the IICNA Takeover Agreement was invalid. Although appellant did not sign the IICNA Takeover Agreement (finding 7(a)), a surety Takeover Agreement may be, but is not required to be, signed by the defaulting contractor. FAR § 49.404(d). Appellant argues that the initial $227,000 payment respondent made to IICNA was "illegal." A surety who completes a defaulted contract under a performance bond, as IICNA sought to do here, is entitled to payment from the unexpended contract balance of progress payments, whether earned prior or subsequent to the original contractor's default. B-192237, 79-1 CPD ¶ 19 (15 Jan. 1979) Even if such payment were "illegal," which it was not, that would not invalidate the surety Takeover Agreement. Our review of the Takeover Agreement discloses no basis for concluding that it is invalid.

The specifications in contracts Q443 and R218 are identical and their drawings are basically the same (findings 1, 16). Respondent segregated in reprocurement contract R218 the costs of added work from the original contract Q443 work, except for $50,000 of contract R218 work not required by contract Q443 (findings 10, 12, 17). Respondent sustained its burden of proof of similarity of the defaulted and reprocurement contracts.

Appellant argues that Sharp's labor costs were unreasonable because (1) respondent provided estimated unit labor quantities and prices to offerors and (2) Sharp's incurred labor costs were significantly less than its proposed labor costs. Appellant concludes that the $997,000 contract R218 price was unreasonable. The record does not support appellant's argument. The cost estimate sheets respondent provided to offerors contained no unit quantities, hours, or prices (finding 11). Appellant's comparison of Sharp's proposed vs. incurred labor costs is invalid because (i) appellant calculated $663,469 in proposed labor costs, but Sharp proposed $565,757 in labor costs (finding 11); (ii) Sharp's proposed labor costs were for a $1,124,311 estimate, not the $997,000 best and final offer accepted in contract R218 (findings 11, 13, 14); and (iii) Sharp's $565,757 proposed labor costs included overhead (supervision and payroll expenses) (finding 11), while the certified payroll reports contained $81,588.94 in unburdened wages (finding 19). Moreover, Sharp's incurred costs are immaterial to whether the price it offered in April 1985 in effective competition with two other qualified offerors (finding 13) was reasonable. We hold that contract R218's price was reasonable.

Appellant argues that respondent's assessment of excess reprocurement costs against appellant on 12 September 1988, some $4\frac{1}{2}$ years after contract Q443 was terminated for appellant's default (finding 21), was untimely. Timeliness is measured by the period from the default termination to the date of award of the reprocurement contract, not the date of excess cost assessment. Respondent and IICNA entered into the Surety Takeover Agreement on 6 March 1984, only 27 days after contract Q443 was terminated (findings 5, 7). Appellant does not contend that such period was unreasonable. Respondent reprocured from Sharp on 25 April 1985, $6\frac{1}{2}$ months after IICNA's Takeover Agreement was terminated for default on 12 October 1984 (finding 14). The record contains no evidence that contract R218's price increased due to any inflationary cause during February-March 1984 or October 1984-April 1985 (finding 14). We hold that the time taken to reprocure from Sharp did not affect the reprocurement contract price or prejudice appellant. *SanColMar Industries, Inc.*, ASBCA No. 15052, 73-2 BCA ¶ 10,306 (delay of $7\frac{2}{3}$ months without proof that the reprocurement contract price increased due to such delay; excess cost assessment was valid).

Respondent could not properly assess excess reprocurement costs against appellant until it had paid Sharp for such work. Respondent completed payment of the original reprocurement work under contract R218 in March 1987 (finding 20), before it assessed excess costs against appellant in September 1988 (finding 21). The fact that respondent paid Sharp's final invoice for added and changed work in April 1989 (finding 24), does not invalidate its September 1988 assessment of excess costs. Respondent sustained its burden of proof of excess reprocurement costs in the amount of $445,496 ($513,496 assessed (finding 21), less $50,000 for work not required by contract Q443 (finding 17), less $18,000 respondent conceded (finding 25)).

B. *Liquidated Damages.*

Respondent assessed $152,200 for 761 days of liquidated damages against appellant (finding 21). Respondent has the burden to prove the validity of its assessment. Liquidated damages are not assessable when there

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are concurrent excusable or Government-responsible causes of delay which are not segregated from contractor-caused delays. *Acme Process Equipment Co. v. United States* [10 CCF ¶ 73,060], 171 Ct. Cl. 324, 437 F.2d 509 (1965).

Respondent ordered the added work on 30 September 1986, five months after Sharp had substantially completed contract R218 on 1 April 1986 (findings 19, 20). Accordingly, respondent sustained its burden of proof that Government-responsible causes of delay were segregated from contractor-caused delays.

Though not briefed by either party, one may question whether respondent was entitled to liquidated damages after terminating IICNA's surety takeover agreement on 12 October 1984 (finding 9), either because for the period 12 October 1984 to 1 April 1986 respondent could receive duplicate liquidated damages from appellant and IICNA, or because such liquidated damages are unreasonable. The GSA Board in *Urban Industries Corp.*, GSBCA No. 3050, 72-2 BCA ¶ 9604, found it inequitable to assess liquidated damages until completion by the second repurchase contractor, since the defaulted contractor had no control over the activities of either repurchase contractor and could not reasonably foresee that the first repurchase contractor would be terminated for default. Here, respondent assessed liquidated damages against appellant and IICNA jointly and severally (finding 21), thereby precluding duplicate recovery of liquidated damages. No decision by the ASBCA or any other tribunal extends *Urban Industries* to a surety takeover agreement. Since the IICNA surety takeover agreement required completion of performance within the original contract price (finding 7), it was not a "reprocurement" for purposes of measuring excess costs, nor do we believe that it is a "reprocurement" for purposes of limiting assessment of liquidated damages. However, we conclude that the $6\frac{1}{2}$-month delay in awarding the Sharp reprocurement contract (finding 14) was unreasonable for purposes of assessing liquidated damages, and must be excluded from the assessment. We hold that respondent is entitled to $113,200 for 566 days in liquidated damages, assessed from 2 March 1984 to 1 April 1986, the date of substantial contract completion, less 195 days for the $6\frac{1}{2}$-month delay. *Rayco, supra.*

C. Administrative Costs.

Respondent assessed $757 in costs to process reprocurement contract R218. Such costs are properly recoverable at common law, a right respondent expressly reserved in the "Termination for Default—Damages for Delay—Time Extensions" clause of contract Q443 (finding 2), if supported by reasonable estimates. *Birken Manufacturing Company,* ASBCA No. 32590, 90-2 BCA ¶ 22,845. Here respondent's contracting officer testified that $757 was a reasonable administrative cost without further explanation or elaboration (finding 22). We hold that such administrative costs were not proven. Respondent's post-hearing brief admits that the $18,411 to update the contract Q443 drawings was improper, and withdrew that element of damages.

We uphold respondent's assessment of excess costs of reprocurement and (in part) liquidated damages and deny the appeal to the extent of $558,696. We sustain the appeal with respect to the amounts respondent claimed in excess of $558,696.

[¶ 26,318] Delta Industries, Inc.

DOT BCA No. 2602, August 26, 1993. Contract No. DTCG40-91-C-30039.

Defaults, Procedure—Cure Notice—Delivery Failure.—Default termination of a contract to supply desks was not vitiated by reason of the government's failure to provide a cure period prior to termination, because the contracting officer's determination that the desks provided by the contractor did not meet the specifications was equivalent to a contracting officer's determination that the contractor failed to deliver. The board did not accept the contractor's argument that a cure notice can be bypassed only if there has not been any delivery and does not apply if there are discrepancies in a shipment. Inherent in the Default provision excusing a cure notice in the case of nondelivery is the notion that supplies delivered must be in substantial conformance with the contract specifications.

Procedure, Boards—Summary Judgment—Default Issues.—The government's motion for summary judgment in an appeal from the default termination of a supply contract for desks was denied because there were substantial and critical factual issues over

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which the parties were in dispute. Despite the government's argument that the desks were clearly defective and that the contractor did not deny they were defective, several letters and a filing all alleged specific facts in support of the contractor's assertion that the government bore some responsibility. These documents also disputed the accuracy of both deficiency reports and the specifications. Whether the desks as delivered were actually defective, whether the contract specifications were actually defective, and whether the government was a cause of the problem encountered during performance all required the presentation of facts.

Contract Disputes, Contracting Officer's Decision—Applicability of Requirement—Appeal of Terminations.—Whether a contractor appealing the default termination of its contract for desks presented all of its defenses to the contracting officer before the termination was not relevant, because a termination for default is in effect a government claim. In addition, new defenses, like new grounds for relief or new bases for a default termination, may be first raised and argued after an appeal has been filed.

For the appellant: George S. Price. For the government: Isaac Johnson, Jr., United States Coast Guard, Washington, D.C.

Before ROBERTORY, Administrative Judge.

ROBERTORY, Administrative Judge: We have before us an appeal by Delta Industries, Inc. ("Delta" or "appellant") from the action of the Contracting Officer, United States Coast Guard Supply Center, Curtis Bay, Maryland ("Coast Guard" or "respondent") in terminating the contract between them for an alleged default. The termination was based on the Contracting Officer's determination that desks provided by Delta under this supply contract did not meet the specifications.

Both parties have now moved for summary judgment.

APPELLANT'S MOTION

Delta has moved for summary judgment on the grounds that the termination notice was issued only "eight (8) days after the date of notification to the Appellant from the Contracting Officer 'specifying the failure to perform the provisions of this contract.' ([AF] tab 24, para 2 and attachments)." According to Delta, this eight-day interval was a failure to allow Delta the ten days specified by the Federal Acquisition Regulation § 52.248-8 default clause and vitiated the termination.

The referenced appeal file Tab 24 notice is a February 24, 1993 letter from the Contracting Officer to Delta stating that contract line items 113(a) through 120(a) were rejected in their entirety due to deficiencies noted in attached Quality Deficiency Reports and asking Delta to provide return shipment instructions within three days. Nowhere in that letter or its attachments is there any mention of Delta being afforded any cure period, ten days or otherwise.

The contract incorporated by reference the clause "Default (Fixed-Price Supply And Service) (April 1984)" set forth in Federal Acquisition Regulation § 52.249-8. Paragraph (a)(1) of the clause permits the Contracting Officer to terminate a contract for default "if the Contractor fails to—(i) Deliver the supplies . . . within the time specified in this contract or any extension; (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below)." The referenced subparagraph (a)(2) provides that the Government's right to terminate for reasons (ii) or (iii) may only be exercised if the Contractor does not cure a failure within ten days of receiving a notice specifying the failure.

After reciting the facts as the Contracting Officer perceived them, the termination for default stated that Delta was in default of the contract "because of your failure to deliver goods conforming to the contract's specifications and drawings within the time specified in the contract . . ." Thus, the termination was effected under reason (i) as set forth in the clause. A ten-day cure period is not required prior to terminating under reason (i).

The appellant argues that reason (i) only applies if there has not been any timely delivery, but does not apply if there are discrepancies in a shipment. We do not accept this argument, for inherent in reason (i) is that the supplies delivered must be in substantial conformance with the contract specifications. *UB Corporation*, GSBCA No. 7701-COM, 86-2 BCA ¶ 18,831 (1986).

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A ten-day cure period neither being required by the clause nor afforded by the Contracting Officer, the termination is not defective for the Contracting Officer's not having allowed ten days to pass prior to issuing the termination.

The appellant's Motion for Summary Judgment must be denied. Whether or not the criteria of reason (i) have been satisfied will be considered at trial.

RESPONDENT'S MOTION

The respondent also seeks a summary judgment in its favor, arguing (i) that Delta "was clearly in violation of the expressed terms of (a)(1)(i) of the default clause," (ii) that Delta did not deny in any Board filing that it was beyond the due date for delivery or that the delivered desks were defective, and (iii) that Delta has provided no explanation for the failure to deliver on time. The respondent further asserts that its reports show beyond a "reasonable doubt" that the desks were defective and those defects were more than merely cosmetic.

The test of whether summary judgment should be granted or denied is not the existence of reasonable doubt. Rather, the test is whether facts are uncontroverted or uncontrovertible. The record belies such an assertion.

A letter to the Board dated May 13, 1993, copies of letters from Delta to Coast Guard Counsel, and a Delta filing dated August 11, 1993, all allege specific facts in support of the appellant's assertion that the Coast Guard bears some responsibility and dispute the accuracy both of the deficiency reports and of the specifications. Whether or not the desks as delivered were actually defective, whether or not the contract specifications were actually defective, and whether or not the Coast Guard was a cause of the problem encountered during performance all require the presentation of facts. The parties are in dispute over these facts and this dispute must be resolved through trial.

In addition, the appellant has raised the argument that delivery was delayed due to weather conditions in Idaho; respondent counters that bad weather in Idaho is not unusual. The default clause makes certain weather conditions an excuse for a failure to perform in a timely manner. Weather conditions in Idaho during performance, what is usual weather in Idaho during that period of the year, and the impact of any bad weather upon performance are all factual issues.

There is indication that the appellant may not have presented some of these defenses to the Contracting Officer before the termination was issued. This is not relevant. Being a termination for default, this is in effect a government claim. In addition, new defenses, like new grounds for relief or new bases for a default termination, may be first raised and argued after an appeal has been filed. *Diversified Marine Tech, Inc.*, DOTBCA No. 2455, 93-2 BCA ¶ 25,719 (1993); *Joseph Morton Company, Inc. v. United States* [32 CCF ¶ 73,277], 757 F.2d 1273 (Fed. Cir. 1985); *Pots Unlimited, Ltd. v. United States* [26 CCF ¶ 83,395], 220 Ct. Cl. 405, 600 F.2d 790 (1979).

DECISION

The parties' arguments show that there are substantial and critical factual issues over which they are in dispute. In such circumstances, disposition by summary judgment would be inappropriate. The Cross-Motions for Summary Judgment are denied in their entirety.

[¶ 26,319] Golden West Refining Company, Kern Oil & Refining Company, Lunday-Thagard Company, Sunland Refining Corporation

EBCA Nos. C-9208134, C-9208135, C-9208136, C-9208137, July 26, 1993.

Procedure, Boards—Discovery—Depositions of Experts.—An expert expected to testify for the government regarding the fair market value of crude oil and the damages incurred by the contractors by reason of the government's extension of their contracts was barred prospectively from testifying on these issues at the hearing because his refusal to testify on these matters on deposition was inexcusable. The pleadings had clearly put the government on notice that these were the key issues that would be explored in the appeals. At his deposition, when asked about these areas, the expert testified that he had not reached any opinions or conclusions on the fair market value, and because the contractors' damages depended on the fair market value, he had also not reached any opinions or conclusions on damages.

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For the appellant: Fettmann & Tolchin, Fairfax, Virginia, by Edward J. Tolchin. For the government: Gustav Goldberger and Michael S. Yanock, Office of the General Counsel, U.S. Department of Energy, Washington, D.C.

Before GILMORE, Administrative Judge.

GILMORE, Administrative Judge: The Board held a hearing on July 20, 1993, to hear oral arguments on Appellants' Motion for Sanctions. Also pending before the Board was Respondent's Motion to Strike with Appropriate Sanctions, which the Board denied at the beginning of the hearing. (See Transcript of Hearing, p. 5.) After considering the oral arguments and written briefs of counsel, the Board grants the Motion for Sanctions, in part, as set forth below.

PARTIES' POSITIONS

By motion filed June 15, 1993, Appellants asked the Board to sanction Respondent for failing to allow a meaningful deposition of Respondent's expert witness by excluding the expert's testimony. Respondent answered that its expert, Dr. Tolmachoff, did provide opinions in areas that he could and should not have been expected to be totally prepared when the hearing was months away. Respondent also argues that Dr. Tolmachoff was to rebut Appellants' case and that Respondent had reserved the right to submit additional interrogatories on Appellants' Strategic Petroleum Reserve (SPR) calculations.

BACKGROUND

In response to Appellants' first set of interrogatories in February 1993, Respondent provided a Federal Rules of Civil Procedure Rule 26(b)(4) disclosure for its expert witness, Innokenty Tolmachoff, Ph. D. It indicated that Dr. Tolmachoff was expected to testify on the following subject matters:

A. Fair market value of crude oil sold from the Naval Petroleum Reserve's Elk Hills field for the period commencing March 1, and ending May 1, 1992, and

B. Damages incurred by Appellants because of the Government's extension of their contracts.

At his deposition, when asked about these areas, Dr. Tolmachoff testified that he had not reached any opinions and conclusions on (A) and, because (B) depended on (A), he had also not reached opinions and conclusions on (B). (Transcript of Tolmachoff Deposition, pp. 30-31) Although he answered a few questions regarding the fair market value of Naval Petroleum Reserve (NPR) crude oil, they were general in nature and did not address the specific factual issues in dispute. The pleadings had clearly put the Respondent on notice that these were key issues that would be explored in these appeals and its Rule 26(b)(4) disclosure shows that Respondent recognized this fact.

In its January 21, 1993, *Pre-Hearing Conference and Scheduling Order,* the Board informed the parties that:

> *No witness, expert or otherwise, will be permitted to testify* who, in response to a request for the witness' identity, has not been identified in time to allow a deposition to be taken or the substance of the witness' knowledge ascertained, or, in the case of an expert, to allow the facts relied upon and opinions held by him/her to be obtained prior to discovery cutoff. (Emphasis in original).[1]

The record demonstrates that, with regard to the issues of fair market value of NPR crude and damages alleged by Appellants, Respondent's failure to allow Appellants any meaningful discovery of the opinions and conclusions of its expert witness prior to the close of discovery on June 25, 1993, was inexcusable. Therefore, pursuant to the Board's Order, Dr. Tolmachoff will not be permitted to offer any testimony about these issues beyond those opinions and conclusions already offered at his deposition.

However, with regard to the issue of SPR pricing, Dr. Tolmachoff will be allowed to testify. At the time of his deposition, the facts underlying this theory of relief were reserved for further discovery by Respondent. Appellants were aware that Respondent had follow-up questions regarding the SPR calculations that were submitted to Respondent for the first time at the deposition of Appellants' expert.[2] (Hearing Transcript, pp. 32-33) As such, Dr. Tolmachoff's inability to answer questions about SPR pricing was excusable.

[1] The Board, under its inherent case management authority, has broad discretion to manage the litigation on its docket. *The Wm. Powell Company,* 86-3 BCA ¶ 19,253 (EBCA).

[2] At the time of this hearing, Respondent's interrogatories had been submitted but not answered by Appellants, who cited Respondent's failure to cooperate during discovery.

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CONCLUSION

Appellants' Motion for Sanctions is granted, in part.

Dr. Tolmachoff will not be permitted to offer further testimony regarding the issues of fair market value of NPR crude and Appellants' alleged damages. Dr. Tolmachoff will be permitted to offer testimony regarding SPR pricing.

ORDER

In light of the above ruling, Respondent's Interrogatories and Requests for Admissions shall be answered by August 9, 1993. If Appellants wish to further question Dr. Tolmachoff regarding SPR pricing, Respondent shall make him available for questioning between August 18 and August 25, 1993, at Appellants' convenience. Respondent's response to Appellants' Motion for Summary Judgment shall be filed by September 10, 1993. Appellants' reply shall be filed by September 20, 1993. The Pre-hearing and Hearing Schedule is suspended until after the Board rules on Appellants' Motion for Summary Judgment.

[¶ 26,320] Integrated Systems Group, Inc. v. Department of the Navy

GSBCA No. 12495-P, August 12, 1993.

Protests, GSBCA—Interested Party—Purchase Orders.—A protest against a purchase order under a nonmandatory schedule contract for automatic data processing equipment was dismissed because the protester did not submit a response to the *Commerce Business Daily* notice within the 15-day period specified in the notice and was therefore not an interested party. Through its own lack of action, the protester effectively eliminated itself from the procurement. Although the *CBD* notice did not involve a competitive solicitation and replies submitted by interested vendors did not constitute offers, the notice did advise vendors of the intended procurement action and afforded them the singular opportunity to identify their interest and capability to respond to the requirement.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Timothy K. Dowd and Barbara Amster, Office of Counsel, Command, Control and Ocean Surveillance Center, Department of the Navy, San Diego, California, and Anita M. LeBlanc, Office of Counsel, Naval Supply Systems Command, Department of the Navy, Washington, D.C.

Before NEILL, LABELLA, and BORWICK, Administrative Judges.

NEILL, Administrative Judge: This protest was filed on July 14, 1993, by Integrated Systems Group, Inc. (ISG). At that time, ISG protested, *inter alia*, the contracting officer's issuance of a purchase order under a nonmandatory schedule contract for the purchase of various automatic data processing equipment (ADPE). ISG contends that the contracting officer erred in proceeding with the issuance of the purchase order after the passage of fifteen days but before the expiration of a thirty-day period following publication in the Commerce Business Daily (CBD) of the Government's intent to make such a purchase. ISG has subsequently amended its protest to include an allegation that the analysis done by the contracting officer of replies received to the CBD notice was improperly performed.

On July 26, respondent, in this case the Department of the Navy, filed a motion to dismiss the original protest asserting that protester lacks interested party status or, alternatively, that the protest is untimely. Following ISG's amendment of the protest, respondent, on August 4, filed a request for reconsideration in the context of a further motion to dismiss the protest, as amended. The request for reconsideration went to the Board's order of August 2 allowing protester's amendment.

Upon consideration of written arguments provided by counsel for the parties, we grant the request for reconsideration and the motion to dismiss this protest, as amended, for the reasons set out below.

Findings of Fact

1. On June 14, 1993, respondent published in the CBD a notice of intent to purchase off of a General Services Administration (GSA) non-mandatory schedule contract for ADPE. The notice provided in part:

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> This is a notice of intent to place an order under an optional GSA schedule contract. The Government has made a determination that the listed Part Number(s) is/are the only product that will meet the Government minimum requirements. However, interested parties are invited to identify their interest and capability to respond to the requirements within 15 days of this synopsis. Include GSA contract number, if applicable, and price. Alternative sources will be considered only if: (1) clear and convincing documentation including technical and pricing information is furnished within 15 days of this synopsis, (2) the proposed equipment and/or services meet the requirements of the Government and (3) it is advantageous to the Government to consider alternative sources. If no affirmative written responses are received within 15 calendar days after publication of this notice to the effect that an acceptable alternate source is available, an order will be place [sic] with GTSI [Government Technology Services Inc.] against GS00K93AGS5681 or subsequent contract. If a response is received that meets the requirements, and analysis indicates competitive acquisition would be more advantageous to the Government, a formal solicitation may be issued. No contract award will be made on the basis of information received in response to this notice. This synopsis is a notice of intent to place an order against a GSA schedule contract and should not be considered as a request for offers.

Respondent's Motion to Dismiss, Attachment 1.

2. On June 29, the contracting officer proceeded to issue the order as originally indicated in the CBD notice. The order is said to have been issued by the contracting officer "after making all relevant determinations and documenting the file." Declaration of Contracting Officer Jane McCluskey (July 19, 1993) Contracting Officer's Declaration at 1.

3. On July 1, the contracting officer received a submission from ISG by telephone facsimile. The cover letter for the submission was dated June 30. Contracting Officer's Declaration at 1. The cover letter states:

> This letter/proposal is in response to your procurement notice in the Commerce Business Daily dated June 14, 1993, page 31. As required by the announcement, this information is submitted within fifteen (15) days of the announcement.

Respondent's Motion to Dismiss, Attachment 4.

4. The contracting officer concluded that ISG had to submit documentation, in accordance with the express terms of the CBD announcement, on or before June 28, 1993, the fifteenth day after synopsizing.[1] She, therefore, did not consider ISG to be a participant in the procurement which led to the issuance of the order against the GSA schedule contract. Contracting Officer's Declaration at 1-2.

5. On July 13, protester, upon inquiry, learned from the Navy that the purchase order which was the subject of the June 14 CBD notice had been issued on June 29. ISG thereupon filed this protest with the Board. The protest alleges:

> The contracting officer failed to timely properly notify ISG of award to the noticed GSA Schedule holder thereby prejudicing ISG's right to a suspension.
>
> The contracting officer failed to wait the required thirty days before placing a GSA Schedule order. 41 USC §§ 401 *et seq.*, 15 USC § 637(e).
>
> The contracting officer conducted and awarded a sole source procurement when brand name or equal products existed, thereby failing to achieve full and open competition.[2]

Complaint at 3.

6. On July 27, protester filed an amendment to its initial complaint. The amendment makes the additional allegation that the contracting officer did not perform a proper analysis (as required by FIRMR 201-39.803-3(b)(2)(i)) that purchase of the synopsized GTSI non-mandatory schedule contract items provides the lowest overall cost alternative to meet the Government's needs. Protester's Complaint, Amendment No. 1 at 3.

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[1] The Federal Information Resources Management Regulation (FIRMR) expressly provides: "In calculating the 15 calendar days for synopsizing, the first day shall be the actual date the synopsis appears in the CBD." 41 CFR 201-39.501-3(b) (1992).

[2] Two other allegations contained in the original complaint have subsequently been withdrawn by protester. *See* Complaint, Amendment No. 2.

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Discussion

In its motion to dismiss, respondent urges us to follow the line of analysis used by our appellate authority in its decision, *MCI Telecommunications Corp. v. United States* [35 CCF ¶ 75,677], 878 F.2d 362 (Fed. Cir. 1989). In that decision, the Court held that a subcontractor was not by law an interested party for purposes of filing a protest. It explained that in order to qualify as an interested party, a vendor had to either bid the contract or protest alleged deficiencies in the solicitation prior to the date for bid opening. *Id.* at 365.

We find merit in the arguments advanced by respondent, especially with regard to the allegation in the initial complaint that the contracting officer has conducted a sole source procurement when brand name or equal products existed and the allegation in protester's amended complaint which challenges the contracting officer's analysis of replies received in response to the CBD notice. The facts in this case demonstrate that ISG not only failed to submit a response to the CBD notice within the fifteen day period specified in that notice but also failed to reply before the agency proceeded with the issuance of a purchase order. Through its own lack of action, therefore, ISG effectively eliminated itself as an actual player in the procurement which was the subject of that notice. We recognize that the CBD notice did not involve a competitive solicitation and that replies submitted by interested vendors did not constitute offers. Nevertheless, the CBD notice did advise vendors of the intended procurement action and afforded them the singular opportunity to identify their interest and capability to respond to the requirement.

For purposes of this protest, and determining interested party status, we agree with respondent that the situation created by the publication of an intent to purchase off of a GSA non-mandatory ADPE schedule contract is sufficiently analogous to that of a competitive procurement as to justify reliance on the fundamental principle enunciated by the court of appeals in *MCI*. A vendor who does not reply to the published notice until after the agency has carried out the intended action is effectively precluded from protesting the propriety of that decision.

In connection with its amended complaint, ISG has attempted to shore up its challenged interested party status by pointing out that, even if it did not submit a timely reply or challenge to the CBD notice, it still has a continuing interest in responding to any solicitation which might have been issued in lieu of a purchase order on the schedule contract. Where the distinction between the decision not to issue a solicitation and the decision to issue a purchase order is anything other than a purely mental distinction, this argument of protester's might have some merit. As it is, however, these "two" decisions are, in reality, nothing more than two sides of the same coin. This fact is readily confirmed when one realizes that to challenge successfully the contracting officer's decision not to issue a competitive solicitation, one must look at the same operative facts supporting the decision to proceed with the purchase order, namely, the analysis and evaluation of replies received to the CBD notice.

In its motion to dismiss this protest, as amended, respondent argues that the rights of ISG, and any other potential offeror, on a solicitation would only be cognizable in the event a decision had actually been made to issue an RFP. Respondent's Motion to Dismiss/Motion for Reconsideration at 2. We agree. In the absence of such a decision, the parameters of the procurement in question do not extend beyond the issuance of a purchase order against the GSA schedule contract. This is a procurement action in which protester failed to make a timely appearance and one, therefore, which protester can not challenge at this late juncture. We are, therefore, in agreement with respondent that protester's challenges to the contracting officer's decision to proceed with the issuance of a purchase order must be dismissed in view of ISG's lack of interested party status.

Our conclusion with regard to the remaining allegations in the initial complaint is, however, somewhat different. In the second principal allegation, ISG contends that the contracting officer was required to wait not fifteen but thirty days for receipt of submissions in response to the CBD notice. In itself, this is a protestable issue and one which ISG, as an interested vendor, could have used as a ground of protest. Nevertheless, the alleged defect was apparent on the face of the CBD notice and clearly, in accordance with our Rule 5(b)(3)(i), should have been protested before the deadline established in the notice for submission of replies. Consequently, so far as this allegation is concerned, we find respondent's alternative argument to dismiss for lack of timeliness much more persuasive. We, therefore, are dismissing as untimely ISG's allegation re-

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garding the insufficiency of the fifteen day notice.

The third and remaining allegation in the complaint, as initially filed, is that the contracting officer failed to provide prompt notice to ISG that the purchase order was, in fact, issued. This allegation has been made in support of a request for suspension, which, although not timely filed, is sometimes granted by the Board pending resolution of a protest if it can be determined that notice was required. *American Service Corp.*, GSBCA 8224-P, 85-3 BCA ¶18,517. Failure to provide such notice, however, is not deemed to be sufficient by itself to justify granting a protest. *PCA Microsystems, Inc.*, GSBCA 9597-P, 88-3 BCA ¶21,081; *American Service Corp.*, GSBCA 8224-P, 86-1 BCA ¶18,652 (1985). Given the conclusions herein to dismiss all other allegations of this protest, we are dismissing this allegation as well.

Decision

Respondent's motion to dismiss is granted. Protester's allegations that the issuance of a purchase order is in violation of statute and regulation are DISMISSED for lack of jurisdiction. Protester's allegation that the CBD notice of intent to issue this order was defective is DISMISSED as untimely filed. Protester's remaining allegation that respondent failed to provide prompt notice of award is DISMISSED as insufficient, by itself, as an independent ground of protest for which relief can be granted.

[¶ 26,321] Integrated Systems Group, Inc. v. Department of Commerce

GSBCA No. 12420-P, July 16, 1993. Solicitation No. 51-EANE-3-00048.

Responsiveness of Bids—Information to Be Considered—Adequacy of Description.—A protest against an award for computer equipment was granted because the government improperly rejected the protester's bid as nonresponsive for failure to specify the source or age of the used items included in its bid. The government contended that the protester did not comply with the invitation for bid's requirement that bidders provide a complete description of used items being bid. Although the protester did not specify the source or age of the used equipment, its bid conformed to the solicitation's plain language, which required the identity and salient characteristics of the used items. The protester also included a statement that "all equipment is used/refurbished/warranted as new." To require the protester to indicate the source or age of the reconditioned equipment would impose a more stringent requirement than any contained in the IFB. Moreover, the government was not entitled to impose an unstated need for details on the acceptability of used equipment pursuant to a general requirement that bidders supply a complete description of their products.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Jerry A. Walz and Kenneth A. Lechter, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C.

Before GOODMAN, WILLIAMS, and DEGRAFF, Administrative Judges.

GOODMAN, Administrative Judge: This protest was filed by Integrated Systems Group, Inc. (ISG or protester) on May 7, 1993, alleging that respondent, the Department of Commerce (Commerce or respondent) improperly rejected ISG's bid for computer equipment to be supplied to the National Climatic Data Center, Asheville, North Carolina.

By decision dated June 15, 1993, we denied respondent's motion for summary relief, as genuine issues of material fact remained in dispute. On June 21, 1993, a hearing on the merits was held.

For the following reasons, the protest is granted.

Findings of Fact

The Solicitation

On February 22, 1993, Commerce issued solicitation number 51-EANE-3-00048 (the solicitation), which contains requirements for the following contract line item numbers (CLINs):

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0001	2 Clearpoint Research Corp. P/N ENCL 0101-07 19-inch, 4 bay minitower enclosure with Centronics 6-foot cables (or equal)
0002	6 Maxtor P/N Panther P1-17S 5.25" 1.7 GB external hard drives (or equal)
0003	2 Exabyte 8500T, 8mm 5.0GB cartridge tape subsystem with Willow Blue Chip device driver (or equal)
0004	1 Documentation IAW Section C

Protest File, Exhibit 1 at 3. Immediately following the list of CLINs, the solicitation provides: "*DESCRIPTIVE LITERATURE SHALL BE SUBMITTED FOR ALL ITEMS ABOVE. REFERENCE CLAUSE 52.214-21 IN SECTION L.*" *Id.*

Section C of the solicitation contains a thorough description of the characteristics of the equipment listed in the CLINS, Protest File, Exhibit 1 at 4-6. Section C.8, Warranty period, of the solicitation states:

> The Contractor shall furnish, at no cost to the Government, all parts and labor, as specified in this contract, for a period of 365 days or the manufacturer's standard warranty whichever is greater, beginning on the Acceptance Date.
>
> Prior to the expiration of the warranty period, whenever equipment is shipped for repair or replacement purposes, the Contractor shall bear all costs, including but not limited to, costs of packing, all transportation, and insurance.

Id. at 7.

Section F.2 of the solicitation requires delivery of all items within thirty days after the date of the contract. Protest File, Exhibit 1 at 11.

Section L.1 of the solicitation, Instructions, Conditions and Notices to Offerors, incorporates Federal Acquisition Regulation (FAR) 52.210-6, LISTING OF USED OR RECONDITIONED MATERIAL, RESIDUAL INVENTORY AND FORMER GOVERNMENT SURPLUS PROPERTY (APR 1984), which provides:

> (a) If the offeror proposes to furnish items or components which are used or reconditioned material, residual inventory resulting from terminated Government contracts, or former Government surplus property, the offeror shall provide the following information as an attachment to the offer: a complete description of the items or components; quantity; name of Government agency from which acquired; and date of acquisition, if applicable. No used, reconditioned, residual inventory, or former Government surplus property other than that listed on the attachment shall be furnished under the resulting contract unless authorized in writing by the Contracting Officer.
>
> (b) All items to be furnished under the resultant contract must comply with the terms and specifications contained in the contract.

48 CFR 52.210-6 (1992) (FAR 52.210-6); Protest File, Exhibit 1 at 36.

Section I of the solicitation, Contract Clauses, incorporates FAR 52.210-7, USED OR RECONDITIONED MATERIAL, RESIDUAL INVENTORY, AND FORMER GOVERNMENT SURPLUS PROPERTY (APR 1984), which provides:

> (a) The Contractor shall not furnish any item or component which is used or reconditioned material, residual inventory resulting from terminated Government contracts, or former Government surplus property, unless such item or component was listed in the applicable attachment to the offer and approved by the Contracting Officer or unless otherwise authorized in writing by the Contracting Officer.
>
> (b) All items or components furnished under this contract shall comply with the terms and specifications contained in the contract.

Protest File, Exhibit 1 at 17.

Section M.2, AWARD, of the solicitation states:

> Award will be made to that Contractor whose bid complies with the requirements set forth in Section C and is considered to be the most advantageous to the Government, price and other price-related factors considered.

Protest File, Exhibit 1 at 40.

There is no requirement in the solicitation that used equipment could not exceed a certain age or that the offeror must have possessed the offered equipment at the time of the offer. Transcript at 13, 51-52.

ISG's Bid

ISG submitted a bid that offers to supply an equivalent product (JMR Electronics' Four Plex FPXT) for CLIN 0001, the specified brand name products for CLINs 0002 and 0003, and the documentation required by CLIN 0004. ISG's total bid price was $14,960.55. Protest File, Exhibit 6.

ISG's bid includes one page entitled "Pricing Notes" that states: All equipment is

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used/refurbished/warranted as new. Protest File, Exhibit 6.

ISG's bid offers the warranty period required by the solicitation:

> Integrated Systems Group furnishes at no cost to the Government, all parts and labor, as specified in this contract, for a period of 365 days or the manufacturer's standard warranty whichever is greater, beginning on the Acceptance Date.
>
> Prior to the expiration of the warranty period, whenever equipment is shipped for repair or replacement purposes, Integrated Systems Group will bear all costs, including but not limited to, costs of packing, all transportation, and insurance.

Protest File, Exhibit 6.

ISG's bid contains an "Equipment Description" and a section entitled "Compliance with Technical Requirements." In these sections, ISG states that it understands the specifications, repeats the equipment characteristics set forth in Section C of the solicitation, and states that its equipment will possess those characteristics. Concerning the equipment ISG offered in CLIN 0001, ISG's "Compliance with Technical Requirements" section states: "Reference: See Four Plex Model FPXT Technical Data Sheets." ISG's bid also contains the statement that "[t]he proposed items are both technically compliant and cost effective. All necessary and required delivery, preparation, installation and maintenance work will be done in a timely manner and in accordance with the solicitation specifications." Protest File, Exhibit 6.

ISG's bid also contains two pages of descriptive literature prepared by JMR Electronics, Inc., concerning the items offered by ISG in CLIN 0001. The second page is dated "Summer '92" and states, "[p]roduct specifications subject to change without notice." These are the technical data sheets to which ISG refers in the "Compliance with Technical Requirements" section in its bid. Protest File, Exhibit 6.

ISG is a systems integrator that deals with a number of distributors on a daily basis. Transcript at 32. Refurbished equipment purchased by ISG for resale is tested by the distributors from which ISG acquires the equipment, and ISG's practice is to test the equipment after assembly and before delivery to the purchaser. *Id.* at 32-33.

ISG had not acquired any used equipment prior to the bid opening date, although it had obtained firm price commitments from the vendors. Transcript at 34-36. ISG had a verbal commitment from JMR Electronics to supply two 19-inch, 4 bay minitower enclosures with Centronics 6-foot cables, Part Number Four Plex, FPXT, which ISG considered to be equal to that specified in CLIN 0001 (2 Clearpoint Research Corp. P/N ENCL 0101-07 19-inch, 4 bay minitower enclosures with Centronics 6-foot cables (or equal)). ISG did not believe a written contract with JMR was necessary, since in ISG's past dealings with JMR, on a daily basis, that firm had acted as a reliable source. *Id.* at 40-41.

ISG had also assured itself of the availability of the identical items required by CLIN 0002 (6 Maxtor P/N Panther P1-17S 5.25" 1.7 GB external hard drives (or equal)) from at least three sources. Transcript at 42. With regard to CLIN 0003, ISG had contacted three sources to confirm the availability of the identical items requested, 2 Exabyte 8500T, 8mm 5.0GB cartridge tape subsystems, and had contacted Willow Blue Chip's local representative with regard to the availability of the Willow Blue Chip device driver. *Id.* at 42-43. CLIN 0004, the documentation in accordance with Section C of the solicitation, was to be provided as required.

Having assured itself of the availability of the items offered, ISG anticipated delivery from vendors to ISG, and ISG assembly and testing, within the thirty-day delivery period had ISG been awarded the contract. Transcript at 43-44.

Commerce's Rejection of ISG's Bid

Commerce received nineteen bids by the time of the bid opening on April 1, 1993, with the four lowest bids being:

$13,050.00	International Computer Purchasing
$14,690.00	Andataco
$14,960.55	ISG
$15,326.00	AC Technology

Protest File, Exhibit 8.

Commerce rejected the lowest bid as nonresponsive because the bid did not include all the items that were solicited, and the bid did not include any descriptive literature. Commerce rejected the second lowest bid as nonresponsive because the bid did not include any descriptive literature. Protest File, Exhibit 8.

Commerce rejected ISG's bid as nonresponsive because it failed to provide information about the offered used equipment. The contracting officer's reasons for finding ISG's bid nonresponsive are set forth

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in his Memorandum For File dated April 21, 1993:

> The third low bidder is Integrated Systems, Inc. In accordance with FAR 52.210-7, the Contractor shall not furnish any item or component which is used or reconditioned material, unless such item or component was listed in the applicable attachment to the offer and approved by the Contracting Officer unless otherwise authorized in writing by the Contracting Officer. The offeror indicated that all equipment is "used/refurbished/ warranted as new." The Contracting Officer has not approved such a list verbally or in writing.
>
> Additionally the bid did not list the quantity, if obtained from another Government activity, and date of acquisition as required by FAR 52.210-6. The Contractor only gave a complete description of the items as it appeared in Section C. Therefore, their bid is considered non-responsive and shall be rejected in accordance with FAR 14.404-2(a).

Protest File, Exhibit 8.

The contracting officer made the decision to reject ISG's bid as nonresponsive, as he believed there was not enough information contained in the bid to enable him to make a determination as to the acceptability of the used equipment offered. He testified as to his decision finding ISG nonresponsive:

> Q What was the basis for that decision?
>
> A The basis is that there was not enough information with the bid, required information, for me to make a determination as to the acceptability of the used equipment offered.
>
> Q And what did you deem to be missing?
>
> A Specifically, what was missing, the source of the equipment was not identified, nor was the date of acquisition, as required by FAR clause 210-6.
>
> Q Okay. Now is that required, in your view of the regulation or the clause—is that information required if an offeror has not yet acquired the used equipment?
>
> A I believe that information is required irrespective of whether or not the equipment has been acquired. The fact that—for example, the fact that the date of acquisition is not available at the time of the bid, does not, in my opinion, negate that requirement.
>
> Q So ... what should an offeror ... say if they ... have not yet acquired the equipment?
>
> A I can only guess that what a contractor should do is to provide whatever information is available to him. If they have not yet acquired the equipment, then they should so state and either provide an estimated date of acquisition or even, if they cannot do that, to simply state the equipment has not yet been acquired.
>
> Q Okay. And assuming that information had been provided, that the equipment had not yet been acquired, so there is no source and no date, that would have satisfied your understanding of the clause, if they had stated that in their bid?
>
> A If I had been faced with that information, it would have resulted in a bid rejection.
>
> ....
>
> Q And why would that be rejected?
>
> A If you were unable to tell me what the source or the date of acquisition was, then I would not have enough information to make a decision. In that case you are telling me you haven't even gone out and purchased this equipment yet. You are telling me, by being silent and not offering that information, that you don't know where you are going to get it and you don't know how old it is going to be or what condition it is going to be in. I do not have enough information, as a contracting officer, to make a reasonable determination of the quality of that item.

Transcript at 11-13.

When the contracting officer reviewed ISG's bid and noted there was no source or acquisition date for the offered equipment, he determined that the lack of this information was not a minor informality that could be cured because it went to the quality of the equipment. Transcript at 17-18.

The contracting officer explained why, in his view, age of used equipment was important:

> In acquiring ADP equipment, just as in acquiring a used car, the age is vitally linked to the reliability and to maintenance costs over the life of that item. And the older the item is, the higher the contract cost is going to be in the long run.
>
> So that, depending on whether or not you gave me something that was ten years old or three years old, I am going to take a look at those two items. For example, if two bidders gave me different items, one that is ten years old and one that is three years old, I would have to assume that the three year old item would be more reliable

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in the long run than would the ten year old item. It probably would break down far less often.

. . . .

[B]eing used equipment, what I would need to make a determination of acceptability would be some indication of how old this equipment was, so that I could ultimately determine how reliable it would be and how much it would cost the government ultimately to maintain this equipment, as opposed to new equipment.

Transcript at 14, 20-21.

The contracting officer further testified that he assumed the end user would use the computers purchased under this procurement for more than one year, but he was not sure. Transcript at 49-50. He also had no idea how long the CLINs had been manufactured and on the market. *Id.* at 18.

Although the contracting officer testified that the age of the equipment would provide some indication of increased maintenance costs after the warranty period expired, he had no knowledge of life cycle costs. He also stated he did not know if the end user intended to have a maintenance contract after the warranty period expired, nor how long the equipment was to be used. Transcript at 22, 25, 48-50.

On April 21, 1993, Commerce decided to award the contract to the fourth lowest bidder, AC Technology. Protest File, Exhibit 8. AC Technology offered the same "equal product" for CLIN 0001 as ISG—the JMR Four Plex. Protest File, Exhibit 7.

By letter dated April 29, 1993, Commerce notified ISG of contract award and informed ISG why ISG's bid was not selected:

Your bid was not selected for award because it did not contain all of the information required by FAR Clause 52.210-6, which was included in Section L of the solicitation. Therefore, your bid failed to conform to the Invitation for Bids.

Protest File, Exhibit 10.

ISG's Agency Protest

On May 4, 1993, ISG filed an agency protest that stated, in part:

Integrated Systems Group, Inc. participated in the referenced solicitation and was notified via a letter dated April 29, 1993 that an award was made to AC Technology for $15,326. Since ISG's bid price was less than the awarded price, and since our bid complied with 52.210-6, we are requesting that award to AC Technology be terminated and award be made to the rightful low bidder, ISG. Our bid complies with all of the specifications required by the solicitation. Your reasons for dismissal are unfounded, for ISG's bid meets the requirements of FAR Clause 52.210-6.

Protest File, Exhibit 11.

On May 5, 1993, Commerce denied ISG's agency protest by stating, in part:

Other than a pricing note which merely stated that "all equipment is used/refurbished/warranted as new," and the statement that "the proposed items are both technically compliant and cost effective," the bid did not contain any other description of used or reconditioned equipment. Further, the bid did not specify the source or age of the equipment being offered, as expressly required by Clause 52.210-6. Therefore, we were unable to determine if the ISG bid would be advantageous to the Government, when compared with other bids which offered new equipment. For that reason, we were compelled to reject the bid.

Protest File, Exhibit 12.

Discussion

The issue in this protest is whether respondent properly rejected protester's bid as nonresponsive. The solicitation included FAR 52.210-6, which required that where used or reconditioned material was bid "a complete description of the items or components had to be included." Respondent contends that protester failed to provide a complete description of the used equipment being offered in that protester's bid did not identify the source or the age of such equipment. Protester contends that the solicitation did not require that used equipment be in the possession of the bidder at the time of bid or that the source or age be identified. We agree with protester and conclude that ISG's bid was improperly rejected as nonresponsive.

It is fundamental that an agency cannot deem a bid nonresponsive when that bid conforms to the plain language of the solicitation, *e.g., International Data Products Corp. v. Department of Energy*, GSBCA 11848-P, et al., 93-1 BCA ¶ 25,293, at 126,025, 1992 BPD ¶ 191, at 4. Further, a bid cannot be deemed nonresponsive where a bidder is clearly bound to perform the material requirements of the IFB and has not taken exception to such requirements. *Denro, Inc.*, GSBCA 9626-P, 89-1 BCA ¶ 21,287, at 107,368-69, 1988 BPD ¶ 238, at

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13. Here, ISG submitted not only the information that the IFB required—the identity of the precise equipment being bid and the salient characteristics—but also a statement that "all equipment is used/refurbished/warranted as new."

The solicitation contained no requirement that the source or age of used equipment obtained from a non-governmental source be identified. Protest File, Exhibit 1. Thus, respondent cannot now reject ISG's bid for used equipment simply because ISG failed to provide information on the source or age of such equipment. Indeed, to require ISG to specify the source and age of the used or reconditioned equipment would impose a far more stringent requirement than any contained in the IFB.

FAR 10.010 mandates that when an agency solicits used or reconditioned material, "the solicitation shall clearly identify the supplies or their components that need not be new, *along with the necessary details on their acceptability*" (emphasis added). Here, since there were no "details" on the acceptability of used or reconditioned equipment set forth in the solicitation, respondent cannot impose them in the evaluation. If there were particular details concerning used equipment that Commerce wanted bidders to include in their bids, it should have stated them explicitly in the solicitation. Commerce cannot subsume an unstated need for details within a general requirement that bidders supply a "complete description" of their products.

In sum, respondent's rejection of ISG's bid as nonresponsive violated statutory requirements for (1) evaluation of sealed bids based solely on the factors specified in the solicitation, 41 U.S.C. § 253b(a) (1988), and (2) award of contracts considering price and other factors included in the solicitation, 41 U.S.C. § 253b(d)(4) (1988). As such, respondent's rejection of ISG's bid as nonresponsive cannot stand.

Decision

The protest is GRANTED. Respondent's delegation of procurement authority is revised as follows: ISG's bid may not be rejected as nonresponsive. Respondent may make an award consistent with this opinion, or revise its solicitation to reflect accurately its current justifiable needs or otherwise proceed in accordance with statute and regulation.

[¶ 26,322] James W. Collins & Associates, Inc. v. Department of Commerce

GSBCA No. 12205-P-R, August 16, 1993.

Protests, GSBCA—Reconsideration—Arguments Already Considered.—Reconsideration of a board's dismissal of a protest against a procurement for computer maintenance services as untimely filed was denied because the protester's reconsideration motion reasserted the contention, previously raised in its response to the government's motion to dismiss, that a telephone call apprising the protester of its status took place later than initially asserted in its complaint. Unlike the contracting officer, who submitted a declaration regarding the date of the telephone call, the protester did not submit affidavits or a declaration in support of its contention that the date asserted in the complaint as initially filed was mistaken.

For the protester: Von L. White I, President of Exact Data Services Division. For the government: Jerry A. Walz and Kenneth A. Lechter, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C.

Before HYATT, BORWICK, and WILLIAMS, Administrative Judges.

Reconsideration of 93-2 BCA ¶ 25,770 denied.

HYATT, Administrative Judge: Protester, James W. Collins & Associates, Inc. (JWC), has moved for reconsideration of the Board's decision dismissing for lack of timeliness its protest of respondent's actions with respect to the procurement of certain maintenance services for Government-owned automatic data processing equipment (ADPE). JWC's protest challenged respondent's decision to exclude it from further consideration for award of the contract and, alternatively, requested recovery of the costs of preparing its proposal and pursuing

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this protest. For the reasons stated, we deny protester's motion.

Background

This protest concerned a proposed small business set-aside procurement for computer maintenance services required by the Office of Computer Services of the Commerce Department. Certain irregularities occurred during the procurement process, which are described in the Board's decision dismissing JWC's protest as untimely filed. *James W. Collins & Associates, Inc. v. Department of Commerce*, 1993 BPD ¶ 22 (Jan. 7, 1993). As a result of these irregularities, the contracting officer excluded from further consideration for award several small businesses, including JWC. JWC protested.

In its complaint, filed on December 3, 1992, JWC stated that a telephone conversation had been held with the contracting officer concerning this matter "on or about November 17, 1992." In a declaration signed and certified to by the contracting officer, she confirmed that a conversation had occurred on this date, and that she had initiated the call in response to a telephone call she had received on November 16. The fact that she received a call from protester on November 16 is verified by an electronic mail message to that effect. A copy of this message was proffered by respondent in its opposition to the motion to reconsider. Her records indicate that she returned the call.

In responding to the initial motion to dismiss, protester asserted that the telephone call that it initially had conceded occurred on or about November 17 actually did not occur until later in November. This assertion was made in an unsworn statement which was not accompanied by any substantiating documentation. The Board noted that protester had made this claim but did not address it in the decision dismissing the protest because it deemed that the weight of the evidence supported the conclusion that a telephone conversation apprising JWC of its status in the procurement had in fact taken place on November 17. *James W. Collins & Associates, Inc.*

In its motion for reconsideration, protester essentially objects that the Board's finding that the telephone call took place on November 17 is erroneous, and adds, again simply in the form of an unsworn pleading, that it has searched its own records and has located no record of such a call. Protester offers to supply copies of its records but never supplied them in the first instance. Based on its records, protester maintains that the call must not have taken place on November 17 after all, and thus contends that its protest should not have been deemed untimely.

Discussion

It is the protester's burden to establish the timeliness of its protest. Rule 7(b)(2)(vi) [1]; *Rotating Memory Services*, GSBCA 10851-P, 91-1 BCA ¶ 23,408, at 117,446, 1990 BPD ¶ 311, at 3; *Electronic Systems Associates, Inc.*, GSBCA 10177-P, 90-1 BCA ¶ 22,439, at 112,679, 1989 BPD ¶ 336, at 13. As we stated in the initial decision, in the interest of minimizing expenses incurred by Government agencies and prospective contractors, as well as creating a degree of certainty as to when protests may or may not be brought, the Board has, on more than one occasion, warned that its timeliness rules will be enforced strictly. *James W. Collins & Associates*, slip op. at 4 (citing *Integrated Systems Group, Inc.*, GSBCA 11075-P, 91-2 BCA ¶ 23,790, 1991 BPD ¶ 42; *Teradata Corp.*, GSBCA 10677-P-R, 90-3 BCA ¶ 23,278; 1990 BPD ¶ 250). Protester's complaint, as initially filed, averred that a telephone conversation took place between it and the contracting officer on or about November 17. Records supplied by respondent have established that a call was placed by protester to the contracting officer on November 16. In her declaration, the contracting officer indicated that she routinely returns calls as promptly as possible and that, to the best of her recollection, she in fact returned protester's call on November 17 and apprised protester of the status of the procurement.

The protest was filed on December 3, 1992. Based on protester's concession and the contracting officer's declaration that the information needed to apprise protester of its basis for protest was conveyed in the telephone conversation that occurred on November 17, the Board dismissed the protest as untimely filed. Although not explicitly stated, the Board simply could not give as much credence to protester's conflicting, unsworn, and otherwise unsupported retraction of its earlier statement concerning that telephone conversation. Based on the preponderance of the evidence in the record at that time, the Board concluded that, as of November 17, protester had full knowledge of its grounds of protest, and, to be timely,

[1] 48 CFR 6101 (1992).

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would have had to file a protest within ten working days. It did not do so.

Protester's motion does little more than reassert its contention that the telephone call it initially conceded took place around November 17 actually took place much later in November. In contrast to the contracting officer's declaration, no sworn affidavit or declaration is offered to support the contention that the date asserted in the complaint as initially filed was mistaken. Protester has offered no new argument or evidence that it could not have offered prior to the dismissal to justify granting its motion for reconsideration. Rule 32.

Decision

Protester's motion for reconsideration is DENIED.

[¶ 26,323] Universal Automation Labs, Inc. v. Department of Transportation; Diversified International Sciences Corporation and Galaxy Scientific Corporation, Intervenors

GSBCA No. 12370-P, July 7, 1993. (The text below is the redacted version issued to the public on July 27, 1993.)

Selection of Contractor—Evaluation Factors, Disclosure—Clarity.—A protest against a solicitation for concepts analysis division support services was denied, despite the contractor's allegation that a solicitation factor failed to state clearly that proposals demonstrating more in-house prime contractor technical expertise would be scored higher than proposals relying more upon the use of subcontractors, because the solicitation, when read as a whole, indicated a preference for in-house expertise. The factor focused primarily on the presence of in-house technical expertise to ensure the effective management of subcontractors.

Cancellation of Solicitation—Changed Needs—In-House Capability.—An amendment that revised the language of an evaluation factor did not warrant cancellation of and reissuance of the solicitation, because the amendment constituted a substantive change rather than a clarification of the solicitation. The amendment changed neither the government's original intent regarding the factor nor the meaning or purpose of the other factors. The protester did not prove its contention that the changes made to the evaluation factor, which expressed a preference for in-house expertise, required the protester to cancel its teaming agreements with subcontractors.

Automatic Data Processing Procurement—Authority to Procure—Blanket Delegation Limitation.—A protester's contention that under a footnote to a revised FIRMR rule that was published in the Federal Register, the government needed a specific delegation of procurement authority to procure computer support services during the transition period before the revised rule's effective date was rejected because, in a series of technical corrections, the Federal Register subsequently required the removal of the footnote requiring a specific DPA. In alleging that the footnote remained valid, despite the technical corrections, the protester interpreted the corrections as amendments. The record showed that the footnote was erroneous and was inadvertently included in the final draft.

Selection of Contractor—Equal Treatment—Proof of Bias.—A protest against an award for computer support services that contended that the protester was deprived of an impartial evaluation of its proposal was denied, because the more detailed comments to the awardee regarding its proposal's weaknesses did not stem from any desire to treat the awardee more favorably than the protester. Moreover, after the protester failed to address evaluators' comments regarding its proposal's potential weaknesses, the government issued clarifying language in an amendment. The clarification in the amendment amply compensated the protester for any temporary advantage that might have accrued to the awardee as a result of the more specific comments that it received. The fact that the protester had filed two previous protests against the government did not constitute proof of bias. The protester's allegations regarding negative statements made by various government employees also did not amount to proof that the protester was treated unfairly.

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Conflicts of Interest—Appearance of Impropriety—Social Contacts.—A protest against an award for computer support services was denied, despite the protester's contention that the government officials' social contacts with competing contractors during the course of the procurement raised the appearance of impropriety, because the protester did not present any hard facts showing the possibility and appearance of impropriety or any evidence that the alleged impropriety could have produced an adverse effect on the procurement process. Although the protester criticized one official's friendships with contractors' representatives, it did not provide any evidence refuting the official's testimony that he did not discuss business during social meetings.

Small Business—8(a) Procurements—Delay in Procurement.—A protest against an award under a solicitation for computer support services was denied, despite the protester's contention that the government's delay in awarding the contract all but guaranteed award to a large contractor in violation of the Small Business Act's requirement that a fair proportion of government contracts be placed with small businesses, because the protester did not cite any regulations that precluded the participation of companies that had developed during the course of the procurement to a point where they were no longer "small."

For the protester: Winston & Strawn, Washington, D.C., by Michael R. Lemov, Michael L. Sibarium, Mark J. Hedien, and Robert A. Berger, and Manatt, Phelps & Phillips, Washington, D.C., by James H. Robert III. For the government: John R. McCaw, Jr., and Sybil Horowitz, Office of the Chief Counsel, Federal Aviation Administration, Washington, D.C., and Thomas E. Flatley, Jr., Patricia A. McNall, and William R. Sheehan, Office of the Assistant Chief Counsel, Federal Aviation Administration, Atlantic City Airport, New Jersey. For the intervenor, Diversified International Sciences Corporation: Smith, Pachter, McWhorter & D'Ambrosio, Vienna, Virginia, by Arthur I. Leaderman and Carl T. Hahn. For the intervenor, Galaxy Scientific Corporation: Saul, Ewing, Remick & Saul, Philadelphia, Pennsylvania, by Robert G. Fryling and John W. Fowler, Jr.

Before NEILL, HYATT, and VERGILIO, Administrative Judges.

NEILL, Administrative Judge: This protest was filed by Universal Automation Labs, Inc. (UAL) on April 14, 1993. It concerns a solicitation for concepts analysis division support services (CADSS), issued by the Technical Center of the Federal Aviation Administration (FAA) located in Atlantic City, New Jersey.

UAL's protest has been prompted by a solicitation amendment issued by FAA. Protester contends that the amendment is considerably more than a mere clarification of an evaluation factor. According to protester, the amendment introduced a change into the evaluation factor in question which was so substantive that it should have led to a cancellation rather than an amendment of the solicitation. UAL further contends that there is proof of bias against it on the part of FAA and that it has been deprived of the opportunity for an impartial evaluation of its proposal. UAL's protest, as amended, also alleges that FAA, in carrying on this procurement, has violated: the Small Business Act, the Procurement Integrity Act, conflict of interest regulations, and other agency requirements, and that these violations so taint the procurement as to necessitate cancellation of the solicitation. Finally, as the record for this protest has developed, an additional issue has arisen regarding the validity of the delegation of procurement authority (DPA) for this procurement.

Two other firms competing for this procurement have intervened in the protest as intervenors of right. They are Diversified International Sciences Corporation (DISC) and Galaxy Scientific Corporation (Galaxy).

The protester and respondent each filed motions for partial summary relief. In addition, intervenor DISC filed a motion for summary disposition on seven of the nine counts in the complaint, as amended. By decision dated May 17, 1993, we denied all of these motions. *Universal Automation Labs, Inc. v. Department of Transportation*, GSBCA 12370-P, 93-3 BCA ¶ 26,142, 1993 BPD ¶ 159 (May 17, 1993).

For the reasons set out below, we deny UAL's protest.

Findings of Fact

FAA's Selection Plan

1. The selection plan for this procurement indicates that it would be for an estimated value of $ and was required by the FAA to provide engineering and test support

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services in conjunction with research, development, implementation and testing of the national airspace system (NAS). The selection plan identifies several program areas of concern such as navigation, communications, surveillance, landing, maintenance, and air traffic control (ATC) program elements and equipment. Protest File, Exhibit 5.

2. The selection plan also indicates that the planned procurement is to be reserved for competitive award to a small business under Section 8(a) of the Small Business Act as amended. Protest File, Exhibit 5. Prior to the time of this procurement, contracts awarded to small businesses by the Technical Center had not been awarded on a competitive basis. Instead, contracts were awarded to small business firms identified to the Technical Center by SBA. After evaluating the capabilities of these firms, the Technical Center would select one with which it would then negotiate on a non-competitive basis for eventual award. Transcript at 699, 809-11.

3. The Technical Center's selection plan for this procurement was approved on August 27, 1990. It envisioned an award within thirty-five weeks of that approval and contemplated a five-year period of performance. Protest File, Exhibit 5.

The DPA

4. By letter dated March 30, 1990, the Technical Center submitted an agency procurement request (APR) to the Director of the Office of Information Resource Management for the Department of Transportation (DOT). Protester's Exhibit BB. A DOT official responsible for review of all APRs from operating administrations within the agency testified that he read the APR submitted by the FAA for this procurement. Transcript at 624-25. This official further testified that no specific DPA was required from GSA for the procurement because there was, at that time, an unlimited blanket regulatory DPA from GSA. *Id.* at 613-17. The Board takes judicial notice that, in the spring of 1990, Part 201-23 of the Federal Information Resources Management Regulations (FIRMR), which prescribes policies and procedures regarding DPAs, provided: "Agencies do not require GSA approval to contract for commercial ADP support services." 41 CFR 201-23.104-6 (1990); *see also* 55 Fed. Reg. 30,702, 41 CFR 201-23.103-1(c)(2) (July 27, 1990).

5. While DOT concluded that no specific DPA was required from GSA, it nonetheless issued an internal redelegation of procurement authority to FAA for this procurement. Transcript at 617-18. The internal DPA was granted in writing by letter dated April 17, 1990. Among its provisions is the statement:

> An amendment to this DPA must be obtained whenever any material change is expected from the basis on which this DPA was issued. Examples of such changes include: a substantive revision in the technical requirement, a change in acquisition strategy, a significant slippage in the planned contract award date, a change in contract life, or an increase in anticipated contract costs.

Protest File, Exhibit 2.

6. On December 28, 1990, the Federal Register published a revised version of the FIRMR. The introductory note published with the final rule contains the following provision:

> EFFECTIVE DATE: This rule is effective April 29, 1991, but may be observed earlier. This rule is applicable to solicitations issued on or after the effective date.
>
> FOR FURTHER INFORMATION: Paul Whitson, GSA, Office of Information Resources Management Policy ....

55 Fed. Reg. 53,386 (1990).

7. Several pages into the FIRMR rule, published in the December 28 issue of the Federal Register, is Section 201-20.305-1, which deals with regulatory delegations. A footnote appended to a provision concerning contracts for support services states:

> For transition purposes, solicitations for support services, regardless of cost, released prior to (insert publication date here) may be awarded without obtaining a specific DPA from GSA and solicitations for support services released after (insert publication date here) that are not awarded prior to (insert effective date here) require a specific DPA if they exceed the applicable dollar threshold in this § 201-20.305-1.

55 Fed. Reg. 53,401 n.1 (1990).

8. On January 3, 1991, shortly after the publication of the final FIRMR rule on December 28, the Technical Center issued the solicitation for this procurement. Protest File, Exhibit 7.

9. On February 7, 1991, the Federal Register carried a series of technical corrections to the final FIRMR rule previously published in the December 28 issue. Among the corrections called for is the following:

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On page 53401 in the third column in § 201-20.305-1(a)(1) introductory text in the second line the reference "1" to the footnote and the footnote are removed.

56 Fed. Reg. 4948 (1991). This notice of technical corrections to the final FIRMR rule carries an effective date of April 29, 1991. *Id.*

10. Mr. Paul Whitson, the GSA representative identified in the December 28 notice as the official to contact for further information, has provided for the record in this case a declaration under penalty of perjury. He states:

> With respect to the footnote that appeared on page 53401 of the December 28th Federal Register, it was the intent of the FIRMR improvement team that the footnote not be included in the version of the new FIRMR published in the Federal Register. The footnote was contained in an early, draft version of Part 20 which was inadvertently given to the Federal Register for publication. When the error was discovered, the decision was made to remove the footnote in a correction which was published in the Federal Register on February 7, 1991.

Respondent's Supplemental Posthearing Brief, Exhibit 3.

11. The DOT official who processed the APR for this procurement has also provided for the record a declaration under penalty of perjury. In that declaration, he states that shortly after the new FIRMR appeared in the Federal Register on December 28, 1990, he contacted various GSA representatives and was told that a specific DPA was not necessary for this procurement because the solicitation had been issued prior to April 29, 1991. He likewise has declared that in early February 1991, after these telephone contacts, he received a GSA guidance memorandum which confirmed the oral advice already received. Respondent's Supplemental Posthearing Brief, Exhibit 4. When called to testify, this same individual stated that subsequent contacts with GSA representatives—as recent as the day on which he testified—have continued to confirm that the "grandfathered old FIRMR blanket delegation of procurement authority" was still valid. Transcript at 636.

12. The DOT official responsible for processing the APR submitted by the Technical Center for this procurement and for issuing the internal redelegation of procurement authority has also testified that neither the APR nor the internal DPA had ever been amended. Transcript at 630-31. He explained, however, that in mid-1992, he received a telephone call and a telefacsimile from his contact at the FAA Technical Center. At that time he was advised of the status of this procurement. He was asked if an amendment of the DPA was needed. He replied that it was not. Rather, he suggested that FAA defer requesting an amendment until the agency has a clear indication of when award will be made. *Id.* at 619-23.

The Evaluation Provision

13. Section M of the solicitation states that proposals will be evaluated to determine which offer is the most advantageous to the Government—technical, cost, and other factors considered. Protest File, Exhibit 7 at 156. The original solicitation listed six evaluation factors in descending order of importance. They were:

> Factor 1: Understanding Requirements
>
> The ability of the contractors to show an understanding of the purpose, scope, and requirements of the work associated with this contract. This will include the contractor's response to the overall contract, the defined task areas, and the technical response to the sample problems.
>
> Factor 2: Experience in the following fields of work. Because of the ongoing nature of the ACD-300 [Concepts Analysis Division] work effort, any new contractor ideally would be experienced in each of the various technical fields; specifically,
>
> Air to Ground Communication/Data Link Processing/Development,
> Air Traffic Control Human Factor,
> Air Traffic Control Modeling and Simulation,
> Data Link Design and Development,
> Maintenance Control Center Design,
> Remote Data Acquisition,
> Remote System Communication, and
> Weather Data Processing.
>
> Factor 3: Experience with the FAA Air Traffic Control System.
>
> Because of the uniqueness of the FAA responsibility, experience and knowledge of air traffic control system requirements/procedures is essential. Specific experience of the potential contractors staff in air traffic control systems and the number of years of experience each staff member brings to the effort will be used to judge the effectiveness of each proposal.
>
> Factor 4: Management Plan
>
> Due to the size and scope of this contract, it is expected that a mix of the prime contractor's and subcontractors will be re-

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quired. The extent of in-house expertise in the specific technical areas and the use of subcontractors for additional expertise must be explained in a Management Plan and will be evaluated.

Factor 5: Management Ability

The ability of the contractors' management to respond to the needs of the projects and their willingness and success at resolving problems as they develop will be evaluated by analysis of previous work efforts and the response to the sample problem and initial tasks.

Factor 6: Realism and Reasonableness of Price[1]

The cost proposals shall be evaluated for realism and reasonableness. The contractor shall include all cost elements that are allowable to the effort and specify if they are to be charged as direct costs or indirect costs.

Id. at 156-57.

Protester's Teaming Agreements

14. At the time protester decided to offer on the CADSS procurement which is the subject of this protest, it likewise elected to offer on two other 8(a) procurements similarly involving support services and issued by the Technical Center during, more or less, the same time period. Transcript at 76, 144, 577. One of these procurements is referred to in the transcript as the "weather" contract or procurement while the other is referred to as the "communications" contract or procurement. Transcript at 231, 577, 809.

15. Protester's Vice President of Contracts testified that at the start of the CADSS procurement UAL had enough in-house staff to cover approximately ninety-five percent of the required expertise. Transcript at 144-45. However, since UAL was interested in offering on all three 8(a) procurements and in submitting winning proposals, it sought subcontractor experience in areas where a subcontractor's expertise would increase its prospects for award. *Id.* at 577.

16. UAL's Proposal Manager testified that it was his understanding that as long as UAL's proposal met the SBA fifty percent minimum,[2] it would not be penalized for using subcontractors. He stated: "As far as the mix, we were free to go up to the maximum allowable by SBA and we felt we had a right to do that." Transcript at 553. He likewise noted that, based on his experience, the FAA had been encouraging and accepting team competition. *Id.* at 555.

17. UAL's Vice President of Contracts testified regarding what he considered to be additional evidence of FAA's policy of not crediting offerors in evaluations for having a higher degree of expertise among in-house staff as opposed to subcontractor staff. He testified that the solicitation for the "weather" procurement had originally contained an evaluation factor which gave credit for in-house expertise. It read:

Factor 3 Prime Contractor Involvement.

The extent of in-house support expertise in the specific technical areas of interest to ACN-230 is of prime interest. The ability to support the technical areas required of the contract and the depth of in-house staff back at the home plant to resolve complex technical problems will be evaluated.

A vendor's question regarding this factor asked: "Does this imply a preference toward bidders who do not use subcontractors?" As a result of this inquiry, FAA deleted this original Factor 3 in its entirety and replaced it with a factor entitled "Technical Approach for Project Completion." This factor includes no reference to either prime or subcontractors. *See* Protester's Exhibit V. It is the testimony of UAL's Vice President of Contracts that this action on the part of FAA provided a context for understanding the language of Factor 4 in the CADSS solicitation. Transcript at 106-07, 147-49. Both this witness and UAL's Proposal Manager contend that they read Factor 4 as not providing additional credit for in-house expertise but rather as allowing and encouraging the use of subcontractors to supplement in-house expertise. *Id.* at 107, 559-60.

18. Accordingly, UAL moved out at an early juncture to negotiate teaming agreements for the CADSS contract with three promising subcontractors. Although the agreements are dated November 19, 1990, correspondence in the file indicates that they were signed after that date. One agree-

[1] This sixth and last factor was subsequently eliminated as a separate evaluation factor by solicitation amendment 0006. Protest File, Exhibit 40 at 157.

[2] Namely, 15 U.S.C. § 644(o) (1988) (in service contracts awarded to a small business concern, fifty percent of the cost of contract performance incurred for personnel shall be expended for the employees of that concern).

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ment appears to have been signed in early December 1990, a second later in that month, and a third in late January 1991. Protester's Exhibit O; Transcript at 592.

19. Under the terms of the teaming agreements, the agreements terminate if the programs to be supported by the CADSS contract were to be canceled or if UAL were not to receive the contract. The agreements do not provide for termination in the event the solicitation is amended. Protester's Exhibit O.

20. The statement of work (SOW) in each of the three teaming agreements provides that a specified percentage of the contract work will be done by the subcontractor or that a designated number of the subcontractor's employees will assist with contract performance. The SOW also provides that each subcontractor will be expected to participate in those areas where its expertise will provide the maximum benefit to the UAL team. Other than a provision prohibiting UAL from soliciting employees of the subcontractor for hire, we find nothing in these agreements which precludes UAL from hiring key staff personnel with an expertise similar to that which presumably is possessed by one or more employees of any of the three potential subcontractors. Protester's Exhibit O.

Evaluation of Offers

21. The chairman of the technical evaluation team (TET) for this procurement prepared two sets of technical evaluation instructions. The first set was a draft that he eventually concluded did not include enough detail or provide for a sufficient number of evaluators. Transcript at 755-56. He, therefore, prepared a radically revised set of instructions prior to receipt of initial proposals. These instructions were then used for all technical evaluations which have been done to date in this procurement. *Id.* at 756-60.[3]

22. The technical evaluation instructions used for all evaluations done thus far in this procurement advise evaluators that the extent of in-house expertise in specific technical areas and the use of subcontractors for additional expertise is to be evaluated. Lower scores are to be assigned for [4]

[5] Protest File, Exhibit 6.

23. The TET chairman was also the author of the technical evaluation factors in Section M of the solicitation. Transcript at 752. He testified at some length regarding the use of subcontractors for this procurement and the interrelationship of the mix of prime and subcontractors to some of the evaluation factors. He explained that, to the extent that the use of subcontractors enlarged the pool of available expertise, this could enhance an offeror's prospects of a higher score on the first factor which dealt with understanding requirements. Transcript at 753, 848-49. He also acknowledged that the number of subcontractors that a prime contractor intended to use could affect an evaluation under Factor 5, management ability. *Id.* at 845.

24. With regard to Factor 4, the TET chairman testified that the purpose of this factor was to examine a proposal from the standpoint of key management personnel employed by the prime contractor. He explained that, in the past, the absence of key personnel expertise in the prime had created problems for the Technical Center. He offered two examples:

> Number one is I have had a couple of cases where a contractor would deliver me a document that I was told that the task was on track, it was being done, it was right. When I got the document, it was technically off of the mark. When I would ask why, I would find out that there was nobody in the prime contractor that had the expertise to be able to evaluate. It wasn't until it got to the Government that we found out. A lot of times they were drafts, and we then had to pay to get them redone.
>
> The other place that I have had a problem is that the subcontractor goes away. For some reason—either the prime and the sub have a falling out or the company goes out of business, or due to other contracts that they are bidding on, they have to terminate with that contract. When that occurs, then I find that there may not be any expertise in the primary company, I end up having to pay to either bring it into the company or education time to

[3] The record contains a copy of this revised instruction. It has, however, been further revised. This third version is a "red-lined" version of the second. The changes introduced in the third version reflect solicitation amendment 0006 and are not considered by the TET chairman to be substantive changes. Transcript at 756, 762.

[4] Namely,

[5] Namely

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train another sub—I had to bring them up to speed.

So it is important that we had some expertise in the prime company that had to do with their knowledge of each one of the areas. That is why I called that key staff mix.

Transcript at 753-54.

25. proposals were received by the amended closing date of July 10, 1991. Protest File, Exhibits . The technical portions of the proposals were sent to the TET to be scored in accordance with the criteria in Section M of the solicitation. The TET completed an initial draft evaluation on August 2, 1991. It showed the following average scores:

[6]

Average Score
Percentile

Id. Exhibit 17. Based upon this initial draft evaluation report, offerors were kept in the competitive range. *Id.*, Exhibit 26; Transcript at 767.

26. By letters dated November 22, 1991, clarification requests were sent to all offerors. Protest File, Exhibit 18. Replies were received during December 1991. *Id.*, Exhibits . On January 17, 1992, following receipt of these replies, the TET chairman submitted a final version of his technical evaluation report.

. *Id.*, Exhibit 24; Transcript at 768.

27. After submitting his final technical evaluation report, the TET chairman met with the Source Evaluation Board (SEB) for this procurement. The SEB requested more information and details to support the technical ratings assigned. In response, the TET chairman revised his report and submitted an expanded version on May 1, 1992. Protest File, Exhibit 27; Transcript at 767-69.

28. When the expanded evaluation report was presented to the SEB for review, concerns were expressed about variances in scores among the evaluators. Transcript at 770-72. In response to these concerns, the TET chairman reviewed the original scoring sheets and conferred with the individual evaluators. As a result of this exercise, it was discovered that certain arithmetic errors had been made, some data overlooked, and some evaluation subfactors misinterpreted. The errors were corrected and a revised technical evaluation report dated May 19, 1992, was provided to the SEB. *Id.* at 771-79; Respondent's Exhibit 3. The average technical scores shown in this revised report were:

Average Score
Percentile

Protest File, Exhibit 28.

29. In June 1992, letters were sent to offerors regarding weaknesses and deficiencies said to have been found in their proposals by the evaluation team. Protest File, Exhibit 29. weaknesses were listed in the attachment to the letter addressed to protester. For purposes of this protest, we are concerned with only one, namely:

> A large percentage of the experience presented is provided by the subcontractors, not the prime.

Id. This weakness, as well as the other listed in the letter sent to protester, were included in the technical evaluation report of May 19. *Id.*, Exhibit 28. The TET chairman has testified that the strengths and weaknesses of individual proposals which he listed in his revised report were comments found on the scoring sheets of the individual evaluators. Transcript at 770.

30. Protester's Vice President of Contracts testified that he was "amazed" at the statement made by FAA that a large percentage of experience is provided by the subcontractor and not the prime. He stated:

> I was amazed at the statement because what large means, I don't know. Large to me could be 60 or 70 percent, and our proposal did not have 60 or 70 percent of subcontractors in it. So I was puzzled at the statement.

Transcript at 151. Nevertheless, although this individual sought clarification on of the listed weaknesses said to have been found in UAL's proposal, he did not seek clarification on this matter of subcontractor experience. Protest File, Exhibit 33; Transcript at 170-73.

31. In the letter sent to DISC listing potential weaknesses found in DISC's proposal, two are of particular significance for this protest, namely:

> DISC has

Protest File, Exhibit 29. DISC's Proposal Manager for this procurement testified: "

." Upon being advised of FAA's concern over the

[6]

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the Proposal Manager concluded: "
."

Transcript at 674. As a result of the clarifications, he stated that he
. *Id.* at 679.

32. By the end of June 1992, the offerors had responded to FAA's letters concerning potential weaknesses and deficiencies in their proposals. Protest File, Exhibits 34-37. Protester made no changes in its technical proposal which were responsive to the concern raised earlier by FAA regarding the extent of its subcontracting. Instead, in addressing this weakness, UAL simply reaffirmed the confidence it had in the team members it had selected to use as subcontractors should it receive the contract. *Id.*, Exhibit 37. DISC, on the other hand, provided a reply to the concern raised by FAA regarding
. DISC
. *Id.*, Exhibit 34 at 19-23.

33. The responses received from the offerors were forwarded to the TET for further review. In the course of updating the technical evaluations, it was discovered that the score-sheet previously used for Factor 4 was incomplete in that it did not list all task areas identified in the solicitation as being within the contract scope. Instead, the TET members were relying on an incomplete listing of task areas which the TET chairman had listed on the score-sheet for Factor 3. Protest File, Exhibit 6 (score-sheets for Factors 3 and 4). The error was corrected by the issuance of a revised score-sheet for Factor 4. Respondent's Exhibit 6; Transcript at 781-89.

34. On January 7, 1993, an addendum was issued to the TET's earlier evaluation report. As a result of the clarifications provided by offerors in response to FAA's earlier letters regarding weaknesses and deficiencies and as a result of the correction in the score-sheet for Factor 4, the scores for the offerors were revised as follows:

Average Score
Percentile

Protest File, Exhibit 39 at 2 (unnumbered); Transcript at 786-87. This addendum expressly notes
Protest File, Exhibit 39 at 5 (unnumbered).

35. We have examined the scores given by each evaluator for each individual factor prior to receipt of answers to the letters regarding potential weaknesses and deficiencies. We have likewise examined these same individual scores as revised after receipt of replies to these letters. From this comparative analysis, it is clear that the principal cause
. In the revised evaluation, each evaluator
. Respondent's Exhibit 3; Transcript at 773-76.[7]

Amendment 0006

36. On February 19, 1993, the Technical Center issued amendment 0006 to the CADSS solicitation. The modification was an extensive one. It updated and/or clarified various provisions. It afforded offerors the opportunity to update both their cost and their technical proposals. Protest File, Exhibit 40.

37. Amendment 0006 included a number of changes regarding the evaluation factors listed in Section M of the solicitation. Factor 6, which dealt with cost realism, was removed and transformed into an altogether separate provision calling for evaluation of cost proposals for realism and reasonableness. Wording was added to the introductory language for clause M.1 to state that the technical factor is considered to be significantly more important than cost but that cost will be increasingly more important as the difference between the technical factor scores decreases. The experience factor in Factor 2 was clarified as being applicable not to total available staff, but to total available key staff. Protest File, Exhibit 40 at 156.

38. Of special significance for this protest are the changes introduced by amendment 0006 into the language of Factor 4. To facilitate analysis, we have italicized the new language added by this amendment. Factor 4 was revised as follows:

> Due to the size and scope of this contract, it is expected that a mix of the prime contractors and subcontractors will be required. The extent of in-house *prime contractor* expertise in the specific technical areas and the use of subcontractors for additional expertise must be explained in a Management Plan and will be evaluated *based on the key staff mix; the higher the degree of in-house expertise, the higher the score for this factor. Whether the offeror's management approach is unique,*

[7] We recognize that some of this is attributable to the correction made in the Factor 4 score-sheets. *See* Finding 33.

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complete and reasonable will also be considered.

Protest File, Exhibit 40 at 157 (emphasis added).

39. The members of the SEB supported the various changes introduced by amendment 0006, particularly those made to the Section M evaluation factors. Protester's Exhibit L. The TET chairman testified in some detail regarding the changes made in the language of Factor 4. These changes were, in his opinion, particularly important. He explained that there was concern that this provision was not properly understood by all offerors. He pointed out that when FAA's concerns relating to this factor had been brought to the attention of in the letter dealing with potential weaknesses and deficiencies, had responded . It was the TET chairman's concern that Factor 4 be understood by all offerors in the same way it was understood by those doing the evaluation. Transcript at 801-03.

40. Upon review of the approximately fifty pages of changes and/or modifications made in the original solicitation by amendment 0006, a UAL consultant concluded that the changes contained in Sections B through H were of a non-substantial nature and would have no impact on UAL's technical and cost proposals. Respondent's Exhibit 4; Transcript at 180-81, 185. This consultant did, however, consider the changes introduced in the wording of Factor 4 in Section M to be a "drastic change." Transcript at 186.

41. Protester's Vice President and Proposal Manager both confirmed that they considered the change made by amendment 0006 in the language of Factor 4 to be a substantive change. They also referred to a change in Section L, which they considered significant. Transcript at 112-15, 139-40, 555-57. The original provision in Section L indicated that respondent, in reviewing resumes, would be looking for recent experience in air traffic control automation. Amendment 0006 limited this experience to *FAA* air traffic control automation. *Compare* Protest File, Exhibit 7 at 148 *with* Exhibit 40 at 148. The TET chairman testified that the addition of the term "FAA" to the resume experience provision in Section L was to bring it into line with the original requirement in Section M for "Experience with the FAA Air Traffic Control System." Transcript at 804-05; Protest File, Exhibit 7 at 156.

42. Subsequent amendments to the solicitation extended the date and time for the submission of proposal updates until 3 p.m., April 14, 1993. Protest File, Exhibits 41, 44. UAL filed its protest with the Board on April 14, 1993, the date on which replies to amendment 0006 were due.

Alleged Bias and Procurement Integrity/Ethical Violations

43. UAL has been involved in two earlier protests against the FAA Technical Center. The first involved the elimination of UAL from the competitive range in the so-called "weather" procurement. The Board granted UAL's protest. *Universal Automation Leasing Corp.*, GSBCA 11268, 91-3 BCA ¶ 24,255, 1991 BPD ¶ 168. The second protest, GSBCA 11867, followed on the heels of the first and alleged that the FAA was failing to comply with the relief provided by the Board in the first protest. This second protest was eventually settled and dismissed in June 1992. Protester's Exhibit Y.

44. At the hearing for this protest, it was reported by a consultant for UAL that a former director of the FAA's Technical Center was reputed to have said that the current director, Mr. Harvey Safeer, had told this former director that UAL would never get a contract. Transcript at 192. When called to the stand, the former director denied having made the statement. *Id.* at 390. Mr. Safeer, himself, likewise denied having made this or any similar statement. He observed that such a statement would be "dumb." He also pointed out that such a statement would constitute an unwarranted intrusion into the responsibilities of his program managers and would be totally inconsistent with quality management. *Id.* at 294.

45. Mr. Safeer, the current director of the Technical Center, was the original source selection official for this procurement until May 1991. At that time, an FAA policy change led to his being replaced as source selection official by an official at the FAA headquarters. Mr. Safeer, however, was unaware of his role as source selection official until he was notified that he had been replaced. Transcript at 288. His only involvement with the procurement, apart from this protest, was to make inquiry several months ago to determine why it was reported to be behind schedule. *Id.* at 289.

46. As Director of the Technical Center, Mr. Safeer is expected to play an active role in the community. He also is expected to receive business representatives wishing to call on him and to discuss, in general terms,

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business with the Center. Transcript at 288, 309-11. Last year he attended fourteen Christmas parties. Two were put on by industry; the rest were put on at the Technical Center or by Technical Center organizations. This included a party given by . He explained that it is his policy to accept such invitations provided he can pay his own way. *Id.* at 307, 312.

47. Mr. Safeer freely admits to having had business meetings with representatives of and to having had some social contacts with senior officials of this company. In particular, he is a close and longtime friend (over twenty years) of an individual who is currently a vice president of . Nevertheless, he contends that no business is discussed when he meets socially with these and other company representatives. Further, he testified that when he has business meetings with the representatives of and other companies, the discussion is general in nature and does not concern specific procurements. Transcript at 291-92, 305-10, 312-14.

48. The TET chairman and one of the TET members are longtime friends of and have frequent social contacts with Mr. William R. Thomas, a former employee of the Technical Center. Transcript at 409-13, 492-96. Mr. Thomas

. Protest File, Exhibits 16 at 8, 14 at 2-1, 15 at 113, 37 at B-11.

49. Mr. Thomas currently works at the Technical Center as a consultant for one of the incumbent contractors. Transcript at 410. This incumbent has not submitted an offer to the FAA for the CADSS procurement

Protest File, Exhibit 13 at III-10. The TET chairman is, of course, aware of this fact. Transcript at 413-14. Mr. Thomas has stated, under oath, that he knew

because of that chose not to become involved in the proposal preparation process. Protester's Exhibit X at 50-51. The TET chairman has testified that he did not discuss the CADSS procurement with Mr. Thomas. Transcript at 429, 451, 813. Likewise, the member of the TET who was also a long-term friend of Mr. Thomas has testified that he never discussed the CADSS procurement with Mr. Thomas except to acknowledge that it was ongoing. *Id.* at 499.

50. A former director of the Technical Center who is now a consultant has stated in a deposition taken in this case that he was advised by a fellow former director that there was a "big flap" between UAL and FAA and that he should distance himself from it. Protester's Exhibit W at 36. This individual has also stated that he did not consider the statement to be derogatory or prejudicial but simply a statement of a fact and a suggestion that he "back away." *Id.* The individual said to have given this caution confirmed at the hearing that he had made the statement. He explained that he had heard "rumblings and rumors" about problems UAL was having with the FAA. He also stated that he did not know the nature of the problems or who was right or wrong. Transcript at 393-94.

51. The President of UAL testified that at a Christmas party she attended last year at the Technical Center, she was advised by a senior FAA official, whom she considers to be a friend, that she should maintain a "quiet rapport" with the Center and keep other UAL representatives away from the Center for a period of time. Transcript at 72, 79-81, 87, 91-96.

52. UAL's Vice President of Contracts testified that, in his opinion, a cost analyst associated with the CADSS procurement has demonstrated bias against UAL. He explained that during negotiations relating to the definitization of a contract in connection with the "weather" procurement, this analyst became extremely agitated and was taken out of the conference room two or three times by the contracting officer. Upon return, the analyst is said to have been a "different person." Transcript at 120-22, 533. In his testimony, the TET chairman for the CADSS procurement confirmed that this same cost analyst is a member of the SEB for the CADSS procurement and has served on the SEB for the weather procurement as well. He stated that this individual has a tendency to become disagreeable with everybody who has numbers that do not match his. The TET chairman also observed that he had never seen this individual participate in negotiations, but at SEB meetings he had seen him become red in the face and agitated whenever he disagrees with a contractor's figures. *Id.* at 816-17.

53. One of UAL's site managers, who has worked either for FAA or for contractors at the Technical Center for approximately thirty-two years, testified that he believes there is bias against UAL at the Technical Center. Transcript at 527-30. He based this conclusion on comments said to be made by FAA and on-site contractor employees after

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UAL's first GSBCA protest. These comments expressed, in general, the hope that winning the protest would not go badly for UAL. *Id.* at 531. He expressed the opinion that the conduct of the cost analyst mentioned by UAL's vice president also evidenced bias. *Id.* at 532-33.

54. This same UAL site manager stated that he considers the association of Mr. Safeer, the Director of the Technical Center, with representatives of companies participating in the CADSS procurement is also evidence of bias. Transcript at 534. Finally, this UAL employee testified that he finds bias in remarks he has heard several times from one particular FAA employee who serves on the TET. These remarks are that UAL, as a contractor, is not providing the Government with its best value, that UAL should not be a contractor, and that work would be better done by government employees. *Id.* at 535.

55. The TET member referred to in the finding immediately above, when called to testify, freely admitted to having made such statements regarding UAL as well as other contractors working at the Technical Center. He explained that his personal preference for use of government employees rather than contractor personnel is well known at the Center. He further explained that his preference is based on a personal belief that use of contractors is not always in the Government's best interest and does not result in getting the best value from government employees. Transcript at 865-66. The TET chairman confirmed from his own personal observations that this is indeed the expressed preference of this TET member. He pointed out, however, that this negative attitude toward outside contractors was "across the board" and not directed to UAL alone. *Id.* at 816.

56. Proposal Manager for the CADSS procurement is also its Vice President for Systems Engineering. As part of his job, he is expected to undertake marketing trips. During the months of June and July 1992, he made several capability presentations to various officials at the Technical Center. This included a presentation on or around June 10 to the TET chairman who, besides being a member of the CADSS SEB, is also Branch Manager for the Advanced Systems Technology Branch of the Technical Center. Transcript at 749. A presentation was also made to the head of the directorate to which the TET chairman's branch belongs. Brief presentations were also made to senior Center officials including the Director and the Deputy Director of the Center. *Id.* at 682-90.

57. On June 29, 1993, the Board received from counsel for respondent a letter supplementing interrogatory answers previously provided to protester and contained in the record for this case. *See* Protester's Exhibit A. The letter advises opposing counsel and the Board that a member of the TET for the CADSS procurement, while attending a conference in Orlando, Florida in late January 1993, received an offer of employment from a representative of . At the time, the TET member informed the representative that he was not interested. Letter from Respondent to the Board of June 28, 1993, at 1-2.

58. In an affidavit provided for the record, this TET member stated that in April 1993, his parents moved to central Florida; that because of their failing health, they asked him to join them; that shortly thereafter he was again contacted by the same representative and told that the offer to work for in Florida was still open; that he then replied that he was interested and began to negotiate in earnest with this individual; and that a firm offer was made on June 10 and accepted by him shortly thereafter. Affidavit of Mark Smolensky (Smolensky Affidavit) (June 29, 1993) ¶ ¶ 2-8.

59. . Letter from Respondent to the Board of June 28, 1993, Attachments (Bylaws).

is mentioned in the proposal submitted for the CADSS procurement by . The is listed as an "available resource" to . Protest File, Exhibit 15 at 2.

60. A memorandum from the contracting officer to the Director of the Technical Center advising him of "possible integrity violations" reports that the TET member has accepted employment with but that his salary will be paid by . Nevertheless, the same memorandum states that, after a "thorough investigation," the contracting officer has concluded that any possible violation has had no impact on the pending award or selection of a source for the CADSS procurement. Letter from respondent to the Board of June 28, 1993, Attachments (Contracting Officer's Memorandum to Harvey B. Safeer (undated)). Counsel for respondent has advised the Board that when the suspension order is lifted, the FAA will pursue the matter further to determine if there has been any vio-

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lation of the Procurement Integrity Act. Respondent's Letter to the Board of June 28, 1993, at 2.

Delay of the Procurement

61. The original schedule for this procurement was disrupted for a variety of reasons. One member of the TET suffered a heart attack. Another had a parent pass away after a prolonged illness. The contracting officer's husband had a heart attack and the wife and daughter of the TET chairman also had health problems during the course of the procurement. Transcript at 805. The TET chairman, obviously a key figure in the procurement, was also beset by a series of other demands on his time. During the period of this procurement, he was program manager for two major programs undertaken on behalf of FAA headquarters in Washington, DC. This involved considerable time and travel to and from Washington. *Id.* at 806. It is also clear from previous findings that the TET chairman was required to spend an extraordinary amount of time preparing for, directing, and validating the evaluation process in the CADSS procurement. *See* Findings 21-28, 34-35.

62. The Director of the Technical Center also provided some explanation for the delay of this procurement. He testified that it was necessary at one point to divert personnel resources from this procurement to plan a massive transcontinental air traffic control simulation to be staged in conjunction with the annual meeting of the Air Traffic Control Association. Transcript at 290. During the procurement three members of the TET were also diverted to assist in rehabilitating a building at the Technical Center to be used as a human factors lab at the Center. *Id.*; Protester's Exhibit D.

63. A representative of and a representative of have testified that their companies are now, or soon will become, too large to qualify under the SBA 8(a) program applicable SIC (standard industrial classification) size criterion for this procurement. Transcript at 652-53, 675-76.

Discussion

Did the FAA Violate Federal Acquisition Regulation (FAR) 15.605?

We consider first protester's allegation that the original solicitation failed to state clearly that proposals demonstrating relatively more in-house prime contractor technical expertise would be scored higher—based on an arithmetic formula under Factor 4—than proposals relying relatively more upon the use of subcontractors.

In making this allegation, protester contends that this alleged failure on the part of the FAA is in direct violation of FAR 15.605(e). This section of the FAR provides in pertinent part:

> (e) The solicitation shall clearly state the evaluation factors, including cost or price, cost or price-related factors, and non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection and their relative importance . . . .

48 CFR 15.605(e) (1992).

For purposes of this discussion, we repeat here the original language of Factor 4. It reads:

> Factor 4: Management Plan.
>
> Due to the size and scope of this contract, it is expected that a mix of the prime contractors and subcontractors will be required. The extent of in-house expertise in the specific technical areas and the use of subcontractors for additional expertise must be explained in a Management Plan and will be evaluated.

Finding 13.

Protester contends that it read this language as not providing additional credit for in-house expertise but rather encouraging the use of subcontractors to supplement in-house expertise. Findings 16, 17. We find this interpretation unreasonable. We agree with respondent that the language of the factor itself together with the context of the entire clause, when read as a whole, indicate that the preferred element in Factor 4 is the presence of in-house expertise.

The first sentence in Factor 4 makes it clear that subcontracting is a given necessity. Nevertheless, the subsequent sentences in the factor indicate a preference for in-house technical expertise. This is the specific quality which is sought in Factor 4 just as Factor 1 evaluates the ability of contractors to show understanding of the work, Factors 2 and 3 look to the experience of the offerors, Factor 5 considers the management ability of the offeror, and Factor 6 measures the realism and reasonableness of the price. *Id.* Given the fact that all other factors mentioned in the evaluation clause focus on the presence of a positive quality, it seems strikingly inconsistent to conclude that Factor 4 would look for less of the specified positive quality and credit instead the degree to

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which that quality can be supplemented with "additional expertise."

We also find significant the fact that the heading for Factor 4 is "Management Plan" and the language for this factor states that the extent of in-house technical expertise and the use of subcontractors for additional expertise "must be explained in a Management Plan ...." When technical expertise is mentioned in the context of program management, one presumably can and should conclude that, *for purposes of management,* it is obviously preferable to have in-house technical expertise rather than to rely primarily on subcontractors to provide it.

Protester offers several arguments in support of its interpretation of Factor 4. First is the claim that FAA encouraged the use of subcontractors to supplement in-house expertise. Finding 17. This statement in itself is correct but it does not provide support for protester's interpretation of Factor 4. As already noted, the first sentence of Factor 4 confirms that a mix of prime and subcontractors will be required. The testimony of the author of the evaluation clause likewise confirms the anticipated need for subcontractors. In addition, the author of the evaluation provision has likewise explained not only the expected need but the benefit of subcontracting in a procurement such as this. Finding 23. We agree with respondent that protester, in reading Factor 4, appears to have stopped with the first sentence. Subcontracting *is* encouraged. Factor 4, however, concerns itself with the presence of in-house technical expertise to ensure that subcontractors are effectively managed. *See* Respondent's Initial Posthearing Brief at 7.

Another argument offered by protester in support of its interpretation of Factor 4 is that UAL understood that as long as its proposal met the SBA fifty percent minimum, it would not be penalized for using subcontractors. As the Proposal Manager stated: "As far as the mix, we were free to go up to the maximum allowable by SBA and we felt we had a right to do that." *See* Finding 16. For this reason, UAL contends that a reasonable interpretation of Factor 4 is that a higher score would be given for the presence of technical expertise in subcontractors than for its presence in the prime. Again, protester's initial premise is correct. The SBA fifty percent minimum does apply to this procurement. It does not, however, support UAL's interpretation of Factor 4. The reason for this is the same as that given above. In the final analysis, Factor 4 does not concern itself with the degree of allowable subcontracting. Rather, it is concerned with a degree of in-house technical expertise which will ensure the effective management of subcontractors.

Perhaps the most puzzling argument advanced by UAL in support of its interpretation of Factor 4 is that regarding the appearance of similar language in Factor 3 of the solicitation for the weather procurement. The language in Factor 3, although different in some respects from that in Factor 4 of the CADSS solicitation, was nonetheless recognized by UAL as being similar. When FAA was questioned on whether the language in Factor 3 was meant to discourage subcontracting, it simply deleted any reference to in-house expertise from the weather solicitation. When similar language appeared in Factor 4 of the CADSS solicitation, UAL somehow concluded that this similar language now appearing in the CADSS solicitation was to be interpreted as simply encouraging technical expertise among subcontractors but not permitting any additional credit for in-house expertise. Finding 17. We are at a loss to understand how protester could draw such a conclusion from the similar reappearance of the language particularly because, in this case, the language remained in the CADSS solicitation and was not deleted as it had been in the weather solicitation.

In short, we are unpersuaded by protester's argument that Factor 4 lacked the clarity required by FAR 15.605(e). We find protester's interpretation in fundamental conflict with both the words and the context of the provision when read as a whole. Moreover, the agency has consistently applied Factor 4 and has attempted to ensure that all offerors shared this meaning. Finding 29-31.

Respondent's interpretation, on the other hand, is reasonable and gives meaning to the provision when read as a whole. From an examination of the instructions prepared for the TET members early in this procurement, it is clear that the Technical Center's understanding of the language in Factor 4 remains unchanged. Furthermore, we do not find that the scoring technique described in these instructions for Factor 4 represents unstated evaluation factors or significant subfactors. *See* Finding 22. Rather, we find them to be logically related to and reasonably encompassed within Factor 4 as originally stated. *See American Computer Educators, Inc.*, GSBCA 10539-P, 90-2 BCA ¶ 22,919, at 115,076, 1990 BPD ¶ 110, at 10; *Johnson Controls, Inc.*, GSBCA 10115-P,

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89-3 BCA ¶ 22,172, at 111,563, 1989 BPD ¶ 245, at 10; *Phoenix Associates, Inc.*, GSBCA 9190-P, et al., 88-1 BCA ¶ 20,455, at 103,450, 1988 BPD ¶ 1, at 17. Finally, we are convinced that the requirement underlying this Factor 4, as explained by the author of the evaluation provision, is a valid and reasonable one. *See* Finding 24.

Does Amendment 0006 Violate FAR 15.606(b)(4)?

The story does not stop here, however. Upon examining the reply of protester to the letter regarding deficiencies and weaknesses in UAL's proposal, respondent became concerned that UAL had misunderstood Factor 4. Finding 39. In a subsequent amendment to the solicitation, therefore, the FAA issued slightly revised language to clarify the meaning of Factor 4. At that point in time, whether the original language of Factor 4 complied with the requirements of FAR 15.605(e) became academic. With issuance of amendment 0006, any allegedly obscure or latent elements regarding this factor became unquestionably clear. *See* Finding 38.

Protester does not believe this revision of the language in Factor 4 was a mere clarification. Instead, it contends that the language constitutes a substantive change in the solicitation and thus, pursuant to regulation, the solicitation must be canceled and reissued.

The section of the FAR relied on by protester reads as follows:

> If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

48 CFR 15.606(b)(4) (1992).

In the past, we have cautioned that "solicitations should not be canceled save for the most pressing of reasons." *C.M.P. Corp.*, GSBCA 9015-P, 87-3 BCA ¶ 20,075, at 101,644, 1987 BPD ¶ 148, at 6. On the other hand, when convinced that a change in a solicitation is truly substantive, we have upheld cancellation. *Vikonics, Inc.*, GSBCA 10575-P, 90-3 BCA ¶ 23,044, 1990 BPD ¶ 148 (cancellation warranted because both technically acceptable offerors had taken material exceptions to liquidated damages provision, payment schedule, and certain technical requirements, and four of six prequalified offerors did not submit bids because of liquidated damages provision and payment schedule); *System Dynamics, Inc.*, GSBCA 9763-P, 89-1 BCA ¶ 21,497, 1988 BPD ¶ 324 (increase in requirements coupled with a drastic revision of the evaluation criteria are so significant as to be tantamount to a complete revision of the solicitation).

The changes made in the language of Factor 4 by amendment 0006 certainly do not warrant complete revision of the CADSS solicitation. The language introduced by the amendment only makes explicit what respondent intended from the outset. We find no change in respondent's original intent regarding this factor and see no change in the meaning or purpose of the other factors resulting from this clarification. Protester appears to have confused an alleged need to completely revise its own proposal with the need to completely revise a solicitation. It is the latter and not the former which justifies cancellation of a solicitation. Cancellation of a solicitation undoubtedly leads to the complete revision of proposals as well. However, to repeat, it is the need to completely revise the solicitation which triggers the cancellation.

We are convinced, therefore, that no complete change in the solicitation is warranted. Furthermore, even the argument that UAL will have to revise radically its own proposal is less than convincing.

Protester apparently is of the opinion that, in view of the changes made in Factor 4, its teaming agreements should be canceled. In its posthearing brief, protester states: "UAL cannot increase its use of in-house expertise in response to Amendment 6 without breaching these agreements." Protester's Initial Posthearing Brief at 18. Protester, however, does not cite us to specific provisions in the agreement supporting this contention. We cannot understand protester's reasoning here. We have examined the agreements in detail and find nothing in any of them which precludes protester from hiring key staff personnel with a technical expertise similar to that which presumably is possessed by one or more employees of any of its three potential subcontractors. Finding 20.

Ironically, despite respondent's efforts to clarify the purpose of Factor 4, protester still appears to misunderstand it. Factor 4, whether in its amended or original form, does not discourage the use of subcontractors. Indeed, as noted more than once herein, the lead sentence of the factor acknowledges the need to rely on subcontractors. The author of the evaluation provision has confirmed this fact and pointed to a specific evaluation factor where the use of subcontractors could even enhance the score of an offeror. Finding 23. In addition, pro-

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tester's own intention from the start of this procurement has been to rely on subcontractors. Findings 14-16. We, therefore, remain at a loss to understand why protester now believes that the clarification offered by respondent relative to Factor 4 requires a complete revision of its proposal and a cancellation of the teaming agreements it has already negotiated with future subcontractors.

Whatever protester's reasons may be for wanting to restructure its proposal, the reasons given are less than convincing. Furthermore, even if a total revision of UAL's proposal were to be necessary, this does not justify a cancellation of the solicitation. If there is a fundamental problem with UAL's proposal, then this is a problem peculiar to UAL and not one which stems from the CADSS solicitation or any action on the part of respondent. Protester's contention that the amendment of Factor 4 was in violation of FAR 15.606(b)(4) is, therefore, rejected.

Respondent's DPA

Late in the development of the record for this case, the question arose as to whether respondent has a valid DPA for this procurement. Respondent and intervenor DISC both argued in their posthearing briefs that the issue was untimely raised. Regardless of whether this issue was specifically pled by protester, it is obviously, a matter of fundamental importance and requires close review. *CACI, Inc. v. Stone* [38 CCF ¶ 76,501], 990 F.2d 1233, 1236 (Fed. Cir. 1993). The Board *sua sponte* reopened the record and requested the parties to brief the issue and submit any relevant evidence they might have.

Protester's contention that respondent's DPA has expired is based upon the footnote contained in the FIRMR rule published in the December 28 issue of the Federal Register. The note covers the transition period between December 28, 1990, and the effective date of the new FIRMR, April 29, 1991. It provides that solicitations for support services issued after December 28, 1990, require a specific DPA if award is not made before April 29, 1991. *See* Finding 7. Because the CADSS solicitation was issued on January 3, 1991, and award was obviously not made by April 29, 1991, protester contends that a specific DPA was required.

Had GSA not issued technical corrections to the FIRMR rule published on December 28, protester's argument would be a convincing one. The technical corrections, however, effectively put an end to the matter. We have found that on February 7, 1991, the Federal Register carried a series of corrections to the rule published on December 28. Among the corrections was a provision calling for the removal of the footnote on which protester relies. Finding 9.

Protester argues that the footnote remained valid notwithstanding the technical corrections issued on February 7. Protester supports this position by noting that the effective date of the technical corrections was April 29. Since the transition period which began on December 28 concluded on April 29, protester contends that it was appropriate to eliminate from the permanent rule, effective April 29, any footnote which addressed the need for a DPA during the transition period and that this was the only reason for eliminating the footnote from the original published notice.

Several factors lead us to reject protester's interpretation of the regulations in question. First, there is the language of the notice published on February 7. It is said to contain technical *corrections*. These are not amendments, they are corrections. Second, a correction regarding the footnote in question appeared to be particularly appropriate in view of language contained on the face of the original notice of December 28. That notice contained, in its introductory provisions, a statement that April 29, 1991, was the effective date for the rule which followed. The provision in the footnote in question was located several pages into the text of the rule and clearly conflicted with the effective date stated in the introduction. This in itself suggested the presence of an error in either one date or the other and the need for a correction.

A third reason for rejecting protester's claim that the footnote remained valid is that we see no reason why the correction of February 7 needed to take effect prior to April 29. The note provided that specific DPAs were required for solicitations for support services if the solicitations were issued after December 28 and award was not made by April 29. Under the footnote, therefore, a DPA for a solicitation issued after December 28 was to expire on April 29 if award was not made. If the footnote, however, were to be canceled effective April 29, then obviously any such DPA would remain in effect. In short, the effective date of April 29 for the correction of the footnote was precisely on target because it would not have been until that date that the note would have had any operative effect. In the meantime, the gen-

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eral public was advised, well in advance of that date, that the note would have no such effect.

The conclusions we reach here regarding the effectiveness of the footnote on which protester relies are based on our analysis of the relevant regulations themselves. We note, however, that our interpretation is fully supported by information provided for the record in this case by the GSA representative identified in the December 28 notice as the official to be contacted for further information on the rule. He has confirmed that the footnote in question did represent an error. It was inadvertently included in the final draft of the rule that was given to the Federal Register for publication. Once the error was discovered, the decision was to correct it through the technical corrections issued on February 7. *See* Finding 10.

We also note that the record contains a declaration from a DOT official responsible for processing his agency's APRs. He likewise confirms that in contacts with GSA officials during the transition period and since then, in connection with this protest, he has been advised that the original blanket DPA for a solicitation issued prior to April 29, 1991, remains valid. *See* Finding 11.

We are, therefore, satisfied that the issuance of the new FIRMR rule on December 28, 1990, and the subsequent published corrections of that rule did not terminate the blanket DPA currently relied upon by respondent as the source of its authority to carry on the CADSS procurement. There remains, however, the question of whether the internal delegation of that authority to the FAA within DOT has remained valid.

The redelegation to the FAA by the DOT stated that an amendment should be obtained whenever a material change was expected from the basis on which the DPA was issued. Among the examples given are "a significant slippage in the planned contract award date." *See* Finding 5. Evidence provided by respondent convinces us that FAA officials did, in fact, advise DOT of the delay in this procurement. It is true that no formal amendment was granted at that time but only because the DOT official responsible for processing any amendment preferred to defer formal action until the date for award became more certain. We find nothing in the conduct of this DOT official which would suggest that the internal redelegation of authority was withdrawn or considered terminated. On the contrary, the implication is that it remains valid and that the reconfirmation of it prior to award is deemed to be little more than a formality.[8] *See* Finding 12.

In conclusion, based on the record before us, we find nothing which convinces us that the DPA for the CADSS procurement is invalid or otherwise inadequate either as provided by GSA or as redelegated within the DOT to the FAA.

Alleged Bias

In its initial posthearing brief, protester sums up its contentions regarding bias in the CADSS procurement as follows:

> There is irrefutable proof of bias against UAL at the FAA Technical Center that has deprived UAL of an impartial evaluation of its proposal.

Protester's Initial Posthearing Brief at 25. UAL is also of the opinion that the facts in this case show not only a bias against UAL on the evaluation team but also a built-in bias among the team's members in favor of . *Id.* at 28.

In making findings of fact in this case, we have spent a considerable amount of time examining the evaluation process. Findings 21-35. In particular, we have reviewed carefully the testimony of the TET chairman as well as the documentation discussed by him during the course of his testimony. We find nothing in this or any of the other related evidence in the record which supports protester's contention that it has been deprived of an impartial evaluation of its proposal.

The record indicates the opposite. The evaluators' concerns regarding UAL's compliance with the requirements underlying Factor 4 were specifically passed on to UAL in the letter regarding the potential weaknesses and deficiencies in protester's proposal. *See* Finding 29. When UAL failed to seek any clarification regarding these concerns or even to address them in a meaningful manner in its response to the letter, respondent decided to issue clarifying language for Factor 4 in an upcoming amendment. Finding 38.

Neither are we convinced that in response to the letter it received on potential weaknesses and deficiencies was attributable to favorable bias on the part of the

[8] Having satisfied ourselves in this case, that the redelegation was not, as a matter of fact, withdrawn, we do not reach the question of what effect, if any, the withdrawal of the redelegation would have had on the validity of this procurement.

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Technical Center. The comments provided in the letter to were much more enlightening than the comment provided to UAL. *Compare* Finding 29 *with* Finding 31. The letter to made specific reference to " " " " . In contrast, the comment made to UAL simply .

We do not believe, however, that the more detailed comments to stemmed from any desire to treat more favorably than UAL. The TET chairman has explained that the difference in the comments was attributable to the fact that these enumerated weaknesses were taken from specific comments written on scoring sheets by individual evaluators. *See* Finding 29. We conclude, therefore, that the greater degree of detail in the letter was merely accidental. In any event, the clarification issued in amendment 0006, primarily for UAL, amply compensates for any temporary advantage which may have accrued to as a result of the more specific comments it received.

Protester contends that the alleged bias against it stems from the fact that it has filed two previous protests relating to Technical Center procurements. Protester's Initial Posthearing Brief at 26. Testimony has been provided for the record indicating that various individuals have speculated or commented on the possible negative effect these protests might have on the business relationships between UAL and the Technical Center. *See* Findings 43, 50, 51, 53.

These comments should not come as a surprise to anyone. This is workplace chitchat. Undoubtedly the present protest has also prompted similar comments and speculations. Protests, however, are a fact of life in the world of government procurement. Once a protest has been settled or decided, experienced, professional, government procurement personnel are expected to put the matter behind them. They generally do. The facts relating to the evaluation of UAL's technical proposal convince us that, so far as this procurement is concerned, this is exactly what has occurred. *See* Findings 21-39.

With regard to the statement attributed to Mr. Safeer, the Director of the Technical Center, that UAL would get no contract, we are not convinced that the statement was ever made. The witness reporting it obviously has an interest in the future of UAL. Both Mr. Safeer and the individual to whom he allegedly made the comment deny it was made. *See* Finding 44. Furthermore, even if the remark was made, nothing indicates that Mr. Safeer could or would have followed through on it. His actual involvement in this procurement was only to inquire once why it was not on schedule. There is no indication that he was involved in any way in the evaluation of proposals. As to his being the source selection official, he was not even aware of this fact until he was replaced by a change in FAA policy. *See* Finding 45.

As to the cost analyst said to be hostile to UAL, Technical Center officials appear to be fully aware of his excitable nature. We find it particularly significant that even UAL's Vice President reported on the contracting officer's ability to calm this individual down quickly by merely taking him out of a meeting for a brief respite. *See* Finding 52. We are not at all convinced that a mercurial temperament such as this would necessarily be the source of any firm or long-term bias. Furthermore, there is no evidence that this individual's attitude has affected in any way the results of any evaluations made thus far in the procurement.

In a similar vein, protester has presented us with nothing which convinces us that one member of the TET who harbors reservations regarding the Government's use of outside contractors has a particular bias towards UAL. The individual in question has made no secret of his views and we have been presented with nothing which convinces us that these reservations are limited to UAL or have in any way affected his ability to serve thus far on the TET. *See* Findings 54, 55.

Alleged Procurement Integrity and Ethical Violations

In its initial posthearing brief, protester states:

> The conduct of FAA officials, including frequent social contacts between source selection officials and competing contractors, during the course of this procurement has violated important procurement regulations and ethical standards.

Protester's Initial Posthearing Brief at 28.

Protester would have us conclude that the contacts described have, in fact, adversely affected the CADSS procurement. Nevertheless, protester also reminds us that even the appearance of impropriety is sufficient to disqualify a contractor. *NKF Engineering v. United States* [33 CCF ¶ 74,691], 805 F.2d 372 (Fed. Cir. 1986).

It is correct that in *NKF*, a contracting officer's decision to eliminate an offeror

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from the procurement based on an appearance of impropriety was upheld. It should be noted, however, that *NKF* expressly states that any alleged appearance of impropriety must be amply supported by "hard facts" demonstrating both the possibility and appearance of any alleged impropriety. Mere "suspicion or innuendo" is not sufficient. *Id.* at 376. For this reason, in applying the *NKF* standard, we require a strong factual showing in support of any allegation of an appearance of impropriety including evidence that the alleged impropriety could actually produce an adverse effect on the procurement process. *TRW Inc.*, GSBCA 11309P, 92-1 BCA ¶ 24,389, 1991 BPD ¶ 205.

In reviewing all the relevant facts adduced by protester and respondent regarding the contacts in question, we conclude that protester has not proven that these contacts rise to the level of an appearance of impropriety.

We examine first the conduct of Mr. Safeer. Mr. Safeer is criticized for maintaining during the CADSS procurement a longstanding friendship with an individual who is today a senior official in one of the companies participating in the procurement. He is also criticized for meeting both socially and for business reasons with other senior representatives of this same company as well as with representatives of other companies which may eventually be awarded the CADSS contract or be subcontractors on that procurement. *See* Finding 54.

The facts, as developed by both parties, convince us that Mr. Safeer is merely doing his job. As director of the Technical Center, he is expected to meet and greet representatives of potential and/or incumbent on-site contractors. He has testified that when meeting with these representatives at the Center, he discusses business with them in general terms. When meeting with them socially, he claims that he does not discuss business. When attending Christmas parties, he insists on paying his own way. Findings 46-47.

Protester has offered us nothing which would lead us to doubt the testimony of Mr. Safeer. He appears to be well aware of the straight line he must walk in dealing with the myriad of contracting and marketing representatives who continually beat a path to his door. When seen in this factual context, the contacts referred to by protester do not appear to us to have the appearance of impropriety. Furthermore, protester has not convinced us of the probability that the alleged appearance of impropriety could adversely affect the procurement process. Mr. Safeer is no longer the source selection official; indeed, he never knew he was. Finding 45. It is also clear that he is not even remotely connected with the actual evaluation process as it has been described in this case. *See* Findings 21-35.

We turn next to protester's concern with contacts the TET chairman has had with Mr. Thomas, and contacts a member of the TET has had with this same individual. As in the case of Mr. Safeer, the relevant facts, when taken as a whole, do not convince us that we are confronted here with an appearance of impropriety. Neither the TET chairman nor the TET member deny their longstanding friendship with Mr. Thomas. Both, however, have stated under oath that, during the pendency of the CADSS procurement, they have not discussed it in any detail with him. We find both witnesses highly credible and have no reason to doubt their word. Mr. Thomas, himself, has stated under oath that,

he deliberately chose not to be involved in the proposal preparation process. *See* Findings 48-49.

Protester believes that the contacts between Mr. Thomas and these two FAA employees have an unmistakable appearance of impropriety because of the . Using a phrase employed by the Court in the *NKF* decision, protester describes this development as having "a certain aroma that is hard to purify." Protester's Initial Posthearing Brief at 31.

We do not view this as evidence of the possibility that the contacts between Mr. Thomas and the two FAA employees could adversely affect the procurement. has no suspicious aroma about it. It was attributable to the fact that specific comments were included in FAA's letter to regarding potential weaknesses and deficiencies in its proposal. The proposal manager was alert enough to recognize the weakness and . Findings 31, 32. We have found this change to be the principal cause for the allegedly . Finding 35. Furthermore, the issuance of amendment 0006 with its clarification of the wording for Factor 4 provided other offerors a similar opportunity to amend their proposals in the same fashion. The may well be only temporary.

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Finally, there is the recent resignation of a TET member and his acceptance of employment with an entity which may be utilized by as "an available resource" if award is eventually made to . On July 6, the Board convened a conference of counsel for the parties to discuss protester's request that the record be reopened to include the materials submitted by respondent and protester regarding this latest development. The request was granted.

The record, even as supplemented in accordance with protester's request, does nothing to strengthen protester's case. It does not contain the "hard facts" necessary to demonstrate that this individual's conduct constitutes a genuine appearance of impropriety and one which could very possibly affect the procurement adversely. Counsel for respondent advises us that they plan to pursue the matter to see if there has been a violation of the Procurement Integrity Act but that this will not be done until our suspension order is lifted. Finding 60.

Furthermore, preliminary indications are that the requisite "hard facts" may not exist at all. A determination by the contracting officer refers to a "thorough investigation" but provides us with no details. The conclusion reached by the contracting officer, however, is that, if there has been a violation, it has had no impact on the pending award or selection of a source for the CADSS procurement. Finding 60. In addition, an affidavit from the TET member represents that his contacts with the representative took place well after completion of the evaluation which led to the current ranking of offerors. *Compare* Finding 34 *with* Findings 57-58. In short, we find nothing in this recent development, as reported to us, which proves the appearance of an impropriety or that such an impropriety could actually produce an adverse effect on the procurement process.

Protester's allegations of procurement integrity violations and other ethical violations are, therefore, rejected.

Alleged Violations of the Small Business Act

In its Initial Posthearing Brief, protester contends:

> The FAA's inexplicable delay in awarding the contract and the substantial changes to the solicitation brought about by Amendment 6 have all but guaranteed the contract will be awarded to a large, incumbent contractor.

Protester's Initial Posthearing Brief at 32. This is said to be contrary to the provisions of the Small Business Act which require that a fair proportion of contracts for the Government be placed with small business concerns and that these contracts be distributed equitably pursuant to objective criteria. *See* 15 U.S.C. § 636 note (1988).

We find nothing mysterious or inexplicable about the delay in this procurement. The delay is regrettable but readily explained. *See* Findings 61-62. As to the alleged substantial changes to the solicitation, we have already discussed and rejected protester's contention that the clarifications provided for Factor 4 in amendment 0006 constituted a substantial change in the solicitation. As for the alleged substantial change in Section L, we disagree with protester. The addition of the term "FAA" was appropriate in order to have the language of this section conform with related provisions in Section M. *See* Finding 41.

The question we are left with, therefore, is whether the delay in the CADSS procurement which did occur violates the Small Business Act by promoting the possibility of award to an 8(a) firm which is no longer "small" under the applicable SIC code.

It is true that and have both developed since the issuance of the CADSS solicitation to a point where they either now or in the near future may no longer qualify under the SIC code for this procurement. Finding 63. Protester, however, cites us to no regulation which precludes either of these companies from continuing to participate in the procurement. We would expect the Small Business Administration, as the agency charged with the responsibility of implementing the Small Business Act, to have a regulation in place if the continued participation would lead to a violation of the Act. If the current SBA regulatory scheme permits continued participation, we will defer to those regulations rather than substitute our judgement for that of the SBA by accepting the interpretation of the Small Business Act which protester urges on us. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

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Decision

This protest is **DENIED.** The Board's order suspending the DPA expires in accordance with its terms.

[¶ 26,324] Federal Data Corporation v. Department of Justice; ViON Corporation, Federal Computer Corporation, and Amdahl Corporation, Intervenors

GSBCA No. 12264-P, March 25, 1993.

Requests for Proposals and Quotations—Restrictiveness—Minimum Needs.—A protest stating that a request for proposals for direct access storage devices and controllers for data centers was overly restrictive was denied, because the protester did not produce any evidence showing that the specified seek times would not meet the government's minimum performance needs. The protester's contention that the required seek times rendered the solicitation unduly restrictive was rejected, because seek times were meaningful indicators of overall performance.

For the protester: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick and Judy Leishman. For the government: Ellen McElligott, Department of Justice, Washington, D.C. For the intervenor, ViON Corporation: Latham & Watkins, Washington, D.C., by David R. Hazelton. For the intervenor, Federal Computer Corporation: David S. Kovach. For the intervenor, Amdahl Corporation: Cohen & White, Washington, D.C., by David S. Cohen.

Before DEVINE, HENDLEY, and GOODMAN, Administrative Judges.

DEVINE, Administrative Judge: The sequence of events that led to the present protest began when Amdahl Corporation protested Amendment 6 to the original solicitation prior to award. The parties settled and the protest was dismissed with prejudice. The terms of the settlement agreement became Amendment 8, which was protested by ViON Corporation, an intervenor in the earlier protest. ViON thereafter dismissed its protest with prejudice without any apparent resolution. Meanwhile Federal Data Corporation had filed the present protest on January 19, 1993. It also challenged Amendment 8. A motion to dismiss ViON's attempt to re-enter as an intervenor was granted. The DOJ's pending motion to dismiss the present protest as untimely, heretofore taken under advisement, is denied.

Findings of Fact

The Department of Justice (DOJ) issued a request for proposals seeking a large number of direct access storage devices (DASDs) and controllers for its various data centers. Protest File, Exhibit 7. The equipment was to be delivered over a five-year period, with options that could extend the contract life to eight years. Protest File, Exhibit 4. The estimated cost of the contract was $305,458,000 over the eight-year system life. The equipment was to be installed at large data centers operated by the DOJ and the FBI as service bureaus for a variety of organizations. The DOJ centers operate large on-line systems that run 24-hours a day and serve the Immigration and Naturalization Service, the Drug Enforcement Agency, the Bureau of Prisons, the DOJ's civil, criminal, tax, and antitrust divisions, plus INTERPOL, and the Internal Revenue Service. Transcript at 118-19. The FBI data centers provide automation support for all of the FBI field offices nationwide, and provide administrative, investigative, and intelligence support for all of the headquarter's divisions. Transcript at 200. The FBI data center also supports the National Crime Information Center, and maintains more than 420 data bases serving 69,000 local, state, and federal law enforcement agencies. *Id.* at 201. These systems require considerable data base query work. *Id.* at 119.

This procurement was designed to give DOJ more data base capacity, and more data retrieval speed. Transcript at 115-16, 119, 187. DOJ proposed to do this with DASDs equivalent to the IBM 3390-2 and controllers equivalent to the IBM 3990-3, with 128 megabytes (MB) of cache memory. Protest File, Exhibit 15. The controllers are not in dispute. The total DASD storage capacity

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required was 14.59 terabytes of data, a very large amount. Protest File, Exhibit 15.

Certain performance characteristics of direct access storage devices are at issue in the present protest. These devices store data which are to be used or processed by a computer. The data are stored on disks in a DASD and are manipulated by electromechanical devices known as disk drives. Transcript at 45-46. A disk drive consists of rotating platters on which data are stored in concentric rings or tracks, together with an actuator containing read/write heads, which are used to retrieve data from the platters. Joint Hearing Exhibit 38. The platters are stacked vertically in the disk drive. The tracks or rings in the same relative position on each platter can be considered to form a vertical cylinder. *Id.* On command, the actuator head senses the computer language set out in 1s and 0s on the platter's surface, just as a phonograph needle picks up music from the grooves of a phonograph record, and sends it to the controller. The actuator contains at least one head for each platter. *Id.* It may move from cylinder to cylinder or it may skip cylinders while searching for data. *Id.* This motion is called a "seek." When the computer needs data from the DASD, it issues an input/output (I/O) request. Transcript at 49. This goes to the controller which has its own memory called "cache." The controller tells the DASD to read the data requested, plus a certain amount of additional data surrounding it on the same cylinder. The requested data goes both to the computer and into cache along with the surrounding data. The next I/O request will be answered electronically from cache if it is related to the first and is to be found in cache (a "cache hit"); if it is not, it will be answered electro-mechanically (and more slowly) from the DASD (a "cache miss"), with nearby data again going to cache. Transcript at 52, 53. A cache hit is much faster than a miss because the data are transmitted at the speed with which electricity travels rather than at the speeds associated with the movement of mechanical actuator arms. A cache miss requires the DASD to again use its mechanical actuator head to find the proper cylinder. While it does this it disconnects from the controller. After it finds the requested data it must wait while the data rotates into position beneath the actuator head. The time to do this is called latency. Transcript at 232. Next the DASD must reconnect to the controller. If the reconnect paths are all in use there will be a wait while the platter rotates for another attempt. Joint Hearing Exhibit 21.

Seek times vary from computer to computer. Joint Hearing Exhibit 32. Seek time is categorized in the manufacturer's literature as:

> Minimum seek time. The time required to move the actuator from a cylinder to the next adjacent cylinder.
>
> Maximum seek time. The time required to move the actuator from the innermost to the outermost cylinder and vice versa.
>
> Average seek time. The time required for the actuator to traverse one third of all the cylinders on a given disk.

Transcript at 61-3.

The average seek time is theoretical. It assumes that all possible seeks are equally likely to occur. Transcript at 62-6, 341-42. The actual average seek time of a given DASD can only be determined by observation during a specific application. Transcript at 342. Different applications will generate different average seek times. *Id.*

Interactive data base applications, common in the DOJ/FBI systems, will exhibit actual average seek times closer to the theoretical numbers than non-interactive batch applications. Transcript at 250-51. The number of minimum seeks is also affected by the type of application under consideration. Transcript at 250-51. The presence of a large cache storage greatly reduces the number of minimum seeks. Transcript at 387-88.

Maximum seek times measure the worst that can occur. Transcript at 246. Thus the IBM 3390-3 at a maximum seek time of 33 milliseconds (ms) will provide slower performance than another DASD meeting the specification requirement of 23 ms.

The most important factor affecting efficiency of performance is the cache hit rate. Transcript at 236. As we have seen, data are transmitted from cache much faster than from the DASD. Transcript at 237. Where a limited amount of data is being accessed repeatedly, as in batch applications, cache hit rates may reach 90%, giving correspondingly quick performance. Transcript at 237-38. On the other hand highly interactive, data-base oriented applications, especially with many simultaneous users, will yield cache hit rates as low as 40%, with correspondingly slower speeds. Transcript at 238-39.

The many factors affecting computer performance led to the development of mathematical models designed to predict system efficiency. One such model is the "Sahai-Gates" which one expert witness testified "will work for most I/O workloads on most

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volumes in most installations." Joint Hearing Exhibit 5. According to the testimony of one expert witness, it is "widely used to model disk subsystems in terms of their expected response times." Transcript at 235. The Sahai-Gates model ignores maximum and minimum seek times, using only average seek times. Joint Hearing Exhibit 21.

The terms of the solicitation, which called for a storage device equivalent to an IBM 3390-2, essentially limited the procurement to the equipment of three manufacturers: IBM, Amdahl Corporation or Hitachi Data Systems. All three offer both a Model 2 DASD with 1.89 gigabytes (GB) of storage and a Model 3 with 2.83 GB. Their operational times are as follows:

	IBM 3390-2	IBM 3390-3	Amdahl 6390-2	Amdahl 6390-3	Hitachi 7390-2	Hitachi 7390-3
Minimum Seek Time	1.5 ms	1.5 ms	1.7 ms	1.7 ms	1.5 ms	1.5 ms
Average Seek Time	12.5 ms	15.0 ms	10.7 ms	11.5 ms	10.0 ms	12.5 ms
Latency	7.1 ms	7.1 ms	6.9 ms	6.9 ms	7.1 ms	7.1 ms

Joint Hearing Exhibit 32.

The above chart does not show the corresponding specification requirements or the maximum seek times. The specifications require an average seek time of 12.5 milliseconds (ms), a maximum seek time of 23 ms, and a latency of 7.1 ms. No minimum seek time is specified. The IBM Model 3 (3390-3) with a maximum seek time of 33 ms and an average seek time of 15 ms does not meet the specifications in either of these categories. All of the other devices do.

The Sahai-Gates model, using the above figures and some generally accepted values, predicts that the IBM Model 3 DASD will service each I/O request approximately 8% slower than the IBM Model 2 for cache hit rates in the 40-75% range. Transcript at 243. It also predicts that the IBM Model 3 will be 13-15% slower than the Amdahl Model 3 (6390-3) under similar circumstances. Transcript at 245. It also shows that the Amdahl Model 3 will outperform the IBM Model 2. Transcript at 242.

At the outset of this procurement the original solicitation generated a large number of questions, some of which resulted in significant amendments. Amendment 3 made it clear that DOJ was seeking DASDs equivalent to the IBM 3390-2 rather than the larger capacity but slower operating IBM 3390-3. Amendment 5 confused the issue again and Amendment 6 (which Amdahl protested), issued to clarify the situation, appeared to allow an IBM 3390-3 at half capacity to be considered equivalent to an IBM 3390-2 with respect to performance. DOJ apparently believed, mistakenly, that at half capacity the speed of the 3390-3 equalled the 3390-2. Next came Amendment 8 which grew out of a settlement agreement executed in a prior protest of this procurement by intervenor Amdahl. Amendment 8 set out what protester refers to as "new requirements:" a maximum seek time of 23 ms and an average seek time of 12.5 ms. These are not new. They are the same seek times set out in the DOJ's requirements study made in 1991, and track identical seek times characteristic of the IBM 3390-2, the same DASD that the original solicitation used as an equivalency. Protest File, Exhibit 1 at 46. It is this amendment that protester challenges on several grounds. The first is that neither a maximum seek time nor an average seek time is a "meaningful" indicator of DASD performance. The second is that there is no basis to conclude that either a 33 ms maximum seek time or a 15 ms average seek time will not satisfy the DOJ's performance needs. The third is that an IBM 3390-3 and an IBM 3390-2 are equivalent in performance, and the fourth is that Amendment 8 imposed more stringent requirements than the original solicitation and thus unnecessarily reduced competition in contravention of law.

Discussion

We consider protester's complaints in order. Protester attempts to show by its evidence that a maximum seek, during which the actuator arm of a disk drive is required to travel from the inner most to the outermost cylinder, is so rarely encountered in the everyday operations of a disk drive that the length of time this passage takes is of no significance in assessing the speed of a system. In doing so protester ignores the fact that it is not the frequency of the manuever but the speed with which it is performed that makes the maximum seek time a valid measure of performance because it gives us

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some idea of the quickness of the machine. It is true that there may well be better measures of overall performance, but it is also true that if A's actuator arm moves faster than B's, then A is always going to be faster than B in operations utilizing the arm, other things being equal. The same reasoning applies to protester's contention that the average seek time is not a valid measure of performance. Protester calls the concept theoretical, and it is. It is calculated by combining the time required to move the actuator arm from each cylinder to every other cylinder and then averaging the positioning time for all combinations. Joint Exhibit 19 at 11. It probably never occurs in the real world. Once again, however, the frequency of its occurrence is not in issue. It remains a measure of the speed of the actuator arm and thus a measure of the speed of one of the elements in the system. All else being equal, the system with the faster arm will get faster results. The experts tell us that the actual average seek time probably does not amount to as much as one quarter of the theoretical seek time, but this can give no comfort to protester. Average seek time, theoretical or not, is a significant aspect of the speed of a system. In a similar vein protester argues that there is no evidence that a 33 ms maximum seek time (rather than the specified 23 ms maximum seek time) will not satisfy the DOJ's performance needs. In this protester is simply wrong. The DOJ's experience with its present system was testified to at some length. Its present system does not have enough storage capacity, nor does it have enough speed. The evidence amply supports these findings and protester has produced nothing to contradict them. We have already found that the 23 second maximum seek time specification is a speed requirement. It is based on the IBM 3390-2 which the testimony shows has been tested in use in small numbers by DOJ in preparation for this procurement, and which the DOJ found to be satisfactory to its needs. Certainly protester has produced no evidence to show otherwise. Continuing this line, protester also argues that there is no evidence that a 15 ms seek time (rather than the specified 12.5 ms seek time) will not satisfy the DOJ's performance needs. Again protester is off the mark. The average seek time is also a gauge of the speed of the system. What we said with respect to the maximum seek time applies with greater force here. Protester next argues that an IBM 3390-3 (Model 3) is equivalent in performance to an IBM 3390-2 (Model 2). However, there is no evidence to support the statement. Protester's own evidence shows only that the best Model 3 can do is get close to the performance of the Model 2. DOJ's evidence shows the Model 3 to be lagging behind the Model 2 in speed of performance by approximately 8%.

In the end, however, it is not a question of whether or not a slightly slower DASD would have performed successfully when put to the tasks that DOJ envisioned for it. The only questions before us are two: Who decides what the minimum needs of the DOJ are? And is there anything in this procurement that unnecessarily restricts competition? As to the first question the answer, within very broad limits, is the Department of Justice. Especially in procurements of the size and complexity shown by the evidence, it is the buyer who knows what is required and not the seller, and for this reason it is the buyer who decides the issue. It is only when there is some element in the procurement which unnecessarily restricts competition that the buyer may be called to account. The emphasis is on "unnecessarily" because all procurements by their intrinsic nature limit competition. All procurements for horses necessarily exclude mules. Although mules and horses look and act very much alike, there are subtle differences between them that make the one emininently suited for tasks that the other would fail at. In the matter before us we find no significant element of the procurement specifications to be unnecessarily restrictive. We find no violation of any regulation, or of the DOJ's procurement authorization, or of any statute. It is not until the competitive process is restricted for some reason having nothing to

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do with the Government's procurement needs that we may intervene.

Decision

We **DENY** the protest.

[¶ 26,325] Air Inc. v. General Services Administration

GSBCA Nos. 10506, 10935, August 17, 1993.

Performance—Directions by Government—Contract Requirements.—Under contracts for disk sanders, a contractor was not entitled to compensation for expenses incurred in refitting and assembling sanders in response to government directions to replace all felt-faced plastic disks with integrated rubber pads, because the disks initially supplied by the contractor failed to comply with the contracts' performance requirements for felt, fiber, or rubber pads that were capable of removing metal and wood from curved surfaces. The government's demand that the contractor supply components complying with the terms of the contracts was fully consistent with the Warranty of Use clauses. The government's approval of the preproduction model did not preclude it from rejecting the items delivered for failure to meet certain untested performance requirements and did not relieve the contractor of its duty to furnish conforming supplies.

For the appellant: Takahashi & Associates, Washington, D.C., by Kenneth K. Takahashi. For the government: John E. Cornell and Wendy Nevett Bazil, Office of General Counsel, Personal Property Division, General Services Administration, Washington, D.C.

Before LABELLA, HENDLEY, and VERGILIO, Administrative Judges. Separate dissenting opinion by Administrative Judge VERGILIO.

LABELLA, Administrative Judge: On February 5, and October 22, 1990, the Board received notices of appeal from Air Inc. Air Inc. was to provide pneumatic disk sanders under two contracts with respondent, the General Services Administration. The contractor had delivered and was delivering sanders in accordance with pre-production models and first article tests which the agency had accepted. A felt-faced plastic disk was part of each sander. Thereafter, the agency received a single complaint from a user that the disk component had shattered during use. The agency inspected the sanders and concluded that the disk component failed to meet the contractual requirements. The agency "directed" the contractor to replace all felt-faced plastic disks with integrated rubber pads for sanders already delivered, and to provide sanders with integrated rubber pads for all items yet to be delivered.

Relying on the Changes clause, the contractor contends that it is entitled to be compensated for its efforts and expenses in refitting and assembling sanders. It maintains that the felt-faced plastic disks complied with federal specifications and had been approved by the agency. Only the question of entitlement is before the Board, the parties having reserved the issue of quantum.

Relying upon the warranty clauses, the agency contends that no change occurred. The contractor was required to deliver a felt, fiber or soft rubber pad that is capable of heavy removal of metal and wood on curved surfaces; the agency claims that the felt-faced plastic disk was not compliant.

We conclude that the felt-faced plastic disks supplied by the contractor failed to satisfy the performance requirements of the contracts. They are not suitable for heavy removal of metal and wood on curved surfaces as required under the contracts as is apparent from an examination of the component itself, introduced into the record, and from the Government's performance test in which five items failed.

Findings of Fact

The contracts

1. The agency issued solicitations (one negotiated procurement for a definite quantity, the other a sealed bid procurement for an indefinite quantity) to obtain portable pneumatic disk sanders in accordance with federal specification 00-S-101 (type II; style 2). Appeal File, Exhibits 1, 2.[1]

[1] Two appeal files exist in these consolidated cases. Unless otherwise noted, references to an appeal file relate to the appeal file in GSBCA 10506. Also, a two volume transcript exists in these ap-

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2. The specification dictates that the sander "shall be equipped with a felt, fiber, or soft rubber pad." Appeal File, Exhibit 16 at 5 (¶ 3.17.1). While the sealed bid solicitation provided an express exception to the specification allowing the sanding pad for the type II, style 3 disk sander to be made of plastic and further providing for a metal or nylon backup plate to which the pad is to be attached, no such exception was provided for the type II, style 2 sander in issue here. *Id.*, Exhibit 2, Contract at 18. Indeed, the specification for the item in issue here had no specific requirement for the composition of the backup plate to which the pad is attached; it only speaks to the composition of the pad. Regarding the general construction of the sander, the specification provides that the "sanders shall be of rugged construction so as to withstand, without failure, treatment encountered during actual service conditions .... Working parts subject to wear shall be of sufficient hardness to withstand the service required." *Id.* at 2 (¶ 3.3). Further, the specification notes that the style and type of sander in issue here is normally used for heavy removal of metal and wood on flat and curved surfaces. *Id.* at 1 (¶ 1.1), 8 (¶ 6.1). In the sealed bid procurement, appellant's bid for the type II, style 2, sander in issue here was more than twice the bid price for the type II, style 3, which inter alia permitted a plastic pad component.

3. The federal specification "requirement" regarding preproduction samples is applicable only when a solicitation so specifies. The clause requires a contractor to submit one sander:

> to prove, prior to starting production, that his production methods and choice of design detail will produce sanders that comply with the requirements of this specification. Examination and tests shall be those specified herein. Any changes or deviations from the preproduction model during production shall be subject to the approval of the contracting officer. *Approval of the preproduction model by the contracting agency shall not relieve the supplier of his obligation to furnish sanders conforming to this specification.*

Appeal File, Exhibit 16 at 2 (¶ 3.1) (emphasis added). The specified "examination" provision dictates: "Each sander shall be examined for conformance to design and construction, dimensions, weight, materials, finish and coating, workmanship and marking requirements." *Id.* at 7 (¶ 4.7). Regarding acceptance tests, the specification provides: "Each sample shall be run at no load to determine integrity of working parts, noise, and vibration." *Id.* at 7 (¶ 4.7.1). The specification does not provide for subjecting equipment to conditions of anticipated use for purposes of acceptance testing. In fact, testing was to be run at "no load" and thus was not a test of the performance requirements that the product be of rugged construction and be capable of heavy removal of metal and wood from curved surfaces, requirements that we interpret to mean a heavy duty product.

4. The definite quantity contract calls for preproduction samples:

> The Contractor shall have available at his expense within *30* days after receipt of notice of award two preproduction samples of each item to be delivered under the contract for inspection and determination by the Government as to compliance with the specifications ....
>
> Preproduction samples required by this contract must conform to all specification requirements. The acceptance of any previous preproduction samples or the granting of any deviations on previous preproduction samples or on supplies required by previous contracts for the same item(s) shall in no way be considered as justification for assuming that the preproduction samples submitted under this contract will be accepted unless they fully meet specifications or that deviations will be granted.
>
> When the preproduction samples are approved, the Government shall notify the Contractor of their acceptance in writing .... (One preproduction sample) shall be delivered to the Government in accordance with instructions to be furnished by the Contracting Officer and upon acceptance shall be deemed an item delivered under the Contract.

Appeal File, Exhibit 1 at 4 (¶ E-FSS-500-A (April 1984)).

5. The indefinite quantity contract provides for "first article approval—contractor testing." Appeal File, Exhibit 2 at 32 (Federal Acquisition Regulation (FAR) 52.209-3 (Alternate I) (June 1985)). Under this provision, the contractor shall test one unit and submit a first article test report within

(Footnote Continued)

peals. Unless otherwise noted, references to a transcript are to volume one.

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thirty calendar days of contract award. Thereafter,

> the Contracting Officer shall notify the Contractor, in writing, of the conditional approval, approval, or disapproval of the first article. The notice of conditional approval or approval shall not relieve the Contractor from complying with all requirements of the specifications and all other terms and conditions of this contract.

Id. (FAR 52.209-3(b)). The clause further states:

> (e) Unless otherwise provided in the contract, and if the approved first article is not consumed or destroyed in testing, the Contractor may deliver the approved first article as part of the contract quantity if it meets all contract requirements for acceptance.
>
> ....
>
> (g) Before first article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the Contractor. Before first article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

Id.

6. Both contracts incorporate the "bid sample" provision from the FAR, 48 CFR 52.214-20 (1985). Appeal File, Exhibits 1 at 11, 2 at 40. Both also contain a clause captioned "Quality Approved Manufacturer Agreement," E-FSS-539 (May 1984), which states in part:

> Notwithstanding any other provision of this contract concerning the conclusiveness of acceptance by the Government, any supplies or production lots shipped under this contract found to be defective in material and workmanship, or otherwise not in conformity with the requirements of the contract within a period of *12* months after acceptance shall at the Government[']s option be replaced, repaired or otherwise corrected by the contractor at no cost to the Government within 30 calendar days (or such longer period as the Government may authorize in writing) after receipt of notice to replace or correct.

Id., Exhibits 1 at 5, 2 at 30.

The sanding pad and backing plate component

7. Prior to the award of each contract, in response to agency facility plant investigations, Air Inc. identified a price, a particular manufacturer, and the domestic or foreign origin of each component of the sander it would be supplying. Appeal File, Exhibits 2, 19, 21, 22. According to the contracting officer, this was done after receipt of appellant's bid and proposal because the facilities plant report questioned appellant's compliance with the "domestic end-product" requirement. *Id.*, Exhibit 31. The appellant's component sheet refers to the sanding pad as a "back up pad," a component comprised of a single part, and lists the source as Spiralcool, a domestic source, at a component cost of $4.75. *Id.*, Exhibits 2, 22 (item 28). At hearing, the Spiralcool pad was shown to be an integrated rubber pad and backup plate, although there was no such representation in the post-bidding documents. *Id.*, Exhibits 2, 19, 21. With effective dates of March 26, and May 6, 1987, respectively, the agency awarded to Air Inc. a firm, fixed-price contract for a definite quantity and an indefinite quantity contract to supply portable, pneumatic sanders in accordance with its bid. Appeal File, Exhibits 1, 2.

8. Under the definite quantity contract, as part of its preproduction sample, the contractor provided a felt-faced plastic disk—that is, a component constructed of a plastic backing plate that is $6\frac{3}{4}$ inches in diameter with a felt ring or gasket approximately $\frac{1}{8}$ inch thick and $1\frac{3}{8}$ inches wide attached by an adhesive to the outer circumference of the plastic backing plate. Appellant's Exhibit 1; Transcript at 46. The agency accepted the sander as a preproduction sample. Appeal File, Exhibit 27 (undated report); Transcript at 41-43, 46, 52. This approval occurred, even though agency personnel testified at the hearing that a simple visual inspection indicated that the component was clearly made of plastic with felt of insufficient size to constitute a compliant product. Transcript, Vol. 2 at 36, 37, 44. Under the indefinite quantity contract, the contractor provided a first article test report. Appeal File, Exhibit 25. Based upon the information contained in that contractor provided report, the agency approved the first article test of the item. *Id.*, Exhibit 27 (letter dated June 24, 1987). Under both contracts, until later problems arose, the contractor provided sanders only with the felt-faced plastic disk utilized in its preproduction sample. Transcript at 42-43,

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46; Appeal File, GSBCA 10935, Exhibit 18. The component actually supplied during pre-production testing and these subsequent deliveries, however, was not that identified prior to award in the component lists and apparently was less costly to the contractor than the pad identified in the component price sheets. Finding 7. Although the agency approved the pre-production model, which was not to be deviated from without contracting officer approval, Finding 3, the contractor did not point out the discrepancy between those items identified as a result of the plant facility investigation and those delivered (for pre-production and subsequently). That is, the contractor did not inform the agency that it was providing other than the rubber pad of the manufacturer identified during the plant facilities investigation. Transcript at 63; Appeal File, Exhibit 31. Moreover, the pre-production model and the first article sanders were tested at "no load" in accordance with the contract terms and, therefore, were not determined to be conforming to the "heavy removal" from curved surfaces service requirement of the specifications. Finding 3.

Shattering disk

9. After delivery had commenced, the agency received a complaint from a user regarding a contractor-supplied sander. A written "record of complaint investigated" describes the "nature of complaint": "Sanders are a hazard to crew members due to the continual breaking of the plastic Backup Pad on Sander which hold[s] the sandpaper in place." Appeal File, Exhibit 3. The summary of the investigator's action states, in part:

> Onsite investigation revealed that Back-up Pad on sander is made of a hard plastic with very little flexibility, and does not conform to contours as a rubber back-up pad would. This causes the operator to put extreme pressure on the sander to try and cover the full surface of the sandpaper. The extreme pressure applied by the operator causes the plastic back-up pad to wear at the outer edge, which then, while in use, splits and then shatters into small pieces creating the hazard to personnel. Recommend that plastic back-up pads be replaced with rubber pads, which would result in safer operation for user and personnel.

Id. The "record of complaint investigated" has blocks filled in as follows: contract number: none; order number: none; batch or lot number: none; date of manufacture: none; date received: 2/88; amount received: 8 each; amount on hand: 8 each; and amount unsatisfactory: 5 each. *Id.* The investigator's findings state that the complaint was justified because of a material deficiency. *Id.* The contractor has raised subsequent concerns, Finding 15, as to whether the referenced "extreme pressure" constituted anticipated or normal use of the sander and whether breakage occurred after any anticipated life of the component. Nevertheless, we think a reasonable reading of this report together with an examination of the component is that "extreme pressure" was necessitated by the requirement in the specifications to perform heavy removal from curved surfaces together with the inflexibility of the item rather than the use of excessive force in the sense of a negligent use or abuse of the item. In the absence of evidence to the contrary, which appellant had the burden of bringing forward, we cannot presume that the Government was negligent in its use of the items.

10. Thereafter, by letter the agency informed the contractor of the complaint:

> Onsite investigation revealed that the backing plate on the sander is made of a hard inflexible plastic that does not conform to sanding contours. This causes the operator to put extreme pressure on the sander causing the plastic back-up plate to wear and eventually split and shatter into small pieces, creating a hazard to personnel.

Appeal File, Exhibit 5. Further, it states that pursuant

> to the warranty paragraph of Clause E-FSS-539, Quality Approved Manufacturer Agreement," of the above noted contracts, you are to replace these 1539 defective sanders. Please advise this office in writing, within ten (10) calendar days after receipt of this letter, of your specific instructions regarding the replacement and disposition of this defective material.

Id.

11. A subsequent "laboratory test record" dated September 9, 1988, notes that a sample size of five items out of a lot of 1539 was utilized for a purchase order under the indefinite quantity contract. Appeal File, GSBCA 10935, Exhibit 9. The lab report supersedes an earlier report which is not in the record. Under a section captioned "test requirements," the report notes that sanders are to be equipped with a felt, fiber or rubber pad. The same section also states:

> Note: The American Society for Testing and Materials defines an elastomer (rubber) as "a p[o]lymeric material which at

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room temperature can be stretched to at least twice its original length and upon immediate release of the stress will return quickly to approximately its original length." The pad supplied with the sander does not stretch whatsoever, thus indicating that the material is not rubber. Further, the density of rubber is 1.0-2.0 GMS per cubic centimeter. The pad has a density of less than 1.0 which is indicative of a plastic or plastic-like material.

Id. The test record concludes that the component does not comply; the sole basis indicated for non-compliance is "no rubber pad." The results are silent as to whether or not the pad is a felt pad. *Id.*

12. By letter dated September 13, 1988, regarding both contracts, the agency informed the contractor that an "examination of the backing plate provided by your firm under these contracts reveals that it is neither felt nor fiber." Moreover, the agency had determined that plastic was not rubber. The agency concluded that the contractor's product failed to conform to paragraph 3.17.1 (felt, fiber or soft rubber), Finding 2. The agency sought corrective action from the contractor for breaching the warranty provision of the quality approved manufacturer agreement, Finding 6. Appeal File, Exhibit 7.

13. A "notice of inspection" dated September 15, 1988, states that the agency has "rejected" a lot of sanders delivered under a purchase order under the indefinite quantity contract. The "remarks" portion of the document contains the following: "The density of the backing plate (rubber) is 1.0-2.0 GMS per cubic centimeter. The backing material has a density of less than 1.0 which is indicative of a plastic or plastic-like material." Appeal File, Exhibit 27.

14. A "notice of inspection" dated September 19, 1988, for the identical purchase order and lot in the notice in the previous finding, rejects the sanders with the following "remarks":

> Pad does not conform to requirements as it shatters into pieces when used under normal performance conditions. This presents a serious hazard to the user.
>
> Material fails paragraph 3.17.1 that sander shall be equipped with a felt, fiber, or soft rubber pad, and paragraph 3.15 for workmanship, in that the sanders shall be free from all defects or imperfections which will adversely affect the general appearance, function, serviceability, or life expectancy.

Appeal File, GSBCA 10935, Exhibit 36.

15. By letter dated September 20, 1988, the contractor informed the agency:

> If the application is such that "extreme pressure" is required, we are obviously not talking about "normal performance conditions".
>
> To cover "the full surface of the sandpaper" is a physical impossibility with this type of tool with any pad. The torque generated by the tool is such that it would be impossible to control and the operator would definitely be subjecting himself to an extremely hazardous condition.
>
> "Extreme pressure applied by the operator" caused the pad to wear on the outer edge. Since the proper size abrasive is 7" and the pad diameter is $6\frac{3}{4}$" it is impossible to wear the outer edge of the pad unless using the wrong size abrasive or an abrasive that has worn away exposing the pad. Operating in this manner, which surely is not "normal performance conditions" will definitely wear the outer edge of the pad and is an abusive use of the tool.

Appeal File, Exhibit 8.

In the letter the contractor also states that it supplies "a plastic backing plate supporting a felt pad which is in contact with the abrasive. Our *pad* meets the specification requirements. There is no *backing plate* requirement." *Id.*

16. By letter dated October 6, 1988, the agency responded to the contractor:

> The question at issue here is that the Pad, Air Inc. Part Number 716-49, currently provided in your Disk Sander, NSN: 5130-00-596-1176, is unsuitable to the Government's requirements. The rigidity, or lack of flexibility of this part creates a hazardous condition during use.
>
> . . . .
>
> Visual inspection clearly reveals that the part, supplied by your firm, is made of hard black plastic.
>
> Accordingly, therefore, the Government reaffirms its position as stated in its letter of September 13, 1988, which requires that you replace the defective sanders in accordance with Clause E-FSS-539, Quality Approved Manufacturer Agreement.

Appeal File, Exhibit 9.

17. By letter of October 20, 1988, the contractor informed the agency that it would "replace all rejected felt pads held by various customer agencies with rubber pads." The contractor also expressly reserved the right to file a claim for all additional costs

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incurred to accomplish the rework. Appeal File, Exhibit 10. The replacement pads were similar to those of the manufacturer named in the component cost sheets, although apparently somewhat less expensive. *Id.,* Exhibit 12; Finding 7; Transcript at 63. By letter of the same date, the contractor repeated its request to the agency for an amendment adjusting the price of the contracts. Appeal File, Exhibit 10. Although the letter alludes to "over 10,000 tools furnished to the government with this type of pad," the record does not support the conclusion that the actual component in question here had been supplied in all of those 10,000 instances. Transcript at 65, 68. Thus, even if felt-faced plastic disks had been provided and had performed satisfactorily, the history of those disks has not been connected to those supplied under the contracts in dispute.

Contractor submissions

18. By letters dated November 13 and 14, 1989, the contractor submitted claims to the agency under both contracts for actual costs incurred in substituting rubber pads for felt-faced plastic disks previously supplied. Appeal File, Exhibit 12. The contracting officer issued a decision denying both claims on December 11, 1989. The basis for the denial was the failure of the felt-faced plastic disk to conform to the requirement that the pad be felt, fiber or rubber. *Id.,* Exhibit 13 ("Visual inspection revealed that the sanding pad, actually the backing plate appeared to be made of a hard, rigid, plastic material."). On February 5, 1990, the Board received the contractor's notice of appeal of that decision. *Id.,* Exhibits 14, 15.

19. By letter dated June 18, 1990, the contractor submitted a claim to the agency for alleged additional costs for sanders delivered with rubber pads under a purchase order under the indefinite delivery contract. Appeal File, GSBCA 10935, Exhibit 18. By letter dated August 2, 1990, the contracting officer denied this additional claim. *Id.,* Exhibit 19. On October 22, 1990, the Board received from the contractor a notice of appeal of the decision. *Id.,* Exhibits 20, 21.

The component in dispute

20. The component in dispute is part of the record as Appellant's Exhibit 1. Finding 8. The $1/8$ inch thick and $1\,3/8$ inch wide felt gasket does not make the component, with its plastic backing plate, less rigid. The item has little flexibility. At hearing, the Government's mechanical engineer who has responsibility for the specification in issue here testified that "the way the specification is written, we would have to accept" a plastic backup plate to which a thicker felt pad was attached. Transcript, Vol. 2 at 5-8, 44. He stated that if a thicker felt pad was attached, the plastic backing plate's flexibility would not change but the extra thickness would allow for better sanding in curved surface areas. *Id.* at 45-46. It is clear from looking at the rejected component that it will not be capable of satisfactorily performing the contract-specified sander function of heavy removal of metal and wood from curved surfaces. The item itself confirms the post-delivery test result of the agency that the component fails to satisfy the intended use identified in the specification.

Discussion

The contractor maintains that the felt-faced plastic disk it supplied satisfies all requirements of the federal specification and contracts, there being no specific requirement for the composition of the backup plate. It maintains that the felt pad and component it furnished performed satisfactorily. Consequently, by requiring the substitution of an integrated rubber component, the agency changed the contracts, thereby entitling the contractor to adjustments in the contract prices.

The principal assertion in the contractor's argument fails; that is, the felt-faced plastic disk it supplied does not satisfy the performance requirements of the federal specification and contracts. Namely, the rigidity of the component, taken as a whole, with the scant amount of felt, makes it ill-suited to the heavy removal of metal and wood on curved surfaces. The best evidence supporting the conclusions of the agency, Findings 9-16, 18, is found in the component itself, Finding 20. Additional credible evidence is found in the investigative report that indicates that the product could not be satisfactorily used on contoured surfaces without applying more pressure than the rigid plastic disk could absorb without shattering. Finding 9.

The agency's demand that the contractor supply components complying with the terms of the contracts is fully consistent with the warranty of use clauses. Findings 3-6. The fact that the agency gave its approval of appellant's pre-production model does not preclude the agency from rejecting the items delivered for failure to meet certain performance requirements of the specifications which were not examined or tested under the contracts' quality assurance provi-

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sions. Moreover, the approval of the preproduction model did not relieve the contractor of the obligation to furnish conforming supplies, that is, sanders that would meet the contract's performance specifications in addition to those requirements that were tested. Accordingly, the agency actions do not constitute a "change" under the terms of the contracts.

The concurring opinion concludes that the contractor provided components at variance with what it obligated itself to deliver under the contracts. We do not agree that the representations made after submission of bids and proposals for purposes of determining whether the bid item is foreign or domestic necessarily bind the vendor to supply only components manufactured by the intended subcontractor identified apart from any bidding document. Had the representation been made as a part of the bid as in an "or equal" procurement, we would agree with the concurring opinion. The only commitment in appellant's bid and proposal was to furnish a domestic end product and the case before us presents no question of appellant's compliance with that requirement.

Decision

The agency has demonstrated that the felt-faced plastic disks supplied by the contractor fail to satisfy the federal specification and the terms of the contracts. No change has occurred under the contract. Accordingly, the Board **DENIES** the appeals.

VERGILIO, Board Judge, dissenting in part, concurring in result.

I dissent from the conclusion of the majority that the record establishes that the felt-faced components initially supplied by the contractor and accepted by the agency fail to satisfy the performance requirements of the contracts. I conclude that the agency has not demonstrated either that the felt-faced plastic component fails to be "felt, fiber or soft rubber," or that the component fails to satisfy the performance characteristics of the contracts. In short, the agency has not proven that it properly invoked the warranty of use provisions of the contracts. However, I concur with the result that the appeals must be denied—the contractor has not established that any change occurred from what it obligated itself to deliver under the terms of the contracts.

The agency substantiates its actions on a narrow ground; it "argues that Appellant did not originally comply with this requirement (that the pad be of felt, fiber or soft rubber), hence, the request for a repair or replacement properly came under the warranty clause." Agency Post-Hearing Brief at 8. This argument is made without regard to the performance characteristics of the pad; rather, the assertion is that there is insufficient felt to be a felt pad, and the plastic is neither rubber nor fiber.

The agency has not met its burden of proof to establish that the component supplied by the contractor was not a felt pad. The agency accepted the felt-faced plastic component as a preproduction sample. The agency acknowledges that a visual inspection of the component supplied by the contractor reveals that it is made of plastic with a felt disc attached to it. The agency accepted this component as part of the preproduction model. Although the component contains no rubber, the solicitation permits felt pads.

The agency's belated attempt to disavow its earlier acceptance of the felt-faced plastic component and to now assert that the design of the felt-faced plastic component is insufficient simply because the component is not made of soft rubber (or felt or fiber) lacks credibility, and runs contrary to the pre-production clause which requires the agency to make a determination regarding the "choice of design detail," Finding 3.[1] Moreover, the test reports of the agency arc lacking in credibility. For example, a lab report provides a definition of rubber (material stretchable to twice its original length), notes that the contractor's component "does not stretch whatsoever," and concludes that this indicates that the material is not rubber. Finding 11. The rubber pads which the agency claims are acceptable, Agency Exhibits 1, 2, do not satisfy the stretchability requirement of the definition.

Given the patent appearance of the felt-faced plastic component, Findings 8, 16, and the unrebutted assertions by the contractor that similar components have been accepted as satisfying the identical federal specification, Finding 17, I am unable to conclude that the component submitted by the con-

[1] The Board is not here faced with the situation where the contractor is objecting to the agency's disapproval of the pre-production sample as an acceptable pre-production model because the component is neither felt, fiber or soft rubber. Here, at the pre-production stage, the agency deemed the felt-faced plastic component to be an acceptable pre-production model.

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tractor was other than a "felt pad" under the federal specification.

Although the agency has not demonstrated that the contractor submitted other than a felt pad, the component must still satisfy the performance and warranty of use provisions of the specification and solicitation. Findings 2-6.[2] There is no indication that the sander was operated under actual use conditions during the preproduction testing; the record actually suggests to the contrary. Findings 3, 8-10.[3] The acceptance of the pre-production model does not limit the scope of the performance and warranty of use provisions so as to absolve the contractor of its obligation to supply a product which conforms to the performance or use requirements expressed in the federal specification. *Keco Industries, Inc.*, ASBCA 13271, 71-1 BCA ¶ 8727. Thus, I would conclude that the agency prevails in this dispute, had it demonstrated that the component failed to satisfy the performance or warranty of use provisions.

In order to prevail under a warranty claim, the agency bears the burden of proof. *Camrex Reliance Paint Co.*, GSBCA 6166, 83-1 BCA ¶ 16,485 (Board concluded that material was not tested in accordance with contract requirements, where chemist who performed tests recited in great detail steps taken in testing; Board inferred from his not mentioning specific procedures that he failed to utilize those procedures in testing); *R.E. Lee Electric Co.*, GSBCA 1040, 1964 BCA ¶ 4401.

The standard of performance and use to be satisfied is expressed in the federal specification: "[S]anders shall be of rugged construction so as to withstand, without failure, treatment encountered during actual service conditions.... Working parts subject to wear shall be of sufficient hardness to withstand the service required." Further, the specification notes that the sanders are normally used for heavy removal of metal and wood. Finding 2.[4]

It may well be that when compared to felt-faced plastic pads, soft rubber pads offer enhanced performance capabilities for sanding contoured surfaces. *See* Finding 9 (the felt-faced plastic pad does not conform to contours as would a rubber pad). However, such attributes are not relevant to the matters before the Board. The specifications permit three types of pads. Nothing in the specification requires that any two varieties of pads perform equivalently in any or all circumstances.

Although the agency has demonstrated that one component failed during actual use, under what is stated to be "excessive pressure," Findings 9, 10, and that some failed during subsequent testing, the agency has failed to develop the record in important areas. The record does not reveal what the subsequent testing entailed. At best, the record contains inconclusive evidence regarding the actual test conditions (what was tested—new or already used equipment—and how), the reasonableness of whatever tests occurred (the duration and extent of pressure necessary to result in shattering as compared to normal or anticipated use), and what may have been the expected durability of an acceptable component.[5]

The state of the record exists despite concerns raised by the contractor, prior to these appeals, regarding the sufficiency of the tests to establish lack of compliance with the specification. Finding 15. In developing the record for these appeals, the agency has not been responsive to the contractor's inquiries and concerns, particularly when the contractor asserted in correspondence that its component meets the specification requirements. *Id.* The record reveals no agency method of testing—none is suggested in the testimony or documents, described in the test reports, or otherwise prescribed in the contracts. Thus, although there exists "a presumption that the method of testing followed by a Government laboratory is proper," *Continental Chemical Corp.*, GSBCA 4483, 76-2 BCA ¶ 11,948, at 57,269, without any indication of the method of

[2] Although I reference Finding 3, I find nothing in the record to support the conclusion of the majority that a "heavy duty product" was solicited.

[3] Although I reference Finding 9, I do not agree with the final two sentences thereof. The alleged "reasonable reading" is conjecture. The agency has not revealed any method of testing or established a prima facie case to shift a burden to the contractor.

[4] Contractor contends that the federal specification "does not specify the intended use of the sander, nor the standard of performance the sander is suppose[d] to achieve. In short, [the specification] is a design, and not a performance type specification." Contractor's Post-hearing Brief at 7. Contractor overlooks the actual language of the specification.

[5] A report states that, after the pad wore at its outer edge, it split and shattered. Finding 9. Nothing in the record suggests that normal or anticipated use includes continued use of a pad worn at its outer edge.

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testing used, there exists no basis to invoke the presumption.

Unlike the majority, my examination of the actual component, Appellant's Exhibit 1, does little to support the agency's position. The thickness of felt is just as apparent to me as it should have been during the pre-production samples. Further, I do not find the performance characteristics of the component to be patent—whether the component is more likely than not to shatter during normal or anticipated use is not evident from an examination of the component. As a judge, I would not on my own, after the record closed, attach the component, Appellant's Exhibit 1, to a sander and test its ability to perform. Whether or not the single component survived my testing would be inconclusive regarding its general performance characteristics. The majority goes much further than performing such a test—it simply examines the component and draws conclusions for which I believe there exists no evidentiary foundation in the record.

The fully developed record does not support the contention that the actual felt-faced plastic components supplied failed to be sufficiently rugged to comply with the specifications. The failure of one product during use (the record contains but a single report of a shattered component) and some products while being subjected to unspecified testing do not enable me to conclude that the components violated warranty of use provisions—the agency has failed to meet its burden of proof.

The record, developed for a *de novo* determination by the Board, reveals that the contractor provided components at variance with what it obligated itself to deliver under the contracts. Findings 7, 8. The contractor neither notified the agency of the substitution, nor gave the agency an express opportunity to accept (with or without price modification) or reject the change. Ultimately, the agency rejected the change, when it required the contractor to provide a pad similar to that designated in the contracts. Finding 17.

Unlike the majority, I conclude that the contractor obligated itself in its contracts to deliver rubber pads with its responses to the plant investigations. Prior to obtaining each of the contracts, after being informed both of the agency's concerns regarding its potential compliance with the Buy American Act and that its *"response will be incorporated into your proposal,"* Air Inc. provided the agency with its "component cost sheet on the sanders offered on this solicitation .... The manufacturers and points of production are indicated in the source column and listed under 'Supply Codes'." Appeal File, Exhibits 18 (emphasis added), 19, 22, 31. The agency relied upon the responses and certifications in making the awards. *Id.*, Exhibit 31. Air Inc. obligated itself to provide a Spiralcool Company "pad" under each contract. *Id.*, Exhibits 19, 22.[6] After receiving the contracts, the contractor failed to inform the agency with the submission of its pre-production samples and its first-article approval that it had deviated from its contracts. Accordingly, by ultimately requiring the contractor to supply a pad component conforming to its contractual obligations, the agency actions did not constitute a change. In essence, upon becoming aware of the contractor's previously undisclosed variation from the terms of the contract, the agency rejected the proposed change—the substitution of felt-faced plastic components for rubber pads. In short, no change occurred—the agency required the contractor to supply components conforming to the terms of the contracts. The contractor has failed to demonstrate its entitlement to any relief given its undisclosed deviations from the terms of its contracts.

[¶ 26,326] Penn Environmental Control, Inc.

VABCA Nos. 3599E, 3600E, 3725E, August 20, 1993. Contract No. V513C-220.

Attorney Fees and Costs Under Equal Access to Justice Act—Prevailing Party—Settlement Agreement.—A contractor that appealed the contracting officer's final decision that reduced the contract price for deleted work was a prevailing party for

[6] In response to requests for admissions, contractor, through its president, denies that either the record or the contracts contain a component cost sheet; it also denies that its prices were based on the provision of pads supplied by Spiralcool. Appeal File, Exhibit 29 at 3 (¶¶ 9-12). The sweeping denials, with no further support in the record, are not credible—they contravene the documentation in the record, including a declaration of a procuring contracting officer. *Id.*, Exhibits 18, 19, 31.

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purposes of the Equal Access to Justice Act, despite the government's contention that the contractor agreed to a settlement that increased its proposed deduction more than 100 percent, whereas the government reduced its offer by less than 50 percent, because the deduction was significantly decreased. Although the government contended that the contractor did not prevail in its claim regarding payments for the removal of asbestos-containing material, the contractor obtained payment of a substantial portion of the amount sought.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Reasonableness in Asserting Position.—Under the Equal Access to Justice Act, a contractor was entitled to recover the attorney fees and costs incurred in litigating its appeal of the government's settlement by determination that reduced the contract price for deleted work, because the government's position was not substantially justified. The government unreasonably contended that the contractor's failure to cooperate in negotiating the reduction required the contracting officer to issue a final decision reducing the price by an estimated amount. Although the contractor complied with the contracting officer's request for a proposal to prevent the issuance of the settlement by determination, the contracting officer ignored the proposal and issued the settlement by determination, which forced the contractor to initiate litigation by filing an appeal with the board.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Retainage.—Under the Equal Access to Justice Act, a contractor was entitled to recover attorney fees and costs incurred in appealing the government's withholding of the payment of retainage on the ground of potential government liability for the disposal of asbestos-containing material, because the government's litigation position in refusing to make any payments was not substantially justified. The government relied on informal advice from the Environmental Protection Agency in deciding to withhold payments, rather than on any contract provisions. The contractor was entitled to recover its fees and expenses in litigating the appeal from the date of the contracting officer's final decision to the date of the government's payment under an agreement in response to the contractor's motion for summary judgment for payment, but it was not entitled to recover any costs incurred in connection with subsequent government withholdings that were substantially justified.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Attributability to Adversary Adjudication.—Under the Equal Access to Justice Act, a contractor was not entitled to recover fees and expenses for services provided before the date of the underlying final decision, because costs incurred prior to the prosecution of an appeal from an adverse final decision are not recoverable. Services rendered by an attorney in connection with matters unrelated to the appeals and services rendered by a lay witness were not compensable. However, the contractor was entitled to recover reasonable attorney fees and court reporter expenses related to the adversary adjudication, despite the government's unreasonable contention that the contractor refused to cooperate in negotiations related to the appeals.

For the appellant: Frederick J. Condon, Solon, Ohio. For the government: Kenneth B. MacKenzie, Trial Counsel, Office of General Counsel, Washington, D.C. William E. Thomas, Jr., Assistant General Counsel, and Phillipa L. Anderson, Deputy Assistant General Counsel, of counsel.

Before KREMPASKY, PULLARA, and ROBINSON, Administrative Judges.

KREMPASKY, Administrative Judge: Penn Environmental Control, Inc. ("PEC" or "Applicant"), has submitted timely applications for attorneys fees and expenses under the *Equal Access to Justice Act ("EAJA")*, 5 U.S.C. §504, in relation to the appeals in VABCA-3599, 3600, and 3725 which were dismissed by the Board with prejudice on April 9, May 7 and May 13, 1993, respectively, pursuant to the parties' settlement of the disputes underlying the appeals and their resulting motions for dismissal. These three applications were consolidated for decision by the Board's Order, dated July 20, 1993.

PEC has submitted separate applications with supporting data, to which the Department of Veterans Affairs ("VA" or "Government") has separately responded, in VABCA Nos. 3599E, 3600E and 3725E. In our decision, we will consider the applications and

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limited record in the underlying three appeals filed with the Board prior to their dismissal to the extent necessary to determine PEC's eligibility to receive attorneys fees. The record in each appeal consists of the Complaint, Answer, the Appeal File submitted by the parties pursuant to the Board's Rule 4, and the parties' Stipulations of Settlements in each appeal.

BACKGROUND

VABCA NO. 3599

VABCA No. 3599 involved the appeal of the Contracting Officer's ("CO") final decision in Settlement by Determination ("S/D") A, dated March 12, 1991, reducing the contract price by $8,532 for deletion of certain work in Contract No. V513C-220 ("Contract"). The S/D was issued in accordance with unpublished VA Acquisition Regulation ("VAAR") 843.204. The amount of S/D A was based solely on the VA engineering estimate submitted to the CO on January 7, 1991. In response to the CO's threat to issue a settlement by determination reducing the Contract price by $8,532 if PEC did not submit a proposal by a specified date, PEC submitted a detailed proposal to reduce the Contract price by $1,930.03 on January 9, 1991. The CO, in the period between January 9 and March 12, 1991, unsuccessfully attempted to contact PEC by telephone to discuss the deductive change. There is nothing in the record to indicate that the parties ever discussed the amount of the deductive change to the Contract price prior to the issuance of the final decision; nor does the record indicate that the VA ever detailed its position on the amount of the change to PEC.

Subsequent to the docketing of the appeals in VABCA Nos. 3599 and 3600, the Board *sua sponte* issued an Order to Show Cause why the appeals should not be dismissed for lack of jurisdiction. This Order referenced the Board's decision in *Interstate Contractors, Inc.*, VABCA No. 3404, 92-1 BCA ¶ 24,480 wherein we held that we did not necessarily have jurisdiction over an appeal from a unilateral change embodied within an S/D issued under VAAR 843.204 simply because the S/D styled itself, as required by the VAAR provision, as an appealable final decision. Both parties responded to the Order to Show Cause. The Board held in *Penn Environmental Control, Inc.*, VABCA Nos. 3599, 3600, 1992 WL 309896, a decision issued on October 15, 1992, that under the facts involved in VABCA Nos. 3599 and 3600 that the parties were in dispute at the time the final decision in VABCA Nos. 3599 and 3600 was issued and that the Board had jurisdiction over these appeals.

The parties resolved the appeal in VABCA No. 3599 by agreeing to a Contract price reduction of $4,000.

VABCA NO. 3600

VABCA No. 3600 also involved a deductive change to the Contract price for deletion of work which was implemented by the CO pursuant to her final decision in S/D B issued on March 12, 1992. The Contract price reduction in S/D B was also based solely on the VA's engineering estimate of $2,920. PEC had forwarded a detailed proposal, under the same CO's threat involved in S/D A, for the deletion of the work involved in S/D B on January 28, 1992. PEC's proposal for the reduction in Contract price was $369.55. As with the deductive change involved in S/D A, the CO attempted, without success, to contact PEC by telephone to discuss the S/D B price deduction. The details of VA's position on the amount of S/D B were never forwarded to PEC prior to the issuance of the final decision reducing the Contract price by $2,920.

VABCA No. 3600 was resolved by the parties with their agreement to a $369.55 price reduction.

VABCA NO. 3725

The appeal in VABCA No. 3725 resulted from the CO's final decision denying PEC's claim for payment of Contract Progress Payment Request ("PPR") No. 3. The VA has never disputed that PEC had performed the work on which the request for payment was based. PEC applied for payment of PPR No. 3 in the amount of $95,002.40 on January 22, 1992. The CO returned the payment application on February 10, 1992, because PEC had not acceded to the VA's position on the amount of the deductive changes. A series of correspondence between the VA, PEC, and PEC's counsel ensued in which PEC questioned the validity of withholding the full contract payment solely because agreement on the amount of the two relatively minor deductive changes had not been reached. On March 19, 1992, the CO again returned PPR No. 3, which PEC had resubmitted, without action. The CO once more noted the lack of agreement on the amount of the deductive changes and cited two additional reasons for return of this payment application: the VA's potential liability for PEC's alleged failure to comply with documentation requirements for the disposal of 98 bags of asbestos containing material ("ACM") generated in per-

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formance of the Contract, and a notice from the Federal Department of Labor ("DOL") to withhold $13,229.89 under the Contract labor provisions. Although PPR No. 3 was not a request for final payment, it is uncontested that all Contract work (with the exception of the ACM disposal) was complete by January 28, 1992. After the second return of PPR No. 3, PEC filed a claim for payment of the full, unpaid portion of the Contract price which the CO denied on June 19, 1992. In her final decision, the CO determined that withholding of the remainder of the Contract price was required to "protect the Government's interest" due to the DOL withholding, PEC's appeal of S/Ds A & B, and because the EPA had "informally" advised the VA that the funds be withheld pending a determination of the issues concerning the disposal of the ACM.

Subsequent to the docketing of the appeal in VABCA No. 3725, PEC moved for summary judgment for payment of the Contract price. Subsequent to this motion, the VA agreed to pay PEC $72,222.88 on November 27, 1992, and made payment of that amount on December 18, 1992. In addition to the Contract payment, the VA paid interest under the *Prompt Payment Act* on the Contract payment for the period between 30 days after PEC's submission of its first application for payment of PPR No. 3 until the date of payment. The VA continued to withhold the 10% retainage, the DOL withhold and the full amount of its Contract price reductions in S/Ds A and B. Upon the payment, PEC withdrew its Motion for Summary Judgment.

The record in VABCA No. 3725 indicates that, prior to the parties' settlement, there were valid questions concerning the documentary record pertaining to the disposal of the 98 bags of the ACM and that there was a reasonable basis for the VA to believe that it had some potential liability, as the hazardous waste generator, for the documentary deficiency. However, nothing in the record indicates that the CO undertook any efforts to establish the potential amount of that liability.

The parties resolved the appeal in VABCA No. 3725 at the hearing convened for the appeals in VABCA Nos. 3725 and 3726 (an additional appeal under the Contract pending decision) in February, 1993, by a mutual clarification of the documentary record pertaining to the 98 bags of ACM supplemented by sworn testimony at the hearing by PEC's president that the 98 bags of ACM had been disposed of in accordance with the applicable Contract requirements.

FEE AND EXPENSE APPLICATION

PEC has applied for recovery of $6,199 each in fees and expenses in VABCA Nos. 3599E and 3600E and $13,534 in fees and expenses for VABCA No. 3725E. The amounts claimed are in four categories of fees and expenses: the fees of PEC's former counsel the firm of Quinn, Buseck, Leemhus, Toohey, and Kroto, Inc. ("Quinn"); payments to Mr. William Davey (a former employee who was PEC's job foreman for the VAMC, Batavia project) for his services during the appeals; court reporter costs for discovery depositions; and the fees of Mr. Condon, PEC's counsel in the underlying appeals.

In the case of the Quinn fees, the payments to Mr. Davey, and the court reporter costs, PEC has allocated one fourth of the total of each of those categories to each application. PEC makes this allocation based on the four appeals that resulted from the Contract. Three of these appeals are discussed above. The fourth appeal, VABCA No. 3726, is currently pending decision at the Board. PEC indicates that these three categories relate to all four appeals and that there is no way to detail, other than its allocation, the costs to any one of the appeals.

The application for Mr. Condon's fees is based on a detailed summary of his time based billing records identifying the appeal to which a particular block of time was devoted.

DISCUSSION

ELIGIBILITY FOR RECOVERY OF ATTORNEYS FEES AND EXPENSES

The Government has not questioned PEC's eligibility, under *EAJA* statutory size standards, to recover fees and expenses in the litigation of its appeals in VABCA Nos. 3599, 3600, and 3725. Based on the certified net worth statements submitted by PEC, we find the Applicant eligible to recover attorneys fees and other expenses in these three applications.

PREVAILING PARTY

VABCA NO. 3599E

In order to recover fees and costs incurred in litigating the three underlying appeals, PEC must be a "prevailing party" in the litigation. PEC need not have prevailed totally on all of its claims; it need only show that it obtained some significant relief from

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the litigation. *Fletcher & Sons, Inc.*, VABCA No. 3248E, 93-1 BCA ¶ 25,472; see also *Preston-Brady Company, Inc.*, VABCA Nos. 1892E, 1991E, and 2555E, 88-2 BCA ¶ 20,574.

The VA avers that PEC was not a "prevailing party" in the litigation of the appeal in VABCA No. 3599 because the deductive amount eventually agreed upon, on a percentage basis, was closer to the amount of S/D A than to PEC's original, proposed amount of the deduction. In VABCA No. 3599, PEC appealed the CO's final decision to reduce the Contract price by $8,532 for the deleted work. PEC's price for the deleted work was $1,930.03. The parties eventually settled this dispute by agreeing to a Contract price deduction of $4,000. The Government contends that, since PEC settled its claim by increasing its proposed deduction by over 100%, while the Government reduced its offer by less than 50%, PEC did not prevail.

The dispute in VABCA No. 3599 centered on PEC's claim that the VA's deduction was excessive; the deduction was significantly decreased after PEC's entry of its appeal and the parties' subsequent successful negotiations. Therefore, under the *Fletcher* and *Preston-Brady* standards discussed above, PEC was a prevailing party in VABCA No. 3599E.

VABCA NO. 3600E

The Government does not contest that PEC was a prevailing party in VABCA No. 3600E. Accordingly, we find, for the reasons expressed in our discussion of VABCA-3599E above, that PEC was a prevailing party in the appeal.

VABCA NO. 3725E

The Government argues that PEC did not prevail in VABCA No. 3725 because PEC has never proved that it complied with Contract requirements regarding ACM disposal. This argument by the Government is more in the nature of an assertion of the reasonableness of, or substantial justification for, its withholding. PEC obtained payment of a substantial portion of the amount it had demanded in its claim as a result of its appeal. Consequently, we find, for the reasons expressed in the discussion of VABCA-3599E, that PEC was a prevailing party for the purposes of its eligibility to recover fees and expenses under *EAJA*.

SUBSTANTIAL JUSTIFICATION

VABCA NOS. 3599E AND 3600E

Once, as is the case here, an applicant specifies in what respect the Government's position was not substantially justified, the Government carries the burden of showing that its position was "substantially justified" in order to avoid the assessment of the applicant's allowable and reasonable fees and expenses against it. *Delfour, Inc.*, VABCA Nos. 2049E et al., 90-3 BCA ¶ 23,066. We find that the VA has failed to meet that burden.

The VA contends that it was substantially justified in issuing S/D A (the underlying issue in VABCA No. 3599) because the CO was left with no recourse but to issue a final decision reducing the Contract price by the amount of the Government's estimate due to PEC's failure to cooperate in negotiating the price reduction. We find nothing in the record to indicate that PEC refused to cooperate in negotiating the deductive changes. Moreover, PEC complied with the CO's demand for a proposal, a demand that stated that submission of the proposals would prevent the issuance of the settlements by determination which gave rise to the underlying litigation. After receiving the proposal, the CO apparently gave it no consideration and proceeded to issue S/D A, which, in turn, forced PEC to initiate litigation by filing the appeal with the Board. The Government's argument rings hollow when it has not shown that PEC refused to negotiate and when the effect of the final decision was to cut off the very negotiations it claims that it sought. Issuing the final decision without any apparent consideration of PEC's proposal for the deduction at issue in VABCA No. 3599 or formal communication to PEC exploring the differences between the VA's estimate and PEC's proposal does not support the Government's argument that its only recourse was the issuance of a final decision. In this context, we find that the VA's position was not "reasonable" within the meaning of the substantial justification benchmark established in *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988).

We are troubled by the fact that the Government forced the matter to litigation when the Contract provided it the ability to assert its position without placing PEC in the position of having to initiate litigation to protect its interests. As we noted in *Interstate Contractors, supra*, the changes provisions in Federal contracts permit a CO to unilaterally change the contract price. The

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VAAR, however, goes further and provides instructions for issuing such a change in the form of a putatively appealable final decision. This has the potential effect of forcing a contractor into premature and fruitless litigation. Even though, in the case of the underlying appeal here, we found that we had jurisdiction based on the fact that it was a properly disputed claim for which the CO was obligated to provide a final decision, the price reduction could have been implemented without compelling PEC to immediate litigation. As the Government pointed out in its brief, the CO knew that the amount of the Government estimate was likely to be revised after discussions with PEC. Moreover, the VA's subsequent actions in withholding Contract payments because PEC had not agreed on the price reduction would seem to indicate the VA's belief that discussions on the amount of the deductions would continue. This expressed belief is contradicted by the apparent unreasoned application of the questionable VAAR provision that served to cut off discussions by finalizing the Contract price reduction. The Government chose to place the matter in litigation without any apparent consideration of either PEC's proposal or of alternative actions available to it under the Contract. Once again, in light of these circumstances, we urge the VA to review VAAR 843.204.

The Government admits that it was not substantially justified in its litigation position in VABCA No. 3600, an admission that recognizes that, with a settlement in the amount of PEC's proposal, there was no rational basis for that position.

VABCA NO. 3725E

PEC argues that the VA had no substantial justification for withholding any funds except the DOL withhold. In support of its argument, PEC points to the Government's acquiescence to the December, 1992, payment, the settlements in VABCA Nos. 3599 and 3600, and the Government's eventual acceptance of sworn testimony to resolve VABCA No. 3725 as evidence that the Government was not substantially justified in refusing to pay the Applicant. The Government asserts that it was substantially justified in withholding payment because of uncertainties relating to the disposal of the 98 bags of ACM and the potential VA liability resulting therefrom.

We find that the VA was not substantially justified, for the reasons discussed, *infra*, in its initial refusal to pay any of the remaining Contract balance; however, we find that the VA was substantially justified in its Contract withholding after December 18, 1992.

Both parties have characterized the amounts that the VA was asserting as deductive changes in S/Ds A and B as Contract withholdings. In fact, the unilateral change orders in S/Ds A and B, as a matter of law, had the effect of reducing the Contract price by a total of $11,452; this reduction was appealed in VABCA No. 3599 and 3600. We discuss the issues related to PEC's entitlement to recover fees and expenses under *EAJA* for litigation of these appeals elsewhere in this opinion. However, since the CO, by issuing S/Ds A and B, had reduced the Contract price, there was no reasonable basis for the VA's original determination to withhold payment of the remaining amounts otherwise due PEC solely because PEC would not agree on the amount of the Contract price reduction already implemented by the CO. There is, of course, no question that the VA was justified in the DOL withholding, since that withholding was permitted by the express terms of the Contract.

The VA also based its withholding on its alleged potential liability relating to the disposal of ACM. However, we find nothing in the record to support the VA's assertion that it was reasonable to withhold the entire remaining Contract amount against that potential liability. In the first place, the VA justified the withholding on the "informal" advice of the EPA to withhold payment. There is no provision in the Contract, similar to the Contract labor provisions, permitting the VA to withhold payment upon the EPA's request or direction. Moreover, there was apparently no official EPA notification to withhold or any formal notification to the VA that it, not PEC, would be liable for any potential EPA assessment of penalties resulting from the ACM disposal issue. The EPA's advice, as characterized by the VA, was "informal." Finally, we find nothing in the record to indicate that the VA made any attempt to quantify the amount of the VA's potential liability arising from the questions concerning the disposal of the 98 bags of ACM that would justify the withholding of all Contract payments due.

After December 18, 1992, the Government withheld payment of the Contract retainage of $26,152.49 and the DOL withhold of $13,229.89. As we noted above, we do not consider that the unilateral Contract price reductions resulting from S/Ds A and B represent Contract withholdings. The Contract payment provisions expressly permit

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the CO to continue to withhold Contract retainage after substantial completion in amounts the CO determines are necessary to protect the interests of the Government. There was a clear basis for the CO to continue the DOL withhold. However, the justification for withholding the retainage because of the ACM issues is less clear.

We are unable, with the sparse record before us, to determine the amount of the VA's potential liability if, in fact, PEC had either improperly disposed of the ACM or if it failed to keep proper records of the disposal. However, since release of the retainage, under the terms of the Contract, was within the discretion of the CO, we find her determination to continue withholding the retainage against the VA's potential liability relating to the ACM disposal questions was a reasonable exercise of that discretion.

Consequently, the period in this litigation prior to the Government's December, 1992, payment and the period subsequent to the payment are two "discrete phases" of the litigation upon which it is appropriate for us to make separate assessments of the substantial justification for the Government's position. *Devine v. Sutermeister,* 733 F.2d 892 (Fed. Cir. 1984). The circumstance in this application is similar to the situation where the Government makes a settlement offer and the eventual judgment in the case does not exceed the offer. In such a situation we have allowed recovery of fees and expenses incurred up to the time of the settlement offer and disallowed recovery for fees and expenses thereafter. *Marino Construction Co. Inc.,* VABCA No. 2752E, 92-2 BCA ¶ 25,015.

Consequently, under the *Underwood* standard, there was no substantial justification for the Government's litigation position, prior to December 18, 1992, that it would make no payments. However, after the payment, we find that the Government was substantially justified in withholding payment of the retainage and the DOL withholding. The eventual final settlement of VABCA No. 3725 wherein PEC obtained all that it had sought, contrary to the Applicant's view, does not demand a finding that the Government's position from the date of the final decision until the date of the settlement was not substantially justified. *Digital Services Group, Inc.,* DOT BCA No. 1817E, 93-1 BCA ¶ 25,358.

Thus, we will permit PEC to recover its fees and expenses in litigating VABCA No. 3725 from June 19, 1992, the date of the Contracting Officer's final decision, to December 18, 1992, the date of the VA's payment of $72,222.88.

FEES AND EXPENSES

VABCA NOS. 3599E AND 3600E

PEC has applied for the recovery of fees and expenses in the amount of $6,199 in VABCA No. 3599E and $6,199 in VABCA No. 3600E. PEC computed the amounts by totaling one fourth of the fees and expenses relating to the services of Quinn, the services of Mr. William Davey, and court reporter costs for each application. To this amount, PEC adds the fees and expenses of PEC's counsel, Frederick J. Condon, derived from Mr. Condon's billings identfying the appeals for which the services were rendered.

Since the underlying appeals in the applications in VABCA Nos. 3599E and VABCA No. 3600E involve essentially the same issues and were contemporaneous, and PEC, in large part, treated the underlying appeals together, we will consider the fee requests for these two appeals together.

PEC has requested a total of $1,160 for legal fees billed by Quinn in these two applications. A review of the documentation supporting this fee request reveals that the bulk of the fees were for services provided prior to March 12, 1992, the date of the applicable final decision. Costs incurred prior to the prosecution of an appeal from an adverse final decision are not recoverable under *EAJA. Fletcher,* 93-1 BCA at 126,874; *Levernier Construction, Inc.,* 947 F.2d 497 (Fed. Cir. 1991). On the face of the documentation presented by PEC, services rendered by Quinn subsequent to March 12, in the main, relate to the Department of Labor withhold, a matter of no relevance to either of these two applications or the transition of representation from Quinn to Mr. Condon. Thus, we find that the services rendered by Quinn have no discernible connection to VABCA Nos. 3599E and 3600E. Consequently, the fee request for legal services provided by Quinn are not recoverable. *Oliviera v. United States,* 827 F.2d 735 (Fed. Cir. 1987); *Delfour, supra.*

PEC requests one half of the $5,000 cost of the services of Mr. William Davey in these two applications. Mr. Davey was PEC's job foreman on the VAMC, Batavia project and testified as a factual witness in VABCA No. 3726. *EAJA,* in 5 U.S.C. § 504(b)(1)(A), permits recovery of the reasonable expenses of expert witnesses or the preparation of reports necessary for the preparation of the applicant's case. As we found in *Fletcher,*

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supra, the above cited *EAJA* provision does not permit recovery of the expenses of lay witnesses. Mr. Davey was a lay witness; consequently, none of the costs of his services are recoverable. PEC cites us to *Akcon, Inc.*, ENG BCA No. 5593-F, 91-3 BCA ¶ 24,147 in support of its request for the costs of Mr. Davey's services. In *Akcon,* the Board allowed recovery of the costs of an independent engineer employed by the Appellant's counsel. The engineer provided professional consultation to Appellant's counsel and testified at the hearing. In allowing the recovery of the engineer's costs, the Board found that, although the engineer did not actually testify as an expert witness at the hearing, his testimony and services were in the nature of expert witness services; consequently, the Board allowed recovery of the engineer's costs under the express provision of *EAJA* allowing recovery of the costs of expert witnesses. In this case, Mr Davey, as indicated in PEC's application, was an employee of PEC when he performed the services, the costs for which recovery is sought, and Mr. Davey testified as a fact witness at the hearing. Thus, this case is clearly distinguishable from *Akcon* and we find in it no basis for permitting the recovery of amounts paid to Mr. Davey.

The VA contests the reasonableness of the application for Mr. Condon's fees and the court reporter costs on the basis that PEC unreasonably refused to negotiate the underlying appeals relating to these two applications and settle the appeals over the telephone. On the strength of these assertions, the VA argues that the court reporter costs should be disallowed and that PEC's attorney fee recovery in these two applications should be limited to a total of 6 hours of services.

As we have previously noted, the VA forced PEC to litigate VABCA Nos. 3599 and 3600 and the VA was not substantially justified in so doing. In the context of the four appeals relating to disputes under the Contract being litigated, we find nothing to indicate that PEC unreasonably failed to negotiate the appeals in VABCA Nos. 3599 and 3600 or that the Applicant unreasonably prolonged the litigation. The course of the litigation of the two underlying appeals here, in our view, suggests that it was the VA, not the Applicant, who acted unreasonably. Thus, PEC is entitled to recover the court reporter costs in the amount of $79.00 each for VABCA Nos. 3599 and 3600.

With regard to Mr. Condon's fees, we have determined that Mr. Condon performed 43.91 hours of services, equally apportioned between the two appeals, relating to the litigation of VABCA Nos. 3599 and 3600. In light of the issues and circumstances of those two appeals we find that this effort is reasonable. PEC requests that it recover the costs of these services at the rate of $150.00 per hour. We have no basis to award fees in excess of the maximum *EAJA* statutory rate of $75.00 per hour. *Fletcher, supra; Buckley Roofing Co., Inc.,* VABCA No. 3374E, 92-2 BCA ¶ 24,826. Consequently, PEC's recovery of attorney fees in VABCA Nos. 3599E and 3600E is $1,646.63 and $1,646.62 respectively.

VABCA NO. 3725E

As discussed above, recovery of fees and expenses under *EAJA* is limited to those fees and expenses incurred in the prosecution of an appeal from a contracting officer's final decision. Thus, only fees and expenses incurred after June 19, 1992 will be allowed. As we found in our discussion of substantial justification in this application, the Government's litigation position was not substantially justified until it made its Contract payment on December 18, 1992; thereafter, the VA was substantially justified in not releasing the retainage. Consequently, PEC can recover its reasonable and allowable fees and expenses incurred between June 19 and December 18, 1992 for litigation of VABCA-3725.

For the reasons discussed above, the amounts claimed for the services of Mr. Davey are not recoverable in this application. In addition, based on the dates of the incurrence of the costs and period in the litigation in which the Government's position was not substantially justified, the Quinn fees are not recoverable. The claimed Court reporter costs relate to depositions conducted on November 23 and 24, 1992; thus, the claimed $79.00 cost for the court reporter may be recovered.

This leaves the determination of the portion of Mr. Condon's fees which will be allowed under this application.

The Government contends that only 2 hours of Mr. Condon's services should have been required to resolve this matter. This assessment is based upon the Government's contention that the parties' agreement to utilize the testimony by PEC's president that the ACM was properly disposed as the mechanism to resolve the payment issue in VABCA No. 3725 should have reasonably required only 2 hours of legal services. The Government asserts that PEC thwarted the

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settlement of the appeal until the hearing; PEC attributes any settlement delay to the Government since the Government never indicated that the appeal could be resolved by a sworn statement from PEC's president.

We concur in the Government's assertion that it is responsible only for the reasonable legal fees and that the Board is entitled to look at the complexity of the issues involved in the litigation in making a determination of the reasonable attorneys fees an applicant can recover. Unlike the Government's characterization, the ACM disposal issue was not the only basis of the Government's determination to withhold all payments. Up to the Government's December 1992, payment, the Government had several reasons for its adamant refusal to pay any amount for PEC's performance of a Contract that was, for the most part, completed in January 1991. There is nothing apparent in the record showing that the Government attempted to rationally determine whether withholding PEC's entire payment request was necessary to cover its alleged potential liability. Moreover, we see nothing in the record indicating that either party unnecessarily delayed the resolution of the matter.

Thus, we determine that the hours of Mr. Condon's effort claimed in this application from the date of the final decision up to December 18, 1992, are reasonable and recoverable. After review of the application, we have determined that 26.6 hours of Mr. Condon's services between June 19, 1992 and December 12, 1992, inclusive, are attributable to the litigation of VABCA No. 3725. At the statutory rate of $75.00, PEC is entitled to recover $1,995.00 for Mr. Condon's services.

DECISION

For the foregoing reasons, the Applicant, Penn Environmental Control, Inc., is awarded fees and other expenses under the *Equal Access to Justice Act* under the applications in VABCA Nos. 3599E, 3600E, and 3725E as follows:

Application No.	Amount of Fees and Expenses
VABCA No. 3599E	$1,725.63
VABCA No. 3600E	1,725.62
VABCA No. 3725E	2,074.00
TOTAL	5,525.25

[¶ 26,327] Busby School Board of the Northern Cheyenne Tribe

IBCA No. 3007, August 25, 1993. Contract Nos. C-50-C-1420-5510, C-50-C-1420-5682.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Indian Self-Determination Act.—The Interior Board of Contract Appeals had jurisdiction to determine whether the parties to contracts under the Indian Self-Determination and Education Assistance Act had entered a binding settlement agreement, because the contracting officer's final decision denying the contractor's properly certified claim triggered the board's jurisdiction and subsequent Contract Disputes Act review.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—Cross motions for summary judgment on whether the contracting officer entered into a binding settlement agreement were granted because the record showed that the material facts were undisputed. Both parties had the opportunity to engage in discovery and to submit affidavits and documentary evidence. The board concluded that little would be gained by a hearing and that there was an unambiguous, integrated written agreement with respect to which credibility assessments would be immaterial.

Procedure, Boards—Summary Judgment—Factual Dispute.—A school operations contractor under the Indian Self-Determination Act was entitled to summary judgment, despite the government's cross-motion alleging a dispute regarding the availability of funds and the authority of officials who executed a settlement agreement, because the record did not raise any disputed facts regarding these issues.

Awards—Existence of Contract—Consideration.—A settlement agreement regarding school operations contracts under the Indian Self-Determination Act was supported by adequate consideration, despite the government's allegation that the absence of a release in the agreement rendered it invalid due to lack of consideration, because the contractor showed that it believed that it had a legitimate claim for contract support funds in excess of

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the settlement amount. The settlement, which stated that it was in resolution of claims, was as binding on the contractor as it was on the government.

Award—Existence of Contract—Intent of Parties.—Extrinsic evidence was admissible to determine the existence of an integrated final settlement agreement of a contractor's claims in connection with its contracts under the Indian Self-Determination Act, despite the government's contention that such evidence was barred by the parol evidence rule, because extrinsic evidence is admissible to establish whether a writing is or is not a completely integrated agreement. The contractor supplied affidavits indicating that the settlement agreement was complete and final, and the government failed to provide persuasive evidence controverting the contractor's extrinsic evidence.

Interpretation of Contracts—Contract as a Whole—Plain and Ordinary Meaning of Words.—A contracting officer entered into a binding settlement agreement of a contractor's claims in connection with school operations contracts under the Indian Self-Determination Act because the plain meaning of the agreement as a whole, harmonizing, and giving a reasonable meaning to all of its parts indicated that the parties intended to enter a final settlement agreement. Words in the agreement, such as "negotiation," "settlement," "resolution," "settlement amount agreed to," "process the award for payment," and "agree" were clear and unambiguous indications of the agreement's purpose.

Mistakes—Relief After Award—Invalidation of Settlement Agreement.—A contracting officer was not entitled to repudiate its settlement agreement of a contractor's claims in connection with contracts under the Indian Self-Determination Act, despite the government's contention that the contracting officer made a mistake in settling, because the government did not invalidate the settlement agreement reached by its authorized contracting officer. The government failed to provide any of the requisite compelling reasons, including proof of invalidity by either fraud or mutual mistake, for setting aside an otherwise valid settlement. Moreover, a unilateral mistake is not sufficient to limit or avoid the effect of an otherwise binding settlement agreement.

For the appellant: Hobbs, Straus, Dean & Wilder, Washington, D.C., by Carol L. Barbero, Michael L. Roy, and Christopher T. Stearns. For the government: Gerald R. Moore, Department Counsel, U.S. Department of the Interior, Office of the Solicitor, Billings, Montana.

Before ROME and PACKWOOD, Administrative Judges.

ROME, Administrative Judge: This appeal concerns a dispute originating under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, P.L. No. 93-638, 88 Stat. 2203 (1975) (*codified as amended* at 25 U.S.C. § § 450-450n (1993) (Self-Determination Act). The Self-Determination Act provides that the Contract Disputes Act (CDA) applies to self-determination contracts. 25 U.S.C. § 450m-1(d). As we elaborate upon below, we have jurisdiction under the CDA to entertain this appeal.

Appellant Busby School Board of the Northern Cheyenne Tribe (Busby) and the Bureau of Indian Affairs (BIA) have cross-moved for summary judgment, pre-hearing, on the question of whether BIA's contracting officer entered into a binding settlement agreement that Busby was entitled to be paid for part of its contract claim and rendering wrong his later decision denying entitlement. In the alternative, appellant has moved for summary judgment that, before reneging, the contracting officer issued what should be deemed a final decision in Busby's favor, not subject to rescission. Because we grant summary judgment for appellant on the first ground, we do not reach the second.

FACTS

I. *Background*

Effective October 1, 1982, Busby entered into contract No. C50-C-1420-5510 (contract 5510) with BIA to operate the Busby School. The contract, as amended, covered fiscal years (FY) 1983-85. Contracting officer Henry Graham signed it on behalf of the United States (Appeal File (AF) 12). Effective November 1, 1985, Busby and BIA entered into a similar contract, No. C50-C-1420-5682 (contract 5682) also signed by Mr. Graham, and, as amended, covering FY 1986 and 1987 (AF 13). Both contracts provided for BIA's payment of negotiated

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indirect costs, also termed "contract support funds" (CSF) (AF 12, *e.g.*, at 3/28/84 and 3/29/85 mods. and Gen. Prov. 24 "Negotiated Overhead Rates"; AF 13 at mods. 5, 7, 9 and Gen. Prov. 24). Appellant alleges that BIA underpaid CSF for FY 1985-87 by $258,203 and that contracting officer Graham agreed to settle Busby's $258,203 claim for $114,719, plus CDA interest.

Procedures under Self-Determination Act contracts for negotiating and fixing CSF; the role of the Department of the Interior's Office of Inspector General (IG); and the fact that BIA's method for allowing indirect costs changed beginning with FY 1985, were described in *Alamo Navajo School Board, Inc.*, IBCA Nos. 2123, *et al.*, 88-2 BCA ¶ 20,563. BIA's statements of procedures in effect for FY 1985-87 are contained in memoranda of record (AF 7, 8); in its responses to appellant's interrogatories (interrog. resp.) 2, 3, 16, 17; and in its response to appellant's document production request 6.

In brief, BIA states: it did not use IG-negotiated rates for payment of indirect costs in FY 1985-87; pursuant to direction from Congress, it changed the way it funded indirect costs for those years and lumped direct and indirect funds together in one payment to Tribal contactors; but, for education contracts, such as those at issue, Federal law still required program and support funds to be identified separately. For FY 1985-87, BIA states that it limited CSF payments to a percentage of the FY 1984 IG-audited rate, but that contractors could use program funds to cover CSF (interrog. resp. 16). The following sequence of IG review and BIA's payment of CSF to Busby for FY 1985-87 is undisputed.

II. *IG-Approved CSF For FY 1985-86 And BIA's Payments*

By letter of January 7, 1985, to Busby's chairman, the IG recorded its review of the school's revised lump sum indirect cost proposal for FY 1985 and presented adjustments to a direct cost base and to indirect costs. The letter concluded that the chairman could use the letter "in the negotiation of lump sum agreements for the reimbursement of indirect costs from the applicable program sources." The chairman signed his concurrence, noting Busby's view that, regarding certain lump sum indirect cost awards, it was free to negotiate with the contracting officer for the full amount allocated by the IG to a particular program, regardless of over or underrecoveries of indirect costs from prior years. The chairman mentioned Department of Education grants. It is not clear whether he also was referring to BIA contracts (AF 8).

Of an accepted $189,537 in indirect costs for FY 1985 (based upon a proposal of $226,769), the IG allocated $72,782 to the school's "General Operations ISEP [Indian School Equalization Program] (BIA)" (AF 8, Exhs. A & B). Appellant alleges that modification 21 to contract 5510 adopted the IG's CSF allocation of $72,782 and added $61,865 of that amount to the contract, and that modification 23 added $7,276, for a total of $69,141. BIA has not disputed this and admits that it paid $61,685 and $7,276 in CSF (complaint and answer (c&a) ¶ 6; interrog. resp. 2 a.). The difference between the IG's $72,782 CSF amount and the $69,141 paid was $3,641.[1]

For FY 1986 and contract 5682, the IG reported its indirect cost findings in its May 16, 1986, letter to Busby's chairman (AF 8). Busby alleges, and BIA does not dispute, that the IG arrived at an indirect cost amount of $136,188 (interrog. resp. 2b).[2] Of the $136,188, effective June 18, 1986, BIA added $45,750 in CSF under modification 3 to contract 5682; and added $5,533, $5,822, and $1,609 under modifications 5, 7, and 9, respectively, effective October 6, for a total of $58,714 (AF 13). BIA admits that it paid the $58,714 (interrog. resp. 2 b.; Response to Requests for Admission (admiss.) 2 a.). The difference between the IG's $136,188 CSF amount and the $58,714 paid was $77,474.

III. *Modification 18 For FY 1987*

BIA issued modification 18 to contract 5682, effective July 8, 1987, which, under "DESCRIPTION OF AMENDMENT/MODIFICATION," provided:

[1] We do not find modifications 21 and 23 in the record. A Mar. 29, 1985, modification of record (AF 12) indicates that: (1) it applied to contract 5510 and to other of Busby's BIA contracts; (2) modification 21 had provided Busby with $11,438 in CSF; and that (3) the $72,782 IG-allocated amount and BIA provisions for $61,865 applied to a contract not at issue. It may be that the briefs and record merely contain insufficient information to clarify the situation. These and other confusing parts of the record do not represent disputed facts and are not material.

[2] We assume that this was $129,168 in ISEP funding and $7,020 in Special Education funding, which the IG apparently mistakenly described as a Department of Education program (AF 8 at 5/16/86 letter, Exh. 1).

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1. Increase Contract amount by $2,100 for FY-87.

2. Attached revised budget is hereby incorporated into this contract. This addes [sic] Contract Support Funds for the special Education Program per fund distribution document #0811 dated June 1, 1987.

(AF 13). A "CONTRACT SUPPORT BUDGET FY 1987" in the total amount of $247,688 was attached to the modification. BIA admits that it approved the modification (admiss. 1). Busby alleges that modification 18 entitled it to $247,688 in CSF for FY 1987. The contracting officer who signed modification 18 is deceased. Although contracting officer Graham, who signed and administered contract 5682, submitted an affidavit in support of BIA's cross-motion, he did not address the modification.

For guidance in assessing consideration for the alleged settlement, the Board issued a Call pursuant to Rule 4.114 (43 CFR § 4.114) and, among other things, requested a copy of fund distribution document #0811, but BIA was unable to find one. BIA's counsel speculated that the second sentence of paragraph 2 in the modification's description should have been placed at the end of paragraph 1, and that the modification added only $2,100 in CSF. In so doing, he arbitrarily eliminated the separate paragraph numbering from his quotation to the Board of the description. His speculation is backed by plausible argument, however.

BIA urges that modification 18 was not intended to entitle Busby to $247,688 in CSF, by analogizing to a fund distribution document 0812, also dated June 1, 1987, which granted $2,000 in CSF to a different school under a different contract (and, in fact, as set forth below, BIA paid only $2,100 in CSF for FY 1987 under modification 18). BIA also notes that the contract support budget attached to modification 18 does not refer to the Special Education program; the IG's FY 1987 lump sum allocation of indirect costs for all contract programs, including Special Education, was $134,699; Busby's original budget submitted for CSF for Special Education was less than 10 percent of the total budget for all programs; total "estimated cost" of the contract, including direct and indirect costs for all contract programs, originally was $372,078; it was increased by modification 11 to $503,439; and modification 18, as interpreted by Busby, would have added, for Special Education, about one half of the total contract amount for CSF. BIA states that modifications 13, 14 and 16 decreased the contract amount from $503,439 and that the revised budget incorporated by modification 18 might be explained by this reduction (BIA Call resp. at 2-4, 7-8; AF 8 at 11/30/87 letter, Exh. 1; AF 13 at § I ¶ 2 and mods.).

Appellant counters with arguments that are not frivolous. It agrees that modification 18 could not, in practicality, be directed at Special Education CSF, a relatively small part of Busby's programs. It urges that the modification covered the panoply of indirect costs identified in the attached Contract Support budget—costs funded through CSF. Busby disagrees with BIA's suggestion that modification 18's budget might be a reduction of modification 11's budget due to a reduced total contract cost. Busby notes that the two budgets covered different costs and alleges that the net effect of modifications 12-17 was to increase modification 11's $503,439 contract amount to $801,400 (Busby 3/19/93 Call resp. at 6-7; Busby 4/8/93 resp. to BIA 3/19/93 Call resp. at 4-5).

IV. *IG-Approved CSF For FY 1987 And BIA's Payments*

For FY 1987, the IG reported its indirect cost findings in its November 30, 1987, letter to Busby's chairman (AF 8), stating that Busby had proposed lump sum indirect costs of $193,016. Appellant alleges, and BIA does not contest (interrog. resp. 2 c), that the IG arrived at an indirect cost amount of $104,204.[3] Of the $104,204, BIA added $65,600 in CSF under modification 14 to contract 5682, effective February 2, 1987, and $2,900 by modification 15, effective March 17, 1987. Both modifications were prior to the disputed modification 18. Regardless of its contentions about modification 18, appellant agrees that BIA paid only $2,100 in CSF under it. BIA does not contest that the total CSF amount paid for FY 1987 was $70,600 (admiss. 2 b.) The difference between the IG's $104,204 CSF amount and the $70,600 paid was $33,604, and between modification 18's alleged CSF $247,688 amount and the $70,600, was $177,088.

[3] We ascertain this to be the total of various amounts for general operations, transportation, Special Education and costs under the Education of the Handicapped Act (AF 8 at 11/30/87 letter, Exh. 1).

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V. *Busby's Claim*

Appellant supplied Mr. Clifford Long Sioux's affidavit. Although not a Busby member when modification 18 issued in 1987, he was a member as of July 21, 1988, and Busby's chairman from January 17, 1989, to June 6, 1991. He stated that he and other members believed, after extensive review, including by Busby's accountant and its counsel, that Busby had not received all of the funding to which it was entitled under its BIA contracts. Regarding modification 18, they determined that Busby had a valid claim that it had alloted $247,688 in CSF for FY 1987.

On May 17, 1991, contracting officer Graham received Busby's $258,203 claim for CSF due for FY 1985-87, properly certified by Mr. Long Sioux. The letter opened with an unqualified request for a contracting officer's decision—an unqualified request repeated in the body of the letter (AF 1). The $3,641 shortfall claimed for FY 1985 was the difference between what was stated to be the $72,782 CSF amount approved—based upon "approval documents" cited as the IG letter of January 7, 1985, and modification 21—and the $69,141 received. (Mr. Long Sioux states in his affidavit that, for FY 1985, the IG-approved amount was approved by BIA through modification 21.) The $77,474 shortfall claimed for FY 1986 was the difference between what was stated to be the $136,188 CSF amount approved—based upon an "approval document" cited as the IG's May 16, 1986 letter—and the $58,714 received. (Mr. Long Sioux states that, for FY 1986, there was no approving modification.) The $177,088 shortfall claimed for FY 1987 was the difference between what was stated to be the $247,688 CSF amount approved—based upon an "approval document" cited as modification 18—and the $70,600 received. The letter concluded that, if Busby's claim were denied in whole or in part, it requested a written decision from the contracting officer stating the reasons for the denial and providing CDA appeal rights (AF 1).

On August 29, 1991, Mr. Graham wrote to Busby that "[w]e are currently researching the files and will issue a decision by October 1, 1991" (AF 2). On September 30, 1991, Mr. Graham wrote to Busby that BIA's records agreed with the claimed $3,641 CSF shortfall for FY 1985 and agreed that there was a $77,474 shortfall for FY 1986 under the ISEP and Special Education programs but, if overall BIA-funded programs and a lump sum agreement were considered, the FY 1986 shortfall was $55,302 for all of the programs. For FY 1987, Mr. Graham stated:

> 3. The total amount of indirect costs allocated to [BIA] funded programs for FY 1987 was $134,699, not $247,688 as you stated. The amount allocated for the General Operations contract was $104,204. A total of $70,600 was provided by [BIA]. This left a shortfall of $33,604.

(AF 3). He concluded: "I believe a shortfall of between $92,547 and $114,719 exists and your claim should be amended accordingly before a decision is made by this office" (AF 3).

VI. *The October 29, 1991 Meeting*

At Busby's request, on October 29, 1991, Mr. Graham met with then Busby chairman Jack Badhorse; Busby member Raymond Little Bear; school superintendent Ted Rowland; the school's business manager, Kitty Gillespie; and the school's accountant, Jon Donham (first and second Badhorse affids.; Rowland affid.; Donham decl.; Graham affid.). Messrs. Badhorse, Rowland and Donham each proclaim, in their affidavits and declaration, respectively, that: (1) the meeting was to settle Busby's claim; (2) Mr. Graham stated that Busby was not entitled to the full amount claimed, but was entitled to $114,719, which included the amounts claimed for FY 1985 and 1986 and the $33,064 difference between the IG-approved CSF for FY 1987 and the amount BIA paid; (3) Mr. Graham stated that, if Busby did not accept the $114,719, he would deny its claim; and (4) an agreement was reached to settle Busby's claim for $114,719. Mr. Badhorse reported that, although Busby believed its full claim was valid, it agreed to the lower amount because Mr. Graham had stated that he would deny the higher claim; a decision might not issue for a long time; Busby needed more funds as soon as possible; to pursue the claim would require costly legal and other expenses; and the outcome on appeal could not be predicted.

Mr. Graham and appellant agree that, after the $114,719 amount was reached, Mr. Donham and Mr. Graham telephoned Mr. Jim Thomas, a "Self Determination Analyst" in BIA's Central Office in Washington, D.C. Mr. Donham states that: Mr. Graham explained to Mr. Thomas that he had determined that Busby was entitled to $114,719 but that BIA's Billings Area Office did not have sufficient funds to pay Busby; and Mr. Thomas explained that he could not act until Mr. Graham had responded to Busby's claim and forwarded his decision to Wash-

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ington. Mr. Rowland states that Mr. Donham and Mr. Graham reported the foregoing to the others.

Mr. Graham states that: he explained "the claim we had received" to Mr. Thomas and that there were no funds in BIA's Billings office to pay a CSF claim for FY 1985-87; asked whether there were funds in the Washington office; and Mr. Thomas told him "to send the entire claim" there for his review. Mr. Graham alleges that he and Busby agreed only that the "proper amount of the claim" was $114,000; it should be amended; and it would be sent to Washington to "see if it could be paid" (Graham affid. at ¶ 6, 7). BIA has not supplied any affidavit from Mr. Thomas.

VII. *The Written Memorialization Of Settlement*

By letter dated October 31, 1991, chairman Badhorse, who had full authority to act for Busby, set forth its understanding of the agreement reached on October 29 (AF 4; first Badhorse affid. at ¶ 5, 6). Because it is key to this appeal, we quote the letter virtually in full:

Re: Resolution Of Claim Under Contract Disputes Act

Dear Mr. Graham:

This is in further reference to the contract dispute initiated by [Busby's] letter of May 14, 1991 requesting a Contracting Officer's Decision under the [CDA] regarding our claim for contract support funds for [FY] 1985, 1986 and 1987. In your response dated September 30, 1991, you acknowledged that [Busby] is due at least $92,547, and perhaps $114,719, and recommended that we amend our claim accordingly.

On October 29, 1991 representatives of [Busby] met with you to negotiate this matter. At that negotiation, you and [Busby] agreed to resolve the claims for the three fiscal years for $114,719. A comparison of the amount claimed and the settlement amount agreed to for each fiscal year follows:

Fiscal Year	Claimed Amount	Amount Agreed to at Negotiation
FY 1985	$ 3,641	$ 3,641
FY 1986	77,474	77,474
FY 1987	177,088	33,604
TOTALS	$258,203	$114,719

As you know, the [CDA] requires payment of interest on the amount paid calculated from the date on which the request for a contracting officer's decision was filed through date of payment. 41 U.S.C. § 611. Please assure that interest is paid on [Busby's] award in this case.

We enclose two copies of this letter, both bearing an original signature on behalf of [Busby]. To evidence your concurrence with this resolution of our claims we ask that you sign both copies. Please use one copy to process the award for payment and return the other copy to us.

* * * * * * *

Agreed:

_____
Henry Graham
Contracting Officer

* * * * * * *

Date:_____

(AF 4). The letter did not include any CDA claim certification.

Mr. Graham responded by letter of November 5, 1991, to Mr. Badhorse:

Reference is made to your letter dated October 31, 1991, regarding a claim for Contract Support Funds during Fiscal Years 1985, 1986, and 1987. Your claim has been revised per our discussions on October 29, 1991. By this letter and a signed copy of your letter (enclosed) acknowledging the claim, I concur with the amount claimed. However, no funds are available in the Billings Area Office to pay the claim. Therefore, it will be forwarded to the Self-Determination Services Division, Central Office for processing.

(AF 5). Mr. Graham signed the October 31, 1991, memorialization of agreement and dated it November 5, 1991, in the spaces provided under the caption "Agreed," without adding any qualification or modification by his signature or elsewhere on the agreement, and without any oral qualifica-

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tion or expression of disagreement to Busby (AF 4; first Badhorse affid. at ¶ 8).

VIII. *Contracting Officer's February 18, 1992, Repudiation of Agreement*

Over three months later, by letter dated February 18, 1992, stated to be his "final decision" and containing appeal information, Mr. Graham wrote to Mr. Badhorse that: a $258,203 claim for CSF shortfall had been submitted; BIA had "reduced" the "claim" to between $92,547 and $114,719 due to "incorrect calculations" by Busby; at the October 29, 1991, meeting, the parties had agreed to "the amount of the claim or shortfall;" an "amended claim" for $114,719 had been received; and all documents pertaining to the claim had been forwarded to Mr. Thomas for review and "possible resolution." Mr. Graham then reported: "My decision is to deny your claim as amended."

Mr. Graham cited various factors, including BIA's different treatment of CSF for FY 1985-87 for Tribal contractors; that indirect costs agreements (presumably with the IG) did not fix CSF to be awarded; and that, although BIA's method of fixing CSF "undoubtedly contributed to shortfalls in CSF funding," his office had no control because direct and indirect funds could not be separated and it could not be determined if there were an actual shortfall for a particular contract. He also considered Busby's claim untimely, stating that almost four fiscal years had passed since Busby "experienced a shortfall in CSF;" he "suspected" Busby used program funds to cover CSF shortfalls; and he questioned whether award of CSF funds would constitute a "windfall," rather than a replacement of program funds used to cover indirect costs. He concluded that it "probably cannot be determined" whether Busby actually suffered from the CSF shortfall and that "[t]he fact that there may have been a shortfall in CSF does not constitute a claim against the Government" (AF 6). Mr. Graham did not state that there were no funds available to pay the claim.

In response to appellant's interrogatory requesting clarification of the windfall suggestion, BIA stated that, at the end of each FY 1985, 1986, and 1987, there were unexpended program funds for direct costs; Busby carried them over to the next year; they were available to pay unfunded direct costs; and a windfall would occur if Busby received funds for indirect costs that already had been paid (interrog. resp. 14). The interrogatory had been directed to Mr. Graham, but BIA's interrogatory responses were signed only by BIA counsel. Mr. Graham did not mention any windfall in his affidavit and BIA did not supply any documentary or testimonial support for the allegation of potential windfall.

IX. *Contracting Officer Graham's Full Authority*

BIA concedes that Mr. Graham had full authority to enter into the type of binding settlement agreement Busby asserts; that there was no dollar limit or procedural or substantive limitation upon his authority; that there was no form or format prescribed by statute, regulation, or other pronouncement of policy (whether or not made available to the public) for a binding settlement agreement; and that Mr. Thomas held a staff position, was not a line officer, and had no superseding authority over the contracting officer regarding appellant's claim (Call and 3/19/93 BIA Call resp.; *see also* interrog. resps. 15, 24-26).

X. *The Appeal*

On March 26, 1992, Busby filed a notice of appeal with this Board from the contracting officer's February 18, 1992, proclaimed final decision. In the appeal notice appellant alleged that, after meeting with the contracting officer to resolve its claim, Busby filed "an amended claim" on October 31, 1991, on the contracting officer's advice and that, on November 5, 1991, the contracting officer wrote to Busby acknowledging the amended claim and awarding "the amount claimed" (AF 9 at 2). The complaint similarly alleges that, on October 31, 1991, Busby filed "an amended claim" for CSF "pursuant to its October 29, 1991 agreement with the contracting officer" and that, on November 5, 1991, the contracting officer issued his decision to award Busby $114,719 in CSF for FY 1985-87 (AF 10 at ¶ 12, 13).

In its motion for summary judgment, appellant no longer alleges that it submitted an "amended claim" on October 31, 1991, and asserts that an agreement was reached on October 29, 1991, not subject to further negotiation or to a later contracting officer's decision; that Mr. Graham did not inform Busby at the time of the meeting that he intended anything other than a final enforceable settlement; and that the October 31 letter, upon which Mr. Graham executed his concurrence, memorialized the settlement agreement. It is now in the alternative that appellant alleges that Mr. Graham's November 5, 1991, letter constituted a decision awarding Busby $114,719, which was

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final and nonrescindable, because the time to appeal from it expired.

DISCUSSION

[1] We first consider our jurisdiction to entertain this appeal. Appellant principally has asked us to find a binding settlement agreement. The CDA applies to certain types of procurement or property disposal contracts, 41 U.S.C. § 602(a), and, by virtue of the Self-Determination Act, to self-determination contracts, as cited above. The alleged settlement agreement, *per se,* does not satisfy those categories.

However, without reaching appellant's alternative contention that the contracting officer issued a final decision awarding Busby its reduced claim amount, it is clear, at a minimum, that Mr. Graham's February 18, 1992, proclaimed final decision denying Busby's properly-certified claim under contracts 5510 and 5682, and Busby's appeal therefrom, imbued us with jurisdiction under the CDA. *See Paragon Energy Corp. v. United States,* 645 F.2d 966, 967 (Ct. Cl. 1981) (a contracting officer's decision is the linchpin for subsequent proceedings under the CDA).

As part of our analysis of the legitimacy of the contracting officer's decision, we may determine whether the claim at issue was settled previously. *See Texas Instruments, Inc. v. United States,* 922 F.2d 810 (Fed. Cir. 1990), where the court of appeals found a final binding agreement on a price for supplies, when an administrative contracting officer had signed her approval, on an internal memorandum, of her representative's oral agreement with the contractor, which had been confirmed in writing by the contractor. In so doing, the Federal Circuit reversed an underlying board decision, *Texas Instruments, Inc.,* ASBCA No. 27113, 90-1 BCA ¶ 22,537, and particularly the board's earlier decision on cross-motions for partial summary judgment, *Texas Instruments, Inc.,* ASBCA No. 27113, 87-1 BCA ¶ 19,394, *reconsid. denied,* 87-2 BCA ¶ 19,767, which had held that there had been no such binding agreement. A contracting officer's decision denying the agreement had triggered the board's jurisdiction and subsequent CDA review. *See also Kurz and Root Co.,* ASBCA No. 17146, 74-1 BCA ¶ 10,543 (successor contracting officer's final decision denying a claim provided jurisdictional context for board's review of, and sustaining, an oral settlement agreement between prior contracting officer and contractor resolving the claim, which had been confirmed by the prior contracting officer in an internal memorandum).

[2] The parties have cross-moved for summary judgment. We have noted previously:

> Summary judgment is a salutary method of disposition to effect the speedy, just and inexpensive resolution of a case when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Although the burden is upon the movant, when it has supported its motion with evidence which would establish its right to judgment, the non-movant must proffer countering evidence sufficient to create a genuine factual dispute * * *. Even if there is a genuine dispute as to fact, the disputed fact is only material if it would make a difference in the result of a case. [Citations omitted.]

Blaze Construction Co., IBCA No. 2863, 91-3 BCA ¶ 24,071 at 120,507. The fact that cross-motions have been made does not, in itself, mean that summary judgment is appropriate:

> [S]ummary judgment in favor of either party is not proper if disputes remain as to material facts. * * *. Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.

Mingus Constructors, Inc. v. United States [33 CCF ¶ 75,126], 812 F.2d 1387, 1391 (Fed. Cir. 1987). When the parties seek summary judgment on the same issue, however, it strongly suggests that the material facts are undisputed. *Id.*

In their joint report to the Board of September 2, 1992, the parties agreed that resolution of the common issue advanced—whether the contracting officer entered into a binding settlement agreement—did not involve significant factual disputes. Also, while only appellant engaged in discovery, both parties had an opportunity to do so, and to submit affidavits and documentary evidence. BIA states that it has provided its available records. As we elucidate below, our conclusions are based upon what we have found to be un unambiguous, integrated written agreement, with respect to which credibility assessments would be immaterial. Thus, little would be gained by a hearing.

Because the material facts upon which we have relied are uncontroverted, we have found summary judgment appropriate.

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[3] Appellant has alleged a compromise and written settlement agreement with BIA's contracting officer memorializing the parties' oral agreement. To prove an express contract with the Government, appellant must establish mutual intent to be bound, expressed by definite offer and unconditional acceptance; that the Government's representative had the requisite contracting authority; and consideration. *Fincke v. United States,* 675 F.2d 289, 295 (Ct. Cl. 1982); *Russell Corp. v. United States,* 537 F.2d 474, 481 (Ct. Cl. 1976), *cert. denied,* 429 U.S. 1073 (1977); *Penn-Ohio Steel Corp. v. United States,* 354 F.2d 254, 267 (Ct. Cl. 1965). Because we have found that there clearly was a written agreement, we do not reach the question of whether there was a prior oral agreement.

Since this appeal involves the compromise of a disputed claim, principles of accord and satisfaction are relevant:

> In our digests * * * and treatises we find "compromise and settlement" and "accord and satisfaction" listed as two separate and apparently independent titles. In fact they are not separate and independent. * * * [A]n accord is an agreement for the settlement of some previously existing claim by a substituted performance. It will be found that this definition of accord also includes all compromises * * *. But the previous claim may be one that is in doubt or in dispute, or one that is certain, liquidated, and undisputed. It is only the former claims that the subject of compromise. * * * From this it appears that a compromise is always an accord, but that an accord is not necessarily a compromise.

6 *Corbin on Contracts* § 1278 at 124 (1962). An accord is reached in the same manner as other contracts. Satisfaction is the performance of the accord, the giving and the taking of the agreed item or service. *Chesapeake & Potomac Telephone Co. of Virginia v. United States* [28 CCF ¶ 81,488], 654 F.2d 711, 716 (Ct. Cl. 1981).

The elements of accord and satisfaction are proper subject matter, competent parties, meeting of the minds, and consideration, typically involving satisfaction of a claim or demand in bona fide dispute. *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.,* 176 F.2d 73, 76 (10th Cir. 1949), *cert. denied* 338 U.S. 943 (1950); *accord Brock & Blevins Co. v. United States* [10 CCF ¶ 72,981], 343 F.2d 951, 955 (Ct. Cl. 1965). *See also Aviation Contractor Employees, Inc. v. United States* [37 CCF ¶ 76,184], 945 F.2d 1568, 1574 (Fed. Cir. 1991); *Penn-Ohio Steel Corp.,* 354 F.2d at 268.

[4] There is no genuine dispute that the settlement's subject matter was proper and that the officials executing the agreement on behalf of the parties were authorized. BIA has conceded that Mr. Graham had full authority.

Nevertheless, in support of its cross-motion, BIA alleged: "After having been informed by Mr. Thomas of the BIA Washington Office that there were no funds available from which the Tribe's claim could be paid, Mr. Graham issued his final decision denying the claim on February 18, 1992" (BIA's 11/10/92 Reply Br. at 4). BIA did not submit any affidavit from Mr. Thomas, or from any other knowledgeable official, or any other evidence, in support of its allegation. Contemporaneously, contracting officer Graham merely stated that there were no funds in the Billings office, he did not claim that no funds were available at all, and his affidavit in support of BIA's cross-motion does not so contend. As the court of appeals has stressed: "[T]he party opposing the motion [for summary judgment] must point to an evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient." *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,* 731 F.2d 831, 836 (Fed. Cir. 1984).

In fact, Mr. Graham's decision purporting to deny Busby's claim did not allege lack of funds and, in its response to our Call inquiry as to whether Mr. Thomas had any superseding authority over contracting officer Graham, BIA confirmed that he did not.[4]

[5] Although BIA alleges that the settlement agreement was deficient because it did not contain a release, at the same time it has

[4] BIA added:

"If the Board's question is whether the contracting officer could have entered into a contract in 1991 for which no funds were available and whether such a contract would be binding on the United States, the answer would be a legal opinion. Although Department Counsel knows of no cases on point, the issue could be researched and argued if the Board desires." (BIA 3/19/93 Call resp. at 11, 12). BIA has had ample opportunity to brief any alleged defenses to appellant's motion and all arguments in support of its own. We decline its invitation and do not reach any hypothetical funding question.

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conceded that no format was required for the agreement. The Federal Acquisition Regulation (FAR), and predecessor regulations, requiring the execution of a particular form for an agreement modifying a contract to be finalized and funds to be obligated, as in *SCM Corp. v. United States* [26 CCF ¶ 83,166], 595 F.2d 595 (Ct. Cl. 1979) and *Mil-Spec Contractors, Inc. v. United States* [34 CCF ¶ 75,412], 835 F.2d 865 (Fed. Cir. 1987) (oral settlement agreements alleged unsuccessfully by the contractor and by the Government, respectively), are irrelevant. The FAR does not apply to Self-Determination Act contracts (except construction contracts). 25 U.S.C. § 450j.(a).

In any case, we are not considering an agreement to modify a contract. Appellant alleges that the claim funds were due under the contract, including modifications already in place. *See Texas Instruments, supra* (contracting officer's signature of approval, on internal Government memorandum, was sufficient to create binding pricing agreement even though her assent had not been communicated to contractor; acquisition regulations requiring execution of standard modification form were inapplicable because a modification was not involved; even internal, albeit unpublished, Governmental monetary limits upon contracting officer's authority did not render agreement invalid.)

This leaves for examination the questions of consideration and mutual assent to contract.

[6] BIA alleged initially that the absence of a release in the October 31, 1991, agreement rendered it invalid due to lack of consideration. The agreement, however, referred to "settlement" amounts and stated that it was "in resolution of our claims." That resolution was as binding upon Busby as it was upon BIA.

Other statements by both parties, however, led us to question whether a bona fide dispute had been resolved or whether Busby had agreed with BIA that its claim had been calculated incorrectly. In its Statement of Uncontested Facts, appellant had declared that the claim sought "the difference between the indirect cost budget approved by the IG for [FY] 1985 to 1987 and the amount of contract support costs funded by BIA for those years" (Busby 10/9/92 Br. at 3, fact 5). BIA also had alleged that appellant's claim was for the difference between IG-reviewed CSF and the amount of CSF paid by BIA in FY 1985-87 (BIA 11/10/92 Br.). Because the settlement appeared to be precisely the difference between IG-determined CSF for FY 1985-87 and the amount paid, the Board's Call aimed to eliminate confusion. The Board noted that appellant's claim for FY 1987 actually appeared to be based upon modification 18 and its alleged addition of $247,688 in CSF to the contract.

Both parties took their lead from the Board in responding. BIA reiterated that Busby had sought recovery of the total amount of IG-approved CSF, and now alleged that there was no consideration because the settlement was for the maximum amount that Busby could have received under that theory. Busby now contended that its claim for FY 1987 "was not based on the CSF budget negotiated with the [IG], but on a CSF budget for that year expressly approved by the BIA contracting officer and incorporated in the contract by Modification 18" (Busby 3/19/93 Call. Resp. at 3-4).

In actuality, as we delineated in the Facts above, Busby's claim for FY 1987 did differ from its claims for FY 1985 and 1986 and was based upon modification 18. Busby has established, in its briefs and affidavits, that it believed that it had a legitimate claim for CSF for FY 1985-87 totalling $258,203, and not merely for the $114,719 settlement amount. The Court of Claims noted many years ago that: "[I]t is settled law that a compromise is supported by sufficient consideration when there is a bona fide claim which is * * * disputed or doubtful, the real consideration to each party being not the sacrifice of the right but the settlement of the dispute." (Citations omitted.) *Penn-Ohio Steel Corp.*, 354 F.2d at 268. Consideration would not be diminished even if BIA's position on the merits of Busby's claim were found to be correct. *Aviation Contractor Employees,* 945 F.2d at 1574. As long as there is a bona fide dispute, "once the parties enter into a valid settlement agreement, the merits of the compromised claims become inconsequential." *Cheyenne-Arapaho Tribes of Indians of Oklahoma, et al. v. United States,* 671 F.2d 1305, 1311 (Ct. Cl. 1982). The parties benefit from the settlement by avoiding the risks and expense of litigation. *Id.* at 1309. Forbearance of a legal right, "even a tenuous cause of action, is good consideration for a bargain." *Goltra v. United States,* 96 F. Supp. 618, 626 (Ct. Cl. 1951).

[7] Regarding the parties' mutual assent to the settlement agreement, "[w]hether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances." *Texas Instruments,* 922 F.2d at 815. "For a con-

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tract to exist there does not have to be, and rarely is, a subjective 'meeting of the minds' all along the line." *WPC Enterprises, Inc. v. United States* [9 CCF ¶ 72,289], 323 F.2d 874, 879 (Ct. Cl. 1963). Thus, in determining whether a meeting of the minds occurred, we look not to subjective intent, but to the objective manifestation of the parties' intent, which can be found in their signed agreement. *Saturn Construction Co.*, VABCA No. 3229, 91-3 BCA ¶ 24,151 at 120,857.

The appellant in *Saturn* argued that agreements with the Government did not constitute accord and satisfaction. The appellant, like BIA here, urged that language used in the agreements did not reflect mutual assent or mean what it seemed to mean because items had yet to be determined, or it had intended to reserve them from the agreements. The appellant pointed to prior correspondence that certain issues would be addressed later, which it alleged should be read in conjunction with the agreements. The board noted that any intended exceptions to the written agreements should have been expressed in them and that the parol evidence rule precluded consideration, on a motion for summary judgment or otherwise, of evidence of prior dealings not included in the agreements when offered for the purpose of varying clear, unambiguous language. 91-3 BCA at 120,857-58.

The Claims Court discussed the parol evidence rule at length in *Design and Production, Inc. v. United States* [35 CCF ¶ 75,718], 18 Cl. Ct. 168, 194-96 (1989). To summarize, the rule operates generally to disallow prior or contemporaneous extrinsic evidence, oral or written, when the parties have reduced their agreement to a final, integrated (complete) writing and the evidence offered would contradict or vary the unambiguous terms of the writing. The most reliable clue to the parties' intentions is the language of the contract.

Despite the parol evidence rule, and prior to considering questions of contract interpretation, extrinsic evidence is admissible to establish that a writing is, or is not, a completely integrated agreement. *Restatement (Second) of Contracts* § 214(a) (1981).

Appellant has supplied affidavits and a declaration of individuals present during the October 29, 1991, meeting (including two affidavits from Busby's chairman, Mr. Badhorse), each of which is to the effect that the settlement agreement was complete and final. Contracting officer Graham executed an affidavit stating that the only agreement reached was that Busby would amend its claim to an agreed amount and he would forward it to BIA's Washington office to see if it could be paid. He did not state that he and appellant discussed that alleged interpretation. At a minimum, it is clear from the plain terms of the October 31, 1991, letter, which was captioned "Resolution Of Claim Under Contract Disputes Act"; referred several times to settlement and resolution of appellant's claim; contained a space for the contracting officer's written concurrence; and asked him to forward a signed copy to Washington as evidence of his decision to "process the *award* for payment" (emphasis added), that Busby did not so interpret the agreement.

Although both parties used the phrase "amended claim" at various times, including Busby in the October 31, 1991, letter and in its notice of appeal and complaint, we conclude, based upon the full text of the letter, upon all of the surrounding circumstances, and upon common sense, that the phrase was intended to mean "claim as reduced and resolved by agreement." There was no motivation for Busby to reduce its claim absent an agreement by the contracting officer that the reduced amount was acceptable for payment. Mr. Graham did not contest the statements in the affidavits and declaration of Busby's participants in the October 29 meeting that he would deny the claim if it were not reduced. It is apparent that they did not intend to abandon their higher claim only to leave the contracting officer the option to deny the reduced amount.

The contracting officer signed the bilateral October 31 agreement without any exception or reservation expressed in it. Citing his unilateral November 5 cover letter, he alleged in his affidavit that no agreement was reached about the validity of Busby's claim and that he simply was sending it to BIA's Washington office to see if it could be paid. We examine the November 5 letter not as part of the settlement agreement, because only the contracting officer signed it, but as extrinsic evidence of whether the October 31 agreement was integrated.

The contracting officer's representations are inconsistent not only with the unambiguous terms of the October 31 letter, but also with his November 5 letter, in which he stated that he concurred with the amount claimed, but no funds were available in Billings, so he was forwarding appellant's "claim" to Washington for "processing". The Washington office did not have any decisional role. The only practical purpose of

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forwarding the "claim" was to reflect the contracting officer's decision allowing it and to get it paid, just as Busby had requested and the parties had agreed.

Further, the contracting officer's statements are illogical. He did not dispute the validity of Busby's reduced claimed in his affidavit, or even claim that he notified Busby that he had not yet made a determination on the merits. Mr. Graham wrote that he concurred with "the amount claimed." This can only mean that he had determined that the reduced claim was valid, because the contracting officer has no role in determining the amount of a contractor's "claim" (nor can he control the nature of a claim, as attempted in his February 18 decision: "The fact that there may have been a shortfall in CSF does not constitute a claim against the Government"). He can only agree or disagree with it, or agree with it in some modified form after negotiations, as he did here.

Indeed, in his final decision denying the claim, Mr. Graham stated that, at the October 29, 1991, meeting, the parties had agreed to "the amount of the claim or shortfall," indicative both of his interpretation of the term "claim" and that, at a minimum, he had acknowledged the possibility of a CSF shortfall. As long as there was a good faith dispute, BIA had an interest in resolving the claim.

Thus, we find BIA's proffered extrinsic evidence unpersuasive and conclude that there was an integrated, final settlement agreement.

[8] We turn to interpretation of the agreement and derive the parties' intent from the plain language of the instrument as a whole, harmonizing and giving a reasonable meaning to all of its parts, without out of context analysis or regard to the subjective unexpressed intent of one of the parties. *Gould, Inc. v. United States* [37 CCF ¶ 76,108], 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Thanet Corp. v. United States* [25 CCF ¶ 82,997], 591 F.2d 629, 633 (Ct. Cl. 1979); *ITT Arctic Services, Inc. v. United States* [21 CCF ¶ 84,288], 524 F.2d 680, 684 (Ct. Cl. 1975). When contract provisions are clear and unambiguous, they must be given their plain and ordinary meaning. *George Hyman Construction Co. v. United States* [34 CCF ¶ 75,378], 832 F.2d 574, 579 (Fed. Cir. 1987).

BIA did not establish that the contracting officer's alleged intent was anything other than subjective and unexpressed. Moreover, when we interpret all portions of the settlement agreement to find harmony, rather than conflict, and give its words—such as "negotiation", "settlement", "resolution", "settlement amount agreed to", "[Busby's] award", "process the award for payment" and "agree"—their plain meaning, we find the agreement clear and unambiguous.

Appellant's $258,203 claim was compromised and resolved at $114,719.

[9] The contracting officer's reversal of position suggests that someone decided he had made a mistake in settling with Busby. Regardless, when a valid and binding settlement agreement has been created, neither party can cast it aside without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake is not sufficient to limit or avoid the effect of an otherwise valid settlement agreement. *Cheyenne-Arapaho,* 671 F.2d at 1309, 1311.

Although it has not been necessary for us to address appellant's alternate argument that the contracting officer's November 5, 1991, letter constituted a final CDA decision, it is, nonetheless, clear that he decided that Busby's reduced claim was acceptable and settled it accordingly. As the Court of Claims emphasized in analogous circumstances, when the Army later determined not to fund a cost overrun after a contracting officer with full authority had agreed to do so:

> We find * * * that [the contracting officer] was aware of the overrun situation and his indication of concurrence meant exactly what it said: that he, as contracting officer, approved the funding of the overrun and favored reimbursing plaintiff for its costs. Under the facts present here, we believe that when an authorized contracting officer expresses a definite opinion concerning the merits of the claim with knowledge of the relevant facts, a "decision" has been made.
>
> As we have emphasized numerous times, it is the unfettered opinion of the person delegated as decision-maker by the parties to the contract that is determinative. * * * the decision of a duly authorized contracting officer could not be defeated by a funding official * * *. Nor, by implication, could the [contracting officer's] finding be reversed by a successor contracting officer. [Citations omitted.]

General Electric Co. v. United States [13 CCF ¶ 82,881], 412 F.2d 1215, 1221 (Ct. Cl. 1969).

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If, as a fully authorized contracting offcer, Mr. Graham had applied his signature to the October 31 letter without considering its import and had sent a "claim" to Washington for processing which he did not consider to be valid, or worthy of settlement and payment, he would have been abusing his discretion, which we will not assume. Unless there is evidence to the contrary, the law presumes that official actions are properly taken. *Id.*

BIA has failed to invalidate the settlement agreement reached by its authorized contracting officer. All of the elements of an express contract, and of a compromise and accord, were met in the October 31, 1991, agreement, but there has been no satisfaction, because BIA has reneged.

Decision

Summary judgment is granted for appellant in the amount of $114,719, plus interest under the CDA computed as of May 17, 1991, the date the contracting officer received its certified claim.

[¶ 26,328] Donald Cooley dba Mojave Equipment Company, Inc., and Mojave Equipment Sales

AGBCA No. 93-202-7, August 31, 1993.

Procedure, Boards—Motion to Vacate—Error of Law.—A joint motion to vacate a prior ruling that a notice of proposed debarment served to debar the contractor as of the date of its appeal to the board was denied because the board could not conclude, as a matter of law, that it erred in holding that the contractor was debarred at the time of appeal. After issuing its ruling that interpreted the notice of proposed debarment, the board dismissed the ruling with prejudice on the ground that there was inadequate evidence to substantiate allegations against the contractor. However, the record did not indicate that the ruling contained any errors of law or fact that would support vacating the prior ruling. The cross motions to vacate did not present any evidence of the debarring official's subjective intent or of the parties' understanding of that intent. The contractor's wish to clear the record of any hint of debarment and the government's desire to show that it did not intend to deny due process were insufficient reasons for vacating the ruling.

For the appellant: Manatt, Phelps & Phillips, Attorneys at Law, Washington, D.C., by James H. Roberts. For the government: Alan D. Groesbeck, Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C.

Before EATON, HOURY, and DOHERTY, Administrative Judges.

Motion to vacate 93-3 BCA ¶ 26,210 denied.

EATON, Administrative Judge: Donald Cooley, dba Mojave Equipment Company, Inc., and Mojave Equipment Sales, of Victorville, California (Appellant), and the Forest Service, U.S. Department of Agriculture (USDA), jointly move to vacate the Board's Ruling of July 19, 1993, *Donald Cooley, dba Mojave Equipment Co., and Mojave Equipment Sales,* AGBCA No. 93-202-7, 93-3 BCA ¶ 26,210, 1993 WL 267112 (July 19, 1993).

In that Ruling, the Board interpreted a notice of proposed debarment, provided to Appellant by letter dated April 23, 1993, which stated that the action would "become final and effective 30 days after receipt of this letter." Appellant had moved for summary disposition, alleging that the notice constituted a *de facto* suspension because, pursuant to the Federal Acquisition Regulation (FAR), 48 CFR §§ 9.404 and 9.405, its name had been placed on a Government-wide list of contractors ineligible for offers, awards, or subcontracts. The Government, in a cross motion for dismissal, argued that the Board had no jurisdiction over a mere "proposed" debarment.

The Board held that the notice, which advised Appellant that any information and argument opposing the proposed action should be submitted within 30 days, but gave no indication that the period would be tolled by submission of information, as contemplated by 48 CFR § 9.406-3(a)(2), or participation in a hearing, as provided by implementing USDA regulations, 48 CFR § 409.406-3(c), served to debar Appellant as of June 1, 1993, the date of its appeal to the Board. The Board retained jurisdiction, but

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declined to dispose of the appeal summarily. The Board further stated that it had no objection to the parties participating in an informal hearing, but would regard such as more in the nature of settlement negotiations than an administrative remedy that must be exhausted.

The parties met and subsequently moved for dismissal on grounds that USDA's Debarring Official had determined there was not adequate evidence to substantiate allegations against Appellant; that Appellant was presently responsible; and that the debarment should not have been imposed. On August 13, 1993, the Board granted the motion and dismissed the appeal with prejudice. *Donald Cooley, dba Mojave Equipment Co., and Mojave Equipment Sales,* AGBCA No. 93-202-7, 1993 WL 308865 (Aug. 13, 1993).

On August 17, 1993, the parties filed a second joint motion, seeking to vacate the Ruling of July 19, 1993. Attached to the motion was a letter dated August 12, 1993, from the Debarring Official to counsel for Appellant, which stated in pertinent part:

> On July 22, 1993, I met with you and your client ... Based on this conference, and based on my examination of Mr. Cooley and Mr. Forster (of Mojave Equipment Company), I have determined that it would not be appropriate to debar Mr. Cooley, *et al.,* from doing business with the Government ... It was never the intention of the Department that this notice of proposed debarment should ripen into a debarment by the mere lapse of time. Accordingly, I am withdrawing the debarment of Mr. Cooley, *et al.* Furthermore, Mr. Cooley, *et al.'s* status as being proposed for debarment is terminated ...

In considering this motion, we use the Federal Rules of Civil Procedure as guidelines. Federal Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ... (3) fraud ... (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated ... or (6) for any other reason justifying relief from the operation of the judgment.

There is some authority that an error of law will justify relief under Rule 60(b). *See Zinger Constr. Co.,* ASBCA Nos. 28788 and 39873, 91-1 BCA ¶ 23,303 and cases cited therein. In this case, however, the Debarring Official's letter clearly and unequivocally stated that the debarment would become final 30 days from Appellant's receipt of notice of the proposed action. We therefore cannot conclude that the Board erred in holding, as a matter of law, that Appellant had in fact been debarred at the time of appeal.

Nor do we find an error of fact in our Ruling. There was no evidence in the cross motions before the Board of the Debarring Official's subjective intent, and no persuasive evidence of the parties' understanding of that intent.

The Board is sympathetic to Appellant's apparent wish to clear the record of any hint of debarment, so as to maintain its reputation and standing in the procurement community. We also recognize the Debarring Official's apparent desire to demonstrate lack of any intent to deny Appellant due process. As reasons to vacate our prior decision, however, these are not within the purview of Rule 60(b). The Board's published decisions on the motion to dismiss and on this Motion, however, amply set out the positions of the parties for these purposes.

RULING

We deny the Joint Motion to Vacate the Board's Ruling of July 19, 1993. The Ruling, and the August 13, 1993, dismissal of the appeal with prejudice, stand.

[¶ 26,329] Diversified House Logs, Inc.

AGBCA Nos. 93-197-R, 93-198-R, 93-199-R, August 31, 1993.

Procedure, Boards—Reconsideration—Arguments Already Considered.—Reconsideration of the board's decision in a consolidated appeal under three timber sale contracts was denied because both parties relied on arguments that they had previously raised. The record showed that the board addressed the issue of the contractor's reliance on an ambiguous interpretation of the contract and that the board properly determined the

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weight of credibility to afford all evidence, including the contractor's testimony, which the government described as self-serving. Moreover, the contractor did not provide any new arguments or evidence in support of its motion to reconsider the board's favorable ruling for the government in the third appeal.

For the appellant: Murphy, Robinson, Heckathorn & Phillips, P.C., Kalispell, Montana, by Donald R. Murray. For the government: Alan J. Campbell, Office of the General Counsel, U.S. Department of Agriculture, Missoula, Montana.

Before DOHERTY, HOURY, and EATON, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 25,991.

DOHERTY, Administrative Judge: The Government requested reconsideration of this Board's decision in the consolidated appeals of *Diversified House Logs, Inc.*, AGBCA Nos. 92-212-1, 92-213-1 and 92-214-1, 93-3 BCA ¶ 25,991, 1993 WL 119821 (Apr. 16, 1993). In the opinion the Board ruled favorably to Appellant in the first two appeals and for the Government in the third. Appellant subsequently sought reconsideration of the third case and the Government moved dismissal of that motion on the basis that it was not timely. Since we find no basis to reconsider our earlier decision, we do not deal with the procedural niceties of the Government's perhaps inadvertent request for reconsideration of the third case and how that might bear on the timeliness of Appellant's submission.

The referenced appeals involved three timber sales. In each case Appellant asserted the right to harvest dead lodgepole pine in defined areas outside sale unit boundaries. The Government defended disallowance of such harvest on the basis of contract interpretation and, in the instance of the third sale, notice prior to award of its interpretation. As to the first two cases, the Board found Appellant's interpretation reasonable. As to the third, based on the weight of evidence, the Board concluded Appellant had notice of the Government's interpretation prior to bidding and could not therefore rely on a contrary interpretation under the facts of the case.

It is well established that reconsideration is discretionary with the Board and that reconsideration will not be granted in the absence of a compelling reason, *i.e.*, newly discovered evidence which could not have been discovered at the time of the original proceeding. Reconsideration is not intended to allow the moving party to reargue its position. *Ben Henderson Logging*, AGBCA No. 86-288-1, 86-3 BCA ¶ 19,212. Arguments that could have been raised at the time of the original proceeding do not provide a basis for reconsideration. *Eagle Contracting, Inc.*, AGBCA No. 92-197-R, 93-1 BCA ¶ 25,320; *Samuel W. Riddle*, AGBCA No. 87-375-1, 88-1 BCA ¶ 20,372.

The Government argues the Board did not address the issue of reliance on an ambiguous interpretation of the contract by Appellant. The Board, in its decision, found the Appellant's interpretation the most reasonable and addressed ambiguity only as an alternative. To the extent the issue was considered important by the Government there was an opportunity to raise and develop the matter prior to the Motion to Reconsider. While not a matter emphasized by the parties, the Board found Appellant's business relied on dead lodgepole pine; both parties wanted to salvage such material; there was environmental litigation and legislation to allow the sales; Appellant participated in those efforts believing the purpose was to sell such materials; Appellant separately cruised the materials including dead lodgepole; and Appellant considered the application of grizzly bear habitat and the unavailability of other materials. Contrary to the Government's assertion on reconsideration, although not made an issue at the time, the Board did in fact consider Appellant's reliance. In Finding of Fact (FF) 21 we found that Appellant concluded he could not compete with other bidders and reduced his bid after the Government announcement that it would not sell timber in the disputed 200-foot buffer zone.

The Government next argues the Board should not rely on testimony of Appellant as self-serving.

The most common witness in Board proceedings, regardless of who else may be called for either side, is the Appellant. The Government asserts that the Board cannot rely on an Appellant's testimony as it is self-serving and, having done such, the Board's opinion should be reconsidered and reversed.

The Board determines the weight of credibility to afford all evidence and in fact accepted as cited testimony of Appellant.

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On the other hand, Appellant restates the evidence offered on the third case and restates those arguments previously presented; principally that he did not know the Government interpretation at the time of bidding the third contract. We found other evidence more persuasive. No new previously unavailable evidence was offered.

RULING

We find nothing in either party's submissions seeking reconsideration that could not have been argued at the time of the Board's consideration of the appeals. The Motions for Reconsideration are denied.

[¶ 26,330] M.C. & D. Capital Corp.

ASBCA Nos. 38181, 40159, August 30, 1993. Contract No. DACA27-85-C-0041.

Procedure, Boards—Reconsideration—Arguments Already Considered.—A "request for an order for award proceedings," treated as a motion for reconsideration of an earlier decision, was denied because it presented no new facts or arguments.

For the appellant: James H. Smith, Downey, California. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Carlton A. Arnold, Engineer Trial Attorney, U.S. Army Engineer District, Louisville.

Before FREEMAN, RIISMANDEL, and RUBERRY, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 25,925.

FREEMAN, Administrative Judge: M.C.& D. Capital Corp. (MC&D) has submitted a "Request for Order for Award Proceedings" with respect to its application under the Equal Access to Justice Act, 5 U.S.C. § 505. The request is dated 5 April 1993. The application to which it refers, however, was denied on the merits by our decision dated 9 March 1993.

Considered as a motion for reconsideration, the request presents no new fact or argument that was not previously considered by the Board at the time the application was denied. On reconsideration, we find no error in our original decision and reaffirm denial of the application.

[¶ 26,331] Petrie Brothers Logging, Inc.

AGBCA No. 92-218-1, August 31, 1993.

Sales of Government Property—Timber Sales—Price Index.—The board would not rule that it was improper to use a regional lumber index to adjust prices under a timber sale contract, even though the same index had been found inadequate under identical contract terms by the United States Claims Court (*Arcata Forest Products Co. v. U.S.* (ClCt 1989) 35 CCF ¶ 75,725), because the purchaser had left the board with only speculation as to the actual relationship of the index to the relevant market. The government offered no evidence of the validity of the index at best; at worst, the government showed disregard for the relationship of the index to actual experience. The contractor, on the other hand, strongly argued for lack of relevance of the index but offered no supporting evidence. In *Arcata*, the court had evidence of direction and amplitude of change experienced by a significant group of affected firms.

For the appellant: Pat Petrie. For the government: Marcus R. Wah, Office of the General Counsel, U.S. Department of Agriculture, Missoula, Montana.

Before DOHERTY, GISH, and EATON, Administrative Judges. Separate concurring opinion by Administrative Judge EATON.

DOHERTY, Administrative Judge: This appeal arises under Forest Service Timber Sale contract No. 753512 awarded to Appellant April 30, 1991. The contract, known as the

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Bruin Beetle Salvage Sale, was located in Shoshone County, Idaho, on the Avery Ranger District of the Idaho Panhandle National Forests. Appellant appeals a Contracting Officer's (CO's) final decision dated May 26, 1992, that denied two claims under the contract. Appellant claims $30,164.56 was improperly charged under the contract's price escalation provision and seeks refund of $3,730.62 in disputed road fees.[1]

A hearing was conducted at Coeur D'Alene, Idaho, April 8, 1993. The Board has jurisdiction under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. § 601 *et seq.*).

FINDINGS OF FACT

1. Petrie Brothers Logging Inc., was awarded Forest Service Timber Sale contract No. 753512 April 30, 1991. The contract was known as the Bruin Beetle Salvage Sale and was located on the Avery Ranger District of the Idaho Panhandle National Forests in Shoshone County, Idaho (Appeal File (AF) E-1-1, F-1-1, G-16-1; Tr. 4). Award was based on sealed bids followed by oral auction April 30, 1991 (AF E-1-1, E-2-1, E-3-1). The contract provided in the Instructions to Bidders that award was to be by written award to the successful bidder (AF E-3-4). Award was by letter dated April 30, 1991 (AF G-16-1), which stated in part:

> You were the high bidder on the BRUIN BEETLE SALVAGE Timber Sale held on April 30, 1991. The sale is hereby awarded to you, effective April 30, 1991.
>
> Enclosed for your signature and certification are three copies of the timber sale contract. Also enclosed are two copies of the Performance Bond Application. Your Performance Bond needs to be in the amount of $15,000.00.

2. Prior to bidding Appellant obtained the Timber Sale Prospectus for the sale (Tr. 7, 33). That document indicated there were required deposits and road maintenance costs that would be adjusted each year (AF E-1-2). The prospectus also included the statement that "Bid rates for timber, except Dead Lodgepole and Dead White Pine, will be tentative, subject to quarterly adjustment during the contract period" (AF E-1-2; *see* Tr. 78-79).

3. Timber payment rates were included at contract provision A5. At A5a rates were entered for Species and Products to be Paid for at Rates Escalated under B3.2 (AF F-1-3; *see* Tr. 80-81; *see also* Tr. 127 and B4.223 **Deposits for Changes Subject to Escalation,** AF F-1-20). Definitions of terms used in A5 included Bid Rates as rates bid by the purchaser exclusive of deposits and consisting of the sum of advertised rates and bid premium rates. The definition further stated that until rate redetermination became effective, the bid rate for species and products in A5a would be the Tentative Rate which was subject to quarterly adjustment under B3.2 (AF F-1-4). The Base Index was entered in A5a as $229.61 per thousand board feet (MBF) as was Appellant's "bid (Tentative)" of $83 per MBF (AF F-1-3).

Base Index was defined in the contract (AF F-1-4) as follows:

> **Base Index** is the specified average of the lumber or other product selling value index used as the basis for computing adjustment in rates for variance in product selling value as provided in B3.2. Base Indices shall be redetermined when rate redeterminations are made under B3.31.

4. Clause A6—Indices used in Quarterly Adjustment applicable to B3.2 (AF F-1-4) listed the Douglas-fir—Larch Index (1985-86 Basis). The index was the Western Wood Products Association Inland Lumber Price Index (Appellant's (App.) Exhibit (Ex.) 3, Government's (Gov't) Ex. 2, AF D-2-1; *see* Tr. 80-85).

5. Clause B3.2 was included in the contract as follows (AF F-1-18):

> **B3.2 Escalation Procedure.** Tentative Rates for those species and products listed in A5a are subject to quarterly escalation in accordance with the following procedures: The calendar-quarter index average for each price index described in A6 is the arithmetic average of the three such monthly price indices preceding January 1, April 1, July 1, and October 1. The difference between said calendar-quarter index average and Base Index listed in A5a shall be the basis for quarterly escalation. To arrive at Current Contract Rates for timber scaled during the preceding calendar quarter, Tentative Rates for each species shall be: (a) reduced by such difference when the calendar-quarter index average is less than Base Index except that a reduction shall not result in a rate below Base Rate, or (b) increased by half of such difference when the calendar-quarter index

[1] The parties specifically agreed that the Government's arithmetic computations were not in dispute but that Appellant challenged the appropriateness of the adjustments made under the terms of the contract (Transcript (Tr.) 7,17,143).

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average is greater than Base Index except that no increase shall exceed the difference between Tentative Rate and Base Rate.

6. The contract included clause B3.21 Unavailable or Inadequate Index as follows (AF F-1-18):

B3.21 Unavailable or Inadequate Index. If an index described in A6 is no longer available or there is reason to believe said index is an inadequate indication of product-price fluctuations, the unavailable or inadequate index may be replaced by another suitable index commonly acceptable in the industry. When there is no replacement index, Current Contract Rate for the remainder of the sale shall be a Flat Rate derived from adjustment of Tentative Rate by the arithmetic average for the index for the preceding 12 months, using the procedure described in B3.2 for quarterly adjustment. Such Flat Rate shall be subject to rate redetermination as provided elsewhere under this contract.[2]

7. Appellant was aware the sale was based on quarterly adjustment (Tr. 9, 39). At the time of the sale Appellant believed adjustment would be based on local log prices (Tr. 24, 37-40, 51-52, 131-132). The sale in issue was the first escalation sale Appellant had purchased (Tr. 32). Appellant relied most heavily on the prospectus with some review of the sample contract (Tr. 33-34). The prospectus is to provide sufficient information in addition to the advertisement of the sale to enable prospective bidders to determine if further investigation of the sale is warranted prior to bidding (AF E-1-1; Tr. 76).

8. The Base Index was $229.61 per MBF; it was in the appraisal summary (AF D-2-1, line 52) and the Western Wood Products Association Inland Lumber Price Index Douglas Fir-Larch (1985-86 Basis) of December 1990 (App. Ex. 3). The base index figure was based on December 1990 prices as that was the figure used in the appraisal (AF D-2-1; Tr. 83, 86-87, 116). The contract stated what the index was and how used but did not identify why the December 1990 index was used (Tr. 87, 89). Contract prices were adjusted upward on the basis of the index (Tr. 94-96; Gov't Ex. 6).

9. Contract clause B3.2 (Finding of Fact (FF) 5) and the Western Wood Products Index have been used with some minor modifications for 25 to 30 years, and in the present format since 1973 (AF F-1-14; Tr. 100-101). The Government expert testified that normally local log prices are not checked, and that he thought the index equitable because he believed lumber prices have an influence on log prices (Tr. 121-122).

10. Prices generally go up in the summer and down in the winter; however that is not always true nor is the season the only factor (Tr. 118-119). It is likely that the price paid for timber will vary from the base index quarter because of the lag between appraisal, advertising, bidding, award, and harvest of timber (Tr. 125, 129).

11. Appellant's bid was $83 per MBF with a Base Index of $229.61 per MBF (AF F-1-3, E-4-1; Tr. 79-80, 84, 87, 92). The rate charged was increased by one half of the increase experienced in succeeding quarters' lumber price index (Gov't Ex. 6). For example, in the second quarter the index rose to $264.73 (App. Ex. 3) or an increase of $35.12. One half of that, or $17.56, was added to the bid of $83 for a price of $100.56 charged for timber hauled during that quarter (Tr. 94-96; Gov't Ex. 6 and 1 at AF I-15-3).

12. The amount claimed, $30,164.56, represents the approximate difference between the amount bid for the timber harvested and the amount paid at adjusted rates (AF C-1-3; *see* Tr. 9-10, 22-24).

13. Road maintenance deposits are collected under authority of the National Forest Roads and Trails Act of October 13, 1964 (16 U.S.C. § § 532-538). Rates are established by the Forest Engineer with approval by the Forest Supervisor. The contract provided for deposits at **C5.4#—ROAD MAINTENANCE** [*see* reference therein to C5.411#, C5.412#, C5.414#, and C5.45#] (AF F-1-40), **B5.4 Road Maintenance,** and **B5.41 Road Maintenance Deposits.** (Gov't Ex. 5; Tr. 103-106.) Fees collected included: recurrent road maintenance C5.45# (AF F-1-54, *see* specific work elements AF F-1-42—F-1-50; Tr. 108-109), surface replacement C5.414# (AF F-1-51—F-1-52), and roadside vegetation C5.415# (AF F-1-53; Tr. 142).

14. The Timber Sale Prospectus (AF E-1-1—E-1-5) indicated required deposits and cost share road maintenance for which the purchaser would be responsible. The prospectus informed interested parties that road maintenance deposits would be required, including vegetation control at included rates, and the deposits would be

[2] Causes B3.2 and B3.21 were supplemented at clauses C3.2 and C3.21 respectively (AF F-1-33). The supplemental language is not considered material under the facts of this appeal.

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adjusted annually (AF E-1-2). The prospectus was based on hauling the timber to a location in Montana (AF E-1-2, *see* AF D-2-1, D-3-4—D-3-6).

15. Appellant intended to haul the timber over a different route to St. Maries, Idaho (*see* AF G-13-2; Tr. 7). Deposit figures were included in the contract as executed by the parties for both routes, including roadside vegetation deposits (AF F-1-51—53). The record did not include a sample contract or other document available to Appellant prior to bidding that stated what roadside vegetation deposit would be required for the route Appellant intended to use.

16. Prior to bidding on the contract, Appellant asked what the alternate figures for road maintenance would be to St. Maries (Stipulation (Stip.) of the parties; Correspondence File letter of March 29, 1993; Tr. 7).

17. A Forest Service employee without specific contracting authority, but who had been designated by the CO to respond to inquiries regarding the sale (Tr. 59, 70, *see* 73), advised Appellant that St. Maries, Idaho, was 81.4 miles (*see* AF D-3-9) at a fee of $8.28 per MBF (*see* AF D-3-8, F-1-2) for a total cost of $14,572.80 based on the estimated volume of 1,760 MBF. At the same time Appellant was advised the cost share portion of the total road maintenance fee had not been "refigured" for the current year and could change. (Stip.; Tr. 8, 65-66.) The person providing answers to Appellant was designated by the CO because that employee was the one most familiar with the sale (Tr. 59-60).

18. Appellant was charged $10.47 per MBF instead of $8.28 per MBF. The actual volume hauled to St. Maries, Idaho, was 1,712.04 MBF. Consequently, the total amount paid by Appellant for road maintenance fees was $17,925.05 ($10.47 multiplied by 1,712.04). (Stip. of the parties; AF I-1-1; Tr. 139-141.)

19. The figures used in computing the $8.28 Appellant was informed of (AF D-3-8) may be compared to the figures used in computing the $10.47 (Tr. 139-141) charged as follows:

Road Maintenance Summary	Told	Charged
Recurrent Maintenance (Purchaser)	$ .82	-
Recurrent Maintenance (Cost Share)	2.50	$ 4.01
Recurrent Maintenance (FS)	-	-
Surface Replacement (FS)	4.04	4.04
Road Reconditioning (Purchaser)	.92	-
Roadside Vegetation (Purchaser)	-	2.42
Totals	$8.28	$10.47

20. The $8.28 figure was taken from the Forest Service timber sale appraisal appendix at (4) Road Maintenance Summary. The appendix is the work sheet used in computing road costs for the sale appraisal. The road maintenance summary form did not have a line item for roadside vegetation. (AF D-3-8; Tr. 61.) Bidders were on notice the document was available and should be reviewed prior to bidding (AF E-1-1, E-2-1; Tr. 62-64).

21. The Timber Sale Appraisal Appendix (AF D-3-1—D-3-13) included all required deposits for the route to Montana (AF D-3-6) but omitted the amount to be deposited for roadside vegetation control ($2.42 per MBF) (AF D-3-8; C5.414, AF F-1-53; Tr. 136) for the route planned by Appellant to St. Maries, Idaho. The vegetation deposit was a new requirement that should have been included for both routes (Tr. 136-137).

22. The $8.28 included two items for $.82 and $.92 that were estimated performance figures for Recurrent Maintenance and Road Reconditioning. These figures would not be required deposits but were cost estimates for work to be performed by the purchaser on the ground. (Tr. 138.)

23. The Recurrent Maintenance (Cost Share) was, in accord with the contract as Appellant had been advised (*see* FF 12, 13, and 16, *supra*), adjusted from $2.50 to $4.01 (AF F-1-23 (B5.4), F-1-54 (C5.45), G-11-1, I-1-1).

DISCUSSION

Appellant claims $30,164.56 as the approximate difference between the amount paid for timber harvested and the amount that would have been charged at Appellant's original bid (FF 12). Appellant knew at the time he bid on the contract that the price would be adjusted on a quarterly basis. Appellant misunderstood the method of adjustment, thinking that it would be related to local log prices. (FF 2, 7.) Appellant also asserts the price should not have varied in the first quarter, noting that the price of the timber increased before he could cut any. Appellant argues the general propriety of escalation for

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sales such as the one here considered and the appropriateness of using a regional lumber index to adjust prices for material sold locally as logs.

Appellant did not offer any alternate basis of computation. He did argue that he relied on some discussions with various people in the Forest Service without specifics as to who provided what particular information. The record includes general assertions as to log sales but does not include any specific evidence of prices Appellant may have received for the timber. More specifically, neither side produced evidence of the actual product price fluctuations on which the Board could base a determination of the index adequacy.

The contract clearly stated that rates were subject to quarterly adjustment and stated the procedure for adjustment including the Base Index and the price index to be used (FF 3, 4, 5, 8). The Base Index was taken from the December 1990 index price (FF 8). Adjustments were based on calendar-quarter index averages (FF 5). There was no explanation of why a monthly price was used as the base except that it was the figure used in the Forest Service's appraisal (FF 8) when a quarterly average was designated in the contract as the basis for adjustment (FF 5). Appellant asserts the December price was used because it was the lowest for the year. Prices generally go up in the summer and down in the winter. That is not always true nor is the season the only factor affecting prices. (FF 10.)

Appellant's honest belief that payment rates were governed by local log prices and expectation that adjustment would not be made in the first quarter of cutting cannot alter the clear and unambiguous terms of the contract. *Hickman Mechanical, Inc.*, GSBCA No. 11787, 93-1 BCA ¶ 25,546; *Zinco Gen. Contractors*, GSBCA No. 5652, 80-2 BCA ¶ 14,785. An Appellant cannot rely on general oral advice particularly to support assumptions regarding contract requirements that are not reasonable. *See Winandy Greenhouse Co.*, AGBCA No. 88-239-3, 89-1 BCA ¶ 21,495.

The Board may consider whether the index was inadequate under the contract. The apparent same index has been found inadequate under identical contract terms where it was shown not to reflect product prices for the north coast of California. *Arcata Forest Prods. Co. v. United States* [35 CCF ¶ 75,725, 8 FPD ¶ 116], 18 Cl. Ct. 93 (1989) modified Aug. 25, 1989, *aff'd* without published opinion, 915 F.2d 1584 (Fed. Cir. 1990). In that case, the court recognized the intent of the parties was to split the risk of rising and falling markets, avoiding a windfall to either party. That objective is defeated when market changes presumed from the index are not experienced in actual sales.

The Government offered no evidence of the validity of the index at best; at worst the Government showed disregard for the relationship of the index to actual experience (FF 9). The Contractor, on the other hand, strongly argued the lack of relevance of the index but offered no supporting evidence. In the *Arcata* case, *supra*, the court had evidence of direction and amplitude of change experienced by a significant group of affected firms.

In an appropriate case on the basis of adequate evidence this Board would not hesitate to set aside an index shown not to be relevant. Here, left only to speculate as to the actual relationship of the index to the relevant market, the Board will not assume it inappropriate.

Appellant's second claim of $3,730.62 represents the total increase in road deposits from pre-contract information to the amount he was charged.[3] There was undisputed authority for road deposits and for annual adjustment thereof (FF 13-14, 17). Appellant knew of the requirement and sought information regarding the deposits prior to bidding (FF 16). Bidders were directed to the timber sale appraisal appendix for information regarding the sale (FF 20).

Information was provided to the Appellant from the designated source by a qualified Forest Service employee designated by the CO to give such information (FF 17). The information included a figure taken from that data that purported to be the current unadjusted road maintenance figure of $8.28 (FF 19). That figure was in error in two respects. First, it included two items of $.82 and $.92 that were not required deposits (FF 22). Second, it did not include a new required deposit of $2.42 for roadside vegetation control (FF 21). The Government has an obligation to assure reasonable accuracy in contract documents. *Tidewater Contractors, Inc.*, AGBCA No. 90-195-1, 93-3 BCA

[3] The figure used by the parties ($3,730.62) varies slightly from the computed amount: that is, the figure charged per MBF ($10.47) minus the pre-bid figure given apellant ($8.28), or ($2.19) times the volume cut (1,712.04) equals $3,749.37.

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¶ 26,050; *Recon.* 1993 WL 193310 (June 8, 1993).

The Government argues that correct figures could have been obtained from the sample contract Appellant reviewed (*see* FF 7; *see also* the CO's final decision at AF C-1-4). The deposit for roadside vegetation was included in the contract (FF 15). The Government does not, however, reference, and we do not find evidence of when, if ever, the figure in question was included in the sample contract available prior to the time of bidding (*see* FF 1).[4]

In accord with the Instructions to Bidders, the contract was awarded and was binding on the parties with the notice of award (FF 1). Signature by Appellant was not necessary to the award. *K. L. McNew,* AGBCA No. 86-221-1, 91-1 BCA ¶ 23,483; *see McMillen Lumber Co.,* AGBCA No. 85-110-1, 88-3 BCA ¶ 21,071. The parties do not raise the potential Government defense that the contract signed by Appellant after award contained a rate for roadside vegetation not included in the pre-award information (FF 15, 19).

Refraining from that argument is consistent with the doctrine of equitable estoppel which acts to prohibit a party from raising a defense or objection otherwise permitted, or from bringing an action which could be pursued under normal circumstances. The doctrine's four requirements would appear to have been met in this case. That is, the Government knew the facts in that it changed the contract; it offered the prior information intending it to be relied on by bidders; and Appellant was unaware of the vegetation deposit figure when bidding and relied on the figures given to his detriment. *Eel River Sawmills, Inc. v. United States,* [38 CCF ¶ 76,473] 27 Fed. Cl. 604 (1993).

Appellant has an obligation to apprise himself of relevant contract information and is charged with that knowledge that a reasonable investigation would disclose, including review of information to which he is directed. *Donald R. Stewart & Assoc.,* AGBCA Nos. 84-226-1 *et seq.,* 92-1 BCA ¶ 24,705; *see Page Constr. Co.,* AGBCA Nos. 92-191-1, 92-228-1, 93-3 BCA ¶ 26,060, 1993 WL 169184; *also* 1993 WL 160316 (May 13, 1993). Appellant did that. He obtained and relied on information from the relevant documents by calling the Forest Service. He received the information as it was included therein. At some point the Government added the roadside vegetation deposit amount to the contract without advising Appellant.

Where the Government fails to disclose to bidders information that is vital for preparation of estimates and for contract performance, the Government is liable. *Jack L. Olsen, Inc.,* AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767. Here the Government knew when it added roadside vegetation to the figures previously included in the timber sale appraisal (FF 18, 20, 21). The Contractor neither knew or should have known of the additional deposit and, by virtue of having given information and then adding an additional deposit, the Government should have been aware of Appellant's lack of knowledge.

The Government vigorously and correctly asserts the well known axiom that the Government is not bound by unauthorized acts of its employees. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380 (1947); *RMTC Sys.,* AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873; *Pine Mountain Lumber Co.,* AGBCA No. 83-194-1, 83-2 BCA ¶ 16,880. There is some evidence of authorization (FF 17). *See Max Drill, Inc., v. United States* [15 CCF ¶ 83,691], 427 F.2d 1233 (Ct. Cl. 1970). We need not decide that issue, however, as the Government employee acted only as a conduit to provide that information to which Appellant had been directed otherwise (FF 20).

There is no evidence in the record to indicate Appellant or any reasonably knowledgeable potential bidder would have been more perceptive than the designated Forest Service employee in reviewing the information provided. The vegetation deposit was new (FF 21) and there was no indication it was not included within another heading. Should Appellant have noted any discrepancy it would have been that the $.82 and $.92 figures were not required deposits but were estimates used for computation by the Forest Service (FF 22). There was no reason for Appellant to compare the two routes if there was no interest in the first.

It is most reasonable to conclude that after Appellant was provided the information on which he relied in bidding, the Government knowingly completed or corrected computation for the route in question and prepared the contract for award with such figures in-

[4] The Presiding Judge at the hearing specifically asked both Government witnesses how a bidder would get to the correct figure for the deposit. The first witness stated the question would be better directed to the second witness (Tr. 69). The second witness referred only to the contract (Tr. 141-142), not to the sample contract or any other source.

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cluded. The award letter enclosing three copies of the contract was dated the day Appellant was the high bidder at oral auction (FF 1). There was no evidence offered to indicate Appellant or any other bidder was advised of an amendment to available contract information.

Under such facts we find the contract on which Appellant bid, and which Appellant was awarded, is the contract by which the parties are bound. In that contract the $2.42 per MBF was not included (FF 21). However, two figures of $.82 and $.92 (FF 22) were included and considered by Appellant in bidding. Appellant was therefore misled in the amount of $.68 and is entitled to refund of that amount paid per MBF for the 1,712.04 MBF purchased or $1,164.19. Appellant is not entitled to an adjustment for increases in recurrent maintenance costs (FF 23) as he was on notice that such costs would be adjusted.

DECISION

The appeal is allowed in the amount of $1,164.19. The remainder of the appeal is denied.

SEPARATE OPINION BY ADMINISTRATIVE JUDGE MARILYNN M. EATON CONCURRING IN RESULT

This appeal concerns a salvage timber sale. Appellant first challenges the Forest Service's quarterly adjustment of bid rates on the basis of a Western Wood Products Association (WWPA) index for Douglas fir and larch. Appellant's contract clearly set out the procedure for adjustment, as well as for use of an alternate index if the index specified were inadequate or outdated.

The majority indicates that in an appropriate case, the Board would consider whether the WWPA index was adequate. In this appeal, however, Appellant primarily argues that for a salvage sale, *any* index is inequitable and a gamble. I would not conclude that the Government disregarded the relationship of the index to actual experience simply because local log prices were not checked. Nor in this case would I shift the burden to the Government to establish the validity of the index. The Forest Service's use of an index is not *per se* illegal or improper, and I would deny Appellant's first claim on that basis.

Appellant's second claim is based on information on required road maintenance deposits, provided by telephone, that omitted a $2.42 deposit for vegetation control for the route over which Appellant planned to haul the timber. The appraisal worksheet that a Forest Service employee consulted to determine the figure provided to Appellant also omitted the deposit in question.

The appraisal, however, was merely one of the documents the Timber Sale Prospectus advised prospective bidders was available for review; among others was a sample contract. The Prospectus specifically stated that in event of errors or contradictions, the sample contract would govern. Appellant's representative testified that in addition to telephoning the Forest Service to determine what road maintenance deposits would be required for its planned haul route, he reviewed the sample contract. It is not clear whether such review included road maintenance deposits.

The Instructions to Bidders provided that after completion of the oral auction, award would be made when written Notice of Award was mailed to the successful bidder, without further action by either party. It is clear, therefore, that the terms of the awarded contract are those of the sample contract.

In its brief, the Government asserts that the sample contract contained the $2.42 deposit for vegetation control for Appellant's planned route. The Government has provided no evidence to support this assertion, although the sample contract was within the exclusive custody and control of the Government at all times prior to the auction and award. The sample contract could have been offered at hearing or included in the record as part of the Rule 4 File. It is not before the Board. From this, I would draw the negative inference that the $2.42 vegetation control deposit was not in the sample contract. This is a logical inference, since the figures included in the sample contract would likely have come from the appraisal from which the deposit was omitted. This interpretation is consistent with the Restatement, Contracts, 2d, Section 28(2), which states:

> Unless contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up.

Comment e. *Published and announced terms,* further states:

> The terms on which goods are to be sold at auction are often made known in advertisements or catalogues or posted at the place where the auction is to be held.

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When the goods are put up, the announcer commonly refers to such terms, and sometimes he announces a modification of the published terms. Ordinarily bidders are or should be aware of terms so published or announced. A bid need not repeat such terms; it is understood as embodying them. Hence the bidder is held to the published or announced terms, even though [the bidder] may have neglected to read them or may have arrived at the auction after the announcement was made. Theoretically, a bidder could make an offer on terms different from those announced, but bidders seldom or never do so.

Here, so far as we can determine from the record, Appellant was never made aware of the $2.42 deposit omitted from the appraisal and, presumably, from the sample contract. There is no evidence that the Forest Service corrected the sample contract before the auction, and no evidence of any modification announced before the auction.

The majority would estop the Government from charging Appellant the $2.42 because of the erroneous appraisal and oral advice based on it. Regardless of the authority or alleged lack of authority of the Forest Service employee providing the advice, I would not permit recovery on the basis of estoppel under the present facts. I would conclude that the sample contract, omitting the $2.42, was the contract on which Appellant bid and the one that the Forest Service awarded. The contract provided to Appellant with the notice of award, corrected to include a deposit for roadside vegetation control, is not enforceable. I concur in the result reached by the majority.

[¶ 26,332] SRP Healthcare, Inc.

ASBCA No. 46227, August 26, 1993. Contract No. F29651-983-00001.

Contract Disputes, Claims—Quantification—Sum Certain.—The board did not have jurisdiction over an appeal seeking a cease and desist order and a declaration that the government breached the contract, even though the appeal may have been seeking money damages as well as injunctive relief, because a claim for money had not been submitted to the contracting officer.

For the appellant: Kathleen P. Allyn, General Counsel. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Capt. Leonard M. Cohen, USAF, Trial Attorney.

Before HARTY, RUBERRY, and RIISMANDEL, Administrative Judges.

HARTY, Administrative Judge: By letter of 22 June 1993, SRP Healthcare, Inc. (SRP) appealed the Air Force's refusal to allow a particular doctor to perform services under SRP's contract for providing emergency room physician health care at the 49th Medical Group Hospital, Holloman AFB. The appeal is based on the contracting officer's 28 May 1993 written confirmation that she did not wish the doctor to work at the base hospital. The contracting officer was responding to a 27 May 1993 letter from appellant that took exception to her oral instruction on that day not to permit the doctor to work at the base hospital during a scheduled June shift. The complaint is an elaboration of appellant's letter of 27 May 1993. It seeks an order from the Board directing the Government to cease and desist from barring the doctor from performing services. The complaint also seeks a finding that the Government breached the contract, but does not claim monetary damages. Appellant has elected the expedited procedures of Board Rule 12.2.

During a telephone prehearing conference on 6 August 1993, arranged by the Board to determine its jurisdiction, appellant's counsel acknowledged that SRP Healthcare was seeking money damages as well as injunctive relief. In this regard, a claim for $5,818.20, covering another incident in late April, was filed with the contracting officer on 3 May 1993 and was still under evaluation at the time the present appeal was docketed on 25 June 1993. On 1 July 1993 the contracting officer issued a final decision denying this claim. (R4, tabs 8 & 21)

Under the circumstances, it was recognized that since the Board is not authorized to grant injunctive relief or specific performance, it is not in a position to order the Air Force to cease and desist from barring the doctor from performing services. Moreover, where, as here, the claim is monetary in nature, it is essential to the Board's jurisdic-

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tion under the Contract Disputes Act, 41 U.S.C. §§ 601-613, that the claim be submitted to the contracting officer in a sum certain. *E.g. Rohr, Inc.*, ASBCA No. 44773, 93-2 BCA ¶ 25,787 (29 January 1993). Since this was not done, the Board lacks jurisdiction over the appeal.

In reaching this conclusion, we have not treated the 3 May claim as providing a monetary component to support this appeal. That claim appears to involve a separate incident and was not referenced in appellant's 22 June 1993 appeal letter. However, if the 3 May claim was intended to provide a monetary component, then the appeal was premature since the contracting officer had yet to complete her analysis of the claim and she was entitled to 60 days from receipt of the claim in which to do so and to issue her final decision. 41 U.S.C. § 605(c)(1). We believe dismissal would still be appropriate in light of appellant's election of the expedited procedures of Rule 12.2. *See Canova Moving and Storage Company*, ASBCA No. 24143, 79-2 BCA ¶ 14,143. If appellant wishes to appeal the contracting officer's 1 July 1993 final decision, it may do so.

Based on the discussion during the prehearing conference, appellant's counsel indicated that she desired to withdraw the present appeal and confirmed that intent by letter of 10 August 1993, withdrawing the complaint.

DECISION

The present appeal is dismissed without prejudice.

[¶ 26,333] Mech-Con Corporation

ASBCA No. 44934, August 30, 1993. Contract No. N62477-83-C-4104.

Quality—Testing—Additional Testing.—A contractor under its contract for chillers was entitled to compensation for additional capacity tests because testing required a full load, which was provided for only one hour on the date selected by the contracting officer. The government was also liable for the reasonable charges of the supplier for its marketing manager's time and expenses and for the time and expenses of the contractor's project manager.

Pricing of Adjustments—Claim Preparation Costs—Necessity for Performance.—A contractor was not entitled to recover, as direct costs of a contract modification, litigation support and claim preparation costs incurred in connection with a claim for additional test expenses, because the costs were not necessary to the performance of the retesting work. The modification recognized the contractor's right to recover for cleaning and retesting.

For the appellant: Albert L. Bond, Jr., President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Lisa C. Gerideau, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before FREEMAN, RUBERRY, and VAN BROEKHOVEN, Administrative Judges.

FREEMAN, Administrative Judge: Mech-Con Corporation claims additional compensation under a unilateral modification. The appeal has been submitted under Rule 11 without oral hearing. We sustain in part on entitlement and remand for settlement of amount.

FINDINGS OF FACT

1. The contract was awarded to Mech-Con on 17 October 1984 for replacement of chillers Nos. 3 and 4 at an air conditioning chilled water plant. The new chillers were installed in March and May 1986, and immediately put in service. In June 1986, they were tested for capacity. The test required a full load for eight hours with capacity readings taken hourly. The average of the hourly readings was to determine whether the specified capacity (900 tons) had been met.

2. Specification section 15652 at paragraph 6.2.1.5 stated: "Testing shall be accomplished when it is determined by the Contracting Officer to be hot enough to provide full load." On the date selected by the contracting officer for the June 1986 tests, a full load was provided for only one hour and the tests could not be completed as specified.

3. On 19 August 1986, the Government notified Mech-Con that it would not declare

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beneficial occupancy until, among other things, the chillers had passed the capacity test. On 21 August 1986, Mech-Con requested that the chillers be made available for testing. This request went unanswered for months. In January 1987, Mech-Con was told that the chillers could not be taken out of service for testing. There was also a disagreement within the Government as late as 6 March 1987 over whether and how a full load could be provided. A second test of the chillers was not conducted until 18 June 1987. The chillers did not meet the specified capacity on this test, but again a full load was not provided for the specified eight hours.

4. After the 18 June 1987 test, chiller No. 3 was opened. Gaskets were found out-of-place or "blown," and the heat exchangers had "extensive fouling" from corrosion and other material. A third test of chiller No. 3 was conducted on 5 December 1987 after the chiller was cleaned and the gaskets reinstalled. The unit did not meet the specified capacity but it was nevertheless considered to be "within the range of acceptability" and was accepted by the Government.

5. On 4 March 1988, the Government directed Mech-Con to clean the heat exchangers on chiller No. 4. This was done on 26-27 March 1988. When the chiller was opened for cleaning a "ripped" gasket was found. Chiller No. 4 was retested in April 1988. This test was unsatisfactory because the chiller had not been properly cleaned. Chiller No. 4 was recleaned and on 12 January 1989 retested. Capacity was found satisfactory and the unit was accepted on 14 January 1989.

6. The Government contends that the "blown" and "ripped" gaskets caused the fouling of the heat exchangers. The chiller supplier, however, has provided calculations showing that the condition of the gaskets had no significant effect on capacity. These calculations are unrebutted by the Government. The Government also contends that exposure of the chillers to weather while awaiting installation caused the fouling of the heat exchangers. The heat exchangers, however, were not directly exposed to the weather. The exposed storage was noted at the time by the parties. The possibility of exterior rust and dents was discussed but not the danger of interior corrosion. The evidence is insufficient to show a causal relationship between the exposed storage of the chillers in late 1985 and early 1986, and the condition of the heat exchangers in June 1987 after more than one year of operation. Chemical analyses were made of the chilled water supply for the chillers in November 1987. One laboratory found a high iron level and noted the absence of standard water treatment. The second laboratory found low iron and "very low" nitrite levels. The second laboratory stated that the low nitrite levels "will eventually lead to corrosion," and recommended evaluation of "the effectiveness of the [water] treatment program against oxygen pitting and general corrosion."

7. On 16 January 1991, Mech-Con submitted a claim for cleaning and retesting the chillers. This claim was addressed to the Resident Officer in Charge of Construction (ROICC) with a request that he "Please forward this claim to the Contracting Officer for his decision." A revised claim in the amount of $200,732 was submitted on 26 April 1991 directly to the contracting officer at the Naval Facilities Engineering Command, Chesapeake Division (NAVFAC-Chesapeake). By letter dated 8 May 1991, the contracting officer replied to the claim in relevant part:

> The issues contained within the request appear to have merit and deserve serious consideration. The Government is presently researching and preparing its position and wishes to conduct negotiations to resolve this matter in the very near future.

8. On 26 August 1991, a negotiator for the ROICC agreed to settle Mech-Con's claim for $176,000, subject to approval of the NAVFAC-Chesapeake contracting officer. Mech-Con's president understood this condition at the time of the negotiation. In a letter to the negotiator dated 4 September 1991, he stated:

> . . . you indicated that the papers were still not ready, but they would be completed immediately and forwarded to Chev Div [sic] for their final approval. Your paper work to Chev Div [sic] would contain the ROICC approval and justification for a settlement payment in the amount of $176,000.00.

9. The NAVFAC-Chesapeake contracting officer did not approve the full amount of the settlement. By unilateral Modification A00006 dated 28 January 1992, he allowed a price increase of $119,066 with no extension of time for "[the] additional cleaning and testing of chillers #3 & #4 as well as additional contractor administrative efforts to support the operation of the two 900 ton chillers after constructive BOD, including interests for one year."

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10. On 26 February 1992, Mech-Con requested a final decision on five items of cost that were not included or were only partially included in Modification A00006. By final decision dated 7 May 1992, this claim was denied. The claimed additional costs are described in Findings 10 through 14 below.

11. Mech-Con claims an additional three hours per person per meeting for three meetings with the ROICC on the cleaning and retesting problem. Modification A00006 allowed five hours per meeting. Mech-Con states that the meetings so fatigued its personnel that they performed no more productive work for the day. There are no affidavits or contemporaneous documentation on the actual lengths of the meetings, the fatigue of Mech-Con's participating employees, or their post-meeting duty status.

12. Mech-Con claims the costs of the June 1987 and April 1988 tests which were not allowed in Modification A00006. The June 1987 tests failed to demonstrate the specified capacity because the heat exchangers were dirty due to inadequate treatment of the chilled water supply. The condition of the chilled water supply was the Government's responsibility. The April 1988 tests failed to demonstrate capacity because the chiller had not been properly cleaned as directed by the Government. The proper cleaning of the chiller was Mech-Con's responsibility.

13. Mech-Con claims the unallowed balance of charges by the chiller supplier for the time and expenses of its marketing manager on the cleaning and retesting work. The claimed hours and expenses are supported by detailed records and estimates. We find that 179 hours of the marketing manager's time and $3,847.40 of his expenses were incurred on that work. Eighteen hours incurred on 28 October 1988 for responding to an oil loss problem are not shown to have been related to the cleaning and retesting. Mech-Con has also failed to show the reasonableness of the $100 hourly charge for the marketing manager's time. Mechanical service work was charged by the supplier at $50 per hour. Absent evidence of the actual hourly pay of the marketing manager, we find $75 per hour a reasonable charge for his time including all supplier fringes and mark-ups.

14. Mech-Con claims the unallowed balance of its program manager's time and expenses incurred on the cleaning and retesting work. The claimed time and expenses are supported by detailed records and estimates. We find that 1,368 hours of the project manager's time and $360 of his expenses were incurred on the cleaning and retesting work. We find unproven six hours of a total ten hours per item estimate for correspondence with the chiller supplier. Mech-Con's ten hours per item estimate is inconsistent with (i) its own estimate of four hours per item on similar correspondence with the Government, and (ii) the four hours per item charged by the chiller supplier for substantially the same correspondence. The 405 hours of the project manager's time supporting the litigation with the chiller supplier made no contribution to the performance of the cleaning and retesting work.

15. Mech-Con claims 140 hours for claim preparation work by a vice-president. The claim was prepared after the last chiller was accepted. The record does not indicate whether the vice-president's salary was charged on Mech-Con's books and records as an indirect cost (overhead or G&A) or direct to particular jobs. The contracting officer found the claim preparation expense and the project manager's time on the supplier litigation unallowable under FAR § 31.205-47. The FAR Part 31 cost principles in effect on the date of the contract were made applicable to adjustments under the contract by the DFARS § 252.243-7001 "PRICING OF ADJUSTMENTS (APR 1984)" clause. That clause was mandated for Mech-Con's fixed price contract by DFARS § 243.205 (S-71).

DECISION

The Government in this appeal has not repudiated unilateral Modification A00006. Therefore, the cleaning and retesting of the chillers is properly compensable under that modification, and the only issue is whether the claimed additional costs are recoverable under the modification. Mech-Con first contends that it is entitled to the difference between the $119,066 allowed in the modification and the $176,000 agreed upon with the ROICC negotiator. That agreement, however, was subject to approval of the NAVFAC-Chesapeake Division contracting officer, and that approval was not given. Accordingly, the agreement with the ROICC negotiator did not become legally binding on the Government.

Mech-Con, however, is otherwise entitled to compensation for the 18 June 1987 tests. Those tests were required because a full load was not provided for the June 1986 tests. The Government was responsible under the contract for designating test dates when a full load would be provided. The Government is also liable for the reasonable charges

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of the supplier for its marketing manager's time and expenses and for the time and expenses of Mech-Con's project manager to the extent indicated in the findings above. The time and expenses indicated in the findings are shown by credible records and estimates to have been incurred for performance of the cleaning and retesting work.

Mech-Con's claim for additional hours for three meetings with the ROICC fails for lack of proof. There are no affidavits or contemporaneous documentation of the length of the three meetings, the fatigue of the participating employees or their duty status upon return from the meetings. Mech-Con's claim for the April 1988 tests is also without merit. Those tests failed because the chiller had not been properly cleaned as specifically directed by the Government before the tests. The Government is not liable for the consequences of Mech-Con's improperly performed work.

Mech-Con's litigation support and claim preparation costs are not barred by the FAR Part 31 cost principles in effect on the date of the contract. FAR § 31.205-47 then in effect applied only to defense of fraud proceedings. The litigation with the chiller supplier was not a fraud proceeding. FAR § 31.205-33 then in effect applied only to "outside" professional services, and not to "in-house" employees and officers. The litigation support was provided by the project manager, an employee, and the claim preparation was performed by a vice-president. Nevertheless, those costs are not recoverable as direct costs of Modification A00006 because they were not necessary to performance of the cleaning and retesting work. *See Singer Co., Librascope Division v. United States* [24 CCF ¶ 81,914], 568 F.2d 695, 720-21 (Ct. Cl. 1977).

The appeal is sustained in part on entitlement as indicated above, and remanded to the parties for settlement of amount.

[¶ 26,334] Engineering Technology Consultants, S.A.

ASBCA Nos. 44237, 45277, 45302, August 27, 1993. Contract No. F66501-90-C-0009.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Default Terminations.—The board had jurisdiction over a contractor's claim for an equitable adjustment for delay, even though the contract had been terminated for default and a surety had succeeded to the rights and liabilities of the contractor, because the contractor was in privity of contract with the government at the time the alleged delay was experienced. The board's jurisdiction extends to appeals by a contractor as "a party to a Government contract other than the Government." A claim concerning the government's refusal to allow the contractor's president onto the project site after the default termination was beyond the board's jurisdiction because, at this time, the contractor, having been terminated for default, was no long in privity with the government.

For the appellant: Carlos A. Salazar, President, and De Obaldia & Garcia de Paredes, Panama, Republic of Panama, by Carlos A. De Obaldia. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Gerald K. Fields and Capt. Michael P. Chiffolo, USAF, Trial Attorneys.

Before ELMORE, RUBERRY, and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: Engineering Technology Consultants, S.A. (ETC or appellant) has timely appealed from four separate "final decisions" of the contracting officer (CO) as follows: ASBCA No. 43454—terminating appellant's contract for default [1]; ASBCA No. 44237—ETC's equitable adjustment claim for $237,647.12, the alleged costs incurred due to the Government's "interference and delays" and "extended overhead expenses," and a 72-day time extension; ASBCA No. 45277 (a Rule 12.2 appeal)—ETC's equitable adjustment claim for $6,756.49, the alleged cost incurred

[1] ASBCA No. 43454, a Rule 12.3 election, is mentioned for information purposes only and is not included in the Government's motions to dismiss. However, we will be referencing the R4 file for ASBCA No. 43454 since it contains documents relevant to our decision. References to a R4 file will be cited with the docket number of the appeal as follows "43454, tab" or "R4, tab" for the R4 file of the appeal being discussed. The same application will be followed for citations to exhibits.

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due to the "Government debarring Surety's Supervisor from the project"; and ASBCA No. 45302 (a Rule 12.2 appeal)—ETC's equitable adjustment claim for $4,257.36, the alleged cost incurred due to the Government's unjustified suspension of payment for work performed and accepted prior to the termination for default.

The Government, in ASBCA Nos. 44237, 45277 and 45302, has filed Motions To Dismiss For Lack of Jurisdiction based on the Board's questioning of its jurisdiction to decide the appeal and raised *sua sponte* during the hearing in ASBCA No. 44237 (tr. 3/147-56, 4/121-24). Appellant has filed responses in Opposition To the Government's Motions. These matters are consolidated for purposes of deciding the motions only. At the hearing in ASBCA No. 44237 ETC was represented by counsel, Mr. De Obaldia. ETC, represented by its President, Mr. Carlos Salazar, has elected to submit on the record and in accordance with Board Rule 12.2, the Small Claims (EXPEDITED) Procedure, ASBCA Nos. 45277 and 45302.

SUMMARY STATEMENT OF FACTS FOR PURPOSES OF RULING ON THE MOTIONS

GENERAL

ETC was awarded negotiated firm fixed price contract F66501-90-C-0009 (C-0009) on 28 September 1990 for the contract price of $397,890.12 to "furnish all transportation, plant, equipment, tools, labor and materials, and all necessary operations to perform 'Miscellaneous Repairs/Alter Kobbe School, Bldg 841', at Howard AFB, Pn, in strict accordance with the technical specifications and drawings, subject to the terms and conditions of the contract." (44237, tab 2)

On 20 May 1991 the CO issued, and ETC acknowledged receiving, contract modification P00001, a final decision terminating for default the contract due to ETC's failure to obtain General Liability insurance between 30 September 1990 and 1 January 1991; its failure to maintain comprehensive General Liability insurance in the correct amount as required by contract and special contract clauses; its signing the Certificate of Compliance with Insurance Requirements without ensuring that the contract requirements were met; and its failure to present proof of insurance for all of its subcontractors. (43454, tab 8; 44237, tab 3; 45277, tab 4; 44302, tab 4)

At a meeting held on 22 May 1991 with the surety, Cia. International de Seguros, S.A. (Cia. International or Surety), the parties agreed that approximately 72 percent of the work had been completed but not totally accepted due to the existence of discrepancies which required correction, and the surety, assuring the Government it would be able to complete the work requested, and the Government agreed to allow Mr. Salazar to act as the surety's consultant. (45277, exh. G-1, -11)

In a letter dated 13 July 1991, Roy Phillipps P., Esq., representing the surety, informed the Government that the on-site Government construction "Inspector [James R.] Teal" had told the surety's subcontractors that Mr. Salazar's presence at the site was "prohibited by superior orders" and, if he made that statement, that Inspector Teal be directed to allow Mr. Salazar access since the parties had agreed the surety was free to use Mr. Salazar's " 'know how' in an *ADVISORY* capacity only"; that it was "no one's intention that [Mr. Salazar] would go back into the project and 'run the show' "; and if Mr. Salazar is prohibited from visiting the project site, his usefulness to the surety in an "*ADVISORY*" capacity will be completely nullified. (Underline in original) (45277, tab 7)

On 17 July 1991 the CO, responding to Mr. Phillipps' 13 July 1991 letter and acknowledging the Government's agreement to allow Mr. Salazar to act as the surety's technical representative, stated Mr. Salazar had written the Government concerning payment which was outside his authority as a technical representative. Mr. Phillipps was informed that if Mr. Salazar agreed to perform in the capacity of a technical advisor and agreed to leave the administration of the contract to the surety, he may continue to visit the project site in the agreed capacity. (45277, tab 8)

On 31 July 1991 the CO acknowledged receipt of ETC's executed Notice and Instrument of Assignment dated 30 July 1991, assigning to Cia. International "payments due or to become due under this contract [C0009]." (44237, tr. 4/14-18; exh. G-12; 45277, exh. G-3)

On 23 August 1991 the Government and the surety executed bilateral modification P00002, "CONSTRUCTION CONTRACT TAKEOVER AGREEMENT," effective 29 May 1991, wherein the parties agreed (44237, tab 4; 45277, tab 5; exh. G-2; 45302, tab 5):

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1. Identification—The following terms will be used to refer to the indicated parties and the following specified contract in this agreement:

a. *RELINQUISHING CONTRACTOR:* Engineering Technology Consultants S.A. . . .

b. *SURETY:* Compania International de Seguros S.A. . . .

c. *SUBCONTRACTORS;* (1) Ingeneria Santiago S.A. . . . (2) Asfaltos Panamenos S.A. . . .

d. *GOVERNMENT:* The United States of America by and through its duly authorized agents.

e. *CONTRACT:* F66501-90-C0009; Project No. HOW 89-0115; Miscellaneous Repair/Alter Kobbe School.

2. On 20 May 1991, the Government terminated the rights of Relinquishing Contractor to proceed with further work on contract F66501-90-C0009 when it terminated the contract for default. In accordance with its obligations pursuant to a performance bond issued to the Relinquishing Contractor for the benefit of the Government on behalf of the Relinquishing Contractor, Surety hereby confirms its election to complete the work required by subject contract in strict accordance with all its terms and conditions not specifically superseded by this agreement.

3. The parties agree to the following:

a. The contract will be administered by the Government, which will hereafter deal directly with Surety in the role of prime contractor unless Surety notifies the Air Force in writing that one of the above referenced subcontractors may be authorized to act on behalf of the Surety in the completion of the project.

b. Upon the completion of satisfactory progress, and in accordance with the terms of the contract, the remaining balance of the contract price, excluding any costs which are or may become due to the Government for reimbursement of expenses incurred in correcting damages to the interior of Kobbe Elementary School, shall be paid directly to the Surety.

c. Surety agrees to the established terms and conditions of the performance period as outlined hereafter.

(1) Surety agrees to the following performance period at no additional costs to the Government.

(2) Further physical construction on this project may commence on 17 June 1991 or after the date when all required signatures are affixed to this Takeover Agreement. The Surety will have sixty (60) calendar days beginning the effective date of this Agreement (17 June 1991), to accomplish all remaining construction. Said work shall be completed by the Surety and accepted by the Government in accordance with the terms and conditions of subject contract. The revised contract completion date is 15 August 1991.

d. Surety certifies that it has on hand all labor, tools, parts, materials, equipment, supervision and quality control required to complete this contract within the above mentioned performance period as extended.

e. The Government does not waive or release it's [sic] right to liquidated damages for delays in work completion subsequent to this Takeover Agreement, except to the extent such delays are excusable under the contract.

f. Except as specifically set forth herein, nothing in this agreement shall alter, affect or vary the rights and obligations of the parties to the subject contract.

g. By accepting the above mentioned subcontractors identified to complete the contract at the election of Surety, all parties hereto agree that the Government will be deemed to have taken appropriate steps to mitigate its damages with regard to the subject contract. Surety will indemnify and hold the Government harmless from any claims that the Relinquishing contractor might make for any alleged failure to mitigate said damages based on the Government's choice to not solicit competitive bids to complete the contract.

h. The Surety's right to payment from the contract retainage and unpaid earnings shall be governed by FAR provision 49.404.

i. Surety further agrees to repair and replace at no additional cost to the Government, all property items which have been identified by the Government for either repair or replacement in the Government's letters to the Surety dated 24 May 1991. Surety agrees to provide to the Government on or before 21 June 1991, satisfactory evidence that new carpeting, vinyl wall base, ceiling tile and wall tile, to complete repairs, have been ordered. The Surety further agrees that all the items listed in the Government's letters to the Surety dated 24 May 1991, excluding the installation of new carpeting, will be installed prior to 15 August 1991 unless oth-

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erwise authorized by the Contracting Officer. Installation of carpeting will be completed within 3 weeks of receipt by Surety.

j. The Government will withhold the amount of $100,000.00 until such time that the surety progresses with the repairs to the interior of the facility. The aforementioned sum ($100,000.00) is subject to release as the repair work progresses to the satisfaction of the Contracting Officer.

4. In consideration of the modification agreed to herein, *which ratifies a Takeover Agreement by the Surety* and *establishes a new performance period,* Surety hereby releases the Government from any and all liability, for further equitable adjustments attributable to *this* modification.

FAR provision 49.404, Surety-takeover agreements, provided in pertinent part that if the surety offers to complete the contract work it should normally be permitted to do so, that because of conflicting demands for unpaid prior earnings (retained percentages and unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a 'takeover' agreement fixing the surety's right to payment from those funds, and, in that event, "the contracting officer may (but not before the effective date of termination) enter into a written agreement with the surety" which should provide:

> ... for the surety to complete the work according to all the terms and conditions of the contract and for the Government to pay the surety the balance of the contract price unpaid at the time of default, but not in excess of the surety's costs and expenses, in the manner provided by the contract subject to the following conditions:
>
> (1) Any unpaid earnings of the defaulted contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the Government by the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract.
>
> * * *
>
> (4) The surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor. Furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on authority of—
>
> (i) Mutual agreement between the Government, the defaulting contractor, and the surety ....

By letter dated 8 July 1992, the surety informed the CO (44237, tr. 1/71; exh. A-12; 45277, exh 2):

> All costs associated with execution and completion of [contract C0009] have been paid in full by Engineering Technology Consultants, S.A. (hereinafter E.T.C.), therefore, there exists no outstanding liabilities arising from the Performance and Payment Bonds issued by our firm.
>
> From the foregoing facts we hereby declare null and void the Assignment of Funds made by ETC for the benefit of Cia. International de Seguros, S.A., and request that all further payments be made directly to Engineering Technology Consultants, S.A. ....
>
> [signed] L.E.G. de Paredes
>
> Manager

ASBCA No. 44237

By letter dated 24 May 1991 the CO, Linda M. Dunn, provided the surety with a notification for reimbursement in the amount of $1,743.46 for electrical damages which occurred at Kobbe on 3 May 1991 due to water infiltrations (R4, tab 83).

On 18 June 1991 the surety provided to another CO, Sgt. Jose R. Medina, notice that a check in the amount of $33,727.52 for damaged property being replaced by the Government was delivered to "DODDS." The check in question identified ETC as the payor. The surety requested a reciprocal amount of money be released and paid to it, the surety, and that "all items replaced and covered by this payment as well as items replaced by future payments become the property of the [surety] and as such will [be] remove[d] as soon as possible." (R4, tab 88)

On 18 June 1991 the surety provided to the CO copies of the purchase order for carpet and for ceiling and wall tile, and its contract with Construcciones Ensin for the installation of the replacement carpet at Kobbe School. The purchase order for the

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ceiling and wall tile, dated 15 June 1991, had been placed with D.R.V. Services & Supply Co. by ETC. On 21 June 1991 the surety provided the CO with a copy of a check in the amount of $34,636.50 issued by ETC to Construcciones Ensin as an advance payment for the new carpet. (R4, tabs 89, 90, 91)

By letter dated 18 July 1991 ETC filed with the Government a certified equitable adjustment claim in the amount of $237,647.12 alleging in pertinent part that the Government had delayed the procurement of roofing material by delaying the approval of the roofing submittals, and that the delay resulted in ETC incurring additional costs which ETC alleged were the responsibility of the Government (R4, tab 95). ETC contends that $93,300.22 of the claim was costs incurred "prior" to the termination and $144,346.90 was costs incurred "after the termination but prior to the signing of the takeover agreement" (app. brief, para. 8).[2]

On 30 September 1992, after the surety declared ETC's Assignment of Funds "null and void," modifications P00005 and P00007 were executed reimbursing ETC $1,328.25 and $523.45 respectively, in compliance with the Board's decisions rendered in ASBCA No. 43376 (*Engineering Technology Consultants, S.A.*, ASBCA No. 43376, 92-3 BCA ¶ 25,100, modified on app. mot. for reconsid., 93-1 BCA ¶ 25,371). (Exh. 23, 24)

ASBCA No. 45277

By letter dated 19 May 1992 ETC, in pertinent part, filed an equitable adjustment claim in the amount of $6,756.49 as follows (R4, tab 10):

Debarment of Surety's Advisor

During the execution of the above captioned contract after the termination for default I was impeded by the Air Force to visit, inspect and/or perform any duties on behalf of Cia. Internacional de Seguros, S.A. (the Surety) for most of the performance period.

The Surety had requested to the Air Force that I be allowed to act as consultant and advisor of the Surety in order to make sure that resources being invested were efficiently utilized. The Air Force did not accept my involvement for most of the period. This decision by the Air Force caused cost increments in labor and materials that were ultimately paid out by our firm as all other costs. The Air Force never provided a reason for this debarment which was downright unjustified. The cost increments being claimed herein are calculated as follows:

Labor costs after default:	$20,474.21.
Inefficiency losses fue [sic] to lack of Surety's Supervisor 33% or $6,756.49 which is the true value of this claim.	

By letter dated 24 July 1992 the CO issued a final decision denying ETC's claim stating in pertinent part that ETC's right to proceed on the contract had been terminated on 20 May 1991; that the contract was completed and accepted by the Government on 27 May 1992, that the Surety had named a technical representative, Mr. Crespo, who it was agreed by both parties would act on behalf of the Takeover Surety at meetings and inspections throughout the contract; that the surety had named a capable superintendent, Mr. Guardado, who was the inspector's point of contact; that the surety represented that Mr. Salazar would act only in the capacity of technical manager or consultant; and that neither the surety nor ETC incurred 33 percent inefficiency costs due to the lack of surety supervision. (R4, tab 2)

By letter dated 26 October 1992 ETC appealed the CO's adverse decision, electing to have the matter adjudicated under Board Rule 12.2, the EXPEDITED Procedure and Board Rule 11, record submittal (R4, tab 11).

ASBCA No. 45302

On 14 May 1991 ETC submitted to the Government "Invoice No. 7" for contract work completed less retainage and prior payments in the amount of $141,912.09 (R4, tab 6).

By letter dated 19 May 1992 ETC, in pertinent part, filed a claim for interest in the amount of $4,257.36 as follows (R4, tab 9):

Unjustified Suspension of Payment

On 14 May 1991, ETC submitted Invoice No. 7 for $141,912.09 with a prompt payment discount period of 10 days. Due date for payment was 24 May 1991.

The above monies were withheld by the Government for several months and finally released on 06 September 1991.

Period from 24 May to 06 September is 105 days or 3.5 months. Assuming 1% interest costs on these funds we have 3.5%

[2] The Government's arguments in support of its motion will be referred to as "Govt. brief". Appellant's Opposition to the Government's Motion will be referred to as "app. brief." References to attachments to either the Government's or the appellant's briefs will be referred to as "attach."

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interest accrued less 0.5% for the prompt payment discount.

Actual interest costs 3.5% − 0.5% = 3.0%
Value of this claim: 0.03 × $141,912.09 = $4,257.36

By letter dated 24 July 1992 the CO issued a final decision stating in pertinent part that at the 22 May meeting the subject of the unpaid earnings was discussed and the Surety and the Government subsequently entered into a Takeover Agreement wherein it was agreed that upon acceptance of satisfactory progress and in accordance with FAR provision 49.404 the remaining balance of the contract price would be paid directly to the Surety; and that ETC, on 30 July 1991, executed an Instrument of Assignment transferring to the Surety "all rights, title and interest in all monies due or to become due from the contract." (R4, tabs 2, 5; 45277, exh. G-3)

On 30 October 1992 ETC appealed the CO's adverse decision, electing to have the matter adjudicated under Board Rule 12.2, the EXPEDITED Procedure and Board Rule 11, record submittal (R4, tab 10).

DECISION

At the outset we must declare our disappointment with the quality of the briefs submitted by the parties on the issue of the Board's jurisdiction. It is evident that the briefs were hastily done with a minimum of research and effort. Suffice to say that the attorneys did their clients, and the Board a disservice with their laxity in presenting an adequate legal discussion of the issues which go to the Board's jurisdiction over these appeals.

It is settled law the Board's jurisdiction extends only to appeals by a contractor described in 41 U.S.C. § 601(4) as "a party to a Government contract other than the Government." *Aries Marine Corporation*, ASBCA No. 37826, 90-1 BCA ¶ 22,484, citing *CBI Services, Inc.*, ASBCA No. 34983, 88-1 BCA ¶ 20,430. An appeal from a contracting officer's decision by a person not a party to the contract must be dismissed for lack of privity of contract. *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193. For us to have jurisdiction over ETC's appeals, therefore, we must conclude that ETC was in privity of contract with the Government at the time the claims arose and that its right to file the claims was not extinguished by the default termination. *Peerless Insurance Company*, ASBCA No. 28887, 88-2 BCA ¶ 20,730.

The facts in ETC's appeals relevant to this issue are essentially undisputed. ETC was default terminated on 20 May 1991, whereupon, the surety, Cia. International, agreed to finish the contract. On 30 July 1991 ETC executed a Notice and Instrument of Assignment assigning to the surety "Payments due or to become due" under contract C-0009. Cia. International and the Government, on 23 August 1991, executed a takeover agreement wherein the surety agreed to act as the prime contractor and that Mr. Salazar, ETC's president, would act "only" as a technical representative or consultant for the surety, without any authority to administer the contract. At the time of the default termination 72 percent of the contract work had been completed. Unquestionably, at the time of the default termination Cia. International by subrogation succeeded to the rights and liabilities of the terminated contractor. *Sosa y Barbero Constructores, S.A., CIA. International de Seguros, S.A., and Misener Marine Construction, Inc.*, ENG BCA No. PCC-57, 90-2 BCA ¶ 22,823, citing, *Peerless Ins. Co., supra.*

ETC, no longer in privity of contract with the Government after the termination, would be entitled to payment for work which was properly performed prior to the default termination. *J.G. Enterprises, Inc.*, ASBCA No. 27150, 83-2 BCA ¶ 16,808. However, if the amount remaining of the contract price is insufficient to cover the Government's cost to complete and liquidated damages, if assessed, the payment to the contractor is reduced by the excess amount. *Id.*, citing *Mark Smith Construction Company, Inc.*, ASBCA Nos. 25058, 25328, 81-2 BCA ¶ 15,306.

ASBCA No. 44237

ETC claims it is entitled to an equitable adjustment in the contract price for delay allegedly incurred when the Government disapproved appellant's submittal No. 21, its proposed roofing system, because the rustic red color was unacceptable.[3] ETC argues that it is the proper party in interest because "of the mere fact that [it] was the party in privity of contract when the injuries came into existence and when the expenditures were incurred" and the surety's rights to the retained funds do not attach until the take-

[3] The Board has determined that ETC was entitled to an equitable adjustment for having been required to install "colonial red roof" vice the "rustic red" proposed in submittal No. 21. *Engineering Technology Consultants, S.A.*, ASBCA No. 42649, 93-3 BCA ¶ 26,134, 8 June 1993.

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over agreement is executed. In the alternative appellant contends that since it was the party making the payments it is the proper party to file the claim "pursuant to subrogation of rights by operation of law of the Republic of Panama," and should the termination for default be held to be improper, the surety's right to the contract's unpaid balance would be inferior to ETC's.

The Government contends the Board lacks jurisdiction inasmuch as ETC was not the contractor in privity with the Government having been terminated for default and therefore is not the proper party to bring this appeal. The Government further argues that the record is silent as to the surety certifying the claim or authorizing ETC to bring the claim.

We limit our decision to whether ETC was the contractor in privity of contract with the Government at the time the alleged delay was experienced and we need not determine the merits of the claim. The alleged delay complained about was experienced between November, 1990 and March, 1991, a period when ETC was the contractor in privity of contract with the Government. Accordingly, ETC is the proper party in interest to bring the claim. Based on this determination we need not address the other arguments raised by ETC.

The Government's motion to dismiss is denied.

ASBCA No. 45277

ETC claims entitlement to an equitable adjustment of $6,756.49 due to the Government's refusal to allow Mr. Salazar onto the project site after the default termination and while he was "performing duties on behalf of Cia. International de Seguros, S.A." The Government contends the Board lacks jurisdiction since ETC, having been terminated for default, was no longer the contractor in privity of contract with the Government.

Unquestionably the claim is predicated on material facts which did not exist until after ETC had been terminated and the surety was the contractor in privity of contract with the Government. Accordingly, the claim and the right to appeal a CO's adverse decision rests with the surety and not Mr. Salazar or ETC.

The Government's motion to dismiss is granted.

ASBCA No. 45302

ETC claims entitlement to interest in the amount of $4,257.36 due to the Government's failure to timely pay ETC's invoice No. 7 submitted 14 May 1991. The Government contends the Board lacks jurisdiction since ETC, having been terminated for default, and was no longer the contractor in privity of contract with the Government.

Invoice No. 7, submitted prior to the default termination, was for work accomplished prior to the termination. ETC's entitlement to interest involves a material fact in dispute and would be predicated on whether the delay in the payment of the invoice was reasonable or not. Since a contractor generally is entitled to payment for work successfully accomplished prior to a default termination, the motion to dismiss, under the circumstances, is without merit.

The Motion to Dismiss is denied.

SUMMARY

The Motions to Dismiss in ASBCA Nos. 44237 and 45302 are denied. The Motion to Dismiss in ASBCA No. 45277 is granted.

[¶ 26,335] Ordway Construction Co., Inc.

ASBCA No. 44149, August 26, 1993. Contract No. N62470-91-C-1015.

Interpretation of Contracts—Patent Ambiguity—Duty to Seek Clarification.—A construction contractor was not entitled to an equitable adjustment for being required to perform work beneath a site proposed for buildings, even though it argued that errors in the drawings persuaded it that site work directly beneath the proposed buildings was not required, because discovering what it believed was a government error did not entitle it to assume that the site work was not required. The contractor reported in a letter that it had not included anything in its bid price for work under the buildings and that the drawings elsewhere stated that the buildings were to be constructed under a separate contract. However, when the government, by amendment, changed the drawings to state that the area under the proposed buildings was to be excavated, the contractor knew or should have known that site work was required beneath the proposed buildings.

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For the appellant: Outland, Gray, O'Keefe & Hubbard, Chesapeake, Virginia, by David A. Hearne. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Garrett L. Ressing, Trial Attorney, Chesapeake Division, Naval Facilities Engineering Command, Washington, D.C.

Before STEMPLER, RUBERRY, and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: This is a timely appeal from a contracting officer's decision denying appellant's claim for compensation for a direction to perform work alleged to be outside the requirements of the contract. The Contract Disputes Act is applicable. A hearing was held and both parties have filed briefs. Only entitlement is before us for decision.

FINDINGS OF FACT

1. In early 1991, Welford Lucy, president of appellant (Ordway Construction Co., Inc. (OCC)) received a call from a Navy contract specialist inquiring whether OCC would be interested in submitting a quote for site work at the Cheatham Annex that was required to be finished by 1 March 1991. The contract was to be awarded by purchase order through the small purchase procedures in order to expedite the matter.* OCC replied that it would be interested (tr. 17-18; exh. G-1).

2. OCC received a package of drawings and specifications to quote on from the Government and it used this package to prepare its quote of $33,000. The Government then called OCC and asked why the quote was so high because the Government needed to keep the price below $25,000. OCC explained that much of the money was involved in the gravel parking lot that the drawings required to be constructed. The Government then revised the drawings to delete the parking lot. OCC revised its quote to $20,900 on 7 February, and the Government issued the purchase order on 11 February 1991 (tr. 18-20; R4, tab 1).

3. Drawing C-1 is relevant to this dispute. The original version of C-1 showed a gravel parking lot to be constructed by the site contractor and the elevations for the grading outside of the footprint (outline) of two proposed buildings: the Command/Administration Building and the Vehicle Maintenance Building. These two buildings were marked, "to be constructed under separate contract." Actually, the buildings were scheduled to be built by a Seabee unit as a training exercise. Finished floor elevations for the buildings were given but there was no information that would enable the site contractor to grade within the proposed buildings' footprints and no information on the buildings themselves. The evidence established that it is industry custom that site work, absent other directions in the contract, starts 5 feet outside of a building's footprint. Site work inside this 5 foot area and inside the building's footprint is considered building construction. Various items on the drawings were represented by different styles of lines. A solid line broken by two dashes represented the limits of grading. The outer limits were marked with such a line and the buildings' footprints were also marked with such a line. On 22 January 1991, the Government, wishing to provide the information necessary to perform the site work under the proposed buildings, had issued amendment 0001 to the solicitation. The amendment revised drawing C-1 and changed the finished floor elevations and added the notes "excavate to 31.25' " and "excavate to 31.00' " to the notes inside the two building footprints. The amended drawing also gave grading elevations. Mr. Lucy testified that these notes did not have any significance to him when he prepared appellant's quote or make any sense to him because the depths to which the notes directed him to excavate were higher than the existing elevations. The actual number for the elevations appeared inside the footprints but a line under the numbers appears to point to areas outside the footprints. It cannot be determined from the drawings whether these lines point to locations outside the 5 foot building construction zone extending from the buildings' perimeters. Additional elevation information for areas outside of the footprints was also given. The broken line indicating the limits of grading around the buildings' footprints was replaced by a solid line (R4, tab 1; tr. 35-36, 39-40, 58, 77; exh. G-2).

4. On 4 February 1991, the Government had issued amendment 0002, revising drawing C-1, deleting the requirement for a gravel parking lot. The broken line indicating the limits of grading was again present

* FAR Part 13 allows the use of expedited small purchase procedures for contracts under $25,000.

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for the buildings' footprints (R4, tab 1; tr. 36-37).

5. On 22 February 1991, OCC signed the purchase order resulting in contract No. N62470-91-C-1015. The firm fixed price construction contract called for completion of the work by 1 April 1991. The work was described as "site work for Vehicle Maintenance Building and Administrative Headquarters Building at the Naval Supply Center, Cheatham Annex, Williamsburg, Virginia" (R4, tab 1).

6. The contract specification contained the following provisions:

> 01010 ¶ 1.4
>
> It is the declared and acknowledged intention and meaning to provide and secure Site Work for Vehicle Maintenance Building and Administrative Headquarters Buildings complete and ready for use.
>
> * * *
>
> 02220 ¶ 3.4.2 Backfill and Fill Material Placement
>
> Provide under paved areas and in the locations indicated for the two proposed buildings. Place in 6-inch lifts. Place backfill material adjacent to structures as the structural elements are completed and accepted. Backfill against concrete only when approved. Place and compact material to avoid loading upon or against the structure.
>
> * * *
>
> 02220 ¶ 3.5.1 General Site
>
> Compact underneath areas designated for vegetation and areas outside the 5-foot line of the proposed structures to 85 percent of ASTM D698.
>
> * * *
>
> 02220 ¶ 3.5.2 Structures, Spread Footings, and Concrete Slabs
>
> Compact the top 12 inches of subgrades under the two proposed buildings to 95 percent of ASTM D698 using a sheepsfoot roller. Compact fill and backfill material to 95 percent of ASTM 698.
>
> 02220 ¶ 3.5.3 Adjacent Area
>
> Compact areas within 5 feet of structures, and proposed structures to 90 percent of ASTM D698.

(R4, tab 1)

7. Mr. Lucy assumed the specification sections requiring work under the proposed buildings did not apply to the contract he was quoting for and applied to the eventual building contractor because some elements in those sections clearly could not be performed by the site contractor. Mr. Lucy did realize, however, that some of the language in the specification sections which required work under the buildings could be read to apply to his contract. He testified:

> This [section 3.4.2] could very well apply to the building contractor, whoever that was to be. At the time, I didn't know when I bid the job. That could apply to the building contractor as well, if not more so than the site work because that's within the building.

(Tr. 41-42)

8. The wage rates required by the contract were for highway construction. These rates are proper for site work outside of the buildings' footprints. A higher rate is appropriate for work inside the footprint because it is considered building construction (tr. 45-46, 79).

9. The job progressed well and in late March, when OCC was almost finished and only the seeding remaining to be done, Mr. Lucy received a call from a Seabee reserve unit in Pennsylvania inquiring about the work OCC was doing. Mr. Lucy explained OCC's work and the Seabee wondered who was going to perform the site work within the buildings' footprints because the Seabees did not plan to (tr. 22-24).

10. On 25 March 1991, OCC called the Government regarding the site preparation within the footprints of the buildings. OCC stated that the drawings stated that the buildings would be constructed under a separate contract and that OCC interpreted this as meaning that its contract would not involve any work within the limits of the buildings' lines. OCC stated that it was not responsible for site work within the buildings footprints (R4, tab 2).

11. On 26 March 1991, the Government ordered OCC to perform the disputed work (tr. 23-24).

12. On 28 March 1991, OCC wrote the Government, taking exception to the Government's direction to perform the site work within the buildings footprints. OCC stated that it had not included anything in its bid price for this work because the drawings stated that the buildings were to be constructed under a separate contract and because there were no details in the contract as to how to prepare the grade in this area. OCC stated that it would perform the work under protest (R4, tab 3).

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13. On 1 April 1991, the Government replied to OCC's 28 March letter, stating that the site work within the buildings' footprints was part of the contract because of ¶¶s 3.4.2, 3.5.1 and 3.5.2 of the specifications (R4, tab 4).

14. The contract work was completed on 2 April 1991 (tr. 23-24).

15. On 29 October 1991, OCC filed a claim for $11,441.50 for the work done under protest. The claim was broken down into approximately $8,700 for fill, $1,100 for stripping top soil and $1,600 for compaction. OCC stated that it had been instructed by the inspectors as to the elevations to grade to and what materials to use since the contract did not provide this information. Specifically, OCC stated that while the drawings did furnish finished floor elevations for the buildings, they did not provide any information as to whether the buildings would be constructed with a slab or with footers, and that the finished floor elevation information was useless without the construction details (R4, tab 7; tr. 25-26, 30-32, 64-5).

16. On 29 January 1992, the contracting officer issued a decision denying the claim, stating that it was clear from ¶¶ 3.4.2, 3.5.1 and 3.5.2 of the specification that the work was included in the contract and that amendments 0001 and 0002 to the solicitation provided the information necessary to perform the work (R4, tab 8).

17. On 17 February 1992, OCC filed a timely appeal.

DECISION

The issue to be decided in this appeal is whether the contract required site work to be performed within the footprints of the proposed buildings. OCC says it does not and points to provisions in the drawings and specifications that support that view. The Government says it does and points to provisions in the drawings and specifications that support that view.

The specifications are confusing and conflicting. While it is true that certain portions (*e.g.*, ¶ 3.4.2, sentence 1) indicate site work was to be performed under the proposed buildings, other provisions indicate that these directions were merely left in the specification when the site work and building construction were separated for separate award (*e.g.*, ¶ 3.4.2, sentences 3-5). Additionally, the wage rate provisions of the contract tend to indicate that no work was to be performed within the footprints of the buildings. Nonetheless, OCC realized at the time it quoted, that the specification could be read to require work by the site contractor under the proposed buildings.

Similarly, the drawings are confusing and conflicting. As originally issued, they stated that the buildings were to be constructed under separate contract. Since the contract did not provide any information on these structures, and there was not sufficient information in the drawings to allow site work to be performed under the proposed buildings (*e.g.*, no elevations in the footprints), one could assume that industry custom would prevail and no site work would be performed within five feet of the buildings' footprints. Further, the "limits of grading" lines seemed to exclude the area under the proposed buildings from the contract. The matter was further complicated by the Government changing the outline line of the proposed buildings in amendment 0001 and back again in amendment 0002. Be that as it may, we are convinced that in amendment 0001, when the Government changed the drawings to state that the area under the proposed buildings was to be excavated, OCC knew or should have known that site work was required under the proposed buildings. OCC is correct when it points out that the elevations the drawings directed it to excavate to were above the existing elevations of the site. OCC, however, realized this at the time it was preparing its quote. The only explanation for this is that OCC read the note, realized that work was being required, and examined the elevations relevant to the work. That it discovered what it believed was an error in the Government's figures did not entitle it to assume that site work was not required. Merely discovering that Government specifications are defective does not entitle a contractor to ignore provisions that require work to be done. Given the totality of the circumstances, we find the Gov-

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ernment's interpretation to be the only reasonable one.

CONCLUSION

The appeal is denied.

[¶ 26,336] Spartan Building Corp.

ASBCA Nos. 43849, 44431, August 26, 1993. Contract No. N62467-88-C-0039.

Contract Disputes, Certification—Adequacy—Liquidated Damages.—A contractor's contention that to the extent appeals before the board concerned liquidated damages they arose from government claims and that therefore certifications were not required for the board to exercise jurisdiction over them was denied because the government had not asserted a claim against the contractor. The government had only withheld liquidated damages and denied the contractor's claims for an equitable adjustment. The contractor's first "claim" made no specific request for relief from the assessment of liquidated damages. A subsequent letter requested an equitable adjustment for interest on late contract payments and liquidated damages. The contracting officer's decisions concerning these claims did not expressly assert a government claim for liquidated damages. Both decisions merely denied, in relevant part, the contractor's requests for an equitable adjustment.

Contract Disputes, Certification—Adequacy—Amount Claimed v. Claim.—The board affirmed its prior decision dismissing a claim for inadequate certification because, by certifying only as to the amount claimed rather than the entire claim, the contractor qualified the scope of the claim certification so as to vitiate the effectiveness of the certification. The board declined the contractor's invitation to reconsider its initial position and take a less "hyper-technical" construction of the certification requirement in light of recent decisions of the United States Court of Appeals for the Federal Circuit, because the certification language used by a contractor must be sufficient so as to "bind the contracting organization in fraud and contract."

Contract Disputes, Certification—Adequacy—Common Sense Reading.—Certification of the amount claimed instead of the claim itself could not be cured by a "common sense" reading of the claim certification documents, because the certification must still contain the "critical information" required by the Contract Disputes Act. The CDA mandates that the contractor certify that the claim is made in good faith. Certificates of pricing and overhead costs submitted by the contractor could not cure the defective certification, because these documents were limited in scope and did not satisfy the CDA certification requirements, even when all the certifications were examined together.

Contract Disputes, Certification—Applicability of Requirement—Nonmonetary Nature of Claim.—An earlier decision dismissing a contractor's appeals for lack of certification of the underlying claims was reversed to the extent that it dismissed the portion seeking a 131-day extension of time, because, as a nonmonetary claim, the contractor's request for a time extension did not have to be certified.

For the appellant: Gardner & Kewley, Metairie, Louisiana, by Thomas F. Gardner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Richard A. Gallivan and Helen D. Rosen, Trial Attorneys.

Before RUBERRY, SPECTOR, and LIPMAN, Administrative Judges.

Reconsideration of 93-1 BCA ¶ 25,506; motion denied on ASBCA No. 44431, granted on ASBCA No. 43849 with respect to extension of time.

RUBERRY, Administrative Judge: Appellant timely moves for reconsideration of our decision dismissing its appeals without prejudice for lack of jurisdiction (93-1 BCA ¶ 25,506). That decision concerned solely whether appellant's claim certifications substantially complied with the requirements of the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1). In the instant motion, appellant argues that the Board erred on the facts and law in its earlier decision. The Government has responded in opposition. Familiarity with our initial decision is presumed.

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Appellant, now represented by different counsel, contends for the first time, that subject appeals arise from Government claims and, therefore, CDA certifications are not required for the Board to exercise jurisdiction over them. Appellant asserts that our jurisdiction derives from the contracting officer's final decisions which allegedly denied appellant's requests for relief from the Government's retention of $141,600 in liquidated damages. As this argument is presented for the first time, a review of the pertinent facts is required.

Contract performance extended past the 29 December 1990 contract completion date. By letter dated 22 January 1991, appellant was notified that the Resident Officer in Charge of Construction (ROICC) had begun and would continue to assess liquidated damages in the sum of $1200/day (R4, ASBCA No. 44431, tab 62). Thereafter, liquidated damages were withheld from each of appellant's monthly pay invoices.

On 26 February 1991, appellant submitted a "claim" to the contracting officer requesting an equitable adjustment of $734,708.74, which included, *inter alia,* subcontractor costs, direct costs, home office overhead, consultant fees, and profit associated with Government caused delays. Also claimed was entitlement to a time extension of 131 calendar days (R4, ASBCA No. 43849, tab 103). The "Background Summary" in the claim document mentioned that the contract contained a liquidated damages provision, but there was no specific request for relief from the assessment of liquidated damages. The contracting officer's 12 September 1991 final decision denied appellant's claim in its entirety (R4, ASBCA No. 43849, tab 104). The decision did not make any reference to liquidated damages. The appeal from this decision was docketed by the Board as ASBCA No. 43849.

By letter dated 25 November 1991, appellant submitted a request for equitable adjustment in the amount of $348,499 in which it sought compensation for additional costs resulting in part from the Government's "[i]mproper assessment of liquidated damages" (R4, ASBCA No. 44431, tab 116). Specifically, appellant stated:

> Because of the Government's refusal to acknowledge and provide extensions of time for delays imposed by the Government, the Government saw fit to withhold liquidated damages as well as other funds otherwise properly due to Spartan. Spartan seeks recovery of the costs of *interest* for this money as demonstrated herein. [Emphasis added]
>
> * * *
>
> Interest on late contract payments and liquidated damages $28,598.00

On 6 March 1992, the contracting officer issued a final decision stating in pertinent part:

> You seek $28,598.00 for interest on late progress payments and liquidated damages .... Liquidated damages were withheld on December 30, 1990, because you were not making satisfactory progress in finishing the job .... Since the alleged Government delays are the basis for this quantum item and since the issue is currently being litigated before the ASBCA, no entitlement to this claim item can be granted.

(R4, ASBCA No. 44431, tab 118) The appeal from this decision was docketed by the Board as ASBCA No. 44431.

Under the CDA, all Government claims must be the subject of a decision by the contracting officer. 41 U.S.C. § 605(a); *Van Elk, Ltd.,* ASBCA No. 45311, 93-3 BCA ¶ 25,995 (20 April 1993); *Melcon Systems, Inc.,* ASBCA No. 40825, 90-3 BCA ¶ 23,139. It is evident from the above facts that neither the 12 September 1991 nor the 6 March 1992 contracting officer's decisions expressly asserted a Government claim against appellant for liquidated damages. Both decisions merely denied, in relevant part, appellant's requests for an equitable adjustment.

However, appellant argues that, in the process of denying its claims, the contracting officer's decisions effectively ratified the ROICC's assessment of liquidated damages. Appellant asserts that by denying all time extensions, the contracting officer determined that the Government properly withheld $141,600 in liquidated damages (which would be the amount for 118 days of delay). In support of this argument, appellant points to the Board's holding in *Bradford Electric Co.,* ASBCA No. 43356, 92-3 BCA ¶ 25,205.

In *Bradford,* the liquidated damages assessed were less than $50,000, so that no certification issue was involved. The issue resolved there was whether the right of the Government to assess liquidated damages was in dispute.

Here, neither of appellant's claims specifically sought remission of the liquidated damages being withheld by the Government. Appellant's monetary requests for

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$734,708.74 and $348,499, respectively, are pure contractor claims which must be certified under the CDA, 41 U.S.C. § 605(c)(1).

Appellant also contends that the Board's original decision was incorrect as a matter of law. It encourages us to reconsider our initial position in light of *Heyl & Patterson, Inc. v. O'Keefe,* Nos. 91-1446, 92-1072 (Fed. Cir. Feb. 12, 1993) and *Fischbach and Moore Int'l Corp. v. Christopher,* No. 92-1092 (Fed. Cir. March 2, 1993) and apply a less "hypertechnical" construction of the certification requirement so as to conclude that appellant's claim certifications substantially complied with the CDA. In addition, appellant argues that a "Certificate of Pricing Pursuant to Defense, DFAR 252.233-7000" and a "Certificate of Overhead Costs" submitted in conjunction with each of the certified claims, satisfies the CDA's statutory requirements.

Appellant was not required to recite the exact language of the CDA, 41 U.S.C. § 605(c)(1), when it certified its claims. *Heyl & Patterson,* slip op. at 7, *citing, United States v. General Elec. Corp.* [31 CCF ¶ 72,180], 727 F.2d 1567, 1569 (Fed. Cir. 1984); *see also Fischbach and Moore,* slip op. at 8. However, the certification language used by a contractor must be sufficient so as to "bind the contracting organization in fraud and contract." *Fischbach and Moore,* slip op. at 9. We believe that, by certifying only as to the *amount claimed* rather than the entire claim, appellant qualified the scope of the claim certifications so as to "vitiate[] the effectiveness of the certification[s]." *LaBarge Electronics,* ASBCA No. 44401, 93-2 BCA ¶ 25,617 (2 December 1992). As we stated in our first decision, appellant is required under the CDA to certify as to the underlying facts asserted in support of entitlement, not just to the calculation of the amount of the claim. In *Heyl & Patterson* and *Fischbach and Moore,* the Federal Circuit noted that the contractors' certification language actually rendered the claim certifications broader than that required by the CDA. *Heyl & Patterson,* slip op. at 9; *Fischbach and Moore,* slip op. at 8. That is not the case with appellant's certifications.

Further, we do not agree with appellant that inclusion of a certificate of pricing and a certificate of overhead costs helps cure an otherwise defective CDA claim certification. Appellant points to *Transamerica Ins. Corp. v. United States* [38 CCF ¶ 76,374], 973 F.2d 1572 (Fed. Cir. 1992), while arguing in favor of a "common sense" reading of its claim certification documents. However, in affirming the use of a standard of substantial compliance when evaluating the adequacy of a certification under the CDA, the court stated that the claim certification must still contain the "critical information" required by the statute. *Id.* at 1580, *citing, General Elec., supra.* The CDA mandates that the contractor certify that the *claim* is made in good faith. Appellant's certificates of pricing and overhead costs are limited in scope and do not satisfy the CDA certification requirements, even when all the certifications are examined together. *See Norcoast-BECK Constructors, Inc.,* ASBCA No. 37977, 89-3 BCA ¶ 21,979; *Continental Maritime of San Diego, Inc.,* ASBCA No. 36733, 89-1 BCA ¶ 21,249.

While we affirm our earlier decision that appellant's monetary claims for $734,708.74 and $348,499, respectively, are not properly certified, it appears that appellant submitted a valid claim to the contracting officer for a 131-day extension of time. As a nonmonetary claim, appellant's request for a time extension does not have to be certified. *See Skip Kirchdorfer, Inc.,* ASBCA Nos. 40515, *et al.,* 93-3 BCA ¶ 25,899 (3 March 1993). This request was denied in the contracting officer's 12 September 1991 decision. Accordingly, appellant's entitlement to a time extension is properly within the scope of our jurisdiction.

CONCLUSION

As for ASBCA No. 44431, appellant's motion for reconsideration is denied. As for ASBCA No. 43849, appellant's motion for reconsideration is granted only with respect to appellant's claim for an extension of time.

[¶ 26,337] John E. Day Associates, Inc.

ASBCA No. 43758, August 30, 1993. Contract No. N62477-88-C-0154.

Interpretation of Contracts—Painting—Stripping.—A contractor's interpretation of a historic preservation contract's window drawing note as excluding some windows from contract paint stripping requirements was unreasonable because the contractor was

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inconsistent in defining the term "existing." The language in the note instructed the contractor to reinstall refurbished sashes for the windows "in existing frames." The contractor interpreted "existing" to mean that the frames were to be left in the same condition as found, meaning that they were not to be stripped of paint. The contractor's witnesses testified that this is the common usage of the word "existing" in the historic restoration trade. The government interpreted the word "existing" to mean simply "that was there" and contended that there was no basis for excluding the windows from the paint stripping requirements. When used elsewhere in the contract, the word was applied by the contractor as having the common definition of "existing," which is something that has actual or real being, and the contractor accomplished the required work or reinstallation with respect to the existing item.

For the appellant: Blum, Yumkas, Mailman, Gutman & Denick, P.A., Baltimore, Maryland, by Joseph C. Kovars. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Sterling Adams and Lisa C. Gerideau, Trial Attorneys, Naval Facilities Engineering Command, Alexandria, Virginia.

Before DUVALL, RUBERRY, and STEMPLER, Administrative Judges.

DUVALL, Administrative Judge: This appeal is taken from a contracting officer's final decision denying appellant's claim for an equitable adjustment for stripping paint from 46 windows as part of a family housing repair contract. Appellant interpreted a window drawing note as excluding the windows from contract paint stripping requirements. This appeal turns on the proper interpretation of language in the note that instructs the contractor to reinstall refurbished sashes for these windows "in existing frames." Appellant interprets "existing" to mean "as they are" or in the same, or pre-existing condition, meaning that the frames are not to be subjected to the following note (No. 13), which calls for the stripping of paint from, *inter alia*, wood frames. The Government understands the word "existing" to simply mean "that is", and contends that there is no basis for excluding the windows listed in note 12 from the paint stripping requirements of note 13. We agree with the Government.

Findings of Fact

On 2 April 1990, the Navy awarded appellant a contract in the amount of $1,194,650 for family housing repairs to four admiral's quarters, A, C, G and U, at the Washington Navy Yard, Washington, D.C. Three of the quarters, including Quarters A, the subject of this dispute, were located in what was designated as the historic area of the Navy Yard. The contract included installation of new HVAC systems, removal and/or replacement of piping, asbestos, and roofing, and selective renovations, which included such items as floors, kitchens, finish and rough carpentry and windows.

Quarters A, the traditional home of the Chief of Naval Operations, was completed in 1803. It has historical significance, and is decorated to a museum quality level. Quarters A has over a hundred windows, of 32 different sizes. Many of the windows in Quarters A are oversized; some are double hung windows approximately 12 feet high. An estimated 30 to 60 layers of paint had been applied to the windows over the years.

The procurement was by competitive negotiation. The project was considered to be general construction. However, special skills were required of proposers, since the work involved "historic construction." Accordingly, prospective proposers were pre-qualified. As part of the pre-qualification procedure, proposers were asked to submit their restoration experience during the past five years. Appellant was able to list ten historic projects it performed during that period. Appellant had extensive historic preservation experience.

Specification 08640, WOOD SASH RESTORATION, included the following provisions:

3.1 Restoration, General:

3.1.1 The extent of wood window restoration work is shown and scheduled on the drawings and specified herein; the work includes but is not limited to the following:

3.1.1.1 Removing all existing wood sash.

3.1.1.2 Stripping paint from both sides of wood sash including the fixed arched sash and transoms, wood sills, exterior of wood frames and stops and preparing surfaces for the application of epoxies, primers and paints.

* * *

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3.1.1.5 Removing existing weatherstripping, if any.

* * *

3.1.1.9 Field applying liquid and paste epoxies to wood sills.

* * *

3.1.1.12 Shop applying paint to the exterior of the wood sash.

3.1.1.14 Field applying paint to the exterior of the fixed arched wood sash and transom sills and related areas.

3.1.1.15 Field applying the specified primer and paints to the interior of the sills and exterior wood frame, trim and stops.

* * *

3.3 Strip existing paint and finishes to bare wood from exterior and interior of wood sash, wood frames, wood casings, sills, stops and trim. Follow OSHA guidelines when removing lead-base paint.

Drawing A-10, the Quarters A Window Schedule, contained a "window number" column beginning with window 1 and ending with window 103. A window number 96 was missing from the schedule but was shown on an architectural drawing. The residence actually had 102 windows. The window listed as 103 did not exist. (Tr. 159)

Central to this dispute are notes 10 through 15 of the window schedule, which read as follows:

10. THE FOLLOWING WINDOWS ARE TO BE REPAIRED IN PLACE. BROKEN GLAZING AND DAMAGED COMPOUND WILL BE REMOVED AND REPLACED. THE SCOPE OF REPAIR WORK FOR THESE WINDOWS DOES NOT INCLUDE THE REMOVAL OF EXISTING PAINT BUILD-UP OR OVERALL GLAZING REPLACEMENT.

MAIN HOUSE: 13 THRU 44, 52, 59, 72, 73, 74, 75, 83, 85 & 87.

GARAGES #2 & #3: 92, 93, 94, 96 THRU 102.

11. THE FOLLOWING WINDOWS ARE INTERIOR OR TRANSOM AND WILL NOT HAVE ANY REPAIR WORK DONE: 50, 51, 95, 53 AND 54.

12. THE FOLLOWING WINDOWS WILL HAVE THEIR SASHES REMOVED, TAKEN OFF SITE, HAVE THE PAINT REMOVED FROM THE SASH, BE REGLAZED, WEATHERSTRIPPED, PRIMED & PAINTED. THEY WILL THEN BE *REINSTALLED IN EXISTING FRAMES:* 1 THRU 12, 45 THROUGH 49, 55 THRU 58, 60 THRU 71, 76 THRU 82, 84, 86, 88 THRU 91. (emphasis added)

13. STRIP EXCESSIVE MULTIPLE LAYERS OF EXISTING PAINT TO BARE WOOD FROM EXTERIOR AND INTERIOR OF WOOD SASH, WOOD FRAMES, INTERIOR WOOD CASINGS, SILLS, STOPS AND ALL TRIM. PREPARE SURFACE FOR NEW PAINT FINISH.

14. ALL HARDWARE IS TO BE REMOVE [sic], CLEANED AND REINSTALLED. DAMAGED HARDWARE IS TO BE REPLACED TO MATCH EXISTING.

15. WHERE WOOD FRAMES, SASHES, AND SILLS ARE BADLY DAMAGED, ROUT IN NEW WOOD TO MATCH EXISTING.

Notes 13, 14 and 15 also appeared (with different numbers) on the window schedules for the other quarters covered by the contract. Specific instructions such as those contained in Notes 10-12 on the Quarters A schedule were not included in the schedules for the other quarters, which had fewer and less elaborate windows. While most of the windows in Quarters A had heavy paint layer build-up, window location and budgetary considerations led the Navy to limit work, as indicated in the notes.

The Quarters A Schedule also contained an "Existing Window Remarks" column that included instructions to repair such items as sills and sashes. Detail 3 of drawing A-11, Quarters A Window Details, depicted a cut diagram of a window and associated construction. The detail included a note stating "Exist. Construction, frame & trim to remain. Repair frame per specs." Detail 4 of the drawing included a note stating "Repair sash as per specs. Reinstall in existing frame."

An American National Standards Institute (ANSI) publication, WOOD WINDOW UNITS, was incorporated into the contract by reference. The stated purpose of the publication is to "establish nationally recognized standard performance requirements for materials, construction, and assembly of wood window units . . ." (Para 1.1). The publication contained separate definitions for a sill, a stop, casings, and window frame. No definition of trim was given. The definitions in the publication indicate that a sill and a stop may be included in a broad definition of the word frame, but that casings were not

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included as part of the frame. The frame definition did not include trim.

Appellant's Vice President of Estimating testified that during bid formation he reviewed the bid take-off from the drawings done by an employee and the specifications and drawings, and concluded that the stripping requirements in note 13 did not apply to the 46 windows specified in note 12 based on his definition of the word "existing". While the sashes were to be removed and renovated, they were to be "reinstalled in existing frames." He interpreted "existing" to mean that the frames were to be left in the same condition as found, meaning that they were not to be stripped of paint. Appellant's witnesses testified that this is the common usage of the word "existing" as used in the historic restoration trade. No corroborating evidence for a special trade usage of the word "existing" was presented.

Since note 10 specifically excluded paint removal from the windows listed in the note, and note 11 stated that no repair work was to be done on the five indicated windows, appellant's Vice President of Estimating testified that appellant concluded that the general stripping requirements of note 13 applied only to window 103 shown on the schedule, which was the only window not listed in the preceding three notes. This testimony conflicts with a letter written to the contracting officer by appellant prior to the appeal which acknowledged that notes 10, 11 and 12 covered all the windows of Quarters A. (R4, tab 14, at 2, 5) Appellant was unable to locate its bid papers or other corroborating evidence of reliance on its interpretation during bid preparation.

Appellant interpreted the term "frames" as inclusive of such items as wood casings, sills, stops and trim, which were separately listed for stripping in note 13 (tr. 74). The Government disagreed with appellant's inclusive interpretation of the word frame. According to a Government witness, a sill or a stop attached to a jamb may be part of a frame, as indicated in the aforementioned referenced publication, but casings and trim are not (tr. 165/177). We find based on this testimony and the aforementioned ANSI publication, that the term "frame" does not normally include casings or trim.

Appellant's interpretation of the meaning of the word "existing" differed when applied to its use elsewhere in the drawings, such as the aforementioned details on drawing 11. There "existing" was defined by appellant as well as the Government to mean the item (*e.g.* frame) "that was there." (Tr. 64) Appellant repaired "existing" items and reinstalled in "existing" frames as instructed elsewhere in the contract.

In July or August 1990 the dispute arose over the extent of work on Quarters A windows designated in Note 12 of drawing A-10. At the Government's request, appellant sent the Government a Request for Information (RFI) relating to the dispute. The Government answered the RFI in a 28 September 1990 letter directing appellant to apply note 13 to all Quarters A windows not designated in notes 10 and 11. Appellant accomplished the directed stripping and in November 1990 submitted a claim for the cost of stripping the 46 Quarters A windows listed in note 12, in the amount of $104,223.

DECISION

We find appellant's interpretation of the word "existing" as used in drawing note 12 to be strained and unreasonable for several reasons. First, appellant was inconsistent in defining the term. Where used elsewhere in the contract, appellant applied the common definition of "existing", which is something that has actual or real being (Webster's Third International Dictionary (1971)), and accomplished the required work or reinstallation with respect to the existing item. Yet it applied the alleged "historical renovation" meaning *i.e.*, to leave unchanged, only to note 12. Appellant failed to justify this inconsistency.

Second, we find appellant's uncorroborated testimony to be insufficient to meet its burden of establishing that widely accepted trade custom or practice gives the term a special meaning, at least in the context of drawing note 12. See *Bruce Anderson Company, Inc.*, ASBCA No. 29412, 32347, 89-2 BCA ¶ 21,872 at 110,030. Third, appellant's interpretation ignores the fact that the operative phrase in note 12 refers only to frames, while note 13 identifies "wood frames, interior wood casings, sills, stops and all trim" for paint stripping. We have found that a "frame" does not include casings and trim.

Finally, a contract must be read as a whole, giving meaning to all of its provisions if possible, rather than as rendering certain provisions useless or inoperative. *Hol-Gar Manufacturing Corporation v. United States* [10 CCF ¶ 72,885], 169 Ct. Cl. 384, 395; 351 F 2d 972, 979 (1965). Aside from ignoring references to casings and trim in note 13, appellant's interpretation of note 12 would mean that the note 13 stripping requirements would have no application to any Quarters A window. We have found that appellant un-

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derstood that notes 10-12 covered all of the windows in the building. The Government's interpretation, which we conclude is the only reasonable one, interprets the contract so as to give meaning to both notes 12 and 13.

The appeal is denied.

[¶ 26,338] Eveready Battery Company, Inc.

ASBCA No. 43640, August 30, 1993. Contract Nos. DAAA09-82-G-7810, DAAA09-85-C-0835, DAAA09-85-G-0019, DAAA09-86-C-1255.

Contract Disputes, Certification—Authority—Overall Responsibility.—Certification of a corporate contractor's claims by its assistant secretary and manager of contract administration was unauthorized because the contractor failed to show that the certifying official had the requisite overall responsibility for the conduct of the contractor's affairs in general. Although the certifier was responsible for the contractor's government contracts, nothing in the record indicated to what extent the contractor's overall business was comprised of government contract work. Without such information, the board was unable to determine whether responsibility for executing and managing the contractor's government contracts was adequate to satisfy the regulatory requirement for overall responsibility. The submission of a supplemental certification by the contractor's plant manager after the contracting officer's decision on the defectively certified claim did not retroactively render the claim properly certified. In any event, the contractor did not show that the plant manager was in charge of the contracts.

For the appellant: Coburn & Croft, St. Louis, Missouri, by Timothy F. Noelker. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Margaret A. Schuyler, JAGC, Trial Attorney.

Before RUBERRY, RIISMANDEL, and LUSSIER, Administrative Judges.

RUBERRY, Administrative Judge: The Board, *sua sponte*, directed the parties to address the adequacy of appellant's claim certification under FAR 33.207(c)(2). Appellant contends that its claim was properly certified by its assistant secretary, or alternatively by its plant manager, and has submitted affidavits and copies of corporate resolutions in support. The Government responded by filing a motion to dismiss, arguing that neither certifying official had requisite authority to certify the claim.

STATEMENT OF FACTS

From 1984 to 1986, the Government awarded appellant the above-referenced contracts to supply batteries. The batteries were manufactured in appellant's plant at Bennington, Vermont. In 1987 a dispute arose concerning whether utility costs properly could be allocated to these contracts (R4, tabs 6, 7). By letter dated 8 December 1987, appellant submitted a $167,001 claim to the contracting officer (R4, tab 8). The claim was accompanied by a properly-worded certification (41 U.S.C. § 605(c)(1)) executed by J.F. O'Keefe—Assistant Secretary.

By letter dated 28 March 1988, appellant revised the claim to $146,337 (R4, tab 9). This revised claim was also accompanied by a properly-worded certification executed by Mr. O'Keefe.

On 10 June 1988, the contracting officer denied the claim, but failed to apprise appellant of its appeal rights under the Contract Disputes Act (CDA), 41 U.S.C. § 605(a) (R4, tab 10).

By letter dated 22 February 1991, appellant submitted a "formal claim" under the CDA renewing its previous request for an equitable adjustment in the amount of $146,337 (R4, tab 11). Once again, the claim was certified by J.F. O'Keefe, this time as Assistant Secretary, Manager, Contract Administration. By letters dated 17 April 1991 and 17 July 1991, the contracting officer denied appellant's claim in its entirety (R4, tabs 12, 13). On 15 October 1991, appellant filed a timely notice of appeal and complaint with the Board, copies of which were also sent to the contracting officer. Included with the complaint was a "Supplemental Certification of Claim" containing language conforming to 41 U.S.C. § 605(c)(1) and signed by Jonathan K. Perryman, Plant Manager, Bennington, Vermont. Although a copy of the complaint, with enclosures, is indicated on the cover letter to the Board as sent to

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the contracting officer, there is no evidence that it was received by the contracting officer. Nor does the record show that any claim was submitted to the contracting officer subsequent to the 22 February 1991 claim.

After reviewing the record, the Board directed the parties to address the adequacy of appellant's claim certification in light of *United States v. Grumman Aerospace Corp.* [36 CCF ¶ 76,013], 927 F.2d 575 (Fed. Cir.), *cert. denied,* 112 S. Ct. 330 (1991). The Government responded by filing a motion to dismiss, arguing that the Board lacks jurisdiction due to the absence of a proper certification. In support of its position, appellant submitted the affidavit of Jerry F. O'Keefe. It states:

1. My name is Jerry F. O'Keefe. I am employed by Eveready Battery Company ("Eveready"), Checkerboard Square, St. Louis, Missouri 63164. I have been employed with Eveready originally under the Union Carbide Corporation and, later, the Eveready Battery Company, since 1960.

2. At all times relevant to this appeal, I have been the Assistant Secretary of Eveready Battery Company and its Manager of Contract Administration.

3. At all times relevant to this appeal, I have had the authority to enter into and manage all contracts with the Federal Government for and on behalf of Eveready. Consequently, I am an officer of Eveready and have overall responsibility for the conduct of Eveready's affairs with the Government.

4. In preparation for this appeal dated October 11, 1991 and received by the ASBCA on October 15, 1991, I personally assisted in coordinating the additional certification of Jonathan K. Perryman. At the time Mr. Perryman made his certification, which was immediately prior to its filing, he was Plant Manager of Eveready's plant in Bennington, Vermont. In that role, Mr. Perryman was a senior company official in charge of Eveready's plant at the location involved in this appeal.

Appellant also submitted the affidavit of Harry L. Strachan, III in which he attests in part:

2. I am now and at all times relevant to this claim have been Vice President, General Counsel and Secretary of Eveready Battery Company, Inc. ("Eveready").

3. J.F. O'Keefe is now and at all times relevant to this case has been the Assistant Secretary of Eveready.

4. As Assistant Secretary for Eveready, Mr. O'Keefe is an officer of Eveready and has the authority to bind Eveready with respect to a claim.

5. In addition, Jonathan K. Perryman was at the time this claim was made and at the time he made his certification the Plant Manager for Eveready's Bennington facility. In that capacity he too had authority to bind the company with respect to the claim.

In addition, appellant submitted copies of corporate resolutions which authorized Mr. O'Keefe, on behalf of appellant, to submit bids to and execute contracts and contract modifications with the federal Government.

DECISION

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1), requires that all claims in excess of $50,000 be certified by the contractor. Proper certification of a claim is a prerequisite to the Board's jurisdiction to adjudicate claims in appeals filed prior to the date of enactment of the Federal Courts Administration Act of 1992. P.L. No. 102-572, § 907(a)(2), 106 Stat. 4506, 4518 (29 October 1992); *Lawlor Corp.,* ASBCA No. 45154, 93-3 BCA ¶ 26,181, 25 June 1993; *Arnold M. Diamond, Inc.,* ASBCA No. 40885, *on mot. for recon.,* 93-3 BCA ¶ 26,083, 7 May 1993, *aff'g,* 93-2 BCA ¶ 25,680; *George Hyman Constr. Co.,* ASBCA Nos. 44155, 44361, 44362, 93-2 BCA ¶ 25,870, 24 February 1993. Federal Acquisition Regulation (FAR) 33.207(c)(2) defines those individuals who may execute the claim certification on behalf of a corporate contractor:

(2) If the contractor is not an individual, the certification shall be executed by—

(i) A senior company official in charge at the contractor's plant or location involved; or

(ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

Accordingly, since appellant filed its notice of appeal with the Board on 15 October 1991, the Board lacks jurisdiction if the certification was not executed by a proper individual. Further, appellant bears the burden of demonstrating by substantial evidence that the certifying official met the requirements of FAR 33.207(c)(2). *Fidelity and Deposit Co. of Maryland,* ASBCA No. 40327, 91-1 BCA ¶ 23,312.

As for the claim certifications executed by J.F. O'Keefe, appellant contends only that Mr. O'Keefe qualifies under the second

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prong of the regulation, FAR 33.207(c)(2)(ii). Moreover, inasmuch as the batteries were manufactured in Vermont and Mr. O'Keefe is located in St. Louis, it is clear that he does not qualify under the first prong. Also see Mr. Strachan's affidavit, *supra,* regarding Mr. Perryman's position. Consequently, appellant must establish that as the Assistant Secretary and Manager of Contract Administration, Mr. O'Keefe, at the time he signed the certification(s), had "'overall responsibility for the conduct of the contractor's affair in general." *Grumman,* 927 F.2d at 580 (quoting FAR 33.207(c)(2)(ii)).[1]

A subordinate officer may qualify as a certifying official, *Kimmins Contracting Corp.,* ASBCA Nos. 43800 *et al.,* 93-3 BCA ¶ 26,000, 27 April 1993, and the evidence submitted suggests that Mr. O'Keefe may indeed have "authority to bind Eveready with respect to a claim." However, appellant has failed to demonstrate that Mr. O'Keefe had the requisite overall responsibility within the meaning of the above FAR provision. Although it appears that Mr. O'Keefe was/is responsible for appellant's contracts with the federal Government, nothing in the record indicates to what extent appellant's overall business is comprised of government contract work. Without such information, we are unable to determine whether responsibility for executing and managing appellant's government contracts is "adequate to satisfy the regulatory requirement that the certifier have 'overall responsibility for the conduct of the contractor's affairs in general.' " *Johnson Controls, supra* at 8.[2]

With regard to Mr. Perryman's certification, a certification submitted after a contracting officer's decision on an uncertified or defectively certified claim does not retroactively render the claim properly certified. *DMS,* ASBCA No. 43595, 92-2 BCA ¶ 24,952; *Jarke Corp.,* ASBCA No. 43509, 92-2 BCA ¶ 24,987 at 124,561. There is no evidence that his certification was received by the contracting officer nor that any claim was submitted after 22 February 1991. *Cf. Carmona Industrias Electricas, S.A.,* ASBCA No. 42996, 93-3 BCA ¶ 25,975, 6 April 1993. In any event, appellant has not shown that Mr. Perryman was "in charge" of the contracts. *Cf. Ingalls Shipbuilding, Inc. v. O'Keefe* [38 CCF ¶ 76,470], Fed. Cir., Feb. 12, 1993, 12 FPD ¶ 13.

CONCLUSION

Appellant has not established that a properly certified claim was submitted to the contracting officer.

The appeal is dismissed without prejudice to appellant's right to submit a properly certified claim to the contracting officer and to timely appeal from an adverse decision or failure to render a decision.

[¶ 26,339] General Dynamics Corp.

ASBCA No. 39866, August 24, 1993. Contract No. N00024-81-C-2134.

Cost or Pricing Data—Data to Be Disclosed—Subcontract Data.—A contractor's motion for summary judgment of an appeal from a contracting officer's decision that reduced the prices of a shipbuilding contract on the grounds of defective pricing by a subcontractor was denied because the contractor did not show as a matter of law that the government could not prove that the subcontractor's defective data resulted in a contract price increase. The contractor contended that the remedy under the prime contract's Price Reduction for Defective Cost or Pricing Data clause did not apply to the subcontract, which was awarded under an earlier contract, and that the government did not rely on the subcontract data in negotiating the prime contract. The contractor did not show that the

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[1] While appellant alleges otherwise, Mr. O'Keefe's positions in the company, Assistant Secretary and Manager of Contract Administration, certainly do not avail appellant of the rebuttable presumption adopted in *United States v. Newport News Shipbuilding and Dry Dock Co.* [37 CCF ¶ 76,095], 933 F.2d 996 (Fed. Cir. 1991), where the contractor's Executive Vice President was found to be qualified to certify the claim. In *Newport News,* the court stated that "certification by a corporate officer, without explanation, necessarily implies that the contractor is representing that he has the requisite 'overall authority,' at least where his title is not inconsistent therewith." Also see, *Fischbach and Moore Int'l Corp. v. Christopher* [38 CCF ¶ 76,483], No. 92-1092, (Fed. Cir. 2 March 1993); *Johnson Controls World Services, Inc. v. Garrett* [38 CCF ¶ 76,477], No. 92-1051, n.4 (Fed. Cir. Feb. 19, 1993).

[2] We also take notice that the Eveready brand of batteries is well-known in the commercial market.

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Truth in Negotiations Act precluded a defective pricing action in a later contract based upon data that formed the basis of negotiation of the earlier contract.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—A government motion for summary judgment of an appeal from a contracting officer's decision that reduced the prices of a shipbuilding contract on the grounds of a subcontractor's defective pricing was denied because the contractor's advancement of one legal theory in support of its summary judgment motion, that is, that the government could not prove reliance on the data, did not constitute abandonment of other positions raised in the pleadings. The record showed that disputed material facts remained as to the date upon which the contractor and subcontractor reached a price agreement and as to whether the subcontractor was entitled to an offset.

For the appellant: Saul, Ewing, Remick & Saul, Philadelphia, Pennsylvania, by John W. Fowler, Jr. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and James H. Haag, Trial Attorney.

Before LIPMAN, RUBERRY, and VAN BROEKHOVEN, Administrative Judges.

LIPMAN, Administrative Judge: This is an appeal from a contracting officer's decision which determined that the prices of (a) the captioned negotiated contract for the construction of Trident-class ballistic missile submarines and (b) a subcontract purchase order should be reduced as a result of defective pricing relating to cost data provided by appellant's subcontractor, Artisan Electronics Corporation. This appeal has been filed pursuant to a sponsorship agreement between appellant and Artisan permitting Artisan to proceed in appellant's name.

Appellant filed a Motion for Summary Judgment, which was followed by the Government's Cross Motion for Summary Judgment and further responses by the parties to both of the motions. Our statement of facts and decision on the motions rest upon the present documentary record, and proposed findings of fact advanced in the motions and uncontested by the opposing party. The sole affidavit before us is an affidavit submitted by appellant's in-house counsel.

STATEMENT OF FACTS

On 30 September 1978, appellant and the Navy entered into Contract N00024-78-C-2453 (Contract 2453), under which appellant, as design agent for the Trident-class submarine, was to procure long lead time materials and equipment for the Trident submarines identified as SSBN's 734 and 735. Contract 2453 contained the Defense Acquisition Regulation (DAR) clauses 7-104.29(a) "Price Reduction for Defective Cost or Pricing Data (1970 Jan) and 7-104.42(a) "Subcontractor Cost or Pricing Data (1970 Jan)."

Under Contract 2453, appellant issued to Artisan Electronics Corporation (Artisan) requests for quotations seeking subcontracts for the supply of cable assemblies for missile tube interface harness wiring systems, which were among the long lead time items in the contract. In response to the request for quotations, Artisan proposed a price of $550,024 for each of three shipsets, contingent upon the simultaneous award of the two subcontracts under Contract 2453 and a subcontract under Contract 2201, which also required the cable assembly. On 7 July 1981, appellant issued three separate purchase orders for the three shipsets on the basis of "not to exceed" prices, subject to an audit to be conducted by appellant.

On 16 January 1981, Artisan entered into a collective bargaining agreement with Amalgamated Local 427 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. The agreement was in effect until 15 January 1984.

On 23 September 1981, appellant completed an audit of Artisan's pricing proposal for the three shipsets. The audit determined that the unit cost proposed by Artisan for each shipset was $490,886, of which $250,841 was comprised of material costs, including quotes from vendors, as follows:

Source	1 Ship Set	3 Ship Sets
ITT Cannon Electric	$121,445.76	$364,337.28
Stanford Applied Eng.	59,270.02	$177,810.06
D. G. O'Brien, Inc.	3,840.00	11,520.00

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Appellant gave advance notice to the Government of the award of the subcontracts; the notice referred to Contract 2453.

On 15 October 1981, Artisan placed a purchase order with Bendix Corporation (Bendix) and, on 31 October 1981, Artisan placed a purchase order with Stanford Applied Engineering (SAE). Both purchase orders were for material to be used in performing the subcontract.

On 7 January 1981, the Navy awarded appellant Contract N00024-80-C-2201 (Contract 2201), on a fixed price incentive basis, for the construction of the SSBN 733 Trident-class missile submarine, with options for the construction of SSBNs 734 and 735. Contract 2201 contained the DAR clauses 7-104.29(a) "Price Reduction for Defective Cost or Pricing Data (1970 Jan)" and 7-104.42(a) "Subcontractor Cost or Pricing Data (1970 Jan)." In connection with that contract, appellant submitted a certificate of current cost and pricing data dated 31 October 1980, the date of the parties' agreement on the price of the SSBN 733.

On 7 January 1982, the Navy and appellant entered into the captioned contract (Contract 2134), on a fixed price incentive basis, for the construction of SSBNs 734 and 735. Contract 2134 contained the DAR clauses 7-104.29(a) "Price Reduction for Defective Cost or Pricing Data (1970 Jan)" and 7-104.42(a) "Subcontractor Cost or Pricing Data (1970 Jan)."

On 6 January 1982, appellant certified that its cost or pricing data with respect to Contract 2134 was accurate, current and complete as of 30 December 1981.

Under Contracts 2201 and 2134, appellant entered into subcontracts with Artisan under which Artisan was to supply harness assembly shipsets for incorporation into the vessels.

The DAR 7-104.29(a) clause entitled "Price Reduction for Defective Cost or Pricing Data (1970 JAN)," found in each of the contracts, provided, in pertinent part:

> If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because:
>
> * * *
>
> (ii) a subcontractor, pursuant to the clause of this contract entitled "Subcontractor Cost or Pricing Data" or "Subcontractor Cost or Pricing Data—Price Adjustments" or any subcontract clause therein required, furnished cost or pricing data which was not complete, accurate and current as certified in the subcontractor's Certificate of Current Cost or Pricing Data;
>
> * * *
>
> the price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction.
>
> * * *

The DAR 7-104.42(a) "Subcontractor Cost or Pricing Data (1970 JAN)" clause, found in each of the contracts, stated, in pertinent part:

> (a) The Contractor shall require subcontractors hereunder to submit, actually or by specific identification in writing, cost or pricing data under the following circumstances: (i) prior to the award of any subcontract the amount of which is expected to exceed $100,000 when entered into; (ii) prior to the pricing of any subcontract modification which involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed $100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.
>
> (b) The Contractor shall require subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that to the best of their knowledge and belief, the cost or pricing data submitted under (a) above is accurate, complete, and current as of the date of agreement on the negotiated price of the subcontract or subcontract change or modification.
>
> * * *

Contract 2453 contained the following clause:

> J-3 RELATIONSHIP OF LLTM TO SHIPBUILDING CONTRACTS
>
> The shipset of long lead time material (LLTM) to be procured under this contract covers items that are contractor-furnished material under shipbuilding contracts. Because of long lead time character of this material, procurement is being initiated under this contract in advance of execution of applicable shipbuilding contracts, to facilitate adherence to planned TRIDENT Program schedules. It is intended that the shipbuilding con-

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tract for the eighth hull of the TRIDENT shipbuilding program will provide that upon execution of that contract the shipbuilder automatically will assume total responsibility for the respective shipset of LLTM as CFM for the respective hull including items previously ordered from vendors or fabricated in-house whether or not delivered and items remaining to be ordered. *The shipbuilding contract will also provide, among other matters, that all costs related to the respective LLTM shipset, direct and indirect, incurred or to be incurred, and any payment made under this LLTM contract on account of such costs shall be deemed to be costs incurred and payments made under the shipbuilding contract.* This includes the cost incurred associated with Program Management of the LLTM contract for Hull eight. *To reflect the foregoing, upon execution of the shipbuilding contract, the Contracting Officer will appropriately reduce the estimated cost of this contract.* To permit implementation of the above stated intent, the Contractor agrees that all contracts and subcontracts with vendors will include legally sufficient provisions for substitution of the Government or the Government's designee for the Contractor, as the Government may direct. Further, with respect to items of LLTM being fabricated or provided by the Contractor in-house, the Contractor agrees to the substitution of the Government's designee for the Government under this contract, as the Government may direct. [Emphasis added]

Contract 2134 included the following clause:

H-63 CONTRACTOR FURNISHED EQUIPMENT

(a) Under Contract N00024-78-C-2453, the Contractor, as design agent for the TRIDENT Class Submarine also is procuring certain long leadtime materials and equipment for the TRIDENT ships identified as SSBN's 734-735. As of the effective date of this contract with regard to Item 0005, all equipment and materials which are being, have been or will be procured for said ships under Contract N00024-78-C-2453 shall be deemed to be equipment and material furnished by the contractor for the performance of this contract. The direct and indirect costs, both already incurred and to be incurred, of such equipments and materials shall be deemed to be costs arising under this contract and the incurrence of such costs and all payments made under Contract N00024-78-C-2453 shall be deemed to be costs incurred and payments made under this contract as of the dates of such incurrence and payments, respectively. The parties acknowledge that each of the prices set forth in Section B of this contract opposite Items 0001 and 0005 include full allowance for the corresponding number of shipsets of long leadtime materials provided for in Contract N00024-78-C-2453. Accordingly, as soon as possible after execution of this contract, and after the exercise of any option under Clause H-36, as the case may be, the estimated cost of Contract N00024-78-C-2453 shall be reduced accordingly.

On 7 January 1982, the date that the parties entered into Contract 2134, they also executed bilateral modification P00012 to Contract 2453. The modification stated as follows:

WHEREAS, by Contract N00024-81-C-2134 the Government is procuring the construction of the FY 81 TRIDENT Class Submarine (SSBN 734) and Special Provision H-63, entitled "Contractor Furnished Equipment", of that Contract provides that as of the effective date of that Contract all equipment and materials which are being, have been or will be procured under this Contract N00024-78-C-2453 for the FY 81 TRIDENT Class Submarine shall be deemed to be equipments and materials furnished by the Contractor for the performance of Contract N00024-81-C-2134, and that the estimated cost of this Contract N00024-78-C-2453 shall be reduced accordingly;

NOW THEREFORE, contemporaneously with the execution of contract N00024-81-C-2134, the total Estimated Cost of Line Item 0002 under Line Item 0002 under SECTION E of this contract and the Limitation of Government Liability under Line Item 0002 are decreased from $101,200,000.00 to zero dollars. The reduction of $101,200,000.00 is credited to the appropriation cited in Attachment A hereto.

On 16 February 1982, as agreed by the parties in clause H-63, appellant transferred the cable assemblies to be supplied under the subcontracts from Contract 2453 to Contract 2134.

On 4 March 1982, Artisan placed a purchase order with Mili Bride, Inc., for material to be used in performing the subcontracts.

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By letter of 24 May 1982, appellant requested Government ratification of the placement of the subcontracts with Artisan at the price proposed by Artisan. The letter referenced Contract 2453.

On 26 May 1982, Artisan's president certified that the cost or pricing data submitted in support of its proposal was accurate complete and current as of 28 April 1982.

On 20 May 1985, the Defense Contract Audit Agency (DCAA) issued a report of an audit of the cost or pricing data which had been submitted by Artisan to appellant in connection with its obtaining the subcontracts. The report identified Contract 2134 as the prime contract. DCAA concluded that Artisan did not disclose to appellant current, complete and accurate pricing data, which resulted in excess costs being paid by the Government. DCAA determined, more specifically, that the prices of Artisan's material vendors were lower than the prices to which Artisan certified, as follows:

As Certified		As Produced		Adjustment
Vendor	Cost	Vendor	Cost	
Pirelli	$ 57,380	Mili Bride	$ 51,413	$ 5,967
SAE	297,642	SAE	187,040	110,602
Bendix	267,586	Bendix	203,237	64,349
Total	$622,608		$441,690	$180,918

To the recommended adjustment of $180,918, DCAA added the figure of $124,522, which had been a 20 percent escalation figure added to the proposal, producing a total of $305,440. DCAA also recommended that, as the result of an existing union agreement which Artisan had entered into on 16 January 1981, Artisan's proposed labor rate of $7.72 per hour be reduced to $5.72. The total price reduction recommended was $569,859.

By letter of 3 July 1985, the contracting officer forwarded the audit report to appellant, indicated that the audit had determined that appellant had submitted defective cost and pricing data in Contracts 2134 and 2201, and provided appellant with an opportunity to comment upon the audit's findings and to communicate with Artisan before the Government took any action to reduce the contract prices as a result of the defective pricing.

Upon being afforded the opportunity to comment on a preliminary version of the DCAA report, on 4 April 1985, Artisan, through its accountant, commented on the report. Among other things, it asserted that, in the conclusions reached in this audit, consideration should have been given to the fact that Artisan experienced losses on previous subcontracts for similar shipsets. It also pointed out that Artisan's proposal was submitted to appellant in May 1981; that appellant's audit of the proposal was completed in August 1981; that appellant informed Artisan that a formal purchase order based on the proposal would be issued; that, in October 1981, Artisan proceeded to place orders for the necessary material; and that, in May 1982, appellant requested that Artisan execute a certificate of cost and pricing data, which Artisan did, as of 28 April 1982, despite the fact that Artisan had submitted its proposal in May 1981 and appellant's own certificate regarding Contract 2134 was effective as of 30 December 1981.

Artisan also stated that the audit had not established that the prices the Government paid appellant were increased as a result of reliance upon Artisan's estimated cost data and also took issue with the quantification of the proposed price adjustment. Artisan further indicated that it charged labor costs as indirect, rather than direct, costs. Artisan also asserted a right to offsets for an increased manufacturing indirect expense rate, increased G&A expense, and certain start-up costs. It offered no comment on the DCAA report's reference to Contract 2134 as the prime contract.

In its reaction to Artisan's comments, DCAA, among other things, noted that Artisan's indirect charging of labor costs had not been previously disclosed to DCAA.

By letter to DCAA of 13 September 1985, appellant compared the results of the DCAA audit with appellant's own pre-award audit of Artisan and asked that DCAA reevaluate its findings based upon appellant's audit. Among other things, appellant pointed out it had determined that the three major vendors proposed were ITT Cannon Electric, SAE and D.G. O'Brien, which differed from the DCAA findings. Appellant also noted that its audited amount of the proposals by the three vendors was $553,667, a total of $111,977 more than the $441,690 reported to have been the total of the actual purchase orders placed by Artisan, and not the

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$305,440 differential shown in the DCAA audit.

On 12 March 1986, appellant advised the Government's contracting officer that appellant had had no knowledge of pertinent information regarding Artisan other than that contained in appellant's proposal, which appellant audited. Appellant also stated, in pertinent part, as follows:

> As a result of this latest review and disclosure of data, it now appears the lower-tier subcontractors quotes provided by Artisan to the General Dynamics Subcontract Audit Department and upon which they based their recommendations and, subsequently the Division based its proposal for contract N00024-81-C-2134, were not the same vendors and/or prices to whom Artisan awarded its actual orders.
>
> Assuming that these orders are for exactly the same material as that contained in Artisan's quote to Electric Boat Division and which they presented to our auditors for review, the chronology of events clearly shows that these three orders were placed well in advance of Artisan's certification to us but were never disclosed to Electric Boat Division prior to award of our order to them. That is, Artisan was audited in September 1981; placed two purchase orders for their material in October 1981, and the last in March 1982; and in May 1982 certified to Electric Boat that their quote to us was current, complete, and accurate as of April 28, 1982, *even though they had already placed their orders to different vendors and/or in different amounts than those quoted to Electric Boat Division and to which they certified.*
>
> Accordingly, Electric Boat Division agrees with the DCAA's statement that 'this known data [on the part of Artisan) should have been furnished [to Electric Boat Division] in accordance with the Truth in Negotiations Act'. [Emphasis and bracketed text in original]

Appellant did take issue with the dollar amount at issue as a result of the defective pricing and with the DCAA conclusion regarding the Artisan labor rate. With respect to Contract 2201, appellant argued that, since it certified its costs prior to the date that it requested a bid from Artisan, there could be no defective pricing on that contract by appellant, the prime contractor. Appellant further advised that, with the concurrence of the contracting officer, it would engage in negotiations with Artisan toward a downward price adjustment.

By letter of 23 July 1986, the contracting officer commented upon the points raised in appellant's 12 March 1986 letter, and pointed out areas where it agreed and disagreed with appellant's contentions. The contracting officer authorized appellant to negotiate with Artisan to resolve the defective pricing issues, but at a greater price reduction than that recommended by appellant. The contracting officer also advised appellant that it would have agreed with appellant's position with respect to Contract 2201 had that contract been awarded on a firm fixed price basis but that, since it was an incentive contract, defective subcontractor cost or pricing data could still have an effect on the cost incurred by the Government.

Pursuant to a request of the contracting officer, DCAA, on 27 June 1986, provided the contracting officer with comments upon appellant's letter of 12 March 1986. Among other things, DCAA stated as follows:

> According to EB's [appellant's] chronology of events Artisan submitted their proposal to EB on 28 May 1981. On 25 June 1981 EB issued an Advance Notification of Award to Artisan and on 7 July 1981 PO's negotiable downward only were issued. On 23 Sept 81 EB completed their audit of Artisan's proposals with no cost questioned.
>
> Artisan, however, did not certify their costs until 28 May 1982 which was eight months after EB completed their audit. In this time span, Artisan not only switched certain vendors but also obtained significantly lower material prices, as indicated in our referenced Audit Report. It is obvious that these lower prices were not mentioned to EB when Artisan certified their costs on 28 May 1982. EB is wrong in calculating a lesser amount for the material cost adjustment based on vendor quotations given to their auditor by Artisan at the time of the EB review (September 1981). Artisan obtained lower prices prior to signing their certificate (5/28/82) and should have made these lower prices known. Their certification is defective and in view of the lower prices obtained the vendor quotations given to EB's auditor, as cited in EB's letter, are meaningless. We repeat, Artisan obtained lower prices and kept silent. Our recommended material price adjustment still stands.

Following further correspondence between the parties, the contracting officer, on 20 October 1988, acknowledged that there had been no defective pricing between appel-

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lant and the Government on Contract 2201, although he maintained that the subcontract price should be reduced because of defective pricing between Artisan and appellant. With respect to contract 2134, he restated the Government position that defective pricing had occurred on the prime contract level and that the price of the contract be reduced. He concluded that the Artisan union agreement had been disclosed to DCAA, but that Artisan had otherwise erred in the calculation of its labor rate. In addition, he reported that the Government had discovered what it considered to be additional defective pricing resulting from information provided by Artisan regarding its inclusion, in its proposal, of toolmaker and technician labor costs as direct, rather than indirect, costs, a change from past practice, which resulted in an overstatement of price. He also concluded that Artisan was not entitled to its claimed offset.

On 17 August 1989, the contracting officer issued a decision in which he concluded that Artisan had failed to disclose to appellant all information reasonably available within its organization as of the date of its agreement on price, 28 April 1982. The bases for the defective pricing determination were the material pricing and the certified labor rate.

With regard to the material pricing, the contracting officer concluded that Artisan had failed to inform appellant of actual purchase orders placed with vendors prior to 28 April 1982, the date of agreement on price between Artisan and appellant. The contracting officer recounted Artisan's contention that agreement on price had actually been reached in September 1981, that Artisan had certified its data as of 28 April 1982 only at appellant's request, that the purchase orders were, therefore, placed after the "shakehands" date on price, and that, as a result, no defective pricing had taken place. However, the contracting officer noted that appellant did not agree that price agreement was reached in September 1981 and confirmed the certification date of 28 April 1982 as the "shakehands" date, which the contracting officer stated was the Government's position.

The contracting officer described the other issue regarding the certified labor rate as stemming from Artisan's removal of costs of its non-union personnel from its overhead pool and including them as a direct cost which the Government considered to be inaccurate and to inflate the labor rate included in the price.

He determined that the total defective pricing that resulted was $482,500, or $160,833 per shipset of cable harness assemblies. He concluded that, with respect to Contract 2201, that the defective pricing existed only with respect to the subcontract and that the subcontract price should be reduced by $160,833 for the one shipset. With respect to Contract 2134, the contracting officer concluded that the contract price should be reduced by $321,667 for the two shipsets purchased under that contract. The inclusion of appellant's profit brought the total price reduction sought by the contracting officer to $382,193. The contracting officer also denied Artisan's contention that it was entitled to offsets.

On 18 August 1989, appellant, apparently not yet having received the contracting officer's decision, sent the contracting officer a letter in response to the contracting officer's letter of 20 October 1988. In its letter, appellant took issue with Artisan's contention that the two companies had definitized the purchase order price as of September 1981, stating that it was not appellant's practice to permit its auditors, who were communicating with Artisan at that point, to negotiate subcontracts, a task performed by the buyers of its purchasing department. Appellant also pointed to price negotiations with Artisan continuing into April 1982 as further supporting the conclusion that the "shakehands" date between appellant and Artisan was 28 April 1982, the effective date of Artisan's certification. Appellant also stated that it considered the Government's determination of defective pricing in material "to be clear and sound." Appellant stated, further, that it agreed with the Government determination of defective pricing with respect to direct labor in that there was no evidence that Artisan had ever disclosed the change in treatment of toolmaker and technician labor from indirect to direct costs. In addition, appellant asserted that it concurred with the Government's rejection of Artisan's offset claims. Appellant's letter concluded, as follows, with respect to an offer of settlement which had been made by Artisan:

> Although Artisan continues to deny the existence of any defective pricing ... [appellant] cannot support Artisan's proposed settlement. [Appellant] concurs with [the Government's] position, as presented in [the Government's letter of 20 October 1988], that the amount of defective pricing is $482,500.

By counsel's letter of 13 November 1989, received by the Board on 14 November

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1989, appellant timely appealed the contracting officer's decision. The notice of appeal included the following:

Artisan Electronics Corporation is bringing this appeal in the name of General Dynamics Corporation, pursuant to an agreement with General Dynamics Corporation. The undersigned attorneys represent Artisan Electronics Corporation.

The record includes an affidavit of appellant's in-house assistant division counsel. In his affidavit, he states that he supervised appellant's participation in this indirect appeal by Artisan; that the alleged subcontract defective pricing here is just one of many issues and cost disputes between appellant and the Government between 1985 and 1990; that appellant's letters of 12 May 1989 and 18 August 1989 in which appellant "seemingly adopted a position contrary to that which it now espouses in this appeal represent the good faith attempt by Appellant to resolve amicably" the Government's defective pricing claims; that appellant considers that Artisan's factual and legal arguments were not frivolous and that appellant took the arguments in good faith; that continued cooperation with Artisan in the prosecution of this appeal evidences appellant's continued belief that Artisan's litigative position has merit; and, that appellant does not concur with the contracting officer's decision which is the subject of this appeal.

The parties' pleadings reflect that they do not agree on the date of agreement on the price of the Artisan subcontracts and on other issues.

DECISION

In this appeal from a contracting officer's decision, seeking recovery, on behalf of the Government, of $382,193 as a result of alleged defective pricing by a subcontractor, Artisan Electronics Corporation (Artisan), each of the parties has moved that we grant summary judgment in its favor.

The Truth In Negotiations Act, 10 U.S.C. § 2306(f), as amended, (TINA) requires a contractor, in a contract of this size, to submit cost and pricing data and to certify that, to the best of its knowledge and belief, the cost and pricing data submitted are accurate, complete, and current. The contract's clause entitled "Price Reduction for Defective Cost or Pricing Data" calls for a contract price reduction if cost or pricing data furnished by the contractor are not complete, accurate and current. The contractor's duty to provide complete, accurate, and current data extends to that data provided by a subcontractor. Subcontractor data and vendor quotations are normally cost or pricing data which must be disclosed to the extent that the data should reasonably be expected to have a significant bearing on estimated costs or the contract price. *Norris Industries, Inc.*, ASBCA No. 15442, 74-1 BCA ¶ 10,482. Even where it appears that the prime contractor is not at fault, the prime contractor is responsible to the Government for the impact upon the prime contract of the subcontractor defective data. *Lockheed Aircraft Corporation v. United States* [15 CCF ¶ 84,015], 193 Ct. Cl. 86, 432 F.2d 801 (1971).

The purpose of TINA was well described in *Cutler-Hammer v. United States* [14 CCF ¶ 83,124], 189 Ct. Cl. 76, 84, 416 F.2d 1306, 1311 (1969), as follows:

> Public Law 87-653 was intended to apply to situations where the data supplied was incomplete, inaccurate, or non-current. It was aimed at cases where costs were known, but information about them was withheld. The statute (and the contract clause which is utilized pursuant to the statute) speaks in terms of Defective Pricing. If a cost is known when the contract price is being negotiated, it must be furnished accurately, completely, and on a current-price basis. If a contractor purchases components from a subcontractor, these costs are also subject to the Defective Pricing Clause.

The Government bears the burden of proving that the contractor failed to disclose accurate, complete and current cost and pricing data. *Sylvania Electronic Products, Inc. v. United States* [18 CCF ¶ 82,334], 479 F.2d 1342 (1973). In determining whether that burden has been met, the test is whether the undisclosed, noncurrent or inaccurate data would be reasonably expected to have a significant effect upon price negotiations. *Plessey Industries, Inc.*, ASBCA No. 16720, 74-1 BCA ¶ 10,603. Disclosure need not take the form of a formal, written submission, and the contractor's obligation is fulfilled if the Government obtains the data in question in some other manner or had actual knowledge thereof. *See, e.g., Grumman Aerospace Corporation*, ASBCA No. 27476, 86-3 BCA ¶ 19,091; *Boeing Company*, ASBCA No. 33881, 92-1 BCA ¶ 24,414, *aff'd on reconsid.* 19 August 1991; *EDO Corporation*, ASBCA No. 41448, 93-3 BCA ¶ 26,135, 9 July 1993.

The Government must also prove that the defective data caused a significant overstatement of the contract price. In that effort,

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however, it is aided by a rebuttable presumption that the natural and probable consequence of nondisclosure is an increase in the contract price. At that point, the burden of persuasion shifts to the contractor, who must show that the defective data were not relied upon, or that the undisclosed data would not have been relied upon even if complete disclosure had been made. *Sylvania Electric Products, Inc., supra.* However, the ultimate burden of proving the causal connection between the defective data and an overstated contract price remains with the Government. *Conrac Corporation,* ASBCA No. 19507, 78-1 BCA ¶ 12,985.

We will grant a motion for summary judgment when there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. The moving party bears the burden of demonstrating both elements and the party against whom the motion is advanced is entitled to have all inferences drawn in its favor. *Paragon Van Lines, Inc.,* ASBCA No. 32294, 87-1 BCA ¶ 19,366. We proceed to apply these standards to each of the moving parties.

Appellant's Motion

In seeking summary judgment, appellant's basic argument is that the Artisan subcontracts under which the alleged defective pricing occurred were negotiated and awarded under the 1978 prime Contract 2453 and that, as a matter of law, the Government is, therefore, unable to meet its burden of proving that the price of prime Contract 2134 was increased as a result of data submitted by Artisan.

In support of its contention, appellant points to the subcontract (a) request for quotes, (b) proposal evaluation, (c) proposal audit by the prime contractor, (d) prime contractor advance notice to the Government of award, and (e) prime contractor request for Government ratification of award, all of which, it states, were conducted and performed under Contract 2453, while the clause providing the Government's remedy is the "Price Reduction for Defective Cost or Pricing Data" clause of Contract 2134. Appellant further argues that the Government's remedy, a reduction in contract price, is limited to a situation where incomplete, inaccurate, or noncurrent data is submitted for the negotiation of the contract having the remedy-granting clause.

Clause H-63 of Contract 2134 refers to equipment and material procured under Contract 2453 and deems them as furnished under Contract 2134. It also refers to the direct and indirect costs of such equipment and material and deems those costs, both already incurred and to be incurred, and payments made under Contract 2453 as costs arising and incurred under Contract 2134 and payments made under Contract 2134, as of the dates of their incurrence and payment, respectively. The Government relies on clause H-63 to bring the Contract 2453 subcontract cost and pricing data under Contract 2134 to enable it to pursue a defective pricing action, based upon that cost and pricing data, pursuant to the "Price Reduction for Defective Pricing Data" clause of Contract 2134.

Appellant, however, contends the purpose of clause H-63 is merely to transfer the material supplied under the Artisan subcontracts from Contract 2453 to Contract 2134, but not to bring the subcontracts themselves under Contract 2134. It argues that the purpose of TINA is to "provide a level playing field for the negotiation of government contracts," that the "playing field" for the Artisan subcontracts is Contract 2453, and that the determination as to whether defective pricing has occurred with respect to the subcontracts "must be made with reference to the factual context of the contract under which the Artisan subcontracts were awarded and the cable assemblies were purchased, Contract 2453." Appellant's argument continues:

> The Navy's position would result in measuring the completeness, accuracy, and currency of Artisan's cost or pricing data with reference to the price agreement dates, certifications, and negotiation of Contract 2134, the 1981 [sic] contract, which occurred years after the award of Contract 2453, the 1978 contract, the contract under which the subcontracts were awarded. Unpredictable and unfair results would follow. For example, cost or pricing data may be complete, accurate, and current with reference to the operative dates of Contract 2453 but not when scrutinized in the context of Contract 2134. In addition, when reviewed under Contract 2453, the subcontracts may be eligible for exemptions and other factual defenses, such as cost overruns exceeding the ceiling price, which would require [appellant] to absorb the increased costs caused by any defective pricing. Thus, TINA and the implementing contract clauses require the defective pricing analysis to be focused on the contract under which the subcontracts were awarded and thereby provide an equalized body of cost information for the

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pricing of government contracts. TINA does not empower the Navy to redetermine the price of any other contract to which the items and related costs might eventually be transferred. To bring the pricing of the Artisan subcontracts within the provisions of Contract 2134, as argued by the Navy, goes beyond the scope of TINA and the Price Reduction for Defective Cost or Pricing Data clause.

Appellant argues that the remedy provided by the "Price Reduction for Defective Cost or Pricing Data" clause is a creation of the clause in each individual contract, that the remedy exists only by virtue of the clause, and that the effect of the clause is limited to the contract in which it was created. Thus, appellant contends that, here, the appropriate contract for any defective pricing action based upon the Artisan subcontracts is Contract 2453 and that the Government has presented no facts to demonstrate that it relied upon the Artisan subcontract data in negotiating Contract 2134. Appellant would have us conclude, as a matter of law, that the Government can not maintain a defective pricing action under Contract 2134 based on the Artisan subcontracts.

We are unable to reach that conclusion. Our task is to ascertain the rights and obligations of the parties based upon a contract interpretation which, to the extent possible, finds meaning in all pertinent contract terms and reads none out of the contract.

In order for the Government to recover for defective pricing under the "Price Reduction for Defective Cost or Pricing Data" clause of Contract 2134, it must establish that incomplete, inaccurate, or noncurrent data were submitted and that the defective data resulted in an overstatement of the contract price. The key question here is whether the cost or pricing data in question, originally submitted by Artisan in connection with the performance of Contract 2453, became part of Contract 2134 for purposes of a defective pricing action under the latter contract.

We are unaware of any provision of TINA or its implementing regulations which would preclude a defective pricing action in a later contract based upon cost or pricing data which formed the basis of negotiation of an earlier contract, as long as that cost or pricing data performed a similar role with respect to the later contract. We must, therefore, look to the specific contract provisions and the manner in which the cost and pricing data related to, and were treated within, each of the contracts.

It is quite clear, based upon a reasonable reading of clause J-3 of contract 2453 and clause H-63 of Contract 2134, that the parties to the prime contracts at issue—appellant and the Government—fully recognized the long lead time nature of Contract 2453 and that material was procured under that contract for use in the individual shipbuilding contracts to follow. They clearly provided that the costs incurred in the performance of Contract 2453 were to be deemed arising out of Contract 2134, as of the date of Contract 2134, with respect to equipment and materials procured in Contract 2453 and deemed to be equipment and materials in Contract 2134 because of their use in Contract 2134.

Consistent with their expectation, and in implementation of the contract clauses, the parties decreased the estimated cost of Contract 2453 from $101,200,000 to zero and increased the estimated cost of Contract 2134 to reflect the transfer of long lead time items to the shipbuilding contract. Contract 2134 was, therefore, comprised, at least in part, of the cost of the items procured in Contract 2453, including those from the Artisan subcontract. Furthermore, the cost and pricing data which supported the negotiated price of Contract 2453 likewise supported the cost and pricing of Contract 2134 although the negotiations between the parties had occurred earlier with respect to Contract 2453. It follows, therefore, that any defect in the cost or pricing data submitted in support of the negotiation of Contract 2453 would be similarly defective with respect to Contract 2134 unless there was an adjustment in contract price to remedy the effect of the defective data prior to the inception of Contract 2134. Accordingly, an action under TINA to remedy an overstated price of Contract 2134 resulting from defective subcontract data originally submitted under Contract 2453 is well-founded and consistent with the purpose of the statute. The remedial clause is the "Price Reduction for Defective Cost or Pricing Data" clause of Contract 2134, the contract to which the costs were transferred and the contract which then became the object of the supporting cost and pricing data. Of course, the applicable burden of proof and presumptions, as discussed above, would apply. Since the cost or pricing data were originally submitted under Contract 2453, Government reliance upon that data must, initially, be demonstrated in the context of the negotiation of that contract and continuing into Contract 2134, as well.

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We are unable to share appellant's concern that this result would subject a contractor to unpredictable and unfair results. Considering the Artisan subcontract cost or pricing data within Contract 2134 for purposes of a defective pricing action does not alter appellant's obligations or the substantive law with regard to whether its cost or pricing data, or that of its subcontractor, are defective. The fact that the incentive pricing provisions of each of the contracts could conceivably lead to different cash flow results from a cost reduction is not a reason not to apply the provisions of Contract 2134. As the Government effectively argues, if we were to adopt appellant's position that the Government's only remedy lies under the provisions of Contract 2453, (a) how can that remedy be exercised since all of the costs were transferred out of Contract 2453 and (b) what purpose is served by the "Price Reduction for Defective Cost or Pricing Data" clause in Contract 2134 and to what cost or pricing data did appellant certify in its Contract 2134 certification?

We conclude that the Government is not precluded from maintaining a defective pricing action under the "Price Reduction for Defective Cost or Pricing Data (1970 JAN)" clause of Contract 2134 based upon cost or pricing data originally submitted under Contract 2453. Appellant's Motion for Summary Judgment is denied.

The Government's Motion

In its Cross Motion for Summary Judgment, the Government argues that since appellant, in its Motion for Summary Judgment, bases its entire argument on its contention that the Government cannot prove reliance on the subject cost and pricing data in the negotiation of Contract 2134 in view of the submission of the cost and pricing data in Contract 2453, appellant had abandoned all of its previous positions stated in its Complaint. Those positions included the allegation that Artisan's cost reductions occurred after its effective date of agreement on price with appellant which, appellant argued, leads to the conclusion that neither appellant nor the Government could have relied upon the cost reductions to Artisan when they negotiated the price of Contract 2134.

We do not agree. While appellant's Motion for Summary Judgment is based upon the one legal theory, its advancement of only that theory in support of a motion for summary judgment does not equate to abandonment of other positions advanced in the pleadings as defenses to the Government's claim, with regard to which it may present evidence later at trial should its motion fail.

The Government also points to appellant's letters which, it contends, constitute binding admissions by appellant that Artisan had submitted defective cost or pricing data, and it further maintains that the admissions are binding on Artisan, which is permitted to pursue this appeal before the Board only through appellant's sponsorship.

The Government is accurate in stating that Artisan can pursue the appeal only with appellant's sponsorship. However, a prime contractor need not be in full agreement with the merits of its subcontractor's position in order to sponsor an appeal on its behalf. *Taysom Construction Company,* ASBCA No. 41016, 91-2 BCA ¶ 23,710. The record includes an affidavit by appellant's in-house counsel in which he states that appellant supports Artisan's litigative position and attempts to explain the apparently clearly-stated position by principals of appellant in agreement with the Government as nothing more than statements made in furtherance of settlement efforts. At this time, we offer no comment upon the affidavit and how it squares with the contemporaneous correspondence except to indicate that, although we regard the letters as admissible evidence of appellant's opinion on the merits (although they may be more in the nature of opinions of law rather than admissions of fact), we do not regard them as binding, determinative of the merits, or as inconsistent with appellant's sponsorship of the appeal.

The crux of the Government's argument is that appellant has advanced no evidence resulting in a question of material fact and that the Government is, therefore entitled to recover as a matter of law.

With the exception of the limited affidavit already addressed, the record contains no affidavits and the parties, in advancing their motions, are apparently content to rest upon the documentary evidence. With respect to the Government's motion, the documentary record is insufficient to enable it to carry its burden of proof and to prevail as a matter of law.

It is quite correct, as the Government contends, that mere allegations in the pleadings are insufficient to establish a dispute of material fact in the face of evidence to the contrary. However, here the record consists of more than mere allegations by appellant and less than sworn affidavits by the Government. We are presented with contempo-

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raneous, but unsworn, documents of the Government, including correspondence, the audit report and contracting officer's decision, comprised of allegations of defective pricing, and contemporaneous, but unsworn, correspondence by Artisan denying the allegations. We are not prepared to grant summary judgment in the Government's favor simply because most of the documents were authored by Government officials.

The material facts in dispute include a question as to the date upon which appellant and Artisan reached agreement on the price of the subcontract. Artisan maintains that the two companies reached agreement in September 1981 but that, at appellant's request, Artisan dated its certificate 28 May 1982. Artisan argues that, had the true date of price agreement been reflected in the certificate, purchase orders for lesser amounts issued by Artisan subsequent to that "shakehands" date could not have been used as a basis for a defective pricing action.

On the present record, we are unable to determine the date upon which appellant and Artisan reached agreement on price, or, even if appellant is correct in its allegation that agreement was reached at the earlier date, whether appellant was required to request from Artisan, or whether Artisan was required to provide, an update of its cost and pricing data with notice of the lower purchase order information.

Other material facts apparently in dispute relate to the Government's allegation of defective pricing with respect to Artisan's treatment of labor and Artisan's contention that it is entitled to an offset.

Since there are material facts in dispute, the Government's Motion for Summary Judgment is denied.

Summary

Appellant's Motion for Summary Judgment is denied pursuant to the discussion above.

The Government's Cross Motion for Summary Judgment is denied since we have concluded that there are material facts in dispute.

[¶ 26,340] Techno Engineering & Construction, Ltd.

ASBCA Nos. 41539, 42810, August 27, 1993. Contract No. N62471-87-C-2457.

Modifications—Changes—Responsibility for Additional Costs.—A contractor was not entitled to compensation under the Changes clause of its contract to install a gas tank, because it failed to show by a preponderance of the evidence that the claimed costs were related to change orders. The contractor did not distinguish between the labor, material, and equipment costs anticipated and incurred for the original scope of work and presumably included and reimbursed in the bid price and any additional costs demanded by the unilateral change orders.

Pricing of Adjustments—Proof—Causation and Amount.—A contractor under a contract to install a gas tank was not entitled to recover the full amount of claimed additional office expenses allegedly caused by changed work and an extended performance period, because the amount claimed by the contractor was unreasonably high. A substantial portion of the claimed expenses was not related to performance of the work and was not recoverable under the Changes clause. The board allocated a reasonable measure of the contractor's monthly additional office expenses over the extended period for which the government was responsible and then subtracted the overhead already paid by the government under unilateral change orders. The board also added profit rate, bond premium rate, and interest under the Contract Disputes Act.

Delays—Overhead—Proof of Loss.—Under a contract to install a gas tank, a contractor was not entitled to recover unabsorbed overhead for a suspension of work between a stop work order and issuance of a unilateral modification, because it did not show that it was imprudent or impracticable to obtain new work or to shift work forces to existing work during the period of delay. The mere existence of a delay did not automatically entitle the contractor to unabsorbed overhead.

Liquidated Damages—Delays—Delay After Completion Date.—Although a contractor's performance under its contract to install a gas tank was delayed by government

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changes, the contractor was not entitled to recover its liquidated damages, because the record showed that it did not diligently prosecute its work. The contractor's unreasonable failure to do any work at the site for significant periods of time contributed to the late completion.

Contract Disputes, Relief Available—Injunctions—Board's Authority.—Under a contract to install a gas tank, a contractor was not entitled to a board order directing the contracting officer to remove and correct the government's evaluation rating of the contractor's performance, because the board lacked the authority to grant the type of injunctive relief that the contractor requested. Although the Contract Disputes Act authorizes the board to grant injunctive relief under limited circumstances, such circumstances were not applicable in the present case.

For the appellant: Michael A. Georgopapadakos, President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Ellen Evans and Wayne O. Hadland, Trial Attorneys, Naval Facilities Engineering Command, West Coast Litigation Team, San Bruno, California.

Before DELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

DELMAN, Administrative Judge: Appellant, Techno Engineering & Construction, Ltd., seeks compensation for Government-ordered changes and delay under its construction contract. It also seeks correction of an unsatisfactory performance rating. Jurisdiction of these appeals lies under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.* We sustain the appeals, in part.

FINDINGS OF FACT

1. On 16 September 1988, the Government sought firm, fixed price bids for the performance of work entitled "Renew Gas Tank, Building A-19 at Camp Catlin Area, Pearl Harbor, Hawaii." Insofar as pertinent, the work included the installation of a fuel storage tank atop a concrete pad, surrounded by a concrete retaining wall; adjacent steel stairs; the installation of an electric dispenser/pump, and related piping and connections. Originally, an underground tank was to be removed, but this work was deleted by amendment P00003.

2. On 1 February 1989, appellant submitted its bid, in the amount of $34,156. Award was made to appellant on 4 April 1989; contract completion was set for 16 October 1989. The contract contained the standard clauses for Disputes (Apr 1984), FAR 52.233-1; Changes (Aug 1987), FAR 52.243-4; and Suspension of Work (Apr 1984), FAR 52.212-12.

3. At or about the time of award, the Government decided to issue a contract modification to relocate the fuel tank. At the preconstruction meeting on 27 April 1989, appellant was given a new set of drawings and a pricing proposal was requested.

4. Appellant submitted a proposal and the parties entered into negotiations. They negotiated for a considerable period of time, and ultimately came to terms. Bilateral contract Modification P00003, dated 1 August 1989, relocated the fuel tank and added incidental work. The parties agreed that the contract price was to be increased by $5,035 and that contract completion was to be extended 45 calendar days, through 30 November 1989.

5. The contract required appellant to furnish daily reports, entitled "Daily Report to Inspector" (DRI), regarding its work activities. Section 01010, Paragraph 1.10 (R4, tab 1). Prior to 1 August 1989, appellant filed only two reports, reflecting site work on 19 and 25 July (exh. G-40).

6. For the next six weeks, appellant performed site work intermittently. See DRI Nos. 3 through 8 dated 3 August, 11 August, 15 August, 16 August, 12 September, 13 September, and 14 September. The record does not explain this erratic work pattern. As of 30 August 1989, with 90 days remaining to perform, appellant had completed only 5 percent of the work (R4, tab 15).

7. On 15 September 1989, appellant's excavation of the work site uncovered a 16-inch water line and a 15-inch sewer line (exh. A-44). The Government's project engineer visited the site on that date and advised appellant to stop work. By letter to the Government dated 15 September, appellant confirmed the project engineer's directive and awaited further direction (R4, tab 17). On 22 September 1989, the contracting officer issued contract Modification P00004 which directed appellant to suspend all activity on the project (R4, tab 18).

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8. The Government decided to relocate the fuel tank a second time, and to repair the existing trench excavated by appellant. The Government solicited a cost proposal from appellant on 28 September 1989, and enclosed a sketch of the new work (R4, tab 20).

9. On 13 October 1989, appellant submitted its cost proposal, an estimate, in the amount of $14,949, excluding repair to the existing asphalt pavement. Appellant also estimated a time extension of 90 calendar days to do this work and to complete the contract (R4, tab 22).

10. The parties entered into negotiations but this time they did not reach agreement. The Government maintained that appellant's proposed costs were unsubstantiated. Appellant submitted a revised estimate on 6 November 1989, in the amount of $12,925, excluding paving repair. The Government also found this proposal unsubstantiated and unacceptable. The parties exchanged letters regarding the reasonableness of appellant's figures in late November 1989 (R4, tabs 25, 26). However, the parties made no further progress in the negotiations. From 15 September to 5 December, when a unilateral modification was issued (below), the Government's stop work order was in effect. We find that this was an unreasonable period of time to hold up the contract work.

11. On 5 December 1989, the Government issued unilateral contract Modification P00005, which directed appellant to proceed with the relocation of the fuel tank and related incidental work. The unilateral change order increased the contract price in the amount of $3,200 and extended the contract completion date by a period not-to-exceed 60 calendar days. The change order also directed appellant to submit a detailed cost proposal by 8 December 1989, and indicated that the change order was to be definitized no later than 2 February 1990. (R4, tab 3)

12. By letter to the Government dated 11 December 1989, appellant acknowledged receipt of Modification P00005 and took exception to the Government's unilateral determination of contract price, which it interpreted as "not to exceed $3,200.00." Appellant contended that it had already incurred $2,912 of costs for the change and believed that the "ceiling price" was unfair. (R4, tab 30)

13. We find that appellant misunderstood the nature of the unilateral change order. It was not priced as a ceiling amount, and did not rule out additional compensation for appellant for the changed work. In fact, Modification P00005 solicited a further cost proposal from appellant, as stated above.

14. The parties met again on 12 December 1989. Appellant reiterated that it had already expended $2,900, and that it would cost approximately an additional $3,400 (total $6,300) to complete the change. The Government advised that Modification P00005 was subject to monetary revision if appellant could prove its costs. (R4, tab 31) Appellant's revised cost proposal of 6 November (finding 10) was over twice as high as its projected cost to complete, as stated herein.

15. On 3 January 1990, the Government requested a DCAA audit of appellant's latest cost proposal (exh. A-49). As far as we can tell, an audit was never conducted.

16. The Government's direction to proceed was sent to appellant on or about 5 December 1989, and was received by appellant on or before 11 December 1989. Appellant did not proceed with the work at this time. It chose to commence field work "after the holidays." Appellant returned to the site on 9 January 1990, approximately one month after receipt of the notice to proceed. See DRI No. 10, dated 9 January 1990 (exh. G-40).

17. When appellant returned to work, it encountered another site problem. The existing subgrade at the new fuel tank location was made up of a clay-like substance which could not be compacted at a 95 percent level per contract requirements. By letter dated 12 January 1990, appellant advised the Government of this fact, and awaited further direction (R4, tab 35).

18. The Government recognized that a further change in the scope of the work would be necessary to accommodate this site condition (exh. A-52). The proposed fix was to excavate wider and deeper to obtain a more suitable subgrade—one foot below the subgrade of the fuel tank's concrete slab and two feet beyond the containment walls. Appellant submitted a cost proposal for this extra work on or about 7 February 1990, in the amount of $3,874. Appellant also submitted a revised estimate for Modification P00005 at this time, in the amount of $13,102.

19. The parties could not agree on a price for either proposal. On 22 March 1990, the Government issued unilateral contract Modification P00006. This modification added $2,405 for the work to be performed under P00005 (relocation of tank), for a total adjustment of $5,605. The Government ex-

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tended the contract completion date 113 calendar days for this work. Modification P00006 also directed appellant to proceed with the additional excavation work which was the subject of appellant's 12 January 1990 letter. The Government increased the contract price by $3,255, and also granted appellant a 10 calendar day time extension for this work.

20. Based upon Modification P00006, the contract price was $48,051. The contract completion date was 2 April 1990.

21. Unlike the situation under Modification P00005, the Government did not suspend work pending issuance of Modification P00006. Between 12 January 1990 and 22 March 1990, appellant made substantial progress (see DRI Nos. 14 through 43), except for the brief period stated below.

22. Soon after appellant discovered the soil problem on 12 January, the weather turned bad—rain precluded any meaningful site work on the following dates: 16, 17, 18, 19, 24 January 1990. (See DRI Nos. 14 through 17, 20) Appellant did not ask for a time extension for weather-related reasons. To the extent there was any project delay, we find that this delay was concurrent with the delay caused by Modifications P00005 and P00006, for which the Government granted appellant a total of 123 days of additional time to complete the work.

23. The Government determined the project to be substantially complete on 13 April 1990. Since the completion date, as extended by the Government, was 2 April 1990, the Government withheld $275 for liquidated damages (11 days late at $25 per day).

24. By letter to appellant dated 21 May 1990, the Government advised appellant that its performance on this job was rated, overall, unsatisfactory. The letter explained the basis for the Government's decision. On 23 May 1990, appellant requested that the Government provide the documentation it relied upon to support its findings. On 13 June, the Government provided this information. (R4, tabs 83 through 85)

25. By letter to the Government dated 4 April 1990, appellant resubmitted its proposals under Modifications P00005 and P00006, in the amounts of $21,599 and $4,045 respectively, less amounts paid, and requested a contracting officer's decision (R4, tab 73). By letter to the Government dated 23 April 1990, appellant supplemented its claim by requesting delay damages in the amount of $32,323. The total amount of appellant's claim was $49,108.

26. The Government failed to issue a contracting officer's decision within 60 days of receipt of appellant's claim, as revised. 41 U.S.C. § 605(c)(1). Appellant timely appealed to this Board, and the appeal was docketed as ASBCA No. 41539.

27. During a prehearing conference in January 1991, it appeared that appellant had other claims under the contract which it desired the Board to consider, but which had not been submitted to the contracting officer for decision. The Board directed appellant to file a claim with the contracting officer, incorporating all claims under the contract.

28. By letter dated 6 February 1991, appellant filed such a claim with the contracting officer. In this claim, appellant reiterated its claims under Modifications P00005 and P00006 and for delay damages, but modified the amounts sought. It now sought $13,099 for Modification P00005 (relocation of the tank plus incidental work), $477 for Modification P00006 (additional excavation), and $8,511 for delay damages. The new claim also added a demand for return of liquidated damages ($275), a return of a withholding for payroll discrepancies ($266), and a return of general contract retainage ($1,000). It appears that the Government was unable to justify the latter two withholdings, and $1,266 was returned to appellant. The date of payment is not of record.

29. In its 6 February claim, appellant also challenged its performance rating. Appellant contended, *inter alia,* that the Government failed to follow certain administrative procedures in making the evaluation, and also claimed that its performance was not unsatisfactory. Appellant sought to have the unsatisfactory rating removed and/or corrected.

30. The Government did not issue a contracting officer's decision on the 6 February claim, and appellant appealed to this Board. The appeal was docketed as ASBCA No. 42810 and was consolidated with ASBCA No. 41539.

Appellant's Claims Under the Unilateral Change Orders

31. With respect to appellant's claim under Modification P00005, appellant seeks approximately $2,857 for equipment "ownership and operating expense." However, appellant did not base this amount upon ownership and/or operating expense, but on commercial rental rates. Appellant also did not explain in its claim, nor at trial, how it distinguished between equipment cost in-

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curred for the base contract work and that incurred for the change order work. We question this amount.

32. During the negotiation of the change orders, appellant's president advised the Government that it used a company known as "ENT" to supply certain equipment for the contract (R4, tab 51). Appellant's project engineer never heard of ENT (tr. 1/82). No such concern was registered in the State of Hawaii.

33. As for some other claimed costs, we note that dump truck rental agreement No. 19540 appears to reflect a 5-hour truck rental for 26 January 1990, yet the agreement indicates that the truck was driven 743 miles. Rental agreement No. 19492 reflects a two-day truck rental charge, but indicates that the truck was driven 1,163 miles. (Exh. A-3) Absent an adequate explanation of record, we question whether these costs pertain solely to Modification P00005. With respect to appellant's alleged dumping costs, we find that the dumping is not fully corroborated by appellant's daily reports. We question whether the 38.87 tons of dirt allegedly dumped relate solely to Modification P00005. Appellant was working other jobs concurrently with this one (exh. A-8).

34. As for labor, appellant claims approximately $4,511, and attaches daily reports and payroll forms in support. However, these documents make no distinction between base contract and change order work. Absent explanation from appellant, we question whether this labor was incurred solely to perform the extra work under Modification P00005.

35. Under Modification P00006 (additional excavation), appellant claims approximately $1,013 for equipment and $571 for labor, and supports its claim in a manner similar to that described above. Our findings regarding the lack of substantiation of these types of costs under Modification P00005 apply equally here.

Additional Office Expense For Extended Contract Period

36. Appellant introduced into evidence documentation which purportedly showed the additional office expense incurred by appellant on this job during the extended period of contract performance. This office expense reflected the wages and salaries of office personnel, and was direct costed to the claim. The salaries were for clerical help, project engineer, construction manager, and "administrator" (appellant's president). For the extended contract period of December 1989 through March 1990, appellant claimed additional office expense, attributable to this contract, in the amount of $9,642. (exh. A-7, -8). Based upon our review of the record, we believe that a substantial portion of this expense related to the protracted negotiations under Modifications P00005 and P00006.

37. According to appellant's claim, appellant's salaried personnel expense, as a percentage of contract revenue, is 14.16 percent (exh. A-6), which we find to be reasonable. By applying this percentage against anticipated contract revenue (the contract price) of $34,156, we find that appellant's anticipated office expense for this contract was $4,836.

The Government's Estimates

38. The Government's estimates, which were used to support the pricing of the unilateral contract modifications, were based upon the estimates of the Government's senior construction management engineer, Mr. Pang, the estimates of the project engineer and the use of the Means "estimating guide." Mr. Pang's production rates were ultimately used to price the modifications, since they were more generous than the Means guide (Fielding Affidavit).[1]

39. In general, the Government allowed additional labor, material, equipment cost, overhead and profit for all the additional work, but less than that claimed by appellant. The Government allowed the equipment rental rates supported by the contractor. For equipment owned by the contractor, the Government used equipment ownership rates derived from the Army Corps of Engineers' Ownership and Operating Expense Manual. Dumping costs were allowed at appellant's claimed unit price per ton, but at a lower total tonnage. (Fielding Affidavit)

40. The Government's estimate to relocate the fuel tank plus the extra incidental work was $5,605; the estimate for the additional excavation work was $3,255. These figures included allowances for overhead ($141.40 and $84.70 respectively), profit at 6 percent and bond premium at 1.44 percent. (See the

[1] As the parties were unable to complete the hearing in the time they had allotted for the trial, it was agreed that the remaining evidence would be submitted by record submittal. References in this opinion to "Fielding Affidavit," "appellant's rebuttal," etc., relate to these evidentiary submissions.

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Government's estimates included as part of appellant's rebuttal evidence).

DECISION

The Unilateral Change Orders

The Government extended this 180-day job a total of 168 days based upon Government changes. Per Modification P00003, appellant agreed to compensation for all direct and indirect costs for the first 45 days of extended performance, through 30 November 1989, but the balance of the period, 123 days, was extended and priced unilaterally by the Government—without appellant's agreement. Under the *Changes* clause, appellant has the contractual right to recover its increased costs related to the performance of the changed work and any extended performance period.

As a threshold matter, however, appellant has the burden to show, by a preponderance of credible evidence, that its claimed costs were incurred for the changed work in issue. Appellant has not met this burden. Generally, appellant failed to distinguish between, and to account for the labor, material and equipment cost anticipated and incurred for the original scope of work and presumably included and reimbursed in the bid price, and any additional cost demanded by the unilateral change orders. For this reason, and for the other infirmities recited in our findings (findings 31 through 35), we must deny appellant's direct cost claim for labor, material and equipment.

We hear appellant to argue that the Government's estimates under Modifications P00005 and P00006 were too low. However, the Government need not prove its estimates—it has no claim here. Appellant has the claim, and must prove that it incurred cost related to the changes beyond that allowed by the Government. Appellant has failed to do so. Hence, it may not recover.

Additional Office Expense Due to Extended Performance

Appellant claims that it incurred $9,642 in additional office expense related to the changed work and the extended period of performance (finding 36). We find this figure unreasonably high. Appellant's anticipated office expense for the entire contract was only $4,836 (finding 37). We believe that a substantial portion of the claimed expense is related to the protracted negotiations under Modifications P00005 and P00006 These costs do not relate to the performance of the work and are not generally recoverable under the *Changes* clause.

We reduce appellant's claimed costs by converting appellant's anticipated salary expense for the contract ($4,836) to a monthly rate of $806 ($4,836 divided by 6 months), and applying that rate over the extended period of the contract for which the Government was responsible (an additional 123 days or 4.1 months). Hence, a reasonable measure of appellant's direct costed additional office expense, allocated to the extended period of performance, would be $3,305 ($806 multiplied by 4.1). From this we must subtract the overhead already paid by the Government under the unilateral change orders ($226), for a subtotal of $3,079. We add the rates for profit (6 percent) and bond premium (1.44 percent) used by the Government, for a total recovery of $3,308, plus interest under the CDA. (Findings 37, 40) We have reviewed appellant's alternative methods of computation and reject them as unsupportable under the contract and the law.

Delay Costs: Unabsorbed Overhead During the Suspension Period

While we agree with appellant that it experienced an unreasonable suspension of work between the stop work order and the unilateral issuance of Modification P00005, this fact, alone, does not entitle appellant to compensation for unabsorbed overhead for this period. As we stated in *J.W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053 at 124,863:

> A contractor must prove more than the mere existence of delay to be entitled to unabsorbed overhead. It is well settled that a contractor must also show that the fixed G&A expenses could not have been reasonably absorbed by other work. [Citations omitted]

Appellant adduced no credible evidence to this effect—it provided no evidence that it was imprudent or impracticable to obtain new work or to shift work forces to existing work. *Capital Electric Company v. United States*, 729 F.2d 743 (Fed. Cir. 1984); *Decker & Co., GmbH*, ASBCA No. 38657, 92-2 BCA ¶ 24,970. Appellant's claim for unabsorbed overhead is denied.

Liquidated Damages

Appellant contends that its performance was delayed due to Government changes. We do not hear the Government to argue the point—the Government does not disavow that it granted appellant an additional 168 days to complete the contract, through 2 April 1990, pursuant to Modifications P00003, P00005 and P00006. However, with

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respect to the issue of liquidated damages, the question before us is not who was responsible for the 168-day delay, but who was responsible for the delay beyond that period, from 2 April 1990 through 13 April 1990.

This record is replete with evidence that appellant did not prosecute the work diligently, even well after the scope of work was settled. There were significant periods when appellant chose not to do any work on site at all, for no valid reason (findings 6, 16). We have no doubt that this fact contributed to late completion. We conclude that appellant was responsible for its failure to complete the project by 2 April 1990. We deny its claim for return of liquidated damages.

Interest on Amounts Withheld

In February 1991, appellant claimed for the payment of contract retainage in the amount of $1,226 which was subsequently paid to appellant. Appellant is entitled to interest on this principal amount under the CDA, from the date the contracting officer received the claim, until payment.

The Correction of Appellant's Performance Ratio

Appellant seeks a Board order directing the contracting officer to remove and/or correct the Government's evaluation of appellant's performance under this contract. This prayer for relief is injunctive in nature. While the CDA authorizes the Board to grant injunctive relief under limited circumstances, 41 U.S.C. § 605(c)(4), those circumstances are not apposite here. We have consistently held that we do not have the authority to grant the type of injunctive relief that appellant requests. *Tempo, Inc.*, ASBCA Nos. 37589, 37681, 93-1 BCA ¶ 25,276. *G. Bliudzius Contractors, Inc.*, ASBCA No. 42365, 92-1 BCA ¶ 24,605. *Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24,170. Appellant provides us with no good reason to depart from this well settled precedent.

We are mindful of appellant's concern that at some future date, the Government may use this unsatisfactory rating to deny appellant a contract award. See FAR 9.104-3(c). If the Government's actions prove unwarranted at that time, legal recourse may be had in a different forum. However, this tribunal cannot afford appellant the relief it seeks. The claim is dismissed.[2]

CONCLUSION

The appeals are sustained in part, dismissed in part, and are remanded to the contracting officer to determine quantum in accordance with this opinion.[3]

[¶ 26,341] Whitton Construction Co., Inc.

ASBCA No. 40756, August 30, 1993. Contract No. F14614-87-C-0022.

Modifications—Bar to Claims—Accord and Satisfaction.—A modification of a contract to install water lines and fire hydrants that increased the contract price for extra work did not constitute an accord and satisfaction that barred the contractor's claim for additional compensation, because the contractor executed a release that excepted claims in connection with the modification. Although the government failed to meet its burden of proving that the modification barred further liability for the contractor's claims, the contractor failed to prove entitlement to an amount in addition to that included in the modification.

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[2] Since we cannot grant appellant the remedy it seeks regarding its performance rating, we need not address whether the Government complied with its internal procedures to evaluate the work, or whether appellant's work was or was not satisfactory.

[3] After the evidentiary record closed, the Government submitted to the Board a copy of an indictment of appellant for mail fraud and Davis-Bacon Act violations. Several months thereafter, the Government submitted, for "the Board's information," a press release pertaining to the conviction of appellant for mail fraud. The Government did not argue that this matter somehow estopped appellant from pursuing its contract claims. See generally *Emich Motors Corporation v. General Motors Corporation*, 340 U.S. 558, 569 (1951). Nor did the Government move the Board to reopen the record to admit these documents. We can only conclude, under the circumstances, that the Government's submissions had no other purpose but to seek to predispose the Board against appellant. This was improper. The indictment, the press release and the conviction are not of record, and they have been ignored by the Board in the disposition of this appeal.

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For the appellant: Randy Whitton, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Robert P. Balcerek, Trial Attorney.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges

JAMES, Administrative Judge: This appeal arises from the contracting officer's final decision denying appellant's $16,228.44 claim for extra work under the captioned contract. The Board has jurisdiction of the appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§601 *et seq.* By agreement of the parties (tr. 5-6), we decide both entitlement and quantum. After a hearing in Wichita, Kansas, respondent submitted, but appellant did not submit, a post-hearing brief.

FINDINGS OF FACT

1. On 27 April 1987 the parties entered into contract F41614-87-C-0022 (contract 0022) to install water lines and fire hydrants at McConnell Air Force Base, Wichita, KS, for the fixed price of $64,580.00. Contract 0022 required completion of performance within 150 calendar days after receipt of notice to proceed and incorporated by reference the FAR clauses 52.233-1 "Disputes," 52.243-4 "Changes" and 52.236-9 "Protection of Existing Vegetation, Structures, Equipment, Utilities and Improvements," which required appellant to protect from damage all existing utilities at or near the work site, the locations of which are made known to or should have been known by appellant. (R4, tab 1)

2. No contract plans show the location of any underground telephone line (R4, tab 36; tr. 52-54). At the 1 May 1987 preconstruction conference respondent gave appellant a "dig permit" with communication drawings "CENTEL ALL SHTS" (exh. G-18; tr. 31, 41, 75, 80-82). Prior to the 1992 hearing, respondent's inspector Jim Whitaker copied a two-page portion of CENTEL drawings and verified that it showed an underground telephone line on the site (tr. 77-83). It is not clear which drawings in May 1987 comprised the "CENTEL ALL SHTS" and whether Whitaker's 1992 CENTEL drawings were identical to the 1987 CENTEL drawings accompanying the dig permit (tr. 82-83). The Board-ordered Government pretrial exhibit list included no CENTEL drawing. When offered in evidence, the CENTEL drawing was not received (tr. 89-90).

3. On 4 May 1987 appellant received notice to proceed on contract 0022, establishing 1 October 1987 as its completion date (R4, tab 4).

4. On 17 June 1987 appellant's surety, Wichita Insurance, invoiced $1,743.66 to appellant for contract 0022 payment and performance bonds, at 2.7 percent of the contract price (exh. G-4, G-16, G-17). Appellant paid $1,743.66 to Wichita Insurance on 24 July 1987 (exh. A-1).

5. The parties amended contract 0022 on 22 June and 14 August 1987 for changes and differing site conditions not in dispute, increasing the price by $1,043.33 and leaving the completion date unchanged (R4, tab 2).

6. On 17 August 1987 appellant tried to locate on site an eight-inch line shown on the plans to which to connect a new water line. Appellant found no eight-inch line, but did locate a six-inch line, which respondent confirmed was the intended line. Appellant had one back hoe, one loader, two equipment operators, three laborers and one field superintendent on the contract 0022 site, and spent about $2\frac{1}{2}$ hours attempting to locate the misdesignated eight-inch line. Thereafter appellant moved its equipment approximately 200 feet to start other work. (Exh. G-6, G-28; tr. 45, 68-70)

7. On 21 August 1987 appellant severed an unmarked water line. Appellant had one back hoe, one loader, two equipment operators, two laborers and one field superintendent on the contract 0022 site. The parties stipulated that appellant is entitled to compensation for 2.25 hours for the consequent delay. (Stipulation No. 1, tr. 7; exh. G-6, G-27)

8. Between approximately 7:30 and 9:00 a.m. on 10 September 1987 appellant excavated for a fire plug. At 9:00 am. respondent directed appellant to change the direction of a section of the water line. (Exh. G-6, G-26; tr. 39, 73-74) Appellant had one back hoe, one loader, two equipment operators and three laborers on the contract 0022 site. On 11 September 1987 appellant had one back hoe, one loader, one trencher (excavator), two equipment operators, three laborers and one field superintendent on the contract 0022 site (exh. G-6, G-25). The parties stipulated that appellant is entitled to compensation for 12 hours incurred on 10-11 September 1987 as a result of the Government's 10 September 1987 change (stipulation No. 2, tr. 7).

9. Before appellant began construction work, the parties visited the construction

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site and observed telephone line locations marked by respondent (tr. 77, 84). On 16 September 1987 the telephone line flags were no longer in place. During the previous week appellant did not ask respondent to re-flag the telephone line locations, as excavators typically do (tr. 51-52). On 16 September 1987, while digging where the water line was to cross a road, the parties saw a telephone pedestal or pole. Respondent's inspector warned appellant to watch out for a telephone line. Appellant stopped digging, found no telephone line on the contract plans, gave respondent the "dig permit" and asked the location of the telephone line. Using appellant's dig permit, respondent's "telephone people" verified that there was a subsurface telephone line crossing the water line. Appellant asked respondent to mark the location of that telephone line and dug two feet on each side thereof by hand shovels. (Tr. 28-29, 48-50, 57, 85-87) On 16 September 1987 appellant had one back hoe, one loader, one equipment operator, two laborers, one field superintendent and one foreman on site (exh. G-6, G-24); locating and digging around the telephone line delayed appellant about $1\frac{1}{2}$ hours (tr. 87).

10. On 17 September 1987 respondent failed to shut off water valves in a timely manner (exh. G-23). On that day appellant had one back hoe, one loader, one equipment operator, two laborers, one foreman and one field superintendent on site. The parties stipulated that appellant is entitled to compensation for 3.75 hours delay. (Exh. G-6, G-23; stipulation No. 3, tr. 7)

11. On the dates set forth in findings 6-10, (a) appellant paid hourly wages as follows: laborers $6.36, one equipment operator $10.00, another operator $15.00, and field superintendent $15.00 (exh. G-6); (b) appellant's overhead rate, including labor burden, was 44.4 percent (stipulation No. 4, tr. 7-8); and (c) the record contains no evidence of any ownership cost or rental paid for the backhoe, loader and excavator appellant used on contract 0022 (R4, tab 29; tr. 105, 113). Appellant purchased $920.96 in additional materials for Government changes on 11 and 16 September 1987 (R4, tab 29; exh. G-3).

12. Appellant adduced conclusory, nonquantitative testimony about "impact" caused by respondent's foregoing delays (tr. 34-37), but proved no specific additional time or costs for such impact or loss of efficiency. The record contains no evidence that appellant paid Wichita Insurance any additional premium for increasing the bond amounts on contract 0022.

13. In addition to the 22 hours of delay described in findings 6-10, appellant delayed performance while awaiting valves on 15 July 1987 and awaiting surveying on another date (exh. G-10, tr. 87-88). Appellant completed contract 0022 work on 2 or 5 October 1987 (exh. G-8, G-9). There is no evidence that respondent assessed liquidated damages on contract 0022.

14. On 19 and 31 August and 22 September 1987 appellant gave respondent written notice of inaccurate contract plans and delays, claiming $13,065.77 and 45 days additional time on 22 September 1987 (R4, tabs 5-7).

15. After submitting its 22 September 1987 claim, appellant's employees Barnes and Morris agreed on 8 October 1987 to the amounts claimed for the backhoe, loader and excavator equipment they owned (R4, tab 9). The record contains no equipment ownership or rental cost data from such manuals as the Associated Equipment Distributors (AED) or "Means" or "AGC." Respondent called Wichita equipment dealers in 1987-88. The lowest monthly rental rates, from Foley Tractor, converted to hourly rates (by dividing by 175), were back hoe, $10.22; loader, $20.00 and excavator, $20.57 (exh. G-2, G-21).

16. Appellant revised and supplemented its 22 September 1987 claim ten times between 29 September 1987 and 13 December 1989 (R4, tabs 8-14, 27, 29, 30). The last revised claim was $16,228.44 (R4, tabs 29, 30).

17. After 9 October 1987 and 4 February 1988 negotiations, the parties agreed to $5,016.05 compensation for the 17 and 21 August, 10-11, 16 and 17 September 1987 delays and "impact" costs appellant claimed as of February 1988, ten percent profit ($501.61) thereon, and $99.32 bonding costs, for a total price adjustment of $5,616.98 (exh. G-21).

18. On 13 May 1988 bilateral modification P00003 to contract 0022 increased the contract price by $5,616.98 for extra work under the "Changes" clause, but did not increase the contract performance time. Modification P00003 contained the following concluding paragraphs:

> RELEASE OF CLAIMS: In consideration of this modification agreed to herein as complete equitable adjustments for contractor's P00003 "PROPOSAL FOR ADJUSTMENT," the contractor hereby releases the government from any and all

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liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "PROPOSAL FOR ADJUSTMENT" (Except for P00003) [sic].

It is the contractors [sic] understanding that this release must be signed in order to receive payment of monies due the contractor. The contractor has been instructed by the Contracting Officer that these monies can not be paid unless he signs this release. The Contracting Officer has assured the Contractor that this release does not in any way wave [sic] or prevent the contractor from further pursuit of recovery of his claim. The Contractor will in no way be prevented or has he given up any of his rights to recover the additional monies he is entitled to for extra work performed under any part of this contract.

(R4, tab 2)

19. The contracting officer's 12 January 1990 final decision denied appellant's claim for compensation in addition to the amount included in modification P00003 (R4, tab 31).

20. Appellant timely appealed that final decision to the Board on 10 April 1990 (R4, tab 33).

DECISION

This appeal presents two legal issues: First, does Modification P00003 bar appellant's present claims? Second, if not, to what compensation is appellant entitled on account of proven extra work, delays and changes?

I.

Respondent argues that Modification P00003 is an accord and satisfaction barring further liability for appellant's claims. Because accord and satisfaction is an affirmative defense, respondent has the burden of proof thereof. *Southwest Marine, Inc.*, ASBCA No. 39472, 93-2 BCA ¶ 25,682 at 127,761-62. Respondent did not sustain that burden. When a contractor signed a release without exception or reservation of claims, as in *George H. Craddock dba Southern Heat Pump Co.*, ASBCA No. 23422, 80-2 BCA ¶ 14,635, cited by respondent, the Board held that further claims arising from the same facts are extinguished. But where a release excepts or reserves specified claims, such claims are not barred. *MSI Corp.*, ASBCA No. 9779, 65-2 BCA ¶ 5094 at 23,996.

The phrase "(Except for P00003)" included at the end of the "RELEASE OF CLAIMS" paragraph appears to except therefrom the "facts and circumstances" giving rise to Modification P00003. Furthermore, appellant reserved its prior claims in their entirety in the final paragraph of P00003. (Finding 18) As in *H.L.C. & Associates Construction Co. v. United States* [11 CCF ¶ 80,495], 367 F.2d 586, 176 Ct. Cl. 285 (1966), respondent "accepted a release which released nothing." We hold that Modification P00003 does not bar appellant's claims in dispute. However, to avoid duplicate recovery, the $5,616.98 payable to appellant pursuant to Modification P00003 must be excluded from any compensation to which we conclude appellant is entitled.

II.

Appellant has the burden of proving entitlement and quantum with respect to affirmative claims such as those in dispute in this appeal. *Service Engineering Company*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,119.

We have found that (a) respondent's misdesignated eight-inch water line caused appellant's $2\frac{1}{2}$ hour delay on 17 August 1987 (finding 6); (b) by stipulation appellant is entitled to 2.25 hours compensation for the delay caused by severance of respondent's unmarked water line on 21 August 1987 (finding 7); (c) by stipulation appellant is entitled to 12 hours compensation for respondent's change order redirecting a section of the water line on 10-11 September 1987 (finding 8); (d) by stipulation appellant is entitled to 3.75 hours compensation for respondent's failure to shut off water valves timely on 17 September 1987 (finding 10). These four items of Government-caused delay total $20\frac{1}{2}$ hours. Appellant sustained its burden of proof with respect to those four changes and delays.

Appellant should have known of the location of the underground telephone line before 16 September 1987 because of respondent's prior marking of such line and appellant's prior site visit to that location. Appellant failed to ask respondent to re-flag that telephone line's location one week prior to excavation, as excavators typically do. Appellant's "dig permit" drawings enabled respondent to relocate and re-flag the telephone line on 16 September 1987. (Finding 9). Appellant was responsible for the $1\frac{1}{2}$ hour delay on 16 September 1987. It failed to prove any specific additional time or costs for the alleged impact or loss of efficiency

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caused by respondent's changes and delays (finding 12).

On each of the foregoing days for which we have found Government liability (a) we have found how many laborers, equipment operators, field superintendents, and job foremen appellant had on the contract 0022 site (findings 6-10); (b) appellant paid its laborers $6.36 per hour, one equipment operator $10.00 and another $15.00 per hour, and its field superintendent $15.00 per hour (finding 11); (c) appellant's stipulated overhead rate, including labor burden, was 44.4 percent (*id.*); and (d) in bilateral Modification P00003, which increased the contract price for these same changes and delays, the parties agreed to 10 percent profit (findings 17, 18).

The record contains no evidence of any ownership cost or rental payment for the backhoe, loader or trencher appellant used on contract 0022 (finding 11). After appellant submitted its 22 September 1987 claim, its employees Barnes and Morris on 8 October 1987 agreed to the amounts appellant claimed for the backhoe, loader and excavator equipment they owned (finding 15). Such "agreement" was a self-serving, post-dispute statement of no probative value. For equipment owned by a contractor and not in active use but rather in standby, 50 percent of the hourly rates determined on a jury-verdict basis applies. *Tom Shaw, Inc.*, DOT BCA Nos. 2106 et al., 90-1 BCA ¶ 22,580 at 113,337. The lowest 1987 Wichita equipment hourly rentals were $10.22 for a back hoe, $20.00 for a loader and $20.57 for an excavator (finding 15).

Our foregoing findings permit us to determine the appropriate quantum for the foregoing changes and delays, which we tabulate as follows:

Date	Delay	Direct Labor	44.4% overhead	Totals	
8-17-87	2.5 hr.	$147.70	$ 65.58	$213.28	
8-21-87	2.25 hr.	$118.62	$ 52.67	$171.29	
9-10 to 11-87	12 hrs.	$542.64	$240.93	$783.57	
9-17-87	3.75 hr.	$197.70	$ 87.78	$285.48	
	20.5 hours			$1,453.62	
9-11/16	Material	$920.96	$408.91	$1,329.87	
Equipment ownership costs:					
Back hoe	$ 5.11 × 20.5 hrs.		=	$104.76	
Loader	$10.00 × 20.5 hrs.		=	$205.00	
Excavator	$10.29 × 6 hrs.		=	$61.74	
Equipment costs			=	$371.50	371.50
	Subtotal				$3,154.99
Profit at 10%					315.50
Total equitable adjustment					$3,470.49

Appellant failed to prove that the Government-caused delays (findings 6-8, 10), rather than the contractor-caused delays (finding 13), were responsible for completion of contract 0022 one or four days after 1 October 1987. We conclude that appellant is not entitled to any contract time extension. Since respondent apparently assessed no liquidated damages (finding 13), the time extension is moot.

Appellant disputed the contracting officer's refusal to allow more than the $5,616.98 increase in modification P00003 (finding 19). Appellant failed to prove entitlement to more than $3,470.49.

We deny the appeal.

[¶ 26,342] Ben Levine Timber

AGBCA Nos. 92-124-1, 92-234-1, 92-235-1, September 16, 1993.

Sales of Government Property—Timber Sales—Logging Plan.—The government's denial of a contractor's logging plan that contemplated downhill logging as well as the construction of a road to a landing within the sale area was reasonable because the contracting officer determined that the logging plan could not be carried out without a signifi-

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cant disturbance of soil conditions and wildlife. The contract provided that the location and width of temporary roads would be agreed upon prior to actual construction. The sale area, as pointed out in the prospectus, was within a northern spotted owl habitat area, and the contract also contained special yarding provisions to minimize soil disturbance. Given the soil and wildlife concerns expressed by and imposed upon the government, the board concluded that the government's denial was reasonable.

Sales of Government Property—Timber Sales—Estimates of Deleted Area.—The government's valuation of timber in five acres deleted from a contractor's timber sales contract was reasonable because there was no showing that the government erred either in computing the value of the timber or in deducting that value from the price the contractor was charged for the timber. The government determined the value of the deleted acres in the same manner it had for the initial sale offering; it applied current contract prices to the estimated volume and deducted the value from the contract price. The contractor asserted that its actual costs should have been used because these costs were lower than those used by the government. The contractor's position, however, was contrary to the parties' agreement for the deletion of the five acres. The agreement provided that if the five acres were to be deleted, the standard government procedure used for the contract estimate would be applied.

Sales of Government Property—Timber Sales—Slash Disposal Deposit.—Although the government elected not to perform slash and brush disposal work under a timber sales contract, a contractor was not entitled to recover the slash disposal deposit it was required to provide, because it was not damaged by the government's election not to perform the work. The slash deposit was a cost of removing the timber, which all bidders had to consider when making their bids to purchase the timber. The elimination of the slash deposit would have resulted in an identical increase in the timber price charged the contractor. The contractor, therefore, was not damaged.

Sales of Government Property—Timber Sales—Estimated Volume Shortage.—A timber sales contractor's contention that the difference between the estimated timber volume and the volume determined by scale evidenced a mistake in the government's estimates was rejected because the contractor did not identify any specific error in the estimates. The contract provided that the government volume estimate would be revised at the contractor's request for identified errors made in determining estimated volume, provided the errors resulted in a decrease of the total sale volume of at least 10 percent of value. The difference between the estimated volume and the volume as based upon a scale of the logs brought into a mill, however, was a shortage of only 6.2 percent. The contract also stated that the estimated quantities were not to be construed as guarantees or limitations of the timber quantities to be designated for cutting under the contract.

For the appellant: Ben Levine. For the government: Arno Reifenberg, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before GISH, HOURY, and SETO, Administrative Judges.

GISH, Administrative Judge: These appeals arise out of a timber sale contract between Ben Levine, dba Ben Levine Timber (Appellant), and the Forest Service (FS), U. S. Department of Agriculture. The contract is identified as the Sandwich Timber Sale contract No. 071931. The sale was a premeasured or lump sum sale; that is, Appellant bid a lump sum amount as payment for all timber within the sale area. The volume was estimated for purposes of the sale but was not measured or scaled to determine volume for payment purposes. The sale was located on the Quilcene Ranger District, Olympic National Forest, Washington. The contract was awarded to Appellant on June 14, 1990, and by letter dated July 8, 1991, the FS advised Appellant that contract requirements on all units had been completed and accepted.

Appellant made three claims to the Contracting Officer (CO) which were denied and timely appealed to the Board. First (AGBCA No. 92-124-1), during the course of the sale a dispute arose as to how Unit 1 was to be logged resulting in a 5-acre portion of that unit being deleted from the sale. The FS appraised the value of the timber in the 5 acres and credited Appellant's timber sale account with that amount. Appellant disputes the deletion of the unit and the valua-

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tion placed upon the timber within the unit. Second (AGBCA No. 92-234-1), Appellant claims a refund of deposits made for slash disposal, claiming that since the FS did not do and did not intend to do the slash work, the money paid as a deposit should be returned. Third (AGBCA No. 92-235-1), Appellant alleges a shortage of timber volume as represented by the FS and claims the value of the difference in volume between the estimated volume shown in the contract and the volume Appellant claims to have recovered from logs delivered to a mill.

A 2-day hearing was held in Tacoma, Washington, November 3 and 4, 1992. The Board has jurisdiction pursuant to the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613).

FINDINGS OF FACT

1. Appellant, a logger and timber operator with many years' experience in the Olympic National Forest area, was, as high bidder at oral auction, awarded the Sandwich Timber Sale on June 14, 1990 (Appeal File (AF) Timber Sale contract). The sale was a premeasured sale with an estimated volume of 3,800 thousand board feet (MBF) over 91 acres in three cutting units (AF, Tab 3, timber sale contract, sale area map).

Claim 1, 5-Acre Deletion:

2. Unit 1, as designed by the FS was to be logged uphill. (Transcript (Tr.) 325, 404.) Appellant's first logging plan followed the original design to log uphill. However, due to the limits imposed by the height of Appellant's logging tower, a landing about halfway down the unit would be required. This would require a road to be constructed into the landing. The FS denied permission to construct the road due to excessive resource damage. (AF, Tab 6; Tr. 68, 404.)

3. Appellant's second logging plan proposed both downhill and uphill logging, the upper half going uphill and the lower half going downhill. The FS initially rejected this plan because downhill logging causes more soil disturbance than uphill logging, a concentration of debris on the landing and stream siltation or in this instance, additional debris in a wet or marshy area within the 5 acres. Subsequently after further discussion or negotiation, the FS concurred in the downhill logging if the lower 5-acre portion of the unit were deleted from the sale. Appellant was agreeable to the deletion if additional timber was added to the sale within 200 feet of the boundary as per the contract. The FS would not agree to timber replacement due to spotted owl habitat restrictions on timber sales. (AF, Daily Diary dated January 10, 1990, Tab 11; Tr. 74, 84-85, 89-90.)

4. Appellant and the FS signed a letter with attached agreement setting forth the terms for downhill logging and the deletion of the 5-acre portion from Unit 1. The agreement provided, among other things, for deletion of the 5 acres if the lower part were logged downhill, for special measures to prevent soil disturbance and for a reduction in payment based upon the same procedure used in making the cruise and appraisal as the original determination of estimated contract volume. The agreement describes the deletion as a minor adjustment under contract provision BT2.37 (AF, Tab 6; Tr. 96-100).

5. The contract provided that the location and width of temporary roads shall be agreed to prior to construction, BT5.2, and that landings and skidtrails be agreed upon prior to their construction, BT6.422. The contract also contained provisions expressing special concern for soil disturbance, CT6.42#. (AF, Tab 6.)

6. The sale area, as pointed out by the prospectus, was within a Northern spotted owl habitat area (AF, Tab 4) and the contract contained special yarding provisions to minimize soil disturbance, CT6.42 (AF, Tab 3). The sale was part of a congressionally mandated sale offering known as a "318 sales" notwithstanding Northern spotted owl habitat (section 318 of Public Law 101-121). (Tr. 93-94, 116, 151-152, 171-172, 200, 265, 274-277, 285; Government (Gov't) Exhibits (Ex.) C and D.)

7. Prior to logging Unit 1, Appellant's president and the CO became engaged in a personality conflict resulting in a lack of communication. In order to resolve the problem Appellant and the CO agreed to have the day-to-day operation of the sale conducted between Appellant's representative (REP) and the FS Timber Sale Officer (TSO). (Levine Appeal File (LAF), Tab 25; Tr. 332, 341, 353, 415.)

8. Appellant's REP logged the entire unit uphill, but decided not to log the 5 acres. In April of 1991, Appellant's REP told the FS to go ahead and make the appraisal. (Tr. 102, 135-138.)

9. The FS followed the same procedure in making the cruise and appraisal of the 5 acres as it did in the original determination for contract volume and value, concluding the contract value should be reduced by

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$26,964.25. (AF, Tab 13; Tr. 390, 425-430.) When Appellant learned of the dollar value the FS placed on the timber in the deleted 5 acres, a dispute arose as to that value, the method used to determine the value and the validity of the deletion itself. Appellant's valuation of the timber in the deleted 5 acres, $69,815.47, was based upon its own costs, not averages used by the FS. An alleged higher volume of cedar in the 5 acres, as compared to the rest of the unit, and a difference in the grade of that volume, also account for some of the difference between the FS's and Appellant's valuation (Tr. 298, 400-402).

10. Appellant contends that it was under duress and coerced into signing the agreement deleting the 5 acres. Appellant stated it would go ahead and sign as it was getting into winter and snow would soon be a problem. Appellant also suggests that if it had not logged the sale, the FS would have called upon Appellant's letter of credit for $700,000 which would cause great financial distress to Appellant (Tr. 40-45, 331). Other than these allegations the record does not indicate that the FS intended or threatened any action which would not have been in accordance with contract terms and conditions.

Claim 2, Slash Disposal:

11. There is no dispute between the parties that the price Appellant paid for the timber included $53,200 as a deposit for slash disposal computed at $14 per MBF. The FS determined, after the units were cut, that there was not enough slash to cause a fire hazard (Tr. 269) and that what slash was there would be beneficial for regrowth. There is also no dispute that the FS retained the amount which Appellant contends should be refunded since the FS neither did the work nor does it intend to do the work. (Tr. 14-16.)

12. The FS appraisal takes into account the cost of slash disposal work and that cost is deleted from the selling price to arrive at the advertised price, the minimum amount at which the FS will sell the timber. If no slash disposal is required no amount will be deducted from the selling price and the advertised price would be higher by an amount equal to the cost of the slash deposit. (Tr. 326-327.)

Claim 3, Estimated Volume Shortage:

13. In a premeasured sale the purchaser pays a lump sum (the bid amount), plus certain deposits. If actual volume realized by the purchaser is more than the estimated volume in the contract the purchaser pays no more. If the actual volume realized is less than the estimated contract volume the purchaser pays no less (AF, Tab 3).

14. The actual volume realized by a purchaser may vary due to a variety of reasons such as errors in cruising the standing timber and in scaling the logs, differences in disallowance for defect, log length and a purchaser's operating methods (Tr. 217, 222-224, 300-301, 307, 314).

15. Contract provision BT2.4, among other things, stated that the estimated quantities in AT2 were not to be construed as guarantees or limitations of the timber quantities to be designated for cutting under the terms of this contract (AF, Tab 3).

16. Contract provision CT4.12 stated that the volume estimate shown in AT2 shall be revised at purchaser's request by correcting identified errors made in determining estimated volume which result in a decrease of total sale volume of at least 10 percent or $1,000 in value, whichever is less, when an incorrect volume estimate was caused by (a) an area determination error, (b) computer input error or computer malfunction, or (c) a calculation error. No adjustment in volume shall be made for variations in accuracy resulting from planned sampling and measuring methods or judgments of timber quality or defect. (AF, Tab 3.)

17. The contract estimate was based upon a cruise of standing timber. The volume recovered from the sale as claimed by Appellant was based upon a scale of the logs brought into a mill. These two measures are different and it is unlikely that they would ever be identical. Appellant's volume recovered on Unit 1 based upon Puget Sound Log Scaling and Grading Bureau was 2,712,670. The FS contract estimate was 2,892,000. The difference is 179,330 or a shortage of 6.2 percent. (Appellant's Amendment # 2, Ex. 7.)

18. Appellant, in making a claim for less volume, is claiming the difference between its volume as determined by scaling cut logs at the mill where Appellant sold its logs and the FS estimated volume in the contract as determined or estimated from a cruise of standing timber. Appellant's calculation makes no deduction of estimated volume for that volume deleted by the 5 acres not logged (Tr. 472-477).

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DISCUSSION

Appellant, appearing *pro se* at the hearing, expressed numerous differences of opinion as to FS timber policy as well as forest management practices. These differences were not the subject of a CO decision and are not before the Board in these appeals. In its post-hearing brief Appellant sets out three issues which are properly before the Board and we will confine our comment to those issues.[1]

The 5 Acre Deletion:

Appellant describes this issue in terms of whether the FS may coerce a purchaser to delete 5 acres and unilaterally decide the value of the timber on the 5 acres. We believe this issue is more properly characterized as an interpretation of the terms of the modification entered into by the parties for the deletion of 5 acres. Appellant contends that it should have been permitted to log Unit 1 as it wished, that the deletion of the 5 acres should have been done as a contract modification rather than minor adjustment and that the valuation of the timber within the 5 acres was not calculated properly.

Unit 1, as originally designed by the FS, was to be logged uphill. Appellant's first logging plan contemplated uphill logging. However, due to the limited height of the logging tower, a landing would have been needed about half way down the unit. This would require construction of a road to the landing. The FS denied permission to construct the road. (Finding of Fact (FF) 2.)

Appellant's second logging plan contemplated both uphill and downhill logging. The first reaction of the FS was to deny downhill logging but eventually the FS approved the plan for downhill logging if the wet area (the 5 acres) were deleted from the sale. Appellant had the option to log it either way. (FF 3.)

After some negotiation between the parties, Appellant signed an agreement whereby the upper half of the unit could be logged uphill with the bottom half logged downhill if the 5-acre area was deleted. If the 5 acres were to be deleted the agreement further provided that the timber within the 5 acres would be valued by the standard FS procedure used for the contract estimate. (FF 4.) Appellant's REP chose to leave the 5 acres unlogged and to log the rest of the unit uphill. In April 1991, upon being advised of this fact, the FS determined the value of the timber left in the 5 acres and deducted that amount from the payment due from Appellant. (FF 8.)

The contract provided for approval of landing sites and road locations by the FS. Because this requires cooperation from both parties, neither can unreasonably withhold that cooperation. The contract also provided for a minimal amount of soil disturbance (FF 5) and FS concern for this aspect was reasonable. We do not find that the denial for the road or for downhill logging was unreasonable given the soil and wildlife concerns expressed by and imposed upon the FS. (FF 6.)

During the course of the sale operation, Appellant and the CO evidently reached an impasse as to how to proceed. In order to move the sale activity forward it was agreed that Appellant's owner and the CO would step aside and the TSO and Appellant's REP would resolve things out in the field regarding as day-to-day activities. (FF 7.) Appellant had the option of logging uphill or downhill and deleting the 5 acres. The record is not clear as to the reasons, but Appellant's REP chose to log uphill and still left the 5 acres unlogged. When the FS was advised of this decision, the timber left in the 5 acres was cruised in the same manner as in the original sale. (FF 9.)

Appellant contends that the FS should not have dealt with it's REP in the field but should have worked with him directly. The FS concedes that was the normal way they had dealt with Appellant but that it was not unusual to deal with a purchaser's representative. Further, in this instance Appellant concurred in the procedure that allowed the TSO and its REP to work things out in the field. (FF 7.)

Appellant also disputed the FS valuation of the timber left on this 5 acres. The FS cruised the timber in the 5 acres to determine the volume in the same manner that it did for the initial sale offering. Current contract prices were applied to that volume and that value deducted from the price Appellant was charged for the timber. Appellant contends that his actual costs should have been used because they were lower than

[1] At the hearing Appellant appeared *pro se* but indicated that he had sought legal advice from an attorney and that he might and, in fact, did seek assistance from counsel in writing the brief. Although no written notice of appearance has been entered in compliance with Board Rule 26 regarding representation of parties, we nonetheless have considered Appellant's brief in reaching the decision in these appeals.

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those used by the FS and would result in a higher value for the standing timber, a difference of some $29,000. This difference, along with others, such as Appellant's alleged higher volume of cedar in the area and higher grade, results in Appellant's higher value for the deleted timber. (FF 9.)

The agreement for deletion of the 5 acres clearly indicated that the valuation was to be done by the standard FS method. The evidence shows that is how the value was determined. Appellant has not pointed out errors in the methodology or computation, but rather believes that his costs should have been used rather than averages in figuring the timber value. That is not, however, what the agreement provided.

Appellant complains about the way the 5 acres were deleted from the contract, arguing that it should have been done by a contract modification rather than minor adjustment. Appellant does not point out how it would help if the agreement were a contract modification. In either event Appellant signed the agreement and is bound by it. We are not persuaded by Appellant's argument that it was under duress or coerced into signing the agreement. (FF 10.) Appellant's president did not give the appearance of a person easily intimidated. Economic conditions or financial factors, unless caused by actions of the other party and not permitted by the contract, are not coercion. We find no evidence that the FS attempted to do anything not permitted under the terms of the contract.

In passing we note that Appellant logged the unit uphill as originally designed by the FS. Therefore, Appellant could have logged the entire unit including the 5 Acres. Appellant's failure to log the 5 acres appears to be a voluntary act on Appellant's part. We find no basis in the contract to credit Appellant for not completing the sale.

The claim is denied.

Slash Deposit:

Appellant's brief phrases this issue as whether the FS may retain a deposit required by the contract specifically designated for the disposal of brush and slash when the FS had elected not to dispose of the brush and slash.

There is no dispute as to the amount claimed or that the FS does not intend to do this slash disposal work (FF 11).

Appellant's argument here is straight forward and is simply that since the FS did not do the slash work and does not intend to do this work, it should not be allowed to retain a deposit required for that purpose. This, Appellant contends, is forced over-payment for the timber. This argument and similar ones have been made to the Board before and rejected. The contract is one for the sale of timber. The slash deposit is a cost of removing the timber which all bidders have to consider when making their bids to purchase the timber. Elimination of the slash deposit would have resulted in an identical increase in the timber price charged Appellant. Therefore, Appellant was not damaged. (FF 12.) *Marshall Logging, Inc.*, AGBCA No. 87-283-1, 90-1 BCA ¶ 22,629, *aff'd* 918 F.2d 186 (Fed. Cir. 1990); *see also, Blue Mountain Forest Prod., Inc.*, AGBCA Nos. 86-248-1, *et al.*, 92-1 BCA ¶ 24,560. Moreover, although the Board allowed recovery for deleted slash work in *H & H Logging, Inc.*, AGBCA Nos. 87-403-1, 88-248-1 and 89-211-1, 92-2 BCA ¶ 24,830, this was because the FS relied on the wrong contract clause to delete the work and did not provide sufficient information supporting the amount claimed.

The claim is denied.

Volume Shortage:

Appellant's brief states the issue is whether the FS may charge for a volume of timber erroneously computed where said error arose by virtue of a cruise by the U.S. Government.

This was a premeasured sale with an estimated volume. The purchaser pays a lump sum and actual volume may be more or less than the estimated amount (FF 13).

Appellant argues that because the timber volume determined by its bureau scale differs from the estimated contract volume a mistake was made by the FS. Appellant does not identify any specific error but relies upon testimony of witnesses that shows why differences might occur. (FF 14.) The Board finds no evidence that any of these witnesses said such an instance actually occurred in this case. Further, Appellant is comparing a scaled volume of logs delivered to a mill with a cruise of standing timber. It is unlikely that such a comparison would ever bring about an exact match of volume amount. (FF 17.) There is, in fact, very little difference when proper adjustment is made for the volume deleted on the 5 acres (FF 18).

Appellant also argues that there is no disclaimer of volume language before the Board. This is incorrect. The contract itself contains such language (FF 15). Such language, absent evidence of negligence, bad

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faith or grossly erroneous volume estimates, amounts to a disclaimer and there is no warranty of volume amount. *Clearwater Forest Indus. v. United States* [28 CCF ¶81,371], 650 F.2d 233 (Ct. Cl. 1981); *K & K Logging, Inc.*, AGBCA No. 85-271-3, 85-3 BCA ¶18,487.

The claim is denied.

DECISION

The appeals are denied.

[¶ 26,343] Linguist Services, Inc.

ASBCA No. 45804, September 8, 1993. Contract No. F42650-90-C-0126.

Contract Types—Time and Materials—Computer Equipment.—The costs of computer equipment were not recoverable under a time and materials contract for translating, interpreting, and related services, because the government was not obligated to purchase the equipment needed to perform the contract. Under the Payments under Time and Materials and Labor Hour Contracts (FAR 52.232-7), materials are compensable only if used or consumed directly in connection with the furnishing of an end product. The contract was for services, not for setting the contractor up in business. It was clear that the contractor did not consider the computer equipment a part of an end product. It made no effort to turn over the computer equipment to the government or to credit the government with its value.

For the appellant: Lorin D. Welker, Treasurer. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Capt. Leonard M. Cohen, USAF, Trial Attorney.

Before LUSSIER and STEMPLER, Administrative Judges.

LUSSIER, Administrative Judge: This appeal is taken by Linguist Services, Inc. (appellant) from the denial of its claim for the purchase of equipment used in the performance of a contract. The appeal is being processed at appellant's request under the accelerated procedures provided by Board Rule 12.3. The parties elected to proceed under Board Rule 11, submitting the case on the record. Each submitted documentary evidence and a brief. Only the issue of entitlement is before us for decision.

SUMMARY FINDINGS OF FACT

1. Contract No. F42650-90-C-0126 was awarded to appellant on 4 June 1990. It provided for on-call English/Russian translating, interpreter and escort services to support the On-Site Inspection Agency (OSIA) carrying out the U.S. Government's obligation under the Intermediate Nuclear Forces (INF) Treaty. The contract was awarded for the base period 4 June through 30 September 1990 at a "ceiling price" of $88,000.00. Each line item in the contract was shown as "estimated", with estimated hours being given if the item called for services, or estimated pages shown if the item called for written translation. The appellant filled in the unit price and extended total price when it bid. The contract stated at page 19 that these line items were "time and material". A separate line item for travel which was to be reimbursed under the Joint Travel Regulations (JTR) was added (as a $4,000 estimate) to all bids by the Government. The contract, at page 19, described this item as "cost reimbursement with no fee".

2. The contract "Statement of Work" specified that the contractor was to provide "all equipment, supplies and services" for the work. The contract "Schedule", listing the line items, likewise specified that the contractor was to provide "all labor, equipment and supplies" for all items other than the JTR travel item. The "Statement of Work" specifically provided that the contractor was to provide linguists/interpreters with portable word processing equipment capable of both languages and with communications equipment to connect them with the contractor's central office equipment for reproduction/review and corrections. There were no line items in the "Schedule" for any equipment or supplies. There is no showing, or allegation, that appellant complained about the absence of such line items.

3. Since classified material was involved, appellant needed whatever equipment, such as safes etc., was required under the applicable security regulations. There was no line item in the "Schedule" for this or for any labor hours connected with this function, or for maintaining a central office point of con-

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tact, which was also required under the "Statement of Work".

4. The contract also contained similar bid items for four one year option periods. An option clause in the contract gave the Government the right to extend the contract upon written notice. The Government exercised the first year option which increased the ceiling price by $224,148. It also exercised the second year option increasing the ceiling price by $236,624. This extended the contract through 30 September 1992. The Government did not exercise the next option however, and the contract expired by its terms.

5. At the time of bidding, the appellant's president, Mr. Lorin Welker, evaluated what supplies and equipment he would need to perform the contract, such as dictionaries and general office equipment, and spread the cost to all the line items in the contract. He was aware that the workload estimates were not firm. Also, he made the assumption that all the options would be exercised. According to his deposition, "Rightly or wrongly we assumed that it would last; we figured four years." He went on to explain: "If we make an assumption that it's all going to be over in three months, our bid is going to be real high. So we had to make some assumption and that was the one that we were comfortable with." Later, when asked whether he understood at the time he was preparing appellant's bid that the option periods might not be exercised by the Government, he answered "totally".

6. According to Mr. Welker, appellant was a new business incorporated when the solicitation for the subject contract was issued. It did not have materials and equipment to perform the contract and obtained a Small Business Administration loan after award to permit it to purchase what was needed.

7. After the Government notified appellant in September 1992 that it was not going to extend the contract, appellant submitted an invoice for the outstanding balance ($13,445.46) of its SBA loan, indicating this amount was used to purchase computer equipment needed for the contract. The Government took issue with the appellant's right to receive payment and appellant filed a claim from which flowed the contracting officer's decision denying the claim and this appeal.

DECISION

Appellant contends that the contract did not follow the FAR 16.601 guidelines for a time and materials contract in that it did not contain line items for the equipment and supply items needed to perform the services. Appellant accurately quotes FAR 16.601(a) defining a time and materials contract:

> (a) Description. A time-and-materials contract provides for acquiring supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit and (2) materials at cost, including, if appropriate, material handling costs as part of material costs.

However, there is nothing in that description which would require the contracting agency to purchase all the equipment and supplies that a contractor would need to perform the contract. The absence of such items from the line item schedule is evidence of intent not to purchase those items.

Appellant claims entitlement to payment under the "Payments under Time and Materials and Labor Hour Contracts (APR 1984)", FAR 52.232-7, clause but that clause applies to materials "which enter directly into the end product, or which are used or consumed directly in connection with the furnishing of the end product" We doubt appellant thought differently since it made no effort to turn over the equipment to the Government, or to credit the Government with its value at any time. Nor can we lose sight of the fact that this contract was one for the appellant to perform services. It was not a contract for the Government to set the appellant up in business.

Appellant's position comes down to asking us to conclude that in circumstances where it was starting up in business and there was a substantial risk that it would not be able to amortize its equipment and supplies, there was an obligation on the Government's part to exercise all the options. This in effect shifts the risk of appellant's business judgment to the Government. No authority exists for this result. The appeal is accordingly denied.

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[¶ 26,344] Laboratory Systems Services, Inc.

ASBCA No. 45798, September 2, 1993. Contract No. N00123-92-C-5317.

Interpretation of Contracts—Repair and Maintenance—Repair Requirements.—Under a contract for preventive maintenance services at a laboratory, a contractor's interpretation of repair requirements as being limited to repairs related to electrical or mechanical problems was unreasonable because the statement of work in the specifications clearly required the contractor to perform all repairs on equipment. No distinction was made in the specifications regarding the nature of the problem necessitating the required repairs. Similarly, the specifications required the contractor to make repairs as necessary to ensure a functional system. The only qualification to the contractor's complete responsibility for performing all needed repairs related to extensive repairs and parts replacement. Because the work performed by the contractor to restore a machine to an operable condition was not shown to have involved extensive repairs or parts replacement, the work was considered within the scope of the contract and did not constitute a constructive change.

For the appellant: Leslie B. Walker, Jr., President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and James J. Paris, Trial Attorney, Naval Regional Contracting Center, San Diego, California.

Before GROSSBAUM and STEMPLER, Administrative Judges.

GROSSBAUM, Administrative Judge: This appeal was taken from a contracting officer's decision denying the contractor's claim for performing work allegedly beyond the scope of a contract to provide preventive maintenance services at a military laboratory. The amount claimed is approximately $26,000 and appellant has elected the accelerated procedure provided by Rule 12.3. Pursuant to Rule 11, both parties waived a hearing and submitted the case for decision on the record. Only liability is before us for decision.

SUMMARY FINDINGS OF FACT

On 20 December 1991 the Government awarded fixed-price contract N00123-92-C-5317 to appellant, Laboratory Systems Services, Inc. (sometimes LSS) for preventive maintenance and servicing of listed Hewlett Packard drug screening laboratory equipment items located in the drug screening laboratory at the Naval Hospital, Oakland, California. The contract term consisted of an eight month base period and two one-year options. (R4, tab 1)

The contract general provisions included the Changes—Fixed-Price (August 1987) clause prescribed by FAR 52.243-1.

Paragraph 1 under specification section C1.2 described the "scope of work" to be performed under the contract as including:

> the furnishing of all labor, equipment, materials and parts to perform all repairs on equipment listed to assure continued operation of the equipment at designated efficiency and capacity.

This provision also required the contractor to "provide all services, materials, and equipment necessary for the repair/service of the equipment stated in Section B" of the contract schedule and located at the Oakland Naval Hospital's drug screening laboratory. (R4, tab 1 at 8)

Specification paragraph C1.2.2 described particular functions that the contractor was required to perform and provided in part:

> b. Insure that only fully qualified field engineers and technicians who have gone through original equipment manufacturer (OEM) or comparable third party service schools for the above mentioned equipment, shall be employed in the performance of any and all work performed under this contract. The highest standard of professional capability and electrical/mechanical workmanship is to be maintained throughout the life of this contract.
>
> c. Make repairs to the extent necessary (as determined by inspection tests or disassembly) to ensure a functional system that will efficiently serve its intended purpose.
>
> d. Correct inoperable condition in a timely manner[,] including loaner response time of no later than twelve (12) hours after telephone notification . . .
>
> e. Provide only the work necessary to restore the equipment to a serviceable/operating condition by adjustments, replacement parts, or minor repairs when it is determined that extensive repairs and parts replacement are not necessary.

(*Ibid.*)

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Specification paragraph Cl.2.3 imposed a special requirement on the contractor to "send a loaner unit within 12 hours of receiving notification that a loaner is required, postage prepaid by the contractor" (*id.* at 9). The specifications also stipulated that "[a]ll compensation for labor ... [and] for parts and materials is included in the contract price" (*id.* at 10).

The equipment items covered by the contract included several models of gas chromatographs (sometimes GC) and "Mass Selective Detector[s]" or mass spectrometers (sometimes MS) in various configurations. Several of the GC/MS units were used to detect the presence of "LSD" in urine samples. (R4, tabs 1 at 2-3, 3)

One of the GC/MS units, identified as "GC/MS #8," became inoperative in early April 1992, shortly after appellant's personnel performed a 7 April 1992 preventive maintenance inspection on this unit. On or about 10 April 1992 the Government determined that the unit could not be used for LSD assays. (R4, tabs 2, 3)

On or about 13 April 1992 the Government notified appellant about the problems being experienced with GC/MS #8. Appellant's personnel began evaluating and attempting to repair the machine that same day and spent the next several weeks (until on or about 11 May 1992) trying to bring the unit back on line. During this time period the Government used another, similarly configured GC/MS unit successfully to perform LSD assays. (R4, tabs 2, 3, 9)

Appellant alleges that, on 20 April 1992, its representative told the drug screening laboratory's manager, Lieutenant (LT) David Lesser, that the problem experienced with GC/MS #8 "was more applications oriented and outside the terms and conditions of our contract" (R4, tab 4). Although there is no evidence in the record to corroborate the alleged 20 April conversation, we find that, at some point prior to 11 May 1992, LSS representatives complained to LT Lesser that they believed the problem was "applications oriented," without identifying the suspected problem. However, we also find that, at no time during the repair of the machine, up through 11 May, did LSS representatives inform LT Lesser that they believed that the repairs were "outside the scope of the contract." (R4, tab 9)

Appellant also asserts that the Government "demand[ed]" that the instrument be brought "up and running irrespective of the nature of the problem" (R4, tab 4). There is no evidence to support appellant's assertion, which is contradicted by LT Lesser (R4, tab 9). We are not persuaded that any Government representative ever demanded that appellant get the equipment up and running regardless of the nature of the problem.

During the period from 13 April through 11 May 1992 the Government's contract administrator observed appellant's repair efforts at close hand. The contract administrator noted, "in the first few days of work, a general state of confusion by [LSS] as to what to do to resolve the problems with GC/MS No. 8." At one point in April 1992, after several unsuccessful LSS attempts "to pin the problem down to hardware," the contract administrator suggested that the problem might be due to a faulty GC column and that it might be worthwhile to change the column. However, LSS took no action on this suggestion, when made, because "other factors were being checked out." (R4, tabs 3, 9)

Pursuant to contract requirements, LSS brought in a loaner GC unit but was never able to make it operational and the unit was eventually removed. On 4 May 1992 the Government requested another loaner unit. However, no other loaner equipment was ever provided. (R4, tabs 2, 3)

Sometime in early May 1992 appellant sent to a testing laboratory the GC column which the contract administrator had suggested might be faulty. This column was replaced and a new GC column was installed in GC/MS #8. After autotuning and conditioning, completed on or about 11 May 1992, the GC/MS unit operated properly. (R4, tabs 3, 8)

By letter dated 23 July 1993 appellant notified the Government that it had encountered a "cost overrun" amounting to $25,586.22 in repairing GC/MS #8, for which reimbursement was requested. According to appellant, it had expended a total of 208 labor hours and 63 travel hours, involving the efforts of "six of our own employees as well as two outside associates," to pinpoint the problem with the instrument. The breakdown for the alleged overrun included labor, travel, air fare and lodging costs, but did not mention any material costs. (R4, tab 4)

Appellant offered no evidence to show that the work needed to restore GC/MS #8 to a serviceable, operating condition involved extensive repairs and parts replacement. Instead, the record supports the conclusion that appellant may simply have

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"expended an undue amount of time analyzing the machine without finding the actual problem, namely, the faulty column." (R4, tab 9)

After the contracting officer disputed appellant's request for reimbursement, by letter dated 28 October 1992 appellant resubmitted to the contracting officer its overrun reimbursement request as a claim. Appellant argued in its claim letter that: specification subparagraph C1.2.2(b) only required the contractor to maintain the highest professional standards with regard to "electrical/mechanical workmanship"; replacement of "consumable devices (columns)" reflected an "applications-related" problem as opposed to an "electrical/mechanical" problem; and, therefore, column replacement was outside the scope of the contract. (R4, tabs 5, 6)

On 18 February 1993 the contracting officer issued a decision denying appellant's claim, from which this appeal was timely taken. (R4, tab 7)

DECISION

Although appellant has not filed a brief, its argument may be gleaned from its claim letter. In effect, appellant argues that the repair requirements imposed by the contract are limited only to repairs related to "electrical/mechanical" problems. Therefore, if the problems necessitating the equipment repair can somehow be classified as other than "electrical" or "mechanical" the contractor is not required to correct them. This argument is based on a strained interpretation of an isolated sentence in specification subparagraph C1.2.2(b) and is without merit.

The record sheds little light on the meaning of "applications related," a term not mentioned in the contract, nor on its distinction from other matters, including those of an "electrical/mechanical" nature. Nor are we persuaded that faulty GC columns in a GC/MS unit used for LSD assays represent an "applications-related" problem distinct from an "electrical/mechanical" problem. However, the distinction, if any, would be irrelevant.

Even if we were to assume that replacement of faulty GC columns in GC/MS #8 reflected an "applications-related" problem as opposed to an "electrical/mechanical" problem, the correction of this problem would still be within the scope of the contract. The statement of work in specification paragraph C1.2.1 clearly required the contractor "to perform all repairs on equipment listed [in Section B of the contract schedule] to assure continued operation of the equipment at designated efficiency and capacity." No distinction was made regarding the nature of the problem necessitating the required repairs. Similarly, specification subparagraph C1.2.2(c) required the contractor to make repairs as necessary "to ensure a functional system that will efficiently serve its intended purpose." Moreover, all compensation for labor, parts and materials needed to effect the required repairs was already included in the contract price.

The only qualification to the contractor's complete responsibility for performing all needed repairs on listed equipment items related to "extensive repairs and parts replacement." As indicated in specification subparagraph C1.2.2(e), performance of repairs and parts replacement determined to be "extensive" was not required by the contract. Instead, the contractor's responsibility to ensure a functional system was limited to making adjustments and performing only such minor repairs and parts replacement "necessary to restore the equipment to a serviceable/operating condition." However, such limitation on the contractor's responsibility is not applicable in this case, since we are not persuaded that the work needed to restore GC/MS #8 to a serviceable, operating condition involved extensive repairs and parts replacement.

We conclude that the work appellant performed in evaluating the operation of GC/MS #8 and in restoring the unit to a serviceable condition, including replacement of a faulty GC column, was within the scope of the contract and did not constitute a constructive change.

Accordingly, the appeal is denied.

[¶ 26,345] Debcon, Inc.

ASBCA No. 45049, September 10, 1993. Contract No. DAAC01-88-C-0068.

Procedure, Boards—Reconsideration—Arguments Already Considered.—A contractor's motion for reconsideration of an appeal involving recovery of convenience

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termination settlement costs was denied because the arguments presented by the contractor had been fully considered in the board's earlier decision.

For the appellant: Henry, Watz, Gardner & Sellars, Lexington, Kentucky, by James W. Gardner. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Michael G. Skennion, JAGC, Trial Attorney.

Before YANNELLO and SPECTOR, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 25,907 denied.

YANNELLO, Administrative Judge: Appellant has moved for reconsideration of the Board's decision of 25 March 1993 in the above-captioned appeal. The Government has responded in opposition.

Appellant contends first, that the Board erred in determining that the Contracting Officer's (CO) letter dated 17 August 1992 did not constitute a final decision. This issue was fully considered in the Board's earlier decision, and no new basis for reconsideration has been offered.

Appellant next contends that the Board erred in finding that appellant was entitled to only $2,673.91 rather than the $3,550.00 claimed. This issue too was fully considered in the Board's earlier decision which concluded that appellant had not presented sufficient evidence in support of its claimed "proposal preparation costs" of $94.55 or of its claimed "labor costs for field preparation" of $665.00. Appellant's brief seeking reconsideration alludes generally to the Rule 4 file but points to no evidence in support of these claims. Accordingly, there is no basis upon which to reconsider the initial decision.

CONCLUSION

For the foregoing reasons, appellant has failed to show any basis warranting the Board's reconsideration of its earlier decision. The motion for reconsideration is denied.

[¶ 26,346] Shemya Constructors

ASBCA No. 45251, September 16, 1993. Contract No. DACA85-90-C-0033.

Interpretation of Contracts—Drawings v. Specifications—Order of Precedence Clause.—A contractor's interpretation of its construction contract as not requiring the installation of fuel gages on underground fuel storage tanks was rejected, even though the drawings did not show the gages, because the specifications required the provision of a tank gage and the contract's Order of Precedence clause established that the specifications governed over the drawings in the event of a conflict. While the specifications required the tank gages, they were silent as to where the gages were to be installed. The specifications referred the bidder to the drawings regarding how the gages was to be mounted, but the drawings did not show gages. The board concluded that the uncertainty was with respect to where the gages were to be mounted, not about whether gages were required.

For the appellant: David M. Moor, Partner. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and M. Susan Fink, Engineer Trial Attorney, U.S. Army Engineer District, Anchorage.

Before DICUS and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: This appeal arises from a dispute as to whether the contract requires installation of fuel gages on ten underground fuel storage tanks. The parties have elected to proceed under Rule 11, and appellant has elected the accelerated procedure under Rule 12.3.

FINDINGS OF FACT

1. Contract DACA85-90-C-0033 for construction of an addition to an existing aircraft support shop was awarded 28 September 1990 in the amount of $2,741,924.00 (R4, tab 1). Installation of ten underground fuel storage tanks was required (R4, tab 10). One tank was to be for diesel fuel, one for motor vehicle gasoline, one for

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turbine fuel, one for heating oil, and six for waste fuel (*id.*).

2. The contract contained the Disputes (APR 1984), Changes (AUG 1987), and Specifications and Drawings for Construction (APR 1984) clauses (R4, tabs 5, 6, 7). The latter clause provides:

> (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided....
>
> (c) Where "as shown," "as indicated," "as detailed," or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provide complete in place," that is "furnished and installed."

(R4, tab 6)

3. The contract also contained the Contract Drawings, Maps and Specifications clause, which states in relevant part:

> (b) Omissions from drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

(R4, tab 8)

4. Technical Specification 15606 governed installation of the tanks. Various specification sections use the plural or "each" to preface the singular in referring to the tanks. Pertinent sections are set out below.

> 6.2 Tank Accessories: Accessories shall comply with standards which apply to the tanks.
>
> * * *
>
> 6.2.3 Tank Gage: The tank shall be provided with a remote reading hydrostatic liquid level gage. The gage unit shall be provided with an indicator unit, purge device, tank assembly unit and connection tubing.
>
> 6.2.4 Cleanout and Gage Connection: A combination cleanout and gage connection shall be provided with each tank and shall consist of a 4 inch pipe extending downward through the top of the tank to within 6 inches of the tank bottom. The cleanout/gage pipe shall have a locking type cap. The entire length of pipe inside the tank shall be provided with 1 inch wide by 12 inch long slots at alternate locations.
>
> * * *
>
> 11.3 Tank Calibration: The tanks shall be furnished with calibrated charts showing the liquid contents in gallons per 1/8 inch of tank depth. Two reproductions of the gage chart shall be enclosed in plastic envelopes and bound in hardback binders. Two gage sticks graduated in feet, inches, and eighths of an inch shall be provided. Gage sticks shall be of wood and properly treated after graduating to prevent swelling or damage from the fuel.
>
> 11.4 Tank Accessories: All accessories shall be installed in accordance with manufacturer's instructions, and tested for operability prior to backfilling the tank.
>
> 11.4.1 Liquid level gage readout shall be mounted as indicated. Gage readout shall be calibrated to coincide dipstick level/calibration chart readings.

(R4, tab 9) The drawings do not show the fuel gages (R4, tab 10).

5. Appellant's subcontractor, Alaska Mechanical, Inc. (AMI) was responsible for installation of the tanks. AMI did not include liquid level gages in its bid (app. exh. I). In a 2 November 1990 design verification/clarification request (DVCR) AMI sought verification from respondent that gages were not required (R4, tab 11). On 29 November 1990 AMI was informed that the gages were required by specification sections 6.2.3 and 11.4.1 (R4, tabs 12, 13). By letter of 6 December 1990 to appellant AMI responded as follows:

> We acknowledge receipt of the November 29, 1990 government response to our DVCR #003 dated November 2, 1990.

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The response is incomplete and additional information is required. Per paragraph 11.4.1 (15606), we are instructed to mount gage "as indicated." No liquid level gage is indicated, only gaging dip tubes.

Industry standards for dispensing fuels normally do not include measuring methods beyond dispenser readings and stick gage readings. As both methods are provided for in the documents, we assumed the liquid level gage was not applicable to this installation since is [sic] was not indicated.

We did not include liquid level gages in our bid. If they are required by the owner, we regard this as a change to the contract pursuant to Contract Clause 75, Changes.

Please provide information as to where the liquid level gages are to be installed. We request a change order for this work, and will forward our costs when they are completely known. Please contact this office if you have any questions.

(R4, tab 13)

6. By DVCR of 18 December 1990 appellant sought further clarification, including the desired location of the gages. Respondent provided the information on 22 January 1991 and advised appellant it considered the gages to be at no additional cost (R4, tab 14). AMI installed the gages and by letter of 10 January 1992 filed a claim therefor in the amount of $11,022.00 with appellant. In that letter AMI states:

The specifications were not clear to provide the gage, (note specification 6.2.3 states tank gage singular). Since it was not indicated at bid time we assumed, that stick-gaging, along with metering on fuel storage tanks, were [sic] the extent of what was required. Our bid reflected this assumption and we did not include remote read tank gauges in the estimate.

(R4, tab 16)

7. Appellant filed a claim in the amount of $17,625.71 by letter of 22 January 1992 (R4, tab 3). In a 29 July contracting officer's final decision, the claim was denied (R4, tab 1). A notice of appeal was filed 28 October 1992 (R4, tab 2).

DECISION

Appellant points out that the drawings do not show the gages and the pertinent specification section refers to "tank" in the singular without a modifier such as "each." Thus, appellant contends it was not required to supply the gages, particularly since the contract provides for other means of measuring fuel levels. Respondent argues the gages are manifestly necessary, that appellant's interpretation is unreasonable, and that any ambiguity present with respect to gages is patent and required appellant to inquire.

AMI's letter of 6 December 1990 states that industry standards normally do not require gages (finding 5). Appellant cites this as evidence of industry standards. However, that single sentence in correspondence leading up to the claim is not probative evidence. *Peterman, Windham and Yaughn, Inc.*, ASBCA No. 21147, 77-2 BCA ¶ 12,674. We cannot conclude that industry standards are established thereby.

The contract establishes an order of precedence in which the specifications govern over the drawings in case of conflict. Specification paragraph 6.2.3 requires the provision of a tank gage. Specification paragraph 11.4.1 refers the bidder to the drawings regarding how the gage shall be mounted. The drawings do not show a gage. While the contract is silent as to where the gage is to be mounted, the governing specification is clear in establishing the gage as a contract requirement. Thus, the matter is resolved by the contract's order of precedence. *Hensel-Phelps v. United States* [35 CCF ¶ 75,736], 886 F.2d 1296 (Fed. Cir. 1989). The conflict is with respect to where the gage is to be mounted, not as to whether gages must be supplied.

Appellant also argues that use of the singular in specification section 6.2.3 confused the issue further. While the contract is hardly a model of clarity, we are not persuaded that the failure to use the plural or a modifier such as "each" somehow relieved appellant of any obligation to seek clarification. In resolving such conflicts, the contractor is under a duty to inquire if the conflict is patent. In AMI's letter of 10 January 1992 to appellant, AMI observed that "The specifications were not clear to provide the gage" and it assumed the gages were not required in preparing its bid (finding 6). If AMI considered the matter unclear, it was on notice of the conflict and under a duty to inquire. *Beacon Construction Co. v. United States* [9 CCF ¶ 72,018], 314 F.2d 501 (Ct. Cl. 1963). No reason has been suggested or is apparent as to why only one of the ten tanks would have been required to have a "remote reading hydrostatic level gage." Even if appellant had failed to recognize the conflict, we believe it was sufficiently obvious to require appellant to inquire. *J.A. Jones Construction Co. v. United States* [12 CCF ¶ 81,823], 395

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F.2d 783, 790 (Ct. Cl. 1968). The contract ranked the specifications over the drawings, and liquid level gages were unquestionably required by specification section 6.2.3.

The appeal is denied.

[¶ 26,347] FBS Generalbau GmbH

ASBCA No. 44496, September 9, 1993. Contract No. DAJA10-90-C-0095.

Contract Disputes, Certifications—Adequacy—Completeness of Data.—A certification of a convenience termination settlement claim that stated that the supporting data were accurate to the best of the contractor's knowledge and belief was defective because the assertion did not state that the supporting data were complete. The board was unwilling to infer that the supporting data were complete, because the contractor had failed to submit the subcontractors' termination settlement proposals. The applicable regulations require that a contractor submit such proposals to the government.

For the appellant: von Maur & Partners, Germany, by Michael J. Murphy. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Patrick J. LaMoure, JAGC, Trial Attorney, Headquarters, U.S. Army Europe & 7th Army.

Before RUBERRY, RIISMANDEL, and DELMAN, Administrative Judges.

RUBERRY, Administrative Judge: The Government filed a motion to dismiss this appeal alleging that appellant's claim was not properly certified under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(1). Appellant opposes the motion.

STATEMENT OF FACTS

FBS Generalbau GmbH (appellant) timely appealed to the Board from a contracting officer's decision denying a claim for DM 750,928.09 under a contract for the replacement of built-in cabinets in family housing in Munich, Germany.

On 26 September 1990, the Government terminated the contract under the FAR 52.249-2-Alternate I "Termination for Convenience of the Government (Fixed Price) (April 1984)" clause (R4, tab 21). The contract is subject to the CDA and contained the FAR 52.233-1 "Disputes (APR 1984)" clause (R4, tab 1).

By letter dated 3 June 1991, appellant submitted its termination settlement proposal to the Government (R4, tabs 24 and 26). On 17 December 1991, the Government informed appellant by letter that appellant had not provided all the information needed to finalize the Government's review of the proposal. One of the main areas of Government concern was appellant's failure to submit subcontractors' termination settlement proposals. The Government noted that 50.7 percent of the total settlement sought involved subcontracts. (R4, tab 35) By letter dated 18 February 1992, appellant addressed many of the areas of concern, but did not discuss not having provided subcontractors' termination settlement proposals (R4, tab 38). On 19 February 1992, the Government wrote appellant that the absence of properly executed settlement proposals from the subcontractors and the lack of access to the subcontractors' records precluded an audit determination of the reasonableness, allowability, and allocability of the amounts being sought. (R4, tab 39)

By letter dated 21 February 1992 to the contracting officer, appellant submitted a "claim" which provided in part:

> Our settlement proposal now remains outstanding and unanswered well over sixty (60) days since the DCAA and Quality Assurance visited our offices. We understand it to be in dispute, and accordingly submit this certified claim pursuant to the Contract Disputes Act for the amounts set forth in our termination settlement proposal, less adjustments, totalling DM 750,928.09. A detailed breakdown of claimed costs which parallels our settlement proposal is attached and part of this claim.

(R4, tab 40)

The basis for appellant's stated understanding that its settlement proposal was "in dispute" apparently relates to a DCAA auditor's statement that extended overhead costs would not be allowed.

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The certification was signed by the general manager of FBS Generalbau GmbH and reads as follows:

> As general manager of FBS Generalbau GmbH, I certify that this claim is made in good faith, that the supporting data is accurate to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(R4, tab 40)

On 21 April 1992, the contracting officer issued a final decision denying appellant's claim (R4, tab 44). The decision stated that appellant had provided limited and incomplete information and had not complied with FAR 15.804-6, FAR 49.104(g), FAR 49-108-3, and FAR 49.108-2.

CONTENTIONS OF THE PARTIES

The Government contends that under 41 U.S.C § 605(c)(1) and FAR 33.207(a)(2), appellant has not properly certified its claim. The appellant's omission of the word "complete" from prong two assertedly renders the certification defective.

Appellant counters that, based upon an examination of its claim in its entirety, "it cannot be reasonably disputed that the data referred to in the second prong of the certification is the same data presented in complete form to the contracting officer and his representatives at DCAA and Quality Assurance to support the termination settlement proposal and this resultant claim." Appellant further contends that the documents and explanations clarifying costs questioned by DCAA are tangible evidence of the completeness of the data supporting the claim. Appellant infers that the language in the first paragraph of the claim (alluding to complete cooperation with the DCAA audit and Quality Assurance visits) should be read into the certification language in the last paragraph of the claim. Appellant concludes that the certification language, when the claim is considered in its entirety, is the substantial equivalent of that required by the CDA.

DECISION

For claims over $50,000, the CDA requires contractors to certify that: (1) the claim is made in good faith, (2) the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Proper certification is a jurisdictional prerequisite, *W. M. Schlosser Co. v. United States* [30 CCF ¶ 70,985], 705 F.2d 1336 (Fed. Cir. 1983). A proper certification either repeats the CDA's wording verbatim or is in substantial compliance therewith. *United States v. General Electric Corp.* [31 CCF ¶ 72,180], 727 F.2d 1567, 1569 (Fed. Cir. 1984).

There is no question that appellant failed to recite the CDA certification language verbatim. Appellant has properly included the first and third assertions in the certification, but the second assertion states "the supporting data is accurate to the best of my knowledge and belief ," rather than stating that "the supporting data are accurate *and complete* to the best of my knowledge and belief." The issue then is whether the language used in the second assertion is in substantial compliance with the statutory language.

Appellant's attempted certification is defective because the second assertion did not state that the supporting data are complete. Failure to certify that the supporting data are complete will defeat a claim certification. *Turbine Eagle Charters, Inc.*, ASBCA No. 36259, 88-3 BCA ¶ 21,128; *Eastern Car Construction Co.*, ASBCA No. 30955, 86-2 BCA ¶ 18,909; *Holmes & Narver Services, Inc./Morrison-Knudsen Company, Inc., A Joint Venture*, ASBCA No. 36246, 91-1 BCA ¶ 23,402; *aff'd*, 937 F.2d 622 (Fed. Cir. 1991) (Table).

In *Heyl & Patterson, Inc. v. O'Keefe* [38 CCF ¶ 76,475], 986 F.2d 480, (Fed. Cir. 1993), the court refused to find a certification defective despite the omission of the word "supporting." The court stated:

> Just as the section 605(a) requirement that the contractor request a final decision can be met inferentially, *id.* at 1577, 1581, so too can the section 605(c)(1) requirement that the contractor verify the accuracy and completeness of the supporting data. Especially in this case, where the government admitted that "there is certainly no evidence that Heyl *intentionally* omitted the word 'supporting' from its certification," we see no reason not to infer from the context in which the certification was made that the data to which Heyl & Patterson's certification refers is the attached data. [Emphasis in original]

Here, however, an inference that the data were complete is not appropriate. Despite the Government's emphasis on the contractor's failure to furnish subcontractors' termination proposals, appellant does not

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allege that such proposals were furnished, and no such proposals are in the record. Subcontractors' termination settlement proposals are required to be submitted to the Government by FAR 49.108-3. These circumstances underscore the importance of the contractor's failure to assert in its certification that the supporting data are complete.

Appellant's certification is not in substantial compliance with the statutory language, nor can substantial compliance be inferred. Accordingly, we lack jurisdiction of the appeal. We need not address whether appellant's general manager, who executed the certification, was qualified to do so under FAR 33.207.

CONCLUSION

The Government's motion to dismiss is granted.*

[¶ 26,348] Kimmins Contracting Corp.

ASBCA No. 44265, September 20, 1993. Contract No. F09650-89-C-0081.

Performance—Directions by Government—Floor Protection.—The government's direction that a contractor remove building floor paper from a welding area and replace it with plywood was a compensable change because the contract requirement that the contractor protect the flooring from combustible material in welding areas could have been satisfied by covering the building paper with fire resistant shields rather than by replacing the building paper with plywood. The contractor had concurrent duties under the contract to protect the flooring from traffic damage and from welding, cutting, and open flame fire hazards. In areas used for welding and cutting operations, the contract stated that combustible floors should be covered with damp sand or protected by fire resistant shields. To order the contractor to protect the floors by removing the combustible building paper went beyond the scope of the fire protection requirements.

For the appellant: George R. Robinson, P.E., Vice President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Maria S. Kavouras and Michael F. Copley, Trial Attorneys.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: This appeal arises from the contracting officer's denial of appellant's claim for alleged Government changes in flooring protection. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* Pursuant to Board Rule 11, the parties agreed to submit this appeal for decision on the record, consisting of the Rule 4(a) file, tabs 1-32; appellant's exhibits A-A through A-G; and respondent's exhibits G-1 through G-40. Both parties submitted briefs. We are to decide entitlement only.

FINDINGS OF FACT

1. On 16 August 1989 the parties entered into contract F09650-89-C-0081 ("contract 81") for the repair and renovation of the Robins Air Force Base, GA, plating shop at the fixed price of $14,123,000 (R4, tab 1).

2. Contract 81 incorporated by reference the Federal Acquisition Regulation 52.243-4 "Changes" (AUG 1987) and 52.233-1 (APR 1984) "Disputes" clauses, *inter alia* (R4, tab 1).

3. Contract 81 prescribed three, sequential phases or areas to permit the plating shop to remain operational while appellant performed demolition and construction work (R4, tab 1, spec. § 01005, ¶ 1.2, § 01652, ¶ 2.1).

4. Contract 81 required appellant in Phase I to install: (a) Fluid Applied Resilient (FAR) Flooring on approximately 5,186 square feet depicted on the drawing of the 61 by 66 foot basement floor and drainage trenches and the second floor elevated walkway of building 142. (b) Carbon steel piping, supports and brackets, which required cutting and welding, throughout Phase I. (R4,

* Appellant submitted a corrected certified claim to the contracting officer on 28 July 1992 regarding the same subject matter as ASBCA No. 44496, to which the contracting officer has not responded. Appellant filed a notice of appeal to this Board on 23 November 1992, and that appeal has been docketed as ASBCA No. 45371.

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tab 1, specification § § 9C, ¶ 9.2.1; 17C; dwgs. A-1, PR-2 *et seq.*)

5. Contract specification § 01005, ¶ 6, in pertinent part provided:

> COORDINATION: ... Avoidance of conflicts between mechanical, electrical, architectural and civil systems and other structural or physical aspects or features is the sole responsibility of the Contractor .... Manufacturers' requirements, if more stringent than the specifications and drawings, shall be incorporated at no additional cost to the Government.

(R4, tab 1)

6. Contract specification § 01505, WELDING, CUTTING, BRAZING, AND OPEN FLAME, provided in pertinent part:

> ¶ 1 GENERAL The Contractor shall observe all precautions and provide welding, cutting, brazing and open flame equipment in accordance with ... OSHA 1926.350 through 1926.354 (1985) and AFOSH Standard 127-5 (14 Feb 84). An AF Form 592 must be retained by the foreman at the work area for the duration of the work.

(R4, tab 1)

7. AFOSH Standard 127-5 (14 Feb 84) provided in pertinent part:

> Inside Areas .... A specific area ... designated or approved by base fire authorities for welding and cutting operations ... will be of noncombustible or fire-resistive construction ... free of combustible and flammable materials, and segregated from adjacent areas. Remove all combustible materials within 35 feet of the operation .... Combustible floors will be covered with damp sand or protected by fire resistant shields.

(R4, tab 29)

8. AF Form 592 contained a CHECKLIST FOR OPERATORS, in which item 3 stated, "Do not perform operation ... [w]ithin 35 feet of combustibles unless combustibles are protected and a fire watch is posted" (R4, tab 30). Neither OSHA 1926.352 Fire prevention, nor AFOSH Standard 127-5 requires *both* the protection of flammable materials or fire hazards *and* the removal of such materials or hazards from a welding area.

9. Contract specification § "9C, FLUID APPLIED RESILIENT FLOORING," provided in pertinent part:

> ¶ 4 SUBMITTALS
>
> ¶ 4.1 ... Manufacturers [sic] Application Instructions: Complete instructions for application of flooring system including any precautions or special handling instructions required to comply with the Occupational Safety and Health Act.
>
> * * *
>
> ¶ 13.1 Surfacing shall set for a minimum period of 48 hours at 70° F before traffic is allowed on the floor. Finished flooring shall be protected from traffic by covering with 30 pound building paper or other equally effective means until final acceptance of the project.
>
> * * *
>
> ¶ 14.4 Upon completion, leave the work clean and free from blemishes.

(R4, tab 1)

10. Appellant's 11 June 1990 submittal #060, which the contracting officer approved on 15 June 1990, proposed MBT-Construction Services as its FAR Flooring vendor, and attached MBT's 9 May 1990 letter to appellant, which stated the following *Operating & Maintenance Guidelines:*

> - Avoid physical impact that may be caused by falling objects or dropped tools, equipment, parts, etc.
> - Avoid gouging or scraping that may be caused by dragging drums, equipment, lift forks, etc. Avoid isolated point loads.
> - Avoid contact with burning torches, open flames, weld splatter ....
>
> Recommended normal precautions for reducing potential flooring damage would include temporary protection such as plywood sheets beneath work areas, use of rubber-wheeled carts or equipment, use of sill plates below point loads, and fire-rated blankets around burning or welding locations.

(Exh. G-11)

11. Under contract 81 appellant subcontracted with (a) MBT to install FAR flooring and protective covering and (b) J. Christopher Enterprises, Inc., later renamed Blue Ridge Mechanical (BRM), to install carbon steel piping (exh. G-38, G-39; R4, tab 2).

12. BRM installed carbon steel piping from May to November 1990. MBT applied FAR flooring in the plating shop basement from 25 June to 24 July 1990, and on the second floor elevated walkway between 14 and 17 August 1990. The FAR flooring was subject to traffic after 8 July 1990. (Exh. G-12 to G-14, G-19; R4, tabs 13-15, 18-22, 24)

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13. After several times observing closeby welding and equipment moved across unprotected FAR flooring, Dennis Keene, respondent's construction manager, on 19 July 1990 told appellant's safety officer David Cordova, and on 20 July 1990 told appellant's site manager Randy Allen, to "meet spec section 9C para. 13" (R4, tab 3; exh. G-13 at 2; G-19 at 1; A-A, ¶ 10).

14. On 20 July 1990 respondent's contract administrator, Gene Lee, verbally directed Randy Allen to comply with Keene's previous instructions to adhere to the specifications (exh. A-A, ¶ 9; R4, tab 3).

15. Appellant's 20 July 1990 letter to respondent, forwarding MBT's 19 and 20 July 1990 letters to appellant, stated that due to welding, building paper was more a fire hazard than a protection; MBT's FAR flooring would resist traffic damage after its 48-hour cure period; welding tarps and thin plywood were a better protection; and "plywood and polyethylene is being placed under ... erection and fitting operations to protect the floor finish." Appellant did not state that Keene insisted on installing building paper or that Lee directed it. (R4, tab 2; exh. A-E, ¶ ¶ 4-5)

16. Appellant's 23 July 1990 letter to Gene Lee stated: "Per your directive, we are preparing to furnish and place 30 pound building paper protection as specified in paragraph 13.1; however, we believe this will create an unacceptable fire hazard" and asked respondent to review it with the base fire safety officer and to revise the specification. (R4, tab 5)

17. The contracting officer's 23 July 1990 letter directed appellant to comply with Section 9C, ¶ 13.1, and stated that appellant could comply with that specification "and still provide adequate fire and safety precautions" (R4, tab 3).

18. Gene Lee's 24 July 1990 conversation record stated that he and Dennis Keene discussed the "30 lb paper we want the Ktr to cover floor with," noting that "Dennis stated that the fire dept. had no problem with this and Dennis wanted it done now" (R4, tab 6).*

19. On 24-25 July 1990 BLM installed 30 pound building paper over the basement floor area. Respondent's 31 July through 10 August 1990 inspection records and 6 August letter to appellant stated that the flooring protection paper had torn areas needing repair or replacement. Appellant replaced the paper covering the south section of the basement floor on 7 August 1990. Respondent's 10 August 1990 notes stated:

> [Manager D. Keene:] inspected site with Randy Allen and discussed situation on paper on floor. Decided to put wood on the areas that work was being accomplished and where the paper was destroyed.
>
> * * *
>
> [Inspector F. Wheeler] Discussed burning permit vs. paper in floor in work area. D. Keene states agreement w/contractor to remove paper & protect floor in welding area.

(R4, tabs 8, 9, 10, 32; exh. G-27)

20. Inspector F. Wheeler's 13 August 1990 Inspection Record stated:

> Called Fire Dept. .... Met w/Inspector Dixon (DEF) for inspection of jobsite. Dixon states that paper protective covering must be removed from welding areas. Discussed w/D. Keene. Concurs to use chip board covered w/fire retardant blankets in welding area as recommended.

(R4, tab 11) Gene Lee participated in these directions (exh. G-3, ¶ ¶ 20-23).

21. On 14 August 1990 appellant removed building paper from the basement floor and second floor elevated walkway, and installed plywood in those respective locations on 14 and 20 August 1990 (R4, tabs 13, 22).

22. Appellant's 15 August 1990 letter notified Gene Lee that on 18 July 1990 Dennis Keene verbally directed appellant to adhere to specification § 9C, ¶ 13.1 and to place 30 pound building paper on the FAR flooring; on 13 August 1990 Keene told appellant to remove the paper and to replace it with another means of protection and that 1/4" ply-

* Appellant's vice president George Robinson in a 1992 affidavit stated that on 24 July 1990, after he discussed FAR flooring protection with Gene Lee, "the conclusion ... was that Kimmins would put down the paper which would remain in place until base safety or fire officials recognized the hazard, at which time we would remove the paper and would have no further requirement" (exh. A-G at ¶ 11). Gene Lee's affidavit discusses his several conversations with Randy Allen, but mentions none with George Robinson on 24 July 1990 (exh. G-3). No other Kimmins affiant corroborates Robinson's statement. Nothing else in the record memorializes a 24 July 1990 Robinson-Lee telephone conversation. Appellant's briefs do not address Robinson's "conclusion" in its proposed findings of fact. Respondent's briefs ignore the Robinson affidavit. Robinson's "conclusion" is so far at variance with the preponderance of record evidence that we accord it no weight.

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wood was acceptable. Appellant considered this to be a FAR ¶ 52.243-4 change. (R4, tab 16) Contracting officer Marlene Humphry reviewed this correspondence (exh. G-4, ¶ 3).

23. Appellant's 21 January 1992 letter to respondent enclosed a $2,802.42 estimate for work to install and remove Kraft paper and to install 1/4" plywood to protect the contract 81 Phase I FAR flooring allegedly "as directed by the Government," with invoices dated from 7 to 20 August 1990 for plywood, Kraft paper and duct tape, labor hours and costs (R4, tab 25).

24. Affiant Randy Allen stated that plywood and fire-rated welding blankets were used "prior to July 23, 1990" and "over five weeks . . . prior to Dennis Keene's insistence to place 30 lb. building paper on the floor for protection" (exh. A-A, ¶¶ 4, 11). Affiant Robin Sauer, appellant's quality control manager, stated that appellant used plywood and fire resistant welding blankets under cutting and welding operations and rubber-wheeled carts or equipment to avoid applying point loads to the FAR-finished surfaces (exh. A-F, ¶ 4). BRM's Marvin Overton stated that protective coverings were used "at all times" (exh. A-B). BRM's Mike Cross stated that "building paper was first installed, and then later chipboard was installed" (exh. A-D, ¶ 5).

25. Government affiant Keene stated that prior to 24 July 1990 there was no proper protective covering on the FAR flooring; he discussed 30-pound building paper with Randy Allen on 20 July 1990, but only directed Allen to comply with specification § 9C, ¶ 13; he told Allen on 10 August 1990 that the paper was not holding up under floor traffic and that plywood was doing a better job and would be acceptable; and he did not order appellant to remove the floor paper on 13 August 1990 (exh. G-1). Affiants John Fehr (a contracted field inspector), Gene Lee and contracting officer Marlene Humphry generally corroborate Keene's statements (exh. G-2, G-3, G-4). Affiant Emmett Dixon said that on 13 August 1990 he did not tell appellant it had to remove the floor paper; it had to protect it with fire retardant covers within 35 feet of all welding (exh. G-6; R4, tab 28).

26. Considering the conflicting 1992 affidavits, and weighing more heavily the contemporaneous 1990 records of the parties' statements, we find that (a) appellant used plywood and fire-resistant welding blankets for FAR flooring and fire protection prior to 24 July 1990, but such protection was inadequate; (b) Dennis Keene did not direct appellant to install 30-pound building paper on 19-20 July 1990; (c) the record contains no evidence of any actual damage to FAR flooring; (d) building paper, repaired or replaced as often as necessary, adequately protected FAR flooring from traffic damage and it was combustible, requiring fire shielding in welding areas; and (e) on 13 August 1990 Messrs. Keene, Dixon and Lee directed appellant to remove paper from the welding areas and replace it with plywood.

27. The contracting officer's final decision dated 25 February 1992 denied appellant's FAR flooring claim (R4, tab 31).

28. Appellant timely appealed that final decision to the Board on 16 March 1992.

DECISION

Appellant has the burden of proving entitlement to affirmative claims such as constructive change order claims. *Teledyne McCormick-Selph v. United States* [25 CCF ¶ 82,891], 588 F.2d 808, 810, 218 Ct. Cl. 513, 516 (1978); *Service Engineering Company*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,119.

Appellant argues that contract 81 gave it the right to choose either "30 pound building paper" or "other equally effective means" to protect the FAR flooring, but not both. Appellant chose "other equally effective means" in submittal #060, namely, "plywood sheets beneath work areas, use of rubber-wheeled carts or equipment, use of sill plates below point loads, and fire-rated blankets around burning or welding locations." Respondent approved that choice, so appellant had no duty to install 30-pound building paper. Appellant does not stress that Dennis Keene's alleged direction to install building paper in July 1990 constituted a change. We found that Keene did not direct appellant to install the building paper in July 1990 (finding 26(b)). Appellant argues that (1) a change arose when respondent recognized that the building paper was a fire hazard and ordered appellant to remove it and to replace it with plywood; and (2) the specification permitting 30-pound building paper was defective because such paper cannot protect FAR flooring from anything.

If specification § 9C, ¶ 13.1, were construed in isolation, appellant's "either paper or equally effective means but not both" argument might be persuasive. But that interpretation conflicts with the elementary rule which requires us to construe a contract as a whole to give meaning to all its provisions. *Julius Goldman's Egg City v. United States*

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[30 CCF ¶ 70,662], 697 F.2d 1051, 1057 (Fed. Cir. 1983); *Coastal Dry Dock & Repair Corp.*, ASBCA No. 31894, 81-1 BCA ¶ 19,618 at 99,235. Appellant had concurrent duties to protect the FAR flooring from traffic damage and from welding, cutting and open flame fire hazards. Installation of 30-pound building paper to protect the FAR flooring from traffic damage did not satisfy appellant's contractual duties. Wherever combustible material was in a welding area, appellant had to protect it by fire-resistant shields (findings 7, 8).

Appellant's argument that the specification § 9C, ¶ 13.1, was defective is not sound. The 30-pound building paper, repaired and replaced as often as necessary, adequately protected FAR flooring from traffic damage (finding 26(d)). In areas of welding, cutting and open flame fire hazards, appellant had to protect the FAR flooring either (i) with noncombustible material or (ii) with building paper covered by fire-resistant shields. The need for such shields does not mean that the specification of building paper was defective.

Inspector Dixon's 1992 affidavit states that he told appellant only to protect the FAR flooring with fire retardant covers, not to remove the building paper on 13 August 1990 (finding 25). Dixon's statement is not consistent with inspector Fred Wheeler's records: 10 August 1990—"D. Keene states agreement w/contractor to *remove* paper & protect floor in welding area" and 13 August 1990—"paper protective covering *must be removed* from the welding areas" (emphasis added; findings 19, 20). We give more weight to the contemporaneous records than to the post-litem affidavit.

Contract administrator Gene Lee participated in the verbal direction which he, Keene and Dixon gave appellant on 13 August 1990 (finding 20). Contracting officer Marlene Humphry reviewed appellant's letter notifying Lee that it considered such direction a change (finding 22). Therefore, she ratified the change. *Reliable Disposal Company, Inc.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717, and authorities cited therein.

Respondent argues that its direction regarding fire protection was a "sovereign act" enforcing the OSHA law and regulations. Neither OSHA 1926.352 Fire prevention, nor AFOSH Standard 127-5 requires *both* the protection of flammable materials or fire hazards *and* the removal of such materials or hazards from a welding area (finding 8). To require appellant to do both was not a sovereign act, but was a contract change.

We hold that appellant's original installation of 30-pound building paper was not a change (finding 26(b)), but respondent's direction to remove such paper on 13 August 1990 (finding 26(e)) was a change. Appellant is entitled to compensation for the cost of removing building paper, but not for installing such paper and particle boards throughout the Phase I area. We sustain the appeal to the extent set forth in this paragraph.

[¶ 26,349] McGhee Construction, Inc.

ASBCA No. 44064, September 20, 1993. Contract No. F08650-90-C-0195.

Performance—Directions by Government—Substitutions.—A contractor that offered laminate from three manufacturers listed in the specifications as acceptable in place of the brand name plastic laminate called for in the drawings was entitled to an equitable adjustment for the government's refusal to accept an alternative, because the contractor was entitled to substitute acceptable alternatives for the brand name. Also, the specifications took precedence over the drawings under the Specifications and Drawings clause.

Interpretation of Contracts—Drawings—Reasonableness of Interpretation.—A contractor was not entitled to an equitable adjustment for being required to use a brand name solid surface building material, even though the contract's listing the brand name product within a plastic laminate schedule and depicting the brand name product as plastic laminate over a plywood base rather than as an SSBM did not contribute to the contract's clarity, because the only reasonable interpretation was that the brand name was required.

For the appellant: Starfield & Payne, Fort Washington, Pennsylvania, by Timothy S. Kerr. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Michael F. Copley, Trial Attorney.

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Before STEMPLER, RUBERRY, and THOMAS, Administrative Judges.

STEMPLER, Administrative Judge: This is a timely appeal from a contracting officer's decision denying appellant's $26,494 [1] claim for providing material allegedly not required by the contract. The Contract Disputes Act is applicable. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 28 September 1990, the Air Force and McGhee Construction, Inc. (MCI) entered into a $741,500 firm fixed price construction contract for the repair and upgrade of the lobby and command section of Building 989 at Patrick Air Force Base, FL. The relevant specification sections are as follows:

SECTION 06240

LAMINATED PLASTIC

PART 1—GENERAL

1.1 DESCRIPTION

A. Work included: Provide laminated plastic where shown on the Drawings, specified herein, and needed for a complete and proper installation.

* * *

PART 2—PRODUCTS

2.1 LAMINATED PLASTICS

A. Acceptable manufacturers:

1. Wilsonart Division of Ralph Wilson Plastics, 600 Bruce Drive, Temple, Texas 76501 (817) 778-2711.

2. Nevamar Corporation, 8339 Telegraph Road, Odenton, Maryland 21113 (301) 569-5000.

3. Micarta Division of Westinghouse Electric Corporation, 304 Hoover Street, Hampton, South Carolina 29924 (803) 943-2311.

B. Colors and patterns: Provide "solid colors & textured finish" *as noted on the drawings selected by the Contracting Officer from standard colors and finishes of the approved manufacturer.* [2]

C. Qualities and types: Provide general purpose type, 0.050" thick, complying with NEMA LD3.

(R4, tab 1)

2. The drawings relevant to this dispute are:

- Sheet 12 of 22: This sheet was the "room finish schedule". The drawing contains finish schedule codes for plastic laminates, ceiling finishes, floorcoverings & accessories, *etc.* The plastic laminate codes ranged from PL-1 to PL-11. PL-1 through PL-8 specified Laminart as the manufacturer with particular colors and finishes. PL-9 specified Wilsonart as the manufacturer. PL-10 read: "Avonite solid surfacing & building material, Color, CI-1050 midnight sky, Finish: High Gloss." PL-11 did not specify a manufacturer. The finish schedule legend stated that "PL" meant plastic laminate.[3]

(emphasis added)

- Sheet 10 of 22 depicted a typical cabinet section. Parts of the cabinet were to be made of plywood with plastic laminate as a finish surface. Notes on the drawing would state (*e.g.*) "plastic lam. on 3/4" plyw'd. on all cabinet front exposed surfaces w/ PL-2". An arrow would go from these notes to an area where there was a 3/4 surface with straight lines (indicating plywood) in it and a bold solid line on top of it. Two surfaces with these same straight lines had a different note. This note stated: "PL-10 Avonite Counter top." Two quarter rounds also appeared on the drawings with the note: "PL-10 Avonite quarter round." These quarter rounds did not have the straight lines in them. Sheet 9 of 22, the display cabinet section, also had notes including the use of both the Avonite quarter round and Avonite counter top, each without the straight lines.

- Sheet 6 of 22, note 2 required contractors to review the complete drawings and specifications to determine the entire scope of their work. It also directed the contractor, in case of conflict between sections of the specification, to include the most stringent requirements. Note 3 required the contractor to coordinate the drawings with the specifications.

(R4, tab 2; exh. G-1; tr. 30-31, 64-65, 67, 80-81)

3. The contract contained the FAR 52.236-5, Material and Workmanship (APR

[1] Appellant's claim now appears to be for $15,750 (app. reply br. at 6).

[2] Section 2.1 B. was changed by hand prior to the bid packages being sent to the bidders. The portion struck through was lined out. The portion in italics was added.

[3] Sheet 2 of 22 has the materials legend symbols. On this drawing, "PLAM" is the symbol for plastic laminate (tr. 123).

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1984) clause, which provides in relevant part:

> References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(R4, tab 1) The contract also contains the Specifications and Drawings For Construction (APR 1984) clause, FAR 52.236-21.

4. Avonite is a "solid surface building material" (SSBM), as distinguished from plastic laminate which is a thin finish sheet that is applied to a building material. Avonite, which is an imitation marble, is approximately 1/2" thick (tr. 34, 45).

5. While Avonite was not a plastic laminate, the architect and engineer firm (A/E) that prepared the drawings did not find it necessary to create a new finish category other than plastic laminate to specify Avonite because it was a surfacing material like plastic laminate. That is how Avonite came to appear on the finish schedule as PL-10. The representative of the A/E firm testified that the lines in the Avonite surface on sheet 10 of the drawings were not intended to depict plywood and were, in retrospect, a mistake (tr. 101-03, 107).

6. In preparing its bid, MCI did not include any amounts for Avonite (as PL-10) as opposed to plastic laminate, or for the more expensive Laminart plastic laminate for PL-1 through PL-8. MCI did not ask any suppliers for quotations prior to bidding. MCI's president (Mr. McGhee), who prepared MCI's bid, testified that he reviewed the entire contract, including the specifications and drawings in preparing the bid. It was his testimony that all three of the acceptable manufacturers listed in the specifications had similarly priced products, so he did not use the finish schedule (that called out Laminart and Avonite) when he arrived at his bid. It was his opinion that the finish schedule would contain only the color and texture of the finishes and that these would have no effect on MCI's bid. Mr. McGhee testified that he saw the reference on drawing sheet 10 to Avonite, but did not know what Avonite was and assumed it was a color or texture of a plastic laminate. He also had never heard the term solid surface building material (tr. 20, 13-14, 23-25, 28-30, 73-74).

7. After award, Mr. McGhee solicited quotes from suppliers for the cabinetry work, giving them the same information the Government had provided MCI to bid on. The suppliers quoted very high and when questioned by MCI, stated that the high bids were because of the Avonite which was not a plastic laminate but a SSBM. This was the first time MCI realized this fact. It was from the suppliers' quotations that MCI also discovered that Laminart had been specified as a plastic laminate on the drawings (tr. 22, 33-34, 71-72, 78-79).

8. On 14 March 1991, MCI submitted submittal no. 36 for the plastic laminates. MCI offered the choice of 5 different manufacturers for items PL-1 through PL-9, including the three listed in the specifications as acceptable. PL-1, 3, 5, 6, 7, and 8 were disapproved on 17 April 1991 with the following note: "Refer to specification 06240, paragraph 2.1 B. Submitted samples are not as specified on sheet 12 of drawings. Intent of design is compromised with submitted alternates." MCI's submittal for PL-10 stated: "Formica 271 Blackstone, Polished (Avonite not available as plastic laminate)." The Government disapproved the PL-10 submission stating: "Same as item 112 [same note as quoted above). Avonite is not a plastic laminate as stated on sheet 12 of drawings under PL-10. Refer to sheet 9 of the drawings for locations of avonite building material on cabinets. The intent of the design is not met with the submitted material alternate." (R4, tab 3; tr. 34-35, 37-38).

9. On 6 May 1991 MCI wrote the contracting officer stating that as to plastic laminates, MCI had not offered Laminart because of its low quality, high price (2-3 times the cost of the alternates), and nonavailability. MCI pointed out that the specifications listed three acceptable manufacturers, none of which was Laminart, and all of which were offered by MCI. As to the Avonite problem: MCI stated:

> 1) The specifications are silent with respect to Avonite or any like materials being required on this project.
>
> 2) The detailed drawings detail a plastic laminate for PL-10. Reference sheet 10, section 14/10.
>
> 3) The PL-10 designation would presumably stand for plastic laminate #10.
>
> 4) The color selection for PL-10 can be found on sheet 12 of the drawings under

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the general heading of PLASTIC LAMINATE.

Only upon trying to locate a supplier for Avonite plastic laminate did we discover that Avonite is a material other than a plastic laminate, at 25 times the cost of the plastic laminate included in our bid. The Government should not be allowed to slip in the more expensive materials on an unsuspecting bidder in the manner utilized on this project.

MCI asked for reconsideration of the disapproval and stated that it would not resubmit until it had a decision on its request for reconsideration (R4, tab 7).

10. On 1 July 1991, the Government replied, stating:

1. Per your letter, the Contracting Officer has reviewed your request to reconsider the previously disapproved submittal items (Submittal No. 36). The disapproved submittals have been reviewed and remain disapproved because the materials are not considered to be equal in quality or functionality.

2. As to your claim that the government "slipped in" a more expensive material, the Avonite and Laminart were clearly identified in the finish schedule of the contract drawings. Specifications Section 06240, Part 2, paragraph 2.1.8, refers the reader to the drawings. In addition, the "General Notes No. 1-9" on Sheet 1 of 22 of the project drawings directs the contractor to include both specifications and drawings since both contain information needed by the contractor to prepare a bid package.

3. The paramount responsibility of the contractor during the bidding stage is to thoroughly review the contract documents and bid accordingly, and if omissions or discrepancies are noted, to raise them at that time. This project was bid without any protest from you, and your company is responsible to comply with the contract requirements. You are herein directed to submit the finishes called for, or finishes that are equal to Avonite and Laminart in quality and functionality. These submittals should reach this office no later than 10 Jul 91.

(R4, tab 7)

11. The Laminart product specified by the Government did not meet the abrasion standards required by the contract (AR4, tab 13; tr. 38-39).

12. On 11 July 1991, MCI filed a claim for $26,494 for the cost of providing the more expensive Laminart and Avonite[4] (R4, tab 8).

13. On 3 December 1991, the contracting officer denied the claim (R4, tab 13).

14. On 28 January 1992, MCI filed a timely appeal.

CONTENTIONS OF THE PARTIES

It is MCI's position that the drawings are defective because they specify a plastic laminate manufacturer who was not cited as acceptable in the specifications and because the drawings specify Avonite as a plastic laminate when it is in fact a SSBM. To the extent that any ambiguities in the contract are present, MCI contends they are latent and not patent.

The Government contends that the contract clearly calls for the use of Laminart and Avonite. If the contract contains ambiguities, the Government alleges that they are patent, giving rise to a duty on MCI's part to inquire before bidding.

DECISION

There are two issues for decision in the appeal before us. First, we must decide whether the Government's requiring MCI to provide Laminart entitles MCI to an equitable adjustment. Second, we must decide whether the Government's requiring MCI to provide a SSBM (where Avonite was specified on the drawings) entitles MCI to an equitable adjustment.

In interpreting contracts, we attempt to give meaning and consideration to all portions of a contract. *Hol-Gar Manufacturing Corp. v. U.S.* [10 CCF ¶ 72,885], 351 F.2d 972 (Ct. Cl. 1965). As to the Laminart issue, we can interpret the specifications and drawings without finding a conflict. While the drawings specify Laminart, MCI was, of course, entitled to substitute acceptable alternatives for the brand name. Also, the specification takes precedence over the drawing under the Specifications and Drawings clause. We hold that § 2.1 A of the specification establishes that products of the three listed manufacturers were acceptable alternatives. Therefore, the Government's rejection of those manufacturers was wrong-

[4] MCI eventually submitted a product called Corian as an alternative for Avonite and the Government approved this substitution. It is the difference between the plastic laminate and the Corian that MCI seeks in this portion of the claim (AR4, tab 34; tr. 38, 43-44).

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ful and MCI is entitled to its increased costs for providing Laminart.

As to the Avonite issue, we hold that the contract required the use of Avonite (or an acceptable SSBM alternate) and MCI is not entitled to an equitable adjustment for providing it. While listing Avonite within the plastic laminate schedule, and depicting (at least in some instances) the Avonite as plastic laminate over a plywood base, did not contribute to the contract's clarity, taken as a whole, the only reasonable interpretation is that Avonite was required. First, sheet 12 of the drawings clearly calls out Avonite as a SSBM. Second, both sheets 9 ad 10 included instances where the Avonite did not include the confusing plywood base representation. MCI's problem was that it was not familiar with Avonite or the term SSBM and it had not contacted any suppliers prior to award. MCI's suppliers had no difficulty interpreting the contract and determining that Avonite was required.

CONCLUSION

The appeal is sustained in part (and remanded to the contract officer for determination of quantum) and denied in part in accordance with the above opinion.

[¶ 26,350] Rice King

ASBCA No. 43352, September 10, 1993. Contract No. 110-100-89-C-0033.

Procedure, Boards—Parties—Partnership v. Doing Business As.—A government assertion that the party before the board was not a party to the contract and lacked standing to proceed was denied, even though the government argued that it had contracted with an individual, not a partnership, because the record contradicted the government. A partnership proposal was drawn up and signed by several individuals as partners; the partnership authorized an individual to submit a bid to a nonappropriated fund activity, which it did. A business clearance memorandum prepared by government personnel proposed award of the contract to "[the individual] dba: Rice King." It was noted that the individual owned and operated a Rice King in San Diego and had put together a partnership capable of providing the cash necessary to build and start operation of the facility for the nonappropriated fund activity. A more formal agreement, memorializing the partnership, was entered into by the individuals identified in the partnership proposal. The award was made to "[the individual] dba: Rice King." The government knowingly contracted with Rice King as the partnership described in documents supplied with the bid submission.

For the appellant: Clinton D. Hubbard, San Diego, California. For the government: Arthur H. Hildebrandt III, Navy Chief Trial Attorney, and Anthony Crouse, Trial Attorney, Naval Facilities Engineering Command, West Coast Litigation Team, San Bruno, California.

Before YANNELLO, RUBERRY, and THOMAS, Administrative Judges.

YANNELLO, Administrative Judge: The Government has filed a motion to dismiss the subject appeal, for lack of jurisdiction, on the grounds that the named appellant is not a party to the contract and lacks standing to proceed.

Specifically, the Government contends that it contracted with Ms. Paula Lutes, an individual who would be operating a restaurant under the name of Rice King; the Government argues that this appeal may be brought only by Ms. Lutes individually or by Ms. Lutes doing business as Rice King, but may not be brought by Rice King-32nd Street, a California Partnership, with which, the Government contends, it has no privity of contract (br. at 9-10).

SUMMARY OF FACTS

On 9 May 1989, a Tentative Partnership Proposal was drawn up and signed by several individuals, as partners, identified as follows:

Names:	[Apparent shares]
Mr. and Mrs. Lutes	8 shares, $80,000
Mr. and Mrs. Steve Sandoval	7 shares, $70,000
Leticia Rosario	12 shares, $120,000

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Mr. & Mrs. Yung-Fa Lee (by Cheng)	4 shares, $40,000
Mr. & Mrs. Shen-Chia Ma (by Cheng)	4 shares, $40,000
Mr. and Mrs. Ron Battle	1 share, $10,000
Total:	36 shares, $360,000

In the record before the Board, affidavits were furnished by Ms. Lutes as well as Mr. Battle, Mr. Sandoval, Ms. Rosario, and, on behalf of Mr. & Mrs. Ma and Mr. & Mrs. Lee, by Dr. Cheng. All attest to their formation of the partnership beginning with discussions in April 1989 and culminating in a meeting on 9 May when the above document was executed. They also attest that Ms. Lutes was designated the General Manager and authorized to submit a bid in response to the Navy's solicitation, as discussed below.

In response to a solicitation for bids issued in March 1989 by the Navy Resale and Services Support Office (also referred to as NAVRESSO or the Navy Exchange), a non-appropriated fund activity, a proposal was submitted on 10 May 1989 by offeror Paula Lutes, who signed the offer as "General Manager." Accompanying the offer were representations that the offeror intended to operate as a member of a partnership, together with descriptions of the proposed partnership (see, e.g., R4, tab 6 at 4-7), including the signed agreement referred to above.[1]

Government questions concerning the bid proposal were addressed to Ms. Lutes who responded by letter of 14 May and enclosed a revised bid for Rice King.

A Business Clearance Memorandum (BCM) was prepared on 19 May by Government personnel (prepared by G.C. Carter as Acquisition Manager and submitted by J.C. Matthews, Commander). It proposed the award of the contract to "Paula Lutes dba: Rice King." It was noted that Ms. Lutes owned and operated one San Diego Rice King restaurant and that:

> She has put together a partnership financially capable of providing in cash the $360,000 estimated as necessary to build and start operation of this facility.

On 4 July 1989, a more formal agreement, memorializing the partnership, was entered into by the individuals identified in the 9 May Tentative Partnership Proposal, with the percentage ownership noted therein (for example, Mr. and Mrs. Lutes with a 22.24 percentage distribution of profit or loss). The name of the partnership was stated as the "32nd Street Naval Station Rice King." With respect to such terms as control and dissolution of the partnership, this agreement referred to a "formal partnership contract" to be drafted later.[2]

Accordingly, approval was given on 14 July 1989 for award of the contract to "Paula Lutes, dba Rice King." The award was signed on 14 July by Mr. Matthews as contracting officer.

Between 1989 and early 1991, the parties discussed revisions in the terms of the contract. Government personnel met or corresponded with Ms. Lutes as well as with other members of the partnership and its counsel.

In May or June 1991, Ms. Lutes resigned as managing partner in Rice King-32nd Street; in September or October 1991, she transferred her interests in the partnership to the remaining partners.

The Government, in mid-1991, issued a unilateral modification to the contract reducing the amount of the contractor's commission. Thereafter correspondence between the parties was chiefly undertaken by either Dr. Cheng or Clinton D. Hubbard, Esquire.

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[1] In the descriptions furnished to the Government, Ms. Lutes was described as co-owner, with her husband, of a Rice King restaurant which opened on 2 March 1989 in San Diego; Dr. Cheng was described as the founder, in 1982, of "Rice King Foods, Inc." and also represented Mr. and Mrs. Lee and Mr. and Mrs. Ma, who entered into the 9 May 1989 partnership. In addition, financial statements for one month of operations of Ms. Lutes' restaurant were furnished.

[2] On 21 August 1989, a General Partnership Agreement was entered into between "Rice King II, Inc." (described as a wholly owned subsidiary of "Rice King Foods, Inc." or "Rice King I" owned by Dr. Cheng) and "Rice King-32nd St.," a partnership. The chief purpose of this Agreement was to obtain for the Naval Station restaurant (also sometimes referred to as "Rice King VII" apparently denoting the seventh in a chain of Rice King restaurants) rights to use the Rice King name. The capital contribution consisted exclusively of $360,000 from "32nd St. Partnership", which in turn had 99 percent of the distribution of profits/losses from the new partnership. This agreement was executed for Rice King II by Dr. Cheng and for the "32nd St. Partnership" by Paula Lutes, Managing Partner, and Mr. Lutes, Mr. and Mrs. Battle, Mr. and Mrs. Lee, Mr. and Mrs. Ma, Mr. and Mrs. Sandoval, and Leticia Rosario.

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The notice of appeal was filed with the Board on 5 August 1991, on behalf of Rice King-32nd St. Partnership. At the same time, the claim involved in the dispute was submitted and certified by Leticia Rosario as General Partner of Rice King-32nd St. Partnership.[3]

The Government contends, in essence, that its contract is with Ms. Paula Lutes individually or d/b/a "Rice King"; that "Rice King-32nd Street Partnership" did not come into being until after the contract was entered into; and that "Rice King-32nd Street Partnership" is not the contractor and is not entitled to pursue the instant appeal.[4]

DISCUSSION

In support of its motion, the Government cites many well-established precepts concerning privity with the Government and standing to sue. It is not necessary to discuss these contentions or precepts here. Rather, we find that the facts present in this appeal are sufficient predicate upon which to base our decision.

At the time of bid submission, the Government was advised that the offeror intended to perform the contract through a partnership, doing business as Rice King. Before bid opening and contract award, the Government was furnished with a description of the partnership together with a partnership agreement signed by the various partners and setting forth their proportionate ownership. There was indeed a partnership formed at the time of bid submission.[5] This

[3] Based on the foregoing findings, the Board notes that the captioned appellant should more precisely be described as Rice King-32nd Street Partnership.

[4] In its April 1992 Answer to the Complaint, at page 3 referring to the third paragraph on page 8 of appellant's proposal of 7 February 1991, the Government had admitted the following assertions:

The within claimant, "Rice King", was awarded the contract on July 14, 1989, under Contract No. 110-100-89C-0033. The managing partner of "Rice King" is Paula Lutes. The formal name of the partnership is "Rice King 32nd Street, A California Partnership" (herein after [sic] referred to as "Rice King").

Thus these facts, concerning the party with whom the Government believed it had contracted as well as the party appearing as appellant—both being "Rice King-32nd Street, a partnership", were addressed in the pleadings some six months before the Government first raised the concerns now voiced in its motion.

Government counsel states in its motion that he had noted, in the filing of this appeal, a change in style from "Paula Lutes, d/b/a Rice King" to "Rice King-32nd Street, a California Partnership" but, however, that he recognized Ms. Lutes as a member of the partnership and hence perceived no difficulty with the appeal. Counsel further states that he had only recently learned of Ms. Lutes' withdrawal from the partnership (allegedly prior to the filing of the Notice of Appeal although the documents make clear that, at that time, she had only resigned as General Manager; her sale of her partnership interest occurred after the filing of the appeal).

It is unclear what significance, as a matter of law, the Government attaches to Ms. Lutes' withdrawal from the partnership (or indeed to any other change in the composition of the partnership) since the partnership itself is admittedly the entity to which the contract was awarded and which performed the contract. In any event, as noted above, Ms. Lutes remained a partner at the time the instant appeal was initiated and for some four months thereafter.

Finally, counsel asserts that he had only recently obtained the documents pertaining to the partnership and thus learned that its formation had allegedly occurred after submission of the 10 May 1989 bid. Arguments concerning this issue are timely raised in the Government's motion.

However, here too, some question may arise with respect to conflicting factual allegations. The Government acknowledges that the partnership came into being by 4 July 1989 and that the contract was awarded on 14 July. Since, indeed, the contract was admittedly awarded to Rice King-32nd Street, a Partnership, and that entity performed the contract (as the Government was aware in its many conversations with the various partners during performance), then a contract between the Government and the partnership may have existed *in fact* regardless of the identity of the person or entity submitting the 10 May 1989 bid. However, since these questions are not raised by the parties, they are not addressed here.

[5] Appellant has provided many references to California law on formation of a partnership and treatises discussing the subject. These references include: West's Annotated California Codes, vol. 24A, "Corporations", sections 9000 to 24999 (1991 Ed.); California Corporation Code § 15006; and the California Business & Professions Code, esp. § 17900; as well as B.E. Witkin, 9 *Summary of California Law*, "Partnership", § 24, at 423 (1989, Bancroft-Whitney, 9th Ed.) and B.E. Witkin, 1 Summary of California Law, "Contracts"; § § 261-262; and a treatise published by the California State Bar entitled "Advising California Partnership" (ed. E. Giacomini, *et al.*; 2nd Ed. 1988). As discussed in these references, the determination of whether a partnership has been formed is based on the intent, manifest and/or otherwise, of the indi-

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formation was further memorialized in an agreement executed on 4 July, prior to contract award on 14 July.

The Government contends that it "was never placed on notice that any entity other than Paula Lutes was the party to be charged under the contract" and that "there is no objective evidence that the Government intended to contract with anyone but Paula Lutes" (see br. at 9). This is contradicted by the record.

Ms. Lutes had owned and operated a restaurant for only a few months at the time of bid submittal (with only one month's financial statements accompanying the bid). There is nothing in the record to show that the Government considered or determined Ms. Lutes' responsibility as the contractor to construct and operate the base restaurant.

Rather, the BCM prepared by the Government clearly evidences that it considered the *partnership* which Ms. Lutes was forming as having the financial capacity to construct and operate the base restaurant facility. Government personnel recommended award of the contract to Ms. Lutes "dba Rice King."

Similarly, the Government's characterization of Rice King as an "undisclosed principal" who, under certain established principles may be restricted in its ability to prosecute an appeal against the Government, is wide of the factual mark. The identity of the partnership, and its individual members, was fully disclosed to and was indeed relied upon by the Government when the contract was entered into.

Thus, we conclude that the Government knowingly contracted with Rice King as the partnership described in documents supplied with the bid submission. Moreover, that partnership, as contractor, may submit a claim and/or initiate an appeal through any authorized officer or general partner; here, Ms. Rosario certified appellant's claim of 5 August 1991 as General Partner at that time, following the resignation of Ms. Lutes.[6]

CONCLUSION

Accordingly, we find appellant, Rice King [32nd Street Partnership], to be the proper party, as contractor, and the notice of appeal filed by its counsel to have properly initiated the above captioned action.

For the foregoing reasons, the Government's motion is denied.

[¶ 26,351] AEC Corporation

ASBCA No. 42920, September 15, 1993. Contract No. N62467-88-C-0646.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—A government motion for summary judgment in the appeal of a default termination was denied because the record did not support the government's contention that the contractor's appeal asserted, as a reason for its failure to perform, that its financial incapacity was caused entirely by parties other than the government. The board had to decide the extent to which, if at all, performance delay resulted from actions or omissions of the government, of the contractor itself, of a bonding specialist, or of a firm hired to oversee contract performance. Despite the government's effort to suggest that the contractor placed the entire blame for its performance difficulties upon the latter companies, for which the contractor itself would have to bear the consequences, the record reflected that the contractor did contemporaneously allege government responsibility and that it submitted an affidavit to this effect.

(Footnote Continued)

vidual partners rather than on any formal filing requirements.

The Government contends that "the partnership did not begin until two months after Ms. Lutes executed the proposal" (br. at 3), referring to the the 4 July 1989 partnership document (br. at 14); that a partnership was created as described in the document executed on 21 August 1989; and that no such partnership could have existed under California law at the time of bid submission (br. at 4). However, the Government cites no state law or other authority in support of these contentions. We have concluded that the parties to the May 1989 partnership proposal regarded the partnership as formed at this time.

[6] In an earlier decision in this appeal (92-2 BCA ¶ 24,805), on a Government motion to dismiss on other grounds, the Board also noted this certification by Ms. Rosario, as general partner.

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For the appellant: Watt, Tieder, Killian & Hoffar, McLean, Virginia, by Robert G. Watt, Barbara G. Werther, and Vivian Katsantonis. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Lisa C. Gerideau, Trial Attorney, Naval Facilities Engineering Command, Alexandria, Virginia.

Before LIPMAN, RUBERRY, and THOMAS, Administrative Judges.

LIPMAN, Administrative Judge: Appellant is appealing the Government's termination for default of this construction contract. The Government has moved that we grant it summary judgment and deny the appeal. The basis of its motion is that appellant has advanced, as a reason for its failure to perform, its financial incapacity caused by parties other than the Government. The motion is unaccompanied by affidavits and is based solely upon documents in the evidentiary file and additional documents submitted along with the motion. Appellant opposes the motion and, in support of its opposition, has submitted affidavits as well as additional documents. We deny the motion below.

In the alternative to its Motion for Summary Judgment, the Government moves that we deem as admitted statements in the Government's Request for Admissions to which appellant provided inadequate responses. Appellant opposes the motion. We deny the motion, but treat it as a motion to compel and order appellant to provide complete responses to the Request for Admissions within 30 days of its receipt of this decision.

STATEMENT OF FACTS

On 12 May 1989, the Small Business Administration, pursuant to the provisions of Section 8(a) of the Small Business Act (SBA), entered into this contract with the Navy for the construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida. The SBA subcontracted performance of the work to appellant at a firm fixed price of $4,361,631. The contract contained the standard construction contract default termination clause and a provision for the imposition of liquidated damages of $2,200 per day of delay beyond the required completion date.

The contract required appellant to provide performance and payment bonds. In order to obtain the required bonding, on 16 August 1989 appellant entered into agreement with Surety Specialists, Inc. (SSI) and Kimmins Contracting Corporation (Kimmins) whereby the two companies agreed to assist appellant in obtaining the required bonds in exchange for a bond premium consisting of $7\frac{1}{2}$ percent of the contract price. Appellant also agreed to permit Kimmins to oversee contract performance and to establish a joint bank account with Kimmins and to submit to the Government an irrevocable notice and directive that the Government make all payments under the contract directly into the joint bank account. On the same date, Cumberland Casualty Surety Company (Cumberland) issued performance and payment bonds for the contract work.

The Government had previously contracted with another contractor to perform the work, and it had terminated that contract for default. Appellant examined the worksite before commencing performance.

The original contract called for appellant to begin work on 22 June 1989 and to complete the work on or before 14 October 1990. The contract was later amended to increase the contract price and to extend the performance period to 3 March 1991.

During the course of contract performance, the Government sent appellant several letters expressing concern about what the Government considered to be appellant's slow progress.

Over the same general period of time, appellant sent the Government several letters complaining about alleged Government actions and omissions and other problems adversely affecting performance for which appellant was not responsible. Appellant also requested that the required period of performance be extended. Among appellant's allegations were the following: (a) lack of cooperation from Government personnel; (b) Government failure to approve drawing submittals in a timely manner; (c) Government mismanagement with respect to contractor requests for payment, including Government failure to place funds into the joint bank account appellant held with Kimmins; (d) additional work required by the Government which warranted a contract time extension; (e) Government misinterpretation of the contract requirements; (f) defective specifications; (g) deficiencies in the work performed by the previous contractor; (h) delays in the issuance of a permit; (i) Kimmins' withholding of funds from appellant; and, (j) interference by Kimmins and SSI with appellant's performance.

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Ultimately, following the issuance of a cure notice, on 22 April 1991 the Government terminated the contract for default due to appellant's failure to make progress. Appellant made timely appeal.

Following the termination, the Government entered into a takeover agreement with the surety, Cumberland, to complete the work.

Appellant brought action in state court against Kimmins, SSI and Cumberland. In that proceeding, appellant alleged that the defendants were responsible for appellant's performance problems. Appellant made similar allegations in a "Demand for Arbitration" it filed with the American Arbitration Association with respect to appellant's agreements with the three companies as well as in a letter of 18 June 1991 from appellant's then counsel to the Government seeking documents under the Freedom of Information Act to assist it in the arbitration proceeding.

Appellant has submitted an affidavit of the Kimmins project manager assigned to the job stating that the Government did not disclose to appellant poor workmanship by the previous contractor as well as asserting other Government actions and omissions as causing performance delay.

DECISION

Motion for Summary Judgment

We will grant a motion for summary judgment when there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. The moving party bears the burden of demonstrating both elements and the party against whom the motion is advanced is entitled to have all inferences drawn in its favor. *Paragon Van Lines, Inc.*, ASBCA No. 32294, 87-1 BCA ¶ 19,366.

In the present appeal, it appears quite clear that material facts are in dispute. We are to decide upon the propriety of the Government's termination of appellant's contract for default and, based upon the positions of the parties, that decision will turn on the reason or reasons for appellant's delay in performance.

We must determine the extent to which, if at all, performance delay resulted from actions or omissions of the Government, of appellant itself or of Cumberland, SSI or Kimmins. Despite the Government's effort to suggest that appellant placed the entire blame for its performance difficulties upon the latter companies, for which appellant itself must bear the consequences, the record thus far reflects that appellant did contemporaneously allege Government responsibility and it has submitted an affidavit providing support for those allegations. We conclude, therefore, that the parties dispute facts material to delay causation.

The Government's Motion for Summary Judgment is denied. Appellant shall provide complete responses to the Government's Request for Admissions within 30 days of appellant's receipt of this decision. Under separate cover, the Board will issue instructions regarding the further processing of this appeal.

[¶ 26,352] Brill Brothers, Inc.

ASBCA No. 42573, September 3, 1993. Contract No. DLA100-87-C-0748.

Defaults, Excuses—Labor and Personnel Problems—Key Personnel.—A contractor's failure to deliver under a supply contract for military jackets was not excused by the president's illness, because when a contract is awarded to a corporate entity, the illness of a key person within the organization does not excuse the corporation's failure to perform its obligations, even though the corporation may be a small business.

For the appellant: Martin S. Brill, President. For the government: Thomas J. Hornak, Chief Trial Attorney, and Diane Cherinchak, Trial Attorney, Defense Personnel Support Center (DLA), Philadelphia, Pennsylvania.

Before ELMORE, RUBERRY, and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: Brill Brothers, Inc. (Brill or appellant) has appealed the contracting officer's (CO) 6 December 1990 "final decision" terminating

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contract DLA100-87-C-0748 (C-0748) for default (R4, tab 35).*

The parties have elected to submit this matter on the record in accordance with Board Rule 11. The record consists of the appeal (R4) file; appellant's supplemental (SR4) appeal file; admissions to the Government's Request For Admissions (admit); and CO's affidavits (Govt. affid.). The Government submitted a brief. Only entitlement will be decided.

FINDINGS OF FACT

1. On 12 August 1987 Brill, a Wisconsin corporation, was awarded contract DLA100-87-C-0748 by the Defense Logistics Agency ("DLA" or "Government) for "1,430 JACKET, PARARESCUE, SAGE GREEN AF SHADE 1535" at a unit price of $77.42 and a total contract price of $110,710.60. The contract provided that Brill "shall deliver 50 unit(s) of Lot/Item 0001 within 90 calendar days from the date of this contract to the Government ... for first article tests." The initial production quantity delivery schedule was (R4, tabs 1, 2, 18; admit 1-4):

LINE ITEM	ITEM	DELIVERY DATE	QUANTITY
0001AA	Medium	08 Feb 88	85
0002AA	Large	08 Feb 88	150
0001AA	Medium	09 Mar 88	85
0002AA	Large	09 Mar 88	150
0001AA	Medium	08 Apr 88	90
0002AA	Large	08 Apr 88	155
0001AA	Medium	08 May 88	90
0002AA	Large	08 May 88	155
0001AA	Medium	07 Jun 88	85
0002AA	Large	07 Jun 88	150
0001AA	Medium	07 Jul 88	85
0002AA	Large	07 Jul 88	150

2. The contract included and/or incorporated by reference the following Federal Acquisition Regulation (FAR) and Department of Defense Federal Acquisition Regulation Supplement (DFARS) clauses: 52.233-1, DISPUTES (APR 1984); 52.249-8, DEFAULT (FIND-PRICE SUPPLY AND SERVICES) (APR 1984); and 53.232-7007, PROGRESS PAYMENTS (OCT 1986), ALTERNATE I (OCT 1986) DFARS. (R4, tab 1; admit 2)

3. FAR 52.249-8, DEFAULT and 52.232-7007, PROGRESS PAYMENTS provided in pertinent part:

DEFAULT

(a)(1) The Government may ... by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to —

(i) Deliver the supplies ... within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(a)(2) The Government's right to terminate this contract under subdivision (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

PROGRESS PAYMENTS

* * *

(c) *REDUCTION OR SUSPENSION.* The Contracting Officer may reduce or suspend progress payments, increase the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract ....

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress or (ii) unsatisfactory financial condition.

* * *

(h) *SPECIAL TERMS REGARDING DEFAULT.* If this contract is terminated under the Default clause, (i) the Contrac-

* The Government filed a Motion For Summary Judgment which was denied. *Brill Brothers Inc.*, ASBCA No. 42573, 93-2 BCA ¶ 25,795, 4 February 1993 slip op.

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tor shall, on demand, repay to the Government the amount of unliquidated progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which the Government elects not to require delivery under the Default clause.

4. On 12 February 1988 Brill informed the Government that, due to its originally contemplated cloth supplier being barred from Government contracts, its new supplier, Gladwyne Textiles, would not be able to begin delivery of its cloth until four weeks after receipt of a purchase order. Brill anticipated supplying the Government with samples of cloth for approval approximately the second week of February, after which it would be able to accurately determine a delivery schedule. (R4, tab 3)

5. The administrative contracting officer (ACO) on 6 May 1988 issued a show cause letter informing Brill its failure to make delivery in accordance with the schedule was not excusable and Brill was advised to prepare a "written proposal" for the principal contracting officer's (PCO) consideration. On 26 May 1988, Brill submitted a written response stating its failure to deliver on time was directly related to its inability to hire additional sewing people; and that although it was operating at a substantial loss it would fulfill its contract commitments (R4, tabs 4, 6; admit 5, 6)

6. On 11 May 1988 Brill informed the Government the test results on Gladwyne Textiles' fabric indicated the warp shrinkage was moderately excessive and Brill requested a waiver. Bilateral contract modification P00001 dated 21 June 1988 provided for the Government's waiver and acceptance of "1,430 each jacket, Pararescue, which failed contractor's dimensional stability" testing, in consideration for a contract price reduction of $253. (R4, tabs 5, 7)

7. On 7 September 1988 Brill requested a waiver for the shade failure experienced "in government laboratory testing," which bilateral contract modification P00002, dated 12 October 1988, ratified in consideration for a $205 contract price reduction (R4, tabs 8, 9).

8. On 17 October 1988 the ACO, informing Brill 520 CLIN 0001AA and 910 CLIN 0002AA items were delinquent as of "07 July 1988," requested Brill to submit a "realistic delivery schedule [and] consideration for the additional performance time needed" (R4, tab 10; admit 7).

9. Brill on 3 November 1988 requested that the contractor inspection system requirements of the contract be deleted which the CO, by letter and proposed modification P00003 dated 27 December 1988, offered to delete in consideration of a contract price reduction of $145. The letter informed Brill the Government had "foreborne" the delinquency of the contract for many months; that despite numerous attempts by Government personnel to revise the delivery schedule, the contract remained delinquent; and that unless Brill submitted a revised schedule within ten (10) days of receipt of the letter, the CO would "issue a unilateral delivery schedule." On 20 January 1989 Brill executed and returned modification P00003 but requested that a definite set of dates for delivery of contract items not be established until the first article was presented, which Brill anticipated would be in "approximately three weeks," inspected and accepted. (R4, tabs 11-15; admit 8, 9)

10. On 2 June 1989 the CO advised Brill that since it had neither presented first article items nor a revised delivery schedule, a schedule would be unilaterally imposed if none was received within ten days after Brill's receipt of the letter. Brill's response of 20 June 1989 stated the first article samples had been "cut, checked by [the Government's QAR] and introduced into the work" and it anticipated the first article lot would be ready to be presented on 17 July 1989 and, with a satisfactory inspection, the immediate start of production should be no problem. (R4, tabs 16, 17; admit 10, 11)

11. Unilateral modification P00004 executed by the CO on 7 July 1989 revised the delivery schedule as follows (R4, tabs 1, 18; admit 12):

50 Ea First Article to be delivered on or before 20 Jul 89
235 Ea to be delivered on or before 18 Oct 89
235 Ea additional to be delivered on or before 17 Nov 89
245 Ea additional to be delivered on or before 17 Dec 89
245 Ea additional to be delivered on or before 16 Jan 90
235 Ea additional to be delivered on or before 15 Feb 90
235 Ea additional to be delivered on or before 17 Mar 90

12. Brill's first article items, examined by Government personnel on 20 July 1989, were disapproved due to an excessive number of defects. Brill in its 14 August 1989 letter stated the contract could not proceed until it "received pattern clarification and [a] response to [its] slide fastener sewing op-

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eration." The CO on 6 September 1989, in response to Brill's pattern inquiry, made an "interim change" to specification MIL-J-38349 but he determined the first article would "still have been rejected for other defects." On 26 September 1989 Brill responded and stated it disagreed with the scoring of the defects. (R4, tabs 19-22; admit 14, 15) Modification P00005, bilaterally executed 5 October 1989, memorialized the "Interim Specification Changes to MIL-J-38349" and stated (R4, tab 23):

> The contract price and delay in delivery due are not affected by reason of the above described changes.
>
> THIS DOCUMENT CONTAINS THE COMPLETE AGREEMENT OF THE PARTIES. THERE ARE NO COLLATERAL AGREEMENTS, RESERVATIONS OR UNDERSTANDINGS OTHER THAN EXPRESSLY SET FORTH HEREIN. IT IS AGREED THAT NO SUBSEQUENT MODIFICATION OF THIS AGREEMENT SHALL BE BINDING UNLESS REDUCED TO WRITING AND SIGNED BY BOTH PARTIES.

13. Unilateral modification P00006 executed 3 January 1990 noted that Brill had failed to comply with the unilaterally revised delivery schedule called out in modification P00004 and set a new revised schedule as follows (R4, tab 24; admit 16):

50 Ea. First Article to be delivered on or before 15 Mar 90
235 Ea. within the 30 day period ending 23 Jun 90
235 Ea. within the 30 day period ending 23 Jul 90
245 Ea. within the 30 day period ending 12 Aug 90
245 Ea. within the 30 day period ending 11 Sep 90
235 Ea. within the 30 day period ending 11 Oct 90
235 Ea. within the 30 day period ending 10 Nov 90

14. On 16 February 1990, Brill, acknowledging the receipt of the unilateral extension of the delivery dates called out in modification P00006, stated it was "essential" the Government answer its 26 September 1989 letter "to enable [Brill] to proceed with this contract." The CO on 28 March 1990 informed Brill that in response to the views expressed in the 26 September 1989 letter the results of the first article test were reevaluated; that the noted defects were deviations to the contract specification requirements and, therefore, the rejection would not be reversed. Brill was requested to advise the CO when it intended to submit a new first article. Brill by FAX letter dated 11 April 1990 requested the CO to waive the deviations found during the first article inspection of 20 July 1989. Effective 4 May 1990, the parties executed bilateral modification P00007 authorizing the waiver in consideration of a contract price decrease of $145.00. In a separate 11 April 1990 FAX letter Brill notified the CO the first article items would be ready for resubmittal on 25 April 1990. By letter dated 18 May 1990 the CO informed Brill its second submittal of the first article was approved and production of the item was authorized. (R4, tabs 25-30; admit 17-19)

15. The CO on 29 June 1990 informed Brill that default termination was being considered due to its failure to meet the delivery schedule and it had ten days from the receipt of this notice to present written facts bearing on whether the failure to perform arose from causes beyond its control. Brill, in its reply of 18 July 1990, stated excuses for late delivery had been previously submitted and it "established" target dates which correlated to the Government's schedule in "Amendment P00006" as follows (R4, tabs 31, 32; admit 20-21):

DELIVERY SCHEDULE

235 ea. in the period ending 12 AUG 90
235 ea. in the period ending 11 SEP 90
490 ea. in the period ending 11 OCT 90
470 ea. in the period ending 10 NOV 90

16. By letter dated 12 October 1990 Brill, conceding it had "not adhered to the schedule [it] set forth in [its] letter of 18 July 1990," submitted the following revised schedule which the CO on 30 October 1990 memorialized in unilateral contract modification P00008 (R4, tabs 33-34; admit 22-23):

REVISED DELIVERY SCHEDULE

470 ea. in the period ending 31 OCT 90
490 ea. in the period ending 30 NOV 90
470 ea. in the period ending 29 DEC 90

17. Brill failed to meet the revised delivery schedule and on 6 December 1990 the CO issued unilateral contract modification P00009 terminating Brill's contract for default (R4, tab 35; admit 26). Brill admits that its "sole excuse for failing to meet the 31 October 1990 delivery schedule was that Mr. Brill, President of Appellant Company, became ill and was unable to return to work until 16 November 1990 to supervise the completion of Contract DLA199-87-C-0748." (Admit 25). Brill, from 31 October 1990 to 6

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December 1990, neither presented contract items for inspection and acceptance nor provided proof sufficient to conclude that any such items were manufactured and available for presentation to the Government.

18. The CO, at the time of the termination, determined that Brill's inability to deliver the items in accordance with the delivery schedule, which appellant admitted was attributable only to the illness of Mr. Martin Brill, was not sufficient justification to grant further extensions; that the contract had been in existence for over three years, and over six months since first article approval, without a delivery; and further extensions were not anticipated to result in any deliveries within the required time. (Govt. affid.)

19. Brill by letter dated 4 March 1991 timely appealed the default termination (R4, tab 36).

BRILL'S POSITION

20. Brill avers that its failure to make timely delivery was due to the illness of Mr. Martin Brill, who was the only one in the organization who has ever prepared inspection reports and was in sole charge of military contracts; and the Contracting Officer's bad faith in terminating the contract.

DECISION

It is settled law that terminations for default "should be imposed (or sustained) only for good grounds and on solid evidence." The Government, as the initiator, has the burden of proof in establishing the validity of the default. *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491, *aff'd. on reconsid.*, 92-1 BCA ¶ 24,693, *aff'd., Local Contractors, Inc. v. Stone, Secretary of the Army*, 988 F.2d 131 (Fed. Cir. 1993) (Table). In a default termination we must be guided by the situation as it existed at the time of the termination and not as it existed thereafter. *RFI Shield-Rooms*, ASBCA Nos. 17374, 17991, 77-2 BCA ¶ 12,714.

Brill's termination was based on its failure to meet the delivery schedule. Under the DISPUTES clause of the contract, subparagraph (a)(1)(i), there is no requirement for the service of a cure notice when the reason for a default termination is the contractor's failure to make delivery of supplies, and the Government became entitled to terminate the entire contract when appellant inexcusably missed the delivery date for the first increment. *Sonora Manufacturing, Inc.*, ASBCA Nos. 31587 *et al.*, 91-1 BCA ¶ 23,444; *H&R Machinists Company*, ASBCA No. 39655, 90-3 BCA ¶ 22,948.

In the instant matter, these facts are undisputed. On 29 June 1990 Brill was informed in writing that the Government was considering terminating the contract for default and, pending a "final decision", Brill was afforded an opportunity to present in writing any facts in mitigation (finding 15). In response Brill submitted target dates for delivery of the items. Unable to meet its suggested target dates Brill, on 12 October 1990, submitted a revised delivery schedule proposing the first delivery to take place by no later that 31 October 1990 which the CO accepted and memorialized in unilateral contract modification P00008 as the "Revised Delivery Schedule" (finding 16). Neither from the record nor from Brill were we able to find any credible evidence to support a determination that the revised delivery schedule was, under the circumstances, unreasonable. At the time of the termination the CO determined, and the record supports with substantial evidence, that Brill, having performed under the contract for three years without providing any contract items, was incapable of performance within the required time (finding 18).

Having concluded that appellant had defaulted in its performance, it remains for us to consider whether Brill's failure to perform was beyond its control and without its fault or negligence or was otherwise excusable. *Orlando Williams*, ASBCA Nos. 26099, 26872, 84-1 BCA ¶ 16,983.

Brill in support of its contention that the failure to perform was excusable raised two arguments, each of which we will discuss separately (finding 20).

a. *Brill's president was ill*

Brill argues that its president, Mr. Martin Brill, the only person in the organization who has ever prepared inspection reports, took ill on 24 October 1990 thereby delaying for presentation for inspection the 470 Jackets due for shipment on 31 October 1990.

As the Government adequately argues, this Board has held that where, as here, a contract has been awarded to a corporate entity, the illness of a key person within the organization does not excuse the corporation's failure to perform its obligations, even though the corporation may be a small business. *M.W. Microwave Corporation*, ASBCA No. 45084, 93-3 BCA ¶ 26,027. As a matter of law the illness of Mr. Martin Brill does not excuse performance.

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b. *The contracting officer acted in bad faith*

It is well established that there is a presumption that public officials perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations, and the burden is on the appellant to prove otherwise. *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766 and cases cited therein.

The Government's actions are reviewed in accordance with the circumstances as they existed at the time of the termination. *RFI Shield-Rooms, supra.* At the time Brill was terminated the contract had been ongoing for over three years and Brill had not proffered any item except the approved first articles (findings 14, 18); the delivery schedule had been modified, both unilaterally and bilaterally, a total of four times (findings 11, 13, 15, 16); subsequent to first article approval, 18 May 1990, Brill failed to meet the delivery schedules it had set for itself (findings 14-16); and Brill's admitted "sole excuse" for failing to meet the revised delivery schedule was that its president was ill and unable to participate in the contract's completion (findings 17, 18).

At the time of the termination the CO had lost confidence in Brill's ability to complete the contract. The CO, having reviewed the contractor's performance from contract award, had sufficient cause to believe Brill was unable to perform as required. Under the circumstances existing at the time of the termination the CO's action was neither arbitrary, capricious, an abuse of discretion, nor illegal. *Cf. Darwin Construction Co., Inc. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593, 598 (Fed. Cir. 1987).

The appeal from the default termination is denied in its entirety.

[¶ 26,353] Arrow, Inc.

ASBCA Nos. 41330, 41338, September 16, 1993. Contract No. F08650-89-C-0003.

Pricing of Adjustments—Proof—Expected Work v. Actual Work.—A contractor's request for a price adjustment under a grounds maintenance contract was denied, even though the contractor alleged that it was required to perform more mowing work than was required by the contract, because the contractor failed to prove that the work performed was in excess of that to be expected. To prove that extra work was performed, one must first prove the amount of work that would have been required even if no extra work had been performed. The number of mowings that would have been required depended on the amount of growth, which depended on the amount of moisture, the amount and quality of nutrients, the temperature, the amount of sunlight, and other conditions.

Pricing of Adjustments—Proof—Records in Support.—A contractor performing a grounds maintenance contract was not entitled to a price adjustment for performing more edging, tree trimming, hedge cutting, and bush pruning than was required by the contract, because it had no records of the actual amount of these work items performed.

Interpretation of Contracts—Ambiguities, Patent—Contract as a Whole.—Under a contract for grounds maintenance, a contractor's claim for extra mowing services was denied because the contractor's reliance on the mowing map, which showed a height of 10 inches, was unreasonable in view of the contract read as a whole. To base a bid upon only one part of a contract, a map, while disregarding the other parts of the contract that clearly spell out that grass should be maintained at a lower height, is foolhardy. In addition to the map showing a height of 10 inches, the contract contained a map showing the disputed area as improved grounds. It also contained specifications that stated that improved grounds were to be maintained at a height of less than 10 inches. Such patent inconsistency between parts of the contract imposed on the bidder the duty to inquire of government personnel as to precisely what was desired.

Convenience Terminations—Short Form Termination Clause—Service Contracts.—A contractor's claim for the useful value of special machinery and equipment, a cost incurred subsequent to termination of the contract for convenience, was denied because the short form clause was included in the contract, which limited settlement charges to services rendered before the date of termination. The contractor argued that the long form clause should have been used because the fixed-price contract for grounds maintenance

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exceeded $100,000 in value. The contractor failed to recognize, however, that the short form clause is appropriate regardless of contract value when a fixed-price contract is contemplated involving services, which was the case with grounds maintenance.

For the appellant: Battle, Winslow, Scott & Wiley, Rocky Mount, North Carolina, by M. Greg Crumpler. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Diana S. Dickinson, Trial Attorney.

Before HARPER, RIISMANDEL, and RUBERRY, Administrative Judges.

HARPER, Administrative Judge: Appellant, Arrow, Inc., a North Carolina corporation with its principal office located in Rocky Mount, North Carolina (hereinafter "contractor"), appeals from two final decisions of a contracting officer of the United States Air Force (hereinafter "Government"). ASBCA No. 41330 concerns contractor's appeal from a decision which denied contractor's claim for an upward equitable adjustment in the price of a grounds maintenance contract. ASBCA No. 41338 concerns contractor's appeal from a decision which denied contractor's claim for a monetary settlement arising from a termination of such contract. Both appeals were consolidated for purposes of efficiency in presenting evidence. We consider entitlement only.

FINDINGS OF FACT

1. On 31 December 1987 Government issued a Solicitation for Bids for furnishing all the personnel, equipment, tools, materials, supervision, labor and services to perform grounds maintenance at Patrick Air Force Base (AFB) in Florida. Such services, equipment, tools, materials, supervision and labor were to be furnished in strict accordance with the Performance Work Statement (PWS) dated June 1987 which comprised a part of the solicitation. Bids were to cover an orientation phase-in period of performance from 28 November through 11 December 1988, an initial contract period of performance from 12 December through 31 December 1988, a basic contract period of performance from 1 January through 30 September 1989, and three options for one year each of performance for the three years successively following 30 September 1989. (R4, tab 1)

2. Patrick AFB is situated in Brevard County, Florida, on a narrow barrier strip of land at the approximate center of the Florida peninsula's east coast. It is bounded on the east by the Atlantic Ocean, on the west by the Banana River, and on the north and south by portions of urban Brevard County. Patrick AFB lies on an island. The widest part of the base is about 7,000 feet and the narrowest part is approximately 900 feet. The base is approximately four miles long. The land is flat, sloping gently from east to west. There is a dune line on the east which reaches an elevation of 10-12 feet. The dune is only about 20 feet wide. From the dune to the Banana River is a gentle slope. Florida State Road A1A, a four lane highway divided by a median strip of land for much of its length, bisects the entire length of Patrick AFB running parallel to and close to the Atlantic Ocean. (R4, tab 1; exh. G19)

3. ASBCA No. 41330 involves a claim by contractor that it was required to perform more mowing in an area known as Zone 8, edging of lawns and grass basewide, tree, shrub and hedge trimming and pruning basewide than was specified in the solicitation and contract.

The solicitation contained a Performance Work Statement for Grounds Maintenance (PWSFGM) which, among other things, provided (insofar as mowing, edging and tree, shrub and hedge trimming were concerned), as follows:

> Performance Work Statement for Grounds Maintenance
>
> Section C 1.1 Scope of Work: The contractor shall provide all personnel, equipment, tools, materials, supervision, and other items and services necessary to perform Grounds Maintenance as defined in this Performance Work Statement (PWS) ... The Contractor shall perform to the standards in this contract. The estimated quantities of work are listed in Technical Exhibit 2, Work Load Estimates.

"Technical Exhibit (TE)-2, Annual Workload Estimate", just mentioned, estimated that there were 391 acres of improved grounds, 360 acres of improved grounds less athletic areas, 31 acres of improved grounds in athletic areas, 632 acres of semi-improved grounds, restricted areas and areas around airfield lighting and navigational aids, and 95 acres of semi-improved grounds designated as restricted areas around airfield lighting and navigational aids. TE-2 also estimated that there were 81,160 linear feet of sidewalks, driveways and curbs in improved areas plus 500 trees that would require trim-

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ming or pruning each year, plus 1,500 shrubs that would require pruning each year, and that there were 1,000 linear feet of hedges. (R4, tab 1)

4. The solicitation's PWSFGM, under Section C-2, contained the following definition of "Improved Grounds":

> 2.2.1. *Improved Grounds:* Areas coded as such at TE-3A. Grounds on which intensive development and maintenance measures are performed. This category normally applies to areas within the built-up section of an installation which contains lawns, landscaping, parade grounds, athletic areas, recreation areas, and road shoulders along main thoroughfares. Military Family Housing common areas, improved areas adjacent to unoccupied Military Family Housing Units, and General's Quarters are also considered as improved grounds.

(R4, tab 1)

5. The "TE-3A" referred to in the definition of Improved Grounds, directed the reader to "TE-14, Base Land Management Plan (BLMP), Atch 1." of the solicitation's PWSFGM. The said BLMP showed Patrick AFB in its entirety drawn to a scale of 1-inch equals 400 feet. Such plan divided the entire air base into outlined areas each of which was designated as "Improved Grounds", or as "Semi-Improved Grounds", or as "Unimproved Grounds", or as "Housing Grounds", or as "Recreation Area" or "Recreation", or as "Golf Course." A legend was included on the left lower corner of such plan which stated as follows:

BASE ACREAGE (Include Housing)

	MOWABLE BREAKDOWN	*COVERED NON-MOWABLE*	*MOWABLE*	*TOTAL ACRES*
HOUSING ACREAGE				
IMPROVED				
Covered		119		
Recreation	31.7			
Mowable	339.3		371	
TOTAL HOUSING				490
GOLF COURSE	210		210	210
IMPROVED BASE				
Irrigated	105			
Non-irrigated	252			
Recreation	3			
Mowable			360	
Covered		203		
TOTAL IMPROVED BASE				563
SEMI-IMPROVED				
Covered		185		
Mowable			632	
TOTAL SEMI-IMPROVED				817
UNIMPROVED				28
TOTAL ACREAGE				2108

(R4, tab 1; exh. G-19)

Required Service	Standard
(RS-1) Mow grass on improved grounds. Excludes Athletic Areas. 5.1.1.1.1.	Height of grass excluding seed heads does not exceed a height of 6 inches nor cut to a height of less than 3 inches. Grass clippings are removed or mulched when clippings are not mulched on initial mowing.

6. Section C-5 of the solicitation's PWSFGM dealt with the specific tasks required to maintain the grounds at Patrick AFB. Paragraph 5.1.1.1.1 of Section C-5 covered grass mowing on "Improved Grounds". It stated that "Grass cutting shall be accomplished on 391 acres of improved grounds including athletic areas as indicated at TE-3A IAW [in accordance with] TE-1."

TE-1, "Performance Requirements Summary," insofar as mowing grass on Improved Grounds is concerned, provided as follows:

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(RS-2) Mow grass on improved grounds in athletic areas. 5.1.1.1.1.	Height of grass excluding seed heads does not exceed 2½ inches nor less than 1½ inches

Paragraph 5.1.1.1.2 of Section C-5 of the PWSFGM of the solicitation stated as follows:

> Grass cutting shall be accomplished on 632 acres of semi-improved grounds as indicated at TE-3B IAW TE-1.

Section C-2, paragraph 2.2.2 described Semi-Improved Grounds as follows:

> 2.2.2 *Semi-Improved Grounds:* Areas coded as such at TE3-B. Grounds that require maintenance of a lesser degree than improved grounds. This category includes, but is not limited to, the airfield, rifle ranges, antenna farms, ammunition storage areas, road shoulders on secondary roads, and banks of drainage ditches.

(TE3-B contained the same information as TE3-A referred to above).

TE-1, Performance Requirements Summary (PRS), referred to in TE-3A and TE-3B above, contained the following language as to moving of semi-improved grounds:

Required Service	Standard
(RS-3) Mow grass on semi-improved grounds, restricted areas, and around airfield lighting and navigationalaids. 5.1.1.1.2.	Height of grass excluding seed heads does not exceed a height of 14 inches nor cut to a height of less than 7 inches except grass in restricted areas and 15 feet around airfield lighting, navigational aids, and edges of runways and taxiways which does not exceed a height of 6 inches nor cut to a height of less than 3 inches.

"Unimproved Grounds" is defined in Section C-2 at paragraph 2.2.2.3 of the PWSFGM of the solicitation and contract as follows:

> *Unimproved Grounds:* Areas coded as such at TE3-D. Grounds not included in the above categories. This classification includes, but is not limited to, bombing ranges, timber and forest areas, agricultural and grazing lands, lakes, ponds, and swamp areas requiring limited or no maintenance.

(TE-3D contained the same information as TE-3A referred to above).

The PRS, TE-1, provided as follows insofar as mowing of unimproved grounds is concerned:

Required Service	Standard
(RS-4) Mow grass in drainage ditches. 5.1.1.1.3.	Height of grass excluding seed heads does not exceed a height of 10 inches nor cut to a height of less than 5 inches.

(R4, tab 1)

7. "TE-12, Mowing Patterns" which comprised a part of the PWSFGM of the solicitation, directed the reader to see "TE-14, Base Land Management Plan (BLMP)". The said management plan was a part of the solicitation. It consisted of 71 pages covering the purpose of the plan, a description of the base, its soils, climate, vegetation, maintenance requirements for Improved Grounds, Semi-Improved Grounds and Unimproved Grounds, instructions to base housing occupants, the requirements for maintaining the golf course, fire suppression, environmental pollution prevention, wetland and flood plain controls, and maps and charts covering soils, equipment, recurring maintenance, and a mowing map. (R4, tab 1)

8. The said "TE-14, BLMP" contained language about mowing of Improved Grounds in pertinent part, as follows:

MAINTENANCE OF GROUNDS

a. *Improved Grounds*—1263 Acres. (This figure included areas not covered by this contract.]

These grounds are intensively maintained because the public can observe so much of the Base from the state highway system. The recurring maintenance at Patrick requires work 12 months a year. The maintenance of these grounds is accomplished with the grounds section of 19 personnel and also borrowed personnel from other sections.

(1) *Turf cover.* There are three primary species of grass used at Patrick AFB. The use of an area, care to be given the area, and available water will dictate the grass species to be used.

(a) Recreation areas are irrigated and receive a lot of wear thus, 419 Bermuda grass is used extensively on the ballfield (see atch 6A Athletic Field Maintenance).

(b) Bahia grass is a drought tolerant grass frequently used on nonirrigated improved grounds.

(c) St. Augustine grass is considered the primary turf cover on the Base improved

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lawns. This is a broad bladed creeping turf grass requiring a high degree of maintenance. Insect [sic] and weeds are constant problems. Chinch bugs and sod webworms are troublesome insects; however, they are easily controlled by chemical spraying. Weed infestation in areas where the grass is weakened by foot traffic or insects consists of weed grasses such as goose grass, bermuda grass, crab grass, crowfoot grass; and broad leaf weeds, such as dichondra, dollar weed, purslane and creeping broad leaf species. Chemical weed control is very difficult in St. Augustine as the grass is sensitive to most of the herbicides.

(d) The St. Augustine grass does have its problems of insects and requires a fair amount of maintenance. However, it is the best adapted grass to conditions of high salt concentration of well water, as well as salt drift from the ocean.

(e) Also, the St. Augustine grass does as well in shade as in sun light. The chart in attachment *8c* shows species of turf grass used in Brevard County, Florida.

(2) *Mowing.* Mowing is very important in turf management. Proper timing of mowing affects turf density. When mowing, only 1/3 of a leaf blade should be removed. Height of cut depends on grass species. St. Augustine and Bahia grass should be cut at 2 1/2 inches to provide a dense turf; whereas, Bermuda is cut at 1 inch or less.

(3) *Fertilization.* Requirements for the different grass species vary, also number of applications per year. The chart in attachment *8b* shows fertilizer requirements for the grass in Brevard County, Florida.

(4) *Irrigation.*

(a) Irrigation is required at Patrick even though we have 45 inches of rainfall annually. There are times that no rain falls for 3-4 weeks and, being a sandy soil with only 0.5 inch moisture holding capacity, this moisture is rapidly depleted. Average water requirements for turf at Patrick is 2 inches per week. Areas like the Golf Course require more due to the height of cut and traffic on the turf.

(b) The Base grounds are receiving irrigation by means of installed, underground irrigation. The systems consist of pop-up heads of various sizes, with an automatic controller to start and stop the systems. The water is from deep wells, which is pumped into the systems.

(5) *Weed Control.*

(a) Weed control is accomplished first by providing a healthy turf which will overcome the weed population. A second approach to weed control in turf is use of herbicides. This method is not extensively used in the St. Augustine grass. Other areas of the improved grounds receive herbicide treatments as required.

(b) Herbicides are used extensively for edging around trees, posts, etc., within grassed areas. Soil sterilients are used around bumper blocks, fire hydrants, fence lines, etc. to reduce hand labor. All herbicides are listed in the Pest Management Plan and are submitted for approval annually as AFR 91-21 requires.

(6) *Insect and Disease Control.* Several insects attack the turf in Florida. The most prevalent are: Chinch bugs, sod webworms, army worms, and nematodes. These insects are all problems at Patrick and control measures have to be taken. The climate is very conducive to disease development; several disease organisms thrive in the hot, humid conditions here and have to be controlled. The chart in attachment *8c* shows the most prevalent insects and diseases in Brevard County.

(7) *Other Turf Operation.* Aeration and verticuting are practiced on the golf course regularly. Some verticuting is done on Base as required. The creeping grasses tend to build a dense thatch, especially since they grow 12 months in Florida.

(8) *Tree and Shrub Work.*

(a) Tree and shrub work is a 12 month program of pruning and replacing. Trees and shrubs have to be selected carefully for planting due to the salt condition and the drought periods. Some of the more common types of planting are Palm, Sea Grape, Crissa Plum, Spanish Bayonet, Austrailian [sic] Pine, Hibiscus, Oleander, Ligustrum, Pitisporum and Carrotwood (*see* atch *8f* for Recommended Plant List).

(b) Patrick AFB is cooperating with state and county personnel in efforts to find plants that will tolerate the conditions of the space coast.

(c) The storms that come through the area frequently cause wind damage consisting of broken limbs and up-rooted trees. When the landscape is badly disrupted new plants are put in. Many times storm damage gives the Base an opportunity to improve the landscape design in housing areas, thus coming closer to the overall Base Landscape Plan.

b. *Semi-improved Grounds—817 Acres.*

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(1) This area is covered with Bermuda and Bahia grass plus several species of grassy weeds. No effort is made to control these weeds as they provide good soil cover and prevent erosion from wind and water.

(2) Mowing to a height of 4 to 8 inches around the lights and close to public areas keeps the area looking neat and controls unwanted vegetation. The outlying areas are mowed at 10 inches as needed.

(3) Fertilization is supplemented on the semi-improved land during establishment of grass. When planting, a period of normally wet weather is chosen because no provision has been made for irrigation of these areas. Liquid sludge is spread on much of this area thus providing some fertilization.

(4) The airfield and nonpublic areas are designated for spreading of liquid sludge in compliance with state environmental regulation.

(5) Trees growing in semi-improved grounds are trimmed.

c. *Unimproved Grounds—28 Acres.*

These acres are old landfill areas and some soil areas where dredge material was piled in previous years. Some grass is being established on the landfill. However, the dredge fill is very poor and it is hard to keep vegetation established on this area.

The said "Plan" also contained a chart entitled "Recurring Work Improved Grounds." Such chart had a space thereon for "Mowing" which directed the reader to "see map." The map referred to is TE-14, Attachment (Atch) 4 which was a part of the solicitation. (R4, tab 1; tr. 1/34, 39)

9. TE-14, Atch 4 is a map entitled "Base Civil Engineering Grass Mowing Map." Such map depicts the entire Patrick AFB, which is shown divided into nine outlined zones numbered 1 through 9. In this appeal we are concerned only with Zone 8 insofar as contractor's claim of having been made to do excessive mowing is concerned. The map contained a box or legend in its lower left hand corner which appeared as follows:

BASE CIVIL ENGINEERING
GRASS MOWING MAP

ZONE	HEIGHT	FREQUENCY	
1*	4″	weekly	Community areas
2	4″	weekly	
3	4″		Picnic area & roadsides Around airfield lighting
	10″	as needed	Airfield out areas
4	4″		
5	4″		
6	4″	as needed	Improved grounds
6A*	4″	weekly	Community areas in housing
7			Golf course maintenance responsibility
8	10″	as needed	
9	1″-4″	S weekly & W as needed	Recreation areas & ballfields

* Grass mowing in housing is limited to community areas only. Individual yards are occupant's responsibility

(R4, tab 1, vol. 2)

10. Zone 8, shown on the Land Management and Land Classification Map and on the Base Civil Engineering Grass Mowing Map, is almost all Improved Grounds. Located in Zone 8 are the base hospital and hospital supply buildings, a yacht club and marina, an entrance to the base, a sewage treatment plant, a dog kennel, several buildings, and a salvage yard. Also located in Zone 8 are an open field of sand and a small lake, both being Unimproved Grounds (R4, tab 1; tr. 1/140-41, 144, 2/21, 166-67, 173, 225; Scott depos. 14)

11. Section C-5, Specific Tasks, of the PWSFGM of the solicitation and of the contract in paragraph 5.1.1.2.1 provided as follows concerning edging or trimming of grass:

Edge/Trim Grass:

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5.1.1.2.1. Sidewalks, driveways, and curbs located in the improved grounds areas shall be edged IAW TE-1. This work involves 81,160 linear feet of sidewalks, driveway, and curbs in areas indicated at TE-3A. Grass and weeds shall be removed and disposed of at the Base Transfer Station when edging is performed.

12. TE-1, PRS, referred to in paragraph 5.1.1.2.1 above, provided as follows:

Required Service	Standard
(RS-5) Edge sidewalks, driveways, and curbs in improved areas. 5.1.1.2.1.	Grass and weeds do not extend over the edge of walks, drives or curbs more than 1 1/2 inches. Edging is not cut back from edge of walks, drives or curbs more than 1 1/2 inches. Grass and weeds are removed and disposed of when edging is performed.

(R4, tab 1)

13. TE-2, Annual Work Load Estimates, of the PWSFGM of the solicitation and contract showed the following as to "edging":

	Type of Work Load	Quantity	Growing Season
	* * *		
8.	Number of linear feet along sidewalks, driveways, & curbs in improved areas	81,160 ft	12 Months

(R4, tab 1)

14. Section C-5, Specific Tasks, of the PWSFGM of the solicitation and contract provided for pruning of trees, shrubs and hedges as follows:

5.1.1.3. *Prune Trees/Shrubs:* Clippings shall be removed and disposed of upon completion of work at the Base Transfer Station. Trimmings shall not exceed 4'-0". Trees referred to include both canopy and palm trees.

5.1.1.3.1. Trees shall be pruned/trimmed as required. Workload estimates are provided at TE-2. Pruning shall be accomplished in accordance with the industry standards indicated at TE-10. Class II medium pruning shall be used in general on all trees. Class IV pruning shall be used only for lifting, removal, and/or cutback of branches that conflict with normal traffic or safety in the vicinity of the trees. Minimum safety clearance is 14 feet over streets, 12 feet over driveways, 8 feet over walk areas, and 4 feet from buildings. Other trees shall be pruned on an as required basis to provide safety clearance and/or prevent structural damage. Trimming/pruning of trees around utility poles/power lines is not the responsibility of the contractor. Notify Base Civil Engineering Service Call Desk at 494-2778 when trimming/pruning around utility poles/power lines is needed.

5.1.1.3.2. Shrubs shall be pruned to maintain their natural growth characteristics. Workload estimates are provided at TE-2. New growth shall not be allowed to exceed 8 inches. Minimum clearances from buildings, utilities, and other obstructions shall be one foot.

5.1.1.3.3. Hedges shall be maintained to their original height and shape at contract start date. No informal hedges or screen plantings shall be converted to formal shapes. This work involves 1,000 linear feet of hedges in areas indicated at TE-3A. Trimmings shall be removed and disposed of at the Base Transfer Station when trimming is performed.

(R4, tab 1)

15. TE-2, Annual Work Load Estimates referred to above as to pruning, provided as follows in pertinent part:

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	Type of Work Load	Quantity	Growing Season
	* * *		
9.	Number of trees that require trimming/pruning each year	500	N/A
10.	Number of shrubs that require pruning each year	500	N/A
11.	Number of linear feet of hedges	1,000	N/A

(R4, tab 1)

16. TE-1, PWSFGM of the solicitation and contract contained the following as to pruning and trimming:

Required Service	Standard
(RS-8) Prune trees. 5.1.1.3.1.	Trees are pruned IAW class II and Class IV of the Pruning Standards for shade trees, National Arborist Association at TE-10. Tree clippings are removed and disposed of upon completion of pruning. For palm trees, all dead fronds are removed from bottom row. All seedpot shoots are removed from all areas of palm trees.
(RS-9) Prune shrubs. 5.1.1.3.2.	Shrubs will be pruned to maintain their natural growth characteristics. Natural growth must be altered to allow for clearance of facilities. Shrub clippings are removed and disposed of upon completion of pruning.
(RS-10) Trim hedges. 5.1.1.3.3.	Hedges are trimmed to their original shape when new growth reaches 6 to 8 inches. Hedge clippings are removed and disposed of upon completion of trimming.

(R4, tab 1)

17. TE-3A, Improved Grounds, TE-3B, Semi-Improved Grounds, and TE-3D, Unimproved Grounds, all of the solicitation and contract PWSFGM, each referred to TE-14, BLMP more fully described in finding 8.

18. The solicitation contained the Prebid Conference/Site Visit (APR 1984) clause which, in pertinent part provided as follows:

a. A combination prebid conference and site visit will be conducted at Patrick AFB, Florida on 20 January 1988 at 0900 o'clock in Building 423, Room C-220.

b. When possible, questions previously presented will be answered during the conference. All questions presented before or during the conference will be answered in writing and furnished all potential offerors as soon after the conference as possible.

* * *

d. No explanation, remarks, or replies made in response to any inquiries will serve to qualify the terms or conditions of the RFP. The definitive treatment of any such problems or questions will be by formal amendment to the IFB.

e. Offerors are urged to attend the preproposal conference to satisfy themselves as to the general requirements of this solicitation.

(R4, tab 1)

19. John R. Jones of Deland, Florida (hereinafter "Jones") and Alfred G. Jones (an employee of Jones), attended the prebid conference and site visit in behalf of Arrow, Inc. (tr. 1/41, 124, 153, 2/7). At such time Jones had been previously involved in grounds maintenance and janitorial work, primarily at military establishments for over 25 years (tr. 2/86). Jones traded under the name of Jones Brothers Landscaping (tr. 2/86). Arrow, Inc. is the alter ego of Guy G. Tutterow, Sr., of Rocky Mount, North Carolina. When Tutterow became aware of Government's Solicitation for Bids to cover the grounds maintenance needed at Patrick AFB he formed an undisclosed partnership with Jones to seek the contract. Tutterow and Jones would prepare a bid showing Arrow, Inc. as the contractor and John R. Jones as Arrow Inc.'s project manager and vice president. Tutterow would provide to Government all preaward survey information and, in the event Arrow, Inc. received the contract, Tutterow would provide some of the contract administration. If the contract was awarded to Arrow, Inc. Jones was to not only supervise all the actual work in Florida, but also to provide all the labor and materials as well as all of Jones' existing

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machinery and equipment. Jones was to receive all Government's checks payable to Arrow, Inc. for deposit in Jones' bank account. Jones was to pay all costs of performance of the contract out of such Government receipts and if any sums were left over after such payment of costs Jones was to divide such sums 50-50 with Tutterow as profit. If additional machinery or equipment was needed Jones and Tutterow were to split the cost thereof 50-50. The partnership arrangement was not disclosed to Government. (R4, tab G6; tr. 1/35, 36, 37, 95, 96, 97, 2/7, 121-23, 169-70, 3/160, 175-77, 203)

20. At the prebid conference and site visit all attendees were instructed to write out any questions that they might have. Government advised that it would try to answer the questions verbally, but that verbal answers were not binding on the Government and that only written answers would be binding. Government also indicated that a written statement of the prebid conference questions and answers would be made and distributed to all attendees. No verbal questions and answers were made at the prebid conference. Neither Jones nor Alfred G. Jones submitted any written questions before or after the site visit. There were some written questions provided by other attendees. The answers were put in writing and assembled into one document by Government and mailed to the attendees at a later date. The following questions and answers pertinent to this appeal were placed in writing:

Quest:	Any estimate on shrubs or landscape areas?
Ans:	Technical Exhibit 2, page TE-2-1 of the PWS provides estimates of types of workload, including shrubs.
Quest:	Is the main road included for mowing?
Ans:	A1A is not included, median belongs to the state. Bid according to grass mowing map.

(R4, tab G3; tr. 2/74)

21. TE-2, page TE-2-1, mentioned above was described earlier herein (*see* finding 15) (R4, tab 1).

22. Jones and Tutterow above prepared a bid for Arrow, Inc. (tr. 1/35-36, 95, 2/50). Contractor's bid was based upon the work statement and grass mowing map contained in the solicitation (tr. 1/43, 128). Although contractor was aware that the grass mowing map of the solicitation indicated that grass in Zone 8 was to be a height of 10 inches while other parts of the PWS showed that the height of grass in improved grounds (which, as contractor knew, made up most of Zone 8), was to be not in excess of six inches and not less than three inches, contractor nevertheless, elected to follow only the grass mowing map and to disregard the inconsistency between such map and the rest of the solicitation requirements. (Tr. 1/183-84) Contractor felt there was an inconsistency between these different parts of the solicitation requirements, but chose not to ask Government to clear up the inconsistency (tr. 185). Jones did not read the entire solicitation at any time prior to assisting in preparation of the Arrow, Inc. bid (tr. 2/50-51).

23. In making up Arrow, Inc.'s bid Jones and Tutterow estimated that contractor would have to mow areas calling for a grass height of two to four inches 32 to 35 times per year. In areas calling for a 10-inch height of grass they estimated contractor would have to mow seven to eight times per year. (Tr. 2/51-52) Arrow, Inc.'s bid price was based upon doing 81,160 feet of edging per year (tr. 1/57, 2/10). Tutterow assumed that Government's Annual Work Load Estimate, TE-2 of the solicitation, was correct when it indicated 81,160 feet of linear feet of sidewalks, driveways, and curbs in improved areas (R4, tab 1; tr. 1/155). Tutterow assumed that once contractor had edged 81,160 feet such would be the maximum edging contractor would be required to perform (tr. 1/201).

24. Contractor interpreted the solicitation's Annual Work Load Estimates, TE-2, to mean that contractor had to perform only 500 trimmings/prunings of trees each year and only 1,500 prunings of shrubs each year rather than trimming/pruning 500 trees and pruning 1,500 shrubs as often as such number of trees and such number of shrubs might need trimming and pruning as described in other portions of the solicitation (tr. 1/203-05, 2/67).

25. Contractor's bid for the basic contract period of performance (1 Jan 89—30 Sep 89) was for $33,333 per month or $299,992 in the aggregate. Government accepted contractor's bid and awarded contract No. F08650-89-C-0003 on 6 October 1988. Such contract contained the following Federal Acquisition Regulation clauses pertinent to this appeal:

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52.214-29	Order of Precedence (JAN 1988)
52.233-1	Disputes (APR 1984) Alternate I (APR 1984)
52.243-	Changes—Fixed Price (AUG 1987)
52.249-4	Termination for Convenience of the Government (SERVICES) (SHORT FORM) (APR 1984)

The contract also contained provisions for reduction in the amount of payments Government would make to contractor in the event contractor failed to meet minimum quality of performance standards set forth in the contract. (R4, tab 1)

26. Up to the time of contract award Government's own employees (normally 19 in number), performed the grounds maintenance at Patrick AFB (Scott depos. at 38). Mr. Charlie C. Brooks (hereinafter "Brooks") was foreman of such employees. Brooks had worked for Government for 34 years doing grounds maintenance at Patrick AFB and had been Government's foreman for 15 years. Brooks resigned from Government employment on 2 December 1988 and was promptly hired by Jones on 5 December 1988 to be the foreman as well as Quality Assurance Evaluator (QAE) for contractor. (Tr. 2/159-60, 162, 163)

27. Contractor started performance of the contract on 12 December 1988 (tr. 2/162). From the start of performance until May 1989, Jones kept six employees, including Brooks, to do the actual work (R4, tab G9; tr. 2/186). At such start of performance Patrick AFB was experiencing its dormant season for grass growth. Such dormant season usually begins in November and lasts until early April each year. (Tr. 2/167, 168; Scott depos. at 10)

28. The contract required contractor to prepare and submit to Government daily reports indicating the prevailing weather conditions, the employees utilized by contractor, the areas where such employees had been assigned to work, the work performed, contractor's oversight of such work, the results of safety inspections, and any Government instructions received (R4, tabs 1, G8). Jones assigned the task of preparing such daily reports to Brooks. Jones told Brooks to put something down on the daily report forms for each work day so that Government's QAE would believe that work had been performed. Brooks prepared a daily report at the beginning of each work day for the particular day involved. Such daily work reports do not accurately reflect the actual work that was accomplished. (R4, tab G8; tr. 2/163-66, 231) Per Jones' instructions the daily reports often made it appear as though certain work (such as mowing) had been done when, in fact, it had not been done (tr. 2/257-59).

29. On 3 January 1989 Jones and Tutterow complained to Government that they disagreed with Government's QAE (inspector) as to how Zone E of the base was to be mowed. They argued that contractor was only required to keep the grass in Zone 8 mowed to a height of 10 inches as shown on the contract mowing map and that inspector was using a map that indicated Zone 8 was to be cut to a height of three to six inches. They claimed that mowing Zone 8 to a height of three to six inches caused them extra work and costs. Inspector used the same map as the contract mowing map except that he had changed the figures in the height column of the table at the lower left hand corner of the map. Specifically, he changed the height for Zone 8 from 10 inches to three to six inches. Inspector claimed that Zone 8 was comprised of almost all Improved Grounds as defined in the contract and only a small unimproved area. Inspector pointed to the base hospital, marina, south entrance gate, sewer treatment plant, and salvage yard, all located in Zone 8, as being improved grounds. Inspector directed contractor to sections TE1-10 and 5.1.1.1.1. as requiring mowing to a height of three to six inches for improved grounds. Inspector pointed to the Land Management and Land Classification map of the contract as further proof that Zone 8 was shown as improved land requiring the shorter mowing height. (R4, tabs 1, G7, TE14, Atch 1, TE 14, Atch 4; tr. 1/39-40, 41, 44, 45, 48, 49, 64-65, 2/14, 53-54, 88-89, 225, 3/130; Scott depos. at 12-13, 14, 15, 16, 17, 58-59)

30. Government further responded to the complaint of Tutterow and Jones by taking them on a tour of the base together with the inspector on 4 January 1989. On such tour the mowing areas were identified as improved, semi-improved or unimproved. Government also offered to provide (and subsequently did provide) larger maps similar to the one employed by the inspector, to contractor to assist in determining what was required by the contract as to mowing. (R4, tab G7; tr. 1/132, 144, 2/23-24, 29, 31, 3/117, 129-30, 131; Scott depos. at 16)

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31. Prior to contractor's start of performance Government had always maintained the height of the grass coverage of Zone 8 at a height of approximately four inches. There was little, if any, good quality grass in Zone 8. The grass was mostly crab grass in the improved ground areas of Zone 8 and weeds on the unimproved areas. St. Augustine grass grew around the hospital. St. Augustine grass never exceeds a six inch height. Crab grass never grows to a 10-inch height. Only weeds in the unimproved portions of Zone 8 (under the right circumstances) might reach a 10-inch height. Government had most recently mowed Zone 8 (to a four-inch height) during November 1988 prior to contractor's taking over the grounds maintenance. (Tr. 2/167, 174-75, 228, 229, 230)

32. Having performed grounds maintenance at Patrick AFB for 34 years for Government prior to being employed by contractor and having been foreman of Government's grounds maintenance crews for 15 years, Brooks felt he knew the work that needed to be done when he became foreman for Jones. Accordingly, Brooks maintained the base the same as he had maintained it for Government. (Tr. 1/144, 2/10, 11, 160, 173, 222-23, 228, 251) When the grass in Zone 8 grew above four inches it was mowed back to a height of four inches. This occurred two times during contractor's entire period of performance from December 1988 through June 1989, *i.e.*, the grass in Zone 8 was mowed once in March 1989 and once in June 1989. (Tr. 2/165-66, 173, 174, 228, 229, 231)

33. During the dormant growth season contractor frequently had no work to do because there was little, if any, growth. Since the contract called for daily work reports Jones instructed Brooks to complete such reports in a way that would make it appear as though work had been performed. (Tr. 2/257-59) Despite contractor's doing little or no work during the dormant growth season Government paid contractor the full $33,333 for each month of such season. (Tr. 2/77, 121-23, 3/76; Scott depos. at 48)

34. Meetings were held between Government and contractor in February and March during which contractor, through Jones and Tutterow, continued to voice concern that Government's inspector was checking upon contractor's work with the aid of maps that were different than those contained in the contract. Government, as mentioned earlier, supplied additional maps and subsequently provided a single map that consolidated all the contract maps and included all the necessary information as to whether areas were improved, semi-improved or unimproved. Government also considered clarifying some of the PWSs in response to contractor's assertions that there were inconsistencies in the contract (not relevant to the present dispute) and it was having trouble understanding precisely the work it was required to perform. Government advised contractor repeatedly not to perform work above and beyond the contract requirements and also advised contractor more than once that Government's inspector did not have authority to broaden the scope of the contract performance requirements. (B4, tab G7; tr. 1/49, 207-08, 2/31, 3/15, 34, 57, 3/130, 133, 145-46; Scott depos. at 16-17)

35. A meeting was held between the parties on 11 April 1989 during which performance of the contract was discussed. One of the items discussed was the amount of edging required along sidewalks, driveways and curbs as well as the amount of hedges that needed to be maintained. Contractor claimed that it was only required to edge the 81,000 plus feet in the contract estimate (contract technical exh. 2) and was required to maintain only 1,000 feet of hedges listed thereon. Moreover, contractor claimed that such work had to be performed only one time during the entire period of the contract term. Government, on the other hand, argued that the 81,000 plus feet listed in the contract for edging was a linear measurement of the aggregate sidewalks, driveways and curbs; that the 1,000 feet of hedges was a linear measurement of the hedges on the base; and that such edging and hedge trimming had to be performed as often as needed during the term of the contract. (R4, tab G7; tr. 1/37, 39, 57, 83, 147, 170, 201-03, 2/10, 3/132)

36. On 14 April 1989 Tutterow wrote to Government advising that he accepted Government's interpretation of the contract requirements as to edging and hedge maintenance and requested Government to "identify location of the estimated 81,000 feet of edging; and location of the estimated 1,000 feet of hedges, you wish us to maintain." Contractor further stated as follows:

> I found an enlarged set of drawings on the main base area and did a preliminary estimate of my own. Based on my estimate the total edging required to maintain your entire base will be approximately 250,000 feet (to be done 3, or possibly 4 times per year). The hedges will be approximately 5,000 feet, as we have already done more than 3,000 feet.

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If I can be of any further assistance in resolving this or any other matters, please advise. We would like to thank you and your people for helping this contract to run well. It is a genuine pleasure to work with people who want to get the job done, without an adversary relationship.

(R4, tab 6)

37. When the growth season arrived in April 1989 contractor added three employees to the six it had been utilizing as its work force to perform the contract (R4, tab G9; tr. 2/186, 189, 190, 226). Government made its first payment deduction from the monthly payment of $33,333 in May 1989 because of defective performance during April 1989 covering edging, pruning shrubs, mowing grass, trimming grass/weeds, and trimming hedges. Government also made payment deductions for defective performance during May and June of 1989. Such deductions did not involve work performed in Zone 8. (R4, tabs 7, 8, 10, 15; tr. 1/158, 1/159, 3/26; Scott depos. at 8, 19)

38. In response to contractor's request that Government identify the edging and hedge locations (finding 36) Government's inspector inspected the area. Government determined that there were 1,094 linear feet of hedges. In addition inspector measured the sidewalks, driveways and curbs that could be edged. Inspector measured not only the linear length of the sidewalks, driveways and curbs as estimated in the contract, but also measured all sides of such sidewalks, driveways and curbs that might require edging and came up with a total of approximately 116,200 feet of edging to perform one complete edging of the 81,160 linear feet of edging estimated in the contract. However, 5,811 linear feet of such possible edging did not require edging and was not edged by contractor because sand had replaced the grass for such linear length. Government identified an additional 22,964 linear feet that should not and had not been edged leaving only 81,641 linear feet to be edged. By letter dated 6 June 1989 Government advised contractor of the specific locations of the 5,811 linear feet of edging that were not required. (R4, tab 8; tr. 1/149, 3/135; Scott depos. at 19-20, 21, 22, 23)

39. Contractor through Brooks also measured *all* sides of the sidewalks, driveways and curbs that might require edging and came up with a total of 120,263 feet (R4, tab G32; tr. 1/167-69, 2/35, 133, 178-79, 180-82). Tutterow, in behalf of contractor, wrote to Government on 12 June 1989 indicating that he recognized that edging one linear foot of sidewalk can actually require three or four feet of edging, since one linear foot of sidewalk may have grass growing on more than one side of such sidewalk. Tutterow further indicated that contractor would edge in accordance with Government's letter of 6 June 1989. (R4, tab 11; tr. 1/154, 167-69, 2/35, 133, 178-79, 180-82) Contractor's own measurement of the *linear* feet of edging required by the contract was 81,160 feet (tr. 2/78).

40. On 15 June 1989 Tutterow wrote to Government advising that contractor had performed work in excess of the contract requirements for the period of 1 December 1988 through 1 May 1989. Tutterow stated that, henceforth, contractor would do no more than the minimum required by the contract since Government was deducting monies for defective workmanship. Tutterow indicated that contractor was only required to trim 378 trees during the contract term of nine months. Tutterow argued that, although the contract called for trimming 500 trees, such was for a period of 12 months. Accordingly, per Tutterow, contractor only had to trim 42 trees per month. Tutterow argued that contractor had already performed trimming 164 trees (as of 15 June 1989); that Government had requested 336 additional trees be trimmed; and that such would exceed the number of trees required to be trimmed by 122 trees. Tutterow stated that contractor would be glad to trim the 122 trees if Government would provide contractor with extra compensation. (R4, tab 12)

41. On 28 June 1989 Government decided that it would be in the best interest of Government to terminate the contract pursuant to its rights under the Termination for Convenience of the Government clause of the contract. Government telephoned Tutterow for contractor on such date and advised of Government's intentions. On 29 June 1989 the contracting officer sent the Notice of Termination as required by the contract clause to contractor. Contractor received the notice on 30 June 1989. (R4, tabs 13, 14; tr. 1/84; Scott depos. at 37)

42. The Termination for Convenience of the Government (Services) (Short Form) (APR 1984) clause of the contract provided as follows:

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this

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contract for services rendered before the effective date of termination.

43. On 25 July 1989 contractor submitted its termination settlement proposal. It was received by Government on 28 July 1989. Contractor stated that its direct costs for 1 January through 30 June 1989 had been $114,513.40 and that it had billed Government for $199,998. Contractor asked for $42,742.29 as a termination settlement. Contractor stated that the difference in operating costs versus its billing amounted to $85,484.60; that such $85,484.60 sum was compensation for six months use of its equipment, supervision and overhead or $14,247.43 per month; and that the three months terminated would amount to three times the $14,247.43 or $42,742.29 (its settlement claim) (R4, tab 16)

44. On 25 July 1989 contractor submitted a claim for compensation for extra work in the amount of $22,146.11 to Government. The claim was for alleged extra mowing of "Area 8" [Zone 8]. Tutterow argued that the contract grass mowing map indicated that "Area 8" was to be cut to a "height of 10 inches as needed"; that Government required contractor to maintain such area at a height of six inches; that the contract required edging of 81,160 feet but contractor had been required to edge 116,227 feet; and that the contract required pruning of 1,500 shrubs each year, but Government made contractor prune 5,000 shrubs. Tutterow stated contractor's damages in pertinent part as follows:

Since we were required to maintain Area 8 at 6" height, we are entitled to be compensated as follows:

PRS, Item RS.1 states that 360A of improved area = 32.7% of contract, of $10,899.89

Area 8 = Approximately 100A or 28% of $10,899.89 = $3,051.97

To maintain at 6" rather than 10" height requires 50% more work per month. 50% of $3,051.97 = $1,525.98 Total Extra Work Area 8 = 6 months × $1,525.98 = $9,155.98

The PWS, TE-2-1 states that the edging requirement is 81,160 feet to be maintained.

The footage that was maintained totaled 116,227 feet. This is a difference of 35,067 feet per month. (*See* Exhibit 4.)

PRS, Item RS-5 states that 81,160 feet = 10.6% of the contract or $3,533.30. $3,533.30 divided by 81,160 feet = $.0435 per foot. Extra edging = 35,067 feet × $.0435 = $1,525.41. Compensation due = 5 months × $1,525.41 = $7.627.05.

We are also entitled to have the monies ($1,413.32) deducted on CDR #2 dated 2May89 paid because the number of deficiencies allowed should have been greater on the larger quantity used. The deduction was based on quantities that were not accurate.

We are also entitled to be paid the $530.00 deducted from our invoice for June services.

Again this deduction was made, based on quantities of work that were not accurate.

The PWS, TE-2-1 states that 1,500 shrubs require pruning each year. PRS Item RS-9 states that 1,500 shrubs are 3.2% of the contract or $1,066.66. $1,066.66 divided by 1,500 = $.71 per shrub. We pruned 5,000, shrubs which is 3,500 more than the contract amount. Compensation due: 3,500 × $.71 = $2,845.00. (Exhibit 5) shows that you were still saying that shrub pruning was unsatisfactory, when we had already done 230% of the contract requirements.

You also deducted the amount of $574.76 from our payments for repair of government property damaged by us. We were also billed for this amount by the Staff Judge Advocate and paid it by our check #1963 (Exhibit 6).

In view of these facts as presented, we claim compensation in the amounts as follows:

$9,155.98	Extra Mowing
7,627.05	Extra Edging
1,413.32	Erroneous Deduction
530.00	Erroneous Deduction
2,845.00	Extra Shrubs
574.76	Deduction for Repairs
$22,146.11	TOTAL

(R4, tab 17) The claim was later reduced to $21,571.35 (R4, tab 23).

45. On 29 August 1989 the contracting officer wrote to contractor seeking substantiation of the costs claimed by contractor in its termination settlement claim (R4, tab 18). On the same date the contracting officer, by separate letter, wrote to contractor asking for proof of the added costs in its claim for compensation for extra work (R4, tab 19).

46. On 1 September 1989 Tutterow replied to the contracting officer concerning substantiation of contractor's termination settlement claim. Tutterow restated contractor's previous claim for $42,742.29 and argued that FAR 52.249-2, paragraph (h)

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says that the cost principles of Part 31 of the FAR govern such claims; that Part 31.2205-42 paragraph (d) allows compensation for loss of value; that the loss of value applies whether or not equipment is owned or leased; that Part 50.302-1(b) allowed Government to settle the claim based on fairness; and that it would be only fair to pay contractor's claim in full since it had only two days notice prior to the termination and Government had shown bad faith by deducting monies from sums due contractor and later billing contractor for same and also for enforcing the provisions of the contract which called for deductions from payments due, when contractor's performance was defective, even though contractor believed it was "performing above the contract levels." (R4, tab 20)

47. On 13 September 1989 Tutterow responded by letter to the contracting officer's request for some proof of contractor's claim for compensation for extra work. He stated that contractor had "cut the salvage yard or the yacht club 27 times without your [Government's] people knowing it was done". As proof thereof he enclosed unsworn signed typewritten statements each dated 5 September 1989, from Jones, Brooks and J.C. Brooks (a tractor operator, *infra*). Jones' statement stated as follows:

> In reply to your request regarding grounds maintenance in Zone 8, this area was maintained to a height of 6 inches or less. Please find enclosed dates on which this area was mowed and trimmed. Edging on the entire Base was done as specified and approximately 5,000 shrubs trimmed.

The list of dates showed 27 dates beginning on 13 December 1988 and ending on 27 June 1989. Such dates were taken from the daily Construction Quality Control Reports (CQCR) prepared by Brooks, which Brooks testified under oath were untrue. (*See* finding 28).

Brooks statement was as follows:

> In reply to your request on grass mowing at Patrick Air Force Base, Zone 8, also edging and shrub trimming. Zone 8 was maintained at a height of 6 inches or less, approximately 5,000 shrubs trimmed and edging was done on the entire base.

Brooks testified under oath that when he signed the paper it did not contain any of the aforesaid typewritten language on it and that he had been led to believe by Jones that the paper was to be an acknowledgement that Brooks had received petty cash from Jones and that Jones was going to fill in the amounts and details thereof when Jones returned to his office. Brooks denies that Zone 8 was mowed 27 times.

J.C. Brooks statement was as follows:

> I, J.C. Brooks was the tractor operator at Patrick Air Force Base and maintained the grass mowing at 6 inches or less.

J.C. Brooks was not called to testify as a witness. (R4, tabs 22, G53; tr. 2/206-10, 216, 237-40) Contractor provided no evidence that Government's deductions for improper performance or nonperformance were incorrect.

48. Contractor's only records that might disclose the actual work performed by contractor were the CQCRs prepared by Brooks and contractor's monthly time book and payroll. The former were inaccurate as to many of its entries and false as to others. The latter records disclosed only the names of the employees and dates that each worked. The hours worked and the tasks performed were not recorded. (R4, tabs G8, G9; tr. 1/176-77, 2/114, 129-30, 165-66, 219-20, 231)

49. Contractor's CQCR's disclose that during the entire period of performance rain fell at Patrick AFB only on 3, 7, 8, 9 and 10 March. Such reports do not disclose the amount of rain or whether the land was irrigated (R4, tab G8). There was no evidence that the weather and growth conditions that occurred during contractor's period of performance were good, bad, or compared favorably or unfavorably with the climatic data contained in the contract (R4, tab 1). The grass in Zone 8 grew approximately $1/4$" per month during the dormant season (tr. 2/243). There was no evidence as to how much the shrubs, hedges, and trees grew during the period of contractor's performance or how much the grass grew in the growth period. Likewise, there was no evidence as to normal growth rates for the vegetation which contractor claims was the subject of extra work. Growth of vegetation or lack of growth is dependent on a multitude of factors such as rainfall, irrigation, sunshine, soil nutrients, temperature, traffic affecting such vegetation and similar factors. (Tr. 1/77)

50. Brooks testified that the grass in Zone 8 was not mowed more or less often than it had been mowed when the maintenance had previously been performed by Government (tr. 2/167). It was cut only twice. Brooks counted the number of shrubs pruned in behalf of contractor. He counted approximately 800 shrubs. They were pruned only

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one time (tr. 2/182-83, 237). The shrubs were only pruned when they needed it (tr. 2/184, 205). Brooks personally performed or directed the performance of the edging for contractor (tr. 3/109). In any event, the contractor lacked adequate personnel to perform all the edging called for in the contract (tr. 3/111). Contractor did no more edging than the 81,160 linear feet called for in the contract (tr. 1/163-67, 176, 3/178, 205).

51. In the absence of substantiation of contractor's claims the contracting officer asked that Government's auditors review contractor's records (tr. 3/33, 50). The Defense Contract Audit Agency (DCAA) conducted an audit of contractor's records including records obtained from Jones Brothers Landscaping. All of contractor's records and those of Jones Brothers Landscaping concerning performance of the grounds maintenance contract were examined. In addition the auditor questioned Tutterow at length. (Tr. 2/124-25, 126-27, 3/155, 156, 157, 158, 160) There was no documentary evidence of any legal relationship between contractor and Jones Brothers Landscaping (tr. 3/166). Contractor's bid papers failed to disclose any estimate of the amount of labor hours or material costs to be utilized by contractor. The bid and bid preparation papers showed only rates of pay and bid amounts. Likewise there was no showing of an estimated profit rate. (R4, tab G49; tr. 3/158, 159) The auditor found only estimates and no proof of expenditures to cover contractor's claims of added labor and material (tr. 3/161). Contractor was unable to show that it, in fact, incurred extra costs to perform the contract (tr. 3/168). Tutterow told the auditor that contractor anticipated making a 10% profit (tr. 3/204, 208).

52. Contractor's records disclosed that it had costs to perform the contract in the aggregate amount of $114,513 and that it received from Government the aggregate amount of $193,115. Contractor's records disclosed that it made a profit of $78,602 (equivalent to a profit rate of 68%). If there had been no deductions by Government for defective performance contractor would have received $199,998 (R4, tabs G42, 43; tr. 3/169, 170). Contractor experienced lower costs to perform the contract than it had estimated in its bid price (tr. 3/172).

53. DCAA provided an audit report to Government covering contractor's claim for an equitable adjustment (in the amount of $21,571.35 for extra costs). The report indicated no basis for sustaining a claim to an equitable adjustment in any amount. (R4, tab G43)

54. DCAA also provided an audit report to Government covering contractor's termination settlement claims for $42,742. The report indicated that contractor had not supported its claim to $42,742. (R4, tab G42) Contractor's claim to $42,742 amounts to the profit it lost as a result of the termination (tr. 3/173). The auditor allowed the sum of $2,262 for depreciation of Jones' machinery, $450 for rental of a lot upon which Jones' machinery was stored, and settlement costs in the amount of $852 for a total of $3,564 (tr. 3/173, 180-81). The auditor in allowing depreciation assumed that contractor was owner of Jones' machinery (tr. 3/182). The lot rental expense allowed by the auditor was actually billed to and paid by Jones (tr. 3/183). The audit reports showed that if contractor were to receive the $21,571.35 equitable adjustment sought and the $42,742 termination settlement sought it would receive a "windfall" profit of $124,733 (R4, tabs G42, 43). The auditor opined that if contractor had finished performance of the contract at only a break even cost for the three months terminated it still would have had an overall profit of 36.6% (tr. 3/224).

55. The contracting officer issued a letter offering settlement of contractor's termination settlement claim for the amount of $4,155.06 on 3 April 1990 (R4, tab 30; tr. 3/50).

56. On 16 April 1990 contractor rejected Government's offer of settlement as being "totally too low for the costs involved."

57. On 17 April 1990 the contracting officer issued a final decision denying contractor's amended claim for $21,571.35 for extra costs alleged for mowing, edging and pruning and disputed deductions made in June and July of 1989 for unsatisfactory performance (R4, tab 32; tr. 3/37). On 30 May 1990 the contracting officer issued a final decision determining that the sum of $4,155.06 was the proper amount for settlement of the contractor's claim for settlement of the termination of the contract for the convenience of the Government (R4, tab 33). Contractor made timely appeals from each of the decisions.

DECISION

Contractor argues in its brief that it is entitled to additional compensation for work performed under the contract in excess of the contract requirements and that it is also entitled to recover for the loss of useful

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value of its machinery and equipment resulting from Government's termination of the contract.

Government contends in its brief that contractor is not entitled to any additional compensation for extra work since it failed to prove that it performed extra work; that the constructive change claimed by contractor did not occur in that the mowing height of 3-6 inches in Zone 8 was spelled out in the contract as well as the 10-inch height which contractor claimed was the contract requirement; that the contract terms, accordingly, were ambiguous; that the ambiguity was obvious; that contractor failed to perform its affirmative duty to seek clarification of the patently ambiguous requirements; that even if the ambiguity is deemed not obvious contractor's interpretation thereof was unreasonable and not in fact relied upon; that if extra work was performed it was done on a volunteer basis; that contractor is not entitled to added compensation for edging and pruning because of claimed differing site conditions; and that contractor failed to prove that Government's deductions for deviations from or nonperformance of contract duties were improper.

In addition Government contends that contractor is not entitled to a termination settlement in excess of the payment it has already received; that it has the burden of proof of its alleged termination settlement costs; that its termination settlement is limited to payment for services performed per the contract terms of the Termination for Convenience of the Government (Services) (Short Form) clause; that contractor failed to prove that it incurred the termination costs claimed; and that sanctions in the form of Government's litigation expenses in the amount of $7,366 should be imposed upon contractor for prosecuting frivolous claims.

The law is well established and needs no citation of authorities to the effect that one who seeks damages must prove by a preponderance of the evidence that damages occurred. In these appeals contractor has alleged being damaged by having been required to perform extra work and by having the contract terminated three months prior to the end of the contract term. However, mere allegations by themselves are not enough to prove that damages in fact exist. To prove that extra work was performed one must first prove the amount of work that would have been required even if no extra work had been performed. The basic work amounts required in these appeals, insofar as mowing in Zone 8 is concerned, were never established. Whether the height of the grass was to be maintained at four inches or 10 inches is of no consequence unless there is growth of the grass. If the grass grew no higher than the prescribed height during the entire term of the contract contractor would not have been required to mow it at all. Thus, the number of mowings performed or required was dependent upon the amount of growth. Contractor had to prove the amount of such growth and the times that it occurred. The evidence showed that growth is and was dependent upon the amount of moisture that fell upon the vegetation, the amount and quality of soil nutrients existent, the temperature that occurred, the amount of sunlight that occurred and other growth conditions that existed. There was little, if any, evidence provided as to such growth conditions and the amounts and times of growth that occurred. Moreover, there was little or no evidence as to historical records of grass growth for the area of Zone 8. In the absence of evidence to assist us we are unable to determine whether the amount of mowing performed by contractor was more or less than would reasonably be expected or more or less than was estimated by contractor in its bid price or whether or not contractor's estimate of the number of times Zone 8 was to be mowed was reasonable. Thus whether Zone 8 was only mowed twice during contractor's performance over a nine month period, as testified to by its foreman (who was most intimately connected with such work) or the 25 or 27 times claimed by Jones is of no help to us in determining whether the amount of mowing performed was more than reasonably anticipated by contractor when it bid. Contractor has failed to carry its burden of proof as to its allegation that it performed *extra* work in mowing Zone 8 because of faulty specifications, maps or by direction of Government.

Likewise, contractor has failed to prove that it performed more edging than was required by the contract. Contractor has no records of the actual amount of edging that it performed. It relies on the allegations of Jones and Tutterow who performed no edging themselves, and did no measuring of edging. Contractor's foreman, Brooks, who did most of the edging himself, and who did the measuring testified that the amount of edging did not exceed the 81,000 approximate feet of edging estimated in the contract. In the absence of any other persuasive evidence we conclude that contractor did nothing more than it was supposed to do insofar as edging is concerned.

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We have a similar situation as to the evidence as to tree trimming, hedge cutting and bush pruning. Contractor has no records of the number of trees it trimmed, the feet of hedges it clipped, or the number of bushes it pruned. Moreover, it has no records of the number of times it performed such maintenance. Here, again, we are left with allegations by Jones who, as project manager, and Tutterow, as office administrator, did not perform the work and did no measuring or record keeping of claimed extra work. But Brooks, the foreman who did such work and directed such work, testified that such work did not exceed the contract requirements. We have been shown no reason to disbelieve Brooks. He was most closely associated with the work and would best know what was done and what was not done. He saw and knows of no work performed above and beyond the contract requirements.

Even if we were to accept contractor's argument that it performed mowing work in excess of the amount it contemplated in its bid price (which we do not accept), we would not find contractor entitled to relief. Contractor's claim that it relied on the contract's mowing map which showed a height of 10 inches for Zone 8 is unreasonable. To base a bid upon only one part of the contract, a map, while disregarding the other parts of the contract, which clearly spell out that grass on Improved Grounds shall be maintained at a lower height is foolhardy. The law requires reading the entire contract in such a way as to give meaning to all parts of it. One cannot pick the part of the contract one wishes to follow and disregard other parts of the contract which are contrary to one's wishes. The contract in this instance contained a mowing map showing grass in Zone 8 to be maintained at a height of 10 inches. It also contained a map showing Zone 8 as Improved Grounds. It also contained specifications that stated that Improved Grounds were to be maintained at a height less than 10 inches. If such was confusing to contractor it was, nevertheless, open and obvious to anyone carefully reading the contract. Indeed, contractor recognized the inconsistency (finding 22). Such patent inconsistency between parts of the contract imposed on the bidder the duty to inquire of Government as to precisely what was desired. Contractor failed to so inquire and thus should not be heard to complain that it was caused more work than it had contemplated. If it had asked it would have been told that there was a small unimproved portion of Zone 8 which called for the 10-inch height mowing whereas most of the zone was Improved Grounds requiring a lower cutting height.

We also find contractor's interpretation of the requirements for tree trimming, shrub pruning, and hedge clipping to be unreasonable. When read as a whole the contract requires trimming, pruning and clipping to be "as needed." Trees were to be pruned to the Pruning Standards (of Class II and Class IV for shade trees) of the National Arborist Association, shrubs to be pruned to maintain natural growth characteristics, and hedges to be trimmed to their original shape when new growth reaches six to eight inches. The amount of growth and the resultant need for maintenance obviously are dependent upon climatic conditions that occur and similar growth factors. It was no more reasonable to interpret the contract as requiring the estimated quantities of trees, shrubs and hedges to be maintained only one time during the entire contract term regardless of the amount of growth than it would be reasonable to insist that the trees, shrubs and hedges be pruned or trimmed even if there were no growth.

Contractor's claim for the loss of the "useful value of special machinery and equipment caused by the termination of the contract for convenience" is based upon its argument that the long form termination clause, FAR 52.249-2, should have been used in the contract rather than the (*Services*) (Short Form) clause FAR 52.249-4. The latter clause limits settlement charges to services rendered before the date of termination. Contractor argues that the long form clause should have been used in the contract since the fixed-price contract exceeded $100,000 in value. Contractor, however, fails to recognize that the short form clause is appropriate regardless of contract value when a fixed-price contract is contemplated involving *services* (such as was the case with grounds maintenance at Patrick AFB) and the contracting officer makes the prescribed determination. (FAR 49.502(c)(1), 52.249-4) There is no evidence that the contracting officer did not make the required determination or did so improperly. In the absence of evidence to the contrary we find no abuse of discretion by the contracting officer and we conclude that the short form clause was properly included in the contract. *Muncie Gear Works, Inc.*, ASBCA No. 16153, 72-1 BCA ¶ 9429.

Contractor's rights to recover a settlement can rise no higher than their source. Under the terms of the termination for convenience clause of the contract Government is

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liable only for services rendered before the effective date of termination, namely 30 June 1989. As such contractor's claims to $42,742.29, which covered the three months terminated, are not allowable. Moreover, if, as the DCAA found, such amount was merely anticipatory profit, even under the long form clause it would not have been allowable. FAR 49.202(a).

We conclude that contractor is not entitled to an equitable adjustment to cover extra work and deductions from contract payments and is not entitled to any additional termination settlement sum.

The appeals are denied.

Government's request for sanctions is denied.

[¶ 26,354] Container Systems Corporation, Inc.

ASBCA No. 40611, September 2, 1993. Contract No. N00197-87-C-0092.

Defaults, Grounds—Delivery Failure—Waiver of Delivery Date.—Despite a contractor's assertion that the government's acceptance of late deliveries under a contract for missile containers waived the delivery schedule, termination for failure to deliver was proper, because even when late deliveries were accepted, each successive increment represented a severable obligation to deliver on the contract delivery date. The board disagreed with the contractor's assertion that a sequence of events involving missed incremental deliveries and government extensions of the delivery dates left no delivery schedule to meet.

Defaults, Excuses—Causation—Burden of Proof.—A contract for the supply of missile containers was properly terminated for default, despite the contractor's contention that the default was excused by reasons beyond the control and without the fault or negligence of the contractor, because the contractor could not prove its allegations that drawing errors and inspection problems caused the default. Moreover, by agreeing to a modification, the contractor surrendered its right to argue then-existing excusable causes of delay as a defense to its later default.

Defaults, Government Acts Excusing—Bad Faith—Abuse of Discretion.—A contractor's argument that the default was excused was denied, even though the contractor argued that the contracting officer abused his discretion by not considering all of the factors listed in FAR 49.402, because the mere failure to consider one or more of the factors is not an automatic admission ticket to a termination for convenience. The first five considerations listed by the contractor made no difference to the decision to terminate. Nor did the sixth consideration, the failure to mention whether the termination was economical, favor upsetting the termination action. The termination memorandum specifically considered the availability of supplies from other sources and the urgency of the need for the supplies. The fact that it did not go into costs was not fatal to the termination.

For the appellant: Chandler, Dillion & Allyn, Chartered, Boise, Idaho, by Thomas B. Chandler and Kathleen P. Allyn, and Popham, Haik, Schnobrich & Kaufman, Ltd., Washington, D.C., by James P. Gallatin, Jr., and Karen D. Powell. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and James H. Haag, Trial Attorney.

Before LUSSIER, RUBERRY, and STEMPLER, Administrative Judges.

LUSSIER, Administrative Judge: This appeal is from a decision terminating for default a contract for the production of containers for the Harpoon missile. Container Systems Corporation, Inc. ("ConSysCo" or "CSC"), the appellant herein, had a change in ownership 18 months into performance and a large part of appellant's case concentrates on the events from that point forward. In attacking the propriety of the termination for default appellant raises many issues including whether there was a valid delivery schedule in effect, whether any default was excusable and whether the decision to terminate violated Government procedures and was an abuse of discretion. We hold for the Government.

FINDINGS OF FACT

I. *The Contract*

1. On 8 September 1987 the Naval Ordnance Station, Louisville, KY (NOSL) awarded Contract No. N00197-87-C-0092, as a formally advertised small business set aside, to CSC, under its former name of Yanke Container Corporation.[1] The contract called for delivery of 306 MK 607 Harpoon missile containers, 50 MK 630 Harpoon missile containers and 40 MK 608

[1] The change of name from Yanke Container Corporation to Container Systems Corporation was recognized by an administrative modification, dated 10 November 1988 (R4, tab 63).

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Harpoon missile containers, to be made in accordance with specified Government drawings and specifications, for a total price of $1,835,910.00. The contract contained the "First Article Approval-Government Testing (APR 1984)" clause, found at FAR 52.203-04, and required submission of one preproduction unit of each model within 150 days, and delivery of the production units thereafter at specified delivery times.

2. The pre-award survey found appellant satisfactory in all areas except for quality control, concluding appellant did not have sufficient quality control personnel and had instances of quality deficiencies on past contracts (R4, tab 8.1). Naval Weapons Station, Earle ("NWS Earle"), which was the design office for the containers in issue (tr. 6/57), recommended close monitoring of performance as a minimum requirement to obtain quality containers from Yanke or any contractor (R4, tab 9). The Navy Contracting Officer (PCO), Charles Buccola, called Richard Fish, who was then appellant's vice president and general manager, on 11 September 1987 to advise him that a Certificate of Competency had been issued and he had awarded the contract to appellant. Mr. Buccola's memo of the phone call states "I told him that I was looking for 100% quality on this. Fish said he believes they make good containers but would put extra attention to this. I told him they could expect a lot of scrutiny on performance" (R4, tab 11).

4. Quality control of missile containers was a matter of concern to the Navy. The containers are designed to protect the missile from shock, vibration, temperature and moisture conditions. The Harpoon missile contains JP 10 fuel with the explosive power of 20-30 sticks of dynamite (tr. 1/30), sensitive electronic circuitry in the missile guidance system, and an explosive device within the missile. In December 1987, the Assistant Secretary of the Navy for Shipbuilding and Logistics requested a study which was jointly conducted by Naval Air Systems Command and Naval Sea Systems Command (app. exh. 7). This study (the "Joint Container Inspection Group" or "JCIG" study) included missile, torpedo and mine containers within its scope. One early result of the study was to institute 100% inspection on container contracts in February 1988 (app. exh. 3, 10).

II. *The Delivery Schedule*

5. The First Article for the MK 607 container was approved for production on 10 March 1988 (R4, tab 19). The First Articles for the MK 630 and MK 608 containers were approved for production on 26 August 1988 (R4, tabs 45, 60.1; tr. 1/269-70).

6. Modification P00016 (Mod 16), effective 21 December 1988, unilaterally revised and extended the contract delivery schedule to require completion of all deliveries by 30 June 1989 (R4, tab 71). Modification P00018 (Mod 18), effective 17 March 1989, further unilaterally revised the delivery schedule. Instead of completing all deliveries by 30 June, appellant now could deliver the last 20 MK 608 and 20 MK 630 containers, 10 of each on 15 July and on 15 August 1989 (R4, tab 81).

7. In early May 1989, appellant ran out of money and ceased production (R4, tab 94). The Government was advised that negotiations were underway to sell appellant's business. The negotiations were with the owners of Defense Technologies Inc. (DTI), a firm in southern California, which also had manufactured containers for the Government (tr. 4/202-05). At the time, appellant's then attorney advised Mr. Jerry Smith, the administrative contracting officer (ACO), that there were three possibilities, consisting of 1) insolvency, 2) novation of specific contracts, or 3) takeover by a third party (DTI) of the entire operation. He also advised the ACO that appellant had potential claims against the Government for inconsistent inspection, delay in progress payments, application of overly stringent quality standards, and bad specifications (R4, tab 97.2).

8. At this time appellant had a number of ongoing container contracts with both the Navy and the Army (R4, tab 103). Based upon a review of appellant's records through March 1989, a Government financial analyst concluded that the financial condition of appellant was unsatisfactory (R4, tab 100). Further, appellant was considered an unacceptable risk for progress payments by the ACO, and was notified on 24 May 1989 that progress payments were being suspended (R4, tabs 101, 102).

9. On 18 May 1989, the PCO wrote to appellant reaffirming the Mod 18 delivery schedule and giving appellant 10 days under the "Default" clause to "cure" the work stoppage, or face possible termination for default (R4, tab 98). Appellant responded on 24 May (R4, tab 104) requesting a new delivery schedule due to "Government caused delays." It suggested it was due monetary consideration for the delays. It also voiced objection to 100% inspection being utilized. The PCO responded on 26 May that appellant's reply was nonresponsive to the ques-

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tion as to what it intended to do to cure the work cessation (R4, tab 105).

10. On 26 May the PCO talked to Mr. Shane Kelly, the intended purchaser (and later to become sole owner and president) of appellant. The PCO's memorandum of that conversation reveals Mr. Kelly felt the subject contract could be completed in short order with his new management and a revamping of appellant's quality system (R4, tab 106.1). When the PCO asked why Mr. Kelly would want to acquire appellant Mr. Kelly gave a number of possible reasons.[2]

11. On 30 May 1989, Mr. Kelly and the PCO had a phone conversation during which the PCO asked Mr. Kelly if he was aware of the delinquent status of the contract. The PCO's memorandum of that phone call shows that Mr. Kelly advised he was aware of it and would not be interested in buying the appellant if all its contracts were going to be terminated for default. The PCO memorandum adds "I explained my situation—that sent cure notice but customer is interested in containers so we will forebear for a short while. Kelly understood the situation" (R4, tab 106.2). The PCO testified that what he meant by "forebear for a short while" was for "a matter of weeks" but he could not specifically recall discussing this with Mr. Kelly (tr. 2/203). The "customer" referred to is obviously the Government office requisitioning the containers. Attached to the memorandum was a hand written schedule for deliveries of containers beginning 30 days after date of agreement and concluding 120 days after date of agreement. This schedule was proposed by Mr. Kelly (tr. 2/201).

12. On 31 May Mr. Fish responded to the 18 May "cure" notice, explaining that appellant was negotiating the sale of 100% of its stock to a buyer experienced in container manufacture. It advised that it could not produce 48 containers a month because of the Government use of 100% inspection instead of MIL-STD-105 sampling inspection. The letter proposed delivery of 36 containers per month from July through November 1989 (R4, tab 107).

13. Notes of a JCIG meeting in Washington, which the PCO attended on 31 May, state that the potential sale of appellant was discussed. The hopeful observation was made that "if acquired, probability exists of completion of performance" (R4, tab 107.2). A more complete trip report of the meeting spelled out the possibilities of: 1) terminating the contract for default, 2) renegotiating the delivery schedule with the current ownership, 3) renegotiating the schedule with the new ownership once the sale was final, or 4) terminating the contract for convenience (R4, tab 107.3). One of the "cons" of the third option was stated to be that it "Requires period of forebearance [sic]".

14. On 7 June, the PCO responded to appellant's letters of 24 May and 31 May. He rejected the concept in appellant's 24 May letter that there were Government caused delays entitling appellant to compensation. He left open the possibility of reducing the monthly quantity, as suggested in appellant's 31 May letter, but advised the Government would expect monetary consideration if it did so (R4, tab 108).

15. On 16 June 1989, the day after the agreement for the sale of appellant's shares was executed (R4, tab 111), the PCO issued a "Show Cause" letter in an effort to get a response and "get the contract rolling again" (R4, tab 112; tr. 2/111). The letter stated that appellant had failed to perform within the time required and the Government was considering terminating the contract for default. Appellant was given 10 days to present facts bearing on the question of whether the failure to perform was excusable. By letter of the same date, DTI notified the Government that the sale had taken place on 16 June and Mr. Shane Kelly would be in touch

[2] I asked why they would want to acquire ConSysCo. Kelly elaborated on a number of reasons as follows: (1) There are some common contracts: they feel that there is still profit in the existing contracts at ConSysCo. (2) The Hawk container contract, which both DTI and ConSysCo have. (3) They would like to have some of the tooling ConSysCo has, particularly for the 608 and 630. (Kelly said they would verify the tooling before planning to use.) This exposes them to some new product. (4) For what they are paying for ConSysCo, they are acquiring metal forming equipment they feel is in good condition and of which they have need. Basically, for the price of the machinery, they are acquiring a company and the contracts. (5) 80% of the material needed to complete is on hand, and they are discounting it at 70% to allow for scrap, rework, etc. Kelly said they don't see a great profit, but feel that they will do well buying the company for what they would pay for one machine. [Although not stated by Kelly, it was evident that cash flow was of interest to him also.] Kelly said that they would FedEx a copy of the signed contract to me. Once signed, Kelly said he will want to talk schedule. He feels they can complete the contract in five months. He reiterated their commitment to quality. (R4, tab 106.1)

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with Mr. Boone the following Monday to "start working out the details".

16. On 21 June Mr. Kelly wrote to the contract negotiator, Mr. Boone, giving a "preliminary" delivery schedule which provided for deliveries beginning on 30 June 1989, and continuing each month thereafter in specified quantities until completion of the last delivery on 24 November 1989 (R4, tab 115). Mr. Kelly had begun rehiring of employees (R4, tab 115) and was planning to move to a new facility in Boise (tr. 4/216). He was also utilizing the services of the prior owner/manager of the company (tr. 4/213).

17. On 28 June Mr. Kelly met with the PCO to discuss a number of matters. The PCO's notes indicate appellant was given an extension of time until 5 July to answer the 'Show Cause" notice of 16 June (R4, tab 119). The testimony of both Mr. Kelly and Mr. Buccola, the PCO, makes it clear that no specific timetables were established at this meeting (tr. 2/150-52, 4/210, 217-18).

18. On 5 July Mr. Kelly responded to the 16 June "Show Cause" letter from the PCO advising that the delay occurred "due to necessary clarifications involving inspection requirements on welds" and stated:

> [W]ith that issue resolved we would like to continue with the remainder of the contract in the following manner:
>
> 1) Follow inspection guidelines as agreed upon by Consysco, Louisville, and the respective DCAS representatives.
>
> 2) Submit a delivery schedule proposal for the remainder of the contract quantity at which time we will offer $250.00 for the modification.

(R4, tab 122)

19. On 14 July the PCO wrote to appellant complaining that appellant's 5 July letter proposed no firm delivery schedule and gave no assurance that any positive action was being taken. The letter requested that a delivery schedule be provided immediately and that failure to provide one "may compel the Government to consider other remedies" (R4, tab 129). It did not suggest what those remedies might be.

20. Government inspection of MK 630 containers was being performed in July (R4, tab 133) and nine were accepted and shipped on 3 August to McDonald Douglas Astronautics Co. (R4, tab 141). A delivery schedule was still on the mind of the Government and Mr. Boone called appellant on 8 August with the message that if appellant did not submit a proposed schedule the Government would impose one (R4, tab 143).

21. By memorandum to file, dated 21 August 1989, Mr. Boone recorded that Modification P00020 (Mod 20) was being issued to incorporate various engineering changes, to reestablish the delivery schedule for MK 607, 608 and 630 containers, "and to protect the Government's rights under the contract" (R4, tab 147). The memorandum made the point that the contract delivery schedule had been delinquent since April 1989 for the MK 630 containers, and since May 1989 for the MK 607 and 608 containers. Attached to the memorandum was a copy of a letter, dated 16 August 1989, from appellant submitting for approval the delivery schedule which was adopted in Mod 20. The modification was signed by Mr. Kelly on 29 August 1989. His testimony is that at the time he signed it he thought he could meet the delivery schedule specified therein (tr. 4/313). For the Government, Mr. Buccola signed the modification. The date shown on the modification for Mr. Buccola's signature is 5 August 1989 but this is obviously in error since the modification terms had not been negotiated until mid-August and the contracting officer signs modifications only after the contractor signs (tr. 1/262).

22. Mod. 20 revised the delivery schedule to provide for delivery on 15 September of 24 MK 607 and 25 MK 630 containers; for delivery on 15 October of 48 MK 607 and 16 MK 630 containers; for delivery on 15 November of 48 MK 607 and 10 MK 608 containers; for delivery on 15 December of 42 MK 607 and 10 MK 608 containers; and for delivery on 15 January of 20 MK 608 containers (R4, tab 142). On 18 September, Mr. Buccola extended the 15 September delivery date until 29 September for the 25 MK 630 containers because of a two week period it took the Government to approve a Request for Deviation (RFD 92-10) affecting the support casting of the MK 630 (R4, tab 151). At the same time he asked for information on what action was being taken to rectify the failure to deliver the 24 MK 607 containers on 15 September.

23. The Government had overpaid appellant on progress payments by approximately $43,000 in August and advised appellant it would not pay future invoices on the subject contract until the amount overpaid had been recouped (R4, tab 156.1). In a telephone conversation with Mr. Boone on 12 October 1989, Mr. Kelly conceded the subject contract was getting little attention since there

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was no potential cash flow. Only one lot of eight MK 607 containers and one lot of nine MK 630 containers had been submitted since the new ownership took over. Mr. Kelly advised he would respond to the 18 September letter and propose a new delivery schedule (R4, tab 159).

24. On 14 October 1989, appellant wrote proposing a new delivery schedule and a $2,000 reduction in contract price (R4, tab 160). The new schedule was proposed by appellant as a "worst case prognosis" with a commitment that "every effort will be made to expedite." The schedule proposed delivery of 20 MK 607 containers on 3 November 1989, 20 on 10 November, 20 on 24 November, 30 on 8 December and 30 "biweekly until contract complete." It further proposed delivery of 11 MK 630 units on 10 November and 10 each on 24 November, 8 December and 22 December. It did not propose any changes in the MK 608 delivery schedule. Appellant's letter added the information that as a result of poor inventory control by the prior owners,[3] progress payments had been suspended prior to the Kelly's purchase of CSC and this coupled with the recoupment of the past overpayment had been making cashflow for the subject contract very difficult. It noted also that its fiberglass tooling for the MK 607 container shells was defective, and it had to build a new set of fiberglass plugs to make new molds. It advised that the new molds should be ready in about three weeks.

25. A memorandum to file on 24 October 1989 from the ACO recorded a meeting the previous day with Mr. Kelly to discuss progress on the several contracts appellant was performing. Appellant's cash flow problem was discussed, with Mr. Kelly eventually expressing the view that without some relief he could not meet payroll and would have to stop production. The memorandum indicated the ACO was attempting to expedite whatever payments the Government could make (R4, tab 161.2).

26. The new delivery schedule proposed by appellant's 14 October letter was incorporated into Modification P00021 (Mod 21), with slight adjustment (R4, tab 162.1). This delivery schedule is sometimes referred to by the parties as the "3 November delivery schedule" since the first delivery was to be on 3 November. Mod 21 was sent to appellant by Mr. Buccola on 30 October 1989. It was date stamped as received by appellant on 6 November 1989, signed by Mr. Kelly, and mailed back to Mr. Buccola, all on the same date (tr. 4/340). It is Mr. Kelly's testimony that he signed Mod 21 because Mr. Boone told him he needed it back but would get a new delivery schedule out (tr. 4/339, 344) and that he signed it because "we were continuing to negotiate so I did what he asked" (tr. 4/340). Mr. Boone has no recollection of such a conversation (tr. 3/53).

27. Prior to the time he received and signed Mod 21, Mr. Kelly had written a letter on the subject (R4, tab 164; tr. 4/338). That letter, also dated 6 November, advised that the financial condition of the company had improved but that appellant was approximately seven days behind schedule on the dates proposed in its 14 October letter. The letter further advised:

> I am sure you agree it would not be in anyone's best interest to execute a modification in which Container Systems is already delinquent. Therefore, I ask that you delay the proposed delivery schedule two weeks for the stated due dates to help us recover. At that point we should be in full operation and will do everything possible to accelerate the delivery schedule.

28. Mr. Boone made a contemporaneous memorandum to file on 8 November 1989 stating that the appellant advised it had not received Mod 21; that while the Government was waiting for appellant to sign Mod 21 appellant became delinquent in deliveries; and that by letter of 6 November 1989 appellant proposed a new delivery schedule with a two week slippage for an additional $500 consideration. The memo concludes "Contract Modification 21 will be reissued establishing a schedule with deliveries to commence on 17 November for a total of $2,500 consideration" (R4, tab 165; tr. 3/53). Thereafter Mr. Boone annotated his file copy of Mod 21 with the word "cancelled" on each page (R4, tab 162.2).

29. On 9 November Mr. Buccola wrote to appellant to advise that Mod 21 was being revised to incorporate the (two week) extension proposed in appellant's 6 November letter. He asserted that the Harpoon Missile

[3] In early November 1989, appellant was involved in a dispute with the previous owners prompting it to demand arbitration in accordance with the terms of the stock sale agreement. Mr. Kelly's position, as stated by his attorney in a letter to the previous owners, at the time, was that, among other issues, the inventory had not been manufactured in accordance with contract terms and needed extensive work, and that the problem was "fraudulent" inspection records (R4, tab 163).

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Program had been severely impacted by the lack of container deliveries and costly wooden containers had to be purchased to allow for continued missile production.[4] The letter forwarded copies of the modification asking appellant to sign and return them if the proposed modification was acceptable (R4, tab 165.1). This modification, sometimes referred to by the parties as the "17 November delivery schedule" was never returned by the appellant. Mr. Kelly had no recollection of ever receiving it and could not find it in his files (tr. 4/344).

30. The record does not reveal when the copy of the first version of Mod 21, signed by appellant on 6 November, was received by the Government. However, Mr. Buccola signed that version on 27 November 1989 and the executed copy was received back by appellant on 5 December 1989 (R4, tab 168.1). He testified that he signed it because Mr. Kelly signed it "and I believed he was in agreement with it. We were seeking a schedule and I signed it" (tr. 2/202).

31. When Mr. Buccola signed Mod 21, the "3 November delivery schedule" on 27 November, three delivery dates set forth in that schedule had already passed without deliveries being made, namely 22 MK 607 containers scheduled for 3 November, 20 MK 607 containers and 11 MK 630 containers scheduled for 10 November, and 20 MK 607 and 10 MK 630 containers scheduled for 24 November. There were additional incremental deliveries due on 8, 15, and 22 December 1989, and on 7 January and 15 February 1990 (R4, tab 168).

32. On 30 November Mr. Buccola sent a certified letter to appellant which refers to the delivery schedule in Mod 21 (version 2), the "17 November delivery schedule". The letter is better quoted than summarized:

> By Contracting Officer letter 4200 1141/1167 of 9 November 1989 you were advised of the Government's concern regarding your poor performance under the above contract. Modification P00021 was forwarded to you to incorporate the revised delivery schedule proposed by your letter of 6 November 1989. By your letter you agreed to deliver 22 MK 607 containers on 17 November and 11 MK 630 containers on 24 November. We have been advised by DCASMA Seattle that no deliveries have been made and that no production effort is being made on any items under this contract including the MK 608 container which is due in less than 30 days. Despite your repeated assurances, Government representatives report that no progress is being made toward completion of this contract.
>
> Since you have *failed to perform* Contract N00197-87-C-0092 *within the time required* by its terms, *and are failing to make progress* toward completion of this contract, the Government is considering terminating the contract under the provisions for default. Pending a final decision in this matter it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part.
>
> Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to Charles F. Buccola (Code 114), Naval Ordnance Station, "V" Building, Louisville, KY 40214-5001, within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.
>
> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract. (Emphasis supplied)

(R4, tab 171)

33. The appellant responded by a letter fax, on 18 December, "to explain the circumstances regarding the delays" (R4, tab 174). No reference was made to any particular delivery schedule. We note that simply reading the "Show Cause" letter and appellant's response one might think that the "17 November delivery schedule" was in effect. However, it is Mr. Kelly's testimony that he did not think at the time that there was a delivery schedule (tr. 4/345). The letter pointed out that the former management of CSC kept no records of inventory purchased. The letter further stated that most of the inventory that had been purchased and reimbursed, through Government progress

[4] This is confirmed by evidence showing that NAVAIR directed the Naval Weapons Station, Earle, to take immediate action to procure 225 MK 607 containers as an "urgent and compelling requirement" because of contract delivery delinquencies (R4, tab 165.2, 167.1).

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payments, was left to deteriorate exposed and unidentified. It advised that at the end of October, when it began to prepare the production line for MK 607 containers, it discovered there were no shock mounts to complete the containers and that the shock mounts could not be obtained until early 1990. An additional problem it identified was the lack of correct castings for the MK 630. Mr. Boone was aware of both problems in November (tr. 3/52, 4/342). The letter concluded:

> I am aware of the severe damage these continued delays are causing the government on these programs. While those delays are in no way caused by the government, they were aware of the circumstances existing prior to my purchase of the company that have caused these delays. Representatives of the Navy have witnessed the conditions referenced above.
>
> While it is understandable that the government is loosing [sic] patience with this company a [sic] ask that you continue to work with us as we solve these problems. If the government were to terminate now it would virtually be writing off the more than $650,000 in outstanding progress payments given to the former owners. Because of the condition of the inventory and the quality records concerning that inventory, the only value in the government paid for property would be for salvage (less than $50,000). It would be in everyone's best interest to allow us to complete to [sic] contract and fully liquidate to [sic] progress payments.
>
> If continuation is desired, please let me know. I would be willing to offer large consideration for a re-negotiated delivery schedule. At this time I have not instructed any of the vendors to stop production. If you wish me to do so, please let me know.

(R4, tab 174)

34. Between 18 December and 20 December, comments were obtained by the PCO, Mr. Buccola, from the ACO (R4, tabs 179, 180, 182, 184) and NWS Earle (R4, tab 178) with respect to appellant's response to the "Show Cause" letter of 30 November. On 20 December 1989, Mr. Buccola sent a certified letter to appellant formally terminating the subject contract for default (R4, tab 185). Referring to his 30 November 1989 letter he asserted:

> You were specifically advised that you had failed to deliver in accordance with the established delivery schedule and that you were failing to make progress toward completion of this contract. The letter further offered you the opportunity to present, in writing, any facts bearing on the question. Your response dated 18 December 1989 did not show that your failure to perform arose from causes beyond your control or from lack of fault or negligence on your part. Accordingly, it is hereby found that your company is in Default under Contract N00197-87-C-0092. Therefore, your right to proceed further with performance under Contract N00197-87-C-0092 is hereby terminated pursuant to the clause of the contract entitled 'Default', said termination to be effective immediately.

35. Between the time of the 30 November "Show Cause" letter and the 20 December termination notice the appellant had missed delivering on incremental delivery dates due under all of the three delivery schedules discussed in our previous findings.[5] If Mod 20 was in effect, it required delivery of 42 MK

[5] *Modification 20 delivery schedule:*

15 September 1989	24 MK 607 containers
29 September 1989	25 MK 630 containers (extended from 15 Sep.)
15 October 1989	48 MK 607 containers 16 MK 630 containers
15 November 1989	48 MK 607 containers 10 MK 608 containers
15 December 1989	42 MK 607 containers 10 MK 608 containers
5 January 1990	20 MK 608 containers

(R4, tab 142)

Modification 21, the 3 November delivery schedule:

3 November 1989	22 MK 607 containers
10 November 1989	20 MK 607 containers 11 MK 630 containers
24 November 1989	20 MK 607 containers 10 MK 630 containers
8 December 1989	30 MK 607 containers 10 MK 630 containers
15 December 1989	10 MK 608 containers
22 December 1989	30 MK 607 containers 10 MK 630 containers
7 January 1990	32 MK 607 containers
15 January 1990	10 MK 608 containers
15 February 1990	20 MK 608 containers

(R4, tab 162.1)

Modification 21 (version 2) the 17 November delivery schedule:

17 November 1989	22 MK 607 containers
24 November 1989	20 MK 607 containers 11 MK 630 containers

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607 and 10 MK 608 containers on 15 December 1989. If Mod 21, the "3 November delivery schedule" was in effect, it required delivery of 30 MK 607 and 10 MK 630 containers on 8 December 1989 and 10 MK 608 containers on 15 December. If Mod 21, the "17 November delivery schedule", was in effect, it required delivery of 20 MK 607 and 10 MK 630 containers on 8 December 1989.

36. Since the time the new management took over CSC in June 1989 and the termination of the contract in December 1989, only 17 containers were delivered and accepted by the Government under the subject contract. These consisted of nine MK 630 containers (the first article unit and eight production units) accepted on 3 August 1989 (R4, tab 141) and eight MK 607 containers accepted in early October 1989 (R4, tab 159; tr. 3/203).

37. During the 60 day period prior to termination, appellant devoted very little effort to work on the subject contract but rather concentrated on other contracts which would produce cash flow to it (tr. 3/142). Mr. Kelly testified that $540 of direct labor was expended on the subject contract in November 1989 (tr. 4/361). However, the general ledger he relied upon to reach that conclusion (R4, tab 203) simply shows the $540 adjacent to the date of 11/30/89 under a column headed "Work in Progress" for the subject contract. The previous date for direct labor is shown as 9/30/89 and thus it is not entirely clear that the $540 charges do not cover October 1989 as well as November 1989. There are no labor charges shown for December 1989. However, as late as 29 November 1989, appellant was writing to Morel Foundry confirming its order for castings (R4, tab 171.1) and, on 6 December, writing to Barry Controls, confirming its order for shock mounts (R4, tab 172), needed for the subject contract. Mr. Kelly also testified that when he received the Show Cause letter advising him that he was in default and anything he did was at his risk, he stopped work on the subject contract (tr. 5/83, 86). However, there is no evidence that he attempted to cancel the orders to his suppliers. Since we are to conclude in the decision portion of this opinion that there was a valid existing delivery schedule and appellant was in default of it at the time of termination we move on to additional facts bearing upon the cause of that default.

II. *Additional Findings—Alleged Excusable Causes of Default*

38. The contract incorporated the "Default (Fixed Price Supply and Service) (APR 1984)" clause which provided in pertinent part:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.
>
> * * *
>
> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.
>
> (d) If the failure to perform is caused by the default of a subcontractor at any tier,

(Footnote Continued)

8 December 1989	20 MK 607 containers 10 MK 630 containers	19 January 1990	32 MK 607 containers
22 December 1989	30 MK 607 containers 10 MK 630 containers	29 January 1990	10 MK 608 containers
29 December 1989	10 MK 608 containers	28 February 1990	20 MK 608 containers
5 January 1990	30 MK 607 containers 10 MK 630 containers	(R4, tab 165)	

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and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

* * *

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

39. When Mr. Kelly took control of the company, there were over 600 containers in various stages of construction on all of appellant's contracts (tr. 4/230). There were some 350,000 parts for this contract alone, and approximately 1,000,000 parts including all container contracts, which had to be segregated, inventoried and inspected before assembly (tr. 4/233). Mr. Kelly found no in-process records or identification of inspection status (tr. 4/231). As a result, according to Mr. Kelly, appellant did 100% inspection of everything, and continued that up until it stopped work in December 1989 (tr. 4/231).

40. Nine MK 630 containers were a first priority (tr. 4/236). These took "a little longer than expected" according to Mr. Kelly because of a question whether the welds had been inspected prior to painting, which was solved by appellant agreeing to remove the paint for Government inspection (tr. 4/237). The inspection of these containers was to be done at a new manufacturing facility (Braniff Street facility), obtained by appellant in late June (tr. 4/235), while fabrication of the components of the MK 607 and MK 630 frame was reinstated at the old facility (Gekeler Lane facility) (tr. 4/240-41). The old facility had only 24,000 sq. ft. of space, which was inadequate to accommodate the inventory and the manufacturing lines (tr. 4/216) whereas the new facility had approximately 45,000 sq. ft. (tr. 4/232).

41. Mr. Kelly prepared a number of exhibits in early 1992 in preparation for the trial of this appeal. One (app. exh. 24) represented the plan he had in mind in early July 1989 for getting work on all of appellant's existing contracts restarted (tr. 4/223, 229). The exhibit was based only upon his best present recollection, PCO notes (tr. 4/227-28) and another document received in discovery (tr. 4/293). We are unimpressed with the appellant's evidence of delay based upon its reconstructed original plan of performance. It is contrived at worst and speculation at best. We are not satisfied that appellant had the plan Mr. Kelly reconstructed in his testimony, or for that matter any fixed plan for performance of this contract. We find this evidence insubstantial and not credible. Mr. Kelly also attempted to reconstruct the time spent on the subject contract from appellant's records (tr. 4/255; app. exh. 27) and a chronology of those events Mr. Kelly happened to be "aware of" (app. exh. 28; tr. 4/265). Another exhibit purported to show the causal relationship between Government actions and appellant's default (app. exh. 26). While useful in illustrating appellant's position, the exhibits are flawed by a lack of credible backup.

A. *Delayed Inspection on Contract A173*

42. Appellant's "plan", as Mr. Kelly remembers it, was to complete the component fabrication of the MK 630 and 607 container parts by 6 August (tr. 4/244). Whether this was reasonable in light of the defective inventory he was to find (see footnote 3) is unclear on this record. The move of the component parts was to begin on 7 August and be completed by 23 August (tr. 4/243-44). Counting and verifying these parts was to be done from 12 August to 9 September, overlapping the moving. Inspection of the components was to have been done during the period 26 August—23 September (tr. 4/245).

43. On 20 July 1989 when Government inspectors came out to inspect the nine MK 630 containers under the subject contract (tr. 4/284-85) appellant had several lots of MK 535 containers ready for inspection under another contract (A-173), occupying a major portion of the new facility, which the inspectors did not inspect. Mr. Kelly strenuously objected (tr. 4/286) but the MK 535 containers were not inspected until the last part of August. Accordingly, there was no space for the move of component inventory on the subject contract from the old facility to the new facility (tr. 4/289). We have not been shown, however, how many components had been manufactured and were ready for an earlier move to the new facility. Nor have we been shown good cause for not counting and inspecting the components at the old facility under the circumstances.

44. The move of the materials began in early September (tr. 4/327). Inventory did not in fact begin until late September (tr. 4/277). By the end of October the machinery was relocated and the component parts

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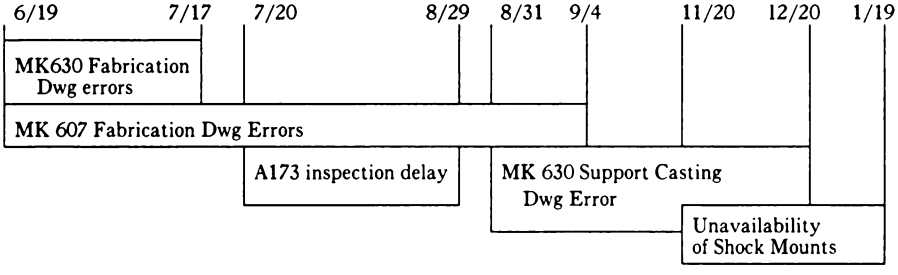
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were pretty well in place (tr. 4/327-28). However, the assembly line for the MK 607 was still being set up in early November (tr. 4/339). The move to the new facility wasn't completed until 22 November 1989 (tr. 4/271-72). Moreover, the new building needed certain renovations and installation of special electrical wiring and gas lines, and these renovations were not completed as of the time of the termination for default (tr. 4/272-73). Taking all the facts into account, we cannot find that a causal relationship between the A123 inspection delay and appellant's default on the subject contract has been established.

B. *Drawing Errors and Shock Mount Problems*

45. In the July, August, September 1989 time frame the manufacturing work (bending of metal and welding pieces together) was still being done at the old facility (tr. 4/304). According to Mr. Kelly's reconstruction (app. exh. 24) of his June 1989 thinking, this work would have been completed on 6 August, instead of the actual completion on 17 September (tr. 4/305). Mr. Kelly's testimony is that he knew the work was not getting done fast enough but, at the time, he did not know why (tr. 4/306). He has since concluded that certain errors on the Government drawings caused delays, the nature and effect of which were computed by appellant's welding expert, Mr. Frank Kuncz, Jr., and a former employee, Mr. Matthew Cooney (tr. 4/309). Appellant's exhibit A-26 graphs the Government caused delays for delayed inspection on contract A173, MK607 drawing errors (fabrication), MK630 drawing errors (fabrication), and MK630 drawing errors (lower support casting). It adds another item for "unavailability of sole source item-shock mounts" for the MK 607 container.

46. The graph may be fairly summarized as follows. We have taken the liberty of adding the end date for the shock mount delay which was not on the exhibit, but was supplied by Mr. Kelly's testimony (tr. 4/350).



B.1. *Shock Mounts*

47. With respect to the shock mount problem, the evidence establishes only that Mr. Boone was made aware of the problem by the appellant (see finding 33) and that one source, Universal Technology, would not deal with appellant because of a financial dispute (tr. 3/66, 4/347). The evidence does not establish that the problem with the shock mounts, to the extent it prevented delivery of the MK 607 containers on time, was beyond the control and without the fault or negligence of both the appellant and its subcontractors. The shock mounts were a long lead time item. Appellant apparently assumed it had a sufficient quantity to complete production. It has not shown a reasonable basis for so doing. Nor has it shown why taking an inventory of the component parts, which revealed the shortage, should not have been done prior to transfer to the new facility, or even more important, why appellant did not have sufficient parts in its inventory to begin with.

B.2. *Errors in MK 607 and MK 630 Fabrication Drawings*

48. There was considerable expert testimony with respect to errors in the MK 607 and MK 630 fabrication drawings. We have carefully reviewed the testimony, and the relevant exhibits,[6] and consider it unnecessary to make extensive detailed findings of

[6] A JCIG study forwarded to the Assistant Secretary of the Navy on 11 March 1988 at p. 3-16 contained the following information:

MK 608, MK-630 and MK-694 Harpoon container drawing packages are being reviewed by NAVWESA. Cursory review, not validated, revealed deficiencies in the following areas: Incomplete specification control drawings, general notes lack reference to straightness requirements, welds not always dimensioned or identified, mating hole positions and strap length are not properly dimensioned, some specifications are out-of-date, some filet welds not properly identified, missing references to applicable MIL-STD for inspection of crit-

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fact. We find that there were drawing defects in Drawing No. 2645429, the drawing used in welding the outer cradle frame for the MK 607 containers, and in Drawing No. 5166063, the drawing used in welding the outer frame assembly for the MK 630 containers. There were similar drawing defects in the MK 608 drawing package. The type of defects included not only inadequate welding information but also design requiring further engineering effort by appellant to overcome welding problems.

49. The problems related to the drawings would have surfaced at the time appellant produced its First Article units, yet there is no indication that appellant found these faults in the drawings until two years after the termination for default was issued. This raises substantial question as to whether the drawing errors in fact significantly impacted production, as now alleged. The proof as to the drawing errors delaying performance, to the extent of being an excusable cause of default, is based entirely upon an estimate, two years after termination, of the amount of labor hours it would take to correct problems in fabricating the MK 607 and MK 630 containers due to those errors. We have precious little to explain why, if in fact appellant encountered such problems, to the degree it now alleges, it did not complain about the drawing errors at the time, or later, when it was threatened with termination of the contract. Even assuming a reasonable basis for silence existed, and we know of none, we still have no sound basis to show that the "extra" hours expended by appellant necessarily delayed delivery. Furthermore, if these delays were in fact being experienced in fabrication of containers during the summer of 1989, as alleged, they were institutionally known to appellant at the time Mr. Kelly proposed, and agreed to, the delivery schedule in Mod 20.

50. Thus, while the evidence establishes drawing errors which complicated fabrication of the containers there is no credible proof showing that these rendered manufacture impossible, only more time consuming and costly. In fact, appellant produced 144 acceptable MK 607 containers prior to, and 8 after, the sale of the company. It produced nine MK 630 containers. Considering the numerous other factors, such as the fact that Mr. Kelly had no plan for any set delivery schedule for this contract when he took over the company, that he apparently inherited an inventory of defective component parts, that the electrical and gas lines necessary for welding at the new facility were never installed, and that appellant elected to devote its work force to other contracts with cash flow, we can not find that the drawing errors caused the default.

B.3. *Error in MK 630 Casting Drawing*

(Footnote Continued)

ical welds on some drawings, detail views not always codified, and readability of drawings is substandard.

(App. exh. 7)

The record also contains April 1988 Production Engineering Studies by NAVWESA of the MK 608 and 630 drawings. The "Summary of Findings" for each study stated:

The engineering package as a whole does not meet the requirements specified for Level 3 data as defined by DOD-D-1000. The major areas in which the data is lacking in Level 3 engineering definition are as follows:

a. Specification and Source Control drawings are lacking performance and functional requirements necessary to ensure identification and adequate reprocurement of interchangeable items. Control appears to be primarily by Vendor's part number rather than the drawing requirements.

b. Dimensions and tolerances are lacking on drawings, particularly on the frame, outer weldment, to accurately fabricate details without resorting to additional engineering effort. This lack of dimensioning also reduces the effectiveness of inspection of finished assemblies/product for Govt. acceptance.

c. Welding symbology is either used incorrectly or fails to contain the required information as specified by ANSI/AWS A 2.4. In addition weld sizes given in many cases result in an over-weld condition (i.e.: weld size greater than thickness of minor member) which while reducing strength increases cost.

d. Dimensions and Tolerances specified produce interference fits in several instances as detailed under specific comments.

(App. exh. 31, 32)

The NAVWESA evaluation of the drawings was not known to appellant. Mr. Buccola, while aware of the JCIG Study, did not recall ever receiving any final report from NAVWESA on its drawing package review (tr. 2/91). The testimony of the Government expert, Mr. Cummings, satisfies us that some of the NAVWESA defects were purely cosmetic, and those that were not could have been discovered by appellant in production of the first article units. The record fails to disclose that appellant, during performance, ever requested a waiver, or deviation, or change, related to any of the errors identified in these studies (tr. 8/61).

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51. On 31 August 1989, appellant submitted Request for Deviation 92-10, requesting a change in dimension on the MK 630 lower support casting drawing to facilitate machining (R4, tab 168). This was approved by the Government on 14 September 1989. The casting for the tooling was to be poured by one subcontractor, Morel Foundry (Morel), and sent out for machining, a process that would take a total of four to five weeks (tr. 4/315). Appellant wrote to Morel on 16 November to complain about delays and "to invoke the Defense Priority Allocations Rating stated on the purchase order."

52. Morel's reply to appellant on 20 November stated the problem with the castings was found originally to be "shift in the mold and also our predetermined shrinkage rule" (R4, tab 167). It added that even after it received the order from appellant in mid October (R4, tab 166, attachment) implementing the dimension change (in RFD 92-10) it was still producing parts "with continued excessive variation" and was continuing to work on the problem. Appellant received and approved an acceptable first article from Morel on the 29th or 30th of November, and received the first production castings necessary to assemble MK 630 containers in the second or third week of December (tr. 4/316-17).

53. Nine MK 630 containers were inspected and accepted prior to the RFD 92-10 change and we have no evidence to conclude they did not meet the specification requirements. Mr. Kelly frankly concedes that his understanding that the casting could not be machined to the old dimension "could be wrong" (tr. 5/112). It is also possible that the machine work for the nine accepted MK 630 containers was done by a different machinist or machine shop than after the sale of the company (tr. 5/113-14).

54. The evidence does not establish that the drawing error with respect to the MK 630 lower support casting, to the extent it prevented delivery of MK 630 containers on time, was beyond the control and without the fault or negligence of both the appellant and its subcontractors. While the evidence suggests that the dimension waiver approved in RFD 92-10 would facilitate manufacture, it also suggests that there were other factors contributing to the problem manufacturing the casting, such as the mold shift mentioned by Morel. Furthermore, the problem was one obviously overcome by appellant in manufacturing the nine MK 630 containers accepted by the Government. While in doing so, it may be assumed extra effort was expended, we have no credible basis to conclude that this caused appellant's failure to make timely deliveries.

C. *Additional Findings—Government Inspection*

55. Although certain objections to Government inspection were included in appellant's post hearing brief under the heading of abuse of discretion by the PCO in terminating for default, it is evident that appellant is also urging them as excusable causes for its delays. These objections relate to the Government's use of 100% inspection and the Government inspectors' use of certain Quality Assurance Letters of Instruction (QALI) (app. exh. 10, 11, 12, 13).

56. The contract incorporated the clause "Inspection of Supplies—Fixed Price" found at FAR 52-246.2 which provides in pertinent part:

> (b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome.
>
> * * *
>
> (c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. . . .

57. The contract also contained the following:

> INSPECTION AND ACCEPTANCE OF THE SUPPLIES OR SERVICES TO BE FURNISHED HEREUNDER SHALL BE MADE BY THE COGNIZANT GOVERNMENT INSPECTION OFFICE AT THE CONTRACTOR'S/SUBCONTRACTOR'S FACILITY.
>
> SPECIAL INSPECTION INSTRUCTIONS
>
> AN INSPECTION LOT SHALL CONSIST OF ITEMS MANUFACTURED UNDER ESSENTIALLY THE SAME CONDITIONS AND AT ESSENTIALLY THE SAME TIME. PRIOR TO SUBMIT-

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TAL OF EACH INSPECTION LOT TO THE GOVERNMENT REPRESENTATIVE, THE CONTRACTOR SHALL PROVIDE INSPECTION AND/OR TEST RECORDS THAT ASSURE THE UNITS PRESENTED HAVE PASSED ALL INSPECTIONS AND TESTS REQUIRED BY THE APPLICABLE DRAWINGS, SPECIFICATIONS AND QUALITY ASSURANCE DOCUMENTATION. UNLESS SPECIFIED OTHERWISE, *AS A MINIMUM,* THIS INSPECTION AND TESTING SHALL BE IN ACCORDANCE WITH MIL-STD-105, LATEST REVISION AT ISSUE DATE OF SOLICITATION, INSPECTION LEVEL II, WITH 100% INSPECTION FOR CRITICAL CHARACTERISTICS, 1.0. AQL (ACCEPTANCE QUALITY LEVEL), FOR MAJOR CHARACTERISTICS AND 2.5 AQL FOR ALL OTHER CHARACTERISTICS. ALL AQLS WILL BE CONSIDERED COLLECTIVELY, BY CLASS. (Emphasis supplied)

(R4, tab 1, p. 9 of 32)

58. MIL-STD-105 states at paragraph 6.1 that "[A]cceptability of a lot or batch will be determined by the use of a sampling plan or plans associated with the designated AQL [acceptable quality level] or AQLs" (R4, tab 220). The sampling plan under MIL-STD-105 involves drawing a certain number of samples at random from the lot to be tested and measuring acceptability of the lot on the basis of the sampling. The publication provides conditions for going to a tightened inspection, which permits rejection for a lesser number of defects than a normal inspection when 2 out of 5 consecutive lots or batches have been rejected. Other specifications (R4, tabs 190, 211, 218) contain a reservation the Government asserts gave it the right to perform any of the inspections set forth in the particular specification, when it was deemed necessary to assure that supplies conform to requirements.[7]

59. When the contract was awarded the, PCO made appellant aware of the fact that close scrutiny was going to be paid to the quality of the product, and there was justifiable cause for the Government to be concerned, as later events were to prove. 100% inspection was instituted in early 1988 as a result of concerns for the quality of the product (finding 4, *supra*). The concerns encompassed both inadequate Government inspection and deficiencies in appellant's quality assurance program (app. exh. 3). It is not disputed that prior to the time of the sale to the new owners, the appellant was objecting to the 100% inspection and talking about filing a claim for extra costs connected with what it considered was excessive inspection (R4, tabs 97.2, 104). As early as June 1988, it objected to amending the contract to require it to correct all defects regardless of the AQLs unless it was also given a price adjustment (R4, tabs, 35, 36). Nevertheless, in August 1988, appellant agreed to a new delivery schedule in bilateral Modification 10 (Mod 10) (R4, tab 42). We have no reason to conclude that in so doing appellant did not take into account the impact upon delivery, if any, of the increased inspections.

60. It is evident that when the new ownership took over in June 1989 100% inspection was considered by Mr. Kelly to be quite appropriate, and even necessary (see finding 39, *supra;* footnote 3). Between June 1989 and the default termination in December 1989, the Government inspected only one lot of nine MK 630 containers and one lot of eight MK 607 containers (see finding 36).

[7] The Government refers to WS 20876, a NAVSEA Weapons System fabrication specification, applicable to all three types of Harpoon containers, and specifically to paragraph 4.1, which reads as follows:

4.1 *Responsibility for Inspection.* Unless otherwise specified in the contract or order, the supplier is responsible for the performance of all inspection requirements as specified herein. The contractor shall provide an inspection system conforming to the requirements of MIL-I-45208. Except as otherwise specified in the contract or order, the supplier may use his own or any other facilities suitable for the performance of the inspection requirements specified herein, unless disapproved by the Government. *The Government reserves the right to perform any of the inspections set forth in the specification where such inspections are deemed necessary to assure that supplier and services conform to prescribed requirements* (R4, tab 190). (Emphasis supplied)

The appellant refers to paragraph 4.1 of that same specification, which reads as follows:

4.4.1 *Quality Conformance Samples.* Examination for major and identified minor drawing requirements *may be performed in accordance with statistical sampling plans defined by MIL-STD-105, general inspection level II.* The acceptable quality level for major characteristics shall be 1.0 and minors 4.0. Inspection shall be by class for each lot submitted. Critical characteristics must be inspected 100%. Undesignated characteristics may be inspected at a level acceptable to both the contractor and cognizant DCAS Representative. After examination, each container shall be subjected to the test defined by Para 4.4.2. (Emphasis supplied)

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While 100% inspection by Government inspectors would normally be more costly and time consuming than sampling inspection, we have no trustworthy basis to measure impact upon any delivery schedule. Thus, we cannot find as a fact that the Government's use of 100% inspection, instead of sampling inspection, led to appellant's default.

61. The QALIs were internal instructions to the Government inspectors which instructed them how to conduct inspections. There was one QALI inspection characteristic (characteristic #30) in use during the period July 1988—January 1989 that was in error. It was cited on a September 1988 inspection report as a basis for finding a defect in one container, which also had many other defects (R4, tab 46.4). The tolerances for another dimension (characteristic #26) were not taken into account (tr. 8/186) resulting in the finding of a deficiency on two containers in September 1988, both of which also had other defects (R4, tab 46.4). While the QALIs were not drafted in accordance with applicable internal Government procedures in certain respects, the evidence does not show a nexus between this and appellant's nonperformance resulting in the default termination.

III. *Additional Findings—Alleged Abuse of Discretion in Termination*

62. The memorandum supporting the default termination was prepared by Mr. Boone and signed by both Mr. Boone and Mr. Buccola on 18 December 1989 (R4, tab 175). It was three and one half pages in length and summarized the contract history. Making reference to the Federal Acquisition Regulation governing the procedure for default,[8] it specifically contained paragraphs paralleling the factors specified in the FAR to be considered.

63. In pertinent part the memorandum stated:

3. In accordance with (FAR 49.402-3] the following factors have been considered:

(a) *The terms of the contract and applicable laws and regulations.* The contract includes FAR clause 52-249.8, Default, which defines the Government's rights to terminate the contract. The contract required delivery no later than 17 Nov 89. Despite repeated assurances, the contractor failed to deliver. In lieu of immediate termination, a show cause letter was issued to determine if the failure to deliver was excusable. Reports from on site DCAS representatives indicated that no work was being performed on the contract. The contractor's response to the show cause did not indicate that the reasons for delay were excusable and the contractor admitted the delay was not the Government's fault. The issue of unavailability of designated sources for shock mounts does not constitute an excusable delay. In view of the contractor's overall performance as well as the performance under the new owners, the Navy's best interests are served by terminating the contract for default.

(b) *The specific failure of the contractor and the excuses for the failure.* The contractor failed to perform in accordance with the terms of the contract. The contractor was given numerous opportunities to cure the condition but failed to do so. Following the transfer of ownership on 16 Jun 89, there was no evidence of effort made toward new production. Only a small quantity of units in process were reworked, completed, and delivered.

(c) *The availability of supplies or services from other sources.* The long acquisition leadtime associated with containers was significant in the Government negotiating numerous schedule extensions. Due to the impact on the Harpoon Missile Program of Consysco's failure to deliver containers,

[8] FAR 49.402-3, which at Subparagraph (f) provides:

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

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MK 607 containers are being obtained via NAEC Lakehurst with competition limited to proven manufacturers. MK 608 and MK 630 containers are being delivered under another contract which was awarded in April 1989.

(d) *The urgency of need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.* This was the factor which attributed to the Contracting Officer's decision to not terminate the contract earlier. The contractor's delay has contributed to the current urgency. Furthermore, due to the contractor's delays, current needs are being met by containers being delivered under more recently awarded contracts.

(e) *The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.* Containers are normally acquired by full and open competition. This contractor is not considered essential to the Government's acquisition program in view of other manufacturers with the capability to perform.

(f) *The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.* As a Small Business, the termination is bound to have an impact on the contractor's ability to liquidate progress payments, etc. As noted above, the Government has extended the contract numerous times in the hope and expectation that the contractor would perform. Negotiations will be held to determine the value of the material funded by progress payments with thoughts of delivering the inventory to Naval Weapons Station Concord for completion by Government personnel.

(g) *Any other pertinent facts and circumstances.* The contractor is a Small Business. The termination was discussed with the resident SADBU who did not object to the termination. A copy of the Show Cause letter was sent to SBA Seattle in accordance with FAR 49.402-3 (e)(4) and no response was received.

4. In accordance with the Default clause of the contract, reference (b), the contractor having been provided notice by reference (c), the subject contract will be terminated for default due to the contractor's failure to (i) make timely delivery of the supplies within the time specified in the contract, and (ii) to make progress (no evidence of on-going production) and that failure endangers performance of the contract.

(R4, tab 175)

64. The ACO's report to the PCO regarding the appellant's answer to the "Show Cause" letter indicated that there might be problems with the shock mount deliveries, that there had been no production activity on the contract in the previous 60 days,[9] that there was no current capability to apply paint, and that the plant lacked power except for two welders (R4, tab 184). He also raised a question regarding appellant's financial capability to follow through on its offer of a "large consideration" for a renegotiated delivery schedule. As previously indicated Mr. Buccola also obtained the views of NWS Earle (finding 34). Appellant suggests that the 18 December memorandum justifying the termination was prepared prior to consideration of its response to the Show Cause letter because of the fact that the Show Cause letter was received by the PCO no earlier than 10:49 A.M. on 18 December. It also relies upon notes of a 13 December 1989 meeting in Washington, attended by Mr. Buccola, which indicate the "consensus" was to terminate "all DTI and CONSYSCO contracts for default" (exh. A to app. Motion to Supplement Record, 17 July 1991).

65. We are not unmindful of the background environment of the ongoing JCIG study and the higher level concern over the quality of Harpoon containers. The record indicates that even before receipt of appellant's answer to the "Show Cause" letter Mr. Buccola was inclined to terminate for default. It also indicates that Navy officials involved in the Harpoon container procurement shared that view. However, it also indicates that there was little reason to expect that appellant would offer excusable cause for its lack of performance. Indeed, it offered none when it responded to the "Show Cause" letter (see finding 33). We conclude that Mr. Buccola's decision to terminate was not a decision brought about by the direction of others, but rather was his own decision based upon his own opinion, an opinion which was shared, but not directed, by

[9] The appellant maintains that there was activity on the contract but the evidence reflects that it was minimal at best. In any event, it is irrelevant to the question of whether the contracting officer reasonably relied upon the reports given him in the context of the issue of abuse of discretion.

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others. In this connection, we also dismiss as unfounded the appellant's assertion that Mr. Buccola terminated the contract in order to give the business to Navy manufacturing facilities.

66. The termination memorandum does not show, as appellant correctly points out, that consideration was given by Mr. Buccola to: 1) his telling Mr. Kelly, at the time Mr. Kelly purchased appellant, that he would "forbear for a short while", 2) the fact that the Government employed 100% inspection, 3) any improprieties in the QALIs, 4) any deficiencies in the drawing package, 5) any disruption caused by delay in inspection of the A123 contract, 6) time spent by Government inspectors in conducting inspections, or 7) whether it was to the Government's economic advantage to terminate for default.[10] We will take these omissions up in the decision portion of this opinion but make the following findings here.

67. Mr. Buccola never believed, and had no reason to believe, that his statement about forbearance in June 1989 was a factor in December 1989. While he was aware of the 100% inspection and the longstanding objection by appellant's predecessor, he had no reason to connect that to appellant's default condition in the fall of 1989. As to the QALI deficiencies, there is no basis to conclude Mr. Buccola had any reason to know of this as a possible factor to consider. While he may be presumed to have been aware of the comment in the JCIG report that NWS Earle had tentatively identified errors in drawings in 1988 (see footnote 6), he had no basis to conclude appellant was being hampered by this in the fall of 1989 after delivery of the first article and production units. Similarly, if inspection delays were the problem, appellant would have been the first to know and allege that fact as the reason for its nonproduction. Mr. Kelly's actions in negotiating a new delivery schedule in August 1989 and attempting to obtain further modifications thereafter belie any intent to make the contracting officer aware of this as a real problem. Thus, it is understandable it would not be specifically addressed in the termination memorandum.

DECISION

The first issue to be decided is whether the appellant was in default at the time its contract was terminated for default. The Government contends that appellant was in default for failure to deliver in accordance with an existing delivery schedule and for failure to make progress so as to endanger the performance, or for abandonment of the contract. It is well established that the Government bears the burden of proof on the issue of default by the contractor. *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759, (Fed. Cir. 1987).

The "Default" clause of the contract permits termination for default under subparagraph (a)(1)(i) for failure to deliver the supplies within the time specified in the contract. Appellant contends that this basis for termination was not available to the Government for the reason that no valid delivery schedule was in existence. It contends that the Mod 20 delivery schedule was waived by the Government and that neither version of Mod 21 ever became effective.

That the Government can waive its right to default a contract is well established. In *D. Joseph DeVito v. United States* [13 CCF ¶ 83,319], 413 F.2d 1147 (Ct. Cl. 1969) the court held that:

> The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent.

It is also well established, however, that even where late deliveries of installments have been accepted, each successive increment represents a severable obligation to deliver on the contract delivery date, for default of which the Government has the right to terminate the contract. *Prestex, Inc.*, ASBCA Nos. 21284, *et al.*, 81-1 BCA ¶ 14,882; *Lapp Insulator Company Inc.*, ASBCA No. 13303, 70-1 BCA ¶ 8219, *aff'd on reconsid.*, 70-2 BCA ¶ 8471; *Novelty Products Company*, ASBCA No. 21077, 78-1 BCA ¶ 12,989; *Systems and Industry Optical*, ASBCA No. 21635, 79-2 BCA ¶ 13,966.

[10] As to the last point the record contains a January 1990 estimate that it would cost $2,184,281 to complete the contract (R4, tab 194). We merely note here that this figure can not be compared, as appellant asserts (Brief, p. 69), to $560,960 remaining on appellant's contract, for the simple reason that the value of appellant's termination inventory was highly suspect by appellant's own admission (see Finding 33), at the time the contracting officer was considering termination.

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Less than three weeks after Mod 20 was executed, appellant missed the first incremental delivery, on 15 September 1989. The contracting officer promptly extended this delivery for two weeks for a portion of the missed delivery (25 MK 630 containers) but asked what appellant was doing to rectify its failure to deliver the remaining portion (24 MK 607 containers) (see finding 22). Appellant then missed the 29 September extension and responded to the contracting officer on 14 October proposing a new "worst case prognosis" delivery schedule for a $2,000 reduction in price, with the first increment to be due on 3 November (see finding 24). This was acceptable to the Government and a formal modification was sent to appellant incorporating its proposal. Mr. Kelly signed the modification and returned it to the Government on 6 November. He contemporaneously expressed concern about signing a modification where the first incremental delivery had already been missed and requested a two week schedule delay for an additional $500 reduction in price (see findings 27, 28). While this was agreeable to the Government, a revised modification incorporating the extension was never executed by appellant (see finding 29). Thereafter, the contracting officer signed the earlier modification, even though three of the nine incremental delivery dates had already passed without deliveries. Appellant would have us conclude that this sequence of events left it with no delivery schedule to meet. We do not agree.

Appellant's reliance upon the Board's statement in *DBA Systems, Inc.*, ASBCA No. 34664, 89-3 BCA ¶ 22,202 at 111,684 that "[b]y insisting that a new delivery schedule was established, the Government is implicitly agreeing that the original contract schedule was waived" is misplaced. *DBA Systems* is distinguishable in that there the only delivery date in the contract had passed; there were no incremental delivery dates yet to be met. Moreover, the quoted statement in *DBA Systems* is based upon a quoted portion of *Northrop California, Inc. v. United States*, Ct. Cl. No. 98-75, 22 CCF ¶ 80,535 at 85,754, adopted in 213 Ct. Cl. 670 (1976), to the effect that "It is clear that if the contract delivery dates are not considered waived there is no requirement, nor need, to establish new delivery dates before terminating for default". In the context of the issue before it, this was not a holding by the court that an effort to negotiate a new delivery is tantamount to a waiver of the existing delivery schedule.

The other cases cited by appellant in support of its waiver argument are clearly distinguishable on their facts. *D. Joseph Devito v. United States, supra; Star Food Processing, Inc.*, ASBCA Nos. 34161, *et al.* 90-1 BCA ¶ 22,390; *Vista Scientific Corporation*, ASBCA Nos. 25974, *et al.* 87-1 BCA ¶ 19,603. The circumstances of each individual case determine what is a reasonable time for the Government to terminate for default. What was said in *H.N. Bailey & Associates v. United States* [16 CCF ¶ 80,782], 449 F.2d 376, 385 (Ct. Cl. 1971) is equally applicable here:

> In light of defendant's extensive experience in Government procuring and in the absence of convincing evidence, it cannot be presumed that defendant waived its right to terminate for default, even impliedly, in a situation where the procured item is urgently needed as part of a vital and high integrity national program, and the contractor has yet to demonstrate satisfactorily that it is capable of successfully producing the article. If we are to penalize defendant for displaying a benevolent attitude towards the defaulting contractor, a posture, incidentally, which the Government does not frequently assume, we must be prepared for the predictable and undesirable consequence of discouraging defendant from again rendering any assistance, voluntary or otherwise, beyond that specifically required by the contract, for fear of waiving an essential contractual right.

By its willingness to negotiate a new delivery schedule it is evident the Government was also willing to forgo terminating for past missed deliveries. However, certain relevant factors must be considered to put this in a true light. It was appellant, not the Government, who opened negotiations for the Mod 21 delivery schedules. Also, the amount of time taken by the Government to consider appellant's proposals was reasonable by any measure. There was an urgent need for the Harpoon missile containers and appellant's efforts to renegotiate the delivery schedule in October and November 1989 were treated seriously by the Government. Each time the Government indicated a willingness to accept appellant's proposal appellant backed off, but not openly. Appellant's failure to execute the modification containing the "17 November delivery schedule", or, if it had not received that modification, to follow up on it, is one example of this. We see little in the record to show any substantial performance by appellant because of the Government's willingness to negotiate the delivery

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schedule. See *Phoenix E. Incorporated,* ASBCA No. 25872, 82-1 BCA ¶ 15,729. Viewed in retrospect, and in light of the appellant's prioritizing other work, it appears to have been more a stall by appellant rather than serious negotiations. If there was detrimental reliance by anybody as a result of these negotiations, it was the Government's, not appellant's.

Even if we accept what we understand to be appellant's view, that it withdrew the "3 November delivery schedule" proposal, despite signing the modification, when it offered the "17 November delivery schedule" proposal, we still cannot accept the conclusion that the Government's willingness to negotiate further constitutes a waiver of its right to terminate for future missed deliveries on the Mod 20 delivery schedule. Whether or not earlier incremental deliveries in Mod 20 were waived by the time lapse between the delivery dates and termination becomes immaterial since the termination was clearly within a reasonable time of appellant's default on later incremental deliveries. The "Show Cause" notice was within 15 days of the missed 15 November delivery and 15 days in advance of the missed 15 December delivery. The termination came quickly (too quickly according to appellant) after receipt of appellant's response to the "Show Cause" letter.

We conclude from our review of the evidence of record, and the controlling law, that appellant failed to deliver supplies within the time specified in the contract, under subparagraph (a)(1)(i) of the "Default" clause, and thus was in default at the time of the termination for default. The Government's alternative ground for termination, that appellant failed to make progress so as to endanger performance of the contract under subparagraph (a)(1)(ii), does not afford a basis for default termination since the necessary "Cure" notice was never issued to appellant. *Lanzen Fabricating, Inc.,* ASBCA No. 40328, 93-3 BCA ¶ 26,079; *C3, Inc.,* ASBCA No. 38391, 91-2 BCA ¶ 23,750; *Turnco Machine Co., Inc.,* ASBCA No. 33559, 88-2 BCA ¶ 20,551. We need not reach the further contention that appellant "abandoned" the contract.

The default having been established, the burden shifts to the appellant to show that the default was excusable, or the result of an abuse of discretion. *Cantrill, Development Corp.,* ASBCA Nos. 30160, 30693, 30717, 89-2 BCA ¶ 21,635 at 108,849; *Sayco Ltd.,* ASBCA No. 36105, 91-1 BCA ¶ 23,568 at 118,165.

Under the "Default" clause of the contract, a failure to perform is excusable if it arises from causes beyond the control and without the fault or negligence of both the contractor and its subcontractors (see finding 38). The factual background related to the issue of excusability may be found at Part II of our Findings of Fact. As there indicated, major obstacles to accepting the alleged excusable causes of default lie in the proof. As to the shock mount problem and the MK630 casting problem, appellant has not shown the problems were beyond the control and without the fault or negligence of itself and its subcontractors. As to all the drawing error problems and the inspection problems, we have been unable to find a credible nexus to the default.

In addition to the deficiency in proof to establish cause and effect, another obstacle exists for a number of the alleged excuses, in that by agreeing to MOD 20, appellant effectively surrendered its right to argue then existing excusable causes of delay as a defense to its later default. *Taylor Corporation,* ASBCA Nos. 37139, 38351, 90-2 BCA ¶ 22,693, *aff'd on reconsid.,* 90-3 BCA ¶ 22,958; *A.C. Ball Company,* ASBCA No. 27677, 86-2 BCA ¶ 18,744. At the time appellant entered into Mod 20 it knew that the Government had been imposing 100% inspection; it knew, or should have known, that it was having problems, if in fact it was, manufacturing containers because of drawing inadequacies or errors; and it knew it had substantial quality problems with the inventory it took over from the previous owners. We conclude that appellant has not established any excusable cause for its default.

The final issue to be reached is appellant's contention that the default termination was improper and should be converted to a termination for the convenience of the Government because the contracting officer abused his discretion in terminating the contract for default. The law is clear that such abuse of discretion by the contracting officer is a basis for setting aside the termination for default. *Darwin Construction Co. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593 (Fed. Cir. 1987). The appellant has the burden of proof on the matter. *Sayco Ltd., supra; Quality Environment Systems, Inc.,* ASBCA No. 22178, 87-3 BCA ¶ 20,060.

The appellant bases its contention on two grounds which we take up separately. The first is that the contracting officer failed to consider the pertinent circumstances existing at the time of termination and there-

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fore failed to comply with FAR 49.402-3 (see footnote 8) which sets forth the factors the contracting officer is to consider in determining whether to terminate for default.

Before discussing the specific deficiencies asserted by appellant in this regard, we note that the mere failure to consider one or more of the factors listed in FAR 49.402 "is not an automatic admission ticket to a termination for convenience. It is but one factor to consider in looking at the totality of the circumstances surrounding the contracting officer's actions". *Lafayette Coal Company,* ASBCA No. 32174, 89-3 BCA ¶ 21,963.

The specific circumstances appellant says were not taken into consideration may be summarized as follows:

a. Mr. Buccola's agreement with Mr. Kelly "to forbear".

b. The Government's imposition of 100% inspection despite the contract provisions specifying sampling inspection.

c. The 100% inspection despite the NAVWESA studies in 1988 indicating there were errors in the drawing package.

d. The use of QALIs that were not prepared in accordance with the Government's internal procedures resulting in more deficiencies being noted by Government inspectors than otherwise would have been.

e. The delay in inspection on the A173 contract and its impact on appellant's ability to perform the subject contract.

f. Whether the termination was economical to the Government.

Our findings of fact make it clear that the first five of these considerations would make no difference in the decision to terminate. Moreover, none of these considerations were raised by appellant in its answer to the "Show Cause" letter. While appellant may not have been aware of the 1988 NAVWESA studies or the QALI deficiencies, it was aware of the extent of what it considered excessive Government inspection, and failure to cooperate, as well as any problems it encountered in producing to the Navy drawings. Nor does the sixth consideration, the failure to mention whether the termination was economical, favor upsetting the termination action. The termination memorandum specifically considered the availability of supplies from other sources and the urgency of the need for the supplies. That it did not go into costs is not fatal to the termination and appellant has not cited legal authority to the contrary.

The second ground for appellant's contention that there was an abuse of discretion is that the contracting officer failed to exercise independent judgment citing *Schlesinger v. United States,* 390 F.2d 702 (Ct. Cl. 1968). We have found otherwise (see finding 65). The contracting officer's reliance upon information and advice provided by others does not negate the independence of his decision. *Kit Pack Company, Inc.,* ASBCA No. 33135, 89-3 BCA ¶ 22,151.

We have carefully reviewed the evidence and arguments presented and conclude that the appellant was in default without excusable cause at the time of termination, and that the termination for default was not the result of an abuse of discretion. Accordingly, the appeal is denied.

[¶ 26,355] Marine Design Technologies, Inc.

ASBCA No. 39391, September 8, 1993. Contract No. N00140-85-D-BA03.

Indefinite Delivery Contracts—Requirements Contracts—Indefinite Quantity v. Requirements.—A contract for ship overhaul planning and ship design support services was of the indefinite-quantity type, rather than of the requirements type, which permitted the government to place delivery orders with sources other than the contractor because, despite inconsistent information given to the contractor, the signed contract contained only indefinite-quantity provisions, not requirements provisions. A contract negotiator had told the contractor that the contract was being changed to a requirements contract, and the letter of notification of award characterized the contract as a requirements contract. As awarded and signed, however, the contract did not contain the Requirements clause or a similar clause.

For the appellant: Obermayer, Rebman, Maxwell & Hippel, Philadelphia, Pennsylvania, by Robert A. MacDonnell. For the government: Arthur H. Hildebrandt, Navy Chief Trial

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Attorney, and David H. Turner, Trial Attorney, Naval Regional Contracting Center, Philadelphia, Pennsylvania.

Before DICUS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: This appeal arises under a contract for ship overhaul planning and ship design support services. At issue is whether the contract is an indefinite quantity contract or a requirements contract.

FINDINGS OF FACT

1. Request for Proposals (RFP) N00140-85-R-BA03 for ship overhaul planning and ship design support services was issued 8 November 1984. The RFP provided under SUPPLIES/SERVICES AND PRICES "This is an Indefinite Delivery-Indefinite Quantity contract with Cost Plus Fixed Fee provisions." The RFP also contained the Indefinite Quantity (APR 1984) clause, which provides "The Contractor shall furnish to the Government, when and if ordered ... services up to and including the quantity designated in the Schedule as the 'maximum.' The Government shall order at least ... the 'minimum.'" The RFP included other relevant provisions set out below:

> L71 SUBMISSION OF PROPOSALS
>
> ... *NOTE:*
>
> The proposed contract(s) will be for services to back-up and supplement the in-house capabilities of SUPSHIP Groton ....
>
> H44 MINIMUM AND MAXIMUM QUANTITIES
>
> As referred to in paragraph (b) of the "Indefinite Quantities" clause of this contract, the contract minimum quantity is a total of $25,000.00 worth of orders .... The contract maximum quantity is a total of total estimated contract price as awarded.

(R4, tab 1)

2. Respondent issued four amendments to the RFP. Amendment No. 3 in relevant part provided "Section L71N—Submission of Proposals is deleted in its entirety and replaced with the following ...." The substituted Submission of Proposals provision omitted the *NOTE* (*see* finding 1; R4, tab 1).

3. Appellant submitted its proposal on 13 March 1985 (R4, tab 2). It was the low responsive offeror (R4b, tabs 1, 2). On 10 July 1985 the contract negotiator sought permission from the Contract Review Board (CRB) to change the contract type from Indefinite Delivery/Indefinite Quantity (IDIQ) to requirements. The CRB, which included the contracting officer, did not approve the change to a requirements contract, noting instead "Award on initial offers as received ...." (R4b, tabs 1, 2) The initial offer was based on an IDIQ contract (R4, tab 2). The record contains no probative evidence that the CRB approved any subsequent change. However, on 12 July 1985 the contract technical representative told the contract negotiator that the minimum guarantee was unacceptable. Thereafter the contract negotiator advised the contract technical representative that the contract was changed to "indefinite delivery." (R4, tab 6).

4. In a 12 July 1985 telephone conversation the contract negotiator told appellant's president that the guaranteed minimum provision was being deleted and the contract was being changed to a "requirements" type. In a subsequent conversation on 23 July 1985 with the contract negotiator appellant agreed to accept the contract without a minimum guarantee on a "requirements" basis, which he understood to mean that no work was assured, but that all of respondent's needs for work meeting the criteria of the contract's Statement of Work would go to appellant (app. exh. D).

5. By letter of 26 July 1985 the contracting officer notified appellant it was awarded the contract. The letter stated "This Indefinite Quantity/Requirements Contract will bear an estimated CPFF of $829,423.00." (App. exh. A). However, the contracting officer forwarded the final version of the contract for the parties execution by letter of 15 August 1985 with the following directions:

> Enclosed herewith are the original and three copies of subject proposed contract. If the contract is in form acceptable to you, it is requested that you promptly execute and return to this office .... The proposed contract must be signed without *change* and mailed or otherwise furnished to the Contracting Center within ten (10) working days after receipt. (Underlining in original.)

(Resp. exh. 24) The contract, with an effective date of 1 August 1985, incorporated appellant's 13 March 1985 proposal and retained the Maximum and Minimum Quantities and Indefinite Quantity (APR 1984) provisions. Under SUPPLIES/SERVICES AND PRICES the fol-

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lowing change was made: "This is an Indefinite Delivery-Indefinite Requirements contract ...." As awarded, the contract did not contain the Requirements (APR 1984) clause or a similar clause (R4, tab 2). The contract was executed by appellant on 20 August 1985 and on 5 September 1985 by the contracting officer (app. exh. B).

6. When appellant had only received $32,954.50 in orders under the contract by 16 May 1988, it complained to respondent. Appellant alleged in a 16 May 1988 letter that respondent had placed delivery orders with others which should have been placed with appellant (R4, tab 7). After attempts at resolution were unsuccessful, appellant filed a claim in the amount of $42,380.61 dated 22 May 1989 (R4, tab 22). The claim was denied in a 21 June 1989 final decision (R4, tab 23).

DECISION

The sole issue here is whether the contract is a "requirements" contract or an "indefinite delivery-indefinite quantity" (IDIQ) contract. Appellant argues it is a requirements contract. Respondent argues it is an IDIQ contract. The parties do not dispute that respondent ordered in excess of the $25,000 contract minimum.

Appellant asserts, in effect, that the parties intended a requirements contract, but a "confused" contract resulted because the contracting officer "modified existing documentation rather than comprehensively modifying that documentation." App. br. at 2. Appellant does not argue mutual mistake, but rather contends that the overall circumstances lead to an interpretation of the contract as a requirements contract. Respondent asserts that the provisions of the contract "unambiguously create" an IDIQ contract, while conceding it is "mislabeled." Resp. br. at 7, 18. We cannot conclude only one reasonable interpretation of the contract is possible, particularly since the "mislabeling" is in a contract provision, while appellant does not dispute the contract included other provisions which are consistent with IDIQ contracts (app. br. at 11; *see* findings 1, 5). The matter cannot be decided, however, based solely on the way the parties have classified the contract. "We must ignore the label plaintiff attaches to its contracts and see what legal rights it claims it received." *Mason v. United States* [27 CCF ¶ 80,204], 615 F.2d 1343, 1346 (Ct. Cl. 1980).

Respondent argues that we should not consider appellant's extrinsic evidence of intent in interpreting the contract. We disagree. "To shut out the light furnished by the parties themselves—to read their words not as they meant them but as they appear when denuded of that meaning—is to decide an unreal, fictitious, hypothetical case." *United States v. Lennox Metal Manufacturing Co.*, 225 F.2d 302, 313 (2d. Cir. 1955). From this record we conclude that as of late July of 1985 the negotiating representatives of both parties intended to enter into a requirements contract (finding 4). However, the contract received and executed by the parties in August and September 1985, as was the case with the proposed contract on which appellant's proposal was submitted in March 1985, had no Requirements clause committing respondent to place all work of like character with appellant (finding 5). In addition, it retained the Indefinite Quantity (APR 1984) and Maximum and Minimum Quantities clauses (*id.*). There is no persuasive evidence that the contracting officer, at the time the contract was executed, was authorized or intended to enter into other than an IDIQ contract. Thus, whatever they had intended earlier, the parties executed an agreement which committed respondent to a minimum purchase of $25,000.00 and limited deliveries to no more than $829,423.00, terms inimical to a requirements contract (findings 2, 5).

Appellant argues that the contract must be interpreted from the instrument as a whole, and that the whole instrument includes the contract, RFP and amendments, the facts surrounding the execution of the contract, and respondent's subsequent interpretation. However, appellant received copies of the contract to execute which did not include the Requirements clause but did include the Indefinite Quantity and Maximum and Minimum Quantities clauses. These clauses clearly establish the range of respondent's obligation. Prior versions of a contract cannot modify the last one and appellant is presumed to have read the contract as executed. *Schoeffel v. United States,* 193 Ct. Cl. 923, 935 (1971). While we are sympathetic to appellant's position insofar as the contract negotiator's misleading precontractual representations are concerned, she was without authority to bind respondent. *Federal Crop Insurance v. Merrill,* 332 U.S. 380 (1947); *Prestex, Inc.,* ASBCA No. 22552, 81-2 BCA ¶ 15,193, aff'd 3 Cl. Ct. 373 (1983).

Moreover, while the contracting officer characterized the contract as a requirements contract in the letter notifying appellant of award, the subsequent letter forwarding the

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contract for execution required appellant to execute the contract without change and gave a last chance to refuse. Appellant does not dispute that the contract forwarded with that letter contained provisions consistent with an IDIQ contract and not a requirements contract. App. br. at 11. We are aware of no principle that excuses a party from reading a contract he is about to sign. *Richardson Camera Company, Inc. v. United States,* 467 F.2d 491, 496 (Ct. Cl. 1972); *Schoeffel v. United States, supra* at 934-35; *Walsky Construction Co.,* ASBCA Nos. 21110, 21556, 21979, 22293, 79-1 BCA ¶ 13,878 at 68,117. In this regard, what appellant refers to as "the admittedly confusing documentation relating to this contract" (app. br. at 5) includes provisions of the contract itself. Only the description of the contract as an "Indefinite Delivery-Indefinite Requirements contract" under SUPPLIES/SERVICES AND PRICES (finding 5) supports the view that the contract is a requirements contract.

In *Mason v. United States, supra,* the Court considered the issue of whether certain contracts were requirements or IDIQ contracts, commenting "Resolution of this controversy depends upon a determination of the respective rights conferred by these term contracts on plaintiff and defendant." *Id.* at 1347. The Court found the contracts to be IDIQ contracts. "The Guaranteed Minimum Quantity clause would be given legal meaning and serve a purpose only if these are indefinite quantities contracts." *Id.* at 1350. We reach the same conclusion here and find appellant's interpretation unreasonable. *See also Ralph Construction, Inc. v. United States* [32 CCF ¶ 72,430], 4 Cl. Ct. 727 (1984). Even assuming appellant's interpretation is reasonable, the existence of the Indefinite Quantity (APR 1984) clause and the Maximum and Minimum Quantities provision would create a conflict with the "Indefinite Requirements" characterization sufficiently obvious to impose upon appellant the duty to inquire. The appeal is denied.

[¶ 26,356] Manhattan House C.T.C., Inc.

DOT BCA No. 2067, September 1, 1993. Contract No. J100C-302.

Procedure, Boards—Failure to Prosecute—Incarceration of Officer.—Incarceration of a corporate contractor's president was not a defense to a motion to dismiss for failure to prosecute, because the failure of the corporation or its incarcerated president to respond to documents served upon them by their own counsel, documents warning that the appeal would be dismissed, was strong evidence that the corporation was not willing to pursue the appeal. The board was not provided with any precedent to support an argument that the incarcerated president was unable to participate in the prosecution of the appeal as long as he remained in prison.

Procedure, Boards—Attorneys—Withdrawal.—The motion of attorneys to withdraw in a case in which a corporate contractor's president was serving a five-year criminal sentence was granted because counsel satisfied the procedural requirements. The motion was held in abeyance initially, but it was granted now because the attorneys had served the registered agent of the corporation and, with the government's cooperation, had documents formally served upon the contractor's president.

For the appellant: Frankfurt, Garbus, Klein & Selz, New York City, New York, by Arthur J. Ginsburg, and Swidler & Berlin, Washington, D.C., by C. Joel Van Over. For the government: Agnes M. Brown, United States Department of Justice, Washington, D.C.

Before ROBERTORY, FENNESSY, and STERN, Administrative Judges.

Granting motions initiated in 93-3 BCA ¶ 26,037 but held in abeyance.

ROBERTORY, Administrative Judge: This appeal grows out of the respondent's termination of a contract with Manhattan House C.T.C., Inc., ("Manhattan House C.T.C") due to alleged abuse of prisoners. Both counsel who entered appearances on behalf of the appellant Manhattan House have now filed Motions To Withdraw. The Board also has pending before it a Motion by the respon-

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dent Bureau of Prisons to Dismiss For Failure To Prosecute.

The background to these Motions is set forth in *Manhattan House C.T.C. Inc.*, DOTBCA No. 2067, 93-3 BCA ¶ 26,037 (1993), *q.v.*, where we held decision in abeyance pending the following actions:

"1. The appellant's counsel are directed to serve upon the registered agents of the corporation in the state in which the contract services were performed and in its state of incorporation, if known, notice of their wish to be relieved of further responsibility for representation, together with a copy of the respondent's Motion To Dismiss For Failure To Prosecute and a copy of this Opinion and Order. Such notice shall advise the corporation that it has thirty days from the date of such service to advise the Board in writing whether the corporation consents to withdrawal of counsel, and that the corporation is at risk of having its appeal dismissed with prejudice for lack of prosecution.

"2. The appellant's counsel shall also serve a copy of the notice upon counsel for respondent, together with brief written interrogatories directed to Mr. Alter, eliciting information about the current condition of the corporation and the identification of its officers. Mr. Alter shall be charged to respond thereto within 20 days of his receipt of service, and advised that the corporation is risking dismissal of its appeal with prejudice for failure to respond. Counsel for respondent shall cause the respondent to deliver a copy of such notice and the interrogatories to Mr. Alter. Respondent's counsel shall advise the Board and appellant's counsel of the date on which Mr. Alter received said notice."

The directed actions having been taken, both firms which entered appearances on behalf of the appellant have now renewed their Motions for Leave to Withdraw and the respondent has renewed its Motion to Dismiss.

Counsel for the respondent has advised the Board in its renewed Motion to Dismiss that Mr. Alter was served with the interrogatories directed in paragraph 2 of the Board's Order (*supra*) on June 10, 1993. All counsel involved advise that they have received no response from Mr. Alter.

On May 14, 1993, Frankfurt, Garbus, in compliance with paragraph 1 of the Board's Order, effected service of counsels' Motion to Withdraw upon the registered agent of Manhattan House C.T.C.,[1] as well as upon the New York Department of State Division of Corporations.[2] No response has been received.

Frankfurt, Garbus further advises that the registered agent for Manhattan House is Michael Young, Esq., said to be a former principal of Manhattan House and one of the attorneys who represented Mr. Alter in the criminal proceeding.[3] Mr. Young made no response.[4]

Upon reviewing the detailed facts as set forth in the Motions submitted by Frankfurt, Garbus, by Swidler, Berlin, and by the Justice Department,[5] which relate their efforts to carry out the Board's Order, the Board is satisfied that appellant's counsel have done all that they can, and all that they are legally required to do, to notify both Manhattan House C.T.C. and Mr. Alter of the pending motions to dismiss for lack of prosecution and for the withdrawal of both firms as counsel.[6]

MOTION TO DISMISS

This appeal was filed on April 28, 1989. The appellant was Manhattan House C.T.C., a corporation; it was not Mr. Alter or any other individual. On August 1, 1989, proceedings were stayed upon request of both parties until completion of a grand jury investigation. Mr. Alter was indicted in June, 1990. He entered a plea of guilty and in April, 1992 was sentenced to five years' incarceration. He remains incarcerated.[7]

[1] The Certified Mail receipt therefor is Exhibit F to the Frankfurt, Garbus Motion.

[2] Swidler, Berlin Motion, pp. 2-3.

[3] Frankfurt, Garbus Motion, ¶ 12.

[4] Frankfurt, Garbus Motion, ¶ 26.

[5] The efforts which have transpired since our initial decision have been spelled out in detail in the Motions; they will not be repeated at length here,

[6] Swidler, Berlin also advises that on March 24, 1993, the Secretary of State of the State of New York dissolved Manhattan House C.T.C. Inc. pursuant to section 203-A of the New York Tax Law. Motion to Withdraw, Exhibit C. Dissolution for failing to file a report does not *per se* disqualify a litigant from proceeding before the Board. See *Allied Production Management, Inc. and Richard E. Rowan, JV*, DOTBCA No. 2466, 92-1 BCA ¶ 24,585 (1991) and *Mather Construction Company v. United States* [18 CCF ¶ 81,686], 201 Ct. Cl. 219, 475 F.2d 1152 (1973).

[7] Frankfurt, Garbus Motion, ¶ ¶ 2-5.

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Counsel argues that, until sentenced, Mr. Alter could take no action regarding this appeal without waiving his Constitutional rights against self-incrimination. Regardless of whether or not that was a valid excuse for the appellant corporation not prosecuting the appeal prior to sentencing,[8] the fact remains that Mr. Alter was sentenced in April, 1992 and some sixteen months have elapsed since then with no action being to prosecute the appeal and, because of the refusal of Mr. Alter or anyone else involved with the corporation to respond to counsel, no action appears imminent.

Counsel also argues that so long as Mr. Alter remains in prison, he is unable to participate in the prosecution of the appeal. Counsel have not referred the Board to any precedents that a corporate plaintiff has a right to suspension of civil proceedings which it has initiated, due to the incarceration of one of its officers.[9] Our research has disclosed none.

In an earlier case where an appellant sought to indefinitely postpone trial, we stated:

> "This Board has held that under the Contract Disputes Act[10] not only the contractor but also the United States has a right to a speedy adjudication. *Inslaw, Inc.*, DOTBCA Nos. 1609, 1673, 1775, 1828, 89-3 BCA ¶ 21,901 (1989) at 110,203-110,204.[11] The legislative history of that Act clearly evidences a legislative intent that contract disputes be adjudicated expeditiously, and the text of Act section 8(e) does not distinguish between United States and contractor in laying its mandate upon the Board. Even apart from the Contract Disputes Act, the United States just as any other party defendant has a right to a reasonably prompt adjudication regardless of the financial capacity of the litigant seeking relief. *Deuterium Corporation v. United States*, 21 Ct. Cl. 132 (1990).
>
> "To indefinitely postpone the trial of the issues which Inslaw itself freely chose to place before the Board over six years ago is to deprive the United States of its right to a speedy adjudication. Every day which passes increases the probability that an adjudication cannot be based on testimony from witnesses having fresh memory of what has transpired,[12] as well as increasing the respondent's potential liability for interest under section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611."

Inslaw, Inc., DOTBCA Nos. 1609 *et al.*, 92-1 BCA ¶ 24,550 (1991) at 122,504-122,505 (some footnotes omitted).

In our initial Opinion, we rejected the appellant's argument that the incarceration of the corporation's president warrants a suspension of proceedings; we again reject it for the reasons there stated. The words quoted above from *Inslaw, Inc.* apply with equal force in the instant appeal.

The failure of the corporation or its incarcerated president to respond to the documents served upon them by their own counsel, documents warning that the appeal will be dismissed, is strong evidence that the appellant corporation is not willing to pursue the appeal. The corporation and its president have received adequate notice that the Board was about to dismiss the appeal for its failure to prosecute. Accordingly, the Board grants the respondent's Motion to Dismiss.

MOTION FOR LEAVE TO WITHDRAW

In our initial Opinion on the Motions, we refused to allow the appellant's counsel to withdraw because we were not satisfied that

[8] A party plaintiff may not claim a Fifth Amendment privilege and simultaneously insist that its suit proceed. *Afro-Lecon, Inc. v. United States* [34 CCF ¶ 75,291], 820 F.2d 1198, 1205 (Fed. Cir. 1987).

[9] We pointed this out in our original opinion. The fact that counsel still have not noted any such precedent is good indication that incarceration of an officer is not an excuse for a corporation failing to prosecute civil litigation.

[10] See section 8(e) of the Act, 41 U.S.C. § 607(e): "An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer." (Footnote in original).

[11] For the effect of this statutory right to a speedy adjudication, from a contractor's perspective, see: *TDC Management Corporation*, DOTBCA No. 1802, 90-3 BCA ¶ 23,248 (1990); *TDC Management Corporation*, DOTBCA No. 1802, 88-1 BCA ¶ 20,242 (1987) at 102,470; *Time Contractors JV*, DOTBCA No. 1669, 86-2 BCA ¶ 19,003 (1986) and cases discussed therein. (Footnote in original).

[12] See *TDC Management Corporation*, DOTBCA No. 1802, 91-2 BCA ¶ 23,815 (1991) especially at page 119,254 and footnote 1, and many of the Findings of Fact, regarding the effect of the passage of time upon witnesses. (Footnote in original).

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they had made proper effort to contact their client, who in the Board proceedings was and is Manhattan House C.T.C., Inc., not Mr. Alter. We insisted that proper notice be served upon the clients. We recognized that the effect of withdrawal would be to essentially strip the appellant of representation when on the verge of a dismissal with prejudice. Therefore, we refused to allow withdrawal at that time.

Since then, counsel have satisfied the procedural requirements. They have served the registered agent of the corporation and, with respondent's cooperation, have had documents formally served upon the corporation's president. Due to the failure of their client to respond or otherwise cooperate, both of appellant's counsel have demonstrated good cause for being relieved of their duty to represent Manhattan House.

Accordingly, there is no longer any reason why counsel should not be allowed to withdraw. The Board determines that Swidler, Berlin and Frankfurt Garbus are to be allowed to withdraw.

DECISION

The Motion by the respondent that the appeal be dismissed for failure to prosecute is granted. The appeal is dismissed with prejudice.

The Motions by C. Joel Van Over, Esq. and Swidler and Berlin and by Arthur J. Ginsburg, Esq. and Frankfurt, Garbus, Klein & Selz that they be allowed to withdraw are granted. The Recorder shall note such withdrawal on the docket. Such withdrawal shall be deemed to be as of the issuance of this Opinion with regard to C. Joel Van Over, Esq. and Swidler and Berlin. The withdrawal of Arthur J. Ginsburg, Esq. and Frankfurt, Garbus, Klein and Selz shall be deemed effective as of the 120th day after their receipt of this Opinion.

Provided, however, that the respondent is directed to serve a copy of this decision upon Mr. Alter within 30 days of receipt, and that Mr. Ginsburg is directed to mail a copy of this decision, certified mail return receipt requested, to the registered agent for the corporation within 30 days of receipt. Proofs of such service shall be filed by each with the Board.

[¶ 26,357] Lorene Mullins and David Hamilton

ENG BCA No. 6016, July 21, 1993. Lease No. DACW63-1-90-0710.

Modifications—Constructive Changes—Government Duty to Cooperate.—Although two grazing rights lessees never obtained the benefit of their lease because of flooding and the actions of timber contractors, the government was not liable for constructive changes to the lease, because no government action was contrary to the provisions of the lease and the government did not fail in its duty to cooperate. The land was essentially unusable because of damage to fencing caused by flooding and by the timber contractors. Under the terms of the lease, the lessees, not the government, were responsible for repairing the fences damaged by flooding. Although the government belatedly ordered the timber contractors to repair fences damaged during timber removal, the lessees did not inform the government of the timber contractors' failure to repair the fences.

For the appellant: Lavender, Rochelle, Barnette & Dickerson, Texarkana, Arkansas, by Jerry Rochelle and Shannon Tuckett. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Jane Holt-Duecaster, Government Trial Attorney, Forth Worth, Texas.

Before JOCKISCH and SOLIBAKKE, Administrative Judges.

JOCKISCH, Administrative Judge: Appellants seek an equitable adjustment in the amount of $10,948 because of the alleged Government actions under grazing Lease No. DACW63-1-90-0710. The parties elected to proceed under Board Rules 12.3, Accelerated Procedure, and 11, Submission Without a Hearing. The record which includes the Complaint, Answer, Rule 4 file, video tape, affidavits, and briefs was closed at the end of April, 1993.

FINDINGS OF FACT

1. During 1990, Mrs. Lorene Mullins and Mr. David Hamilton, her son, (hereinafter Appellants or lessee) were the highest bidders for the lease of Parcel No. 2, 210 acres of grazing land, at Wright Patman Lake,

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Texas. Lease No. DACW63-1-90-0710 was entered into between Appellants and the Government for Parcel No. 2 for a term of three years at a rental cost of $424 per year.

2. The following lease terms are pertinent to this appeal.

Granting Clause: That the Secretary of the Army, by virtue of the authority contained in Title 10, United States Code, section 2667, and for the consideration hereinafter set forth, hereby leases to the party of the second part, hereinafter designated as the lessee, for a term of three (3) years beginning September 1, 1990, and ending August 31, 1993 but revocable at will by the Secretary of the Army.

* * *

4. That the lessee has inspected and knows the condition of the leased property and it is understood that the same is hereby leased without any representation or warranty by the Government whatsoever, and without obligation on the part of the Government to make any alterations, repairs, or additions thereto.

* * *

5. That, subject to the limitations of Condition No. 23 hereof with respect to the restoration of the leased property, all portions of the leased property shall at all times be protected and maintained in good order and condition by and at the expense of the lessee.

* * *

7. *That the right is hereby reserved to the United States, its officers, agents, and employees, to enter upon the said premises at any time for any purpose necessary or convenient in connection with river and harbor and flood-control work, to remove timber therefrom, and to flood the leased premises whenever necessary, and the lessee shall have no claim for damages of any character on account thereof against the United States or any officer, agent, or employee thereof.* [Emphasis added]

* * *

15. (a) That, except as otherwise provided in this lease, any dispute concerning a question of fact arising under this lease which is not disposed of by agreement shall be decided by the said officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the lessee. The decision of the said officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the lessee mails or otherwise furnishes to the said officer a written appeal addressed to the Secretary of the Army. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this condition, the lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the lessee shall proceed diligently with the performance of the contract and in accordance with the said officer's decision.

(b) This Condition does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, that nothing in this Condition shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

* * *

16. That this lease may be terminated by the lessee at any time by giving to the Secretary of the Army, through the said officer, at least sixty (60) days' notice in writing provided that, in case of such termination, no refund by the United States of any rental theretofor paid shall be made, and provided further, that in the event the said notice is not given at least sixty (60) days prior to the rental due date, the lessee shall be required to pay the rental for the period or term shown in Condition No. 1 hereof.

* * *

22. That the lessee will cooperate in programs for the management and improvement of fish and wildlife and hunting. Hunting and fishing and other recreational activities as approved by said officer are permitted in accordance with all applicable Federal, State and local laws for the protection of fish and game, except in prohibited areas designated by the said officer.

* * *

28. That *in the event the United States* revokes this lease or *in any other manner materially reduces the area covered thereby or materially affects its use by the lessee prior to the date of expiration thereof, an equitable adjustment in the rental paid or thereafter to be paid under*

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this lease shall be made. ... [Emphasis added].

* * *

32. Prior to conducting *any initial activity* on site, the lessee will make an appointment with the Reservoir Manager, Wright Patman Project Office, to discuss use of the leased area. [Emphasis in original].

* * *

37. The lessee will be responsible for restricting his livestock to his leased area and will prevent the trespass of other livestock at all times. The lessee will therefore be required to maintain surveillance of fences and perform repairs as needed to assure that fences are adequate to control livestock. The materials used for repairs will be the same type and quality as those required in the new fence specifications (available from project office). All materials used for such repair will become the property of the Government. The lessee will also make repairs to any fences, gates or other appurtenances which are damaged as a result of his operation.

* * *

41. Parcel No. 2 contains approximately 210 acres. Grazing is allowed by no more than 40 AU [animal units] at any one time yearlong. The stocking rate and period of grazing may, however, be revised by the Government in accordance with Condition No. 39 above. As a portion of the consideration to be provided by the lessee for the use of this parcel, *the lessee shall mow approximately 130 acres of open area each year.* The area to be mowed shall be designated by Project Office personnel and shall be cut between June 1 and August 31 of 1991, 1992 and 1993. [Emphasis added].

* * *

3. Because of heavy rains, the leased grazing area was covered with flood water from April through August, 1990. In the fall of 1990, the Government entered into timber sale contracts to remove trees stressed by the flood waters. (R.4, Tab 9).

4. Mrs. Mullins, one of the lessees under subject lease and a previous priority lessee under Government regulations, was aware of the need for Government timber contractors to cross leased land to harvest the timber. The operation of the timber contractor was the normal method of timber cutting operation, which had been previously performed in a like manner on the leased property in previous years. (Aff., Gov. Exh No. 1). This entailed the timber contractors' cutting fences for their operation, which fences were to be repaired by them when the timber removal was completed for the year. Mrs. Mullins' previous lease from September 1, 1987, through August 31, 1990, did not contain the underlining of the phrase *"any initial activity"* as is found in condition 32 of the present lease. The Government emphasized the notification requirement because Mrs. Mullins had not used the leased area during her previous lease. (R.4, Tabs 3, 6).

5. In December, 1990, Mr. Hamilton, the other lessee under subject lease, noted to the Government the inadequate repair of fences by the timber contractor. Mr. Hamilton asserts he informed Don Crutcher, owner of the timber cutting firm, and Danny Kellam, Government Project Forester, but not the Reservoir Manager that he had intended to place livestock on the leased land during January, 1991, until he discovered fences in disrepair. Repair of the fences was the responsibility of the timber contractor and/or Corps. (App. Brf. pp. 5; Gov. Exh. G-5). Additional fence repair was performed by Government project personnel and completed in February, 1991. By the time of the fence repair in February, 1991, Appellants had entered into another lease to graze their livestock until August, 1991. During the first half of 1991, Appellants had made no repairs to fences which were in disrepair and were their responsibility to repair under this lease. Appellants had *not* coordinated their intended actions with the Reservoir Manager as required by Clause 32 of the lease. (See Finding 2; Aff. Murtishan, Reservoir Manager, Gov. Exh. G-5).

6. By affidavits, both Crutcher and Kellam deny being told by Mr. Hamilton in November, 1990, of his intent to graze cattle beginning in January, 1991. Mr. Kellam asserts as supporting evidence that no such conversation occurred: (1) that the flood had destroyed the grass growing on the leased land so as to make it unfit for grazing cattle until at least mid-summer 1991; (2) that had there been such a conversation, he would have remembered it and taken immediate action to inform his superiors because Appellants' intent to graze cattle would have been a significant change from the previous years when Appellants did not use the leased premises. Condition 32 of the lease made special emphasis of the need for the lessee to contact the Reservoir Manager "prior to conducting *any initial activity,"* with which condition the lessee never complied. (Affidavit Kellam & Crutcher, Gov. Exhs. G-3, 4).

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7. In June, 1991, the timber contractor had moved back into the area to cut the remaining timber under its contract with the Government. The lessee had previously been informed of the scheduled timber cutting. During August, 1991, Mr. Hamilton informed the Government that the timber contractor was knocking and cutting down fences, destroying his pasture, and crossing his grazing lease area. He requested that all repairs be made by December 1, 1991, so he could use the leased land for grazing. The Respondent asserts that Appellants, again, never coordinated their planned activity on the leased land with the Reservoir Manager as required by Clause 32 of the lease.

8. Upon investigating the Appellants' complaints about the timber contractor, Respondent informed Appellants of their responsibility to repair the fences damaged by the flood of 1990 before livestock could be released in the area and of their obligation to mow the 130 acres of land. Also, Respondent directed the timber contractor to repair before December 1, 1991, the fences that it had damaged when providing itself access to the area and to avoid skidding or decking (stacking logs on pasture land to await removal) which was damaging the pasture area. (Aff. Wengier, Gov. Exh. G-1). Repairs were made and completed by the timber contractor and by the Government project office, which deducted its costs for repairs from the timber contractor's performance deposit. The area was ready for cattle grazing by November 22, 1991, except for fence repairs not done, which were the obligation of Appellants. The lessee had lost the use of approximately 3 to 5 acres of the 210 acres of pasture area in the lease because of damage to the land by the timber contractor. (G-3, Kellam Aff.)

9. Hamilton asserts that he made the fence repairs which were his responsibility, in August and October, 1991. Appellants' video tape shows some fences which were repaired by Appellants during this time frame. However, according to the Respondent, the fences damaged by the flood of 1990, which were the responsibility of the lessee to repair, were never repaired. (Aff. Crutcher, Gov. Exh. G-4). Respondent's representatives, when performing site investigations in August and November, 1991, noted at least eight places where fences, whose repair was the responsibility of Appellants, had not been repaired. (Aff. Wengier, Kellam; R.4, Tab 16-Pictures 2, 3, 4 & 6). These repairs would have been required before placing grazing animals on the leased land.

10. During 1991, Appellants mowed 130 acres as they were required to do by Clause 41 of the lease. On September 18, 1991, the lessee paid the $424 annual rental for the lease from September 1, 1991, through August 31, 1992.

11. By letter dated October 29, 1991, Appellants requested that the Government make them whole for alleged losses suffered during the term of the lease up to that time. These included:

$2,600	Mowing 130 acres at $20/acre
200	Transporting livestock in January, 1991
300	Leasing other land in January, 1991
200	Transporting livestock in August, 1991
1,000	Leasing other land in August, 1991
3,000	Mowing of other land lease[d] as agreed in January, 1991 (150 acres at $20/acre)
200	Expected cost of moving back on Government land
400	Time lost from work plus long distance telephone expenses

They asserted these losses were incurred because the Respondent's timber contractor did not maintain the fences and used the pasture land on which to stack logs. (R.4, Tab. 19).

12. By letter dated December 19, 1991, the Appellants "rescinded" their lease and asked for an equitable adjustment as the "nonbreaching" party. (R.4, Tab 24). In January, 1992, Respondent confirmed from both signers of the lease their intent not to utilize the leased lands. (R.4, Tab 25). A Contracting Officer's decision was issued on June 18, 1992, essentially denying Appellants' claim but providing reimbursement as provided for under the lease because of the reduction of the 210 leased acres by the use of 5 acres of the leased land by the timber contractor. (R.4, Tab 2).

13. Respondent refunded Appellants' rent paid for the year September 1, 1991, to August 31, 1992, and $2.50 for the lost use of 5 acres for the three months of June, July, and August, 1991.

14. In their Complaint filed with the Board on December 8, 1992, Appellants increased their damage request to $10,948 as follows:

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$2,600	Mowing 130 acres at $20/acre (Summer 1991)
200	Transporting livestock in January 1991
300	Leasing other land in January 1991
200	Transporting livestock in August 1991
1,000	Leasing other land in August 1991
3,000	Mowing of other land lease[d] as agreed in January 1991, (150 acres at $20/acre)
400	Time lost from work plus long distance telephone expenses
848	Rent payment of Government land
100	Materials to repair fences
300	Labor to repair fences
500	Attorney's fees for letters written to Government
1,500	Attorney's fees for preparation of appeal

DECISION

After reviewing the facts of this appeal, the Board has considerable sympathy with Appellants' frustrations in their attempt to utilize the leased land for the purposes they intended when they entered the lease. *However,* the Board must decide the issues raised by Appellant under the terms and conditions of the lease executed by the parties. For the following reasons, Appellants cannot prevail.

The Board finds Respondent's actions to have been in accordance with its rights under the clear provisions of the lease. First, Appellants were put on notice that the leased property is as-is, with no obligation in Respondent "to make any alteration, repairs or additions thereto." Appellants understood that fence damage, other than that caused after the execution of the lease by agents of Respondent, was their responsibility to repair, which they did not do until at least October, 1991, according to their own calculation, and which they never did according to Respondent's conclusions after contemporaneous site investigations. The leased land could not be used for grazing until the fences were repaired, as to which the best evidence is that they were never fully repaired by Appellants.

Second, the Respondent reserved the right to enter onto the leased premises to perform "flood control work, to remove timber therefrom, and to flood the leased premises whenever necessary." When Respondent takes such actions, the lease states that, "the lessee shall have no claim for damages of any character on account thereof against the United States or any officer, agent or employee thereof." Thus, Appellants were on notice of the potentiality that events could occur, as they did, which would restrict their use of the leased area. Respondent's actions taken through its timber contractor were within the terms and conditions of the Appellants' lease.

Third, the lease required the lessees to "mow approximately 130 acres of open area each year," between "June and August 31 of 1991, 1992, and 1993." Thus, Respondent's insistence on the 1991 mowing by Appellants was simply enforcement of a lease condition.

In their brief, Appellants do not substantively challenge either the lease conditions or Respondent's interpretation of the conditions; but Appellants' focus is upon the issues of "good (bad) faith" dealings between the parties and of the "implied duty of cooperation and noninterference" by the Government.

As consistently stated by courts and boards, there is a "presumption that public officials act 'conscientiously in the discharge of their duties' . . . and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing." *Kalvar Corporation, Inc. v. United States* [22 CCF ¶ 80,737], 211 Ct. Cl. 192, 543 F.2d 1298 (1977); *Monarch Enterprises, Inc.,* VABCA Nos. 2239, 2296, 86-3 BCA ¶ 19,281.

It is important to note that the lease requirements were properly implemented and enforced by Respondent. Appellants could have utilized the leased property as intended by promptly taking the repair action required for the fences for which they were responsible and by providing timely and appropriate notification of when they intended initially to use the leased area, as stated in the lease. Appellants have not shown "bad faith" and we find no "bad faith" dealings on the part of Government officials in administering the lease.

On the issue of cooperation and noninterference, we note that the principle involved here has also been called the "implied duty of cooperation and noninterference which is inherent in any contract." *S/A. Healy Co. v. The United States* [24 CCF ¶ 82,317], 576 F.2d 299, 306 (Ct. Cl., 1978). However, "The duty to cooperate is not a duty to relax contract requirements." *Banks Construction Co. v. United States* [11 CCF ¶ 80,556], 176 Ct. Cl. 1302, 364 F.2d 357 (1966); *International Dictating Services of Boston, Inc.,* VABCA No. 2014, 88-3 BCA ¶ 21,182.

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In the lease which is the subject of this appeal, there are specific clauses that put the lessees on notice of potential timber cutting on and around the leased premises. The Respondent did nothing more than invoke the rights reserved by these clauses, as could have been anticipated, for appropriate reasons, and in a manner normal for the industry. Respondent took actions when appropriate, even though Appellants did not comply with the letter of the lease conditions, to permit them to use the leased premises had Appellants themselves performed as the lease required. We find no actions on Respondent's part which violated the implied duty of cooperation and noninterference. *See Robert R. Marquis, Inc.*, ASBCA No. 38438, 92-1 BCA ¶ 24,692; *Toombs & Co. Inc.*, ASBCA Nos. 34590, *et al.*, 91-1 BCA ¶ 23,403.

Whether Appellants put themselves into the position to use the leased land by repairing the fences they were required to mend, or coordinated their intended activity on the leased land with the Reservoir Manager as required by the contract, which factual issues are not fully resolved by the record before the Board, is immaterial to the result in this appeal, as Appellants have demonstrated no action by Respondent outside the terms and conditions of the lease.

At the time Appellants rescinded the lease, Respondent was in compliance with the terms and conditions of the lease. This is not to say that Appellants may not have incurred costs in mowing, mending fences, or entering into additional leases as a result of Respondent's exercise of its rights under the lease, but is to say that there is no condition of the lease which provides for the relief requested by Appellants and that Respondent has not violated the terms of the lease, but rather has acted in accordance with the terms of the lease and has provided Appellants compensation in accordance with those terms.

We note that under Condition No. 16 of the lease the Government appears to have the right to retain the rental payment made by the lessee for the 1991-1992 lease year. However, since the Government, apparently, determined that it would be equitable to refund the lease payment for that year and prorate the 5 acre lack of availability to the lessee for the 1990-1991 lease year, the Board sees no reason to disturb Respondent's equitable decision.

For the above stated reasons, the decision of the Contracting Officer is affirmed, and the Appeal is DENIED.

[¶ 26,358] Lane Construction Corporation

ENG BCA No. 5834, September 22, 1993. Contract No. 1E0103.

Site Conditions—Inspection—Wetland Requirements.—A bridge construction contractor's claim for delay resulting from the inability to place construction cranes efficiently was denied because the placement problems were the result of the need to obtain a permit to locate the equipment in a wetland area. That the area surrounding the bridge was a wetland area was readily ascertainable from a site inspection.

Site Conditions—Weather—Contract Provisions.—A claim that a total of four days' rain delay over two months constituted a compensable differing site condition was denied because the contract specifically stated that no claim for rain delay would be permitted for delays of fewer than four days in one month and five days in the next.

Delays—Suspension of Work—Traffic Control.—For purposes of the Suspension of Work clause of a bridge construction contract, the government's suspension of work on the night of a professional hockey game for fear of adversely affecting unusually heavy traffic generated by the game was unreasonable, even though the government's concern for traffic was understandable, because the order to suspend work directly contradicted the contract's promise of site access during certain nighttime hours. Under the clause, suspension of work is compensable only if the suspension was "unreasonable."

Delays—Suspension of Work—Traffic Plan Reformulation.—A bridge construction contractor was not entitled to compensation for delays resulting from a suspension of work while the government formulated a new traffic control plan, because the contractor's inability to perform under the contract's traffic plan was the cause of the need to develop a

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new plan. The contractor was unable to complete each night's scheduled work during the time allowed by the contract, resulting in massive traffic jams in the morning. Suspension of work for several days while the government developed a new schedule was reasonable.

Delays—Sequence and Scheduling—Traffic Plan.—A bridge construction contractor was not entitled to additional compensation for delays resulting from the government's order to limit the amount of work to be undertaken during each night, because the contractor had demonstrated its inability to do a greater amount of work in the time allowed. The contractor's inability to perform under the original contract schedule resulted in nightly lane closures far longer than permitted by the contract, with ensuing massive traffic jams during the morning rush hour. The government reasonably ordered the contractor to undertake only a limited amount of work each night to ensure that traffic lanes would open on schedule.

For the appellant: Maloney & Burch, Washington, D.C., by J. Thomas Burch, Jr., and William T. Bennett. For the government: Robert L. Polk, General Counsel, and Patrick F. Crow and M. Lee Johnson, Washington Metropolitan Area Transit Authority, Washington, D.C.

Before FRENZEN, SOLIBAKKE, and PETROWITZ, Administrative Judges. Separate opinion concurring in part and dissenting in part by Administrative Judge Petrowitz.

FRENZEN, Administrative Judge: This is a timely appeal from a decision by the Contracting Officer denying a claim by Appellant for 18 days of additional time for contract performance and $51,206 in costs. In the post-hearing brief, the claim is adjusted to 13-1/2 days of delay and $32,954.74. The project at issue is a part of the Washington, D.C. mass transit system. The dispute involves construction of a bridge over the Capital Beltway at the Greenbelt (MD) Metrorail station. The Board has jurisdiction by virtue of the standard Disputes clause in the contract.

FINDINGS OF FACT

1. WMATA contract 1E0103 with Appellant called for, among other things, a five span bridge over the Capital Beltway (Interstate Route 95). The bridge connects the parking lot of the Greenbelt Metrorail station with the Beltway. (R.4, Tab 3; C.O. Finding 1).

2. The Contract, entered into on April 7, 1988, included the following General Provisions and other requirements that are relevant to this appeal:

General Provisions

Article 3—CHANGES

a. The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the Contract . . .

* * *

b. Any other written order or an oral order, which terms as used in this Paragraph b. shall include direction, instruction, interpretation or determination from the Contracting Officer, which causes any such change, shall be treated as a change order under this article, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances and source of the order and that the Contractor regards the order as a change order.

* * *

e. If the Contractor intends to assert a claim for an equitable adjustment under this article, he must, within 30 days after receipt of a written change order under Paragraph a. above or furnishing of a written notice under Paragraph b. above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Authority. The statement of claim hereunder may be included in the notice under Paragraph b. above.

* * *

Article 5—TERMINATION FOR DEFAULT, DAMAGES FOR DELAY AND TIME EXTENSIONS.

* * *

d. The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage under the following circumstances:

(1) If the delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, acts of

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the public enemy, acts of the Authority in its contractual capacity, acts of another contractor in the performance of a contract with Authority, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers.

(a) Unusually severe weather conditions:

[1] Pursuant to paragraph d. (1) above, the Authority will use the following table as the basis for determining allowable time extensions to the Contract for unusually severe weather conditions and the impact of such weather at the construction site.

[2] The column below labeled WORK DAYS represents work-day delays which may be expected in each month named within the Washington Metropolitan Area, based on a five-day work week:

MONTH	WORK DAYS
January	4
February	4
March	4
April	5
May	5
June	2
July	2
August	3
September	2
October	3
November	4
December	4

[3] Time extensions for weather delays during a given month will be allowed only for actual work days in excess of those numbers listed above and only when those excess days of delay affect the current critical path(s) leading to specified Contract completion or milestone dates.

* * *

Article 13—CONDITIONS AFFECTING THE WORK.

a. The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve the Contractor from responsibility for successfully performing without additional expense to the Authority ....

Article 22—SUSPENSION OF WORK

* * *

b. If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the Contracting Officer in the administration of this Contract, or by his failure to act within the time specified in this Contract, or if no time is specified, within a reasonable time, an adjustment shall be made for any increase in the cost of performance of this Contract, excluding profit, necessarily caused by such unreasonable suspension, delay or interruption and the Contract modified in writing accordingly. However, no adjustment shall be made under this article for any suspension, delay or interruption to the extent:

(1) that performance would have been so suspended, delayed or interrupted by any other cause ... or

(2) For which an equitable adjustment is provided for or excluded under any other provision of this contract.

* * *

Article 36—SITE INVESTIGATION.

a. The Contractor acknowledges that he has investigated and satisfied himself as to the conditions affecting the work including, but not restricted to, those bearing upon transportation, ... handling and storage of materials; ... roads; ... uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the work ....

Section 101, General Requirements

Article I Contract Documents:

* * *

D. Definitions:

* * *

3. Terms:

... the following terms ... shall be accorded the meanings assigned below:

* * *

e. Engineer: Authorized Representative of the Contracting Officer.

f. Jurisdictional authorities: State, federal and local authorities ... having jurisdiction over work to which reference is made.

* * *

Article III Contractor:

* * *

D. Construction Procedures:

* * *

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11. Maintenance of Traffic

a. The Contractor shall be responsible for maintaining traffic and for erecting and maintaining traffic control devices, as required by the jurisdictional agency of the area where the work is to be performed and in accordance with the applicable provisions of the Manual on Uniform Traffic Control Devices (MUTCD) published by the U.S., Department of Transportation, Federal Highway Administration.

* * *

d. Redirecting traffic: Channeling and shifting of traffic lanes as well as barricading of traffic in connection with this work will be subject to approval of the jurisdictional agency.

e. Temporary closing: Prior to the temporary closing to traffic of part of any street, sidewalk or other access or prior to changing traffic patterns from those shown, approval shall be obtained from the appropriate jurisdictional agency by the Contractor at least 30 days prior to the time such closures and changes are to be made. Deviations from this will be for a bona fide emergency only and as approved by the jurisdictional agency.

* * *

k. (2) The construction work for the erection of structural steel for the entrance ramp to Interstate Route 95 bridge will only be permitted between the hours of 3:00 A.M. to 6:00 A.M. During this time the Contractor will be permitted to close the eastbound and or westbound roadways of Interstate Route 95 for 15 minute intervals while the structural steel is being lifted into place. Once the steel is in place and sufficiently supported, traffic can then be allowed to flow again even though part of the newly erected steel may extend over the travel lanes. The Contractor shall open the eastbound and/or westbound roadways of Interstate Route 95 to traffic until there are no backups prior to another 15 minute closing. The Contractor may allow steel (supported) to hang over the travel lanes, at no time is he allowed to swing the steel over the traffic. The Contractor shall submit request for approval to close the eastbound and/or westbound roadways of Interstate Route 95 prior to the erection of structure [sic] steel for the Entrance Ramp to Interstate Route 95.

l. Work on Interstate Route 95 that requires a lane(s) closure shall not be performed the day before and the day after a holiday, including the holiday itself, or on weekends between 6:30 P.M. on Friday through 9:00 A.M. on Monday unless otherwise approved. If during the summer months traffic backs up on southbound Interstate 95 due to a lane closure on Fridays from 12:00 noon to 6:30 P.M., the Contractor will be directed to reopen the closed lane until there are no backups prior to another closing.

* * *

o. Throughout the period of construction, traffic will be maintained by implementing a phase Traffic Control Plan approved by the jurisdictional authority.

p. No work shall begin on any stage of construction until all the required traffic control devices for that stage, indicated on the approved plans, are complete in place. Compliance with specify [sic] precautions contained herein shall not relieve the Contractor of his primary responsibility to take necessary measures to protect and safeguard the work.

q. The Contractor shall notify and gain approval in writing from the Engineer, 48 hours in advance of changing a Traffic Control Phase. All approved changes to the Traffic Control Plans shall be submitted to the Engineer.

r. The Engineer may modify or expand on the methods of traffic control specified and to [sic] restrict working hours if, in the opinion of the Engineer, the Contractor's operation is detrimental to traffic during peak periods. The Engineer may alter lane configurations and require the Contractor to remove or relocate traffic control devices accordingly.

* * *

(R.4, Tab 3).

3. Appellant originally subcontracted the steel erection for the 5-span bridge to Syphax Steel Company, Inc. of Washington, D.C., but that company ceased doing business prior to the time for performance and a new subcontract for the same work and based on the Syphax proposal was awarded to Newnan Enterprises, Inc., also of Washington, D.C. (C.O. Finding 10; Tr. 1-30-31, 81).

4. The five span bridge is 675 feet in length and consists of four parallel structural girders connecting an abutment and a pier or connecting two concrete piers, and supporting a concrete deck. The bridge passes above the traffic lanes of the Capital Beltway. (C.O. Findings 1, 2).

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5. The District Engineer, State Highway Administration, Maryland (MHA), wrote Appellant on November 9, 1988 and "approved" proposed hours for steel erection over Interstate 95 to be 11:00 p.m.—4:00 a.m. in lieu of 3:00 a.m.—6:00 a.m. (R.4 Supp., Tab 48).

6. The President of the steel erection subcontractor (Newnan) did not visit the site until shortly before commencing work after both the Contract and Subcontract had been signed. A representative of Syphax did visit the site prior to submitting its proposal to Appellant. (Tr. 1-82).

7. Appellant submitted a CPM schedule that was approved by Respondent on November 2, 1988. This schedule indicated that erection of the bridge steel had an early start date of December 5, 1988, a late start date of December 21, 1988, an early finish date of February 7, 1989, and a late finish date of March 10, 1989. This schedule was never revised in spite of substantial delays that later occurred. (C.O. Finding 11; Tr. 3-50). The time for contract completion was, however, extended to July 27, 1990. (Finding 8, *infra*).

8. The contract specified an original contract performance time of 540 calendar days, which put the contract completion date at October 21, 1989. This completion date was extended by 85 days to January 14, 1990, by Modification No. 4 covering PCO No. 4—Pier Misalignment to Entrance Ramp Bridge. Contract Modification No. 12 further extended the time for contract performance by 194 calendar days to July 27, 1990, and increased the contract amount by $352,356 to compensate for delay by WMATA in obtaining a Wetlands Permit (PCO No. 12) without which bridge construction could not begin. In fact, Substantial Completion Inspection for the Contract occurred on July 27, 1990. (Exhs. R-8, R-12-14).

9. On March 14, 1990, Newnan met with representatives of Lane, Maryland State Highway Administration and Respondent in the office of the WMATA Resident Engineer to discuss aspects of the steel erection plan. (R. Supp. R.4, Tab 36).

10. The MHA Project Engineer approved a Traffic Control Plan at the March 14 meeting that varied from the Maintenance of Traffic provisions of the Contract. This Plan stipulated that for erection of structural steel over the Beltway, the Contractor could begin closing traffic lanes, one at a time, beginning at 10:00 p.m., with full closure of all 4 lanes achieved no earlier than 11:00 p.m. Closure of all 4 traffic lanes could not exceed 15 minutes at a time and all lanes were to be fully reopened not later than 5:00 a.m. The 15 minute rule could be exceeded when there was no traffic buildup. No steel erection work was to be performed during bad weather. This meeting was attended by Mr. Raj Puri, WMATA Resident Engineer and six other WMATA representatives, officers or employees. The meeting was conducted in the office of the WMATA Engineer and the minutes of the meeting were written on a WMATA Memorandum form. (Supp. R.4, Tabs 36, 54).

11. On March 22, 1990, Newnan began erecting structural steel. (C.O.Finding 17; Supp. R.4, Tab 47).

12. Appellant's witness, Mr. Bulware, testified that Newnan's work on the project was delayed a total of one-half day over the period of March 27 and 28, 1990, because of restrictions on the positioning of cranes needed to hoist the steel beams for span E. (Tr. 2-78). He said it was a permit problem, and not that the ground was unsuitable. Mr. Satterfield, another of Appellant's witnesses, testified that he observed no site problems when he visited the site prior to drawing the crane location plan. (Tr. 1-169).

13. Respondent's witness testified that its Inspector's Daily Reports (IDRs) contained no indication that restrictions on crane positioning were delaying Newnan's progress on the indicated dates. The IDRs of March 27 and 28 are consistent with this testimony. March 29 shows no contract work because of rain. (Tr. 3-32; Supp. R.4, Tab 47).

14. A contract drawing showed the boundaries of the construction area and the borings indicated the soil conditions that would most likely be encountered. The borings indicated soft ground. One boring indicated high level ground water. Surface conditions could also be observed in the course of a site visit. (Tr. 3-154-156).

15. Appellant claims April 6, 1990, as a rain day. The IDR for that date states that scheduled bolting up and torquing operations were conducted during the day shift. Apparently steel erection during the swing shift was the only work affected by rain on that day. (Tr. 1-136-144; R. 4, Tabs 21, 47).

16. On April 10, 1990, steel erection was cancelled because of wind and rain conditions. There was a "rainout" on April 30. (Tr. 1-185; R.4, Tab 43).

17. During the night shift on April 9, 1990, Newnan made its first attempt to set steel

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beams between piers 2 and 3 (span C), which required work above the outer loop of the Beltway. This effort was aborted almost at the start because Newnan did not have the proper "spreader bars" with which to hoist the long curved beams onto the bearing pads atop the piers and abutments. (Tr. 1-184-185; C.O. Finding 17; R.4, Tab 47).

18. On April 11, 1990, steel erection over the Beltway was cancelled by the Maryland Highway Administration because of heavy traffic resulting from a hockey game at the Capital Center. (Tr. 1-186-1-187; C.O. Finding 18).

19. On April 12, 1990, steel erection over the Beltway was not permitted by the Contract because it was the day before a state holiday. There is no Newnan Daily Field Report for this date. (R.4, Tab 43, and see below).

20. April 13, 1990, was Good Friday, which is a holiday in Maryland. (Tr. 3-83; R.4, Tab 2).

21. April 14 and 15, 1990 fell on a Saturday and Sunday.

22. During the night between April 16 and 17, 1990, Newnan began erecting the first steel beams over the outer loop of the Beltway in span C. The plan called for the erection of two beams each consisting of two girders spliced end to end, to be hoisted onto piers. Once the first beam was in place, the work had to continue until the second beam was in place and secured. Traffic on all lanes of the Beltway had to be halted while the two beams were being hoisted into place and secured. The erection of these two beams did not go smoothly with the result that all lanes of the Beltway were closed for most of the night in violation of the contract requirements. There was one traffic accident on site that caused a brief delay. Appellant's witness, however, said, when asked what else happened:

> [j]ust the length of time in setting things up, positioning, making the bolts. Fifteen minutes is usually a reasonable time to make the splice. It just didn't go together.

Although one lane of the Beltway was reopened at 5:30 a.m. on April 17, 1990, all of the lanes were not open until 8:15-8:30 a.m., the middle of the morning rush hour, resulting in a traffic backup estimated to be 13 to 17 miles. (Supp. R. 4, Tabs 43, 56; C.O. Findings 25, 26; Tr. 1-190-194; 3-102).

23. After this traffic tie-up, the Maryland Highway Administration (MHA) told Newnan that everything would be reviewed and the bridge work was shut down. MHA's purpose was to review the situation in the wake of the traffic problems. Newnan was, however, able to continue day-shift work such as bolting up splices and diaphragms and welding bearing pads that did not require closure of Beltway lanes. (R.4, Tabs 43, 47, 56; Tr. 2-88-89; C.O. Finding 27).

24. On April 20, 1990, the Assistant District Engineer of the Maryland Highway Administration, Mr. Warnick, issued a directive amending the original Traffic Control Plan and limiting the erection of steel for the overpass to one girder per night on the nights of April 24 and 26, 1990. Mr. Warnick visited the work site promptly after the April 17 traffic tie-up became apparent. He testified that the one girder per night policy was based on what the Contractor said it could do. The directive also specified that one girder per night could be erected on the nights of April 30, and May 1, 2 and 3, 1990, but required that splices had to be completed not later than 2:00 a.m., otherwise the night's operation would have to be aborted. (Supp. R.4, Tab 55; Tr. 3-114-115).

25. There is testimony that there was a State directive to keep all Beltway lanes open until 12:30 a.m. the night of April 23-24, because of a hockey game. Newnan's operations that night consisted of bolting up splices and diaphragms. (IDR., 4/23, R.Supp. R.4, Tab 47; Tr. 2-90). No hockey delay claim is made for this night.

26. During the night shift on April 24-25, Newnan erected beam 2 in span C and on April 26-27 erected beam 1 in span C, both without any problems. (Tr. 2-91-2-92; Exh. R-6).

27. Appellant's witness testified that on April 24 and 26, 1990, Newnan's progress was delayed a total of one day because of an MHA restriction allowing the placing of only one spliced beam over the Beltway during the night shift on those dates. Appellant claims it would have been possible to place two beams on each of those nights without exceeding the restrictions on closure of Beltway lanes. (Tr. 1-205-207).

28. Appellant's Post Hearing brief also claims April 25, 1990, as a Hockey delay, with no citation to the record. (Br., p. 10). The Final decision agrees the Hockey game was on April 25, 1990, but asserts Appellant was not delayed. (Finding 32). Appellant's Daily Field Reports filing does not have an entry for April 25, 1990. The IDR shows some work activity for Newnan on April 25-26, 1990. (R.4, Tabs 43, 47). There is testi-

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mony (Mr. Satterfield, Project Manager, Newnan) that Newnan could not erect steel on April 25, but it was not in response to a question about hockey, but about some contretemps at a meeting of the parties. There is also testimony (Mr. Boulware, Field Superintendent, Newnan) that the 25th was a "hockey . . . night." (Tr. 1-217; 2-91).

29. The beams over the inner loop of the Beltway, span B, were erected during the weekend nights of April 28 and 29, 1990. All lanes of the inner loop of the Beltway were closed a part of the night on those two dates, and traffic was diverted onto side streets by Maryland traffic authorities during the closure. (R.4, Tabs 47, 58; Tr. 2-59-62, 229-230).

30. The use of the detour was based on a decision by the MHA. The Field Superintendent for Newnan recommended to Mr. Warnick of the MHA that work on a Friday, Saturday, or Sunday, when more time was available, would be the way to avoid new traffic problems. (Tr. 2-141-142; 3-120).

31. A handwritten WMATA memorandum notes the proposed work hours for April 25 through Sunday, April 29, including a notation of Newnan plans to work "until 10—11:00 A.M." and asserts that the schedule was "provided by FARID HAMAD, project Engineer for Lane . . . and has Maryland State Highways concurance [sic]". (R.4, Tabs 38, 58).

32. Newnan's Project Manager, Mr. Satterfield, testified that fifteen minutes is usually a reasonable time to make a splice, and that a fifteen minute interval would "just take coordination" to erect steel. (Tr. 1-194; 2-62-63).

33. Although the Resident Engineer was willing to grant Appellant five days of uncompensated time extension for completion of contract performance (1 day Hockey, 4 days MHA review) the Contracting Officer's Final Decision denied Appellant any time extension because, he said, it was concurrent with a time extension previously granted. He referred to Modification 4, (Part 1A) which was signed in November and December, 1989. (R.4, Tabs 2 (Findings 6 and p. 15), 13; Exh. R-14).

34. Appellant claims Hockey game delay costs for April 11 and April 25. We find that there was a compensable delay only for April 11. (Finding 18). For that date the evidence supports a direct cost of $625 for crane rental. Newnan calculated overhead costs at $690.89 per day, but made no attempt to allocate between this and other work. There is evidence of other work by Newnan, and we allocate $345.45 to April 11. The allowable cost for April 11 is therefore $970.45. (Tr. 1-267, 2-16; R.4, Tab 23, Exhs. A-2, A-6-A-7).

35. Contract Modification No. 4 dealt with corrective work on certain bridge piers. It provided a price increase and provided that it was "a full accord and satisfaction for all costs and time of performance" related to the actions of the modification. Contract Modification No. 12 dealt with the "Wetlands Permit Delay Costs" and it, also, was a "full accord and satisfaction" for all costs and time of performance for the actions of the modification. (Exhs. R-13-R-14).

36. Newnan presented a "Consolidated claim" to Appellant and the WMATA Contracting Officer by letter of September 25, 1990, making no mention of a plan to start work in June or July. It complained of various delays, including April 10, Rain and April 30, Rain. It placed the second hockey game delay as April 26. It did not mention impossibility. (R.4, Tab 11).

37. WMATA obtained "some type of permit" from the State of Maryland in order to construct the bridge. (Tr. 3-123).

DECISION

The claims being asserted by Appellant involve the erection of steel for a vehicular bridge over the heavily traveled Capital Beltway. The bridge forms part of a ramp connecting the Greenbelt Metrorail Station and the Commuter Rail Station with the Beltway. These facilities are all located in the State of Maryland.

Because this bridge is in Maryland, the contract incorporated some State inspired or mandated restrictions on the erection of structural steel over the traffic lanes of the Beltway. Respondent obtained a permit for the bridge construction from the State (Finding 37), and the permit might have been conditioned on the application of these restrictions. The restrictions nevertheless were subject to some periods of guaranteed access to the worksite for the Contractor. See Article III-D.11, Maintenance of Traffic, Subparagraph k(2) which permits traffic lane closure, with certain limitations, between the hours of 3:00 a.m.—6:00 a.m. (Finding 2). In due course the MHA approved a change of the hours when closure was permitted to the period 11 p.m.—4 a.m. (Finding 5). This, and subsequent decisions by the MHA, were effective in controlling the contractor's actions, at least on a *de facto* basis. It is obvious that in all, or nearly

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all cases, WMATA was aware in a timely way of these MHA actions.

Two lengthy delays in the start of the bridge construction occurred that were not the fault of Appellant or its subcontractor. The effect of this was to shift the period of bridge construction from the winter months of 1988-89 to the spring months of 1990. (Findings 7-11).

The Wetlands Delay

Appellant makes a claim for a differing site condition for "undisclosed restrictions ... for Wetlands." Pursuant to a revised schedule, Appellant's subcontractor (Newnan) began erecting structural steel on March 22, 1990. (Finding 11). Newnan now claims that the work was delayed a total of one-half day during March 28th and 29th by its inability to position cranes efficiently on "wetland areas." We note that Newnan did not visit the site before bidding the job (Finding 6), but Mr. Satterfield, an employee of Newnan, who drew up the crane location plan, did visit the site at that time, and testified that he observed no problems with the site. (Finding 12). The evidence shows soil borings that revealed a high level of ground water and soft ground. (Finding 14). Also, the IDRs do not have any indication that Newnan had difficulty with cranes. (Finding 13). One of Appellant's witnesses testified that there was no problem with unsuitable ground, but that there was a problem with the permit. (Finding 12). We conclude that adequate information was reasonably available to Newnan regarding ground conditions that might have caused site restrictions on crane placement so that its bid and work plan could have accommodated them. Evidence in support of this claim is generally lacking. This part of Appellant's appeal is DENIED.

Rain Delays

The Appellant makes a somewhat unfocused claim for rain delays on March 29-30, April 6 ($1/2$ day), and April 10 and 30 for "an aggregate delay of four and one-half days, with a net delay of two days." This is clearly not allowable under the contract's General Provisions 5 and 22 (Finding 2) which, when considered together, require weather delay to exceed a certain minimal level (four days for March and five for April) before delay is excusable. Appellant says, nevertheless, that it planned to do the work in drier summer months and was thrown into the wet months by earlier WMATA delays. Therefore, presumably, it should not be subject to the limitations of GP 5 and 22 for March and April. However, there is uncertain evidence as to Appellant's plan. While Newnan's President testified that Newnan planned the bridge work for June and July (Tr. 1-65-66), Appellant's written plan shows bridge spans being erected in the winter (Finding 7), a time of greater moisture. This conflict is not resolved in the record. We further note that at the time of Newnan's formal claim to the WMATA Contracting Officer, it mentioned only April 10 and 30 as rain delays. (Finding 36). Our findings support only April 10 and 30, and possibly March 29 as, indeed, being rainy enough to preclude work. (Findings 13, 16). Three days of rain delay would not require extensions under the contract even under the dry summer month plan theory. The rain delay claim is, in sum, not credible for all of these reasons and is DENIED.

MHA Delays

Appellant makes various claims for delay (hockey game traffic—April 11 and 25), traffic plan impossibility, delays for review of that plan (April 12, 17-20, 23) and restrictions on performance (April 24, 26, 28-29).

Hockey

MHA effectively prohibited work on the night of April 11th apparently because of concern over heavy traffic expected from spectators at a professional hockey game in the vicinity of the project. There is also a claim for a hockey game for April 25, but the evidence for this date is lacking. (Findings 18, 28). The contract guaranteed to the contractor a limited, but genuine, right of access to the work site in Article III-D.11 (Finding 2), and the later adjustment of the hours for traffic closure preserved this right. While WMATA did not cause this suspension, where a contract guarantees site access, suspensions such as those caused by the MHA here, where there is indication of cooperation between Respondent and MRA (Findings 10, 37), should be analyzed as constructive suspensions occurring under *Fruehauf Corp. v. United States* [25 CCF ¶ 82,426], 218 Ct. Cls. 456, 470; 587 F.2d 486 (1978). Looking to the clause that deals with this topic, SUSPENSION OF WORK (Finding 2), we note that it requires compensation for "unreasonable" suspensions. The question then becomes whether the hockey delay was reasonable.

While it is understandable that MHA would have concerns over unusual traffic volumes from the hockey crowds, its action directly conflicts with the contract's promise of site access, and arises from conditions

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outside the control of the contractor. This is a situation where the entire delay of one day is unreasonable. *Chaney & James Constr. Co. v. United States* [14 CCF ¶ 83,407], 190 Ct. Cl. 699, 713; 421 F.2d 728 (1970).

We have considered the possible application of Article III D.11.r. (Finding 2) which permits the "Engineer" to modify traffic plans and restrict working hours during peak periods. The "Engineer" is defined as the Contracting Officer's representative by the Definitions subsection of the General Requirements (*id*). This action was by the MHA, and unlike the other delays subject to MHA directive, it did not arise from problems in Contractor performance or contract administration. We conclude that the hockey game delay for April 11 only is unreasonable.

Impossibility

The impossibility claim is not credible. The claim appears to be that the fifteen minute closure period of the contract was insufficient to do the work. However Newnan's own project manager testimony does not support such a theory. (Finding 32). This claim does not appear in the Newnan letter of September 25, 1990, and is not mentioned in the complaint. We do not need to address the jurisdictional question that Respondent raised. The claim has no merit.

Traffic Plan Review

Delays for review of the traffic plan arose because the MHA effectively shut down the work for certain periods, claimed by Appellant to be April 12, 17-20 and 23.

The principal event related to this claim is the difficulty Newnan had when it began steel erection on April 16/17, 1980. (Finding 22). This resulted in a lane closure much longer than permitted by the contract, and an extensive traffic backup. This problem was caused by Newnan's own difficulties in steel erection. MHA then issued a suspension order, to review the situation. (Finding 23). On April 20, MHA issued a revised plan that would limit Newnan to the erection of one girder per night. Thus, the operation was effectively suspended for a period of time and then subject to the one girder per night rule for certain dates. An MHA representative testified that the one girder limitation was based on what the contractor said it could do. (Finding 24).

Again, there is no apparent WMATA action involved in causing these events. It involves the contractor and the State. Again, however, we analyze the suspension and the partial suspension (one girder rule) as a constructive suspension under the contract. *Freuhauf, supra.* Here, we believe the burden is on Respondent to show that the suspension was reasonable because it had the best access to the state agency, the MHA, that initiated and enforced the suspension. *Santander Constr. Co.,* ASBCA No. 15882, at p. 56,334, 76-1 BCA ¶ 11,798. The evidence shows the time of suspension was reasonably spent. The traffic tie-up caused by Newnan's initial efforts was massive. A traffic problem of this size causes or contributes to a sense of anger and helplessness in large numbers of commuters and travelers. The tie-ups are a severe problem of modern life and should be avoided at all cost. The evidence shows that the MHA responded to the tie-up almost immediately, investigating on the site. Its next step was to request a plan of erection procedures from the contractor. Given the need for information from the contractor and review within the MHA bureaucracy, it was reasonable to use a period after the major traffic jam of April 16-17 to April 24 to develop, review and approve procedures to avoid a second jam. The one girder limitation was also a reasonable initial step to restart the operation, and evidence indicates the limitation had the contractor's support, at least initially. These suspensions were reasonable and this part of the claim is DENIED.

April 12 was a day before a state holiday and work that required lane closure was not permitted by the contract. (Findings 2, 19). The claim for April 12 is also DENIED.

Change in Sequence

The balance of the claim is for "restrictions on performance" (April 24, 26 and 28-29). April 24 and 26 claims are for alleged costs because of a one girder per night limitations, and as indicated above, this part of the claim is DENIED.

The claim for April 28-29 is for an alleged WMATA order to change the sequence of work for these dates, a weekend. The claim is for overtime and double time. The evidence shows this work, which involved the use of a detour and a longer duration of closing of the traffic lanes, was based on a decision by the MHA, not WMATA. As before, WMATA curiously points to the State as the agency-in-charge of this phase of the work and says it, WMATA, did not cause it. Be that as it may, a constructive change can occur if the Government observes a change occurring. *W. Southard Jones, Inc.,* ASBCA No. 6321, 61-2 BCA ¶ 3182. Here, it is clear WMATA was aware of the change in work

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(Finding 31), although there is no indication of a timely notification that the Contractor regarded the change as compensable. We believe that the contractor either recommended the change or readily acquiesced in it as a way to complete the work efficiently. (Finding 30). The weekend work provided benefit to both parties. It freed the contractor from some limitations of night time work and the 15 minute limit. It benefited WMATA by an earlier effective completion of the work. These circumstances suggest that there was a tacit agreement that the change in sequence would be accomplished without affecting price. *Bruce-Andersen Co.*, ASBCA No. 28125, 83-2 BCA ¶ 16,892. We conclude that this sequence adjustment was for the benefit of both parties and is not compensable. This part of the claim is DENIED.

Summary

The appeal is SUSTAINED for the hockey game delay for April 11 in the amount of $970.45. (Finding 34). In all other respects, it is DENIED.

OPINION BY ADMINISTRATIVE JUDGE PETROWITZ CONCURRING IN PART AND DISSENTING IN PART

I concur with the Majority in its decision on the Wetlands Delay Claim. I do, however, part company with the Majority on the basis of its reasoning regarding the Rain Delay Claim and the delay claims associated with actions of the Maryland Highway Administration (traffic plan review and modification, hockey game restrictions and steel erection restrictions), though the end result I reach on quantum does not differ greatly from that of the Majority.

Delays Because of Rain: Appellant advances the argument that its subcontractor based its bid on a minimum number of expected rain days because bridge erection was originally scheduled for the summer months, whereas the work actually was performed during the spring months of the following year as the result of Respondent-caused delays. Appellant argues that its subcontractor thus had to absorb the cost of the greater number of rain days to be expected during the spring months and was, therefore, prejudiced by Respondent's delay.

The simple manner of disposing of this claim is to point out that it has no factual basis because the subcontractor's approved Part 2 CPM submittal scheduled bridge erection for the *winter* months that have almost as many expected rain days as do the Spring months and not for the summer months as Appellant alleges. Furthermore, giving Appellant every benefit of the doubt, I find that a total of only four rain days was experienced during March and April, 1990, well below the total that should have been expected in the subcontractor's estimate. I concur with the Majority that this claim should be DENIED.

Delays at the Direction of the Maryland Highway Administration:

I read the Maintenance of Traffic provisions of the Contract (Special Provisions, Section 101, III-D-11) as giving the MHA Traffic Engineer authority to "modify or expand on the methods of traffic control ... and restrict working hours" if the Contractor's operations were detrimental to traffic during peak periods. This, coupled with the provisions of the approved Traffic Control Plan, gave the MHA ample justification for suspending steel erection from April 17th to the 20th while the agency conducted a review of the traffic control situation following the massive traffic jam that occurred on the morning of April 17th. The evidence clearly indicates that the traffic tieup was at least partly the fault of Appellant's subcontractor. The MHA directive limiting steel erection to one beam per night on April 24th and 26th was also justified by the same facts.

The closing of the inner loop of the Beltway all night on April 28th and 29th gave the subcontractor uninterrupted periods during which to finish erecting steel over the roadway and, therefore, resulted in a cost benefit even though the work was performed at premium labor rates. I join the Majority in denying these elements of Appellant's claim.

The order by the MHA precluding Appellant's subcontractor from erecting steel until after 12:30 a.m. on the three nights that hockey games were played effectively prevented the subcontractor from erecting any steel over the Beltway on those nights. I note that Appellant's claim covers only two of those nights. My interpretation of the Contract provisions conferring traffic control authority on the MHA even to the extent of restricting working hours during peak traffic periods appears to me to be adequate justification for the action taken. I would, therefore, deny Appellant's claim based on disruption caused by the hockey games.

Having determined that Respondent was not at fault for any of events for which Appellant claims compensation, I conclude that Appellant's appeal must be DENIED.

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[¶ 26,359] Geo-Con, Inc.

ENG BCA Nos. 5749, 5976, August 31, 1993. Contract No. DACW45-89-C-0024.

Performance—Specifications—Performance v. Design Specifications.—Specifications for stabilizing sludge as part of a contract to clean up a hazardous waste site were design specifications, rather than performance specifications, because the contract stressed the effort and expertise expended by the government in drafting the highly detailed procedures to be followed and made the procedures mandatory by stating that the contractor "shall use" the specified formula to achieve stabilization of the sludge. Language stating that the formula might require some adjustment was not sufficient to change the mandatory specifications from design specifications to performance specifications. The contractor was entitled to additional compensation when the specified formula failed to achieve stabilization of the sludge.

Site Conditions—Contract Indications, Category I—Indication of Conditions.—A contractor's claim that off-gassing at a hazardous waste site constituted a differing site condition was denied because the contract clearly indicated that off-gassing was a serious problem that had been encountered at the site under an earlier contract. The contract was replete with warnings about the seriousness of the problem. An offhand remark by a government representative during a postaward meeting involving other issues was not sufficient to offset the contract's clear warnings.

Site Conditions—Contract Indications, Category I—Subsurface Conditions.—A claim that subsurface rocks, boulders, and hard lenses, and the intermingling of sludge with such materials constituted a differing site condition was rejected because the contract stated that a previous contractor had encountered difficulties with such materials, and the contract's boring logs and test wells clearly indicated the presence of rocks and hard materials intermingled with sludge. The contract description, containing 142 pages of boring logs, gave more than adequate notice of the subsurface conditions to be expected.

Site Conditions—Contract Indications, Category I—Hazardous Waste Identification.—The need to use pH testing to distinguish hazardous waste from other excavation materials was not compensable, despite a contractor's assertion that the contract indicated that the materials could be distinguished by color, because the materials were identifiable as such until intermingled by the contractor's excavation methods. Further, the contract required the contractor to conduct pH testing of all materials regardless of whether they were identified as hazardous waste.

Performance—Voluntary Work—Contractor's Convenience.—A contractor that stabilized all materials excavated from a hazardous waste site rather than merely stabilizing sludge as required by the contract was not entitled to additional compensation, because the need to stabilize all materials resulted from the contractor's excavation methods. After the failure of its initial plans to segregate sludge from other materials during excavation, the contractor chose to excavate with a dragline, which mixed all the materials together. The need to stabilize all such materials resulted from the contractor's business judgment, in which it concluded that stabilization of all materials was more efficient than efforts to segregate sludge from other waste.

For the appellant: Starfield & Payne, Fort Washington, Pennsylvania, by Michael H. Payne and Joseph A. Hackenbracht, Jr. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Richard P. White, Government Trial Attorney, Baltimore, Maryland.

Before JOCKISCH, SOLIBAKKE, and SHERIDAN, Administrative Judges.

JOCKISCH, Administrative Judge: Appellant asserts that it encountered differing site conditions and defective specifications during its attempt at performing the sludge stabilization required by the contract and that the Government ordered a change to the contract-specified compaction requirements for stabilized material. The Contractor appealed the Contracting Officer's decision which disposed of the claim issues for the year 1989 on July 11, 1990; however, because of certain developments and at the

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request of the parties, the Board canceled the scheduled hearing date of September 23, 1991, and dismissed the appeal on March 27, 1991, pursuant to Board Rule 30, which allowed for reinstatement to the Board's docket within three years. On January 8, 1992, at Appellant's request, the appeal was reinstated. At that time, the parties informed the Board that a second Contracting Officer's decision and appeal based on the same essential factual issues as the reinstated appeal for the year 1989 but for the years 1990 and 1991 would be forthcoming. These consolidated appeals by Geo-Con, Inc. are based upon essentially the same general factual allegations for the years 1989 ($1,770,804.11) and 1990 and 1991 ($1,308,073.74). The Contractor appealed this subsequent decision on June 12, 1992. Following a two week entitlement only hearing in December, 1992, briefing of the issues was completed by the parties in July, 1993.

FINDINGS OF FACT[1]

General

1. Invitation for Bids (IFB) No. DACW45-88-B-0092, Bruin Lagoon Superfund Site, Bruin Borough, Pennsylvania, was issued on July 25, 1988. (R.4, Tabs 3, 4, and 51). On August 11 and 30, 1988, the Government provided for site visits. (R.4, Tab 4). During a site visit, prospective bidders could see sludge, stiff and hard material, rocks, the small work area available, and the closeness of houses to the site. (Tr. 549-551). Among those attending both site visits was Mr. James Wallwork of Geo-Con, Inc. (hereinafter Geo-Con). (R.4, Tab 4). Because of various amendments to the bid invitation, the bid opening was finally set for October 6, 1988.

2. Prior to any cleanup, the site, which occupied approximately 6 acres, was an open earthen-diked lagoon containing approximately 35,000 cubic yards of asphaltic sludge and 575,000 gallons of acidic liquid supernatant. (R.4, Tab 19, 1 N-1). The site, which was ranked as the third most hazardous site on the Superfund National Priorities List, had been the subject of an earlier remedial contract which was terminated for convenience following a major off-gassing incident. Following termination of the remedial contract, an Environmental Protection Agency (EPA) emergency response contractor backfilled the opened lagoon area with stabilized sludge and soil. (Tr. 446; R.4, Tab 19, 1 N-1; Exh. R-1).

3. The EPA determined that the site required further study before remediation could be continued. Two consultants, Weston Engineers and GAI Consultants (GAI), conducted field investigations; and GAI, under contract to the Omaha District of the Corps of Engineers, prepared plans and specifications for completing the remedial action, after reviewing the previous study effort and after conducting extensive testing of the site. (Ex. R-89; Tr. 655-657). GAI developed a "mix" design/stabilization process in an attempt to produce a stable material; that process was included in the contract specifications for the Contractor's use.

4. The *Commerce Business Daily* announcement and the Notice to Prospective Bidders described the project as including "gas monitoring during site activities, gas venting/collecting/treating ..." (R.4, Tabs 3, 4, 51; Ex. R.74, 75). In order to assure against violent gas emissions, such as the one which shut down the first remedial attempt in 1984, gas vent wells were to be constructed by the Contractor prior to starting construction. (R.4, Tab 25). Further, gas collection and treatment systems were to be installed "prior to any lagoon disturbances." (R.4, Tab 25 pp. 2C-1). Workers were to wear "Level B" protective equipment which included a full face mask with supplied air and a protective suit, and the Contractor was required to establish and maintain an air monitoring system. (R.4, Tab 9 pp. 1D-30). There were 142 pages of drill logs provided in IFB and all the borings were within the limits of excavation. A majority of these boring logs showed off-gassing during the drilling, which would be typical and expected when "acid" sludge is being exposed to air or neutralizing treatment. (R.4, Tab 41; Tr. 924).

5. The major work activity in the project was the stabilization of the contaminated material, referred to as "sludge." The contaminated material was specifically identified in the solicitation as either a "black sludge and waste," or a "yellow waxy waste." (R.4, Tab 30, 2H-4).

6. The specifications required that, when backfilled, the stabilized sludge was to meet the following criteria:

a) pH between 9 and 11.5

b) water content less than 32 per cent

[1] References to the transcript, to exhibits, and to other documents provided the Board by the parties are for illustrative purposes only and are not exhaustive.

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c) compacted density of 100% of optimum in place moisture content density

d) unconfined compressive strength of 2.0 tsf.

7. The specifications indicated that the Government had developed a method by which the performance requirements identified above could be achieved. Paragraph 2.2 of Section 2H of the specifications stated:

2.2 *Bench Scale Studies.* Two bench scale laboratory sludge stabilization studies were performed. After reviewing the previous mix designs from the site remediation and laboratory studies, a preliminary study of forty (40) mixes were [sic] investigated. These mixes used varying ratios of the sludges, soil, fly ash, lime and/or cement to make a stabilized material that would have the strength to support a cap and neutralize the sludge....

8. The Contract Mix Designs were characterized as guidelines to be adjusted in the field and identified as follows:

The following are the mix designs for the black sludge/waste and the waxy sludge/waste... Should the Contractor choose to use his own mix design he shall submit prior evidence to the Contracting Officer that his mix provides equivalent performance.

Material	Volume cy	Unit Weight #/cf	Mix Design by Weight Sludge/Soil/Hydrated Lime
Black Sludge/Waste	19,000	74	1 : 1.5 : 0.12
Yellow Waxy Waste (R.4, Tab 30).	1,800	76	1 : 3.0 : 0.12

9. Although the solicitation permitted the contractor to develop its own mix design for sludge stabilization, Appellant decided during the bidding process that it would be "prudent" to follow the Government's mix design stated in the bid invitation, particularly considering the amount of time, effort, and expense the Respondent spent in developing the mix design. (Tr. 156, 247, 248, 666-672). Geo-Con considered the mix design in the invitation for bids as a design specification, "a recipe you should follow," which was developed to meet certain performance criteria. (Tr. 1284). Geo-Con assumed that the Government and its consultants had developed the mix design on a "worst case" scenario. However, the mix design was based upon the composite readings from several borings, which produced a mix design for the average material to be encountered rather than the worst case scenario. (Tr. 769-771; Exh. A-52).

10. The soil, or bulking agent, required by the mix design was to be obtained on-site from the excavation of the two designated areas. The bulking agent was to be used as needed to stabilize the black sludge and yellow waxy waste. The excavation quantities in the specifications totaled 81,400 cubic yards. The bid schedule separated this quantity into a base bid amount of 73,250 cubic yards and a contingent overrun quantity of 8,140 cubic yards of excess overburden. The specifications provided for the stabilization of an anticipated 20,800 cubic yards of sludge or waxy waste. The Government estimate anticipated mixing 20 cubic yards of sludge/waste per mixing pit, which would require 1272 mixings to stabilize the estimated amount of sludge. (Tr. 694-696; Exhs. A 4, 35).

11. Geo-Con Inc. is an experienced hazardous waste remediation contractor. The company specialized in, among other things, stabilization of superfund sites. Approximately 60% of the Contractor's work involved environmental projects, with a major portion being hazardous waste sites. (Tr. 15; Exh. A-1).

12. Geo-Con prepared its bid anticipating from the specifications that the contaminated material would be readily identifiable by color and that, based upon the cross sections provided, the materials were to a large extent segregated and could be excavated separately. The cross sections indicated the top of rock to be relatively smooth and continuous. The Appellant considered that heavy scraping equipment would achieve the necessary cleanliness of the rock face, that dump trucks could transport the various sludges and soil to mixing pits, that the blending of sludge, soil, and hydrated lime would be performed by backhoes with power harrows, that the neutralized sludge would be backfilled into the excavation or stockpiled, and that, while the total quantity of material to be excavated could vary, the specifications provided for the stabilization of 20,800 cubic yards of sludge or waxy waste. (R.4, Tab 107).

13. Based upon the number of mixing pits and the size of the equipment it planned to

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use, Geo-Con estimated that the sludge stabilization would be accomplished in approximately 73 work days, which would require an average processing rate of approximately 285 cubic yards of raw sludge and 715 cubic yards of bulking material per work day. Because of the small batch size, the specified reagent ratios, and the installation of gas vents, Geo-Con anticipated no significant air quality problems ("off-gassing") would be encountered. (R.4, Tab 107). Geo-Con planned to use two mixing pits instead of the one anticipated by the Government and to mix approximately 50 cubic yards of material (not just sludge) per pit. (Tr. 50-51).

14. Geo-Con stated it relied heavily, almost exclusively, on the cross sections contained in the contract drawings in preparing its bid. (Tr. 24-25). It interpreted the cross-sections as assuring a bidder that the waste material was located in discrete, segregable areas and deposited in "delineated layers of various types of waste." (Tr. 185-186). The Government states that the profiles (cross-sections) indicated a mix of material, contamination spread throughout the site, and contained notes to inform prospective bidders to refer to the boring logs to ascertain the site condition at localized areas. (R.4, Tabs 43, 44). Further, the Government points out that notes on Drawing No. 8, Sheet 8, Construction Sequence, state, "the existing lagoon does *not* contain a homogenous material *but rather intermingled* pockets of wastes and soils *of different consistencies.*" (Emphasis supplied). Additionally, Respondent notes that the Bruin Lagoon material was not in a natural condition but was man-made with the dumping interspersed and that previous work at the site intermingled the materials. Appellant was aware of all of this prior to bidding. (Tr. 1119).

15. During a site visit, Appellant saw "oily patches" intermingling on the surface area of the site and heard the details of the problems experienced by the previous stabilization contractor. (Tr. 18, 19).

16. When originally preparing its bid Appellant's estimator, James Wallwork, scheduled the project for two construction seasons and planned to use a pug mill mixing technique to perform the stabilization work. (Tr. 729-783). However, Robert Brandt, Wallwork's supervisor, and Christopher Ryan, president of Geo-Con, believed that the estimate prepared would not be competitive and changed the concept for performing the stabilization and "knocked" a year off anticipated project performance, which reduced the bid to be submitted by over a million dollars. (Tr. 781-784). At the time Geo-Con submitted its bid, Appellant asserts it anticipated commencing sludge stabilization at the end of April, 1989, and completing the contract work in one construction season.

17. Appellant's stated plan of operation on which it bid anticipated excavating 1000 cu. yds. of material a day of which only a portion would require stabilization. (Tr. 179-182). This would allow Geo-Con to complete stabilization in 73 days. (Tr. 35-37). Respondent notes that Appellant's bid papers show a potential subcontractor providing a bid to Appellant based on treating the total 81,390 cu. yds. and Appellant's work sheets indicated an intent to stabilize 73,250 cu. yds. at the rate of 1000 cu. yds. per day. The 20,800 cu. yd. figure of the estimated amount of sludge stated in the bid invitation is not found in Appellant's estimate. (Ex. A-3). Geo-Con intended to use a large hydraulic excavator, a number of off-road dump trucks, a 225 type excavator (backhoe) and a front end loader to accomplish the project. (Tr. 50-51, 253-354; Exh. A-3). This method required the capability selectively to excavate clearly definable pockets or layers of sludge/waste material, and the capability to mix 50 cu. yds. of material in a mixing pit. (Tr. 53, 54). Appellant stated that, when it prepared its bid it did not expect significant off-gassing. (Tr. 280-281, 1285-1287).

18. Geo-Con felt it would be a good marketing tactic for the company to have cleaned-up the third ranked superfund site, and the job was attractive to it as it was "in its own backyard." (Tr. 784-785).

19. Bids were opened on October 6, 1988. (R.4, Tab 51). The apparent low bidder was Geo-Con, Inc. at the firm fixed price of $3,982,387. (R.4, Tab 51). Since the Government estimate was $4,998,271, $1,015,884 greater than Geo-Con's bid, Geo-Con requested a meeting to discuss its bid. The meeting was held in Omaha, Nebraska, with Government personnel, on October 26, 1988. (R.4, Tabs 49 and 50). During these discussions, Geo-Con and Government representatives discussed many issues. One issue raised by Geo-Con was that of "off gassing." (Tr. 45, 56, 817-820; R.4, Tab 49). The Government refused to rule out the possibility of "off gassing" in the mixing pits, but it explained to the contractor that it had attempted to minimize the possibility for "off gassing" in the mixing pit during stabilization activities by the careful development of reagent mixes

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and batch sizes. (Tr. 810, 811; R.4, Tab 49). Further, the Respondent indicated that it did not expect a catastrophic release of gas, as had occurred during performance of the first remedial contract, because of requirements to provide gas vents prior to commencement of excavation. (Tr. 810-812, 819, 822). The best evidence does not indicate that Respondent assured Appellant that there would be no off-gassing problems. During these discussions, it became apparent that the primary reason for the difference in Geo-Con's bid and the Government estimate was Geo-Con's intent to complete all sludge stabilization work in one construction season, while the Government anticipated the need to use two seasons and the entire 608 days stated in the contract for job performance. (Tr. 808, 809; R.4, Tabs 49 and 50). The Government representative believed the equipment Geo-Con had selected was too big and heavy to perform at the limited work site available and on the material it would encounter. (Tr. 807).

20. Subsequent to this meeting, Appellant confirmed its bid. (Tr. 150-151; Ex. R-77). The contract was then awarded to Appellant on November 22, 1988. (Tr. 55-56; R.4, Tabs 3 and 51). The contract required Appellant to remove, stabilize, and backfill various hazardous sludge materials at the Bruin Lagoon Superfund Site, Bruin Borough, Pennsylvania. Notice to proceed with the work was issued on January 4, 1989. (R.4, Tabs 3 and 6).

21. The following contract clauses are relevant to this appeal:

A. General Provision:

1. G.P. 45, Disputes

2. G.P. 47, Differing Site Conditions

3. G.P. 48, Site Investigations and Conditions Affecting the Work

4. G.P. 58, Schedule for Construction Contracts

5. G.P. 59, Specifications and Drawings for Construction

6. G.P. 60, Changes

7. G.P. 63, Inspection and Construction

8. G.P. 68, Default

9. G.P. 71, Modification of Proposals—Price Breakdown

10. G.P. 74, Pricing of Adjustments

11. G.P. 76, Certification of Overhead Costs

B. Special Clauses:

1. *COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK.*

The Contractor shall commence work under this contract within ten (10) calendar days after the date of receipt by him of Notice to Proceed, prosecute said work diligently, and complete the entire work ready for use not later than 608 calendar days after receipt of Notice to Proceed. The time stated for completion shall be to final project acceptance by the government but does not include the one year of post-closure activities. The Contractor shall also be responsible for one year of post-closure activities which shall commence from the government's official acceptance of the construction.

1.1 *Start Work.* Evidence that the Contractor has started procurement of materials, preparation and submission of shop drawings, preparation of subcontracts, and other preparatory work will satisfy the requirement that work commence within ten (10) calendar days after receipt of Notice to Proceed. Therefore, work need not be commenced at the construction site within ten (10) calendar days (based on FAR 52.212-3).

2. *LIQUIDATED DAMAGES—CONSTRUCTION.*

2.1 *Failure to Comply.* If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of $560 for each day of delay. The work shall be all construction activities performed for final project acceptance by the government but does not include the one year of post-construction site maintenance.

* * *

2A. *ORDER OF WORK.* The Contractor shall follow the general construction sequencing below.

(1) Contractor preparation/submission/approval of all required plans to the Contracting Officer. The Contracting Officer may consider partial plan submission/approval to provide for non-hazardous mobilization and support activities prior to full plan approval.

(2) Approval from the Contracting Officer to begin on-site work.

* * *

(4) Gas venting, collecting and treating.*

* * *

(9) On-site stabilization/neutralization of remaining unstabilized sludge and bedrock.*

* * *

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* Indicates hazardous work.

* * *

5. *PHYSICAL DATA.* Pursuant to CONTRACT CLAUSES clause:

"Site Investigation and Conditions Affecting the Work," information and data furnished or referred to below are furnished for general information only and the Government may not be held liable for any interpretation or conclusions drawn therefrom by the Contractor.

* * *

5.2 *Weather.* Weather conditions shall have been investigated by the Contractor to satisfy himself as to the hazards likely to arise therefrom. Complete weather records and reports may be obtained from the local U.S. Weather Bureau.

* * *

11. *TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER.*

11.1 *Anticipated Weather Delays.* This clause specifies the procedure for the determination of time extensions for unusually severe weather under the authority of the CONTRACT CLAUSE entitled "Default (Fixed-Price Construction)." The listing below defines monthly weather conditions for the contract period and is taken from Department of Commerce publication "Climatological Data Annual Summary, Volume 88, No. 13."

* * *

15. *CONTRACTOR QUALITY CONTROL (CQC).* In conformance with the requirements of CONTRACT CLAUSES clause: "Inspection of Construction," the Contractor shall establish and maintain an effective Quality Control Program.

* * *

27. *CONTRACTOR PREPARED NETWORK ANALYSIS SYSTEM (NAS).*

27.1 The progress chart to be prepared by the Contractor pursuant to the CONTRACT CLAUSE entitled "SCHEDULE FOR CONSTRUCTION CONTRACTS" shall employ a network analysis system as described below. Implementing this system for the planning and scheduling of construction shall be the responsibility of the Contractor.

* * *

28. *TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER.*

* * *

C. Technical Provisions

(1) Section 1C, Environment Protection, Paragraph 2, which generally requires the contractor to submit and have approved a plan for environmental pollution control prior to beginning any work and to meet with the representatives of the Contracting Officer to discuss this plan;

(2) Section 1C, Environment Protection, Paragraph 9, Dust Control;

(3) Section 1D, Safety, Health and Emergency Response, Paragraph 1.1, which states in part:

"*The Bruin Lagoon Site consists of about a 6-acre fenced site with approximately 4 acres contaminated with oily wastes.* These wastes are derived from the manufacture and refining of oil materials. *The major site hazards are high acidic soil and some organic materials.* Stabilization of the site has been attempted in the past. *In May 1984, a toxic gas was released from the site when a layer of lagoon material was penetrated...*" (Emphasis supplied).

(4) Section 1D, Safety, Health, and Emergency Response, Paragraph 5, *et seq.*, describes the personnel protective program and the levels of personnel protection required based upon the work being accomplished;

(5) Section 1D, Safety, Health and Emergency Response, Paragraph 12.9, Action Levels, states the requirements for the contractor when contaminants are encountered at the levels cited;

(6) Section 1D, Safety, Health and Emergency Response, Paragraph 13, Site Specific Compound Summary, which provides information concerning the chemical compounds expected to be found in the lagoon, exposure limits applicable to these compounds, physical properties of these compounds, and an EPA model of the release of certain gases;

(7) Section 1E, Contractor Chemical Quality Control Section (CCQCS), Paragraph 2.6.1, identifies chemical tests to be accomplished during remedial construction. The last test listed is: "Stabilized Waste (pH measure on-site)." Table 1E-1 of this section, which starts on page 1E-45 of the specification, also details required testing. On page 46, Stabilized Waste is shown as being required to be tested for each 50 cubic yards of placement, and its pH is to be determined;

(8) Section 1G, Definitions, provides definitions of terms used in the contract;

(9) Section 1N, Summary of Work, generally describes the history of the Bruin La-

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goon Site and what work is to be accomplished. Paragraph 3.2.4.1 of this section warns of sludge migration and "oozing." Paragraph 3.2.4.2 discusses gas venting. Paragraph 3.2.4.3 describes the general mix to be used for two types of waste and informs the contractor that adjustment of these formulas will be needed to meet the specified pH criteria. The provision also specifies that quick lime will not be used, and that when mixing sludges and wastes a pH range of 9 to 11.5 is to be maintained.

(10) Section 1P, *Measurement and Payment,* describes the various items of work included within the contract, and how they are to be measured for payment purposes. Paragraph 4.2(a) describes the materials to be excavated as *black oily tar, black coal/ash wastes, yellow waxy sludge,* previously stabilized sludge, and common soil to be mixed for stabilization. (Emphasis supplied).

(11) Section 1Q, Special Project Procedures required because of the potentially hazardous nature of the work. Approval of the plans listed within this section is a prerequisite for project startup.

(12) Section 2C, Pre-Construction Gas Vent Wells, Paragraph 1 states:

"*GENERAL.* This section describes the well drilling procedure, gas collection, and treatment requirements that the contractor shall implement prior to and during lagoon stabilization. Materials, for construction of the gas vent wells, are described in Section: Monitoring Well Installation.

1.1 Due to the fact that prior stabilization activities encountered *violent gas emissions,* the contractor shall install the gas collection and treatment system prior to any lagoon disturbances. (Emphasis supplied).

1.2 This section shall be implemented to help minimize any sulphur dioxide (SO_2) and hydrochloric acid (HCL) releases which could adversely affect site personnel, surrounding residences and the environment . . .";

(13) Section 2H, Sludge Stabilization, is the specification which describes most of the actual work required under the contract. Paragraphs 1.3, 1.5, 1.5.1, and 1.5.2 were deleted by Amendment 0001 to the solicitation;

(14) Section 2H, Sludge Stabilization, Paragraph 1.4.4, *et seq.,* which describes the *use of environmental foam in the event the contractor encounters hazardous gas emissions* of a certain level; (Emphasis supplied).

(15) Section 2H, Sludge Stabilization, Paragraph 1.9 which lists the estimated quantities as follows:

Black Sludges and Wastes	19,000 c.y.
Yellow Waxy Wastes	1,800 c.y.
Previously Stabilized Sludges	20,500 c.y.
High pH Soil	47,600 c.y.
Existing Dike Embankment	23,500 c.y.

1.10 The proposed excavation quantities associated with lagoon stabilization include:

Black Sludges and Wastes	19,000 c.y.
Yellow Waxy Wastes	1,800 c.y.
Incidental Stabilized Sludge and Soil (Assuming 1H:1V Sideslopes)	60,600 c.y.

(16) Section 2H, Sludge Stabilization, Paragraph 2. *MIX FORMULA,* particularly Subparagraph 2.3 Mix Design, which states:

"*The following are the mix designs for the black sludge/waste and the waxy sludge/waste. The design mix shall be used as a guideline and may need to be adjusted during the stabilization process because of the variation in the sludge consistency.* The sludge and soil should be mixed initially followed by the addition of lime . . ."; (Emphasis supplied).

(17) Section 2H, Sludge Stabilization, Paragraph 3.1.2 Performance Objectives, particularly,

"To provide effective remote mixing stabilization of the sludge, *the mix as recommended in Paragraph 2.3 or mix which provides equivalent performance may be used.* The processing/mixing procedures must be developed and optimized in the contractor's stabilization plan . . ."; (Emphasis supplied).

(18) Section 2H, Sludge Stabilization, Paragraph 3.1.2.2, particularly:

"The final neutralized product shall achieve decreased acidity of the stabilized sludge. Field testing procedures shall be utilized to confirm that the neutralized sludge mixture has a pH greater than 9.0 and less than 11.5 (EPA SW846 method 9045).";

(19) Section 2H, Sludge Stabilization, Paragraphs 3.1.2.4 and 3.1.3.8 discuss what standard of compaction is to be gained for the stabilized sludge, particularly,

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"The remote stabilized mixture shall then be compacted in maximum 8-inch loose lifts with a roller into the previously excavated area after it has attained the physical characteristics as specified in Paragraph 3.1.2. The compaction shall be 100% of the density obtained by ASTM D 698 at the in place moisture content and pocket penetrometer reading of unconfined compressive strength of 2.0 tsf.";

(20) Section 2H, Sludge Stabilization, Paragraph 3.1.4 identifies certain kinds of waste, which can be compacted in the stabilized sludge.

(21) Section 2H, *Sludge Stabilization,* Paragraph 3.2., *Bedrock Neutralization,* provides the following:

"Bedrock, once exposed by excavation, shall be neutralized by placing a 6 inch layer of crushed aggregate limestone and ground agricultural limestone directly on top of the bedrock. Once in place, backfilling operations may begin . . . .

3.2.3. Based on earlier findings, it is anticipated that the ground water table in the northeast section of the lagoon will be on the order of one (1) to three (3) feet above the surface of the bedrock. In this area the limestone aggregate layer shall be placed to the level shown on the Drawing. If needed, additional aggregate shall be placed to sufficient thickness such that its top surface is at least six (6) inches above the water level, thereby precluding the backfilling of stabilized waste into the ground water."

(22) Section 2H, *Sludge Stabilization,* Paragraph 5, *Sampling, Testing and Quality Control,* Subparagraph 5.4 provides the following:

"If the results of the quality control sampling and testing indicate that the performance objectives of Section 3.1.2 are not being achieved, the design mix shall be adjusted until the performance criteria are achieved. The adequacy of the inplace stabilized sludge must be evaluated by the Contracting Officer. . . ."

(23) Appendix A to the contract specifications, Supplemental Field Investigations Data, contains 142 pages of drilling and well logs. These logs generally identify sludges, rocks, debris, etc., present in the soil and provide data as to the hardness of the material.

D. Contract Drawings

(1.) Drawing No. 2, Sheet 2, Existing Features and Boring Location Plan, provides an overview of the Bruin Lagoon, the location of the borings, and existing contours. The second note on the right hand side of the drawing states that boring logs are to be found in the specifications at Appendix A. The boring logs and contract drawings describe the existing conditions as containing "rock fragments, rock, crust, boulders, cobbles, other hard materials and hard clays," and describe hardness of the material in terms of "blow counts."

(2.) Drawing No. 3, Sheet 3, Existing Sections, provides two material profiles located on Sheet No. 2. Materials identified include: *black tar-like sludge, oily ash-like waste, soil/sludge mix, black, oily tar-like and ash-like waste, and a yellow waxy paste.* (Emphasis supplied).

(3.) Drawing No. 4, Sheet 4, Existing Sections, 2 of 2, provides much of the same type of information as found on Sheet 3. Both Drawing Nos. 3 and 4 contain the following note

NOTE:

THE GEOLOGIC SECTIONS PRESENTED IN THIS DRAWING ARE INTENDED ONLY AS VISUAL AIDS REPRESENTING GENERALIZED SUBSURFACE CONDITIONS INTERPRETED FROM BORING LOGS *PROJECTED* TO SECTION LINES. SOME INCONSISTENCIES IN SURFACE AND BEDROCK ELEVATION AT INTERSECTING SECTION LINES HAVE RESULTED FROM THE BORING-PROJECTION METHOD OF INTERPRETATION. *SEE BORING LOGS FOR CONDITIONS ENCOUNTERED AT SPECIFIC LOCATIONS.* (Emphasis supplied).

CONDITIONS ENCOUNTERED DURING EXCAVATION MAY VARY FROM THOSE SHOWN HERE.

(4.) Drawing No. 5, Sheet 5, Erosion and Sedimentation Control Plan, contains notes about the construction sequence, and the hydrology of the site.

(5.) Drawing No. 7, Sheet 7, Construction Plan, shows, in the upper right hand corner, legends for four different kinds of waste identified on the drawing to the left. The note on the right hand bottom of the page states:

"The excavation limits shown here are approximate limits based on available data. In the event that unstabilized waste is encountered at the boundary shown, the excavation and stabilization shall continue as far as required beyond the limits shown

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until unstabilized waste is no longer encountered...";

(6.) Drawing No. 8, Sheet 8, Construction Sequence, contains general notes on the right hand side of the drawing. Note 1 informs the contractor of the need to have movable barriers to contain raw sludge in the excavation pits. Note 2 states:

"*The existing lagoon does not contain a homogenous material but rather intermingled pockets of wastes and soils of different consistencies.* The contractor shall be responsible for choosing his own equipment type and size to complete the excavation, stabilization and backfill." (Emphasis supplied).

E. Appendix A is one hundred and forty-two pages of data taken from borings made on the project site. The generalized cross-section on drawings Nos. 3 and 4 were taken from this data, with specific reference to see the borings for specific data at a particular location. Examples of the detailed information found on the boring logs are as follows:

(1) Numerous references to the "Soil Density-Consistency or Rock Hardness" as hard, medium, stiff, very stiff, very dense, etc.

(2) Various "blow counts" showing material to be anywhere from soft to very hard.

(3) Many descriptions detailing the intermixing of material such as "Dr. grayish brown Silt, some sand, grades moist to saturated with some black ash like material; "Yellowish brown Silt, and Sand tr. black ash like material; "Black tar like material, very plastic and sticky," "Clay-like material medium to highly plastic, very sticky, saturated with occasional fabric-fibers, tr. wood, tr. ash like material, some white sticky material (possible caisco)," etc.

(4) Considerable number of repetitive and informative remarks such as "Boring terminated because of vast quantities of tar like material being augured up," "Some Blocky Structure," "Blk. Tar-Like waste on Fracture Faces," "Auger Refusal." Numerous SO_2 and H_2S gas releases while performing borings were noted on a scale as ">50,>399, OF (off scale)."

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22. Following the preconstruction conference of December 9, 1988, and the notice to proceed of January 4, 1989, Appellant submitted the contract-required plans which included the sludge stabilization plan and the network analysis system. (Tr. 57-61; Exh. A.5,6). The network analysis schedule showed a completion date of October 10, 1989, reflecting Appellant's intention to complete the work in one construction season. Appellants's Sludge Stabilization Plan, as submitted on January 27, 1989, stated an intent to mix sludge, bulking material and lime with backhoes equipped with Standard buckets, while reserving the right to use other equipment to insure proper mixing. (R.4, Tab 53). The critical path shown on the network analysis system submitted on February 2, 1989, included the sludge stabilization effort. The plans were returned without approval and with comments. Geo-Con's submittals were incomplete. The Safety, Health, and Emergency Response Plan (SHERP) was returned with 233 comments requesting clarification or additional information. (Tr. 646, 647). Many of the same comments were made on successive Geo-Con submissions. (Tr. 648, 649).

23. By letter dated February 7, 1989, sent in response to Appellant's comments concerning the preconstruction conference, Respondent stated that Paragraph 2.3 of Section 2H, *Sludge Stabilization,* of the contract, indicates, "the design mix shall be used as a guideline and may need to be adjusted during the stabilization process because of the variation in the sludge consistency." The Government went on to state, "If work performed exceeds the scope of work under Section 24, then a modification will be issued under the applicable Contract clauses. Merely changing the size or formula of the mix, in accordance with Section 24, does not constitute a change to the contract." (R.4, Tab 67). Appellant did not respond to Respondent's statement at that time. At a meeting on February 23, 1989, to discuss the Respondent's comments, Appellant accepted Respondent's comments except for an issue concerning removal of existing sewer and water lines which is not a part of this appeal. (R.4, Tab 57).

24. The contract plans and specifications indicated that sludge stabilization was to be performed in Area 1 and then in Area 2. Following the completion of the site work in Area 1 and the installation of the remote recording equipment, sludge stabilization could commence. Appellant planned to commence sludge stabilization on April 10, 1989; but, because of various problems, including getting necessary approvals of plans, it did not begin stabilization until June 26, 1989. (Tr. 94; R.4, Tab 107). However, mobilization had begun around March 23, 1989. (Ex. R-102). Government representatives at the

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project site recommended to Geo-Con that it use the southeast corner of the site for its material storage area as was indicated on the contract drawings. (Tr. 554, 555). However, Geo-Con used this area to set up its trailer complex. (Tr. 553). This required Geo-Con to stockpile excavated material along the perimeter of Area 2 when it commenced its major excavation, which resulted in an intermingling of backfill and waste material, a restricted traffic flow in an already constrained area, and a surcharge which pushed waste material into areas already excavated. (Tr. 554, 926-927).

25. Appellant commenced excavation of small test pits which revealed little sludge and mostly bulking agent with a pH greater than 12. (Tr. 61-63). On June 26, 1989, Appellant began mass excavation of Area 1. (Exh. R-101). On June 28, 1989, during a job site meeting, Appellant notified the Government of the presence of rocks in the excavation. (R.4, Tab 65, 66, 68, and 74).

26. The specifications provided the quantities, in cubic yards, of the black sludge/waste and yellow waxy waste that Appellant should expect to encounter. The Contract included cross-sections of the areas to be excavated detailing the location and extent of the contaminated material. The cross-sections summarized Respondent's interpretation of the results of earlier subsurface exploration. The cross sections showed the area extent and depths of the pockets of material classifications black sludge/waste and yellow waxy waste which required neutralization. However, during the July 5, 1989 progress meeting, Appellant informed Respondent that it was having difficulty in distinguishing raw sludge from bulking material, as the material in place allegedly differed from the contract-stated black oily or yellow waxy description. (Tr. 61-63). Respondent's construction representative for quality assurance testified that the materials were visually identifiable and were found as to be expected from the cross sections and borings. (Tr. 975, 1003).

27. Appellant was required by the specifications to identify sludge material by pH sampling in order to determine the proper mixture. Low pH was to be treated as if it were the yellow waxy material. (Tr. 301-319). The pH testing was more time consuming than visual identification.

28. Appellant planned on using a large hydraulic excavator to remove the different materials. Appellant stated that it would be able to excavate the materials separately because the materials allegedly were shown to be to a large extent segregated. Appellant anticipated that sludge stabilization would be accomplished in about seventy-three work days, or about three months. However, the sludge was not found in large deposits but was encountered in thin discontinuous "marbleized" layers intermingled throughout the excavation area. (Tr. 954-956).

29. Appellant had planned to excavate and stabilize approximately 1000 cu. yds. of material a day, however during the first month it treated no more than between 300-400 cu. yds. per day. (Tr. 276, 855, 856). Appellant indicated that the reason for this low production was because the material was not found in distinct, segregated pockets but in fact in a "marbleized" condition. (Tr. 954, 956). Respondent, who did not consider the production low for what it considered to be a two year project, indicated that Geo-Con's problems were the result of unsuitable and too much equipment for the limited work area of the site, equipment downtime, particularly the large DMAG which was down more than it was operable, poor site plan, lack of management oversight, uncoordinated work effort, equipment collision, abuse of equipment by inexperienced operators, and numerous heat stress rest breaks as the cabs of the equipment were not air conditioned. (Tr. 555-557, 928, 1065, 1068). Respondent supports its position with contemporaneous diary entries made by Robert Brandt, Appellant's group manager, which stated in essence as follows:

a. Brandt indicating work at site disorganized and that Obenauf, project manager, was ineffectively managing the site.

b. Ryan complained to Brandt of men taking excessive time on breaks, of poor uncoordinated equipment movement, and a general lack of enthusiasm and told Brandt to "kick it and make it go."

c. Ryan and Brandt discussed need for second shift, additional supervision, and a good operations manager.

d. Operator causing problems—switch after lunch. Job seems fragmented, needs direction.

e. Work uncoordinated, lack of direction, trucks sitting, loaders cannot get to pits, trucks in one another's way (Tr. 264, 268, 269, 270, 929, 1028; Exhs. R-8, 10, 13).

30. The contract-recommended sequence of work was for excavation to proceed in Area 2 from the west side to the east side in three stages. (Exh. R-86, Sheet A; R.4, Tab 47). By following the contract-recommended sequence, the Contractor could have used

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each zone as a working platform and stockpile area while excavating the adjacent zone. Geo-Con did not follow the contract-recommended sequence, which caused a limiting of the work area available for equipment movement. (Tr. 558-560).

31. Geo-Con encountered additional problems in its stabilization effort such as: (1) lack of appropriate clean up of bedrock; (2) 1:1 slope not maintained which caused some material to fall into the excavated area; (3) lime stockpiles were not maintained causing shortages for mixing operations; (4) lack of water control on the site caused rain to make site a quagmire and unworkable. (Tr. 932, 1070-1072).

32. As most of the material excavation had a pH over 12, it was classified under the contract as bulking material and could not be used for backfill. Appellant stocked the bulking material to use eventually with the low pH sludge. This would bring the pH of the combined material to less than 12 and make it suitable as backfill. (Tr. 462-465).

33. On August 8, 1989, the Corps allowed high pH material, which had been stockpiled, to be used as backfill, provided:

> Stabilized sludge with a pH greater than 12.5 can be placed on an occasional basis only, provided the Contractor mixes lower pH material during compaction efforts with the sheepsfoot roller. This mixing requirement also applies to any material placed as backfill that has a pH of 11.5 to 12.5.

34. The sludge material encountered varied significantly in pH values which made the design mix stated in the contract to achieve the required pH inapplicable in certain situations. (Tr. 62, 63, 276).

35. Appellant continued to encounter numerous rocks and a "hardened crust" up to 5 feet thick which made its plan of excavation using backhoes with rotary-mining attachments unworkable. Appellant eventually utilized backhoes with a standard bucket to mix the material. (Tr. 215).

36. While Appellant excavated in Area 1, concentrations of contaminated sludge began to seep from beneath the existing protective dike on the east side. This area was outside the limits of excavation shown on the contract drawings. The Respondent decided not to increase the work area and directed Geo-Con to spread lime over the contaminated area before backfilling. There was no provision in the contract for this work.

37. On August 1, 1989, Appellant began placing stabilized material into the excavation in Area 1.

38. The specification in Section 2H, Paragraph 3.1.3.8, required that the stabilized material was to be placed in the previously excavated area and compacted in eight inch lifts, and that "the compaction shall be 100% of the density obtained by ASTM D698 at the in place moisture content...". During the review and approval of the Sludge Stabilization Plan, Geo-Con asserts it was directed to change the compaction criteria from in-place moisture content density to "... 100% of maximum dry density as determined by ASTM D698." (App. Exhibit 32). However, Respondent asserts that Geo-Con, itself, had proposed the 100% of maximum dry density in its stabilization plan. (Tr. 862, 867; R.4, Tab 53). This stricter criteria allowed Appellant to save time by eliminating the need to test the material to determine the moisture content. (Tr. 864). The Government permitted Geo-Con to use the stricter test. (Tr. 863).

39. The contract also required that the backfill material was to have a water content of less than 32% as determined by ASTM D2216.

40. As backfill proceeded, Appellant found that the material which had been stabilized did not meet these two criteria. The stabilized sludge contained liquids, other than water. Appellant reworked the lifts of material, adding dry bulking material. In some instances, Geo-Con placed dry bulking material in an attempt to "dry out" the fill. Numerous QA/QC reports indicate that the material could not be compacted at all if the moisture content exceeded 24 percent. When the moisture content was above 24 percent, the material would pump. When the stricter test could not be met, Appellant went back to the contract-required test. (Tr. 864).

41. The backfill operation proceeded at a rate much slower than had been planned. Since Area 1 was designated in the contract as the stockpile area for material removed from Area 2, sludge stabilization in Area 2 could not proceed until the Area 1 fill was completed.

42. The Area 1 fill was completed on August 16, 1989. The volume of material to be excavated from Area 2 was more than six times the volume to be excavated from Area 1, and the limited work site precluded the complete excavation of Area 2 before beginning the backfilling of Area 2. Appellant's

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plan of operation divided Area 2 into three portions, as follows:

> The next [after Area 1 completed] area containing material requiring treatment is located in the western one-third of the northern lagoon portion . . .
>
> The contract portion that is adjacent to the eastern third will be worked next . . .
>
> The last raw sludge source is located along the eastern dike of the lagoon.

43. Appellant encountered the same subsurface conditions in Area 2 as in Area 1. The sludge allegedly was not visually identifiable, and the quantities of sludge were significantly less than anticipated. The amount of bulking agent greatly exceeded the amount anticipated, and Appellant had to stockpile the material in case it was needed as bulking material later. In addition, the pH of the material was in excess of the required pH of backfill thus rendering it unusable until after it was mixed with low pH contaminated sludge.

44. With the difficulties it had experienced in Area 1 and the difficulties which it was continuing to experience in Area 2, the possibility of completing the project in one year appeared unlikely. In addition, as the sludge stabilization work was temperature dependent, the remaining time available during the 1989 construction season was limited. The contract required that: (App. 37)

> No stabilized sludge shall be mixed or placed if the temperature of the materials either in-place or in the stockpile is less than 45° F.

45. This temperature requirement effectively limited the performance of sludge stabilization to the months of April through October.

46. With the loss in productivity during July and August, Geo-Con accelerated its efforts to try to complete sludge stabilization before winter weather precluded the work. Geo-Con added one mixing pit and expanded the size of the existing pits, effectively doubling the work area, and brought on a second shift, doubling the daily work time. The second shift began operation on August 15, 1989. (App. Exh. 38).

47. On August 16, 1989, Geo-Con notified the Corps that it was raising the pH of the contaminated material by using the stockpiled high pH bulking material instead of adding lime. (App. Exh. 35). Geo-Con was subsequently directed by the Corps to add lime without regard to the resulting pH of the material. The Corps confirmed this when it commented on the minutes of the August 16, 1989 meeting, as follows: (App. Exh. 40)

> Any batch of material containing sludge must be mixed with hydrated lime to neutralize and stabilize the material.

The Respondent indicated that the addition of lime was not necessary to raise pH, but would resolve the problems associated with compacting the stabilized sludge during backfill operations.

48. At this time, Geo-Con discovered that the pH was dropping in the stockpiled material. (App. Exh. 42). At a meeting of August 28, 1989, the Corps directed Geo-Con to spread a layer of lime and work it into the lift when placing material from the stockpile. (App. Exh. 43).

49. By the beginning of September, the original concept of segregating the materials and then applying different specific dosages in a discriminate manner had given way to wholesale treatment of everything with massive dosages of the ingredients in the mix formulas, indiscriminately raising pH to change the materials from acids to bases.

50. When it did not encounter sufficient quantities of sludge in the first third of Area 2, Appellant widened the scope of its excavations. At the September 6, 1989, progress meeting, Geo-Con stated that: (App. Exh. 36)

> Excavation is now proceeding eastward toward the NE corner of the lagoon. Once the NE corner is finished, the excavation will proceed toward the south. This move is being made in an attempt to find low pH sludge. To date, no large pockets of raw sludge have been found.

51. Appellant alleged that the enlargement of the excavation beyond the planned area prevented backfilling of the excavated areas with stabilized material, required the sludge which was found to be stockpiled, hindered movement around the site, and caused double handling of the material, forced the equipment movers back and forth searching for sludge, and disturbed the ground surface until the ground would not support the equipment which would then bog down.

52. While excavating raw sludge on September 11 and 12, 1989, and at times thereafter, Appellant experienced "off-gassing" of potentially hazardous gasses that met or exceeded the stated minimum levels for gas in the contract specifications which would require Appellant to take precautionary actions . . . (Tr. 319-320; R.4, Tabs 65, 66, 90, 92 and 93). In lieu of covering the affected

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areas with environmental foam identified in paragraph 1.4.4 of Contract Technical Provision Section 2H, Sludge Stabilization, the Government permitted Appellant to smother the gasses with bulking material. (Tr. 1062-1063; R.4, Tab 65 No. 63, 66, and 93).

53. Five times in September, on the 11th, 12th, 26th, 27th and 29th, Geo-Con stopped all work and evacuated its employees. (App. Exh. 46). Off-gassing occurred when during the Contractor's excavation sludge materials were exposed. (Tr. 319). The contractor's dragline method of excavating exacerbated the off-gassing. (Tr. 1059-1063).

54. On September 30, 1989, Geo-Con notified the Corps of the continuing impact of the "off-gassing": (App. Exh. 47)

> Due to the unusual high readings of gas (HCL and SO_2) in the active work area, Geo-Con was instructed to do the following:
>
> Real time monitoring is to be performed in the bottom of the excavation pit ... every thirty minutes during construction operations. If equipment has to be stopped it will be done to perform this monitoring.
>
> If readings of gas exceed action levels, the excavated area is to be immediately covered, active work areas shut down, personnel evacuated and report readings to the Contracting Officer and await further instructions.
>
> Time for these delays will be logged and if additional costs are incurred by Geo-Con, a request for additional compensation will be submitted.
>
> (Tr. 278-279).

55. As efforts to perform sludge stabilization continued, gas emissions on October 2, October 3, October 5, October 6, and October 10, 1989, stopped operations. (App. Exh. 48).

56. With the onset of colder weather which would restrict and eventually preclude the sludge stabilization process, Geo-Con, at a special meeting on October 12, 1989, notified the Corps that it was shutting down the project until warmer weather. (Tr. 889; App. Exh. 49). Geo-Con proceeded to backfill the excavated area, seal exposed sludge areas with a layer of stabilized material, grade the stockpiles, and grade and ditch the site to direct runoff into the sedimentation basins. Geo-Con began removing its equipment and, except for a skeleton crew, its personnel. (App. Exh. 50).

57. At the job site meeting of October 12, 1989, Appellant informed the Government it would be submitting a claim for various differing site conditions, including the existence of "large rocks" in the bulking material, the pH of the material, the "absence" of sludge, and the off-gassing. (R.4, Tabs 93 and 102).

58. On November 14, 1989, the Corps confirmed its position taken at the October 12, 1989, meeting that it did not see a basis for an equitable adjustment to the contract for the problems Geo-Con experienced in stabilizing the sludge during the 1989 construction season, and advised Geo-Con to pursue relief under the "Disputes" clause. (App. Exh. 51).

59. Correspondence between the Contractor and the Government concerning the alleged differing site conditions continued during the remainder of 1989. (R.4, Tabs 97, 98, and 101). During a special progress meeting held on December 4, 1989, Geo-Con notified the Government it would be submitting a claim for the various differing site conditions discussed above, and added an assertion that it could not identify and segregate materials to be stabilized from bulking and previously stabilized material. (R.4, Tabs 103 and 106). This meeting was the first written notice provided by Geo-Con to the Government concerning its alleged inability to identify materials by color.

60. Modification P-00007 to the contract was issued on January 29, 1990. (R.4, Tab 116). This modification granted Appellant a 16-day time extension for unusually severe weather during the sludge stabilization process in 1989.

61. On February 22, 1990, Appellant submitted a claim which alleged differing site conditions relating to rocks, lack of segregated materials, absence of sludge, off-gassing, delays and problems with identifying materials, and requested $1,770,804.11 in compensation. (R.4, Tabs 107 and 108). Although this claim was certified in accordance with the Contract Disputes Act, the certification required by Contract Clause 76, for overhead costs, was not provided. (R.4, Tabs 3, 107, and 108). Following docketing by the Board as Appeal No. 5749, Appellant, on August 15, 1990, filed a Complaint with the Board. On March 27, 1991, at the request of the parties, the Board issued an Order of Dismissal Without Prejudice with right of reinstatement. On January 8, 1992, at the request of Appellant, the Board reinstated Appeal No. 5749.

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ENG BCA No. 5976

62. The findings of fact stated previously in ENG BCA No. 5749 are incorporated into ENG BCA No. 5976 as background of the continuing dispute between the parties for the years 1990 and 1991.

63. By letter dated February 9, 1990, Appellant reiterated its problems encountered in 1989 and submitted a revised work plan. (R.4, Tab 68). Geo-Con proposed going to an in-situ "shallow soil mixing" method to stabilize the site and to minimize off-gassing. (Tr. 83-87; Exhs. A-13, A-20). On March 2, 1990, Respondent rejected the proposal as this method had never been used with acidic sludge, could not scrape and seal the bedrock, and could not stabilize hard material. (Tr. 907-908). Following a series of meetings, Geo-Con submitted a revised sludge stabilization plan which the Corps approved. Geo-Con proposed a change in methodology for sludge stabilization in 1990. Instead of large hydraulic excavators, a Manitowoc 3900 dragline with a four cubic yard bucket would excavate, premix, and place the material in the mixing pits. The use of this machine placed the operator over one hundred feet from the source of any off-gassing. The boom length gave the dragline an ample area from which to collect the necessary materials for proper mixing. Secondly, the dragline operation would have the effect of premixing the sludge and soils during its excavating cycle. The dragline operator would attempt visually to balance the proportions of sludge and bulk in accordance with the specification requirements as the pit was loaded. During pit loading operation, a front-end loader would shuttle lime from a silo to the mixing pit. After the pit was loaded, an hydraulic backhoe would mix the materials in the pit to combine the sludge, bulking soils and lime. While the material was being mixed by the backhoe, the dragline would load a second pit with soil and sludge. In May 1990, Appellant began the mixing of sludge in the mixing pits. (Tr. 98-100, 275; Exh. 146; R.4, Tab 69). Geo-Con had removed Mr. Obenauf and replaced him with Mr. Brandt as project manager and Mr. Workman as superintendent. (Tr. 210, 228, 231). Geo-Con's productivity increased in the second year over its first year efforts. (Tr. 230-232).

64. On June 11, 1990, Respondent informed Appellant that contentions of differing site conditions must be provided prior to Appellant's disturbing the site and alleged that when it went to investigate the Appellant's numerous alleged differing site conditions the sites had been disturbed preventing investigation. (R.4, Tab 69). Geo-Con continued to insist that it could not utilize the specified mix design to achieve the required results, which made for considerable remixing. (Tr. 100, 326). Respondent insisted that part of the problem was that Geo-Con's mixes did not comply with contract requirements, were poorly performed, and that the recipe should be adjusted by the Contractor to achieve the desired pH results. (Tr. 63, 240, 1049-1051).

65. On June 15, 1990, the Respondent allowed stockpiling of sludge at pH levels above 11.5 as the pH levels of the stabilized sludge had generally gone down over a period of time. (R.4, Tab 69).

66. By letter dated June 20, 1990, Appellant reported the results of bench scale tests of five segregated types of sludge: black solid hard sludge, white waxy sludge, grey sludge, black tarry sludge, and black coal fine sludge. Each was mixed with bulking agent and lime under the "recipe" prescribed by Section 2H, Paragraph 2.3, of the contract specifications. All five failed to meet the pH levels of 9 to 11.5. Four black hard solid sludge, white waxy sludge, black tarry sludge, and black coal fine sludge were not brought up to the required pH range; and one, grey sludge, exceeded the range. (R.4, Tab 70). The results of the bench scale tests were reported as follows:

1. Black Solid Hard Sludge—This material was likened to tar and at times required ripping to excavate from the area. A total of eleven samples were extracted of this material which exhibited a pH range of 0.45 to 1.16. The average pH of this material after throwing out both the low and high readings was 0.61, or almost as acidic as pure sulfuric acid which has a pH of 0.3.

2. Yellow or White Waxy Sludge—This material appeared to be the yellow waxy waste identified in the Specification. Six samples of this material were extracted which exhibited a pH range of 1.63 to 12.10. The average for this material, after throwing out both the low and high readings, was a pH of 7.99.

3. Black, Tarry Sludge (sometimes characterized as waxy or containing white or grey specks)—This material was softer than the black solid sludge in Item No. 1 and also tended to be a higher pH than Item No. 1. Sixteen samples of this material were extracted and a pH range of 0.52 to 6.59 was recorded. An average pH for this material, after throwing out both the low and high range readings, was 1.47.

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4. Black Coal Fines—This material, granular in nature, appeared to be a coal or coking waste and may have been the carbonaceous soil noted in TAT Well #4 and was readily excavated. Twenty samples of this material were extracted which exhibited a pH range of 0.58 to 2.75. An average of this waste, after throwing out the low and high range, was 0.71.

5. Other wastes encountered included a grey sludge with a pH of 1.19 to 1.48, a yellow tarry sludge with a pH of 1.07, and a muddy sludge with a pH of 0.10 to 1.22.

67. On June 21, 1990, the Respondent's consultant, GAI Consultants, Inc. ("GAI"), stated the conclusions of a previously made site visit. (R.4, Tab 71). It reported that the recipe was working, albeit requiring occasional overdosing with lime and remixing of batches. However, Appellant contended that the "mix design" in the specifications did not provide the expected results, on many occasions. Respondent countered that Appellant's charging of the mixing pits was not consistent and mix proportions were not according to design.

68. On July 2, 1990, a second bench scale study was conducted by Appellant. This time six batches of sludge using the specified recipe were tested. (R.4, Tab 72). All but one of the treated batches fell below the required pH range of 9 to 11.5. One, gray with black streaks, exceeded it. None fell within range.

69. At the progress meeting of July 5, 1990, Appellant reported it had achieved the proper pH range with the use of additional lime and announced a revised plan to use a dragline. The Government agreed to the plan. (R.4, Tab 73).

70. On July 10, 1990, Respondent questioned Appellant's use of a D-9 loader in places where it contended a D-68P would have been more efficient. (R.4, Tab 69).

71. On July 17, 1990, the Government permitted the stabilization of sludge at pH levels of seven (7) or above, provided that the pH of backfill was also at an acceptable level. (R.4, Tab 69).

72. In the middle of July, 1990, Appellant encountered two layers of "black, solid, hard sludge" which its excavating equipment could not penetrate. The material varied from 3 to 7 feet in thickness. Eventually Appellant used a "dozer" to break up the material in order to remove the material to the mixing pits for stabilization. (R.4, Tab 79). Boring logs and drawings pertaining to the areas where the material was encountered indicated hard, stiff materials and crusts were to be expected. (Tr. 1116, 1121).

73. During the mixing cycle of the black, solid, hard sludge, temperature in the mixing pit generally reached 152F or higher. After the mixing was complete, the highest pH level of the 11 bench scale tests was 1.88 with an average of 1.4 which was well below the required minimums. In order to achieve the proper pH levels, Appellant reduced the amount of sludge and provided greater quantities of bulking agent and lime.

74. During the breaking up of the black sludge, the initial mixing which raised the temperatures of the mixed product, and the later addition of large amounts of bulking agent and lime, significant off-gassing resulted which required the Contractor to take appropriate actions under the contract.

75. At the same time, Appellant was encountering major amounts of yellow/white waxy, black tarry and black coal/cokering waste sludge. With each of these sludges, Appellant found great difficulty in reaching the prescribed pH levels, which it blamed on the sludges not being homogenous or not having consistent chemical characteristics, on the contract-stated recipes not producing the required results, on the bulking agent not having the required high pH, and on the heat generated by the mixing process. Appellant alleges that the above problems were in conflict with what Respondent had indicated in the contract. Respondent replied to Appellant's allegations that nothing encountered was not as stated in the contract and that Appellant never gave notification of the alleged differing site conditions or problems in sufficient time for investigation before the area was disturbed. (R.4, Tab 80).

76. Off-gassing continued as a major source of contention between the parties in 1990. Appellant claimed that off-gassing occurred much more often than was to be expected, that at least 23 times during the 1990 season work had to stop for a minimum of 60 minutes because of off-gassing, that the alleged Government direction to use bulking agent to cover the gasses rather than the contract-required foam only trapped the gases and did not relieve the problem, and that the Government disapproved the Contractor's proposed solution because it did not want to admit to an off gassing differing site condition. (R.4, Tabs 78, 81, 83, 84, 85, 86, 87).

77. During the 1990 construction season, Respondent and Appellant jointly instituted a system for reporting incidents in an attempt to quantify the impact on the work of

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remixing, material variability, and off-gassing. One hundred and twenty-eight incident reports were issued for the 1990 season, seventy-one of the reports concerned off-gassing. Respondent insisted that only the actual lost time for individual incidents was to be recorded. No impact was acknowledged by the Government.

78. The Respondent brought in GAI consultant (GAI) to review the off-gassing problem, and GAI found the problems stated by the Contractor to be "exaggerated." (R.4, Tab 88). Respondent informed Appellant that it was reporting shut-downs due to off-gassing when other reasons existed, that some of the Contractor's monitoring devices were either not working or calibrated in error, and that the Contractor's air monitoring system had been deficient in both 1989 and 1990. (R.4, Tabs 94, 95, 98, 99, 100).

79. The Contractor continued to assert in 1990 that it was unable to classify sludge by color and had to resort to pH testing to determine mixing ratios. (R.4, Tab 79).

80. Appellant alleges that the work was affected by six significant impacts in 1990: material variability that required substantial remixing of batches; hard lenses of material not identified in the plans or borings that required substantial ripping by a large bulldozer before it could be excavated; substantial off-gassing of the excavated materials that necessitated stringent control measures and frequent work stoppages; material not segregated which required treatment of essentially all excavated material instead of only the portion defined by the project specifications; weather and temperature restrictions; and disruption of the work caused by delayed restart of productive operations following any incident of work stoppage.

81. As noted on incident reports, twenty-seven "pit remixes" were required between May 24 through July 12, 1990, because of low pH.

82. On July 13, the Government disregarded the contract defined pH range and permitted "overdosing" with lime to reach an acceptable stabilized product. No additional costs for remixing are claimed by Appellant after July 13, 1990.

83. As noted on incident reports, forty-five hard cement-like lenses of dense material requiring "ripping" machinery to remove were encountered by Appellant during the 1990 season.

84. Appellant continued to experience off-gassing of HCL (hydrochloric acid) and SO_2 (Sulfur dioxide) during the 1990 stabilization work. As noted on incident reports, 71 off-gassing actions occurred in 1990.

85. Sludge identification continued as a problem for Appellant in 1990, and it mixed approximately 72,310 cu. yds. of material, essentially all the material at the site.

86. According to the National Climatic Service, 1990 was the wettest year on record in the project area. Appellant's operations were delayed because of the wet weather. All work stoppages, for whatever cause, increased standby time and decreased productivity, which Appellant estimated as a 40% loss of efficiency for 1990.

87. Appellant returned to complete the job in 1991. Substantial completion was accepted as of July 17, 1991. By contract modifications, Respondent extended the scheduled contract completion date to November 9, 1990. Respondent had withheld $140,000 (250 days560) in liquidated damages. (Answer 155, 157).

88. Appellant submitted three claims for the 1990, and 1991 work effort.

a. $350,185.25 and 59-day time extension for the 1990 delays and costs;

b. $957,888.46 and 194-day time extension for the 1991 delays and costs;

c. $140,000 remission of liquidated damages.

89. The Contracting Officer decision denying all of the claims was issued on June 10, 1992. This was appealed by the Contractor on June 12, 1992.

POSITIONS OF THE PARTIES

Appellant contends that the specifications were design specifications wherein Respondent warrants satisfactory performance if Appellant complies with the contract requirements; that the design mix provided in the specifications for the Contractor's use did not perform as indicated; that significant off-gassing encountered by the Contractor during project work was unexpected and in conflict with indications in the contract; that rocks and hard lenses were unexpectedly encountered; that the visual identification of sludge material indicated in the contract was impossible and only pH sampling could identify the sludge; that the sludge was found in thin, discontinuous layers rather than the bulk quantities indicated in the contract; that liquid other than water prevented the Contractor from meeting the changed stabilization requirement of Respondent; that concrete-like dense sludge

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lenses were encountered because of the previous terminated work at the site and were not indicated in the specifications; that the type of sludge and the pH of the sludge and bulking material varied greatly from the consistency expressed in the contract specifications; that virtually all of the excavated material had to be treated and mixed, as compared to approximately 56 to 62% specified in the contract; that sludge came into the work area from outside the contract-defined work area; that the Contractor's site investigation did not reveal a project site so different from that stated in the specifications; and that the above differing site conditions, defective specifications, and changes caused a decrease in contractor efficiency and extended contract performance into three construction seasons rather than the one planned by the Contractor when bidding the job.

Respondent counters that the specifications were performance type which provided a specified formula, to be adjusted as necessary, for sludge stabilization; that the mixing formula when adjusted for the pH of the sludge, worked as contractually designed; that off-gassing was a problem to be expected as stated in the contract documents and as noted in the termination of the previous contract for sludge stabilization at this project site; that the borings, cross-sections, and contract drawings clearly forewarned Appellant to expect rocks, hard lenses and stiff concrete like material; that the sludge *was* visually identifiable; that the Contractor always planned and expected to perform pH testing to develop the proper formula for the particular sludge stabilization; that the contract plans and specifications detailed the sludge as being in thin, discontinuous layers, as well as in bulk pockets, as actually was found by the Contractor at the site; that Appellant, not Respondent, changed the compaction stabilization requirement in order not to have to test for water content; that the dense concrete-like layers encountered by Appellant were readily foreseeable by Appellant prior to bid on the basis of a proper site investigation, a careful review of the plans and specifications, and a review of the information available about the previously terminated contract; that the contract imparted to a Contractor the expectation of encountering various levels of pH at the project site and of the need to adjust the mixing formula to compensate for these variances; that Appellant mixed virtually all the material excavated because it believed this would be more efficient than segregating the material; that the contract provided for extension of the area to be stabilized in order to account for sludge from outside areas; and that there were no differing site conditions, Type I or II, no defective specifications, no changes, and no impacts on the Contractor's job performance because of the fault of Government design, action, or inaction.

DECISION

There exist numerous separate issues to be resolved in this appeal. Under the mantle of differing site conditions, defective specifications and change allegations hides the paramount issue of actual *impact* on Appellant's operations in stabilizing the "sludge" at the project hazardous waste site. As detailed in the following, Appellant and Respondent each prevail on certain of the distinct issues. As the appeal is here solely on entitlement, the quantum result from this decision reflecting the *impact* on Appellant's operations either will be negotiated by the parties or adjudicated later by this Board.

A number of the arguments presented by the parties can be characterized as "double-edged swords." For instance, does the fact that a previous contract for the same work was terminated for the convenience of the Government provide the Government with superior knowledge of the site or alert the Contractor as to the site conditions and the significant problems encountered by the previous contractor? By asserting significant time impact associated with issues on which it does not prevail does the Contractor limit recovery as to the issues on which it does prevail because of concurrent delays? This later issue may make negotiation of the appropriate equitable adjustment difficult.

As in many cases, there is much posturing by the parties in support of their positions; however, in this appeal, as is usually the case, the contract plans and specifications are generally the key elements determining the result as to each of the issues presented to the Board.

Before considering the specific issues raised by the parties, the Board notes that the record, as detailed in the findings of fact, is replete with evidence of Appellant's misreading the contract plans and specifications, misjudgment, intentionally under bidding by $1,000,000, poor work plans, poor construction equipment, poor excavation procedure, poor excavation work, and, initially, poor construction management. Appellant's obvious enthusiasm and aggressiveness to secure this contract led it to make judgments which, at best, were overly optimistic and, at worst, ignored the

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clear warnings provided in the contract specifications and drawings. These factors have considerable impact and influence on the Board's ultimate decisions.

Mixing Formula

The Respondent provided in the contract specifications a mixing formula to stabilize the sludge which Appellant was directed—"shall use"—to use unless Respondent approved another formula requested by Appellant. Appellant reasonably relied upon Respondent's formula, particularly in the face of Respondent's stressing in the contract specifications the amount of time and effort that it and its consultant had taken in developing the formula in part based upon its experience on the previously terminated contract to provide sludge stabilization at this site. It was reasonable for Appellant to believe, after all the effort expended by Respondent and its consultants to develop the proper "recipe," and after considering the history of the earlier attempted remedial work at the site, that the mix design was developed to handle the "worst case scenarios" at the site, not just the average conditions for which, it later was revealed, the mix recipe was actually designed. Thus, Appellant reasonably relied upon the contract-stated mixing formula when it bid to perform the sludge stabilization.

Respondent's eventually allowing the use of a significant surcharge of "lime" in the mixing process in order to accomplish the stated performance results strongly suggests that the mixing formula was not adequate for complete job performance.

Respondent's argument that the contract specifications were performance and not design specifications is not supported by the record. Though the specifications state that the formula may require adjustment to meet the stated performance requirements, the specifications also state that the Contractor "shall use" the formula for mixing and stabilization of the sludge. Thus, considering all the effort expended by Respondent in determining the mixing formula, of which effort Respondent informed prospective bidders, the Appellant was reasonable in expecting the mixing formula, with possibly *minor* fine tuning, to produce the performance results for which it was designed by Respondent.

When the Government specifies a specific procedure for implementation, the Contractor has a right to rely on that procedure to accomplish the intended results, if the procedure is properly followed by the Contractor. An implied warranty runs from the Government to the Contractor that the detailed design specification, if followed, will produce an acceptable result. *See United States v. Spearin*, 248 U.S. 132 (1918); *J.D. Hedin Construction Co., Inc.*, 171 Ct. Cl. 70, 347 F.2d 235 (1965); *Lionsgate Corporation*, ENG BCA No. 5391, 91-1 BCA ¶ 23,368. When the mixing formula provided by Respondent did not produce sludge stabilization results which met the performance results specified in the contract and extensive remixing by Appellant was required, Appellant had encountered a defective specification. It is entitled to an equitable adjustment for the additional costs it expended to overcome the effects of the failure of the specified mixing formula.

Off-Gassing

Appellant's position that off-gassing was an unanticipated problem, because of the Government's thorough work in creating the mixing formula and because of the Government's knowledge from the previous contract, is not supported by the record before the Board. First, the most significant off-gassing problems encountered by Appellant were not in the mixing process but were encountered during the excavation at the site. The contract specifications clearly forewarned a potential bidder, the Contractor, of "violent" off-gassing problems encountered by the contractor at the site under the previously terminated contract.

Further, the contract specifications are replete with warnings of off-gassing concerns and with methods to combat the potential significant and serious off-gassing at the site. Some of these contract warnings, directions and requirements concerning the likelihood of a contractor encountering significant off-gassing while performing the excavation and stabilization work at the project site are as follows: a. Level B protection equipment required for Contractor personnel during excavation and stabilization work; b. Elaborate air monitoring system required to be continuously operating during site work; c. Gas vent wells required at all times during the work at the site; d. Boring logs indicating off-gassing when drilling performed; e. Special project procedures required for health and safety concerns at the site; f. Acidic sludge waste to be treated, from which a reasonably experienced contractor would expect the strong potential for off-gassing; g. Third ranked superfund site, where the original stabilization contractor was terminated for convenience because of a significant off-

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gassing incident. When read as a whole and when the information provided in the specific provisions of the contract is taken into account, it is incredible that the Contractor would not have expected the potential for significant or serious off-gassing problems at this site.

Appellant's assertions that the off-gassing constituted either a Type I or II differing site condition, or rendered the specification defective, are without merit. Obviously, from above, the contract clearly and unambiguously forewarned the Contractor of the potential for significant off-gassing and a reasonably experienced Contractor dealing with the excavation and stabilization of acidic sludge waste would expect off-gassing to occur. There was no superior knowledge within the possession of Respondent withheld from Appellant as to the potential of off-gassing at this project.

Appellant's efforts now to attach great significance to a brief discussion with Government representatives after bid is unavailing. The focus of the meeting was the reason for Appellant's significantly low bid, which centered upon the issue of Appellant's intent to complete the project in one construction season and the type of equipment it proposed using. The Government representatives were estimators, not experts on sludge excavation and stabilization process, and they did not and could not provide a warranty of no significant off-gassing to be expected during the project work. This purported understanding by Appellant is totally countered by the specifications which clearly detail and warn of the potential for significant off-gassing and by the experience of this Contractor who reasonably should have expected off-gassing problems when dealing with highly acidic wastes.

Rocks/Boulders/Hard Lenses/Concrete Like Material

A reading of the boring logs, test wells and contract specifications do not support Appellant's contention that it was led to expect essentially an easy homogenous excavation effort at the site. Besides the warning in the contract specifications of the difficulties encountered by the previous contractor at the site, the boring logs and test wells clearly indicate the presence of rocks, boulders and significantly hard material to be excavated at the project site. (See Finding 21E(1) & (2).). The specifications warn the Contractor of the need to provide and to adapt the necessary equipment to perform the excavation of the various materials expected to be found at the project site. A site inspection prior to bid would have revealed the presence of cobbles and outcroppings of hard and stiff materials. (Finding 1)

This record simply does not support the reasonableness of Appellant's alleged view of an easy and routine excavation and stabilization project. From the lessons learned from the previous excavation and stabilization contract at this site and from the detailed (142 pages of logs) description of the site provided in the contract specifications, the Appellant should reasonably have expected a difficult excavation effort and the site conditions actually encountered.

Bulk Sludge/Lenses/Sludge Intermingling

Appellant's assertion that the contract documents misled it into assuming that the sludge/waste would be found in discrete, severable pockets ready for segregated excavation is in conflict with contract plan and specification when read as whole and when giving meaning to all portions of the contract without making significant sections of the specifications and drawings mere surplusage.

Appellant's sole reliance on cross sections based on projections from borings to support its allegations is not convincing considering the considerable additional data found in the contract specifications and drawings. First, it was obvious that the cross sections were interpolations of the boring data furnished. Even the sections themselves would not be interpreted by a reasonable, experienced contractor to warrant clearly definable pockets of segregated sludge; nor would a reasonably experienced contractor ignore the rest of the contract specifications and drawings to create an interpretation that the interpolated cross sections exactly defined the area.

The contract boring data clearly shows an intermixing of lenses of various materials, as well as some limited pockets of material. (Finding 21D(6)). Appellant ignored the boring data. The specifications clearly state that the Contractor should expect intermixed lenses of non-homogenous material throughout the project site. (FF 14). Appellant ignored the clearly stated specification language, if the language conflicted with its view of the cross-sections. The history of the project site, known to Appellant, clearly shows a man-made condition which had been reworked over time, including the excavation effort of the first remedial contractor, which would cause the site materials to

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become intermingled. Appellant ignored this history.

When the contract is read as a whole giving meaning to all parts, Appellant's assertion that it reasonably expected the sludge material to be in bulk quantities in defined areas of the project site is not supportable. Though some cross sections indicate that some sludge would be found in definable bulk quantities, the contract plans and specifications clearly forewarned the Contractor that the sludge material would be scattered, varying in consistency, differing in pH values, and found in intermixed lenses throughout the project site and non-homogenous. (Findings 14, 21D(6)).

A reasonable contractor would *not* have expected from the plans and specifications a simple excavation of carefully segregated material. The sludge material was found at the project site as described in the contract plans and specifications.

Color Identification

Appellant's position that it was unable to identify the waste materials by color, black or yellow, as described in the contract specification and that it was required to utilize pH testing to determine what was waste/sludge is not supported by the record.

First, Respondent's testimony at the hearing, supported by convincing photographic evidence depicting site conditions prior to and during the actual excavation and stabilization effort, clearly indicates that the site conditions were as depicted in the contract specification. The photographs showed "intermingled pockets of sludge, soil and previously stabilized material" of different consistencies, and the sludge/waste was identifiable as the "black tar-like sludge, oily ash-like sludge, soil/sludge mix, black, oily tarlike and ash-like waste, and a yellow waxy paste" stated in the contract.

Second, Appellant was apprised in the contract of the need for pH testing of the sludge/waste material, since the stabilized material was required to fall within certain performance characteristics of pH values. Thus, the requirement for pH testing of the sludge/waste material was stated in the contract whether or not the sludge could be identified by color. A reasonably experienced contractor, as Appellant, performing sludge stabilization for acidic sludges would know of the need to perform pH testing to determine the pH values of the material it was stabilizing and to assure the stabilized material met the contract parameters.

Mixing 100% of Excavation

Appellant's position that it *had to* mix and treat all the material on site rather than just the 20,800 cubic yards of estimated sludge is not supported by the evidence. This position taken by Appellant is an outgrowth of its assertion that it expected to be able to excavate clearly distinct pockets or layers of sludge/waste and that it could not identify the sludge/waste by the color indications in the contract. The Board notes its discussion of these two issues previously and will not reiterate it here.

Besides having found against Appellant's assertions on the two issues noted above, the Board finds that it was Appellant's excavation practice and its use of *its* business judgment which led it to mix and treat most of the material it excavated. From the beginning of the project Appellant's excavation plan caused problems: a. The heavy and large equipment it employed was unsuitable for the project site; b. The stockpiling of material at the restricted work site caused surcharging of the contaminants into other soils; c. Some stockpiled material fell back into the excavated areas causing additional contamination; d. The excavation was performed in a macro manner intermingling the sludge/ waste with the other soils, rather than using more discrete and selective excavation techniques.

After the problem of its excavation technique was made obvious, Appellant elected not to excavate selectively but to use a dragline which, by its very nature, intermingled the various materials at the site. Appellant was the party who decided that it was more efficient and economical to excavate and mix essentially all the site material rather than selectively to excavate the sludges, which would be slower and would require discrete stockpiling and sorting. This was Appellant's choice as a business decision and was not required by the contract documents or Respondent. Therefore, Appellant must live with that choice and cannot prevail on this issue.

Compaction Requirement

The parties do not disagree on the soil compaction requirement in the contract or on the actual events that took place in the field. Their disagreement lies in why the events took place. Appellant alleges the Government changed the contract compaction requirements to a more stringent one, while the Government asserts the Contractor voluntarily used the more stringent compaction standard in order to expedite its work, as

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detailed testing would not be required to determine whether the compaction requirement in the contract was being met when the more stringent compaction requirement was being performed.

The evidence produced by the parties at the hearing supports Respondent's position. Appellant has produced no evidence of Respondent's changing the contract requirement for the standard for compaction or provided a reason why Respondent would want to change the compaction requirement. Conversely, Respondent has adduced evidence that the first time the more stringent compaction requirement was indicated was in Appellant's sludge stabilization plan, that Respondent merely approved the plan, and that Appellant had a self interest in time saving by compacting to the high standard, which did not require the sampling and testing as did the contract-required less stringent standard.

Further, the Board finds support for Respondent's position because no modifications were issued changing the contract compaction requirement or changing back to the original contract compaction standard after Appellant experienced difficulty meeting the more stringent standard and since Appellant began using the more stringent standard immediately in its job performance without requesting a change order or giving any indication it considered that the Respondent was changing the contract standard at the time.

Appellant's voluntary effort for its own purpose does not constitute a change by Respondent even though Respondent allowed Appellant to attempt to compact the material to a standard more stringent than contractually required.

SUMMARY

Though all of Appellant's contentions of differing site conditions, defective specifications or changes are not supported by the record, Appellant's assertion concerning the "mix recipe," as stated above, is found supportable by the Board. Thus, the Appeal is SUSTAINED IN PART and DENIED IN PART, as detailed above.

The Appeal is returned to the parties for negotiation of an equitable adjustment in accordance with the above decision and the following observations. Though it is obvious that Appellant suffered some delay and impact because of the failure of the detailed mixing formula stated for use by Respondent, the delay impact must be considered against the concurrent delay impacts caused by the off-gassing which Appellant should have expected, the Contractor inefficiency and difficulty because of its apparent erroneous assumptions of no rock, boulders, and hard material, the erroneous expectation that sludge would be found only in easily distinguishable bulk quantities, the difficulty it encountered in meeting contract compaction requirements and its own inefficient operation. Respondent should release to Appellant the amount of liquidated damages assessed by it which relate to the delay in contract completion caused by the specified "mixing formula." If the parties cannot negotiate an equitable adjustment under these guidelines within 120 days, the Contracting Officer shall issue a unilateral determination within 180 days of the date of this decision. Either party may then request the appeal be returned to the Board's docket.

[¶ 26,360] White & McNeill Excavating, Inc.

IBCA No. 3108-F, September 23, 1993. Contract No. 4-CC-60-00830.

Attorney Fees and Costs Under Equal Access to Justice Act—Prevailing Party—Board Raised Issue.—Even though the board rather than the contractor raised the issue upon which a contractor prevailed in its appeal, the contractor was entitled to award of attorney fees because the evidence presented by the contractor and its claims led the board to the issue upon which the board based its decision in favor of the contractor.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Burden of Proof.—The government failed to meet its burden of proving substantial justification for its position in litigating a contractor's appeal, because the government failed to show that it was reasonable for it to have continued to enforce a defective specification after it determined that the specification was unnecessary to carry out the intent of the contract. Further, the government had no reasonable basis for its

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contention that the contractor had suffered no harm as a result of the defective specification.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Successful to Unsuccessful Claims.—A contractor was entitled to the award of 10 percent of attorney fees incurred in one appeal and 56 percent of the fees incurred in a second appeal, because those percentages represented the successful versus unsuccessful claims submitted in the two appeals. In the absence of sufficient records to determine how many hours were expended on each issue, the board based the fee awards on the *pro rata* share of successful to unsuccessful claim amounts.

For the appellant: Winston & Cashatt, Spokane, Washington, by L.H. Vance, Jr. For the government: Gerald R. Moore, Department Counsel, Billings, Montana.

Before ROME and PACKWOOD, Administrative Judges.

ROME, Administrative judge:

BACKGROUND

I *Fees and Expenses Sought*

White & McNeil Excavating, Inc. (WME) has applied under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988), for an award of a portion of its attorney fees and expenses incurred in three aspects of prosecuting its appeal, as follows: $10,317.10 in connection with its success in *White & McNeil Excavating, Inc.*, IBCA No. 2448, 92-1 BCA ¶ 24,534 (*WME I*), in proving part of a riprap specification defective; $3,937.50 related to a quantum remand issue decided in *White & McNeil Excavating, Inc.*, IBCA No. 2448, 93-1 BCA ¶ 25,286 (*WME II*);[1] and $1,600 incurred for its EAJA application.

The *WME I*-related amount claimed is about 10 percent of WME's incurred fees and expenses (at allowable EAJA rates and with certain deductions) and is based upon the proportion of WME's ultimate recovery in *WME II* after remand, $35,358.11, to the total it had sought in *WME I*, $351,234. WME has not apportioned the amount it seeks based upon its efforts on remand, although it was not fully successful; it had sought $63,442.11, based upon two contentions, and recovered only the $35,358.11, as we elaborate upon below.[2]

II. *The Appeal—WME I*

WME appealed from the contracting officer's decision denying its claims in connection with riprap work performed under a dike repair contract with the Bureau of Reclamation (BOR). After reducing its claim at hearing, WME sought $351,234, alleging that BOR wrongfully had precluded it from exploring alternatives to the contract-specified quarry; BOR had superior knowledge about alleged quarry deficiencies; there was a Type I or a Type II differing site condition; BOR's rejection of WME's riprap work and requirement for rework was untimely; and BOR's riprap specifications were defective and its rework requirement a contract change.

In *WME I* the Board denied WME's claims, except to the extent that it found a portion of the riprap specification to constitute a "bottleneck," as WME had alleged, and to be unreasonable in practice. WME and BOR had spent at least 10 percent of their litigative and heard efforts on the defective specification issue.

Moreover, during contract performance, BOR never conceded officially that the specification was defective or unreasonable in any part. BOR's designer had changed the standard BOR specification for the riprap at issue but, although it could have been done at the time the design changes were being considered, BOR did not plot the "bottleneck" effect of the changes until after the contract had issued and after WME had accomplished its initial riprap placement. It was after WME had placed the riprap, and BOR had directed rework because the riprap failed to meet specifications, that BOR determined that the "bottleneck" portion of the specification was not necessary to design intent.

BOR did not notify WME about this determination, however. Indeed, BOR continued to stress to WME that all specification for placement remained in place and continued to enforce the specification for placement purposes. Although BOR ultimately

[1] Both *WME I* and *WME II* were affirmed by the court of appeals: *White & McNeil Excavating, Inc. v. Secretary of the Interior*, Fed. Cir. No. 93-1013 (May 5, 1993) (*affirmed mem.*).

[2] In addition to the amounts stated, the *WME I* and *WME II* claimed and awarded amounts included interest under the Contract Disputes Act, 41 U.S.C. § 611.

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relaxed the bottleneck portion of the specification for acceptance purposes, it never relaxed it for payment purposes, as it appeared from the record in *WME I*, and as WME confirmed on remand.

At hearing, BOR continued to defend its riprap specification, and to deny that it had caused WME damage, although its design expert admitted that the bottleneck was not reasonable. In fact, for a follow-on contract, BOR changed the specification to omit the bottleneck.

The Board found that WME had failed to meet riprap specification requirements, even if the defective portion were not considered, and that WME's own actions in delay testing, rather than the bottleneck, had resulted in the need for rework. The case was a close one, however, and WME's efforts were effective in proving that the specification was defective in part.

In the overall context of its claims that the specification was defective and the rework requirement unjustified, WME presented documentation which suggested that BOR had taken payment deductions for placed riprap that did not satisfy the bottleneck portion of the specification. WME was seeking payment for all of its riprap placement and rework efforts, and, thus, had not isolated any particular payment deduction on account of the bottleneck portion of the specification, but it was WME's efforts that led to the Board's quantum remand in *WME I*, issued on November 4, 1991, with the following direction:

> Nevertheless, although the bottleneck did not cause BOR to be liable for WME's rework costs, it was unreasonable, as established. Therefore, any payment deduction for placed quantities that did not satisfy the unreasonable restriction would itself be unreasonable and not within BOR's contract rights * * * to deduct or refuse to pay for nonconforming work. If there was such a deduction, and there appears to have been [citation to fact findings], the parties are to calculate the appropriate upward adjustment, including interest, within 90 days of the date of this decision, and BOR promptly is to pay WME accordingly. Once payment is made, or if there was no deduction, BOR is to file a motion to dismiss this appeal with prejudice * * *.

92-1 BCA at 122,443.

III. *The Remand—WME II*

On December 13, 1991, WME's counsel submitted documentation to BOR's counsel demonstrating that payment deductions had been taken based upon WME's failure to satisfy the unreasonable "bottleneck." WME sought $63,442.11 in compensation for those deductions and in payment for 2,380 tens of hauled riprap that BOR had alleged was wasted in WME's grizzly operation and WME contended was placed properly. Alternatively, WME sought $35,358.11 for the payment deductions based upon the defective portion of the specification alone. Upon subsequent inquiry by WME's counsel, BOR's counsel advised that WME's materials had been forwarded to the contracting officer.

When, after more than 90 days had passed from the date of *WME I* and WME had not received any response or proposal from BOR on the remand issue, on February 14, 1992, WME filed a motion to approve its damage calculations, supported by documentation. BOR responded on March 12, 1992, with a motion to dismiss denying any entitlement. BOR included a complete set of certain BOR notes upon which WME had relied, and offered the calculations and assumptions of BOR's counsel (albeit not in affidavit or declaration form). BOR did not provide any information or affidavit or declaration from the author of the notes, the contracting officer, or anyone else involved with the contract.

In *WME II*, the Board noted that BOR's primary focus during contract performance had been upon the elimination of rock that did not satisfy the bottleneck's strictures; that this had contributed greatly to BOR's requirement for removal of placed riprap, additional hauling and additional placement; and that the evidence demonstrated that BOR had aimed to eliminate bottleneck-related rock from its payment base. We found that WME had failed to prove that BOR's waste contentions were incorrect, but that it had established payment deductions properly based upon the defective part of the riprap specification, in the claimed amount of $35,358.11.

IV. *Procedural Course of WME's EAJA Application*

On December 4, 1991, while the remand was in progress, WME filed an EAJA application for $143,178.64 in attorney fees and expenses. By order of December 10, 1991, the Board directed the parties to attempt to resolve the fee application along with the

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remand issue. The Board granted the parties an additional 30 days to negotiate the fee matter, but stressed that nothing in the order was to serve as a basis for delay in paying WME any amount due pursuant to *WME I* and the remand. On February 19, 1992, after WME had filed its motion to approve its damage calculations, and it was apparent that the parties had failed to resolve any quantum issue through negotiation, the Board dismissed the EAJA application as premature.

After the Board issued *WME II* on July 24, 1992, deciding the remand issue, WME refiled and supplemented its application on August 12, 1992, substantially reducing its claimed fees and expenses. By letter of August 27, 1992, appellant advised that it would supplement its EAJA application to comply with the Board's rules and did so on September 2, 1992. However, on October 20, 1992, the Board received notice that WME had appealed to the Federal Circuit from the Board's decisions. We dismissed the refiled EAJA application without prejudice to reinstatement within 30 days of final disposition of appellant's appeal. *See* 5 U.S.C. § 504(a)(2).

The Board's decisions were affirmed on May 5, 1993, and we reinstated WME's EAJA application by order of May 21, 1993, pursuant to its motion and its representation that it would not appeal further.

DISCUSSION

I. *Prevailing Party*

[1] EAJA provides that, in an adversary agency adjudication, fees and other expenses incurred by a qualifying prevailing party,[3] other than the United States, in connection with the proceeding, are to be awarded to that party, unless the adjudicative officer finds that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). BOR has not alleged, and we do not find, any special circumstances that would make an award unjust. Hence, we consider only whether WME was a prevailing party and, if so, whether BOR's position nonetheless was substantially justified.

EAJA does not define the term "prevailing party" but its legislative history makes it clear that prior judicial interpretations of the term should be applied. *Austin v. Department of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984). The Supreme court established in *Hensley v. Eckerhart* 461 U.S. 424, 433 (1983), addressing the concept of prevailing party under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, that a litigant is deemed to be a prevailing party if it succeeds on any significant issue which achieves some of the benefit it sought in bringing suit. This definition has been applied repeatedly in EAJA cases, *e.g.*, *Austin*.

Under appropriate circumstances, a contractor may be a prevailing party for EAJA purposes even if it recovers as little as 10 percent of the total amount claimed. *Delfour, Inc.*, VABCA Nos. 2049E, *et al.*, 90-3 BCA ¶ 23,066 at 115,817; *Crown Laundry & Dry Cleaners, Inc.*, ASBCA Nos. 28889, *et al.*, 87-3 BCA ¶ 20,034. *See also Jackson Engineering Co.*, ASBCA No. 36220, 91-3 BCA ¶ 24,178 (although denying an EAJA application because the Government proved its position substantially justified, the Armed Services Board of Contract Appeals first found the appellant to be a prevailing party based upon a pre-hearing settlement which gave it only 8.8 percent of the amount it claimed).

BOR states that WME was not a prevailing party in any sense because the Board, while partially accepting WME's defective specification theory, rejected the argument that the defective specification caused any of appellant's claimed costs. BOR asserts that the issue of whether there had been any deduction from payment quantities had not been raised by either party. However, WME had claimed strenuously during contract performance and at hearing that it was not being treated fairly regarding placed riprap and the re-work requirement; that the riprap specification was defective; and that it had not been paid properly for rock placed, and re-placed. As noted, it was documentary evidence concerning placement and payment, relied upon by WME, that prompted the remand. In our judgment, the remand issue arose out of, and was linked to, WME's overall claims that the defective specification had caused it monetary damage.[4]

[3] To qualify for an EAJA award, a corporate entity must have a net worth of less than $7,000,000 and employ 500 or fewer persons. 5 U.S.C. § 504(b)(1)(B). WME has averred that it meets these requirements and BOR does not dispute its qualifications.

[4] Moreover, the Interior Board has stated previously that an appellant can be a prevailing party even if the Board granted relief that was not based upon a theory proffered by the appellant. *R&R Enterprises*, IBCA No. 2664-F, 90-3 BCA ¶ 23,039 at 115,671. Some Boards have held differently in

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II. *Substantial Justification*

[2] Once a qualified litigant has been determined to be a prevailing party, the burden shifts to the Government to prove that its position was substantially justified. *Salisbury & Dietz, Inc.*, IBCA No. 2382-F, 89-3 BCA ¶ 21,981 at 110,559. Whether an agency's position was substantially justified is to be determined based upon the administrative record as a whole. 5 U.S.C. § 504(a)(1). The Government must establish substantial justification in the context of the litigation and the administrative action or inaction upon which the adversary adjudication was based. *Devine v. National Treasury Employees Union*, 805 F.2d 384, 386 (Fed. Cir. 1986); *Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049. The Government's position is substantially justified if it is justified to a degree that could satisfy a reasonable person, which is to say that it has a reasonable basis in law and in fact. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988).

We find that BOR has not met its burden to prove substantial justification. BOR's actions in failing to plot the effect of its specification until after the contract issued and after initial placement by WME; in continuing to enforce its specification for placement purposes even after it had determined that the bottleneck portion was not necessary to design intent; in denying that its riprap specification was defective; and in denying that the bottleneck caused WME any monetary damage, including after remand by the Board, did not have a reasonable basis in fact and were not substantially justified.

III. *Determining Award*

A. *Discretion and Apportionment*

[3] The Supreme Court has stressed that, as with other fee awards, the trial forum has discretion in determining the amount of an EAJA award. *Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 151, 165-66 (1990). *See Hensley v. Eckerhart, supra*, 461 U.S. at 437. "[T]he most critical factor is the degree of success obtained." *Id.* at 436.

When a prevailing litigant has less than complete success against the not-substantially-justified Government, the courts and Boards have used various approaches in determining the appropriate amount of an EAJA award. Although not required, and not always appropriate, apportionment methods can be applied. One acceptable method of apportionment is based upon the amount of time expended on the issue or issues upon which the litigant prevailed. *Community Heating & Plumbing Co. v. Secretary of the Navy*, Fed. Cir. No. 92-1362 (8/20/93) (1993 U.S. App. Lexis 21450). Another acceptable method of apportionment, when circumstances warrant, is based upon the degree of recovery to the total recovery sought. *See Sardis Contractors*, ENG BCA No. 5256-F, 90-3 BCA ¶ 23,010.

WME has advocated the latter pro rata approach for its efforts in *WME I*, seeking 10 percent of certain incurred fees and expenses otherwise allowable under EAJA. It has eschewed any pro-rata approach for its efforts in *WME II*, however.

We find a 10 percent-based award, set forth below, for allowable fees and expenses incurred by the applicant in *WME I* to be reasonable based both upon the proportionate amount of WME's ultimate recovery, $35,358.11, to the amount sought, $351,234, and upon the apparent amount of effort spent on the issue leading to its partial recovery after remand. *See Salisbury & Dietz, supra*, at 110,561.

For consistency, we also apply the pro rata approach to the fees sought on account of applicant's efforts expanded in *WME II*. However, there is not enough in the record upon which to base a "time expended" allocation between WME's successful proof on remand that BOR wrongly deducted payment amounts on account of the failure to satisfy the defective portion of the riprap specification, and its unsuccessful claim that BOR incorrectly categorized properly placed riprap as waste. Accordingly, we base this part of our award, below, upon the proportion of the recovery in *WME II*, $35,358.11, to that sought in *WME II*, $63,442.11, which is 56 percent.

(Footnote Continued)

the context of deciding whether the Government was substantially justified in defending against an appellant's claims. *See Seaman Marine Co.*, ASBCA No. 36579, 91-1 BCA ¶ 23,653; *Murphy Brothers, Inc.*, DOT BCA No. 1836, 87-1 BCA ¶ 19,500 at 98,570-71. (In the relevant part of each case the appellant prevailed, but upon a contract provision that neither party considered or argued; the Board found the Government substantially justified in opposing the appellants' claims). We do not expand upon this issue because we have found that WME's recovery was linked to its defective specification claims and presentations to the agency during contract performance and at hearing.

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B. *EAJA Application Fees*

[4] The successful applicant also is entitled to fees incurred in the prosecution of the EAJA application. *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985). Moreover, once the Government has failed to prove its position substantially justified on the underlying merits, there is no additional substantial justification defense to an EAJA application. *Immigration & Naturalization Service v. Jean, supra.*

C. *Amount of Award*

[5] BOR's October 13, 1992, opposition to WME's EAJA application included some valid objections, most significantly that the application requested fees and expenses pertaining to WME's efforts in advancing its claim prior to the contracting officer's decision. Such costs are not deemed to be part of the adversary adjudications covered by EAJA. *Levernier Construction, Inc. v. United States* [37 CCF ¶ 76,202], 947 F.2d 497 (Fed. Cir. 1991) *Northwest Piping, Inc.*, IBCA No. 2642-F, 90-1 BCA ¶ 22,446. WME replied to BOR's objections on October 29, 1992, modifying its application either to eliminate, to allocate correctly, or, in our estimation, to support as proper, amounts contested by BOR.

BOR urges that WME has not adequately segregated costs pertaining to the defective specification issue and that its time sheets specifically identify only a small portion of time allotted to the issue. However, as we have noted, it is apparent from the overall record that WME spent at least 10 percent of its time on the defective specification question and we have applied a prorata, rather than a segregated, approach. It is clear from WME's law firm's time records that much of its efforts, including discovery, trial preparation, exhibit review, briefing, correspondence, telephone calls, and the like, were intermingled and covered various matters pertaining to WME's appeal. We find this, nonetheless, to be specific as to date, time expended, general type of service and by whom it was performed, and to be sufficiently detailed to support an EAJA award. *See Gracon Corp.*, IBCA No. 2582-F, 90-1 BCA ¶ 22,550 at 113,186.

We note that WME has not sought attorney fees in excess of the statutorily-authorized basic rate of $75 per hour, *see* 5 U.S.C. § 504(b)(1)(A), although the normal billing rate of the two attorneys principally involved is $125 per hour. Regarding paralegal and law clerk work, many Boards allow recovery only at the cost to the law firm and not at regular billing rates, as the Interior Board has held. *Gracon, supra* at 113,188; *Francis Paine Logging*, AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043.

We do not elaborate upon the proper rates for paralegals and law clerks because here, while the paralegal's normal billing rate is $50 per hour, WME only seeks compensation at the rate of $35 per hour. It seeks compensation for its law clerks' time at $30 per hour, although we have not located any reference to their normal billing rates. WME has not stated that the paralegal and law clerk amounts sought are their costs to the law firm, but BOR has not objected to the claimed rates; they are reasonable; we infer that they approximate the law firm's associated costs; and we accept them as allowable under EAJA.

Finally, as to WME's claim for fees in connection with its EAJA application, it seeks $1,600, but only 5.2 attorney hours (5.2×$75 = $390) and 5.6 paralegal hours (5.6×$35 = $196), for a total of $586 in costs, are presented as supported by time sheets. The balance represents the estimate of appellant's counsel, not contained in any affidavit or documentation submitted to the Board, and we reject it due to appellant's failure of proof.

DECISION

Accordingly, WME's EAJA application is granted in part, as follows: $10,317 (rounded) for its successful efforts in *WME I;* $2,205 (rounded) for its successful efforts *WME II* ($3,938 (rounded)×56 percent); and $586 for its EAJA application efforts, for a total of $13,108.

[¶ 26,361] Interwest Construction

VABCA Nos. 3724, 3890, September 20, 1993. Contract No. V101DC-0048.

Interpretation of Contracts—Heating and Cooling—Cooling Capacity Requirements.—Under a building renovation contract calling for the supply of water-cooled chillers, a contractor's contention that the specifications for chillers were ambiguous with

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respect to the cooling capacity required of the chillers after they had been converted to a low ozone depletion refrigerant was rejected because the specifications, when read with the drawings, indicated the cooling requirements after conversion. The government insisted that chillers had to produce 900 tons of cooling capacity before and after conversion to the new refrigerant. Because the specifications did not specifically mention that the converted cooler must meet the 900-ton requirement, the contractor contended that chillers had to meet the 900-ton requirement only before conversion. The specifications, however, stated that the contractor was to provide components matched to ensure that performance "will meet" requirements depicted on the drawings, which included the 900-ton requirement. The term "will meet" could not be restricted to the present capacity of the chiller without creating a void in the future cooling capacity requirements.

Interpretation of Contracts—Heating and Cooling—Omitted Language.—Under a building renovation contract calling for the supply of water-cooled chillers, the board concluded that the government's omission of language in the guide specification regarding the cooling capacity for the chillers after conversion to a new refrigerant did not render the contract ambiguous, because the contract documents were adequate to place the contractor on notice of the cooling capacity requirements after conversion. The government insisted that the chillers have a 900-ton cooling capacity before and after conversion to a new low ozone depletion refrigerant. The contractor's chillers, although compliant with the 900-ton requirement before conversion, failed to meet the 900-ton requirement after conversion. The board noted that if the omitted language had in fact been included in the guide specification, any doubt as to the required cooling capacity after conversion to the new refrigerant would have been removed. The omission, however, did not result in an ambiguity with respect to the cooling capacity after conversion, because the contract notified the contractor of the cooling capacity requirements.

For the appellant: Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, by Eric C. Olson. For the government: Kenneth MacKenzie, Trial Attorney, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas, Jr., Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

Before ROBINSON, ANDERS, and KREMPASKY, Administrative Judges.

ROBINSON, Administrative Judge: This opinion addresses two appeals brought by Interwest Construction ("Interwest" or "Contractor") on behalf of a mechanical subcontractor, M-T Enterprises ("M-T"), from adverse decisions by a Contracting Officer ("CO") for the Department of Veterans Affairs ("VA").

VABCA No. 3724 is an appeal from the CO's final decision which rejected Appellant's interpretation of certain contract terms relating to the required cooling output of two chillers. Briefly stated, Appellant contends that the applicable chiller specification was ambiguous with respect to the need for maintaining 900 tons of cooling capacity after a future conversion to one of the several refrigerants posing less threat to the ozone layer. While that particular claim involved only a question of contract interpretation which was at least arguably ripe for adjudication, the subsequent Complaint filed with the Board indicated that costs had been incurred since the CO's final decision. Because Interwest's claim now included $72,293 allegedly attributable to additional costs of supplying the disputed chillers, and because the CO had never received a quantified and certified claim by the Appellant, the parties recognized the jurisdictional problems presented. In order to avoid undue delay in litigation, the Appellant presented a certified claim for $72,293 to the CO, which was promptly denied in a final decision. That decision was then appealed to the Board and assigned Docket No. VABCA-3890. Consequently, VABCA No. 3724, having been rendered moot, is dismissed with prejudice.

A hearing was held in Washington, D.C. The record for decision consists of the one volume transcript of the hearing, together with the Government's Rule 4 file (tabs 1 through 7), Appellant's supplement (tabs 8 through 15), and the CO's final decision denying Interwest's certified claim (tab 16). Counsel for both parties filed pre-hearing briefs. The Appellant filed a supplemental brief following receipt of the transcript.

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FINDINGS OF FACT

On July 5, 1991, the VA issued an Invitation for Bids ("IFB") for Project No. 660-139 at its Salt Lake City, Utah, Medical Center. The IFB's description of the project was to: "EXPAND/RENOVATE BUILDING NO. 1, PHASE I." This phase included general construction and asbestos abatement. (R4, tab 1)

The low responsive bidder, Interwest Construction, was awarded Contract No. V101DC-0048, in the total amount of $8,386,000. Interwest then subcontracted with the firm of M-T Enterprises for the mechanical work required by the contract. M-T arranged with the York International Corporation ("York") for supply of the required chillers. York dealt with M-T through its sales representative, Long & Associates ("Long").

The term "chiller" refers to a large-capacity commercial or institutional air conditioning unit. Such a unit consists of three basic components: a condenser, an evaporator, and a compressor (a pump). The evaporator collects heat from inside the building, which is then "exchanged" by the condenser with the outside air. The compressor moves a closed system refrigerant between the evaporator and the condenser. As a result of the constant exchange of the inside and outside air by these three devices, and the consequent temperature differentials of the refrigerant, there is a temperature transfer to an internal system of water pipes. These pipes then carry the "chilled" water throughout the building. (Tr. 15-16)

The following contract provisions are relevant to this dispute:

SPECIFICATION SECTION 15650
REFRIGERATION EQUIPMENT (HVAC)

2.1 CENTRIFUGAL WATER CHILLERS:

A. General: Where centrifugal chillers are shown on the drawings rotary screw chillers are acceptable. Provide complete package including evaporator, condenser, compressor, motor, starter, oil heater and cooler, economizer or intercooler, operation and safety controls, purge system and evacuation system receiver and piping if controlled above atmospheric pressure, refrigerant piping, instrument and control piping and auxiliaries necessary for safe, controlled automatic operation of equipment. *Provide components matched to ensure that performance will meet requirements shown on the drawings.* ARI tolerances will not be allowed in the determination of chillers' ability to meet specified requirements. (Emphasis added)

* * * * * *

P. Refrigerant and Oil: Provide sufficient volume of dehydrated refrigerant and lubricating oil to permit maximum unit capacity operation before and during tests. Refrigerant charge lost during the warranty period due to equipment failure shall be replaced without cost to the Government.

1. *The chillers shall be either furnished with refrigerants [with] an ozone depletion factor (ODF) of .05 or less, or have the capability of conversion to refrigerants HCFC-123 or HFC-134a at a later date.* The chillers shall have been successfully tested and operated on the new refrigerants for a minimum of one year. The manufacturer shall certify in writing that all components of the chillers that come into contact with the new refrigerants such as seals, o-rings, motor windings, etc., are fully compatible with the new refrigerant and that all pressure components are rated for the pressure developed by the new refrigerants. Conversion to new refrigerants shall not require replacement or modification of any [major] components such as compressors, condenser, evaporator, drive mechanism, gaskets, seals and o-rings. (Emphasis added)

Paragraph 2.1.C of Contract Section 15650 provides, *inter alia,* that the chiller "[u]nit shall be open or hermetically sealed type using one of the halogenated hydrocarbon gasses as refrigerant." During the bidding period, several of these hydrocarbon refrigerant gasses were commercially available. Three of these gasses, HCFC-123, HCF-134a (also referred to during the hearing, as "R-123" and "R-134a"), and R-22, have an ozone depletion factor of .05 or less ("low ODF"). The other refrigerant gasses then commercially available, R-11 and R-12, have ODF factors that are greater than .05 ("high ODF"). (Tr. 21-24)

Contract Drawing H-3 consists of equipment schedules which contain the necessary performance criteria. The schedule for the two water cooled chillers sets out the necessary information for chiller performance, including *900 tons of cooling capacity,* at maximum power input, for each unit. (R4, tab 7)

In addition to the foregoing technical provisions, the contract contains the usual clauses required by the Federal Acquisition Regulations ("FAR"), including Section

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01001.1.1.44—FAR 52.236.21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION. That clause states, *inter alia*, that: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."

The VA prepares standard guide specifications for various aspects of hospital construction. At page 15650-8 of this guide specification relating to chillers (R4, tab 13), a close variation of previously-quoted Contract clause 2.1.P.1 is set out, followed immediately by subparagraph 2, which states that: "The chillers with future conversion capability shall meet the following requirements:" Relevant to this dispute is clause (c) of the guide specification, *not* made a part of the contract, which states that:

> After the conversion, the chiller shall meet the requirements for total cooling capacity and maximum power consumption at full load as shown on the equipment schedule. Chiller performance shall be factory tested, rated and certified on HCFC-123 and HFC-134a in accordance with the edition of ARI standard 550 in effect on the date of equipment shipment or shall be demonstrated by the manufacturer in an equivalent field test following the conversion.

The only evidence of the Appellant's (or its subcontractors') awareness of the existence of this clause in the VA guide specification is the statement of a York official that he discovered the provision *after* the dispute arose, during subsequent discussions with VA officials. This individual was not personally involved in the original preparation of York's bid to Long/M-T. (Tr. 66-68)

York provided a price quote for the two chillers, through Long, to M-T. The Prime Contractor, Interwest, then based its bid to the VA, in part, on the total price quoted by M-T for mechanical work required by the contract. Altogether, M-T received quotes from three firms relative to the chiller packages. The price spread among the three quotes was 3% and 5%. There is no record that any of the bidders or potential subcontractors for this project ever sought clarification of the chiller specifications and drawings prior to opening of bids. (R4, tab 12)

Interwest transmitted its chiller submittal package to the VA on January 15, 1992. The narrative information in this submittal disclosed that the Contractor would provide York "CodePak" centrifugal liquid chillers capable of operating with R-11 or R-123 refrigerant. The attached performance data sheets identified the chiller as Model #YTK7K6F2-CAF, having a maximum load of 900 tons at 100% power. According to the data sheets, this particular model chiller would utilize the R-11 refrigerant. (R4, tab 2)

The architect/engineering firm ("A/E") retained by the VA reviewed the submittal. It recommended disapproval of the chiller submittal package for failure to demonstrate that this particular York chiller could be converted to operate with a low ODF refrigerant at a 900 ton capacity. The A/E based its recommendation, concurred in by the VA, on interpreting Specification Section 15650 and Drawing H-3 to allow the Contractor the option to initially install chillers with a low ODF (.05 or less) refrigerant or to install chillers capable of utilizing such a refrigerant (without major modifications) in the future. Under their interpretation, the specification and the drawing, when read together, require that the current refrigerant, *as well as any future low ODF refrigerant* utilized by the chillers, allow for 900 tons of cooling capacity. (R4, tabs 2,3)

The York Model YTK7K6F2-CAF with R-11 refrigerant was convertible to the (low ODF) R-123 refrigerant. Other firms' chillers, using R-12, were convertible to the (low ODF) R-134a refrigerant. When converted to the R-123, however, there is no dispute that the cooling capacity of the York chiller drops to a maximum load of 747 tons. This information was contained in the Contractor's resubmission dated February 19, 1992. The VA rejected that submission because the future use of R-123 refrigerant would result in a cooling capacity of less than the required 900 tons. (R4, tab 3; tr. 23)

The Contractor defended its selection of the York Model YTK7K6F2-CAF chillers in subsequent correspondence with the VA. A letter from Long, dated March 23, 1992, explained how and why it priced this particular model in its pre-bid quote to M-T:

> In preparing its proposal regarding the VA Expand/Renovation of Building #1 Phase 1, Long & Associates read paragraph 2.1(A) and (C) as requiring a unit that was open or hermetically sealed using one of the halogenated hydrocarbon gasses as refrigerant. The components making up the "complete package" were to be "matched" so that performance would meet the "requirements shown on the drawings." Long understood that the unit, using haloge-

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nated hydrocarbon gases, had to meet such performance requirements at the time of delivery and start-up. The specification clearly states that the chiller shall produce 900 tons with CFC-11. Thus, we proposed an R-11 refrigerant and two York centrifugal chillers each having a 900 ton capacity.

Further along in paragraph 2.1, in sub-part (P), Long read that the chillers must use a refrigerant with an ozone depletion potential (ODP) factor of .05 or less or be convertible to refrigerants HCFC-123 or HCFC-134a at a later date. The York chillers submitted can be converted to HCFC-123. Long did not read paragraph 2.1 or any other part of the specifications as setting a level of performance for the converted chillers. Sub-part (P) speaks in detail of the performance of the converted chiller but neglects to mention performance requirements. As a consequence, in putting together the proposal, Long (and we suspect all the other suppliers) offered chillers that met the requirements on the drawings without regard to how the performance might change upon conversion.

(R4, tab 4)

The letter from Long also stated that the R-11 replacement (R-123) was not as efficient as R-11, and that as of March, 1992, 90% of all centrifugal chillers were furnished with R-11 refrigerant. The letter further explained that because of the open drive configuration of the proposed York chiller, a motor failure would not contaminate the R-11 refrigerant. Because of this, there would be no need to replace the refrigerant over the expected life of the chillers. Long concluded its letter by requesting that the VA either admit that the chiller specification was vague and release the proposed chillers for production or consider issuing a change order for a "more efficient and environmentally safe" York chiller model utilizing (low ODF) R-22 refrigerant.

Despite this letter from Long and subsequent correspondence from the Contractor supporting the use of the York Model YTK7K6F2-CAF with R-11 refrigerant, the CO refused to approve what he considered to be a deviation from the clear contractual requirement that, no matter what refrigerant was to be used initially, the chillers had to produce 900 tons of cooling capacity before *and after* any subsequent conversion to a low ODF refrigerant. (R4, tab 6)

The Contractor then solicited quotes from Long and the Trane Corporation ("Trane"), for chillers having low ODF refrigerants which could deliver the 900 tons of cooling capacity demanded by the VA. The most advantageous price was that quoted by Long for the York chillers using R-22 refrigerant. These chillers were eventually installed at the hospital for what Appellant claims to be an additional cost of $72,293, including markups. (R4, tabs 10, 12, 14 & 15)

The General Sales Manager of York's Applied Systems Division testified that at the time this project was bid (late 1991), none of the six manufacturers of commercial/institutional chillers could produce such equipment which would operate at a 900 ton cooling capacity after conversion to a low ODF refrigerant. (Tr. 42-43) On the other hand, he stated that at the time of bidding, York *was* manufacturing the (more expensive) chiller model which utilized the low ODF refrigerant, R-22, and which the Contractor ultimately installed under protest. (Tr. 21-24)

York's General Sales Manager explained that the York Model YTK7K6F2-CAF chiller, as originally bid (through Long to M-T), was so designed that the R-11 refrigerant would not escape and would remain enclosed within the chiller for the useful life of that equipment. At the time of bidding, moreover, he was aware of no (statutory/regulatory) requirement for installed systems with R-11 to be converted to a low ODF refrigerant at any time in the future. (Tr. 34-35)

The (low ODF) R-22 refrigerant is under higher pressure than the (high ODF) R-11, requiring more expensive high pressure equipment involving thicker containment vessels with heavier special welds. The lower pressure R-11 refrigerant required less expensive equipment which could be converted to house (low ODF) R-123. Such a conversion would result in a reduced cooling capacity, however. York considered it advantageous to both itself and to the VA to bid the less expensive chiller since there was no technical or regulatory basis for believing that the R-11 refrigerant (delivering the requisite 900 tons of cooling capacity) would have to be replaced over the useful lives of the two chillers. (Tr. 37-43)

This witness conjectured, as did individuals from Long and M-T, that the other two firms (Carrier and Trane) which had submitted chiller price quotations to M-T prior to the bid opening, must have made the same assumptions as Long and York. That is, that since the specification did not specifically contain the 900 ton capacity requirement for

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converted equipment, the only thing that the VA was essentially interested in was a chiller currently capable of delivering 900 tons. Because conversions were not technically feasible, all of those individuals concluded that the two competitors bid with the less expensive high ODF refrigerant systems in order to be competitive. The only basis for these conclusions, however, was the fact that the Trane and Carrier bids were within 3% and 5% of the York bid. Appellant offered no independent corroboration of this speculation, from either Trane or Carrier. (R4, tabs 4, 11, 12; tr. 66)

DISCUSSION

In the opening paragraph of his post-hearing brief, Appellant's Counsel cites the following three evidentiary bases for concluding that the specifications were latently ambiguous in failing to put prospective bidders on clear notice of the capacity requirements for chillers after conversion to a low ODF refrigerant:

(a) the [VA's] failure to address the issue of capacity after conversion anywhere in the specifications issued;

(b) the [VA's] failure to use the available guide specification that explicitly disclosed the capacity requirements upon conversion;

(c) the uniform failure on the part of all Project bidders to propose chillers consistent with the [VA's] current interpretation of the capacity requirements.

Taking these arguments one at a time, we begin by observing that Appellant's statement in (a) is not entirely accurate. While it is true that Section 15650, Part 2.1.P, of the specification makes no mention of the need for the converted chillers to meet the 900 ton load requirement, Part 2.1.A, a clause of *general* application, states that the Contractor is to: "Provide components matched to ensure that performance will meet requirements shown on the drawings." In our view, this performance requirement of Contract Drawing H-3 (900 tons) supplied whatever specifics were otherwise missing from Part 2.1.P of the specification. The term "will meet" cannot be restricted to the present capacity of chillers supplied under the contract. To make such an interpretation would leave the decision of the future cooling capacity of the chillers (after any refrigerant conversion) entirely up to the bidders. That interpretation would simply not be consistent with the plainly expressed specification requirement to follow performance criteria on Drawing H-3, and is not reasonable. A coordinated reading of the applicable specification and drawing, as called for by FAR 52.236.21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION, gives a contractor a complete picture of what is being asked for by the Government. Any failure by a contractor to read and consider these provisions and their interaction is a risk that cannot be transferred to the Government. *Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶72,885], 169 Ct. Cl. 384, 395 (1965). *Hoffman Construction Company, Inc.*, VABCA No. 1787, 83-2 BCA ¶16,636; *M.A. Mortenson Company*, VABCA No. 2435-36, 88-3 BCA ¶20,895; *Shumate Constructors, Inc.*, VABCA No. 2772, 90-3 BCA ¶22,946. We do not consider the contract to be at all ambiguous with respect to the 900 ton cooling requirement.

Closely associated with this ambiguity argument is Appellant's position that the contract gave bidders an *option* which did not then exist. Specification Section 15650.2.1.P states, in this regard, that: "The chillers shall either be furnished with refrigerants [with] an ozone depletion factor (ODF) of .05 or less, or have the capability of conversion to refrigerants HCFC-123 or HFC-134a at a later date." The available evidence indicates that the second option was technically impossible during the mid-to-late 1991 bidding period (and continues to be), because existing systems utilizing high ODF refrigerants would have required major modifications simply not technically practicable (and prohibited by the terms of clause 2.1.P.1) to accommodate low ODF refrigerants while still providing 900 ton peak loads. The York model could not be converted to use a low ODF refrigerant with 900 tons cooling capacity, because of the higher pressure requirements of the associated equipment.

The Appellant's argument ignores the fact that the first option *was then available* to York utilizing a chiller model with the low ODF refrigerant, R-22. It would have cost more money for York to bid a chiller with this low ODF refrigerant/900 ton capacity. But if, as its witness testified, York's competitors were equally incapable of furnishing a convertible chiller per the second option, these firms would likewise have had to price the more expensive low ODF chillers in their pre-bid quotations to M-T. If all the chiller manufacturers chose the first option, the only one then available, York (and Long and M-T) would have suffered no competitive disadvantage in choosing a chiller with refrigerant option number one.

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To reiterate, the Board concludes that the first option available in the above-discussed specification was entirely achievable at the time of bidding for this VA project. The fact that the second option was not technically possible simply reinforces the need to choose the first option or to alert the VA to the problem with option number two, seeking guidance with respect to the VA's intentions. What the Contractor could not do, but what it did do, was to choose a third option which the terms of the contract would not support—to give the VA a chiller using high ODF refrigerant which could not be converted to low ODF refrigerant without reducing the contractually required 900 ton cooling capacity. York provided convincing testimony that its high ODF refrigerant in Model #YTK7K6F2-CAF would not need replacement over the life of the chiller, thus making any future conversion unnecessary. That may well have been the case, but that is not what the VA asked for, nor for that matter, what some future law or regulation could conceivably mandate. It is not up to bidders to substitute their judgment for the Government's. So long as the requirements are clearly stated and achievable (as in option number one), the Government is entitled to demand strict compliance with the terms of its contracts. *Bhanderi-Davis-Eckert (A Joint Venture),* VABCA No. 3475, 93-1 BCA ¶ 25,456 at 126,790.

The Appellant's other two arguments are essentially an effort to convince the Board that there is extrinsic evidence which establishes that the contract is, in fact, ambiguous and that its interpretation was consistent with the VA's intention as interpreted by other bidders as well.

The failure by the VA to include the omitted language from its guide specification is unfortunate, but not fatal to its position. That omitted clause reads, *inter alia:* "After the conversion, the chiller shall meet the requirements for total cooling capacity and maximum power consumption at full load as shown on the equipment schedule." While the inclusion of this language certainly would have removed all doubt as to the Government's needs, the language in Clause 2.1.A, as discussed above, was adequate to put any contractor on notice that the 900 tons was a constant performance requirement. If any bidder thought otherwise, it was under a duty to make an inquiry prior to submitting quotes or bids for the VA's project. As we have stated, Appellant's assumption that the 900 ton requirement could be dispensed with after conversion to a low ODF refrigerant, without any minimum cooling criteria to be supplied, creates *an obvious void* in the necessary information. A bidder who proceeds without seeking clarification does so entirely at its own risk and must bear the consequences if its assumptions are incorrect. *See, e.g., A & A Insulation Contractors, Inc.,* VABCA No. 2766, 92-2 BCA ¶ 24,829 at 123,882 (citations omitted).

With respect to the unused VA guide specification, the Appellant has offered no contention nor evidence that some prior course of dealing would have led its subcontractor(s) to believe that the VA's (unexplained) decision to not insert that clause in this particular specification meant that the 900 ton requirement was not applicable after a future refrigerant conversion. According to the record, York's General Sales Manager only became aware of the provision well after the bidding period, while discussing the dispute with VA officials.

The Appellant's third point, that other potential subcontractors had based their price quotations to M-T on the same assumptions as made by Long and York, is simply not supported by the facts established by the record. All of the testimony and evidence supporting this speculation relies on the price spread between the original York, Trane and Carrier quotes for the equipment. In the absence of first-hand testimony or explanation for the Trane and Carrier price quotations to M-T, the Board is constrained from drawing the particular conclusion urged by Appellant. Moreover, such an interpretation, even if shared by all three bidders, does not overcome the clear contract language pertaining to post-conversion cooling capacity.

DECISION

For the above-stated reasons, the appeal previously docketed as VABCA No. 3724 is dismissed as moot, and the appeal in VABCA No. 3890 is denied.

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[¶ 26,362] Dawson Construction Co., Inc.

VABCA No. 3558, September 15, 1993. Contract No. V101C-1133.

Modifications—Reduction in Requirements or Prices—Scope of Deduction.—A deductive change under a contract to construct an outpatient facility at a military installation was properly calculated by the government, despite the contractor's contention that the deduction included costs for work for which it was not responsible, because the deductive change included only the costs of installing x-ray equipment, a task the contractor was required to perform under the contract. The government elected to use the manufacturer, rather than the contractor, to install the equipment. Although the government viewed the contract as requiring the contractor not only to install but also to test and adjust the equipment, it decided, for reasons not readily apparent on the record, not to include these costs within its deductions. In view of the fact that the deduction did not include testing and adjustment costs, the contractor's contention that it was not responsible for these costs and that the contract terms were ambiguous regarding its obligations to perform these tasks was not pertinent to the government's calculation of the deduction.

Modifications—Reduction in Requirements or Prices—Cost of Substituted Performance.—The government's calculation of a deductive change for deleted work involving the installation of an x-ray machine was proper because the actual cost of the deleted work, which was performed by the manufacturer of the x-ray equipment, was available and was found to be reasonable. The manufacturer provided the hours required by its technicians to install the equipment. The number of hours was adjusted downward by the government to account for time spent by the manufacturer in performing certain tasks, such as testing and adjusting the equipment, for which the contractor was not responsible. In view of the government's reliance on the manufacturer's cost information, the board found that the government had provided ample proof of the cost of the deleted work and that this cost was reasonable.

For the appellant: Tom Dawson, President. For the government: Sonya M. Cromwell-Singleton, Trial Attorney, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas, Jr., Assistant General Counsel, Washington, D.C.

Before McMICHAEL, ANDERS, and PULLARA, Administrative Judges.

McMICHAEL, Administrative Judge: This is a timely appeal from a contracting officer's final decision on a Government deductive change order deleting certain work related to the installation of Government furnished X-ray equipment. To resolve this dispute, we must determine the proper scope of the deductive change and whether the costs associated with that work were reasonable.

The parties have elected to waive their hearing rights and to submit their cases on the record, pursuant to Board Rule 11. Following extensive supplementation of the record, as provided by Board Rules 11 and 13, the parties submitted simultaneous briefs, followed by supplementary briefs. The record in this appeal consists of the Pleadings; the Rule 4 Appeal File, as supplemented (R4, tabs 1—20); the Government's Supplement to the Record (Exh. G-1 through G-25); the parties' briefs, with attachments; and their supplementary briefs, also with attachments. In addition, the Board, *sua sponte*, has introduced and tabbed as Exh. B-1, a copy of a November 22, 1985, letter from E.C. Ernst, Inc. to the Contractor (this letter was part of the record as Exh. G-197 in *Dawson Construction Company, Inc.*, VABCA Nos. 3306-3310, appeals which arose out of the same contract, but which were heard separately from the appeal currently before us).

FINDINGS OF FACT

On April 6, 1983, the Veterans Administration (VA, now the Department of Veterans Affairs) awarded Contract No. V101C-1133, for the construction of an outpatient addition, the relocation of a spinal cord injury unit and general renovations at the VA Medical Center (VAMC) in Miami, Florida, to Dawson Construction Company (Dawson or Contractor). (R4, tab 2) The Contract had an initial price of $16,508,396 and a completion date of not later than 1,275 days after issuance of the Government's Notice to Proceed, which was received on April 22, 1983. (R4, tabs 2-3) Dawson subcontracted certain electrical por-

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tions of the Contract work to E.C. Ernst, Inc. (Ernst), an electrical subcontractor. (Exh. G-6)

As part of the Contract requirements, Dawson was to install VA provided X-ray equipment in certain Clinical Addition examination rooms. In other rooms, however, the VA assumed responsibility for both supplying and installing the electrical equipment. To distinguish between such situations, Contract Drawing 1-2, "Abbreviations and Interior Signage," indicated that where the VA bore responsibility for providing and installing such equipment, the equipment would be designated with the two letter marking, "V.V.," whereas, where the VA agreed to provide the equipment, but the Contractor bore responsibility for installing same, the two letter marking "V.C." was used. Where the Contractor was to both provide and install equipment, the two letter designator, "C.C." was used. (Exh. G-16)

Contract Drawing 1-3, "Drawing Information," indicated that different equipment drawing symbols were also to be utilized to distinguish between VA and Contractor responsibility regarding electrical equipment installation. Under the architectural symbol subheading "Equipment," Contract Drawing 1-3 indicates that VA supplied and installed equipment (V.V.) was designated by the use of broken dashed line enclosures (- - - -); VA supplied and Contractor installed equipment (V.C.) was designated by alternating dashed dotted line enclosures (— . — .); and Contractor supplied and installed equipment (C.C.) was designated by continuous line enclosures (——). Adjacent to each enclosure, the appropriate two-letter marking was also provided. (Exh. G-16)

Portions of the Contract specifications also addressed the question of whether the VA or Dawson was responsible for installing VA supplied electrical equipment, in this case, VA supplied X-ray equipment. Specification section GR-20, "GOVERNMENT FURNISHED EQUIPMENT," for example, states in pertinent part:

> A. Equipment furnished by Government to be installed by Contractor will be furnished to Contractor at Station.
>
> * * * * *
>
> D. Equipment furnished by Government will be delivered in "knock down" condition in accordance with existing commercial practices, complete with all fittings, fastenings, and appliances necessary for connections to respective services installed under contract.
>
> 1. *Completely assemble and install such equipment in place ready for proper operation* in accordance with specifications and drawings.
>
> 2. Conduit, wiring and raceway systems for X-ray Equipment are shown on accompanying contract drawings .... Obtain detailed layout information from Resident Engineer when equipment has been purchased by Government.
>
> 3. Government will furnish services of an installation engineer to *supervise assembly* and *installation* of X-ray Equipment. (emphasis added)

(Exhs. G-1, G-2)

Similarly, Section 854 of the Contract specifications, captioned "RADIOLOGY ELECTRICAL SYSTEMS," at subsection 854-5, "SYSTEM INSTALLATION," states in pertinent part:

> F. The VA will furnish the X-ray equipment and the services of a manufacturer's representative to *technically supervise* the *installation, connection, adjustment and testing of the equipment.* Except for the X-ray equipment in the Cardio-pulmonary Unit, *install, connect, adjust and test the X-ray equipment as directed by the Resident Engineer.* (emphasis added)

(Exh. G-20, Section 854-5, SYSTEM INSTALLATION; App.'s Br., Attach. at 5)

Significantly, in connection with the present appeal, Section 854-5 sets forth not only a Contractor obligation to install the relevant X-ray equipment, but also a duty to connect, adjust and test that equipment. As the remaining findings of facts and our ensuing legal analysis will demonstrate, the distinction between the Contractual requirements to *install,* versus *test,* the relevant X-ray equipment, lies at the heart of the dispute in this appeal.

Slightly more than two years after initial Contract award, on August 9, 1985, Jeffrey P. Salvin, the VA's Senior Resident Engineer (SRE) assigned to the project, forwarded a letter to Buddy Rogers, Dawson's Project Manager, requesting that Dawson provide the Government, for each room referenced: 1) the anticipated installation time for the X-ray equipment; 2) the anticipated number of installation personnel required; and 3) the approximate installation starting date. Salvin represented that this information was necessary to properly determine the appropriate number of Picker International, Inc. (Picker) employees needed to supervise Dawson's installation of Picker X-ray equipment in Radiology Rooms 1D-147, 1D-151, and 1D-152, and to assist Salvin in

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coordinating the timing of Dawson's and Picker's work. (Exh. G-5) Picker was the manufacturer with whom the VA decided to contract to provide the VA supplied X-ray equipment required by this Contract.

On October 7, 1985, Rogers responded to SRE Salvin's request, indicating that, while Dawson's electrical subcontractor, E.C. Ernst, had yet to convey its estimate concerning the amount of manpower needed to *install* the VA supplied Picker X-ray equipment, Dawson independently estimated that six Ernst employees, working simultaneously in each of the three radiology rooms, would require a total of three weeks to install the Government provided X-ray equipment. (R4, tab 5 at 4)

Rogers followed his October 7, 1985, communication to the Government with a letter to James McConlogue of Ernst, dated October 8, 1985, revealing a pre-existing dispute between Dawson and its electrical subcontractor concerning Ernst's obligation to install the Picker equipment. Rogers' language, quoted in part below, provides some measure of the depth of the parties' disagreement:

> If you [Ernst] weren't so asinine, and a little more assiduous in the examination of the contract documents and your contract, you would readily see the purpose of my letters requesting your *installation time* for the Picker equipment. Especially after Dawson has expended so much of our valuable time reiterating the same to you. This redundancy will cease with this letter. Anew, I repeat the following:
>
> 1. Your contract includes all the contact documents.
>
> 2. Your contract includes all electrical work.
>
> 3. The V.C. items are shown on drawing 1-73.
>
> * * * * *
>
> There will be no change order for this work. You are hereby directed to perform this work, under Picker supervision, with six (6) men for three weeks working simultaneously in each room. You are to provide all labor required to complete this work. (emphasis added)

(Exh.G-6)

Contract Drawing 1-73, "1/4" SCALE PLAN—PORTIONS OF AREA 2, FIRST FLOOR," referred to in Dawson's letter above, depicts, in pertinent part, Radiology Rooms 1D-147, 1D-151, and 1D-152, and contains both the two-letter marking codes and the differing equipment drawing symbols described previously. All electrical equipment contained in the designated rooms, with the exception of a mobile monitor and a waste disposal unit in Room 1D-147, as well as a waste disposal unit in Room 1D-152, prominently bear the two letter marking, "V.C.," indicating that the equipment was to be provided by the Government, but installed by the Contractor. The excepted equipment bears the two letter marking "V.V.," indicating that VA supplied, VA installed equipment was intended in the indicated areas.

On October 17, 1985, Rogers forwarded a request to SRE Salvin, requesting that all VA supplied equipment which Dawson was to install in the radiology rooms be delivered to the VAMC Miami. Rogers' request specified that Dawson was "not requesting Picker equipment at this time, but all other V.C. equipment." (Exh.G-7).

On November 13, 1985, Margaret Smith of the VAMC's Supply Service, the departmental component responsible for purchasing and obtaining the Government provided X-ray equipment in this project, contacted SRE Salvin and informed him that, in purchasing the Picker X-ray equipment under a separate contract, the Supply Service had also purchased factory installation services. Because Picker was also contractually required to install the X-ray equipment, the Government elected to use Picker, the manufacturer, rather than Dawson, to install the equipment. Concomitantly, the Government's need to provide the services of a manufacturer's representative to supervise the X-ray equipment installation was no longer necessary, inasmuch as Picker would be installing the equipment. (Exh. G-10) Dawson's responsibilities regarding the X-ray equipment, after preparatory construction work, would thus be limited to final clean up and trash removal during and after installation. (Exh. G-22)

This determination led to SRE Salvin's issuance of Field Proceed Order 5D, on November 13, 1985. There, Dawson was instructed to incorporate the following change into the scope of the Contract work:

> Delete *installation, connection, adjustment, and testing* of V.A. furnished X-ray Equipment as specified by Sect. 854, para. 5.F, except as follows:
>
> A) Final Cleanup
>
> B) Trash Removal
>
> This Proceed Order is issued in accordance with Clause 3 of the General Provisions of the Contract and the matter of contract

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price and time will be subject to equitable adjustment as provided therein .... Pending the issuance of a Change Order, the contract price (*for fiscal purposes*) is being decreased by the amount of Ten Thousand Dollars and No Cents ($10,000.00). (emphasis added)

(R4, tab 5)

In a memorandum to the VA Project Supervisor, provided the same day, SRE Salvin estimated that the total credit for the deduct order would be $18,000, utilizing information supplied by Dawson in its October 7, 1985, letter. Salvin arrived at the $18,000 figure by adopting Buddy Rogers' estimate that fifteen Ernst employees, working fifteen days, would be required to install the X-ray equipment in Rooms 1D-147, 1D-151, and 1D-152, for a total of 90 man days of labor, and then multiplied this figure by a $200 daily cost figure separately arrived at by Salvin. (R4, tab 5; Exh. G-22) After careful review of the record, we have been unable to ascertain precisely how SRE Salvin arrived at the $200 daily cost figure, but note that Dawson has never challenged the reasonableness of that estimate. Significantly, while the language of FPO 5D talks of deleting the "installation, connection, adjustment, and testing" of the X-ray equipment, Salvin's deduction estimate was premised only on Rogers' estimate of the Ernst time required to *install* the equipment as multiplied by an hourly rate. (R4, tab 5 at 4)

Ernst subsequently asserted its position that it bore no responsibility for installing X-ray equipment, in a letter to Dawson dated November 22, 1985. There, Ernst responded to an earlier Dawson directive that it "re-define [its] position regarding contract drawings 1E-91 and 1-E92 [sic] in respect to the installation of the X-ray equipment." Ernst steadfastly refused to change its position explaining that it "[could] not be any more explicit than [our] 10-18-85 letter delineates," and that "contrary to Dawson's statements [Ernst did] not agree that *installing, connecting* and *testing* the X-ray equipment [were] part of [its] subcontract." (emphasis added) (Exh. B-1) Ernst concluded by requesting that Dawson respond to a VA letter dated October 23, 1985, with a request for a change order for the disputed items and by indicating to the Government that "negotiations on these items were put on hold awaiting [Dawson's] resolution [of this issue]." (Exh. B-1) The October 23 letter is not part of the record before us. The X-ray equipment was subsequently installed, with the installation being observed by members of the VA's resident engineer staff. (Exh. G-21)

On August 29, 1986, in response to a request from Maggie Smith that Picker provide the VA with documentation detailing the actual number of hours spent by its employees installing the X-ray equipment, Ted Schenk, Picker's Account Executive, attached Service Manager Larry Trobough's breakdown of hours, indicating that 1,164 hours had been required to install the X-ray equipment. (Exhs. G-9, G22) Trobough visited the site once a week during the installation and his calculation was based on an analysis of service tickets utilized by Picker to track the number of hours spent performing this job. (Exh. G-20) SRE Salvin took Picker's figures as the starting point for his estimate and then adjusted the 1,164 hour figure downward to 944 hours to exclude a reasonable amount of time for "calibration, start-up and testing, for which Dawson was not responsible." (Exh. G-22) Salvin then forwarded his estimate for the deleted work to Project Director Len Romano via a memorandum dated September 10, 1986. In that memorandum Salvin suggested that, given Picker's familiarity with its own equipment, "[h]ad the [testing, adjustment and start-up] work been performed by Dawson (Ernst) the hours expended would have been much *greater* due to the inherent unfamiliarity with the Picker equipment." (Exh. G-11) (emphasis added) Notwithstanding this observation, however, Salvin made no upward adjustment in the estimated number of installation hours. He proceeded to calculate the value of the deleted work as $21,013.44, based on the actual rate paid to electricians of $18.55 hour, plus 20% for overhead and profit, multiplied by 944 hours. (Exhs. G-9, G-11, G-22) Thereafter, Salvin requested that a Unilateral Change Order (UCO) in the amount of $21,013.44 be issued and that FPO 5D be canceled. (Exh. G-11) In a subsequent affidavit, dated June 7, 1993, Salvin reconfirmed his initial determination to deduct 220 hours from Picker's 1,164 hour total, and thereby continued to keep the time associated with the calibration, start-up and testing of the X-ray equipment out of the VA deductive change order. (Exh. G-24)

In mid-to-late September 1988, the VA adjusted its internal estimate of the Contract deduction, which had previously been set at $10,000 for fiscal purposes, upwards to $18,000, to comport with the figure which SRE Salvin had originally estimated in his October 7, 1985, memorandum. This deter-

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mination was memorialized in a September 16, 1988, letter from VA Project Manager Robert B. Eidson, to Dawson's new Project Manager, Ralph P. Weathers, as well as in a September 16, 1988, interoffice memorandum from Eidson to Contracting Officer (CO) Nathan Johnson. (R4, tabs 6-7)

The matter of the valuation of the deductive change associated with FPO 5D, was also the subject of correspondence commencing with a November 16, 1988, letter from Eidson to Dawson Project Manager Weathers. There, Eidson noted that FPO 5D's initial valuation of $10,000 had been increased to $18,000 by Salvin, based on manpower information supplied by Buddy Rogers. (R4, tab 9) Weathers responded to Eidson on November 22, 1988, disputing the additional $8,000 contract price deduction being proposed by the VA concerning FPO 5D. Weathers asserted that critical path method (CPM) records already reflected the "value of a $10,000.00 credit which we feel is more than adequate to cover this cost." As part of its demands, Dawson sought payment of, among other things, the additional $8,000 proposed for withholding, or, in the alternative, the issuance of a contracting officer's final decision. (R4, tab 10)

No final decision was rendered and the matter remained outstanding. On February 8, 1989, in response to an inquiry from the United States Fidelity & Guaranty Company (USF&G), Dawson's performance surety, Eidson indicated that, as of September 14, 1987, the Contract work had been accepted at a total Contract price of $17,971,188.95. Eidson noted that, Contract acceptance notwithstanding, several issues remained outstanding and that, as a result, $34,616 in funds were being withheld from payment. (R4, tab 12)

Approximately 5 years after the issuance of FPO 5D, on September 27, 1991, Unilateral Change Order 2T (UCO 2T) was executed by VA Contracting Officer Nathan Johnson, in the amount of an $18,000 deduction to the Contract price. UCO 2T ordered Dawson to proceed with the following change in work:

> Furnish labor and material necessary to delete the *installation, adjustment, and testing* of VA-furnished X-ray Equipment as specified by Section 854, Paragraph 5.F, except for final cleanup and trash removal—
>
> at a decrease in the contract price, in accordance with the provisions thereof, by the sum of Eighteen Thousand Dollars ($18,000.00). (emphasis added)

(R4, tab 13)

This document provides the only record evidence regarding the Contracting Officer's interpretation of the contractually required work, since CO Johnson has not submitted an affidavit concerning how he interpreted the Contract regarding the adjustment, calibration and testing of the X-ray equipment.

Dawson responded to UCO 2T on October 18, 1991, indicating its belief that UCO 2T must have been issued in error, "as all the change orders on this project were settled some four years ago." Dawson requested CO Johnson's rescission of the change order or, in the alternative, some clarification as to why such a late issuance had occurred. (R4, tab 14)

Johnson responded on October 31, 1991, reaffirming the propriety of UCO 2T, and indicating that the unilateral change had been intended to supersede FPO 5D, for which Dawson had "never responded" to repeated requests for a credit proposal, despite Government requests "on several previous occasions." (R4, tab 15) Dawson's response, dated December 23, 1991, once again rejected, as improper, the issuance of UCO 2T, disagreed with the additional $8,000 deduction, "for reasons stated in Mr. Tom Dawson's letter of November 12, 1991," and asked that a contracting officer's final decision be rendered. Dawson's November 12th correspondence is not part of the record before us. (R4, tab 16)

On February 5, 1992, CO Johnson issued a final decision, stating that his determination regarding UCO 2T was "unchanged," that FPO 5D had been "outstanding" since October 1988, and that the $18,000 credit taken in reference to UCO 2T was based on "manpower data provided by Mr. Rogers." Johnson additionally indicated that he found no evidence of a "settlement" between Dawson and SRE Salvin on the costing of the credit charge and concluded that the fact that the proceed order "remained unresolved" until the issuance of UCO 2T was "evidence that there had been no agreement concerning the final pricing of this modification." (R4, tab 17) Dawson timely appealed the final decision on March 2, 1992.

Addressing the installation issue, Robert Squillante, who now works for the VA as a Biomedical Engineer, but was formerly the Picker installer for the X-ray equipment in issue, enumerated the following installation activities which Picker performed:

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We, Picker, uncrated the X-ray equipment. We carried it to the Chest and Fluoroscopy rooms. We used Picker lifting equipment to mount ceiling rails on the Dawson installed unistruts. We drilled and set anchors in the floor to bolt the X-ray tables. We used equipment to align the X-ray tables to the drilled holes. We further bolted controls to the floor. We ran the 480 volt disconnect to the centroid which is the central power source for the X-ray equipment. Dawson supplied the wiring which supplied electricity to the 480 volt disconnect. We ran wire to the different components of the X-ray equipment. We calibrated, tested and balanced the X-ray equipment. The calibration involved adjusting the equipment to certain parameters.

(Exh. G-25)

Squillante directly controverts Dawson's contention that it played a significant role in the installation and that it "furnish[ed] carpenters and laborers to assist in the uncrating and bolting down in place of the X-ray equipment." (Exh. G-25) Squillante's affidavit is supported by an affidavit from Thanh K. Tran, who, as the VA Resident Engineer assigned to this job, spent 75% of his time on field inspection and personally observed Picker installing the X-ray equipment at issue. Tran observed Picker performing the installation in the rooms in issue. (Exh. G-21)

A careful examination of the relevant daily logs discloses no evidence that Dawson's workers assisted in uncrating and bolting down the Picker X-ray equipment. While the August 1, 1985, through December 18, 1985, daily logs are replete with entries detailing certain Ernst and Dawson work in the radiology rooms, nowhere in the daily logs is there any indication that Dawson or Ernst performed or assisted in the performance of the installation work detailed in Robert Squillante's rebuttal affidavit. (Exh. G-19)

DISCUSSION

Following the filing of this appeal, both parties submitted opening and rebuttal briefs, with the Government extensively supplementing the evidentiary record. Contractor focused primarily on disputing its initial obligation to provide the testing, balancing and calibration services for the Picker X-ray equipment. Dawson suggested that the specifications were ambiguous concerning its obligation to test, adjust, balance, and calibrate the equipment, and that it "relied on the standard practices in the industry as relate to X-ray equipment and prepared [its] bid accordingly." While Dawson alludes to a trade practice, the effect of which is that construction contractors are not ordinarily tasked with testing X-ray equipment, it neither explains the nature of, nor provides affidavit or documentary evidence of, the trade or standard industry practice being alleged. Dawson's trade practice representation, we note, is at variance with its purported initial conclusion "that installing, connecting and testing the X-ray equipment [were] part of [Ernst's] subcontract." Consistent with its apparent shift in position, Contractor also now suggests that the majority of the costs associated with the deductive change order did not involve installation or connection, but were for "the testing, adjusting, balancing and calibration of the equipment [for] which Dawson was not responsible."

The Government argues that the Contract is unambiguous and trade practice cannot be used to vary its clear terms. It did not comment on Dawson's vague assertion that it bid according to standard industry practice. Instead, the Government argues that the deduction for installation and connection was reasonable and that it did not take credit for the effort in testing, adjusting, balancing and calibrating the equipment.

Whether the Contract terms are ambiguous regarding the Contractor's obligations to test, adjust, balance and calibrate the X-ray equipment is not pertinent to this appeal, and does not affect our ultimate decision. The facts reveal that the Government calculated its deduction based solely on the hours it took Picker to *install* its equipment. It did not include in the deductive change the costs associated with Picker's testing, adjusting, balancing and calibrating its equipment. The reasoning for the Government's decision not to deduct these costs is not readily apparent from the record. Clearly, at the time he estimated the deduction, SRE Salvin wrote that he believed that Dawson *was not* responsible for the calibration, start-up, and testing. However, when issuing FPO 5D he not only specifically deleted installation, but also *connection, adjustment and testing* from the listing of Dawson's contractual obligations. So too, UCO 2T issued by the Contracting Officer deleted the installation, *adjustment and testing* of the X-ray equipment from the scope of the Contract work. It would appear that the VA concluded that in this particular contract there was a requirement for Dawson to adjust and test the equipment,

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but decided not to include the costs associated with this work in its deduction. In any event, whatever standard industry or trade practice may exist with respect to X-ray equipment testing responsibility is not material given the facts before us. The costs attendant to the deductive change order were solely associated with the *assembly* and *installation* of the Picker X-ray equipment. While the 1,164 hour figure reported by Picker in August 1986 initially may have included time spent by its employees testing, balancing and calibrating Picker X-ray equipment, SRE Salvin subsequently reduced that number by 220 hours to eliminate the time associated with testing, balancing and calibrating the Picker X-ray equipment.

Dawson has never argued that a trade practice exists regarding the *installation* of X-ray equipment. Accordingly, even if proven, Contractor's proposed custom and trade practice defense does nothing to rebut the 944 hour figure associated with Picker installation time, a subject which we consider below. The determinations whether the Contract is ambiguous, whether a cognizable trade practice exists, or whether the trade practice could be used to interpret this Contract would not affect the amount of this deduction. Accordingly, we have not, and need not consider these issues here.

Notwithstanding Contractor's initial acknowledgment of its contractual obligation to install the Picker X-ray equipment, however, Dawson has also, since the onset of this litigation, subtly changed its position regarding the equipment installation issue. In essence, Contractor now contends that by providing "rough-in electrical and raceway system[s] for the X-ray equipment; certain mechanical rough-in; carpenters and laborers to assist in the uncrating and bolting down in place; miscellaneous metals in the ceiling to support the overhead arms of the X-ray equipment; and coordinated the layout of the rooms where the X-ray equipment was installed," Dawson, in fact, *installed* the equipment for which the Government now seeks an $18,000 deductive credit.

In response to Contractor's amorphous definition of the term "installation," the Government proffered Robert Squillante's rebuttal affidavit, which directly controverts Contractor's allegation that the latter assisted in the uncrating and bolting down in place of the Picker X-ray equipment. Because Squillante's sworn affidavit testimony is not opposed by countervailing affidavit evidence and otherwise appears to be trustworthy, we find it more compelling than Contractor's unsubstantiated allegations. *Schoenfeld Associates, Inc.*, VABCA Nos. 2104, *et al.*, 87-1 BCA ¶ 19,648 at 99,472-3; *Nat'l. Helium Corp. v. United States*, 219 Ct. Cl. 612, 613 n.3 (1979). The only indication that Contractor played a role concerning the X-ray equipment's installation pertains to the "rough-in" work, set forth above, which we have determined was associated with Contractor's preliminary X-ray construction obligations. This conclusion is supported by the daily logs, concerning which, as we previously indicated in our findings of facts, we have made a careful review. Based upon that review, we found no indication that Contractor or its subcontractors assisted in the installation of the new X-ray equipment or in the relocation of the old. Having determined that Dawson did not perform any of the X-ray equipment *installation* work required by the Contract, the Government is entitled to a reasonable credit for the full deletion of the work.

We now turn to the pricing of this deduction. It is well-established that the Government bears the burden of proving its entitlement to equitable adjustments associated with deductive change orders. *Blount, Inc.*, VABCA No. 3236, 93-1 BCA ¶ 25,474 (*citing Nager Elec. Co., Inc. v. United States* [16 CCF ¶ 80,367], 194 Ct. Cl. 835, 853, 442 F.2d 936, 946 (1971)); *State Mechanical Corporation*, VABCA No. 2797, 91-2 BCA ¶ 23,830; *Zurfluh Enterprises, Inc.*, VABCA No. 1941, 85-1 BCA ¶ 17,789. Where actual cost data is both available and reasonable, such data should be utilized in calculating the proper measure of quantum. *Nager*, 194 Ct. Cl. at 851-53, 442 F.2d at 945-46; *see also Jen-Beck Associates*, VABCA Nos. 2107, *et al.*, 87-2 BCA ¶ 19,831 at 100,324. Regardless of whether actual or estimated costs form the starting point of our damages analysis, however, "the measure of the equitable price adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion." *Zurfluh*, 85-1 BCA at 88,908 (citations omitted).

Here, where the deleted work was actually performed, and the actual costs of assembling and installing the relevant Picker X-ray equipment have been tracked and provided by the equipment's manufacturer, our damage analysis is greatly simplified. As indicated earlier, Picker stated that its technicians had required 1,164 hours to install the X-ray equipment at issue here. SRE Salvin

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subsequently adjusted this figure downwards to 944 hours, to account for time Picker spent testing, adjusting and starting-up the equipment, for which both parties initially agreed the Contractor was not responsible. The lower hourly figure was then multiplied by the Contract rate paid to electricians, $22.26/hour, to arrive at an estimated Contract deduction figure of $21,013.44. This figure was subsequently communicated to the VA's Project Supervisor, Len Romano, in SRE Salvin's letter, dated September 10, 1986, wherein the latter sought rescission of FPO 5D and the issuance of a unilateral change order in its place. The 944 hour figure did not, however, take into consideration Picker's familiarity with its own equipment, which presumably would have increased the total hours required if Contractor had been compelled to install the equipment.

Accordingly, we find that the Government has offered ample proof of its incurred costs which we find to be reasonable. We also note that here, the VA credit was less than the $21,013.44 deduction it could have justifiably taken, derived from the time Picker spent *actually* performing the work. Dawson failed to proffer any form of alternative pricing in opposition to the Government's *prima facie* showing. Based on the record before us, the Government has met its burden of proving its deductive credit of $18,000, and we deny the appeal.

DECISION

Accordingly, for the reasons set forth above, the Appeal of Dawson Construction Co., Inc., is hereby denied.

[¶ 26,363] Allstate Products Company

ASBCA No. 43988, September 13, 1993. Contract No. F05600-90-C-0016.

Site Conditions—Consequences of Differing Condition—Amount of Adjustment.—In reconsidering an appeal in which the government conceded that the installation of a flat roof gutter underneath existing roofing materials was a differing site condition, the board found that the adjustment for the differing site condition included the cost of preparing the revised installation drawing because the differing site condition required the revision. The cost of delay in installing the gutters, on the other hand, was not recoverable by the contractor, because this delay was not caused by the differing site condition but by the contractor's request to change the gutter material and by its delay in submitting the revised installation drawing. Although the incompatibility of the existing roofing materials and the flat roof gutter might have created a problem for the government, performance of the work as specified was not impossible, nor did it excuse the contractor from performing the work as specified.

For the appellant: Lawrence J. Green, Littleton, Colorado. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Robert C. Allen, Trial Attorney.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

Revising and affirming 93-3 BCA ¶ 26,032 on reconsideration.

FREEMAN, Administrative Judge: Allstate Products Company (Allstate) moves for reconsideration of our decision of 12 April 1993 on its flat roof gutter and leaking roof/soffit shimming claims.

On the flat roof gutter claim, the Government admitted that the attachment of the old gutter underneath the roofing materials was a differing site condition. This condition required cutting away the old gutter, leaving a remnant flange in place and fitting the new gutter around the flange. Unilateral Modification P00004, issued 4 December 1990, granted Allstate a price increase for the cost of this additional work. Our decision sustained the determination in Modification P00004. Allstate, however, contends that it was unable to proceed with the gutter work until Modification P00004 was issued, and that it is entitled to costs of delay and disruption as measured by total costs of performance.

When the differing site condition on the flat roof gutters was first noted in August 1990, the Government's project engineer, Lt. Manley, went to the site, discussed the matter with Allstate's representatives and agreed with Allstate's proposed fix of cutting

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away the old gutter (tr. 3/565-66). Lt. Manley at that time also told Allstate to submit a revised drawing for installation of the new gutter around the remnant of the old gutter. Allstate had previously submitted an installation drawing for the new gutter with the old gutter completely removed. The Government did not immediately agree with Allstate that the attachment of the old gutter to the roofs was a differing site condition. Nevertheless, Allstate knew how it was to perform the work after the discussion with Lt. Manley in August 1990.

The subsequent delay in installation of the new gutters was not caused by the differing site condition, but by Allstate's proposals to change the new gutter material, and by its delays in submitting a revised installation drawing. Allstate alleges that a change in material was required by the differing site condition because the remaining piece of the old aluminum gutters would cause rapid corrosion of the specified steel for the new gutters. This incompatibility of materials might have created a maintenance problem for the Government, but it did not make performance of the work as specified impossible or impractical, nor did it excuse Allstate from performing the work as specified. By letter dated 23 August 1990, Allstate was expressly instructed to "continue work using approved materials (such as 24 gauge gutter) until the Contracting Officer gives written approval for use of any materials you propose to change."

On 24 August 1990, Allstate submitted alternative change order proposals to use either 26 gauge steel or aluminum gutters. The stated reason for these proposals was that the specified 24 gauge steel gutters had a long delivery lead time and "would extend the (contract) completion time by 15 to 20 weeks." On 5 September 1990, the contracting officer disapproved both proposals with the comment that the 26 gauge steel proposal would be acceptable if the credit to the Government were increased to $2,284. By FAX message dated 10 September 1990, Allstate agreed to the credit proposed by the Government, but refused to provide revised shop drawings and installation instructions because "[w]e do not want the obligation or the liability for the design criteria."

Installation of the new gutters was a simple matter of fitting the interior side under and behind the flange remaining from the old gutters. This did not require a "redesign" of the gutter system and was well within the scope of the specification requirement for submittals. Allstate's original submittal on the gutters dated 11 July 1990 included a detailed installation drawing. See exh. A-101. To the extent not expressly required by the specification section on gutters, the revised installation drawing was properly required by the Government under specification section 01300, paragraph 1.02 A. which stated in relevant part: "The Contracting Officer may require submittals in addition to those listed when deemed necessary to adequately describe the work covered by the contract."

The cost of preparing the revised drawing is compensable because the revision was required by the differing site condition. But the cost of Allstate's delay in submitting the drawing is not. There was nothing in the Differing Site Conditions clause or elsewhere in the contract which prevented Allstate from proceeding with the work as specified after notice of the condition was given to the Government. A change in the new gutter material, while perhaps desirable, was not required by the differing site condition, and the Government was clearly within its rights to require a revised installation drawing. Moreover, the fact that the specified 24 gauge gutter had a long delivery lead-time was Allstate's responsibility and not the Government's. *See National Construction Co.,* ASBCA No. 26234, 83-2 BCA ¶ 16,793 at 83,483.

On 28 September 1990, Allstate was again directed to proceed with installation of the specified 24 gauge steel gutters until a change was approved. Again it failed to do so and it did not submit a revised installation drawing until 17 October 1990. Moreover, it did not complete all required submittals for its proposed change to 26 gauge steel until 31 October 1993. The AF Form 3000 required by specification section 01300, paragraph 1.02, and the color sample required by specification section 07631, paragraph 1.02 were not submitted until that date. The 26 gauge steel gutter proposal was approved on 1 November 1990, but Allstate still did not proceed with the work. On 13 November 1990, it submitted a new proposal to provide aluminum gutters at "no extra cost." That proposal was approved on 14 November 1990, and the gutters were completed in early December 1990. On these facts it is clear that the delay in completing the new gutters was not the result of the differing site condition on the old gutters.

Allstate also requests reconsideration of our denial of the leaking roof/soffit shim-

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ming claim. However, it presents no new fact or argument that was not previously considered. The warping of the existing soffit should have been apparent from site inspection prior to bidding. Shimming the furring strips for the new soffit panels was a necessary detail of work in the circumstances present and was required for a workmanlike installation of the new soffit panels. See tr. 3/576. As such it was required by the omissions paragraph of the Contract Drawings, Maps and Specifications clause and by the Material and Workmanship clause.

On reconsideration, we find that the adjustment for the differing site condition on the old gutter should include the cost of preparing the revised installation drawing in addition to the costs allowed in Modification P00004. Our decision on the appeal is otherwise affirmed in all respects.

[¶ 26,364] Eraklis Eraklidis dba Hercules Painting Company

ASBCA No. 43720, September 8, 1993. Contract No. N62474-88-D-7831.

Procedure, Boards—Reconsideration—Issues Raised Elsewhere.—A contractor's motion for reconsideration of an appeal involving the right of the government to recover amounts for liquidated damages and repair work was denied because the contractor raised issues that were not pending in the instant appeal. The issues raised by the contractor had been the subject of a final decision in a related appeal in the United States Court of Appeals for the Federal Circuit.

For the appellant: Eraklis Eraklidis, President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John S. McMunn, Trial Attorney, Naval Facilities Engineering Command, San Bruno, California.

Before PAUL, SPECTOR, and RUBERRY, Administrative Judges.

Affirming 93-3 BCA ¶ 26,002 on reconsideration.

PAUL, Administrative Judge: On 19 April 1993, we issued a slip opinion in this appeal in which we denied appellant Eraklis Eraklidis' (Hercules) contention that the Navy was not entitled to recover amounts for liquidated damages and for screen repairs performed with respect to the buildings which were the subject of the underlying contract. We had previously issued a decision, *Eraklis Eraklidis d/b/a Hercules Painting Company,* ASBCA No. 40110, 91-3 BCA ¶ 24,188, *recon. denied,* 92-1 BCA ¶ 24,689, in which we denied Hercules' appeal from a termination for default of its contract for "Indefinite Quantity Painting" at the Naval Air Station, Moffett Field, California. Hercules appealed our earlier decision to the United States Court of Appeals for the Federal Circuit which affirmed the Board in an unpublished slip opinion dated 21 October 1992. Hercules did not appeal the Federal Circuit's ruling.

Hercules has filed a timely motion for reconsideration of our decision in the present appeal. However, the motion does not deal with the issues of liquidated damages and screen repairs which are pending before the Board. Instead, Hercules harks back to the question of its termination for default which was the subject of the earlier appeal. Our appellate court has uttered the final word on this matter, and we are in no position to reopen the record in that case.

CONCLUSION

We have reconsidered our decision and affirm it.

[¶ 26,365] Mike Albert Leasing, Inc.

PSBCA Nos. 3342-3369, July 30, 1993. Contract No. 114382-86-V-A135.

Contract Types—Vehicle Rentals—Burden of Coming Forward.—The board affirmed its ruling that the government was liable for damage to rental vehicles, even though the government argued that the board had not determined whether the damage was

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ordinary wear and tear, because the government first had to satisfy its burden of coming forward with evidence concerning the issue of its negligence. The cause of damage, when known, is a factor to be considered in determining whether damage exceeds ordinary wear and tear. For example, damage that gives the appearance of being "parking lot dings" might be considered ordinary wear and tear if caused by the doors of adjacent parked cars in public parking lots, but it might not be so considered if known to be caused by impacts from government carts or other equipment. In these appeals, the government was in a unique position to provide evidence relevant to both elements of the determination of its liability for damage.

For the appellant: Tim A. Graham. For the government: William A. Campbell, Jr., United States Postal Service, Atlanta, Georgia.

Before BROCHSTEIN, Administrative Judge.

Affirming 94-1 BCA ¶ 26,282 on reconsideration.

BROCHSTEIN, Administrative Judge: Respondent, United States Postal Service, has filed a motion asking for reconsideration of that portion of the Board's Opinion dated March 4, 1993, which found Respondent liable for damage characterized as "outward dings" in vehicles leased from Appellant, Mike Albert Leasing, Inc., for use in Fort Lauderdale, Florida.[1]

In the original Opinion, the Board concluded that the nature of the outward dings was such that it was reasonable to conclude that the damage occurred while the vehicles were actually in use by Postal Service personnel. Accordingly, the Board determined that it was reasonable to shift to Respondent the burden of coming forward with evidence with respect to the cause of the damage. Since Respondent failed to offer any such evidence, the Board concluded that Respondent was liable for the cost of repairing the damage.

In its reconsideration motion, Respondent argues that the Board failed to make a determination that the damage exceeded ordinary wear and tear before deciding to hold Respondent liable for the cost of repairing "outward dings." Respondent contends that the basis of the Board's Opinion was that because the damage occurred while the vehicles were being operated by Postal Service personnel, Respondent was in a unique position to be able to address whether the damage in question resulted from Postal Service negligence. Respondent argues that it does not hold a similarly unique position with respect to determining whether the damage in question exceeded ordinary wear and tear. Accordingly, Respondent contends that before shifting the burden of coming forward with evidence with respect to the issue of Postal Service negligence, the Board was obligated to decide that the damage in question exceeded ordinary wear and tear. Respondent argues that it was not necessary to determine the cause of the damage in order to address the issue of ordinary wear and tear.

Appellant argues that while the contract at issue here did not contain a definition of ordinary wear and tear, the Postal Service has since revised its vehicle lease contracts to include such a definition:

> In no event will the Postal Service be responsible for ordinary wear and tear which includes damage to vehicles from flying rocks and debris, substandard streets and roads, minor dents and scratches to the sides of vehicles from the doors of other vehicles in parking lots and garages, inclement weather conditions and the regular passage of time.

Appellant argues that this definition shows that the Postal Service does not consider mail tray damage and cargo damage to be normal wear and tear.

Although not stated by the Board in those precise terms, Respondent is correct in concluding that the basis for the Board's shifting of the burden of coming forward with evidence in this instance is Respondent's "unique position" to have information concerning the cause of the damage. Respondent is incorrect, however, in arguing that a determination of whether damage is beyond ordinary wear and tear is independent of a determination of the cause of the damage. On the contrary, the cause of the damage, where known, is a factor to be considered in determining whether damage exceeds ordi-

[1] The motion is limited to reconsideration of the Opinion in docket nos. 3342, 3343, 3345, 3348-3355, and 3357.

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nary wear and tear. For example, damage which gives the appearance of being "parking lot dings" might be considered ordinary wear and tear if caused by the doors of adjacent parked cars in public parking lots, but might not be so considered if known to be caused by impacts from Postal Service carts or other equipment.

Accordingly, Respondent's argument that the Board must first determine that damage is beyond ordinary wear and tear before deciding to shift the burden of coming forward with evidence to Respondent is not accepted. Contrary to Respondent's argument, in these appeals it was in a "unique position" to provide evidence relevant to both elements of the determination of its liability for damage. Having failed to do so, it remains liable for the cost of repairs.

Accordingly, having reconsidered those portions of the Opinion questioned by Respondent, the Opinion is affirmed.

[¶ 26,366] Analytical Management, Inc. v. Department of the Navy

GSBCA No. 12549-P, September 9, 1993.

Protests, GSBCA—Jurisdiction—Automatic Data Processing Equipment.—The board dismissed a protest for lack of jurisdiction because it pertained to asbestos surveying, rather than to automatic data processing equipment or services.

For the appellant: James F. Nicol, President. For the government: Royanne C. Bailey, Office of Counsel, Naval Sea Systems Command, Arlington, Virginia.

Before LABELLA, PARKER, and DEGRAFF, Administrative Judges.

LABELLA, Administrative Judge: The Board has received a protest from Analytical Management, Inc., stating that it wishes to protest a contract award made by Hercules Incorporated, Hercules Aerospace Company, for an asbestos survey contract at the Allegany Ballistics Laboratory, a facility of the Department of the Navy.

Because the matter appears to involve an award by other than a Government agency and pertains to asbestos surveying rather than to automatic data processing equipment or services, on August 24, 1993, the Board issued an order to show cause why this protest should not be dismissed for lack of jurisdiction. Protester failed to respond to the order.

The Board's protest jurisdiction is limited by statute to procurements involving the acquisition of automatic data processing equipment and services (ADPE). 40 U.S.C. § 759(a), (f) (1988). ADPE is defined to include equipment "used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception of data or information." 40 U.S.C. § 759(a)(2)(A). Moreover, the Board has no jurisdiction to entertain protests of subcontracts awarded by managing and operating prime contractors. *U.S. West Communications v. U.S.* [37 CCF ¶ 76,142], 940 F.2d 622 (Fed. Cir. 1991).

Decision

Protester was instructed to show cause why this matter should not be dismissed for lack of jurisdiction on or before August 30, 1993. Since we have not received a response from protester, this protest is, therefore, **DISMISSED** for lack of jurisdiction.

[¶ 26,367] Riverfront Guard Service, Inc. v. General Services Administration

GSBCA No. 9836, September 17, 1993.

Procedure, Boards—Failure to Prosecute—Absence from Hearing.—An appeal was dismissed for failure to prosecute because the contractor failed to appear at the hearing set for the merits of its case and subsequently failed to submit its case on the record or to tender an excuse. The contractor was ordered to show cause why the case should not be dismissed for failure to prosecute, and it failed to respond in any manner.

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For the appellant: Paul Lynch, New Castle, Pennsylvania. For the government: Robert J. McCall, Office of Regional Counsel, General Services Administration, Philadelphia, Pennsylvania.

Before DEVINE, HYATT, and DEGRAFF, Administrative Judges.

DEVINE, Administrative Judge:

ORDER

Appellant requested that a hearing on the merits of its case be held in Pittsburgh, PA. The Board complied with the request and convened the hearing; however, appellant failed to appear. Appellant offered no excuse for its absence. Appellant then requested and received two weeks to submit its case on the record. Appellant failed either to submit its case or tender an excuse.

On August 31, 1993, appellant was ordered to show cause, on or before September 10, 1993, why its case should not be dismissed for failure to prosecute. To date, appellant has failed to respond in any manner.

Decision

Accordingly, the appeal is DISMISSED WITH PREJUDICE FOR FAILURE TO PROSECUTE.

[¶ 26,368] JL Associates, Inc.

ASBCA No. 45941, September 28, 1993. Contract No. N62477-90-D-0133.

Interpretation of Contracts—Clear Meaning—Weight Class of Trucks.—A contractor was entitled to an equitable adjustment under a contract for providing drivers for government-furnished trucks, because the contract stated unambiguously that three trucks were in the weight class qualifying as "medium" for driver classification purposes whereas the trucks were in fact in the weight class qualifying as "heavy." The contractor was required to pay its drivers at the heavy truck rate and was entitled to compensation for the extra cost.

Interpretation of Contracts—Ambiguities, Patent—Prebid Reliance.—Although specification representations for truck weight class were in conflict, a contractor was not entitled to an equitable adjustment for providing drivers at the heavy truck rate for two trucks, because it failed to prove actual reliance on the inaccurate specification in bidding. Appendix D of the solicitation showed the trucks in the heavy class whereas Appendix G showed them in the medium class. The contractor did not prove reliance on the Appendix G representation.

For the appellant: Sigvart Sande, Executive Vice President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Stirling Adams, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before FREEMAN and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: JL Associates, Inc. (JL) claims a price adjustment of $10,560.38 for alleged Government misrepresentation of the payload of Government-furnished trucks under a transportation services contract. The parties have submitted the appeal for decision under Rule 11. We sustain the appeal in part and remand to the parties for settlement of amount.

FINDINGS OF FACT

1. The contract was awarded to JL on 27 September 1990 for the operation and maintenance of transportation and civil engineering support equipment (CESE) at the Patuxent River Naval Air Station. The specified services included, among other things, providing drivers for Government-furnished trucks.

2. The specific trucks to be driven were to be selected by JL from a CESE inventory at Attachment J-C3c-2 of the contract. The CESE inventory identified the trucks and other equipment by "USN" serial number and by an equipment code. Specification section C.2.h stated that "CESE is further defined in NAVFAC P-300." The P-300 document, among other things, gave "payload" and "rated capacity" for the various truck codes.

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3. The contract required JL to pay workers on the contract no less than the prevailing rates set forth in the applicable Department of Labor (DOL) wage determination. The applicable wage determination required higher wages and fringe benefits for "heavy" truck drivers than for "medium" truck drivers. The DOL Service Contract Act Directory of Occupations defined a "medium" truck as a truck with a rated capacity from 1 1/2 to four tons, and a heavy truck as one with a rated capacity over four tons.

4. JL selected a number of trucks from the J-C3c-2 CESE inventory with equipment codes 0445 and 0449. Appendix D of NAVFAC P-300 showed payloads of over four tons for Code 0445 trucks, but Appendix G of the same document showed a "rated capacity" of two tons for the same code. Appendix D showed payloads of four tons or less for Code 0449 trucks. Appendix G showed a rated capacity of two tons for that code. (See exh. G-1, pages D-4, G-2, G-3 and the "NOTE" on G-7)

5. On 6 August 1992, JL submitted a claim to the contracting officer for the additional cost of providing heavy truck drivers on 11 trucks having an actual payload in excess of four tons, but which were allegedly misdescribed as trucks with payloads of four tons or less in the J-C3c-2 CESE inventory and P-300 document.

6. On 16 October 1992, JL reduced its claim to eight trucks allegedly misdescribed. However, only five of those eight trucks appear in the Attachment J-C3c-2 CESE inventory with equipment codes. Two of those five trucks (USN Nos. 95-27625, 95-27628) were coded 0445. The other three (USN Nos. 95-23470, 95-28066, and 95-28067) were coded 0449.

7. JL alleges generally but has failed to prove by affidavit, contemporaneously prepared bid estimating worksheets, or other documentation that it in fact relied on the equipment codes and their definitions in P-300 in preparing its bid estimate for drivers for the contract.

8. By letter dated 2 February 1993, the contracting officer denied JL's claim. This appeal followed.

DECISION

JL is entitled to a price adjustment for the three trucks coded 0449. They were unambiguously misrepresented in the J-C3c-2 CESE inventory and in the NAVFAC P-300 document as being in the weight class qualifying as medium for driver classification purposes. They were in fact in the weight class qualifying as heavy, and JL was required to pay their drivers at the heavy truck rate.

JL is not entitled to an adjustment for the two trucks coded 0445. The specification representations as to their weight class were conflicting. Appendix D of NAVFAC P-300 showed them as in the heavy class while Appendix G showed them in the medium class, and JL has failed to prove actual reliance in bidding on the Appendix G representation. See, *D.E.W., Inc.*, ASBCA No. 35172, 92-1 BCA ¶ 24,548 at 122,497.

The appeal is sustained as to the three trucks coded 0449 and remanded to the parties for determination of amount. The appeal is denied in all other respects.

[¶ 26,369] Total Property Services of New England, Inc.

ASBCA No. 45883, September 21, 1993. Contract No. N62467-91-C-3433.

Interpretation of Contracts—Clear Meaning—Clarification.—A contractor had no reasonable basis for waiting for clarification of a requirement for replacing lights, because the contracting officer expressly directed the replacement of all lights at the start of that phase of work. The contractor withdrew its claim for the costs of replacing the lights and sought only the costs of delay in clarifying the requirement. The contractor's initial contention that the solicitation was ambiguous was not reasonable, because both the general description of the work and the amendment indicated that more than one light in each building was to be replaced and the requirements in the drawing notes applied to all lights. Therefore, a delay for clarification was neither excusable nor compensable.

Delay—Approval Delays—Piecemeal Submittal.—Although the government did not complete a review of submittals within the period prescribed by a contract for the repair and alteration of warehouse buildings, a contractor was not entitled to compensation for the delay, because the piecemeal submittal of additional data during the review period extended

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the period. The contract called for the installation of new overhead doors and required the contractor to submit manufacturer's data and installation instructions. Specifications allowed the government 15 working days after receipt to review a submittal. Although the government did not respond within 15 days of the initial submittal, it responded within three days of the last submittal, well within 15 working days of receipt of the last item.

Delay—Causation—Delay in Issuing Revisions.—A contractor was entitled to a time extension and relief from liquidated damages because the government was responsible for a delay in the installation of frames and doors under a contract for the repair and alteration of warehouses. The government did not timely issue a change order authorizing metal frames, even though it was not disputed that the existing wooden door frames were incompatible with new steel doors. However, the contractor was entitled to delay costs only for the period in which there was no concurrent contractor delay.

For the appellant: Thomas F. Patch, Plymouth, Massachusetts. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Alan R. Caramella, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before FREEMAN and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: Total Property Services of New England, Inc. (TPSNE) appeals the denial of its claims for a price increase and time extension under a building repair and alteration contract. We sustain the appeal in part.

FINDINGS OF FACT

1. The contract was awarded to TPSNE on 19 June 1991 for repair and alteration of warehouse buildings 99 and 100 at the Naval Coastal Systems Center, Panama City, Florida. The specified work was to be performed in three phases. Phase A is not at issue in this appeal. Phase B was to begin on 2 September 1991 and be completed by 9 December 1991. Phase C was to begin on 10 December 1991 and be completed on 11 December 1991.

2. The contract specified liquidated damages for delay in completion of $100 per day for Phase B, and $50 per day for Phase C. The contract further provided that "In the event that more than one phase of the work is in arrears at the same time, damage will be assessed concurrently." TPSNE began Phase B on 4 September 1991 and substantially completed it on 12 February 1992. There is no record of when Phase C was started but it was deemed completed by the Government for liquidated delay damages purposes at the same time as Phase B.

3. On 17 June 1992, the Government assessed liquidated delay damages against TPSNE for 65 days delay in completion of Phase B (9 December 1991—12 February 1992) and for 63 days delay in completion of Phase C (11 December 1991—12 February 1992). Both warehouse buildings remained occupied and in full use by the Government while the Phases B and C work was performed. The building manager for the Government testified that the building occupants and TPSNE worked around each other and that TPSNE cleaned its work areas every day.

4. On 1 July 1992, TPSNE submitted a request for a time extension of 113 days and a price increase of $29,900 under the contract. This request was denied by the resident officer in charge of construction (ROICC) on 10 September 1992. The request was submitted as a claim to the contracting officer on 25 September 1992. It was denied by final decision of the contracting officer on 22 February 1993. In its complaint on appeal, TPSNE claimed $8,500 for replacing high intensity discharge (HID) light fixtures, $6,500 for Government delay, and a 113-day time extension. At hearing, TPSNE withdrew its claim for the cost of replacing the HID light fixtures, but continued to press claims for alleged Government delays in (i) clarifying the HID lighting requirement, (ii) reveiwing the overhead door submittals, and (iii) authorizing installation of metal door frames.

5. Contract drawing E-1 showed 22 HID lights in Building 99, and nine HID lights in Building 100. The HID lights in Building 100 were also designated by the circuit they were on. Two were marked as circuit "a" lights. Seven were marked as circuit "b" lights. One of the otherwise identically marked HID lights in Building 99 had the word "typical" written beside it and a reference to drawing note 4. One of the seven circuit "b" HID lights in Building 100 had the word "typical" written beside it and a reference to drawing note 11.

6. Drawing Note 4 stated in relevant part: "Remove existing stem mounted H.I.D. in-

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dustrial type high bay fixture and install new metal halide fixture ...." Drawing Note 11 stated in relevant part: "Remove existing H.I.D. low bay lighting fixture and associated receptacle, conduit and wire. Install new metal halide fixture ...." Specification section 01011 at paragraph 2 required the removal and replacement of the HID "fixtures" in both buildings. Amendment 0003 to the solicitation, issued 26 April 1991, stated that: "The correct number of existing stem mounted HID light fixtures to be removed is 18 ...." The "stem mounted fixtures" were the HID light fixtures in Building 99.

7. TPSNE alleges that the requirement to replace the HID lights was limited to the one light in each building marked "typical" on Drawing E-1. However, its project manager admitted at hearing that its bid estimate for Building 99 included the cost of replacing all of the HID lights in that building (tr. 31). TPSNE first asserted its interpretation of the lighting requirement to Mr. Peckham, the construction representative, and to Lieutenant Pollard, the contracting officer on 6 September 1991. Lieutenant Pollard told TPSNE to replace all the lights and if it disagreed with his decision to write a letter to the ROICC. Lieutenant Pollard's directions are reported on TPSNE's daily report to inspector (DRI) for 6 September 1991.

8. On 12 September 1991, TPSNE wrote to the construction representative, Mr. Peckham, repeating the argument previously made on the HID lighting requirements, and requesting a "constructive change directive." Mr. Peckham was not the ROICC and had no authority to overrule the direction previously given by the contracting officer, Lieutenant Pollard. On 30 November 1991, TPSNE was again directed to replace all of the HID lights in both buildings as specified by the contract. The new lights were received on or about 15 December 1991 and their installation was completed on or about 9 January 1992.

9. The contract required installation of two new overhead doors in Building 99, and three in Building 100. Submittal of manufacturer's data, installation instructions etc. was required for these doors. Specification section 01300 at paragraph 1.5.3 allowed the Government 15 working days after receipt to "review" a "relatively simple" submittal. TPSNE submitted some, but not all, of the required data for the doors on 25 September 1991, 3 October 1991, 8 October 1991 and 16 October 1991. The first of these submittals was received by the Government on 1 October 1991. The last was received on 21 October 1991. All of the submittals were disapproved by the resident engineer on 24 October 1991. The disapproval with a list of the deficiencies in the submittals was faxed to TPSNE on that same day. A resubmittal was made on 28 October 1991 and was approved on 4 November 1991.

10. The contract required two new metal personnel doors in Building 100. However, it did not specify new door frames. The existing frames were made of wood and would not support the weight of the metal doors. On 4 September 1991, TPSNE notified the Government that the existing frames were wood. On 17 September 1991, the Government requested a cost estimate for providing metal frames. The requested estimate was provided on 8 September 1991, and on 21 October 1991, TPSNE submitted manufacturer's data on metal frames. The submittal was approved on 12 November 1991, but approval of the submittal did not authorize TPSNE to proceed with the change. As of 20 January 1992, the Government had still not issued a change order or otherwise directed the installation of metal door frames. On 2 and 3 February 1992, TPSNE installed the metal frames without direction in order not to delay the work. The doors, door hardware, drywall studs and drywall around the doors, which were dependent on prior installation of the frames, were installed between 3 and 12 February 1992. TPSNE's contemporaneously prepared DRI's show that on 3 February 1992 it was also installing sprinkler heads and valves for the fire protection system. No Government-responsible causes for the delay in installing those items have been shown.

DECISION

TPSNE's interpretation of the HID lighting requirements as requiring replacement of only one light in each building was not reasonable. The general description of the work in the specifications and Amendment 0003 to the solicitation clearly indicated that more than one light in each building was to be replaced, and the requirements in drawing notes 4 and 11 applied to all lights of the same type as those marked "typical." *Mountain States Mechanical, Inc.*, ASBCA No. 35250, 91-2 BCA ¶ 23,779, at 119,100. The contract was ambiguous as to replacement of the two circuit "a" lights in Building 100. However, TPSNE withdrew its claim for the cost of replacing the lights, and now seeks only the cost of delay in clarifying the

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requirement. The contracting officer, Lieutenant Pollard, expressly directed the replacement of all HID lights on 6 September 1991 at the start of the Phase B work. TPSNE had no reasonable basis for waiting for further "clarification" thereafter. The subsequent delay in procuring and installing the HID lights was neither excusable nor compensable.

On the overhead doors delay claim, the review period for the first submittal, received by the Government on 1 October 1991, ended on 23 October 1991. However, the piecemeal submittal of additional data items on the doors during this review period extended the review period to 15 working days after the last item was received. The last item was received on 21 October 1991. The review was completed and the results were faxed to TPSNE on 24 October 1991, well within 15 working days of receipt of the last item.

On the door frames delay claim, the Government is responsible for the delay installing the frames and doors and completing the adjacent areas through 12 February 1992. It is not disputed that the existing wooden door frames were incompatible with the new steel doors, and that the Government did not timely issue a change order authorizing metal frames. TPSNE is accordingly entitled to a time extension and relief from liquidated delay damages through 12 February 1992. However, since there were other delays for which TPSNE was responsible concurrent through 3 February 1992 with the Government-responsible delay, TPSNE is entitled to delay costs only for the period 4 February to 12 February 1992. See Findings 8 and 11 above. The appeal is sustained to the extent indicated and is in all other respects denied.

[¶ 26,370] Rex Systems, Inc.

ASBCA No. 45874, September 30, 1993. Contract No. N00104-90-C-M245.

Interpretation of Contracts—Contract as a Whole—Uncited Clause.—A contract clause was not the controlling standard for determining if the government took an unreasonably long period of time to review and approve a minor deviation request, because the clause was not referenced anywhere in the contract documents. The contractor stipulated that the clause was not cited in the contract, but contended that it was applicable because it superseded the contractually cited clause when it was issued. However, no portion of a contract may be rendered meaningless, useless, inexplicable, or without purpose unless no other interpretation is possible. Accepting the contractor's contention would render meaningless the contract clause that was included for determining the reasonableness of the government's review and approval.

Delays—Approval Delays—Deviation Request.—An appeal seeking an equitable adjustment for alleged government delay in approving a deviation request was sustained because the government provided no explanation for taking 92 days to approve the deviation request except to say that the length of time was not unreasonable. However, the government's contention that the delay was not unreasonable was contradicted by its earlier unilateral determination to extend the contract, assumedly as compensation for the delay in approving the deviation request. The board was left with no alternative but to conclude that the contractor's performance was disrupted for the time alleged because the government addressed neither the reasonableness of the time it took to review the request nor its unilateral contract extension.

For the appellant: Nathan & Associates, Eagan, New Mexico, by Dale C. Nathan. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Gary P. Van Osten, Trial Attorney, Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania.

Before ELMORE and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: Rex Systems, Inc. (Rex or appellant) seeks an equitable adjustment in the amount of $1,660.98 for alleged "Government delay in approving [Rex's Request for] Deviation D0001 [RFD] and First Article Approvals" (R4, tabs 11, 13). The appellant has elected to utilize the Board's ACCELERATED procedure. A one-day hearing was held and entitlement only will be decided (tr. 7).

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SUMMARY FINDINGS OF FACT

On 17 September 1990, Rex was awarded negotiated contract N00104-90-C-M245 (M245) to manufacture and deliver to the Government 78 Vertical and Horizontal Deflection Driver Printed Wiring Board Assemblies (PWB) at a contract price of $23,322.00 (R4, tab 1). The contract incorporated Federal Acquisition Regulation (FAR) clause 52.233-1, Disputes (APR 1984).

The contract, Section C, paragraph C-14, informed prospective bidders that submissions of requests for deviations and waivers should be made in accordance with MIL-STD-481A, "Configuration Control—Engineering Changes, Deviations and Waivers" and "[w]hen engineering changes or revisions do not affect any of the factors in 5.2 (of MIL-STD-481A] they shall be authorized (or disapproved) by the Government QAR or by the CAO (Contract Administration Office)...." (R4, tab 1)

Rex acknowledged its awareness, prior to submitting its bid, of the specification requirement/statement that "[m]ilitary specifications and standards cited herein shall be used in the revision indicated" and that "[n]o deviation from or waiver to this specification should [sic] be permitted without prior written authorization by the Government." The contract documents further advised Rex that "[a]ny reference to Teledyne Electronics ... as approval authority ... required to manufacture and test this item shall be changed to Naval Sea Logistics Center, Mechanicsburg, PA." (R4, tab 1; tr. 58-60)

Drawing 136645, Revision E, Sheet 2 of 2, Notes 2 and 15 informed prospective bidders that plastic laminate, blue in color, was to be procured from an approved supply source (R4, tab 3, exh. A-3; tr. 29-31). Rex, prior to bidding, identified three sources for the laminate, two of whom refused to submit a quote due to their inability to meet the rhodium plating requirement. Rex awarded the laminate PWB subcontract to Accurate Engineering Corp. (Accurate). Rex was neither informed nor aware at the time it awarded the subcontract to Accurate that there was a problem with getting the blue laminate for the PWBs. (Exh. A-5; tr. 31, 72-74)

Rex, to comply with the contract requirement for a first article submittal, submitted on 2 July 1991 five blue laminate PWBs accompanied with Accurate's "Certificate of Conformance." The Government approved the first article items. There was no mention either from Accurate to Rex or from Rex to the Government that the blue laminate would not be available in the future. (Tr. 31-32, 36)

Rex, upon getting first article approval, ordered from Accurate the remaining laminate PWBs which, when received, were "natural" in color. Rex, upon inquiring into the color disparity, was informed by Accurate on or about 23 January 1992 that the color was changed by a Government engineering change order (ECO), and it "didn't have to comply with the blue color, that they had allowance to supply natural in the place of blue." (Tr. 36-38) On 6 February 1992, Accurate informed Rex the laminate color change did not result from an engineering change proposal (ECP), that the document Accurate relied on for the information was "an internal [Teledyne] document only," but the only difference in the material is the pigment and blue was available but only in large quantities (exh. G-1; tr. 65). Rex opined to Accurate that because Rex was not informed of the color change beforehand, a deviation would have to be requested which would take "60 to 90 days for a reply which holds up [Rex's] contract and [Accurate's] invoice" (exh. G-1).

On 3 February 1992, Rex requested Government's approval for a "minor deviation" allowing the use of natural color PWBs. Accompanying the request was a copy of Teledyne's internal memorandum to "Printed Wiring Board Manufacturers" that "natural color flame retardant epoxy laminate (FR4GFN) is an acceptable substitute for the blue flame epoxy laminate (FLGF Blue Color) as currently specified on Teledyne Electronics Drawings." (R4, tab 5) Nothing in the memorandum indicated that the Government was either aware, or approved, of this color change. The Government's QAR, QAE and ACO, recommending approval for the deviation, forwarded the request to the Defense Contract Management Area Operations (Defense Logistics Agency), Milwaukee, Wisconsin for review and determination (R4, tab 7). The request was forwarded to the PCO at SPCC Mechanicsburg and was finally accepted after approval by the cognizant technical personnel (R4, tabs 8-10).

The Government on 5 May 1992 issued unilateral modification P00006 approving and incorporating into the contract Rex's requested deviation to use natural colored laminate PWBs at no change in the total contract price and a new delivery date of "92 JUN 30" in lieu of "92 May 08" (R4, tab 2).

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No explanation was offered why the review and approval required a total of 92 days.

On 28 August 1992, Rex submitted a claim for alleged delay occasioned by the Government's failure to timely approve the deviation request and for delay in the Government's failure to timely approve the First Article Test Report/Test Samples.* Rex contended it submitted its minor deviation request on 3 February 1992; that minor deviations, in accordance with MIL-STD-481B, paragraph 5.3.3 [sic, 5.2.3], should have been approved within 30 days after receipt, that approval was not given until 5 May 1992. Rex claimed entitlement to $1,660.98 for a sixty-two day delay it experienced in prosecuting the contract (R4, tab 11).

Rex stipulates that MIL-STD-481B, dated 15 July 1988, is not cited anywhere in contract M245 but contends it is applicable because it superseded the contractually cited MIL-STD-481A when issued (exh. A-2; tr. 69). Rex was unable to establish it possessed MIL-STD-481B prior to submitting its bid (tr. 78).

MIL-STD-481B states in pertinent part as follows (exh. A-2):

> 5.2.3 *Deviation review and approval.* Unless otherwise specified in the contract, minor deviations which do not affect any factor listed in 5.2.1 shall be approved (or disapproved) for the Government by the CAO. Deviations affecting one or more of the factors listed in 5.2.1 can be authorized only by the PCO or their authorized representative. Requests for deviations shall be processed within 30 calendar days of receipt by the Government.

MIL-STD-481A provides as follows (R4, tab 4):

> 5.6 [Deviation] Review and Approval
>
> 5.6.1 Unless otherwise specified in the contract, deviations which do not affect any factor listed in 5.2 shall be authorized (or disapproved) by the CAO.
>
> 5.6.2 Deviations affecting one or more of the factors listed in 5.2 can be authorized only by the PCO or his authorized representative. The concurrence of the military activity responsible for technical requirements, (or in the case of a MIPR the requiring department), shall be obtained before authorizing a deviation.

On 16 December 1992 the contracting officer issued a "final decision" denying Rex's claim for an equitable adjustment stating the approval time was not overly excessive, and acceptance of nonconforming supplies does not call for price modification unless it appears that the savings to the contractor in fabricating the nonconforming supplies will exceed the cost to the Government of processing the modification, or the Government's interests otherwise require a modification (R4, tab 13).

On 19 March 1993 Rex appealed the CO's adverse decision (R4, tab 14).

DECISION

It is black letter law that an appellant, to prevail, has the burden of proving its affirmative claim and establishing its entitlement to an equitable adjustment by a preponderance of the evidence. *Planning and Human Systems, Inc.*, ASBCA No. 29725, 90-2 BCA ¶ 22,821, *recon. den.*, 90-3 BCA ¶ 23,098.

Rex contends that MIL-STD-481B, although not referenced anywhere in the contract documents, is the controlling standard for determining if the Government's review and approval of its minor deviation request was unreasonably long. The record is unclear as to when Rex came into possession of MIL-STD-481B. Should we determine that it was in Rex's possession prior to its bid submittal, we must then also conclude that Rex was, or should have been, aware of an existing and patent ambiguity, that this MIL-STD was a different version from the one cited in the contract. Where a contractor has actual knowledge of a patent ambiguity, there is a duty to seek clarification prior to bidding. *Westerchil Construction Company*, ASBCA No. 35191, 88-2 BCA ¶ 20,528 and cases cited. Rex failed to seek clarification and, accordingly, would not be entitled to an equitable adjustment. *Ranco Construction, Inc.*, ASBCA No. 39050, 90-1 BCA ¶ 22,614.

We note also that the present state of the law is that no portion of the contract may be rendered meaningless, useless, inexplicable or without purpose unless no other consideration is possible. *Sylvan Service Corporation*, ASBCA No. 36193, 89-2 BCA ¶ 21,819. Accepting Rex's contention we would render meaningless, useless and without purpose the contract clause requiring that "military specifications and standards cited [in the

* It would appear that Rex elected not to pursue its claim for delay by the Government in approving the First Article Test Report/Test Sample for it was not addressed at the hearing or in appellant's brief.

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contract] herein shall be used in the revisions indicated" and apply the standard of the succeeding MIL-STD. We can find no authority, and appellant has not cited any, which supports our rewriting the terms of the contract.

To prevail, Rex must show that, under the processing prescribed by MIL-STD-481A, the time for the Government's review and approval of deviation request D0001 was unreasonably lengthy. Rex's only stated basis for the delay claim is that the Government review and approval took longer than the 30 days called out in MIL-STD-481B, a standard not applicable to this contract. Although Rex has proven its performance on the contract was disrupted it has failed to prove it is entitled to delay costs for 62 days as claimed.

The Government, on the other hand, has provided no explanation for its taking 92 days to approve the deviation request except to say the length of time taken was not unreasonable. We find this contention contradicts the Government's unilateral determination that Rex's contract be extended 54 calendar days, from 8 May to 30 June 1992, assumedly as compensation for the delay in approving the deviation request. The Government, having neither addressed the reasonableness of the 92 days it took to review and approve the deviation request nor its unilateral contract extension of 54 calendar days leaves us no alternative but to conclude Rex's contract performance was disrupted for a total of 54 calendar days.

Accordingly, the appeal is sustained in part as indicated above and the matter is remanded to the contracting officer for negotiation of quantum. Although Rex's computation of its alleged entitlement is based on the Eichleay formula, we cannot concur with Eichleay's use under the circumstances of this case. See, *Interstate General Government Contractors, Inc.*, ASBCA No. 43369, 92-2 BCA ¶ 24,956, *aff'd., Interstate General Government Contractors, Inc. v. Stone, Secretary of the Army* [38 CCF ¶ 76,446], No. 92-1430 (Fed. Cir. June 11, 1993); *Daly Construction, Inc. v. Garrett, Secretary of the Navy* [39 CCF ¶ 76,572], No. 92-1154 (Fed. Cir. September 15, 1993).

[¶ 26,371] Deep Run Salvage

ASBCA No. 45152, September 23, 1993. Contract No. 27-1090-073.

Contract Disputes, Certification—Failure to Certify—Premature Appeal.—Although a claim was uncertified as the result of a facially defective certification at the time the contracting officer issued a decision, the claim was not dismissed for lack of jurisdiction, because no useful purpose would have been served by dismissing or suspending the technically premature appeal. Under an amendment to the Contract Disputes Act, the defects in the language of the purported claim would not deprive the board of jurisdiction; however, the appeal was docketed prior to the date of the amendment's enactment and therefore the amendment did not affect the claim. Proper certification filed after the contracting officer issued a final decision on the then uncertified claim did not retroactively render the claim properly certified. However, the facts of the appeal presented a compelling case for retaining jurisdiction, inasmuch as filings by both the government and the contractor subsequent to the docketing of the appeal made it clear that both parties sought a board decision on the merits of the claim.

Sales of Government Property—Buyer's Remedies—Summary Judgment.—A government motion for summary judgment seeking the denial of an appeal alleging that the government breached a contract by failing to release the scrap material described in the solicitation was denied, because triable questions of fact existed. Facts relating to the accuracy of the description of the material, both during the inspection period and at the time the property was tendered to the contractor were in dispute. The government's motion for summary judgment alleged that the disputed facts were immaterial because of liability limiting provisions in the contract that restricted the government's maximum liability to refund of the purchase price. However, liability limiting clauses do not always restrict the purchaser's remedy or otherwise curtail the damages remedy that is applicable to breach of contract.

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For the appellant: James P. Casper, Sr., Managing Partner. For the government: Matthew Pausch, Trial Attorney, Defense Reutilization & Marketing Service (DLA), Battle Creek, Michigan.

Before GROSSBAUM, RUBERRY, and THOMAS, Administrative Judges.

GROSSBAUM, Administrative Judge: This dispute involves one item of a surplus sales contract awarded in July 1991 to appellant, Deep Run Salvage (sometimes Deep Run), a partnership located in Martins Ferry, Ohio. Appellant alleges that the Government breached the contract with respect to this item by failing to release the material (scrap aluminum) described in the solicitation on which appellant had bid.

The appeal is taken from a contracting officer's decision denying Deep Run's claim for damages in the amount of approximately $76,000. Pursuant to Rule 5(b), the Government moves to dismiss this appeal with prejudice for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment denying the appeal on the merits. Appellant opposes the motion. Since matters outside the pleadings have been presented and need to be considered, we treat the motion as one for summary judgment. *See* Fed. R. Civ. P. 12(b).

Without alluding specifically to our jurisdiction, the Government also alleges and argues that appellant's

> claim should be denied [sic] because Appellant never properly certified his claim pursuant to the Contract Disputes Act until after a final decision was issued by the Contracting Officer.

(Gov't Memorandum in lieu of Answer, ¶ 42). An allegedly improper certification of a contractor's more than $50,000 monetary claim under a contract to which the Contract Disputes Act (CDA) (41 U.S.C. §§ 601 *et seq.*) applies affects the jurisdiction of this Board. Therefore, although not promptly filed as a motion addressed to the Board's jurisdiction, as required by Rule 5(a), the Government's allegation and argument concerning appellant's Improper claim certification must be considered before we can rule on motions going to the merits of the appeal.

A. *Jurisdiction*

In June 1991 the Defense Reutilization and Marketing Service (DRMS) issued an invitation for bids (IFB) for Sale No. 27-1090, consisting of surplus metal and nonmetallic scrap, with a bid opening date of 18 July 1991. More than 80 separate items of scrap materials, situated at various locations, were described in the solicitation. (R4, tab 1)

Deep Run submitted bids on several items described in the IFB, including Item 57, described as comprising 673,041 pounds of aluminum scrap, located in a specified building at the Defense Depot Annex in Piketon, Ohio (R4, tabs 1, 3).

Deep Run's bid of $.0212/lb. for Item 57 ($14,268.47) was the highest of three bids received by DRMS. On 25 July 1991 the DRMS office in Columbus, Ohio, awarded Deep Run Contract No. 27-1090-073, covering Item 57 and two other items. (R4, tab 5)

After award, Deep Run's managing partner paid the award balance due and went to Piketon, Ohio, to pick up the property. According to Deep Run, government personnel refused to release the material it had bid on and instead provided glass material that did not contain aluminum. (R4, tabs 7, 24)

Between July 1991 and May 1992 Deep Run and the Government exchanged extensive communications concerning Deep Run's grievance. (R4, tabs 6—42) Under letter to the contracting officer dated 26 May 1992, Deep Run provided factual data to support its revised request for damages in the amount of $76,212.30. This letter did not include a certification as required by CDA section 6(c)(1), 41 U.S.C. § 605(c)(1). (R4, tab 44)

By July 1992 the parties' discussions had reached an impasse and the Government clearly disputed any liability to appellant and the amount requested by appellant. In a letter to Deep Run dated 17 July 1992, the contracting officer analyzed the 26 May 1992 request and asserted that "there is no authority under the contract to consider your request." The contracting officer concluded her letter by reminding Deep Run that a CDA certification must be provided for its "request to be considered as a claim" and "before a final contracting officer's decision can be issued." (R4, tab 46)

At the end of a 22 July 1992 letter to the contracting officer reasserting its claim, Deep Run's managing general partner, James P. Casper, Sr., signed the following certification applying "to my claim dated 26 May 92":

> I assure you my claim is made in good faith, and supporting documents and statements are true.

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> I firmly believe the government is liable to compensate us [for] lost business opportunity [*i.e.*, Deep Run's characterization of the requested damages].

Mr. Casper's signature was followed by a Notary Public's acknowledgment. (R4, tab 47)

In a letter to Deep Run dated 9 September 1992, the contracting officer acknowledged the purported claim certification in Deep Run's 22 July letter but questioned whether this certification complied with the CDA and advised that "proper certification is a jurisdictional requirement of both the Armed Services Board of Contract Appeals and the U.S. Claims Court." Nevertheless, in that same letter the contracting officer denied Deep Run's claim for additional compensation and, using language substantially as prescribed by FAR 33.211(a)(4)(v), characterized her letter as "the final decision of the Sales Contracting Officer," which may be appealed to the ASBCA or may serve as the basis for bringing an "action directly in the United States Claims Court." (R4, tab 52)

In a 25 September 1992 letter to the deputy head of the DRMS procuring activity, Deep Run reiterated its claim and enclosed a summary claim computation and a certification signed by Mr. Casper, the text of which conformed to the language set forth in 41 U.S.C. § 605(c)(1). At the end of the covering letter, Mr. Casper stated that, if the enclosed certification

> is still not proper I would appreciate some one sending me literature detailing "proper certification." In the meantime I will have notified ASBCA of a pending appeal of [the contracting officer's] decision.

(R4, tab 53)

The deputy head of the procuring activity acknowledged receipt of Deep Run's 23 September letter and attachments thereto and expressed regret that the sale dispute could not have been resolved amicably. The response concluded with the observation that:

> The matter now falls solely within the cognizance of the Contracting Officer and the Armed Services Board of Contract Appeals. Accordingly, I have forwarded your correspondence to [the contracting officer] for action.

(R4, tab 54) The contracting officer never issued a new decision and does not appear to have taken any other action on Deep Run's claim after the claim correspondence, including Deep Run's proper certification, was forwarded to her for action.

Meanwhile, on 2 October 1992 the Board received a letter from Deep Run which attached the contracting officer's 9 September decision and stated:

> Please take notice that our company is appealing [the attached] decision . . .
>
> I would appreciate if you would send us whatever literature you have available so that we can file our claim properly.

Based on the foregoing notice, on the same day the Board docketed the matter as ASBCA No. 45152.

DECISION ON JURISDICTION

There is no dispute that, as Deep Run's managing general partner, Mr. James P. Casper could properly execute required claim certifications. *See* FAR 33.207(c)(2)(ii). However, the language of the purported claim certification at the end of his 22 July 1992 letter fell short of conforming to the text appearing in 41 U.S.C. § 605(c)(1), especially with respect to the second prong of the canon. Such a departure from that talismanic invocation normally dooms the effectiveness of the attempted certification. *See, e.g., Bontke Brothers Constr. Co.*, ASBCA No. 39437, 92-1 BCA ¶ 24,611; *C&S Carpentry Services, Inc.*, ASBCA No. 42987, 92-1 BCA ¶ 24,449; *Patty Precision Products Co.*, ASBCA No. 25338, 83-2 BCA ¶ 16,606 (fatal irregularities in certification language); *but cf. Heyl & Patterson. Inc. v. O'Keefe* [38 CCF ¶ 76,475], 986 F.2d 480, 483 (Fed. Cir. 1993) (applying "substantial compliance" test set forth in *United States v. General Electric Co.* [31 CCF ¶ 72,180], 727 F.2d 1567, 1569 (Fed. Cir. 1984)).

Under an amendment to the CDA adding a new subparagraph (6) to CDA section 6(c), 41 U.S.C. § 605(c)(6), the defects in the language of appellant's purported claim certification would "not deprive a court or an agency board of contract appeals of jurisdiction over that claim." Federal Courts Administration Act, Pub. L. 102-572, § 907(a)(1)(B), 106 Stat. 4518 (enacted 29 October 1992). However, the instant appeal was docketed on 2 October 1992 and the foregoing amendment does not affect "those claims which, before such date of enactment, have been the subject of an appeal to an agency board of contract appeals . . ." *Id.* § 907(a)(2).

Since Deep Run's 22 July 1992 purported certification was facially defective, its pending "claim" was uncertified at the time the

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contracting officer issued her 9 September 1992 decision. Despite appellant's sincere and continued efforts to certify its claim properly, the proper certification submitted by Mr. Casper on 25 September 1992, after the contracting officer issued her decision on Deep Run's then uncertified claim, "does not retroactively render the claim properly certified." *DMS,* ASBCA No. 43595, 92-2 BCA ¶ 24,952 at 124,356.

Nevertheless, in *Carmona Industrias Electricas, S.A.,* ASBCA No. 42996, 93-3 BCA ¶ 25,975 (decided 6 April 1993), as in this case, the contracting officer never issued a decision after the claim was properly certified. We there observed:

> The appeal to this Board, which took place prior to certification, was premature at the time taken. Although the appeal was premature when originally taken, subsequent filings by the appellant with the Board make it clear that appellant is seeking a Board decision on the merits of [the] claim

(slip. op. at 6) and denied the Government's motion to dismiss for lack of jurisdiction.

The facts before us present as compelling a case for retaining jurisdiction over this technically premature appeal as those described in *Carmona.* In particular, filings by both the Government and appellant subsequent to the docketing of this appeal make it clear that both parties are seeking a Board decision on the merits of the claim. Cf. *Emerson Electric Co.,* ASBCA No. 31184, 86-2 BCA ¶ 18,979 at 95,855-57 (no useful purpose would be served by dismissing or suspending premature appeal).

Accordingly, we retain jurisdiction over this appeal.

B. *Motion for Summary Judgment*

We next consider the instant motion going to the merits of the appeal. Facts relevant to this motion are summarized in the numbered paragraphs (¶ s) below.

1. The IFB for Sale No. 27-1090 incorporated by reference the DRMS Sale by Reference pamphlet. The following relevant General Sale Terms and Conditions were set forth in Part 2 of the pamphlet and became incorporated in the instant contract:

1. INSPECTION.

The bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation.

2. CONDITION AND LOCATION OF PROPERTY.

Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless otherwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. *This is not a sale by sample.* (Emphasis in original).

* * *

12. ADJUSTMENT FOR VARIATION IN QUANTITY OR WEIGHT.

Unless otherwise provided in the Invitation, ... when the property is sold by "weight," the Government reserves the right to vary the weight tendered or delivered to the Purchaser by 25 percent. The purchase price will be adjusted upward or downward in accordance with the unit price and on the basis of the quantity or weight actually delivered....

* * *

14. RISK OF LOSS.

Unless otherwise provided in the Invitation, the Government will be responsible for the care and protection of the property subsequent to it being available for inspection and prior to its removal. Any loss, damage, or destruction occurring during such period will be adjusted by the Contracting Officer to the extent it was not caused directly or indirectly by the Purchaser, its agents, or employees. At the discretion of the Contracting Officer, the adjustment may consist of rescission. With respect to losses only, in the event the property is offered for sale by the "lot," no adjustment will be authorized under this provision unless the Government is notified of the loss prior to removal from the installation of any portion of the lot with respect to which the loss is claimed.

15. LIMITATION ON GOVERNMENT'S LIABILITY.

Except for reasonable packing, loading, and transportation costs (such packing, loading, and transportation costs being recoverable only when a return of property at Government cost is specifically authorized in writing by the Contracting Officer) the measure of the Government's liability in any case where liability of the Govern-

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ment to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

* * *

22. WITHDRAWAL OF PROPERTY AFTER AWARD.

The Government reserves the right to withdraw for its use any or all of the property covered by this contract, if a bona fide requirement for the property develops or exists prior to actual removal of the property from Government control. In the event of a withdrawal under this condition, the Government shall be liable only for the refund of the contract price of the withdrawn property or such portion of the contract price as it may have received.

* * *

32. GUARANTEED DESCRIPTIONS.

Notwithstanding any other provisions of this Invitation for Bids to the contrary and subject to the limitations and conditions set [sic] in our subparagraphs a and b below, all of which are of the essence, the Government guarantees to the original Purchaser of the property that the property delivered or offered for delivery under any contract resulting from this Invitation for Bids will be as described in the Invitation for Bids.

(a) That if a misdescription is determined to exist prior to removal of the property from Government control, that the sole and exclusive remedy available to the Purchaser will be refund of the purchase price of the property as to which such misdescription exists, or such portion thereof as the Government may have received.

(b) That if a misdescription is determined to exist after removal of the property from Government control, then the Government will make an adjustment in the purchase price paid for the property commensurate with the market value of the property actually received. . . .

(c) . . . however, the Government will accept return of any property determined to have been misdescribed, to a location specified by the Contracting Officer at the Purchaser's expense, and refund to the Purchaser the purchase price or such portion thereof as the Government may have received, provided timely notice of the misdescription has been furnished to the Contracting Officer . . .

(d) The foregoing guarantee is in lieu of all other guarantees, expressed or implied, and all other obligations on the part of the Government to deliver or offer for delivery property as described in the Invitation for Bids and shall not entitle the Purchaser to any payment for loss of profits or any other money damages, special, direct, indirect, or consequential, nor shall any recovery of any kind against the Government under this provision be greater in amount than refund of the purchase price of the specific material found to have been misdescribed. THE GOVERNMENT DOES NOT WARRANT THE MERCHANTABILITY OF THE PROPERTY OR ITS FITNESS FOR ANY USE OR PURPOSE.

(R4, tab 2)

2. The IFB for Sale No. 27-1090 described Item 57 as follows:

> 57. ALUMINUM, SCRAP: Including countermeasure and roll assembly chaffs. Approximately 50% of weight paper.
>
> Inside—Bldg. PB2, South Rear Wall—SCL D1D A*B—In crates & packaging (which are included in weight & sale)
>
> 673,041 POUNDS

(R4, tab 1)

3. On or about 9 July 1991 a Deep Run representative traveled to Piketon, Ohio, to inspect and obtain samples of Item 57. According to appellant's representative, at that time Government officials showed him a roll of aluminum chaff located on the premises as an example of Item 57 and gave him samples of the material. (R4, tab 24)

4. On 29 July 1991, after receiving the award for Item 57 and paying the balance due, Deep Run's managing partner, Mr. Casper, brought his truck to the depot at Piketon, Ohio, to pick up the property. According to Mr. Casper, officials at the depot gave him glass, not aluminum scrap as described in the IFB. (R4, tabs 7-9)

5. Mr. Casper promptly reported this situation to a DRMS Sales Contracting Officer (SCO). On 30 July 1991 he brought the material to the DRMS regional office in Columbus, Ohio, where the SCO undertook to arrange for inspection of the material. (R4, tabs 7, 9)

6. Initially, Deep Run sought specific performance of the sales contract. On 30 July 1991 Mr. Casper submitted to the SCO a writing purporting to be "OUR CLAIM FOR ITEM #057 ON SALE # 27.1090 CONTRACT #27.1090.073 FOR 673,041 LBS, OF ALUMINUM SCRAP AT .0212 PER LB." Deep Run persisted in requesting delivery of the allegedly promised aluminum scrap throughout 1991. However, by February 1992 Deep Run began asserting a monetary claim for breach of contract damages, con-

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sisting mainly of out-of-pocket expenses and "Lost Business Opportunity." (R4, tabs 6, 24, 27, 33).

7. Meanwhile, DRMS representatives insisted that Item 57 had been correctly described prior to being offered for sale and was not misrepresented during the inspection period. The same representatives also suggested that samples of aluminum that were not for sale may have been given out during the Inspection period. DRMS' denial of any alleged misdescription was based on a physical Inspection of Item 57 conducted "prior to [the item] being offered for sale." (R4, tabs 29, 34, 46). Nothing in the record indicates the results of inspections performed on the material from Item 57 brought by Mr. Casper to the DRMS regional office in Columbus, Ohio, on 30 July 1991, or if any such inspections were ever performed.

8. In April 1992 the SCO cancelled contract 27-1090-073 with respect to Item 57. During April and May 1992 DRMS approved and processed a refund to Deep Run of the more than $14,000 purchase price of the cancelled item. (R4, tabs 37, 40, 43).

9. In a 21 April 1992 letter to the SCO, Deep Run indicated its unwillingness to accept a refund of its purchase price for fear of waiving its right to claim damages for "lost business opportunity." The SCO's 30 April reply to Deep Run requested additional documentation to support claimed costs and assured Deep Run that rejecting the refund of its purchase price was not required to preserve its claim rights. (R4, tabs 39, 41). Subsequent correspondence between the parties, as described in Part A of this opinion, led to this appeal.

DISCUSSION

Summary judgment may not be granted unless the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c).

In this appeal, facts relating to the accuracy of the description of Item 57, both during the inspection period and at the time the property was tendered to Deep Run, are clearly in dispute. In particular, genuine issue exists concerning: the composition of the samples shown and given to Deep Run's representative in early July 1991 and what Deep Run's representative was told about them by DRMS personnel; the composition of the property tendered to Deep Run on 29 July 1991 as Item 57 and the extent, if any, to which it differed from the item described in the IFB; and, if the tendered property differed significantly from the description, how and why such difference came about. (¶ s 3, 4, 7)

The essence of the Government's motion is that the foregoing ostensibly disputed facts are immaterial because of liability limiting provisions in the contract, especially the Limitation on Government's Liability and the Guaranteed Descriptions clauses. According to the Government, these clauses restrict the Government's maximum potential liability in surplus sales contracts "to a refund of the purchase price [paid for the property], which the Government has already provided." (Gov't mot. at 7-8)

Nevertheless, the liability limiting clauses on which the Government relies do not always restrict the purchaser's remedy to return of the contract price or otherwise "curtail the damages remedy that is generally applicable to breaches of contract." *See Harry Thuresson, Inc. v. United States* [17 CCF ¶ 81,068], 453 F.2d 1278, 1283 (Ct. Cl. 1972); *Freedman v. United States,* 320 F.2d 359 (Ct. Cl. 1963). Moreover, a purchaser's recovery might not be limited to the purchase price where "'arrant indifference tantamount to a lack of good faith [by the Government has] been shown," *Chesapeake Salvage Corp.,* ASBCA No. 24861, 81-1 BCA 15,020 at 74,326, or where enforcement of the liability limitation would be unconscionable. *See Mighty Mouse Fish Co.,* ASBCA No. 25381, 82-1 BCA ¶ 15,763, *den. motion for reconsid.* 83-2 BCA ¶ 16,550.

When considering a summary judgment motion we are obliged to draw inferences favorable to the nonmoving party, appellant herein. The record before us leaves unresolved questions as to whether the property tendered to Deep Run as Item 57 was actually aluminum scrap (which had simply been misdescribed as to weight, type of materials included, or percentage of waste) or was some different material that had been substituted for the item described in the IFB. If the property was simply misdescribed, appellant's remedy would be limited by the Guaranteed Descriptions clause.

On the other hand, the unjustified substitution of some entirely different material than described in the solicitation might constitute a material breach outside the Guaranteed Descriptions clause or might even be treated as a constructive cancellation or withdrawal of the described item, bringing the Withdrawal of Property After Award

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clause into play. Under the latter clause, the Government may be liable for breach of contract damages unless it can establish that "a bona fide requirement for the property develop[ed] or exist[ed] prior to actual removal of the property from Government control." *See Peck Iron and Metal Co., Inc. v. United States* [20 CCF ¶ 82,040], 496 F.2d 543 (Ct. Cl. 1974).

Drawing inferences favorable to appellant we discern the existence of triable questions of fact that preclude the entry of judgment for the Government as a matter of law.

The Government's motion for summary judgment is denied and the parties are directed to prepare for hearing.

[¶ 26,372] C&N Contractors, Inc.

ASBCA No. 44549, September 22, 1993. Contract No. DABT10-90-C-1833.

Contract Disputes, Certification—Authority—Senior Company Official in Charge.—A contractor's project manager was a proper person to certify a claim because the project manager was solely responsible for the performance of the contract, was physically present at the site, and exercised full authority to bind the corporation on the contract. The board noted that the Federal Courts Administration Act of 1992, which modified the certification requirements of the Contract Disputes Act, does not apply to claims that were the subject of an appeal to a board of contract appeals before October 29, 1992. The contractor filed notice of appeal with the board on May 15, 1992. In determining whether an individual is a senior company official, the board looked to a person's rank and managerial responsibilities at the time of certification. The project manager's position was one tier below the highest company official, and although the contract manager had no responsibility outside of the contract, the contract represented approximately 50 percent of the contractor's gross revenues.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Jane Broadwater Long. For the government: Col. Riggs L. Wilks, JAGC, Chief Trial Attorney, and Maj. Donald L. Powers, JAGC, Trial Attorney.

Before STEMPLER, RUBERRY, and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: The Government moves to dismiss this appeal for lack of jurisdiction, alleging that appellant failed to properly certify its claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)*. The Government contends appellant's project manager, who signed the certification in question, was not a "senior company official" as required by Federal Acquisition Regulation (FAR) § 33.207(c)(2).

STATEMENT OF FACTS

The Government awarded C & N Contractors, Inc. (C & N), an Alabama corporation located in Birmingham, Alabama, contract No. DABT10-90-C-1833 on 27 September 1990 to rehabilitate latrines at Fort Benning, Georgia. The total amount of the contract was $557,000. In November 1991, C & N submitted a certified claim to the contracting officer, totalling $72,247.41, for additional work allegedly not covered by the contract. The contracting officer failed to issue a decision after C & N petitioned for, and the Board issued, an order directing the contracting officer to render his decision. After the Government failed to comply with the Board's order, C & N appealed the deemed denial of its claim to the Board. The Government subsequently filed this motion to dismiss, alleging that C & N's claim certification was improper.

C & N contends that its project manager, Mr. Samford, who executed the claim certification, was a senior company official with primary responsibility for the execution of the contract and a physical presence at the site. The Government contests that Mr. Samford was a senior company official, while conceding that he was primarily responsible for the execution of the contract

* Although the Federal Courts Administration Act of 1992, P.L. No. 102-572, 29 Oct. 1992, modified the certification requirements of the CDA, 41 U.S.C. § 605(c), it does not apply to claims that have been the subject of an appeal to a board of contract appeals before 29 October 1992. § 907(a)(2), 106 Stat. 4518. Appellant filed its notice of appeal with the Board on 15 May 1992.

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and that he had the requisite presence at the site.

Mr. Samford is a director of Glade Contracting Corp. (GCC). C & N hired, as employees, Mr. Samford and 12 of GCC's employees to perform the contract. Mr. Samford was appointed C & N's on-site project manager. The position of project manager, in C & N's small organization, was one tier below the highest company official. Mr. Samford had full authority to bind C & N with respect to the contract, did sign all the modifications for the contract, and was solely responsible for the performance of the contract. C & N's annual gross revenue was approximately $1,000,000. It employed between 12 and 30 persons during performance of the contract. Upon conclusion of the contract, Mr. Samford and the other GCC employees, left C & N's employ.

DECISION

Proper claim certification is jurisdictional (*Universal Canvas v. Stone* [37 CCF ¶ 76,370], 975 F.2d 847 (Fed. Cir. 1992)) and the contractor bears the burden of proving that a proper individual has certified under FAR 33.207(c)(2)(i). *Fidelity and Deposit Company of Maryland,* ASBCA No. 40327, 91-1 BCA ¶ 23,312. In deciding whether an individual is a senior company official, we look to a person's rank and managerial responsibilities with the organization at the time of certification. *J.A. Jones Construction Company,* ASBCA No. 40625, 92-3 BCA ¶ 25,212. We hold that Mr. Samford was a proper person to certify C & N's claim. Mr. Samford was solely responsible for the performance of the contract, was physically present at the site, and exercised full authority to bind the corporation on the contract. His position in C & N's small organization was one tier below the highest company officer and was sufficient to make him a senior company official. While it is true that Mr. Samford had no responsibility outside of this contract, the contract represented approximately 50% of C & N's gross revenues and Mr. Samford supervised between 33% and 100% of C & N's employees. Mr. Samford clearly meets the test to be a senior company official. *All Star Maintenance, Inc.,* ASBCA No. 42832, 93-3 BCA ¶ 26,034, 16 April 1993; *Holmes & Narver, Inc./Morrison-Knudsen Company, Inc. (a joint venture),* ASBCA No. 40111, 91-3 BCA ¶ 24,235; *M.A. Mortenson Co.,* ASBCA No. 39978, 91-1 BCA ¶ 23,558.

CONCLUSION

The Motion is denied.

[¶ 26,373] American Marine Decking Services, Inc.

ASBCA Nos. 44440, 45418, 45419, September 21, 1993. Contract Nos. N00123-88-D-0011, N00123-88-D-0295, N00123-88-D-0282.

Contract Disputes, Claims—Statement Adequacy—Future Intent.—Although a contractor was found to have submitted a claim for variations in estimated quantities for the second option year of its contract, the board refused to find that the contractor had filed a similar claim with respect to the base year and the first option year, because the contractor's claim to the contracting officer was expressly for the second option period and merely stated a future, not present, intent to file a claim for the base year and first option year.

For the appellant: Kenneth A. Kopf, Rancho Bernardo, California. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Michael R. Nevarez, Trial Attorney, Office of the General Counsel, Western Division Trial Team, San Bruno, California.

Before LUSSIER, RUBERRY, and SPECTOR, Administrative Judges.

LUSSIER, Administrative Judge: The subject appeals are taken from a contracting officer's decision denying American Marine Decking Systems, Inc.'s (appellant or AMD) claim for an equitable adjustment under the above referenced contracts. The Government has filed a motion to dismiss the appeals in part, striking from the amended complaint appellant's claim for monies related to the base and to the first option year of each contract. The Government contends that the Board has jurisdiction to decide these appeals only insofar as they relate to the second option year.

STATEMENT OF FACTS FOR JURISDICTIONAL PURPOSES

1. Appellant was awarded the three referenced contracts to perform removal and replacement of deck covering. Separate line

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items for various items of work for a base year, and for two option years, were specified with estimated quantities of work given for each item. Both options were exercised by the Government for each contract. The standard REQUIREMENTS clause in FAR 52.216-21 was incorporated by reference in all three contracts.

2. After performance appellant submitted a claim to the contracting officer by a letter dated 23 January 1992. The letter stated that the claim was being submitted "pursuant to the Contract Disputes Act of 1978 and the Disputes Clause in the contracts and in accordance with the Act, AMD hereby requests a final decision on its claim within the statutorily required time." It enclosed an "Attachment A," an "Attachment B" and a "Certification." The Board file does not contain attachments A or B, but does contain a CDA certification from appellant's president, dated 10 February 1992, and a one page document entitled "Computation" which appears to present a formula for calculating quantum.

3. The claim letter alleges certain factual background related to the estimates versus the actual work ordered:

> Option year 2 [for Contract 0011] ran from March 1990 to March 1991. During that Option year, the Government's total estimated extended price for all quantities for all CLINs was $762,060.00. During that option period, the actual invoiced total price for all CLINs was only $488,770.26—or only 64.14% of the estimated quantities that the government provided for the contractors to rely on in their bidding.
>
> Option year 2 [for Contract 0295] ran from October 1990 to September 1991. During that Option year, the Government's total estimated extended price for all quantities for all CLINs was $404,100.00. During that option period, the actual invoiced total price for all CLINs was only $7,500.00—or only 1.8% of the estimated quantities that the government provided for the contractors to rely on in their bidding. (During the base year for this contract, the Government only ordered 1.2% of the total estimated quantities, and during the first option year, the government ordered NO work at all! This comes to only 1.03% of the total years' estimated quantities).
>
> Option year[sic] [for Contract 0282] ran from October 1990 to September 1991. During that Option year, the Government's total estimated extended price for all quantities for all CLINs was $952,050.00. During that option period, the actual invoiced total price for all CLINs was only $159,414.60—or only 16.7% of the estimated quantities that the Government provided for the contractors to rely on in their bidding. (During the base year for this contract, the Government only ordered 12.5% of the total estimated quantities, and during the first option year, the government ordered 36.4% of the estimated quantities. This comes to only 21.9% of the total estimated quantities.

4. After reciting this background the claim letter then discusses, under a section entitled "CLAIM", various Board of Contract Appeals decisions granting claims for variations from estimated quantities whether because of negligent estimates or diversion of work. This is followed by a section entitled "QUANTUM" which briefly discusses a GSBCA decision and concludes with the following pertinent paragraphs:

> Following the relief granted contractors under similar cases, AMD claims that an adjustment under the changes clause is authorized, or alternatively, relief under the termination for convenience clause to realign the CLIN prices is appropriate.
>
> The supporting calculations for the quantum under the changes clause (and case law) are contained in Attachment A. The supporting calculations for the quantum under the termination for convenience clause (and case law) are contained at Attachment B.
>
> Based on these calculations, AMD claims that it is entitled to an equitable adjustment pursuant to and under the contracts in an amount of $894,597.54 ($180,275.82 for #011; $475,581.24 for #931 [sic]; and $238,740.48 for #295). Since AMD had to wait until the Agency issued no more delivery orders to assess its claim, this figure is a final one under these contracts. AMD will be submitting similar claims for the Base and first Option years under each contract.

5. Not receiving a final decision of the contracting officer, appellant filed an appeal to this Board on 14 April 1992 from a "deemed denial" of its claim under 41 U.S.C. 605(c)(5). On 15 April 1992, the contracting officer issued her decision on appellant's 23 January 1992 claim. In it she characterized the claim as one for an equitable adjustment of $894,597.54 covering the second option year for all three contracts, and correctly stated "AMD also advised the Navy that it

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intended to submit similar claims for the base year and first option year under each contract." She concluded that due care was exercised in preparing the estimates and that no diversion of work occurred. She denied the claim.

6. The Complaint filed in these appeals on May 1992 was a consolidated complaint which repeated in essence the allegations in the claim. The request for relief was simply stated "Appellant claims it has been damaged and is entitled to recover in the amount of $894,597.54, plus interest." In December 1992 appellant filed an amended Complaint in which it added the following allegation. "... During the Base Year of Contract 0011, the Agency ordered only 63.5% of the Estimated Quantities; during the first option year, ordered only 57.22% of the Estimated Quantities; and during the second option year ordered only 64.13%—substantially less than those set forth by the Agency in its RFP, and upon which Appellant relied." It also amended it request for relief by changing the amount claimed to $2,368,913.32 plus interest.

7. In May 1993, appellant further amended its Complaint to change its request for relief to now read: "Appellant claims it has been damaged, utilizing a breach of contract calculation, in the amount of $2,368,913.32 plus interest; or in the alternative, utilizing a partial termination for convenience/constructive change calculation, in the amount of $874,877.00 plus interest."

8. The Government concedes entitlement, but not quantum, as to the Second option year for contracts 0282 and 0295.

DECISION

The Government's position in support of its motion is simply that the appellant never filed a claim for the base and first option years with the contracting officer, in the absence of which the Board has no jurisdiction. Appellant does not dispute the principle but contends that such a claim was filed with the contracting officer. Both parties cite a number of cases involving the nature and form of a CDA "claim." None are helpful here.

In essence, appellant asks us to find it filed a claim because it explained its theory of relief and gave the formula, from which the Government could deduce what the "similar" monetary claim it intended to file would be. To state the proposition condemns it. Appellant's claim to the contracting officer is expressly for option year two. It specifically states that appellant "will be" submitting similar claims for the base and first option years, thus we cannot find it was currently submitting such claims. By any interpretation, it expresses a future, not present, act.

There could be many reasons why the present intent to submit a future claim might not come to fruition. The choice was appellant's, not the Government's. It did not do so, and cannot now do so by amendment to its Complaint.

Accordingly, we grant the Government's motion to partially dismiss, and strike the amendment to the complaint insofar as it attempts to include a claim for the base and first option years.

[¶ 26,374] Koehlke Components, Inc.

ASBCA Nos. 44354, 44625, September 22, 1993. Contract No. DLA900-91-D-5119/0001.

Methods of Procurement—Purchase Orders—Lapsing of Order.—Although the 36 electrical components tendered by a contractor under an indefinite delivery purchase order for 100 such units were accepted by the government, the board determined that the offer for the remaining 64 units had lapsed because the contractor failed to tender delivery of the full quantity of units after the specified time. The government's purchase order did not confer any rights on either party. The purchase order was an offer for a unilateral contract that could be accepted by the contractor's rendering the specified performance. In reaching its determination that the offer for the remaining units lapsed by the contractor's failure to deliver the full quantity ordered, the board was influenced by the fact that the contractor had not requested an extension of the delivery date and did not appear to have the remaining units ready for inspection on the specified date.

Methods of Procurement—Purchase Orders—Item Price.—In determining the price of 36 electrical components that were tendered by a contractor and accepted by the government under a purchase order for 100 such items, the board ruled that the contractor

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was entitled to the price set forth in the order, not the discount price stated in the invoice, because the discount price was applicable only to quantities of 100 or more and the government accepted only 36 units. The government could have assured itself of the discount price by agreeing to extend the offer delivery time to permit the contractor to deliver the remaining 64 units, but it chose not to do so.

For the appellant: Shulman & Hall, Dayton, Ohio, by Thomas G. Kramer. For the government: Michael J. Kraft, Trial Attorney, Defense Electronics Supply Center, DLA, Dayton, Ohio.

Before LUSSIER, RUBERRY, and THOMAS, Administrative Judges.

LUSSIER, Administrative Judge: ASBCA No. 44354 is an appeal from a decision of the contracting officer confirming cancellation of a purchase order contending the order had lapsed. ASBCA No. 44625 is a claim for amounts appellant claims are due and owing on supplies accepted by the Government under the cancelled order. The parties have elected to waive oral hearing and submit the appeals on the record under Board Rule 11. Each has filed a brief and reply brief.

FINDINGS OF FACT

1. The Defense Electronics Supply Center (DESC) issued a Request for Quotations (RFQ) on 28 March 1991 requesting quotations for furnishing 67 electrical components described as "Contact, Electrical" in accordance with a specified drawing.

2. The RFQ contained Defense Logistics Agency Regulation clause 52.213-9002, "Indefinite Delivery Purchase Order (IDPO) Agreement (Feb 1990)", whereby the appellant agreed that:

> [I]f an order is placed for the solicited quantity, the Government may place additional orders for the item(s) covered by this Request for Quotations, at the same price quoted for the solicited quantity, for any order issued, within a quantity range of 12 to 140 units* within 1 year from the date of that purchase order. Such orders will be issued no more frequently than 3 times per quarter. The aggregate total dollar value of orders issued shall not exceed $25,000. In no event shall the Government be obligated to place subsequent orders under this agreement. The initial purchase order will contain the terms under this agreement. The initial purchase order will contain the terms and conditions of this agreement, including this provision, and subsequent purchase orders will cite the initial purchase number. The contractor agrees to advise the Contracting Officer, in writing, at any point in time it determines that it cannot accept subsequent orders under this agreement.

3. The clause contained a section for the quoter to include prices for additional increments. This section was filled in by appellant as follows:

*ADDITIONAL INCREMENTS	PRICE—UNIT PRICE
12 to 29	$112.63
30 to 49	$112.63
50 to 99	$ 93.85
100 to 140	$ 77.38

4. The RFQ specifically advised that it was "a request for information and quotations furnished are not offers." Appellant (KCI) submitted its quotation on 1 April 1991. Its quote specified a unit price of $93.85 for the 67 units and a "price break" of $77.38 for a quantity of 100 units. Appellant also checked boxes indicating inspection and acceptance were to be at origin, with standard item inspection to be at its subcontractor's plant (Hughes Connecting Devices in Irvine, California), and packaging inspection and acceptance to be at the contractor's plant.

5. On 21 May 1991, Diane Jackson, a contracting officer with DESC, issued Form DD1155 as a combined purchase order (DLA900-91-D-5119)/delivery order (0001). On page 1 of the order the same breakdown of prices for various quantities was shown as appeared on appellant's quote. It showed these as "FOB destination". Item 10 on page 1 provided for delivery to "FOB Point" by 27 December 1991. On the continuation sheet, the figure "67" was crossed out and next to it was written the figure "100". The unit price was listed as $71.38, and "amount" as $7738.00. At the bottom of the sheet, a "Parcel Post/Freight Address" was shown as "Defense Depot Richmond, De-

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fense General Supply Center, Richmond, Va". The order further provided that item inspection would be at Hughes Aircraft, Irvine, California, by the Government's Santa Ana office, and packaging inspection and acceptance would be at Koehlke Components, Inc., Centerville, Ohio, by the Government's Dayton office.

6. The purchase order expressly provided that "the contractor hereby accepts the offer represented by the numbered purchase order as it may previously have been or is now modified, subject to all the terms and conditions set forth, and agrees to perform the same". It did not require appellant to signify acceptance by signing the purchase order.

7. On 7 October 1991, appellant wrote requesting a no cost modification to the contract to change the place of item inspection from the Hughes facility in Irvine, California to a Hughes facility in Tijuana, Mexico. The letter advised that although all component parts were manufactured in the United States the assembly takes place in Mexico (R4, tab 5). When the product was ready for inspection, the Santa Ana inspection office, responsible for inspections at Hughes' Irvine facility, refused to proceed insisting that an inspection had to take place first at Tijuana. The Government office responsible for inspections in Tijuana was the San Diego office. To accomplish this change in inspection point a modification to the contract was required by the inspector (app. exh. 3; R4, tab 13).

8. On 21 October, the Government asked for a $300 price reduction to issue the modification, which appellant orally agreed to on 31 October (R4, tabs 5, 6). It is the testimony of the DESC contract specialist that $300 is a standard DESC administrative cost charged for changes requested by contractors (Munday deposition p. 12). Based on a contemporaneous note on 23 October, we find that appellant was also asked whether it needed a delivery extension and replied it did not. Irrespective of whether appellant could have asked for the change earlier, and we do not know that it could, the Government understood that the inspection change, if it was to mean anything, would have to take place soon enough to permit timely delivery (see Munday deposition p. 14).

9. On 4 November, appellant faxed its agreement "to pay the $300 for the confirming modification" for changing the inspection point (R4, tab 6). The modification states the agreement in terms of the Government changing the inspection point in return for appellant's agreement "to a bulk fund decrease of $300.00. As a result the total amount of the order is changed to $7,438.00." (R4, tab 8)

10. On 18 November, appellant sent another fax requesting issuance of the modification (R4, tab 7). The record indicates that on that date the contracting officer signed the modification which states its "effective date" is 27 November 1991 (app. exh. H). The "effective date" was explained by the contract specialist at DESC to mean the date the modification actually left DESC (Deposition of Sharon Munday, p. 25). An unsigned "advance copy" was not dispatched to appellant until 27 November. The modification is a unilateral modification not requiring appellant's signature. Appellant received the "advance copy" on 2 December and immediately faxed it to Hughes (app. exh. 4).

11. The record is very sparse on the details but it supports our finding that the Government inspector received his copy of the modification on 16 December 1991 and on that date inspected 36 units (R4, tab 13). These units were apparently shipped to appellant's facility in Centerville, Ohio, because on 27 December 36 units were accepted there by the Government inspector and shipped to the General Supply Center in Richmond (R4, tab 14). By 27 December appellant had committed itself to purchasing the remaining 64 units from Hughes (app. exh. 4). However, the Government no longer needed the items and the DESC contract specialist contacted appellant by phone on 30 December 1991 to ascertain the status of shipments and discuss a no-cost cancellation of the order. Appellant refused to agree to a no-cost cancellation (R4, tab 9; app. exh. 4). There is no evidence to show that appellant ever asked for an extension of delivery date prior to that time. Appellant advised that it would deliver 25 units by 3 January 1992 and complete the order by 30 January 1992. We note, however, that the testimony of the Hughes employee responsible for this order is that "by January 9, 1992 the remaining [64] units were in Tijuana awaiting inspection" (Deposition of M.J. Kimball p. 2). It would appear that the 64 units were not available for inspection on 16 December 1991.

12. On 31 December 1991, the contracting officer faxed appellant a notice advising that the delivery order "has lapsed pursuant to its own terms as a result of KCI's failure to deliver the full quantity of material by 27 December 1991, and [that] the Government

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will not accept late delivery of any material under this order". Appellant was asked for disposition instructions for any units that may already have been shipped (R4, tab 11).

13. On 3 January 1992, the 36 units appellant had shipped were received by the Defense General Supply Center, Richmond, Va. Appellant invoiced these at $2,485.68, which amounted to a unit price of $77.38 per unit (× 36 = 2,785.68 less the $300 reduction in price in the Modification) (R4, tab 14).

14. On 27 January, appellant wrote to the contracting officer asking for a decision under the Contract Disputes Act. It asserted that the unreasonable insistence upon a contract modification being issued as a prerequisite to inspection in Tijuana, and the delay in issuing a modification, prevented appellant from delivering the material on 27 December 1991. It contended that the Government was estopped from asserting lapse of the delivery order and its attempt to do so was a breach of contract. It demanded reinstatement of the order and inspection of the items remaining to be shipped.

15. The contracting officer wrote to appellant on 20 February 1992 confirming her decision that the 64 units were cancelled. She advised, however, that the 36 shipped units would be accepted and paid for by the Government (R4, tab 13). Neither the contracting officer nor her contract specialist who negotiated the modification believe that there was any delay in issuing it. Both consider the time frame normal (Deposition of Sharon Munday, p. 22; Deposition of Deborah Duffy, p. 35). The appeal from this decision is ASBCA No. 44354.

16. On 6 March 1992, appellant wrote to the contracting officer regarding the 36 units accepted by the Government (R4, tab 16). It claimed it was not obligated to pay the $300 it agreed to for the modification because the modification was not timely issued. It also claimed it was entitled to be paid for the 36 units at $112.63 instead of $77.38 as the latter price was quoted only for 100 units or more. It specifically requested a decision under the Contract Disputes Act within 60 days, which was never issued. The appeal from the deemed denial of this claim is ASBCA No. 44625.

DECISION

Appellant's brief in ASBCA No. 44354 seeks a remand to the contracting officer for payment under the theory of termination for convenience of a bilateral contract. See *ITT Defense Communications Division*, ASBCA No. 13420, 69-1 BCA ¶ 7548; *Klass Engineering, Inc.*, ASBCA No. 22052, 78-2 BCA ¶ 13,236, *modified and aff'd on reconsid.*, 78-2 BCA ¶ 13,463.

It is clear that the Request for Quotations was simply a request for information and appellant's quotation was not an offer permitting acceptance by the Government. By the same token, the Government's purchase order/delivery order itself did not confer any rights on either party. It did not invite a written acceptance but rather was an offer for a unilateral contract which could be accepted by appellant rendering the specified performance, in the absence of which the offer would lapse. *Sunshine Cordage Corporation*, ASBCA No. 38904, 90-1 BCA ¶ 22,382, *aff'd on reconsid.*, 90-1 BCA ¶ 22572; *Klass Engineering, Inc., supra.*

When the Government negotiated a $300 reduction in price for the issuance of the modification which it considered necessary before it would inspect at Tijuana, it obligated itself to issue the modification in a timely manner. Inspection took place in Tijuana on 16 December and this permitted shipment from appellant's Ohio facility on 27 December. However, there is no evidence to show why only 36 units were inspected. We have a nexus between the issuance of the modification and the date of the Tijuana inspection, but we have no nexus between the issuance of the modification and the limited number of units inspected on 16 December. In this respect we are influenced by the twin facts that appellant never asked for an extension in the delivery date prior to 30 December 1991 and that it has not established, by evidence we would assume would have been available to it, that it had units, in addition to the 36 units it tendered, ready for inspection on 16 December 1991, which the Government refused to inspect.

In view of its actions, we hold the Government acceptance of the delivery of these 36 units is binding upon it. Apart from the fact that the Government inspected and accepted the items on 27 December in Ohio, the subsequent 6 day delivery delay to destination is attributable to the Government's delay in providing inspection. Furthermore, on 20 February 1992, the contracting officer accepted those units. As to the remaining 64 units, we hold the offer lapsed under the case law cited above. Accordingly, ASBCA No. 44354, the claim based upon a termination for convenience theory for the undelivered 64 units, is denied.

The alternate claim by appellant in ASBCA No. 44625 relates to the price it is

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entitled to for the 36 accepted units should it not prevail on ASBCA No. 44354. We hold it is entitled to the price set forth in the order, namely $112.63. In this regard, we attach no significance to appellant's 29 January 1992 invoice at the $77.38 unit price, since this invoice was concurrent with its contemporaneous (27 January 1992) demand that it be allowed to deliver the remaining 64 units. The $77.38 unit price was obviously a quantity discount price, applicable only to quantities of 100 or more. Having accepted the 36 units, the Government could have assured itself of that price by agreeing to extend the offer delivery time to permit appellant to deliver the remaining 64 units. It chose not to do so. ASBCA No. 44625 is sustained on the merits to the extent that appellant is entitled to be paid at the price of $112.63 per unit for the 36 units, less the $300 it agreed to for the change in origin inspection point.

SUMMARY

ASBCA No. 44354 is denied.

ASBCA No. 44625 is sustained.

[¶ 26,375] Intram Company

ASBCA No. 44159, September 23, 1993. Contract No. N62470-88-C-4425.

Interpretation of Contracts—Repair and Maintenance—Service Call v. Inspection.—Under a repair and maintenance contract for a fire alarm system, the contractor's interpretation that minor repairs were compensable as service calls and were not part of the daily inspection and testing requirements was rejected because the contract, when read as a whole, clearly required that minor repair work be performed during inspection and testing to keep the equipment functioning properly. The bid schedule clearly included repair and maintenance work outside the separate line item for service calls. The contract further directed the contractor to a military maintenance manual and a national fire protection code, which required repair work to remedy problems discovered during inspections. The service call specification, on the other hand, contemplated work specifically ordered by the government rather than repair and maintenance work identified by the contractor during routine inspection and testing.

For the appellant: Lewis B. Bibb, Owner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John Adam Dietrich, Trial Attorney.

Before DUVALL, RUBERRY, and SPECTOR, Administrative Judges.

DUVALL, Administrative Judge: This appeal is from the contracting officer's final decision denying appellant's claim for an equitable adjustment for minor repair work accomplished during daily inspection and testing of the fire alarm system in a Navy hospital. Appellant contends that service calls should have been issued for the performance of the work. The Government contends that performance of minor repair work during inspection and testing fell within the fixed contract price. The Government also contends as separate grounds for denial of the claim that appellant failed to meet the Changes clause notice requirements and that appellant also failed to demonstrate injury. Entitlement only is at issue.

FINDINGS OF FACT

On 30 September 1988 appellant was awarded a contract for maintenance and repair of the fire alarm system at the Naval Hospital, Portsmouth, Virginia for the total firm fixed price of $66,920. The initial contract term was for one year. The contracting officer exercised two options for yearly renewal; the third and final year of the contract expired on 30 September 1991. The General Requirements clause of the Contract Schedule and Specifications included: "performing emergency work and routine service work; performing preventive maintenance; performing routine recurring work such as testing and repair of the Fixed Fire protection and warning systems at the Naval Hospital."

The contract bid schedule included the following items, with appellant's unit and total prices:

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		Annual Quantities	Unit Price	Total Amount
	* * *			
0001AF	Inspections, tests, maintenance and repair of Fire Alarm Systems Control and Auxiliary equipment.			
	(20) Pedestal Pull Boxes	80	50	$4000
	(106) Pullboxes	424	10	$4240
	(109) Visuals	436	10	$4360
	(Section C, para C.13 and C.20)			
	* * *			
0001AJ	Service calls:			
	Emergency	34	100	$4300
	Routine	9		
	(Section C, para C.7)			
	TOTAL PRICE FOR CONTRACT LINE 0001			$66,920
	(Contract subline items 001A thru 001AJ)			

According to appellant, when service calls exceeded indicated annual quantities, it was entitled to an equitable price adjustment for the additional work.

"Maintenance" and "repair" were defined in the specification as follows:

C.2.5 Maintenance—The day-to-day, periodic, or scheduled work required to preserve or restore a facility or equipment to a condition that it can be effectively utilized for its designed purpose. It includes work to prevent damage or the deterioration of a facility that otherwise would be more costly to restore.

C.2.16 Repair—The restoration of a facility or equipment to a condition that allows it to be used for its designed purpose. Repair may require overhaul, reprocessing, or replacing parts or materials that have deteriorated because of use or time.

Pertinent portions of Specifications C.13 and C.7 respectively stated:

C.13 *FIRE ALARM SYSTEMS:*

The contractor shall schedule and conduct all tests and inspections of the Fire Alarm Systems in accordance with this specification. The inspections and test procedures shall conform to NAVFAC-MO-117 and the current National Fire Protection Association Codes. The Fire Alarm Systems shall consist of, but not [sic] limited to, the following:

a. Fire Alarm Control Panels

b. Manual Pull Stations (Pedestal-mounted Pull Boxes)

c. Smoke Detectors

(1) Ceiling-type connected to a coded Fire Alarm Loop.

(2) Ceiling-type—120 Volt-Non-coded-Electrically-powered.

(3) Duct-Detector—controls shut-down of Air-Handlers.

(4) Automatic Door Closures—Door Closures contain hydraulic and electric parts. Closures shall be maintained as a total unit.

d. Fire-pumps: Electric

e. Heat Detectors

f. Sprinkler Pressure and Flow Switches

g. Carbon-Dioxide Systems (Pressure-Cylinder—Hose & Reel type and portable cart system)

h. Dry-Chemical Extinguishing System Activation Switches

C.7 WORK CLASSIFICATION:

* * *

c. *Service Calls:* Service calls shall be classified as emergency or routine and shall be so designated by the Contracting Officer or authorized Government representative at the time of Contractor notification. Contractor shall maintain a record log of all service calls and shall provide the Contracting Officer a summary of all service calls, by classification, received during the previous month.

(1) *Emergency Service Calls:* Service calls shall be classified as emergency when the work consists of correcting failures which constitute an immediate danger to personnel or property. The Contractor shall respond to emergency calls 24 hours a day, seven days a week, within two (2) hours during normal working hours, and within three (3) hours during all other times. The Contractor shall correct the emergency condition before departing the

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job site. The Contractor shall be required to maintain sufficient off-the-shelf materials to support emergency requirements, after which time completion requirements will be in accordance with routine classification.

(2) *Routine Service Calls:* Service calls will be classified as routine when the work does not qualify as an emergency call. Routine calls shall be completed within five (5) working days after receipt of the call. Routine calls shall be accomplished during regular working hours, unless permission to work outside these hours has been granted by the Contracting Officer. On occasion, the Contractor may be expected to perform some calls after hours as directed by the Contracting Officer.

Specification C.13 did not specify the frequency of fire alarm and automatic sprinkler system inspections. However, NAVFAC MO-117, MAINTENANCE OF FIRE PROTECTION SYSTEMS, included a table of the frequencies of various tests and inspections. The applicable National Fire Protection Association Code (NFPA 1221, 1988 Edit.) included the following pertinent provisions in the Testing paragraph (3-1.5):

3-1.5.1.1 Tests and inspections shall be made at intervals not less frequent than those specified in this standard.

3-1.5.1.3 All apparatus shall be restored to normal condition as promptly as possible after each test or alarm for which the apparatus functioned.

3-1.5.1.4 Where supervisory devices or tests indicate that trouble has occurred anywhere on the system, the operator shall *take appropriate steps to repair* the fault or, if this is not possible, isolate the fault and notify the official responsible for maintenance. [Emphasis added].

The contract included the standard Changes-Fixed Price clause (FAR 52.243-1, ALT. I).

The fire alarm system specification in the follow-on contract did not reference the publications named in the quoted specification (C.13) in appellant's contract, but specified the frequency of inspections and, under "daily" inspections included the requirement to "Perform maintenance and repair in response to a symptom or suspected malfunction."

Appellant did not anticipate daily inspections when it bid on the contract. Appellant was informed that daily inspections were required shortly after work on the contract began. Appellant employed Control Systems, Inc. to do the inspection work. (Tr. 2/6, 7, 56) Control Systems personnel performed minor repairs and adjustments while making the daily inspections. On infrequent occasions, they would ask the Government's Quality Assurance Representative (QAR) whether he would consider an item of work to be appropriate for a service call rather then work to be performed as part of the daily inspection. There is no indication in the record that Control Systems personnel ever disputed the QAR's determination, or generally complained about having to perform minor repair work as part of the daily inspection (tr. 2/82, 83).

Approximately a month and a half before expiration of the contract on 30 September 1991, appellant ended its association with Control Systems, Inc., and the responsibility for inspections was assumed by appellant's field superintendent. He would ask Government personnel for a service order in connection with such repair work, and they would respond that no service order was required (tr. 2/53, 54).

A typical example of a minor repair or adjustment which, according to the Government, was required to be performed without additional compensation as part of the inspection and testing requirement, but which appellant considered as requiring issuance of a service call, was malfunctioning of the spring device which automatically closed doors when activated by the fire alarm system. When, during inspection, a door was found closed when it was supposed to be in an open position, the spring device could be reset with a turn of a screw, which could be accomplished in less than a minute (tr. 1/146, 147).

On 9 September 1991 appellant made a written request for a suspension of the daily inspections. The request was promptly denied by the Officer in Charge of Construction (OIC). (Gov't exh. 3; app. exh. 1)

In a written response to the OIC's letter, dated 18 September 1991 appellant questioned whether the contract required daily inspections and, for the first time, complained in writing about having to perform minor repairs during daily inspections, without issuance of a request for a service call. Appellant advised that it could find no such requirement in the contract (app. exh. 3).

On 11 October 1991 appellant submitted a claim of $45,000 for performance of repair services during daily inspections during the life of the contract. Appellant's claim as-

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serted that "no specific requirement concerning minor repairs to equipment during daily inspections can be found in this section [Section C] of the contract." Appellant submitted three additional equitable adjustment claims at the end of the contract, as follows:

$15,600	—	Weekly sprinkler system inspections,
$75,000	—	daily fire alarm inspections and;
$4,560	—	repair and inspection of six additional fire alarms systems.

The last claim resulted in a bilateral modification awarding the amount claimed. On 28 May 1992 the contracting officer issued a final decision finding appellant entitled to an equitable adjustment for the daily fire alarm and weekly sprinkler system inspection claims in the amount of $18,718, and a unilateral modification was issued increasing the contract price by that amount. This decision was not appealed. The amount awarded included total miscellaneous material costs in connection with daily fire alarm inspections, before markups, of $800.00. The balance of the increase for the fire alarm claim was for labor and markups. (Gov't. exh. 12)

On 9 December 1991 the contracting officer issued a final decision denying the equitable adjustment claim for minor repair work during daily fire alarm inspections. Appellant appealed the decision on 20 February 1992.

Appellant paid Control Systems, Inc. $1,625 twice a month. Appellant estimated that $300 of this was allocable to minor repairs and maintenance, and multiplied this amount times 50 weeks per year, times three years, to arrive at the $45,000 claim. Appellant's claim was audited by the Government following appeal. The auditor found no documentation to support the claim, and no way of determining how much was spent for minor repairs and maintenance (Gov't exh. 13, tr. 2/93, 103). The required reports submitted by appellant during the contract period failed to disclose the quantity of minor repair work performed during the contract period (tr. 2/131, 132).

DECISION

Appellant's interpretation of the contract, that minor repairs and adjustments identified during daily inspections should be compensated as service calls and are not part of the daily inspection and testing requirements, violates the basic precept of contract interpretation that a contract must be read as a whole, so as to give meaning to all of its provisions if possible, rather than rendering certain provisions useless or inoperative. *Hol-Gar Manufacturing Corporation v. United States* [10 CCF ¶ 72,885], 169 Ct. Cl. 384, 395; 351 F 2d 972, 979 (1965).

We note that Line Item 0001AF of the contract bid schedule required quotation of a fixed price for "Inspections, tests, maintenance and repair of Fire alarm Systems Control and Auxiliary Equipment." Thus, the bid schedule clearly contemplated and the fixed contract price included repair and maintenance work outside the separate line item for service calls, which was limited to a specific annual quantity. Line Item 0001AF referenced Specification Paragraph C.13, which directed the contractors to current National Fire Protection Association Codes and a Navy maintenance manual. The fire code testing paragraph required repair work to remedy problems discovered when testing during inspections. The service call specification, on the other hand, clearly contemplated work specifically ordered by the Government, rather than repair and maintenance work identified by the contractor during routine inspection and testing. Appellant's contention that the latter work demands a service call order is contrary to the clear intent of the contract terms when read as a whole.

The fact that the Government clarified the contract requirements in the follow-on contract has no bearing on interpretation of this contract. Subsequent remedial measures are not evidence of liability (Fed. R. Evid. 407).

Having decided against appellant on the threshold interpretation question, we need not address the lack of notice and lack of injury defenses raised by the Government.

The appeal is denied.

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[¶ 26,376] Planning & Human Systems, Inc.

ASBCA No. 44013, September 22, 1993. Contract No. HEW-105-77-1059.

Cost Limitations—Notice Adequacy—Proof of Mailing.—A cost-plus-fixed-fee contractor was not entitled to an increase in the contract ceiling price to reflect increased overhead costs, despite its contention that a letter sent to a government contract specialist notified the government of the expected overrun, because there was no direct evidence that the letter had been sent and there was no indication any such notice had been given to the agency. Even if the letter had been given to the agency, it would have been ineffective as notice, because it failed to meet the Limitation of Cost clause requirements of advising the contracting officer that a total cost overrun was expected and of giving a revised estimate of total performance costs.

Cost Limitations—Waiver of Limitations—Proof.—A contractor's contention that the government had waived the notice requirement for an overrun under a cost-plus-fixed-fee contract was rejected because the contractor failed to establish that the contracting officer or the contract specialist was aware of the overrun in question. A reference to prior conversations, contained in the contractor's request for funding that was submitted just before the expiration of the contract, was not sufficient to show that the government officials were aware of the overrun. The government subsequently raised the contract ceiling to cover the overhead increases for prior years included in the same request, but it did not fund the amount in dispute. Testimony by the contractor's president that the original contracting officer had made an oral commitment to fund the contractor's actual overhead rates was uncorroborated.

Cost Limitations—Overhead—Negotiated Overhead Rate v. LOC Clause.—A contractor was not entitled to be paid overhead costs in accordance with its actual overhead rate for the final year of its contract, because any final payments the contractor sought were subject to the terms of the Limitation of Cost clause. Contract requirements regarding the negotiation of final overhead rates did not provide an exception to the cost ceiling and notice requirements under the LOC clause. In the absence of unforeseeability, waiver, or estoppel, the government was not obligated to fund the final year overrun, even though the contractor may have assumed it would be funded. The government did in fact increase the contract cost ceiling for overhead increases in other years. The contractor assumes the risk of nonfunding when the requirements of the Limitation of Cost clause are not strictly adhered to.

For the appellant: Dr. Frances Georgette, President. For the government: Dalton Phillips, Trial Attorney, Department of Health and Human Services, Washington, D.C.

Before DUVALL, RUBERRY, and SPECTOR, Administrative Judges.

DUVALL, Administrative Judge: This dispute concerns the contracting officer's denial of appellant's claim for an increase in the ceiling price of this cost plus fixed fee contract for increased overhead costs occurring during the last year of the contract. The denial was based on failure to meet the notice requirements of the contract Limitation of Cost clause. Appellant contends that it provided a limitation of cost notice prior to contract expiration and, alternatively, that the contracting officer waived the notice requirement and rendered the notice requirement "nugatory." According to appellant, the contracting officer had knowledge of the claimed overrun and had agreed to pay it, while directing appellant to continue to work.

FINDINGS OF FACT

1. Effective on 30 September 1977 appellant was awarded a negotiated cost-plus-fixed fee contract pursuant to Section 8(a) of the Small Business Act. The contracting agency was the Office of Human Development Systems (HDS) of the Department of Health, Education and Welfare (now HHS). After several yearly renewals, the contract expired on 29 September 1981. Appellant was to provide training and technical assistance to fourteen Head Start programs and to develop manuals for use by other Head Start projects. The contract Statement of Work described the project as "an experimental/demonstration program in providing preventive mental health services in Head Start programs."

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2. Article IX, ESTIMATED AND ALLOWABLE COST, fixed the total estimated cost of the contract at $140,166.00 plus a fixed fee of $9,812.00. The clause also provided that allowable indirect costs under the contract would be established by the Negotiated Overhead Rates Clause, but included a provisional rate at the beginning of the contract of 101.51% of total direct labor and fringe benefits.

3. Pursuant to modification 3, effective 30 September 1980, the total estimated cost plus fixed fee obligated under the contract was raised to $708,384. This amount consisted of estimated cost of $662,041 and a fixed fee of $46,343.

4. The contract General Provisions included the following:

Clause No. 3—LIMITATION OF COST

(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work in the Schedule and all obligations under the contract within such estimated cost. If, at any time, the Contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost then set forth in the Schedule, or if, at any time, the Contractor has reason to believe that the total cost to the Government for the performance of this Contract, exclusive of any fee, will be greater or substantially less than the then estimated cost hereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

(b)... [T]he Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication, or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs had been incurred after the increase; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

Clause No. 5—NEGOTIATED OVERHEAD RATES

(a) Notwithstanding the provisions of the clause of this contract entitled "Allowable Cost and Fixed Fee," the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than 90 days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Contracting Officer, with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with paragraph (b) of the clause of this contract entitled "Allowable Cost and Fixed fee."

(d) The results of each negotiation shall be set forth in a modification to this contract, which shall specify (1) the agreed final rates, (2) the bases to which the rates apply, and (3) the periods for which the rates apply.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, and to apply either retroactively or prospectively, (1) provisional rates may, at the request of either party, be revised by mutual agreement, and (2) billing rates may be adjusted at any time by the Contracting Officer. Any such revision or negotiated provisional rates provided in the contract

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shall be set forth in a modification to this contract.

(f) Any failure by the parties to agree on any final rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the "Disputes" clause of this contract.

* * *

Article XXII, Technical Direction, of the contract provides in relevant part:

B. Technical direction must be within the general Statement of Work stated in the contract. The Project Officer does not have the authority to and may not issue any technical direction which (i) constitutes an assignment of additional work outside the general scope of the contract; (ii) constitutes a change as defined in the contract clause entitled "Changes"; (iii) in any manner causes an increase or decrease in the total estimated contract cost or the time required for contract performance, (iv) changes or waives any of the expressed terms, conditions, or specifications of the contract; (v) interferes with the Contractor's right to perform the terms and conditions of the contract; (vi) gives supervision to the contractor's employees.

* * *

E. If, in the opinion of the Contractor, and [sic] instruction or direction issued by the Project Officer is within one of the categories as defined in (i) through (vi) above, the Contractor shall not proceed but shall notify the Contracting Officer in writing within five (5) working days after the receipt of any such instruction or direction and shall request the Contracting Officer to modify the contract accordingly ....

5. In April, 1981 Mr. Larry Davis, a HHS cost analyst, conducted a cost review to establish final indirect cost rates for the three year period 1 October 1977 to 30 September 1980, and a provisional rate for the fiscal year ending 30 September 1981. This was followed by a bilateral modification (Mod 4) amending article IX with respect to overhead as follows:

[I]ndirect costs shall be reimbursed at the final negotiated indirect cost rate of 107.38%, applicable to total direct labor dollars and fringe benefits for the period 10-1-77 thru 9-30-78, 63.94% for the period 10-1-78 thru 9-30-79, 94.66% for the period 10-1-79 thru 9-30-80; and at the provisional rate of 105.75% effective 10-1-80 thru 9-30-81 until amended.

6. The bilateral modification (effective date 15 April 1981) was signed by appellant's president, Dr. Frances Georgette, Phil J. Aravanis, as "contracting officer," Contracts Branch, HHS, and by a representative of the SBA. The agreed upon provisional rate for FY 81 was the best estimate both parties could come up with at that time.

7. On 6 May 1981 appellant's executive vice president, Ms. Jane L. Watson, drafted and signed the following letter to "Mr. Phil J. Aravanis, Contract Specialist":

In accordance with Clause No. 3—Limitation of Cost, of the General Provisions, this is to notify you that the costs we expect to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all cost previously incurred, will exceed seventy-five percent (75%) of the estimated costs set forth in the contract.

(Tr. 198; app. supp. R4, tab 7)

8. There is no direct evidence that the letter was placed in the mail and we are unable to find that it was given to HHS (See findings 23, 24, *infra*).

9. Notwithstanding the fact that Mr. Aravanis signed mod 4 as "contracting officer," we conclude from the preponderance of the evidence before us that he was a contract specialist, without contracting authority with respect to this contract during the last fiscal year, and that the contracting officer during this period was Mr. Ben Sharp (app. supp. R4, tabs 7, 8; GR4, tab 2—Mod. 4, 5; tr. 153, 189). Neither Messrs. Aravanis, Sharp nor the cost analyst, Mr. Davis, appeared as witnesses at the hearing.

10. On or about 20 May 1981, appellant submitted a voucher in the amount of $56,884.41, which included $48,346.97 for overhead for fiscal years 77-78, 78-79 and 79-80, in accord with the April 1981 modification of the final overhead rates for those years. At that time, the cumulative total of expenditures was within the ceiling limit. The voucher was processed and paid shortly after receipt (tr. 146; app. exh. 29).

11. On 22 September 1981, seven days before the expiration of the contract, Ms. Watson sent the following letter to "Mr. Ben Sharp, Contracting Officer":

This is to request additional funds for the above referenced contract for:

1) The fringe and overhead differential between the provisional rates and the audited rates for the 1977, 1978, 1979, and 1980 fiscal years. The contract was modi-

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fied to incorporate these approved rates by Modification Number 4. The amount of the difference between the provisional and audited rates was invoiced and paid; however, the modification was never implemented to add the additional funds to the contract.

2) Additional funds to pay the difference between provisional fringe and overhead rates for fiscal year 1981, set in April 1981, and actual rates determined with a nine month experience base.

The purpose of this letter is to request that a modification be put through now, as the contract funds have run out. *We first discussed this in July, then again in August, at which time you said that Mr. Aravanis had given you our file and that you had to review it.* Attached is the cost breakdown for the modification and the figures for the nine-month fringe and overhead rates. [Emphasis added]

We would also like to request permission to continue to invoice in excess of the current contract dollars, and be paid now for the period 8/15 through 9/30/81.

12. At the hearing on the appeal Dr. Georgette gave the following response to a question from the presiding Administrative Judge as to whether modification 4, which raised overhead rates, also raised the ceiling price:

DOCTOR GEORGETTE: No, it did not. It did not change the ceiling, but when the Government says it—you know, we're four years of dealing with, you know—this man was new. Mr. Anthony was new. We'd been dealing with [Phil Aravanis] and Ben Sharp on this contract for—respectively for a four year period. Now, *when those people say to me "were going to pay you,"* I believed them. Of course, I did. They kept their word before. There was originally a ceiling in that contract. Jim Offord, who originally signed the contract said to me—when he put it in as a ceiling I said "Jim, I can't live with that." And he said to me "if you exceed that, we will make an adjustment to your actual rates" and they did. But, the contract officers who had been there all that time did in fact do that in modification four. They changed it to the actual and he had promised that and they did it. [Emphasis added]

(Tr. 201, 202)

13. Mr. Offord was the contracting officer who signed the original contract in September 1977. It is not clear from the record when he left this position and there is no evidence to corroborate his alleged oral commitments. We cannot find that such commitments were made.

14. The only evidence that the contracting officer during the 1981 fiscal year, Mr. Ben Sharp or, for that matter, the contract specialist, Mr. Phil Aravanis had been apprised of an overrun and may have indicated a willingness to pay for it is the underscored language In the 22 September 1981 letter and in Dr. Georgette's quoted testimony. This is insufficient evidence to support a finding that either one was aware of, or promised to pay for, the increased overhead costs which are the subject of this dispute.

15. On 23 September 1981, the HHS project officer, Dr. Phyllis Stubbs, sent appellant a critique of the final report submitted by appellant pursuant to the contract. The critique contained comments suggesting changes and expansion in several areas. The final paragraph read:

The above comments reflect our views on the strengths and weaknesses of the draft CFMH Final Report. We offer this technical direction in support of your production of the CFMH Final Report.

16. On 11 December 1981, HHS issued a bilateral modification (Mod. 5) increasing the total estimated cost by $52,420.00. This modification increased the total estimated cost plus fixed fee from $708,384 to $760,804. The purpose of the modification was to add funds to cover further additional cost arising from the adjustment of indirect cost rates that were previously incorporated into the contract as modification 4. Mr. Ben Sharp signed modification 5 as the HHS contracting officer.

17. On 16 June 1983 the Defense Contract Audit Agency issued an audit report on indirect expense rates for the fiscal years ending 30 September 1981 and 1982 in connection with appellant's cost reimbursement contracts, including this contract. The report determined an overhead rate of 209.07% for the fiscal year ending September 1981.

18. The audit report noted that appellant maintained a job order cost accounting system which was considered adequate for the accumulation, segregation, and recording of costs incurred under Government contracts (app. supp. R4, tab 3; tr. 6, 8, 113). Specifics relating to appellant's accounting system are not included in the report and do not appear elsewhere in the record.

19. A copy of the report was forwarded to appellant by Mr. Davis, the HHS cost analyst, on 28 June 1983. In a covering letter he

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advised appellant that "ultimately the agency on [sic] Operating Division (OPDIV) with the preponderance of the money will negotiate an overhead rate with you." Mr. Davis later identified that agency as the Health Care Finance Administration (HCFA), indicating that he would accept the same rate for the contract which is the subject of this dispute (tr. 65, 66).

20. The next day appellant submitted a voucher for an additional payment of $77,385.01 over the contract cost ceiling amount. Virtually the entire amount of the claimed increase was for increased overhead for FY 81, utilizing an overhead rate of 209.07%.

21. Appellant experienced a contraction of business activity during the second half of FY 81. In the third quarter the Government stopped work on one of the appellant's five then current Government contracts. In July (4th quarter), work on another contract was stopped. Both contracts were later cancelled. Appellant had written a number of proposals for new contracts during the second quarter of FY 81; many of these solicitations were cancelled without contracts being awarded. In appellant's past experience, 73% of its Government contracts had been awarded during the last quarter of the fiscal year. This experience was not repeated in 1981. New business and the accompanying expected 4th quarter increase in the labor base did not materialize. Appellant's direct labor and fringe benefit base was reduced during the 1981 fiscal year, as reflected by the following figures:

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
Total dir. labor & Fringe	$114,265	$92,663	$62,861	$27,307

(App. supp. R4, tab 19)

22. In the face of the loss of labor base, appellant made efforts to cut back on expenses. Office space was sublet. Twelve people were let go in an effort to reduce overhead expenses. Only Dr. Georgette, Ms. Watson, and two other key persons remained in overhead (app. supp. R4, tab 19; tr. 105-108).

23. On 16 June 1984 the contracting officer, Mr. Joel B. Anthony, whose involvement with the contract began some two years after it expired, issued a final decision denying the claim as represented by appellant's 29 June 1983 voucher in the amount of $77,385.11 based solely on appellant's failure to supply the notice required by the Limitation of Cost clause. Prior to issuance of the final decision, he made a thorough search for an LOC notice. None was found (tr. 183).

24. A meeting was held with appellant to discuss the decision on 24 August 1984. Appellant argued that it had made efforts to reduce overhead costs during FY 81, and that the claim was justified under the negotiated overhead rates clause, which, appellant contended, was an exception to the LOC clause. Appellant did not contend that the LOC clause notice had been given. No mention was made of the 6 May 1981 LOC notice letter. That letter first surfaced when appellant submitted it to the Board as a proposed exhibit prior to the hearing on the appeal held in July 1992. There is no indication in the record that at the meeting appellant contended that the notice requirement had been waived.

25. The Government took the position that appellant's records did not reflect any result from such cost reduction efforts. As a result of the meeting the contracting officer let his final decision stand, and so advised appellant by letter dated 24 August 1984. Appellant filed a notice of appeal with the ASBCA on 15 September 1984.*

26. The Health Care Finance Administration (HCFA) of HHS had two contracts with appellant. One concerned hospital administration and the other medicaid reimburse-

* On 29 September 1986 the Board granted the Government's motion to dismiss the appeal for lack of proper certification. The Board found that the claim of $77,385.01 arose under the latest renewal of the contract, extending performance from 29 September 1980 to 29 September 1981 and as such was subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 et. seq.) The appeal was dismissed without prejudice to the filing of a new appeal after a duly certified claim was submitted to the contracting officer, and a final decision rendered 87-1 BCA 19,381, Mot. for Recon. denied, 87-3 BCA 20,027).

On 15 January 1992 appellant appealed from the contracting officer's failure to issue a decision, which appeal was docketed by the Board. The recertified claim was submitted to the contracting officer on 8 February 1990 (tr. 101).

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ment. Work on these contracts terminated in 1982. Appellant had given notice of a cost overrun with respect to these contracts prior to their expiration (tr. 127-129). In supplemental Agreements of Settlement for both contracts signed in March 1985, HHS agreed to increases in the contract price based on an overhead rate for FY 81 of 199% which was accepted by appellant. On 29 February 1984 another agency of HHS, the Health Resources and Services administration, issued a Notice of Indirect Cost Rates for yet another contract with appellant (232-80-0035) which established a final overhead rate of 209.07% for the period 1 October 1980 through 31 July 1981 (app. supp. R4, tab 15).

DECISION

We are unable to conclude that appellant satisfied the general prerequisite to recovery of an overrun of giving effective notice thereof prior to incurrence of such costs, as required by the Limitation of Cost (LOC) clause of the contract. At the outset, we are unable to find that the 6 May 1981 "notice" was ever given to the Government. Even if it had been given, it would have been ineffective because it failed to meet the LOC clause requirements of advising the contracting officer that a total cost overrun was expected, and of giving a revised estimate of total performance costs. Under the terms of the clause there is no obligation to reimburse costs in excess of the estimated costs unless such notice is given. The 22 September 1981 letter, also deemed an LOC notice by appellant, was ineffective because it was sent just seven days before contract expiration, or after most, if not all, of the overrun had already occurred.

Another prerequisite for recovery established by the clause, a responsive written notice from the contracting officer increasing the contract's estimated cost, was also not satisfied in connection with either of these letters from the appellant.

The bar to recovery for overruns imposed by noncompliance with the LOC clause requirements has been overridden only in instances where the contractor, during performance, has no reason to believe that an overrun would occur (see *General Electric Company v. United States* [16 CCF ¶ 80,284], 440 F2d 420 (Ct.Cl. 1971), or where the equitable doctrines of waiver and estoppel allow for recovery (See *Hughes Aircraft Corporation,* ASBCA No. 24601, 83-1 BCA ¶ 16,396, at 81,516-17).

Appellant does not argue, and we cannot find on the record before us, that the overrun of overhead costs was not ascertainable during approximately the second half of FY 1981 when the claimed costs were incurred. In fact, the appellant's waiver argument, largely predicated on the Government's alleged foreknowledge, would contradict such a position.

With respect to appellant's waiver (or estoppel) contentions, we note that the burden is on the contractor to prove waiver and estoppel. Appellant has not met its burden. We have found that appellant has failed to establish that either the contract specialist or the contracting officer was aware of the overrun which is the subject of this claim, or promised to pay for it. In this connection, we note that the ceiling was in fact raised to accommodate increased overhead costs, although not the amount in dispute, in a modification issued over two months after the contract expired.

The technical direction offered by the project officer shortly before expiration of the contract in no way served to increase the total estimated contract costs. This is proscribed by article XXII of the contract. Moreover, the Government's cost analyst's post award indications that a higher overhead rate would be accepted were not binding on the Government, since he had no authority to waive the contract's funding limitations.

We note in this regard that the contractual notice requirements under the LOC clause are separate from the contractual requirements regarding negotiation of final overhead rates. Accordingly, any final payments appellant seeks are subject to the terms of the LOC clause regardless of the final overhead rate negotiations by appellant. *Kirschner Associates, Inc.,* ASBCA No. 24958, 81-1 BCA ¶ 14,834.

Finally, the fact that other HHS agencies funded overhead overruns in other contracts in accordance with final negotiated rates does not operate as a waiver of the Government's right to apply LOC requirements here. We have consistently held that each claim for funding must stand on its own. *General Time Corporation,* ASBCA No. 18962, 75-2 BCA ¶ 11,462, and cases cited therein.

While appellant may have assumed that the overrun would ultimately be funded, absent a clear showing of unforeseeability or of waiver and estoppel, the Government is not so obligated, and the contractor assumes the risk of non-funding when the requirements

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of the Limitation Of Cost clause are not strictly adhered to. (See *Hughes Aircraft, supra*).

The appeal is denied.

[¶ 26,377] Technical Services—K.H. Nehlsen GmbH

ASBCA No. 43869, September 29, 1993. Contract No. DJA37-87-C-0381.

Conflicts of Interest—Government Personnel—Incompatibility with Government Duties.—Under a contract to provide boiler firing services, the government's refusal to allow a contractor to hire a government employee to fire the boilers was improper, because the government failed to demonstrate that this individual's employment with the government disqualified him from holding such a position under the terms of an executive order. The executive order, in prescribing the standard of conduct applicable to military and civilian personnel, stated that military personnel could not engage in outside employment that was incompatible with the performance of their government duties. The government asserted that the employment of the individual would have created a conflict of interest in violation of the executive order. However, the government failed to provide proof that the individual's duties with the government were inconsistent with the proposed duty of firing boilers. Requiring the contractor to employ a person other than the government employee at additional costs was a constructive change to the contract that entitled the contractor to an equitable adjustment.

Modifications—Constructive Change—Hire of Government Personnel.—Under a contract to provide boiler firing services, the government's refusal to allow a contractor to hire a government employee to fire the boilers and the contractor's subsequent employment of another person at additional costs was a constructive change because the government failed to demonstrate that this individual's employment with the government disqualified him under the terms of an executive order from holding a position with the contractor. The executive order stated that military personnel could not engage in outside employment that was incompatible with the performance of their government duties. Although the government argued that the employment of the individual created a conflict of interest in violation of the executive order, it failed to prove that the individual's duties with the government were inconsistent with the proposed duty of firing boilers.

Risk Allocations—Risk of Loss—Sabotage v. Inept Operation.—A contractor was responsible for damage to boilers under its contract to provide boiler firing services, even though it was uncertain whether the damage to the boilers was caused by sabotage or inept operation, because the contractor was responsible for the damage under either theory of causation. Because neither the government nor the contractor contended that the damage was due to normal wear and tear on the boilers, the board determined that the damage was caused either by sabotage or by negligent operation by the contractor's employees. If the damage was caused by inept operation, the contractor remained responsible under the Government-Furnished Property clause. The Government Building clause made the contractor responsible for repairs resulting from its failure to use care in avoiding damages to government equipment. If the damage was caused by sabotage, the contractor would have been found to have assumed the risk of such loss under the terms of the contract. The contractor was required under the Government-Furnished Property clause to secure and protect the area and to ensure against such a loss.

Modification—Scope of Contract—Relocation of Storage Area.—The costs of moving coal from a basement storage area to a new exterior storage area were compensable to a contractor under its contract to provide boiler firing services because the relocation of the storage area resulted in extra work. During the contract performance period, the government began a process of converting the building's heating system from coal-fired boilers to a centralized system, and the contractor was directed to move the coal from the basement to the new outside storage area.

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For the appellant: Matthews Law Office, Sulzbach, Germany, by Leodis C. Matthews. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Patrick J. Lamoure, JAGC, Trial Attorney, HQ, USAREUR & 7TH Army.

Before SHACKLEFORD, RUBERRY, and RIISMANDEL, Administrative Judges.

SHACKLEFORD, Administrative Judge: This is an appeal from the contracting officer's failure to issue decisions on several claims. Hearing was held in Mannheim, Germany. Only entitlement is at issue. Both parties have filed post-hearing briefs and appellant has filed a reply. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. § § 601 *et seq.*

FINDINGS OF FACT

On 21 September 1987, Contract No. DAJA37-87-C-0381 (the contract) was awarded to Technical Services-K.H. Nehlsen GmbH (TS or appellant) in the total estimated amount of DM 892,770.00. Under the contract TS was to provide non-personal boiler firing services at various locations in the Federal Republic of Germany.

As awarded, the contract was for a one-year period (1 October 1987 to 30 September 1988) with two one-year options. However, due to difficulties experienced by TS in obtaining the services of qualified boiler firemen and due to delay in award of the contract, commencement of work was delayed until 1 November 1987 and the incumbent contractor, PAE, was awarded a four-week contract extension.

Paragraph 1.12.6 of the Contract's Statement of Work, provided that:

> The contractor has to keep all mechanical rooms, electrical distribution rooms, motor control centers, chemical storage areas, etc. under his control locked or otherwise secured at all times.

Paragraphs 2.15, 2.16 and 2.17 of the Statement of Work covered maintenance and repairs to be performed by the contractor, as follows:

> 2.16 *LEVEL I WORK:*
>
> Preventive or annual recurring maintenance/repairs performed according to checklists prepared by the contractor and on a scheduled basis to prevent malfunction breakdown in deterioration of the equipment or facilities.
>
> 2.17 *LEVEL II WORK:*
>
> Unscheduled maintenance/repair work limited to a maximum of 16-man-hours as estimated by Engineering Performing Standards (EPS), specific definet [sic] limits in section C-5 or DM 500[.]00 in reimbursable parts, materials and supplies.
>
> 2.18 *LEVEL III WORK:*
>
> Unscheduled maintenance/repair work in excees [sic] of 16-man-hours as estimated by EPS, specific definet [sic] limits in section C-5 or DM 500.00 in reimbursable parts, materials and supplies.

Level I work consisted of preventive maintenance[1] and annual recurring maintenance[2] both of which were included in the contract price for the basic work. Level II work is generally described in section 5.4 of the Statement of Work as minor unscheduled repairs not exceeding the manhours set forth in ¶ 2.17. Level III work is generally described in section 5.4 as unscheduled major repair work exceeding the manhour threshold set forth in ¶ 2.18 above. Both Levels II and III were reimbursable work.

The contract included the short form Government Property clause (FAR 52.245-4) which provided in part as follows:

> (c) Upon delivery of Government-furnished property to the Contractor, the Contractor assumes the risk and responsibility for its loss or damage, except—
>
> (1) For reasonable wear and tear;
>
> (2) To the extent property is consumed in performing this contract; or
>
> (3) As otherwise provided for by the provisions of this contract.

The contract also included the Protection of Government Buildings, Equipment, and Vegetation clause (FAR 52-237-2) which provided as follows:

> The Contractor shall use reasonable care to avoid damaging existing buildings,

[1] Paragraph 2.24 of the Statement of Work defined preventive maintenance as "systematic maintenance of componence [sic] of a system or a piece of equipment in order to extend the live [sic] of the equipment and to minimize break downs."

[2] Paragraph 2.2 of the Statement of Work defines annual recurring maintenance as "that work performed on an annual schedule which has been submitted to the appropriate office. Recommendations of the equipment manufacturer or of a recognized standard of the industry predominant in trade[]must be fulfilled. Annual recurring work is seasonal work completed prior to the maximum utilization of the item."

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equipment, and vegetation on the Government installation. If the Contractor's failure to use reasonable care causes damage to any of this property, the Contractor shall replace or repair the damage at no expense to the Government as the Contracting Officer directs. If the Contractor fails or refuses to make such repair or replacement, the Contractor shall be liable for the cost, which may be deducted from the contract price.

Section H-11 of the contract required TS to carry an insurance policy as follows:

A Comprehensive General Liability with a minimum lump sum coverage of *DM 200,000.00* against material damages; and *DM 1,000,000.00* against personal injuries or damage occuring [sic] within the service system. [Emphasis in Original]

In September 1990, appellant filed several claims with the contracting officer. On 26 September 1990, the contracting officer acknowledged receipt of the claims and advised that they were undergoing evaluation. On 3 July 1991, the contracting officer wrote to TS, referred to the claims which are the subject of this appeal, advised of the Government's tentative position on some, asked for additional information on others and, finally, advised that upon receipt of documentation, a final decision would be issued. We have no evidence of whether the additional information was ever provided.

As of 1 December 1991, no final decision had been issued and, on that date, the contractor filed an appeal from the failure of the contracting officer to issue a decision. Each claim is discussed below.

Findings of Fact—Extra Personnel Costs at Schneeberg

On 28 October 1987, a meeting was held between Government and TS officials to discuss the readiness of TS to begin contract work on 1 November with enough qualified personnel. While a determination was made at the meeting that TS was prepared and capable of beginning work, TS was advised that its plan to utilize a Government employee, who worked for the using activity, to fire the boilers at Schneeberg would not be allowed. It was the Government view at that time that it would be illegal for a Government employee to be paid both by a contractor and the Government for work completed in the same hours. The Government took this position even though the employee in question, Mr. Rappel, had performed these services for the predecessor contractor while also employed by the Government.

It later developed that the Government misunderstood the extent to which TS intended to utilize Mr. Rappel. In fact they planned to use his services only in the early morning prior to his going to work for the Government and in the late afternoon, after completion of his workday for the Government. The misunderstanding as to the extent to which Rappel would be used emanated from a Government misunderstanding as to the contract requirements. The position taken originally was based upon the mistaken impression that the contract required a person to operate the boiler at Schneeberg 24 hours per day when in fact the contract only required the plant to operate 24 hours per day.

As the Government refused to approve Rappel, TS proceeded to hire another individual to work at Schneeberg at greater expense than it would have incurred to pay Rappel and on 15 September 1990, filed a claim for DM 42,750 for such additional expense.

DECISION

Allowing TS to hire Rappel, the Government contends, would have caused a conflict of interest to arise in violation of Executive Order 11222. Appellant counters that Rappel had performed the very same work for the prior contractor while employed by the using activity and that the Government was aware of appellant's intention to use Rappel when the contract was awarded.

Section 201 of Executive Order 11222 states in pertinent part as follows:

(a) Except in accordance with regulations issued pursuant to subsection 9(b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty ....

The Department of Defense has implemented Executive Order 11222 in 32 C.F.R. Part 40 (July 1, 1989 edition), by prescribing the standards of conduct applicable to mili-

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tary and civilian personnel. Section 40.4(b)(11), Outside employment of DoD personnel, provides as follows:

> DoD personnel may not engage in outside employment or other outside activity, with or without compensation, that is not compatible with the performance of their Government duties, may reasonably be expected to bring discredit upon the Government or DoD Component concerned, or is otherwise inconsistent with the requirements of part [sic]. This includes the requirement to avoid actions that reasonably may be expected to create a conflict of interest or the appearance of conflict of interest.

The Government alleges that the mere fact that Rappel was employed by the using activity is sufficient to disqualify him from holding employment with a DoD contractor under the executive order. The implementing regulation, however, requires more than that. It requires incompatibility with Government duties or at least the appearance of a conflict of interest. There is simply no proof here that Rappel's duties with the using activity were inconsistent with his proposed before and after-hours duties of firing boilers. In fact, we have no evidence of the nature of Rappel's Government job.

The Government has demonstrated no valid basis under Executive Order 11222 or under its implementing regulations to bar the employment of Rappel by TS. In addition, we question whether the Government could even preclude a contractor from hiring a Government employee inasmuch as the executive order and its implementing regulations are restrictions on the activities of employees, not restrictions on contractors. Neither party has pointed to any clause in the contract, and we have found none, that gives the Government the right to preclude the employment of Rappel by TS so long as he was technically qualified to perform the duties.

Requiring TS to employ a person other than Rappel at additional cost was a constructive change to the contract which entitles TS to an equitable adjustment to its contract. The matter is remanded to the contracting officer to negotiate quantum.

Findings of Fact—Alleged Sabotage in Buildings 263 and 684

Several days prior to turnover of heating plants at Grafenwoehr, Vilseck and Bindlach, the Government instituted an emergency operating plan in anticipation of possible problems "due to the negative attitude of the boiler firemen" of the then current contractor with respect to the new contractor firm. TS was unsuccessful in hiring the employees of the predecessor contractor as they were dissatisfied with the employment terms offered.

Josef Lissman was the Government boiler inspector responsible for Vilseck which included the boilers in buildings 263 and 684. Building 684, which had an automatic coal fired boiler, was adjacent to building 263 which had a semi-automatic coal fired boiler. Lissman knew that TS was not going to be able to hire the firemen of the predecessor firm and was concerned about the new firemen's ability to operate these highly modernized systems. In anticipation of the turnover, therefore, he observed the operation of the systems for a week prior to turnover and satisfied himself that they were operating satisfactorily.

On the evening of 31 October 1987, Lissman arrived at buildings 263/684 at approximately 1700 hours, talked to the PAE employees there, asked if they knew of any problems and determined that the systems were operating automatically and at the correct temperature. At 2300 hours, Lissman inspected the boilers again, assuring himself that everything was operating properly. Subsequently, Klaus Barro Nehlsen (Nehlsen), TS's vice president, and other TS personnel arrived. They observed the boiler in 263, determined that everything was at the proper setting and operating properly. At this joint inspection in conjunction with turnover, the lights were working and the coal feed system was operating properly. In addition, the coal bunker was half filled, the floor was dry and the coal chute was half filled. Lissman then padlocked building 263, left the lights on in the coal bunker and the boiler house and went with the TS personnel to building 684.

The automatic system in building 684 included devices called bimetal relays (often spelled relais), which protect the motors from overheating. Certain values on the motors correspond to the values on the relays and a button is used to adjust the relays to correspond to the values on the motors. At the turnover inspection the bimetal relays had not been changed and were working properly. During the inspection, a TS employee began to make adjustments to the relay buttons but at Lissman's direction changed them back to their proper settings. When the buttons are switched randomly and wrongly, the sequence of automatic operation is affected and the heating plant can

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be damaged, but it is not clear how that occurs.

The system in building 684 was controlled from a number of switchboards which the parties referred to as "luminous boards." These luminous boards controlled three boilers, the transportation system for the coal feeding and a complete transportation system for ash removal from all three boilers. Green lights on the luminous boards signified that the system was operating properly and running automatically. Red flashing lights would signify that there was trouble or damage to the boards. In Lissman's inspection on the night of turnover, there were only green control lights which indicated the system was running automatically.

In building 684 burned coal is removed by a hoist which works automatically. Large pieces of burned coal, known as slag, are removed from the three boilers in 684 by a horizontal conveyor belt which transports the slag to a crusher which reduces its size and transports the smaller slag by way of a vertical conveyor belt to be fed into a large container. This large container is emptied every several days. A redundancy was built into the system such that there were two vertical belts, the second designed to begin operation if the first failed or became clogged. At the turnover inspection the ash removal system was operating properly and was still operating properly, according to Lissman, when he left the area at 0800 hours the morning of 1 November 1987. The second branch of the vertical system was not inspected on the evening of takeover.

Karl Plum was the initial TS employee responsible for 263 and other boilers in the area. Plum was relieved about 0600 in the morning of 1 November 1987 by Karl Baumann. Plum advised Baumann that in 263, the lights were not working and the coal transportation system was not operating. The light problem was corrected later in the afternoon when Army engineers replaced fuses which were defective. Baumann later that same day inspected the coal feeder and found it was filled with coal fines and water. Baumann corrected the problem by removing the coal from the feeder by hand. The nature of the clog in the system made it impossible to use a shovel to remove the fines and water. It was Baumann's judgment that the high percentage of fines placed in the feeder were placed there deliberately.

During the two days the feeder was inoperable, the boiler was fed manually by loading buckets of coal and feeding it into the burners with shovels.

Nehlsen testified that during the day on 1 November 1987, the second vertical slag removal system in building 684 was found to have been clogged and damaged even though he says TS had not used that system. TS cleaned and repaired the vertical system and the Government refused to compensate them for it because it was considered to be normal cleanup work. Nehlsen testified that the amount of work involved went beyond the 16 hour limit of level I and level II repairs and they have not been paid for that work.

On 13 December 1987, TS advised the Government in writing about the foregoing problems with the heating plants at Vilseck, and stated that in 684 the bimetal settings on the controls were out of phase with the motors and that boiler regulators and electronic controls had been readjusted between visits to the boiler. Nehlsen considered these situations to have resulted from sabotage.

The Government conducted an investigation of the foregoing and concluded as follows:

> 3. At the turnover of the contract the heating plant #263 was operatable [sic]. According to the contractor's site manager, this heating plant is presently working without problems. Since, the heating plant has a very sensitive coal and de-ashing system, it is probable that the conveyer [sic] was jammed due to unexperience [sic] of operating personnel.
>
> 4. All keys of the heating plants have been turned-over from the previous contractor. It is questionable that persons from outside readjust controls and settings. The contractor was advised to install new locks at the boiler room doors.

On 15 September 1990, TS filed a claim for DM 3,495 for costs incurred due to the alleged sabotage at boiler #263, stating as follows:

> On 1. Nov. '87 shortly after take over someone with an unaccounted key took access to the boilerhouse at #263.
>
> This person
>
> —removed the fuses of the lighting circuits
>
> —filled up the coal-feed with dust and dirt and water
>
> The local authorities were not prepared to consider this a repair case and refused a repair order.

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The local management was only too much after establishing a case of "breach of contract" to hold it against us. We therefore could not stop our work at #263 but had to get the coal feed operational again and put our men to work accordingly.

There is no clause in the contract to which we have to remedy such obvious cases of sabotage or to consider this a minor repair. We therefore invoice the US-Government the normal rates of the open market.

By letter of 10 September 1990, TS requested payment of DM 4,495 for the repair of damages to boiler 684 at Vilseck alleged to have been caused by sabotage by unknown persons in which:

1. the bimetal-relais settings were changed to higher or lower values.

2. The luminous board for the operation of coal feed, slack crusher, ash disposal was not working properly.

3. The right branch of the vertical ash removal system was jammed and full of ash and slack.

Decision—Alleged Sabotage at Buildings 263 and 684

Appellant argues simply that damages to equipment in buildings 263 and 684 were caused by sabotage and are therefore compensable as an equitable adjustment under the Changes clause of the contract. The Government does not challenge the logic of appellant's theory, it merely argues that appellant failed to prove the damages resulted from sabotage, and failed to show its own employees were competent to operate the equipment. The Government believes the damages were due to TS employee error. At the time the premises were turned-over to TS, all systems were operating properly. Neither party has cited any authority for its respective position either under the contract or under case law. Appellant believes, but did not prove, that damages to the equipment were due to sabotage. The Government believes, but did not prove, that the damages were due to employees of TS improperly operating the equipment. Since neither party contends the damages were due to normal wear and tear on the equipment and there is no evidence it was, we find the damages to be due to either sabotage or negligent operation of the system by TS employees. In either event, appellant may not prevail.

If the cause was inept or negligent operation of the equipment by appellant's personnel, the appellant must bear the costs. The Government-Furnished Property clause places the risk and responsibility for loss on appellant subject to three exceptions, only one of which, reasonable wear and tear, is arguably applicable here. Since we have found the damages were not due to reasonable wear and tear, the risk and responsibility for damages remains with appellant. In addition, under the Protection of Government Buildings clause, the contractor was to use reasonable care to avoid damages to the equipment, and upon its failure to do so, is charged with responsibility for repairing or replacing the damage at no cost to the Government.

If we were to find, as appellant urges, that the damages were the result of sabotage, appellant still would not prevail. In addition to the assumption of risk and responsibility mandated by the Government-Furnished Property clause, paragraph 1.12.6 of the Statement of Work required the contractor to keep premises under its control locked or secured at all times. Section H-11 of the contract required TS to carry a comprehensive liability insurance policy including material damage. Thus, if someone entered the premises and damaged the equipment on purpose, TS assumed the risk and responsibility for that loss; TS was required under 1.12.6 to secure and protect the area and TS was required under the contract to insure against that loss.

Thus, whether the cause was inept operation or sabotage, appellant bears the burden of any expense as it is responsible under either theory. The claims for damages due to alleged sabotage at buildings 263 and 684 are denied.

Findings of Fact—Building 263, Inoperable Equipment 9/88—4/89

On 15 September 1990, TS filed a claim with the Government for DM 14,430 for alleged extra work expended to repair machinery in building 263 from September 1988 to April 1989. The explanation for this extra cost is set forth in the letter as follows:

In early '88 the EIP at #263 was extremely shaky, worn out and in parts not operational any more. Because of this the local US-Management wanted to abandon operation fast as possible and to convert to district heat.

It is quite understandable that no more money was spent on summer overhaul and repairs.

When operation was to start again on 20. Sept. 1988 we had to face the fact, that the semiautomatic motor driven ash and slack

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disposal was beyound [sic] repair. Therefore ash and slack had to be removed by hand from the boiler and be hand carried to the slack container outside the boiler house.

This extra work had to be performed until 19. April 1989, when the semiautomatic coal feed broke down completely and consequently the coal fired boiler was replaced by an oil fired boiler. In the meantime the operation had to be stopped temporarly [sic] because the motor of the airvent blew up and had to be rewound. This was between 24. Dec.—30. Dec. 1988.

DECISION

The Government contends that the repairs performed were caused in part by operational errors of the TS personnel working on the machinery. Appellant does not discuss this issue in either its initial or reply brief, and thus we are not fully cognizant of its theory of recovery. In any event, we conclude that appellant has failed to demonstrate that the repairs were other than Level I preventive maintenance repairs, which were included in the base price of the contract.

Findings of Fact—Extra Work, Buildings 475/478, July-Nov 1988

Buildings 475 and 478 were heated by a coal fired boiler in the basement of one or both of the buildings. The record is unclear as to whether there was one boiler for both buildings or whether there was a common basement. In any event, the boiler was fired by coal which was stored in bins in the basement 10 to 12 meters from the boiler itself. The coal was transported from the interior bin by shoveling it into coal wagons which were moved the 10 to 12 meters to the boiler and loaded easily into the boiler. This interior storage area was protected from rain and snow.

During the contract performance period, the Government began a process of converting to district heat, a system of heating several buildings in an area from a central heating plant. Buildings 475 and 478 at Vilseck were among the first buildings to be connected to that new system. The basement area in which the coal was stored was slated to be used for instrumentation associated with the new district heating, and in order to install those instruments, the coal which was stored in the basement was moved to the outside, about 6 to 8 meters from the buildings. This storage area was unprotected from rain and snow.

The Government installed a coal chute to facilitate transporting the coal from the outside storage area into the building housing the boiler. The plan was that coal would slide down the chute and into a coal wagon which could be pushed directly to the boiler and loaded into the heating system. The chute was not used, however, because it was too flat, with insufficient angle for the coal to slide down. The contrary testimony of Mr. Baur, a former disgruntled TS employee, was not credible. TS had to hand carry fuel from the coal storage area outside the building into the boiler room in the basement.

This diversion from normal operations lasted from 28 July 1988 until 22 November 1988, and caused the incurrence of some additional labor effort, the amount of which is unclear from the record.

On 15 September 1990, TS submitted a claim to the Government for DM 14,260 for alleged extra work expended from July to November 1988 at buildings 475 and 478 in Vilseck. The explanation for this extra cost is set forth in the claim as follows:

The local US-Management closed the coal bins at #475 and #478, Vilseck, on 28th July '88 to make room for the installation of substations for district heat.

The result was, from 28th July '88 until 22nd Nov. '88 the fuel had to be handcarried from coal piles outside the buildings into the boilerrooms in the basements.

Wooden coal chutes installed by the engineers department were of no help at all.

For similar reason the ash hoists were not operational. So ash and slack had to be removed by hand from the boilerrooms to the ash-containers outside.

This caused 3 times the hours needed normally to feed the boilers and to dispose of ash and slack.

On top of this our personnel requested extra pay for the much harder work. For July, Aug., Sept., Oct. '88 we could fend this off. For Nov. '88 we had to agree to a "Erschwerniszulage" of DM 2,50 per hour worked in #475 and #478.

Decision—Coal Chute at Buildings 475 and 478

As our findings indicate, the chute was not installed at a proper angle to be of any usefulness at reducing the amount of effort necessary for transporting coal from the exterior of the structure to the basement boiler room. While we acknowledge the testimony of Baur who stated the chute was properly installed, we do not believe that workers would simply ignore a properly installed chute and choose a method that involved more work.

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We deny any recovery for additional work associated with ash removal as appellant has failed to prove entitlement and neither party discusses the issue in the briefs. While the record supports a conclusion that more work resulted from the closing of the coal storage area in the basement and moving it to the exterior, the record is inconclusive as to the extent of that extra labor. We therefore remand the matter to the contracting officer to negotiate quantum.

SUMMARY

The claim for extra personnel costs at Schneeberg is sustained. The claims for costs to repair equipment damaged by alleged sabotage to equipment in buildings 263 and 684 are denied. The claim for extra labor costs associated with inoperable equipment in building 263 is denied. The claim involving the coal chute at buildings 475 and 478 is sustained with respect to the additional cost of moving coal from the outside storage area to the boiler to the extent it exceeds the cost that would have been incurred had the storage area remained in the basement; but is denied with respect to the claim for extra costs of ash removal. Those matters sustained are remanded to the contracting officer to negotiate quantum.

[¶ 26,378] Paragon Dynamics, Inc.

ASBCA No. 43618, September 16, 1993. Contract No. N00104-89-C-G051.

Quality—Testing—Test Parameters.—Under a contract for circuit card assemblies, a contractor's contention that a change in the specification test parameters for transistor components was necessary was rejected because it was clear that the government's existing test parameters could be met. A change to the drawing was not warranted, because the components had been manufactured over a 20-year period without problems with the specifications or test requirements.

Performance—Specifications—Request for Deviation.—Although the government's electrical engineer recommended approval of a requested deviation from the tolerances for transistors under a contract for circuit card assemblies, the government's refusal to approve the deviation was not an abuse of discretion, because the contracting officer's determination that a waiver was the appropriate means of relaxing specifications was reasonable. At the time of the requested deviation, the majority of the transistor components had been manufactured. Furthermore, the requested deviation was made by the contractor after 100 to 150 of the components had been completed but rejected. With respect to the completed components, the contracting officer reasonably concluded that a waiver rather than a deviation from contract requirements was appropriate. The fact that the government's electrical engineer found the request for the deviation technically acceptable and recommended approval did not bind the contracting officer.

Delay—Approval Delay—Request for Deviation.—Although the government was slow in acting on a contractor's request for a deviation under a contract for circuit card assemblies, it was not responsible for the tardy response to the request, because its approval of the request was not necessary to correct a defective specification, and the contractor was able to continue production and testing under the contractually mandated procedures. While the deviation request was pending, the contractor continued to produce and ship the majority of the components.

For the appellant: Ronald E. Giroux, Vice President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Kim Lantz Yoder, Trial Attorney, Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania.

Before DUVALL, RUBERRY, and THOMAS, Administrative Judges.

DUVALL, Administrative Judge: Appellant seeks an equitable price adjustment of the contract for alleged cost increases associated with the contracting officer's disapproval of a requested deviation from specification tolerance requirements for testing of a transistor. The transistor was a component of the circuit card assemblies produced under the contract. Appellant contends that the specification was defective and that the disapproval and delay in acting on the deviation request were arbitrary, capricious, unreasonable and constituted a failure to cooperate with the appellant. Appellant also alleges that the Government failed to disclose superior knowledge in the form of revisions to drawings that were in existence during the contract period but not sent to appellant. Appellant elected to proceed on the available record, without a hearing, pursuant to Board Rule 11.

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FINDINGS OF FACT

On 8 December 1988 the Government awarded appellant a contract for 1602 circuit card assemblies for a total contract price of $134,119.44.

Contract drawings 2626162 and 2530733 required the use of a transistor, part number 2N3302 as part of the assembly. These drawings were revised following award of this contract. The Government denies, and appellant has failed to establish, that such revisions had any bearing on the dispute which is the subject of this appeal (Govt. exh. 2). *

On 9 April 1990 the contract was partially terminated for the convenience of the Government for a quantity of 324 units.

In February 1991 appellant advised the Government electronics engineer that it was considering submission of an Engineering Change Proposal (ECP) for what it thought were problems in the inherent tolerances in the transistor. The engineer recommended that a Request for Deviation (RFD) be submitted instead of an ECP. That recommendation was based on his conclusion that a technical change to the drawings was not warranted because of the over 20 year history of manufacture of the assembly without problems with the specifications or test requirements (Govt. exh. 2).

On 12 February 1991 appellant submitted the RFD requesting relation of tolerances required by the specifications. Appellant indicated that "The expanded test range for block 23 is required for the inherent tolerance found in transistor 2N3302". (R4, tab 11) The request was made for the entire remaining contract quantity of 1278 circuits assemblies. No change in contract price was indicated in the form.

In early April 1991 Government technical personnel recommended approval of the deviation (R4, tab 12).

In May 1991 the Government's Quality Assurance Representative prepared a DD Form 1998, COMMENTS ON WAIVER, DEVIATION OR ENGINEERING BEQUEST, in which he concurred with the contractor's request. He noted on the form that "100+" units pending disposition of this request". (R4, tab 14) This comment was based on a conversation with appellant's Quality Assurance Manager, who told him that 100 to 150 had been rejected and set aside for later re-evaluation. (Govt. exh. 3). Prior to the February 1991 RFD proposal, 140 units plus first article units had been shipped. Subsequent to the RFD submittal, another 125 were shipped in February 1991. During the months of March, April and May of 1991 600 additional units were shipped. These units were accepted as complying with the specifications. The QAR assumed from the response of the appellant's Quality Assurance Manager that there were remaining 301 units left to be delivered and that they had been completed. (Govt. exh. 3)

On 17 June 1991, the contracting officer, after discussing the recommendation with the Government QAR, determined that, despite technical approval of the deviation, a deviation of the total contract quantity would be inappropriate. She concluded that since, as she had been told, all manufacture was completed, a waiver was the appropriate means of relaxing specifications and that it should be accompanied by an offer of consideration.

Appellant requested reconsideration of the RFD disapproval on 28 June 1991, and also requested a copy of the Form 1998 under the Freedom of Information Act. After discussing the matter with appellant's president on 17 July 1991 the contracting office responded to appellant's 28 June 1991 request with a letter affirming the disapproval. The letter also constituted a "show cause" letter warning that, since appellant had failed to complete contract performance in the time specified in the contract, consideration was being given to termination of the contract for default.

Appellant responded on 1 August 1991 with a claim for a time extension and an equitable price adjustment of $11,366.06. Appellant contended that a change in the specification test parameters was necessary, that the disapproval of its RFD was arbitrary, capricious and unreasonable, and that it was entitled to compensation for delay in the Government's response to the RFD.

In its response, appellant acknowledged that there were 301 units left to be delivered, but advised (and we so find) that not

* In a "complaint" filed in connection with what the Board considered an amendment to its claim (as discussed, *infra*) appellant took issue with the Government's position that the version of drawing 2530733 which was part of its contract required use of a "selected" transistor. A selected transistor is a purchased item guaranteed to meet required test parameters. Appellant requested that the Board require the Government to file an answer to the complaint. The Board denies the request because the issue of whether or not a "selected" transistor was required is not material to our decision.

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all of these units had been manufactured. Appellant stated that the items that did not pass were being held pending approval of the RFD, and that manufacture of the remaining items had been put on hold for the same reason. Appellant then advised that "Due to the problem being with a Government specified component, and since all items have not been manufactured, PDI has no intention of submitting a waiver". Appellant did not state, and the record does not disclose, how many of the 301 units remained to be manufactured at this time (R4, tab 22).

On 7 October 1991 appellant appealed the deemed denial of its claim to the Armed Services Board of Contract Appeals. On 12 December 1991 the contracting officer issued a final decision denying the claims.

The contract was not defaulted, and was ultimately completed in May 1992. Contract records indicate that after cleaning and retesting, 80 percent of the 100 to 150 units set aside for retesting passed the acceptance criteria without the need for a deviation or waiver of contract requirements (Govt. exh. 3). We find that appellant has failed to establish that a relaxation of specification tolerance requirements was required.

On 26 August 1992 appellant submitted an additional claim, in the amount of $20,678.00, to the contracting officer for alleged increased production costs arising out of the failure to approve the RFD. The deemed denial of this claim was appealed to the Board. The Board considered this claim as an amendment to the instant claim, since it arose from the same cause of action, and dismissed the second appeal. (ASBCA 45262, 93-2 BCA ¶ 25,781).

DECISION

In its brief appellant has attacked the accuracy of some statements contained in sworn affidavits placed in evidence by the Government. We give no credence to such allegations, which are unsupported by the record, and have made findings based on material statements in the affidavits, in the absence of contradictory evidence. Both parties were provided the opportunity to supplement the record.

Appellant has failed to establish that it was entitled to a change in the transistor test parameters. It is clear from the record that the Government's test parameters could be met. Consequently, the general rule of contract law that the Government is entitled to strict compliance with contract requirements is applicable here. *Granite Construction Co. v. United States* [37 CCF ¶ 76,290], 962 F2d 998, 1007 (Fed. Cir. 1992).

Appellant also has not met its burden of demonstrating that failure to approve the deviation request was an abuse of discretion or an actionable failure to cooperate. Our findings show that, although not all of the assemblies required by the contract had been manufactured before the contracting officer disapproved the request, the majority were, and the request was originally made by appellant in the context of some 100 to 150 assemblies that had been completed but rejected. With respect to these and other completed assemblies, a waiver rather than a deviation was appropriate. Moreover, the contracting officer's requirement for consideration was appropriate, whether or not required by regulation, since appellant was seeking a relaxation of attainable contract requirements. The contracting officer was in no way bound to grant a deviation simply because Government technical personnel found the proposal technically acceptable and recommended its approval.

We also hold that appellant has failed to establish entitlement to delay damages. While the Government was slow in acting on the deviation request, we have held that the Government is not responsible for tardy responses to requests for deviations or waivers when such an action is not necessary to correct a defective specification (as was the case here) and the contractor's production and testing can proceed under the contractually mandated procedures. *Salisbury Special Tool Co.*, ASBCA No. 37530, 89-2 BCA ¶ 21,838. Here, appellant continued to produce and ship the majority of the assemblies while the deviation request was pending.

Finally, appellant's superior knowledge argument provides no basis for recovery, since appellant has failed to show that undisclosed drawing revisions made after award would have had any bearing on the subject matter of this claim.

The appeal is denied.

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[¶ 26,379] RTS Data Corporation

ASBCA No. 43499, September 28, 1993. Contract No. F08651-90-D-0012.

Contract Disputes, Contracting Officer's Decision—Effect of Decision—Evidentiary Value.—Under a requirements contract for logistics material control activity functions, the government was liable for a portion of the contractor's claim regarding an ambiguous understatement of the estimated pickup and delivery element of work, because it failed to offer any evidence to rebut the contracting officer's decision allowing the contractor's claim. Although the contractor had not agreed to accept the amount allowed, the contracting officer's decision constituted an evidentiary admission by the government sufficient to establish liability. However, the contractor was not entitled to recover for any excessive pickup and delivery work during the remaining two option years of the contract. The record did not show that the government exercised its options to enter into these two contracts. The board concluded that the contracting officer's statement acknowledging the contractor's entitlement to prospective equitable adjustments with respect to these two periods of future contract performance was premature and speculative.

Interpretation of Contracts—Ambiguities, Patent—Duty to Seek Clarification.—Under a requirements contract for logistics material control activity functions, a contractor was not entitled to an equitable adjustment for the costs incurred in performing the researching and processing work associated with base supply nonaccountable equipment and supply requests, because the performance work statement's and technical exhibit's omission of estimated quantities for researching and processing work raised a patent ambiguity that imposed on the contractor a duty to inquire. By entering into the contract without protest, the contractor adopted the government's interpretation of the contract. Moreover, the contractor failed to show that it reasonably relied on its proffered interpretation.

For the appellant: R.T. Strickland, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Michael F. Copley, Trial Attorney.

Before GRUGGEL, RIISMANDEL, and RUBERRY, Administrative Judges.

GRUGGEL, Administrative Judge: Appellant seeks compensation in the total amount of $181,633.20, representing an amount ($45,408.30) for the original one-year contract period and each of three one-year option periods, contending the estimated workload with respect to "pickups and deliveries" and Base Supply nonaccountable equipment/supply requests was grossly understated. Only entitlement is at issue (tr. 12-13). A one-day hearing was scheduled and held. Appellant did not attend the scheduled hearing (tr. 4-6, 66). Appellant also did not submit a brief with respect to its appeal. Pursuant to Board Rule 19, we deem appellant to have submitted its case on the record under Board Rule 11 (tr. 3, 66).

FINDINGS OF FACT

1. Contract No. F08651-90-D-0012, a fixed-price, small business set-aside, requirements contract principally for the performance of the Logistics Material Control Activity (LMCA) functions at the Air Force Armament Test Laboratory (AFATL), Eglin Air Force Base, Florida, was awarded to appellant on 8 November 1989 after formal advertising and under sealed bid procedures as prescribed by the Federal Acquisition Regulation (tr. 14-15; R4, tab 1). Appellant agreed to perform the LMCA functions at Eglin AFB during the initial contract year (1 February 1990—30 January 1991) at a price of $170,605.12 per year. In accordance with the contract provisions, the Government was entitled to exercise three additional one-year options for appellant's performance of the LMCA functions as follows: 1 February 1991—30 January 1992, $168,338.44 per year; 1 February 1992—30 January 1993, $170,354.84 per year; 1 February 1993—30 January 1994, $172,363.36 per year (*id.*). The Government exercised its option to extend appellant's performance for the first option-year (R4, tab 2). The evidentiary record is silent as to whether the Government ever exercised its options for the last two option-years of the contract.

2. The contract contained the standard Ordering (FAR 52.216-18 (APR 1984)), Delivery—Order Limitations (FAR 52.216-19 (APR 1984)), Requirements (FAR 52.216-21 (APR 1984)), Interest (FAR 52.232-17 (APR 1984)), Prompt Payment (FAR 52.232-25 (APR 1989)), Disputes (FAR 52.233-1 (APR 1984)), Changes—Fixed Price (FAR 52.243-1

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(AUG 1984)) ALTERNATE I (FAR 52.243-1 (APR 1984)), Pricing of Adjustments (DOD FAR SUP 52.243-7001 (APR 1984)), Not-To-Exceed Cost Agreement (AFSC FAR SUP 52.243-9001 (APR 1987)) and Changes Not Requiring Monetary or Delivery Schedule Adjustments (AFSC FAR SUP 52.243-9002 (APR 1987)) contract clauses (R4, tabs 1, 2).

3. The contract included Performance Work Schedule (PWS) No. F77DOL 7180001, dated 1 July 1987 (R4, tabs 1, 3). The PWS contained the following, pertinent provisions:

Section C-1

General

1.1 SCOPE OF WORK. The contractor shall provide all personnel, equipment, tools, materials, supervision, and other items and services necessary to perform the Logistics Material Control Activity (LMCA) function as defined in this Performance Work Statement (PWS) except as specified in Section C-3 as Government furnished property and services at the Air Force Armament Laboratory (AFATL), Eglin Air Force Base, Florida. The contractor shall perform to the standards in this contract. The estimated quantities of work are listed in Technical Exhibit 2, Workload Estimates.

* * *

1.12 PHASE-IN PERIOD. The period thirty (30) days prior to conversion to a contractor operation is designated the phase-in period is [sic] to allow the contractor to have certain key personnel on-site to observe the Government operation and make preparation for conversion to a contractor operation. Responsibility of the operation of the LMCA remains with the Government during the phase-in period.

1.12.2 It is recommended that the contractor have key personnel on-site in their respective areas during the phase-in period. The job title and on-site dates of contractor key personnel shall be addressed in the Contractor Technical Proposal. The total cost for the phase-in period shall be indicated in the Bid Schedule.

* * *

2.2.14 Contractor Operated On-Base Civil Engineer Service Store (COCESS): A civil engineer maintenance and repair parts store located in or near the base civil engineer maintenance shop area. It is operated under contract by a commercial firm, normally as an extension of the firm's main hardware and supply operation. Sales are made exclusively to authorized Air Force representatives.

* * *

2.2.77 Table of Allowance (T/A): An equipment allowance document which prescribes basic allowances of organizational equipment . . . .

* * *

SECTION C-5

SPECIFIC TASKS

* * *

5.3 CUSTOMER SUPPORT UNIT (CSU) FUNCTION. The contractor shall:

5.3.1 Process all requests for supplies and equipment. (AFSCR 57-8, paragraph 3-1)

* * *

5.3.2 Research all supply and equipment requests.

* * *

5.3.2.2 Determine possible sources of supply and any special processing procedures or requirements for other base activities' coordination for such items as Contractor Operated Civil Engineering Service Store (COCESS), Special Purpose Recoverables Authorized Maintenance (SPRAM), EAID, medical, photographic, individual equipment, automatic data processing (ADP) hardware and software, munitions items, or tools.

5.3.2.3 Determine the availability of the requested item from organizational resources, holding areas or logistic support stocks. If the item is available from in-house assets, fill the requirement.

5.3.2.4 Maintain a part number file . . . or use an automated system . . . and process each request.

5.3.2.5 Stamp or mark each document to show that all research actions have been completed.

* * *

5.3.3.1 Process the request to the supply source via the proper standard method.

5.3.3.2 . . . assign a document number to each request submitted through Base Supply.

* * *

5.3.8.1 Process adjustment requests to Base Supply.

* * *

5.3.11 Process COCESS and medical supply requests. (DOL OIs 67-1 and 67-7)

* * *

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5.4 **EQUIPMENT CONTROL UNIT (ECU) FUNCTION.** The contractor shall:

* * *

5.4.3 Prepare and process equipment requests.

5.4.3.1 For budget code "Z" requests, obtain all necessary external coordinations.

5.4.3.2 Screen the appropriate listings and holding areas for assets to satisfy the request.

* * *

5.4.3.4 Process Base Supply computer transactions and clear or reprocess rejected computer transactions.

* * *

5.4.4 Maintain files of allowable allowance source documents. Validate the authorization using the applicable allowance source document. Review and validate the SBSS [Standard Base Supply System] and EMAS [Equipment Management Accounting System] P009 and Q10 listings—Load the appropriate Allowance Source Code.

5.4.6 When required, prepare and process AF Forms 601 to HQ AFSC/LGSE for approval.

5.4.7 Maintain suspense files for Base Supply [equipment] transactions until processing is confirmed.

* * *

5.4.23 Process equipment shipments. (AFSCR 67-8, Paragraph 4-20)

5.5 **MATERIAL HANDLING UNIT (MHU) FUNCTION.**

* * *

5.5.7 Pick up and deliver compressed gas cylinders.

* * *

5.5.9 Provide pick-up and delivery service.

(R4, tab 3) The contractual scheme thus delineates the respective responsibilities of the CSU and the ECU with respect to the researching and processing of equipment and supply requests (*id.*). The above-quoted portions of PWS ¶ 5.3 (CSU Function) and PSW ¶ 5.4 (ECU function) establish that the CSU involves particularized researching (*e.g.*, ¶ C-5.5.3.2 and quoted sub ¶ s) and processing (*e.g.*, ¶ s C-5.5.3.1, C-5.5.3.3.1, C-5.5.3.11) functions with respect to supply requests as well as equipment requests (*id.*). On the other hand, the above-quoted portions of PWS ¶ 5.4 establish that the ECU involves separate researching (*e.g.*, ¶ C-5.5.4 "Review and validate") and processing functions (*e.g.*, ¶ s C-5.5.4.3, C-5.5.4.6) only with respect to equipment requests (*id.*). Finally, the contract documents contained in the evidentiary record do not define the terms accountable equipment, non-accountable equipment or item (*id.*).

4. Technical Exhibit 2 (Workload Estimates) of the PWS provides, in pertinent part:

TYPE OF SERVICE	ESTIMATED WORKLOAD
Process Equipment Requests:	
AF Forms 601	
Review and sign	53 requests per month
Research allowances in TAs [Tables of Allowances]	200 allowances per month
Budget Code "Z" requests	5 requests per month
Furniture requests	15 requests per month
Equipment loans	2 loans per month
* * *	
Direct Procurement Actions (AF Form 9):	
Review, prepare, sign, and process	125 requests per month
* * *	
Contractor Operated On-Base Civil Engineer Service Store (COCESS):	
Prepare and submit requests	4 requests per month
* * *	
Medical Supply Requests:	
Order items from hospital	3 requests per month
* * *	
Pick-up and Delivery:	
Load, deliver, and unload property	400 items per month
* * *	

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Item Research:	
Review documentation	250 documents per month
Research requests	250 requests per month

* * *

MILEAGE FROM THE LMCA TO LABORATORY PICK-UP AND DELIVERY POINTS

FROM	TO	TRIPS PER MONTH	ROUNDTRIP MILEAGE
Building 13	Site A-15 (Island)	10	56
Building 13	HERD Facility (Bldg 1200)	20	10
Building 13	Range 64	10	50
Building 13	Navy Base, Pensacola	2	108
Building 13	Fort Walton	2	16
Building 13	Niceville	2	8

(R4, tab 3) Technical Exhibit 2 separately identifies 53 AF Forms 601, 5 Budget Code "Z" and 15 furniture requests as well as 2 equipment loan requests per month as discrete work requests involving the processing of specified types of equipment transactions (*id.*; R4, tabs 3, 9-10; tr. 19-30, 32-34, 48-57). Technical Exhibit 2 also separately identifies 125 Direct Procurement (AF Form 9), 4 COCESS and 3 Medical Supply requests per month as discrete work requests involving the processing of specified types of supply transactions (*id.*). Technical Exhibit 2 does not specifically identify or quantify the researching or processing of Base Supply nonaccountable equipment and supply requests as two discrete sub-categories of work (*id.*). Technical Exhibit 2, as indicated by the above format thereof, specifically identifies the researching of 200 allowances in connection solely with the reviewing/signing of 53 AF Forms 601 equipment requests per month (*id.*). As also indicated above, the researching of 250 "item" requests is specifically identified in Technical Exhibit 2 as a separate aspect of the contract work (R4, tab 3).

5. The LMCA services that are the subject of the instant contract were previously performed by "15 full-time [Air Force] employees (8 civil service and 7 military personnel)." (R4, tab 5; tr. 19) The Air Force's "most efficient organization to perform the LMCA function is 11 full time civil service employees" (*id.*).

6. The Government estimate of the cost to perform the LMCA services that are the subject of the instant contract was approximately $335,900 per year (tr. 63-64; R4, tab 4). The second low bidder's offer was approximately $254,610.70 per year (*id.*). The third low bidder's offer was approximately $259,154.92 per year (*id.*). Other bidders' offers ranged from $356,625.00 per year to $549,600.00 per year (*id.*).

7. By letter dated 19 January 1989, the contracting officer had requested that appellant "review your worksheets in support of your bid and if you feel you can perform the service at the offered unit prices ... [provide] a written verification of your bid prices" (R4, tab 15). By letter dated 21 January 1989, appellant stated that "cost data to support bid prices has been reviewed and I am confident that services delineated in the Performance Work Statement can be performed at the offered prices" (R4, tab 16).

8. The Government's 10 February 1989 preaward survey recommended to the Small Business Administration (SBA) that no award be made to appellant "as it is obvious that [appellant] does not understand the PWS and does not have the required expertise ..." (tr. 31-42; R4, tab 4). The Government's primary concern centered upon appellant's proposed use of 5 employees to perform the work *vice* the 15 individuals who were then currently performing the LMCA work at a monthly manhour rate per person of 160 (*id.*; tr. 26). Appellant provided the pre-award survey team with its proposed manhour estimate: LMCA chief—74 manhours/month; ECU chief—133 manhours/month; CSU chief—148 manhours/month; and, 2 MHU employees—158 manhours each/month (*id.*; R4, tab 17). The evidentiary record does not contain either appellant's actual bid estimate or its working papers in support thereof. The preaward survey team contemporaneously informed appellant that the Air Force was utilizing 15 individuals to perform the LMCA work (tr. 36, 42).

9. By letter dated 23 February 1989, the SBA informed appellant that the contracting officer proposed to reject appellant's

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bid on the basis of nonresponsibility due to inadequate technical ability and lack of adequate manning (R4, tab 17). The SBA stated:

> Applying for a [Certificate of Competency] involves a comprehensive review of your ... bid, estimates, plans ... by production specialists ... from this office. To qualify for a COC you must present ... your detailed production plans outlined by operation. ... [Y]ou should remember that the burden of proof concerning competency rests with you.

(*Id.*)

10. By letter dated 1 March 1989, appellant requested that the SBA issue a Certificate of Competency to appellant (R4, tab 18). By letter to the SBA dated 13 March 1989, appellant stated that "[g]iven the workload as delineated in Technical Exhibit 2 ..., I am confident of my ability to perform the specified tasks with the five (5) personnel named in INITIAL STAFFING, previously provided" (tr. 45-6; R4, tab 19). Appellant reiterated its confidence in its ability to perform the LMCA "requirements of [the] solicitation" (*i.e.*, the PWS and Technical Exhibit 2) in its 15 March 1989 letter to the SBA:

> A very thorough analysis of the workload to be performed has been conducted. There is no doubt in my mind that the stated tasks can be performed with the personnel previously proposed. However, if there are any misunderstandings of the level of effort required to perform the projected workload, and if additional labor is required, I agree to provide the additional employees.

(Tr. 46-48, 56-58; R4, tabs 20, 21). In this regard, appellant did not rebut the sworn testimony of the Government representative who performed the pre-award survey and the Small Business Administration's representative who performed the certificate of competency investigation that Mr. Strickland (appellant's President) repeatedly stated throughout the 1 March 1989—1 October 1989 time period:

> [W]ith the Government inefficiencies, [appellant] can do it a lot better .... [H]e really wanted the contract, and he would hire the additional labor that he needed in order to get the contract, to perform it, it being his first [Government contract].

(Tr. 4-6, 47-8, 66)

11. By letter dated 15 March 1989 to the contracting officer, the SBA stated that it intended to issue a certificate of competency to appellant with respect to subject contract (R4, tab 5). The contracting officer subsequently opposed, in writing, the SBA's decision to issue the certificate of competency stating, *inter alia*, the following concerns regarding the inadequacy of appellant's proposed manning levels and appellant's failure to fully consider the technical work requirements of the PWS:

* * *

> (3) RTS Data Corporation's entire proposal is based on the Government's work load estimates described in technical exhibit 2 of the PWS. It does not appear RTS Data Corporation took into account the specific requirements of the PWS as stated in Section C-5. The figures in technical exhibit 2 are only estimates and cannot be relied on to be firm and unvarying work loads. By using the workload estimates in technical exhibit 2 solely as the basis for their proposal, RTS Data Corporation overlooked certain critical elements required by the PWS. Though not all inclusive, listed below are some PWS Section C-5 requirements which require significant manhours to accomplish that RTS Data Corporation failed to consider when making their proposal:
>
> (a) Process all requests for supplies and equipment (PWS Section C-5, paragraph 5.3.1). This requirement is one of the major functions of an LMCA operation. Other than identifying manhours for direct procurement actions (AF Forms 9), RTS Data Corporation did not address this requirement anywhere in their proposal.

* * *

> (e) Process Base Supply [equipment] computer transactions (PWS Section C-5, paragraph 5.4.3.4).

(R4, tab 5; tr. 65-66) The evidentiary record establishes that the Government had, on previous occasions, repeatedly informed appellant that appellant's estimated man hours of work appeared to be inadequate when compared with the Government's prior experience and estimate (findings 7-9; tr. 48-59).

12. The SBA reacted to the contracting officer's opposition to the issuance of the COC to appellant by "faxing" a comparison of the Government's estimated manhours of effort necessary to perform the contract and appellant's corresponding estimate to appellant on 17 August 1989 (tr. 48-61; R4, tabs 23-24). The evidentiary record establishes that appellant had furnished its manhour estimate to the Government sometime prior

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to 17 August 1989 (*id.*). Comparison of the 17 August 1989 Government manhour estimate with appellant's corresponding manhour estimate shows, *inter alia*, the following:

Type of Service	Estimated Workload	AFATL (manhours/mo.)	RTS (manhours/mo.)
Process Equipment Requests:			
AF Form 601			
Review and sign	53 requests per month	160.14	22.00
Research allowances in TAS	200 allowances per month	200.35	16.67
Budget Code "Z" requests	5 requests per month	10.92	2.08
Furniture requests	15 requests per month	0.30	6.25
Equipment loans	2 loans per month	12.00	0.81
	* * *		
Direct Procurement Actions (AF Form 9)			
Review, prepare, sign and process	125 requests per month	63.06	52.08
	* * *		
Contractor Operated on-Base Civil Engineer Service Store (COCESS)			
Prepare and Submit Requests	4 requests per month	9.32	2.00
	* * *		
Medical Supply Requests			
Order Item From Hospital	3 requests per month	1.26	1.30
Item Research:			
Review Documentation	250 documents per month	21.10	20.03
Research Requests	250 requests per month	65.02	20.03
	* * *		
Pickup and Delivery			
Load, Deliver and unload Property	400 items per month	192.00	120.00

(R4, tabs 4, 10, 23) The Government estimate portion of the 17 August 1989 manhour comparison furnished to appellant also identified the PWS ¶s that were applicable to each subcategory of work set forth on Technical Exhibit 2 and also provided the specific, estimated manhours attributed by the Government to the performance of each such PWS work provision (*id.*). As indicated above, appellant's manhour estimate indicates that appellant planned to expend: (a) 22.00 manhours per month in accomplishing the work associated with reviewing and signing the estimated monthly quantity of 53 AF Forms 601 equipment requests; (b) a total of 16.67 manhours per month in order to "research" 200 equipment allowances per month, associated with the 53 AF Forms 601 equipment requests, in the Tables of Allowances (TAs); and, (c) 20.03 manhours per month in order to research 250 "item research" requests per month (*id.*). The Government estimate portion of the 17 August 1989 manhour estimate comparison specifically references, *inter alia*, ¶s C-5.5.1.1, C-5.5.1.14, C-5.5.4.3.2, C-5.5.4.3.4 and C-5.5.4.16 of the PWS under the "AF Forms 601, Review and sign—53 requests per month" sub-category and estimated that approximately 164 manhours per month were anticipated by the Government in order to perform these aspects of the equipment request processing work (R4, tab 23). The referenced PWS ¶s identify specific processing functions associated with equipment requests including the processing of Base supply equipment computer transactions (R4, tabs 3-4, 10, 23). The Government estimate specifically references, *inter alia*, ¶C-5.5.4.4. of the PWS under the "Research Equipment Requests, AF Forms 601, Research Allowances in TAs, 200 allowances per month" subcategory and estimated that 200.00 manhours per month were anticipated in order to perform this aspect of the equipment request processing work. ¶C-5.5.4.4 identifies the Tables of Allowances equipment research/validation functions associated with equipment requests (*id.*). The Government estimate also references, *inter alia*, ¶s C-5.5.3.2.2—C-5.5.3.2.5 and C-5.5.3.3.2 under the "Item Research, Research requests—250

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requests per month" subcategory and estimated that approximately 65 manhours per month were anticipated by the Government in order to perform these aspects of the supply processing work (R4, tab 23). The referenced PWS ¶s identify specific research functions associated with supply requests, including the assignment of a document number to each request submitted through Base Supply (R4, tab 3).

13. After reviewing and analyzing the manning level comparison (finding 12, supra), Appellant informed the SBA, by letter dated 18 August 1989, that:

> 1. Through automation, and the maintenance of a complete, up-to-date library of applicable publications, the research functions of "Research Allowances in TA's" (200 man hours) and "Research Request" (65 man hours) can be drastically reduced.
>
> 2. Through conscientious scheduling. [sic] Pick-up and Delivery time (209 man hours) can be reduced. The need for more than one (1) employee in making pick-ups and deliveries will be closely monitored. Each individual assigned to the MHU Section will be a qualified driver.
>
> 3. "Process Receipts" time (126.37 man hours i.e. 6.32 man hours per day) seems excessive for the volume of transactions processed.
>
> 4. Maintenance of the Administrative and Janitorial Stock (82.43 man hours i.e., 4.12 man hours per day) seems excessive.
>
> 5. There is nothing in the projections that significantly alters my own opinion of the work effort required to perform the overall LMCA function.
>
> All the LMCA functions will be closely monitored during the early phase of the contract to ascertain the adequacy of the initial staffing[.] Adjustments will be made, if necessary.
>
> I remain confident that through the use of highly skilled, functionally flexible Supply Specialists, cross trained in the various functions of the LMCA, RTS Data can fulfill the contract requirements as previously stated.

(Tr. 50-57; R4, tab 24) The sworn testimony of the SBA representative who performed the COC investigation and appellant's written communications to the SBA establish that appellant's president and said SBA representative repeatedly examined, in detail, "the [performance] work statement" requirements, including the specific references to Base Supply equipment and supply requests contained in the 17 August 1989 Government manhour projection, for the purpose of ascertaining whether appellant's proposed manning levels adequately provided for the performance of all aspects of the work described in the PWS Technical Exhibit 2 (tr. 44-61; R4, tab 24; findings 7-12). This detailed investigation together with the information contained in the 17 August 1989 estimated manhours comparison and appellant's repeated assurances to the Government that it understood the work requirements of the PWS establishes that, by 18 August 1989 and prior to contract award, appellant knew or should have known that the Government interpreted the PWS/Technical Exhibit 2 provisions as requiring the researching and processing of all supply and equipment requests including, *inter alia,* all Base Supply equipment and supply requests (*id.*). The evidentiary record does not establish that appellant ever questioned any Government representative either as to whether the PWS and Technical Exhibit 2 required performance of the Base Supply non-accountable equipment and supply request work involved herein or as to the omission of estimated quantities of such work in Technical Exhibit 2. The evidentiary record also fails to establish either that appellant ever attempted to withdraw/revise its original bid price or changed its basis of the bid price at either the time of bid submission or at the time appellant submitted its above quoted 18 August 1989 letter. Appellant's failure to inquire and/or increase its bid price coupled with its contemporaneous assertions that it "really wanted the contract" and would hire "additional labor that [it] needed to get the contract, to perform the contract ... it being [appellant's] first Government contract" (findings 7-12), establishes that appellant exercised its business judgment and voluntarily assumed the risk of performing subject contract for its original bid price in accordance with bargained for terms of the contract. Except for the limited indications in the 18 August 1989 letter quoted hereinabove, the evidentiary record does not contain any contemporaneous documents that establish appellant's interpretation of the contract requirements for the work at issue as of 18 August 1989.

14. The SBA issued the Certificate of Competency to appellant on 2 October 1989 (tr. 60-61; R4, tab 25) thus effectively mandating that subject contract be awarded to appellant for the initial one-year performance period (R4, tab 4).

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15. In accordance with the contract provisions, appellant began phase-in work on 2 January 1990—30 days prior to 1 February 1990, the date for commencing actual contract performance—with the Government personnel who were performing the LMCA services (R4, tabs 9, 10).

16. By letter to the contracting officer dated 17 January 1990, appellant requested that "the Contract Price for [subject] Contract be increased by the amount of $72,430.68 per year for the life of the Contract" due, *inter alia,* to the alleged failure of the Government to expressly quantify "Logistics Stock" and "Base Supply" requests in Technical Exhibit 2 of the PWS (R4, tab 9). Appellant acknowledged the PWS required that both types of requests were to be researched and processed (*id.;* finding 3). Appellant's uncertified, unsworn 17 January 1990 claim alleges that appellant's bid price was based on appellant's alleged pre-contract award interpretation that the contract only required performance of work involving a maximum of 43 Base Supply and Logistic Stock requests because that work, although not expressly quantified, was included in Technical Exhibit 2:

> It was affirmed during the Preformance [sic] Conferance [sic] conducted 14 January 1989 that the difference between the 207 requests referenced in the Exhibit 2 of the Performance Work Statement and the 250 requests processed through Item Research consisted of requests for Base Supply items and requests for items from the Logistics Support Stocks. This was also the reasoning that the Contractor deduced from the information provided when determining the level of effort required to perform the LMCA function.

(R4, tab 9). Examination of appellant's pre-17 August 1989 manhour estimate does not establish that appellant accounted for the performance of any researching/processing work with respect to "Base Supply" equipment and supply requests (R4, tabs 10, 23). The evidentiary record does not establish: (a) the nature of the "Preformance [sic] Conferance" [sic] referred to by appellant in its 17 January 1990 letter to the contracting officer; (b) the identity of the attendees at said meeting; (c) that said meeting occurred on 14 January 1989 or any other date; or, (d) the identity/capacity of the individual who "affirmed" the interpretation of "[Technical] Exhibit 2" set forth in appellant's 17 January 1990 letter. The evidentiary record also does not establish that the aforesaid interpretation was ever communicated to the Government at any time prior to 17 January 1990. Appellant's pre-17 August 1989 manhour estimate does not establish that appellant planned to perform any processing work with respect to the 43 alleged "Base Supply" and "Logistics Stock" requests (R4, tabs 4, 10, 23). The evidentiary record does establish that, subsequent to appellant's 17 January 1990 letter, appellant has not asserted that the Government ever "affirmed", acknowledged or otherwise concurred with the interpretations set forth in appellant's 17 January 1990 letter (R4, tabs 1, 9 - 25; Complaint).

17. By letter dated 28 January 1991, appellant submitted its certified claim for a reduced equitable adjustment of $45,408.30 per contract performance year—*i.e.,* a total equitable adjustment amount of $181,633.20 (R4, tab 10). The reduced amount of appellant's claim stems from appellant's withdrawal of the allegedly understated "Logistic Stock" requests element thereof (*id.;* R4, tab 9 at pp. 46-49). Appellant's 28 January 1991 certified claim changes the underlying rationale of its earlier 17 January 1990 claim by stating that appellant's bid price was based on appellant's alleged pre-contract award interpretation that the contract did not require the performance of any work involving Base Supply non-accountable equipment and supply requests because "none were specified in Technical Exhibit 2 . . ." (*id.*). Appellant explained the basis of its claim, as follows:

> 12. . . .
>
> a. Statistics accumulated from 19 months of operations reflect that an average of 282 Base Supply non-accountable equipment and supply requests are processed per month. See Enclosure 1. None were specified in Technical Exhibit 2, Workload Estimates, of the Solicitation.
>
> b. Statistics accumulated for the period 1 May 1990 thru 30 August 1990 reflect that an average of 838 items per month are delivered to customers. This is more than double the amount of 400 items indicated in the Solicitation Workload Estimates. See Enclosure 2.
>
> c. Attached as enclosure 3 is an extract of the Contractor's actual level of effort worksheets used when preparing to bid on the contract. Note that the norm used, regardless of type of request, was 35 minutes of administrative processing time per request, i.e. 10 minutes of review-research time and 25 minutes of other administrative processing. Note also that an average

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of 18 minutes per item was used in the estimate for delivery time.

* * *

13. It is the opinion of the Contractor that when the Appendix 2 Workload Estimates were generated the Base Supply non-accountable equipment and supply requests and the related customer delivery requirement for this type request were erroneously omitted from the estimates.

14. At bid time the Contractor had no reason to question the Government's ability to state the workload estimates. Much of the AFATL operation is of a research and development nature and it seemed perfectly feasible that most of the supply type items would be obtained through direct purchase, as opposed to obtained from Base Supply.

(R4, tab 10) The evidentiary record does not establish the actual amount of manhours expended by appellant during performance with respect to the research/review and processing work associated with either the supply/equipment request work involved herein or the specified types of supply/equipment request work delineated on Technical Exhibit 2. Appellant's statement in subparagraph 12.c of its certified claim is not substantiated by the pre-17 August 1989 manhour estimate[1] it furnished to the Government (finding 12) since said estimate indicates: (a) 15 or 20 minutes of research/review and 25 minutes of processing per each of the 53 estimated AF Forms 601 requests; and, (b) 10 minutes of research/review and 30 minutes of processing per COCESS request (R4, tabs 10, 23).

18. By final decision dated 7 June 1991, the contracting officer allowed the portion of appellant's claim wherein appellant asserts that the PWS understates the "Pickup and Delivery" estimated workload (R4, tab 12). The contracting officer acknowledged the existence of a compensable ambiguity and stated, *inter alia:* "I have as a result of this ambiguity, determined an equitable adjustment is due you of $7,631.19 per year ... [based upon] doubl[ing] the workload estimate for pickup and delivery to 800 ..." (*id.*). The Government has not proffered additional documentary evidence or testimony with respect to this portion of the contracting officer's decision. The only evidence proffered by appellant with respect to actual "pickups and delivery" work relates only to the May-August 1990 time period (finding 22, *infra*). The contracting officer denied the remainder of appellant's claim on the basis "that the PWS in conjunction with the Technical Exhibits correctly states our requirements" (*id.*).

19. By letter to this Board dated 3 September 1991, appellant timely appealed the contracting officer's final decision (Bd. correspondence file).

20. The basic, unsworn rationale[2] now proffered by appellant in support of its appeal herein is that Technical Exhibit 2 (Workload Estimates) allegedly establishes a maximum of 250 "customer requests input to the [LMCA]." (Complaint at encl 1) In addition, according to appellant's allegations, it "was perfectly clear" that Technical Exhibit 2 establishes a maximum of 207 "LMCA requests output to sources of supply" comprised of (a) 75 specified equipment requests: AF Forms 601—53 requests per month; Budget Code "Z" requests—5 requests per month; furniture requests—15 requests per month; Equipment loans—2 loans per month; and, (b) 132 specified supply requests: Direct procurement requests (AF Form 9)—125 requests per month); COCESS requests—4 requests per month; and, Medical Supply requests—3 requests per month (*id.*). The remaining "LMCA requests output to sources of supply" are not specifically identified in Technical Exhibit 2 but, according to appellant's allegations, cannot exceed 43 ("the difference between requests researched (input)"—250—and "requests processed (output)"—207) (*id.*). Appellant alleges:

> At bid time, the Contractor saw no reason to question these [Technical Exhibit 2] statistics. An additional 43 requests was clearly indicated. The exact makeup of these 43 additional requests was not of major concern to the Contractor.

(Complaint at 1-3) Appellant thus seeks an equitable adjustment to compensate it for its additional costs incurred while performing the research/processing work associated with the actual quantity of Base Supply non-accountable equipment and supply requests that exceeded the estimated monthly quantity of 43 unidentified equipment and supply requests that allegedly inhered in Technical Exhibit 2 (Complaint at 1-2).

[1] The evidentiary record does not contain any other version of appellant's manhour estimate.

[2] (As best as can be determined by this Board in view of the appellant's unexplained failure to appear at the duly scheduled hearing with respect to this appeal (tr. 4-6, 66)).

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21. During calendar year 1989, Government employees operated the LMCA and processed an average of 280 Base Supply non-accountable equipment and supply requests per month (tr. 10-12; R4, tab 10; AR4, tab 2). During the 1 February 1990—31 August 1990 time period, appellant operated the LMCA and processed an average of either 282 or 287 Base Supply and non-accountable equipment requisition requests per month (tr. 10-12; R4, tab 10; AR4, tab 4). The evidentiary record does not establish the existence of any significant variance during appellant's 1 February—31 August 1990 performance as between the estimated and the actual quantities of the specific types of equipment and supply requests identified in Technical Exhibit 2. The evidentiary record is silent as to whether appellant's performance after 31 August 1990 involved performance of "excessive" Base Supply non-accountable equipment/supply request work.

22. During the 1 May 1990—31 August 1990 time period, appellant delivered an average of 838 items per month to customers (tr. 10-12; R4, tab 10; AR4 tab 6).

23. As we have stated, appellant failed to proffer any sworn, oral testimony at the hearing of this appeal (tr. 4-6, 66). On the other hand, Mr. Vanta, the author of the PWS and Technical Exhibit 2 and the former chief of the LMCA during 1989, testified under oath that the estimated monthly figure of 200 researches of equipment allowances in the Tables of Allowances was intended to include researching the Tables of Allowances in connection with the acquisition of 73 new, accountable items of equipment per month—*i.e.* AF Form 601 equipment (53), Budget Code "Z" equipment (5) and Furniture (15) (tr. 23-4). The remaining 127 (200 minus 73) researches of allowances in Tables of Allowances was intended to relate to "transfers of [non-accountable] equipment" which did not "require a document to [transfer]" but did require research "to see whether the gaining activity was authorized the piece of equipment" (tr. 20-24). In this regard, his testimony does not address the format of Technical Exhibit 2 which depicts a direct relationship only between "review and sign" 53 AF Forms 601 requests per month and "research [200] allowances per month in TAs" (finding 3). Mr. Vanta also testified that the sub-category of 200 researches of equipment allowances in the Tables of Allowances was intended to relate only to the category entitled "Prepare and Process Equipment Requests" contained in Technical Exhibit 2 and was not intended to relate in any way to the subcategory of 250 research requests set forth under the separate category entitled "Item Research" (tr. 25-29). Mr. Vanta further testified that he intended for the "250 Item Research" requests to represent "[Base Supply non-accountable equipment and supply requests). They did not include the Process Equipment items or any other category [*i.e.* direct procurement, COCESS and medical supplies]" (tr. 24-30). In this regard, Mr. Vanta's testimony does not adequately explain, by reference to PWS/Technical Exhibit 2 provisions or custom or trade practice, why a reasonable bidder should have realized that the "Item Research" category applied only to the estimated research effort associated with the work at issue in this appeal.

DECISION

The Government contends in its Brief that the portion of the contracting officer's decision which acknowledges that the "Pickup and Delivery" element of Technical Exhibit 2 was ambiguously understated (finding 17) "is not supported by the evidentiary record. The contract was never modified and the [a]ppellant never agreed to accept the $7,631.19 as payment for its claim. Therefore, the [a]ppellant should not be entitled to recover the $7,631.19 per year that the contracting officer would have allowed." (Gov't br. at 31-32).

The "evidentiary admission by the Government", as a result of the contracting officer's final decision (finding 18), sufficiently establishes the Government's liability herein for the portion of appellant's claim that asserts entitlement to an equitable adjustment based upon the ambiguous understatement of the estimated pickup and delivery element of work during the initial year and final option-year of contract performance. *See: Wilner v. United States,* No. 92-5161, slip op. at 5-13 (Fed. Cir.) 24 May 1993 12 FPD ¶46. In this regard, we note that the Government has failed to offer any evidence to rebut the validity of appellant's pickup and delivery claim that relates to these two years year of contract performance (*id.*). This aspect of the appeal is sustained.

With respect to the portion of appellant's claim for excessive "pickup and delivery" work during appellant's performance of the remaining two option years of the contract, our *de novo* review reveals that the evidentiary record does not contain any evidence

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whatsoever that establishes that the Government exercised its option(s) to enter into these two contracts (findings 1, 14, 22). We, therefore, conclude that the contracting officer's statement acknowledging appellant's entitlement to prospective equitable adjustments with respect to these two periods of future contract performance is premature and speculative inasmuch as said statement is necessarily without basis in the evidentiary record and deny the remainder of appellant's "pickup and delivery" aspect of its appeal.

We next address whether appellant is entitled to an equitable adjustment for its costs incurred in performing the researching and processing work associated with Base Supply non-accountable equipment and supply requests.

Appellant correctly acknowledges that the PWS required the performance of researching and processing work with respect to all equipment and supply requests, including the Base Supply non-accountable equipment and supply requests at issue herein (findings 3, 16). However, Technical Exhibit 2, as set forth in the solicitation, does not specifically identify or quantify the research and processing work associated with the performance of Base Supply non-accountable equipment and supply requests (findings 4, 16-17, 20). According to appellant's present, unsworn assertions, it reasonably based its bid price upon performing the work involved herein by assuming that the difference between the quantity of "requests researched (input)" and "requests processed (output)" identified in Technical Exhibit 2 was the Base Supply non-accountable equipment and supply request work involved in this appeal (finding 20).

The Government asserts that Technical Exhibit 2, read in conjunction with the PWS, includes estimated quantities of the disputed work that approximate appellant's actual experience (finding 23). The Government also contends, in the alternative, that the contract was patently ambiguous with respect to the estimated quantities of the work involved herein. Since appellant failed to inquire about said ambiguity prior to contract award, the Government argues that appellant's claim is precluded. Finally, the Government argues that appellant has not established that it relied upon its now proferred interpretation thus precluding its claim.

We have examined the PWS and Technical Exhibit 2 and are convinced that the interpretations proferred by the parties are not reasonable. Appellant's 28 January 1991 interpretation that only the specific work identified in Technical Exhibit 2 was required to be performed is unreasonable since it fails to account for the PWS requirements that all supply and equipment requests, including all Base Supply equipment and supply requests, must be researched and processed and fails to account for the fact that appellant had previously acknowledged that the very work at issue in this appeal was required by the PWS (findings 3, 16, 20). We also note that by mid-August 1989, prior to contract award, appellant knew or should have known that the Government interpreted Technical Exhibit 2 as requiring significant manhours for the performance of the Base Supply equipment and supply request work involved herein (findings 12, 13). Moreover, appellant's alleged interpretations as respectively set forth in its 17 January 1989 letter and its Complaint, that Technical Exhibit 2 only required the performance of some combination of 43 "Logistics Stocks" and "Base Supply" or some combination of 43 "Base Supply non-accountable equipment and supply request work" are equally unreasonable since neither Technical Exhibit 2 nor appellant's manhour estimate directly or indirectly accounts for processing work associated with for the 43 "unidentified" requests (findings 4, 12, 16, 17). Finally, the Government's interpretation that Technical Exhibit 2, *per se,* includes researching and processing of 127 unidentified equipment requests and 250 unidentified supply requests is unreasonable since it ignores the format of Technical Exhibit 2, ignores the PWS requirements which establish that both the CSU and ECU involve different research efforts with respect to each equipment request and does not persuasively explain, by reference to PWS provisions, custom or trade practice, how a reasonable bidder could reasonably be expected to so interpret Technical Exhibit 2 (findings 3, 23).

Instead, our review of the PWS in conjunction with Technical Exhibit 2 convinces us that any reasonable person (*e.g.,* lay person or prospective bidder) would have initially concluded, prior to receipt of the 17 August 1989 manhour estimate comparison, that estimated quantities for the performance of research and processing work in connection with Base Supply non-accountable equipment and supply requests are obviously not set forth directly or by clear and reasonable implication (findings 3-4, 12-13). In our view, this omission constituted a patent ambiguity that imposed a duty to inquire upon appel-

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lant. Appellant has failed to establish that it ever communicated such an inquiry to the Government at any time prior to contract award (finding 13). Our findings that by mid-August 1989 appellant knew or should have known that the Government believed that estimated quantities of such work were included in Technical Exhibit 2, that the Government had repeatedly questioned the adequacy of appellant's proposed manhour estimate and that appellant never withdrew or revised its bid price even after it was or should have been aware of the Government's interpretation further highlight appellant's disregard of its duty to inquire (findings 7-13). Appellant's failure to inquire bars this aspect of its claim for an equitable adjustment *See: Arrow, Inc.,* ASBCA No. 41330, 94-1 BCA ¶ 26,353, 16 September 1993 at 28. Moreover, it is well established that, by accepting the award and entering into the contract without protest or reservations, the expressed, 17 August 1989 interpretation of the Government became the adopted interpretation of both appellant and the Government. *Cf., Caraco Construction Company,* ASBCA No. 34754, 88-3 BCA ¶ 20,912 and cases cited therein.

Our determination is further buttressed by appellant's failure to adequately prove that it reasonably relied upon its now proferred interpretation. Appellant's manhour estimates which are contained in the evidentiary record suggest only that prior to 17 August 1989, appellant planned to perform the tasks identified in Technical Exhibit 2 by expending specified quantities of manhours (findings 7-12). After appellant's receipt and review of the 17 August 1989 manhour estimate comparison, appellant knew or should have known that the Government interpreted Technical Exhibit 2 as requiring performance of all supply and equipment research and processing work required by the PWS, including all Base Supply non-accountable equipment and supply requests (finding 13). Appellant may have thereafter decided, *inter alia,* that no additional effort, in terms of manhours and cost, was necessary to perform the Base Supply equipment and supply request work identified by the Government in its 17 August 1989 estimate or appellant may have ignored the Government's interpretation. Appellant's bid price amounts were never changed and the evidentiary record simply does not establish the basis of appellant's continuing to maintain its bid prices after it received the Government's detailed, 17 August 1989 estimate. Appellant's failure to prove that it reasonably relied upon its now-proferred interpretation compels denial of this aspect of its claim. In this regard, we also note that appellant proferred at least two mutually exclusive interpretations of the contract's requirements with respect to the work involved in this appeal thus further undermining any conclusion that appellant's bid was based upon either interpretation. Instead, the preponderance of the evidence that we have been able to glean from the confusing evidentiary record before us convinces us that appellant exercised its business judgment and voluntarily assumed the risk of performing the contract for a stated price in accordance with the bargained for terms of the contract (finding 13).

For the foregoing reasons, we deny appellant's claim for compensation with respect to its performance of the Base Supply non-accountable equipment and supply request work.

The appeal is sustained to the extent indicated, but otherwise denied.

[¶ 26,380] Triax Pacific, Inc.

ASBCA No. 41891, September 16, 1993. Contract No. N62474-89-C-1175.

Mistakes—Relief After Award—Reformation.—Under an invitation for bids for building repairs, a contractor was not entitled to reformation in connection with a mistake in bid, because at the time of award, the contracting officer had no reason to suspect an error in the contractor's bid and thus had no duty to request verification of the low bid. The record did not show that the contractor's bid was out of line with the closely grouped bids of the second, third, and fourth low bidders. Moreover, the contractor assumed the risk of its roofing subcontractor's mistaken quote, which resulted in the bid mistake, by failing to investigate a dramatically higher roofing quote that it received after bid opening and before contract award.

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For the appellant: Timothy Miguel Willardson, Alpine, Utah. For the government: Arthur H. Hildebrandt, Chief Trial Attorney, and Wayne O. Hadland, Trial Attorney, Navy Facilities Engineering Command, San Bruno, California.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: This appeal arises from a contracting officer's final decision denying Triax's 29 January 1990 certified claim for contract rescission, or reformation and a $218,000 price increase, due to an alleged mistake in Triax's bid. Our 15 September 1992 interlocutory decision, *Triax Pacific, Inc.*, ASBCA No. 41891, 93-1 BCA ¶ 25,441, denied respondent's motion for summary judgment because the record at that time had insufficient facts for us to conclude as a matter of law that the contracting officer had no constructive notice of a mistake in Triax's bid. Jurisdiction of this appeal lies under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* By agreement of the parties, both entitlement and quantum are in issue (tr. 1/6-7). After three days of hearings in Salt Lake City and Seattle, both parties submitted post-hearing briefs.

FINDINGS OF FACT

1. On 28 July 1989 respondent issued solicitation N62474-89-B-1175 (the "IFB") for bids to be submitted by 29 August 1989 for repairs to Building 13 at Whidbey Island Naval Air Station, Washington (R4, tab 1).

2. The IFB's specification No. 12-89-1175 included (a) Section 07220, "ROOF INSULATION"; (b) Section 07530, "ELASTOMERIC SHEET ROOFING SYSTEM," in which ¶ 2.1.1 specified "Hypalon membrane"; and (c) Section 07600, "FLASHING AND SHEET METAL" (R4, tab 1).

3. Respondent's Public Works Engineering (PWE) branch prepared a $1,284,000 Estimated Cost of Construction (ECC) for Work Orders 3 and 4 for the IFB work on Building 13 in December-January 1988-89, and used it to negotiate an architect-engineer design fee and to budget funds. The ECC did not change thereafter. (Tr. 2/85, 131-34, 156, 179-80, 218-20)

4. In early 1989 PWE selected the Tsang Partnership as respondent's architect-engineer to design and to estimate the cost of the Building 13 repairs and construction. Tsang's 3 February 1989 "15 Percent Design Submission" estimated $1,362,574 for Work Order 3 (but had no estimate for Work Order 4). It estimated Division 7 roofing costs for 23,400 square feet at $148,087, and Division 15 mechanical costs, at $388,571, nearly all in terms of square feet. (Exh. A-38; tr. 2/136, 143, 146) The 15 Percent Design estimate exceeded the ECC for Work Order 3. Therefore, Tsang deleted paving ($86,000) and furring, window blinds and insulation work ($46,000+) (exh. A-10, A-19; tr. 2/140-48, 172, 181, 224).

5. Tsang's 28 June 1989 "Final Design Submission" estimated $1,347,720 for Work Orders 3 and 4, including Division 7 roofing costs at $120,577 for 23,720 square feet and Division 15 Mechanical costs at $306,601 in terms of "E" (each), "LF" (linear feet), and "LB" (pounds) (exh. A-37; tr. 2/124-25, 130, 143, 177). Page 2 of the Final Design Submission (Exhibit A-37) contains a $40 error in the cost subtotal. Some Division 15 section numbers in specification 12-89-1175 and Exhibit A-37 do not match. Materials and work estimated in A-37 §§ 15612, 15711 and 15907 correspond to specification 12-89-1175, §§ 15355, 15651 and 15996. Vibration and insulation work in specification 12-89-1175, §§ 15200 and 15250, are found in A-37 §§ 15711 and 15895. Specification 12-89-1175, § 15011, defines document requirements not estimated in A-37. (Exh. A-37; R4, tab 1). We find no significant discrepancy between the materials and work in the A-37 Final Design Submission and in specification 12-89-1175.

6. Respondent's 18 August 1989 estimate for the IFB was $1,347,720, the same as Tsang's final estimate (R4, tabs 3, 6; tr. 2/130, 156).

7. In 1982 Triax had installed a roof similar to the hypalon membrane roof the IFB specified for building 13 (tr. 1/37). Before bidding on the contract in dispute here, James Vallett, Triax's vice president and estimator, read the IFB specifications, knew the type of roofing specified, visited the construction site and as a result thereof revised Triax's bid price (R4, tab 11; tr. 1/36-37, 79-81, 97). The other bidders also made prebid site visits (tr. 2/87). The record contains no evidence whether any of the other bidders had or had not performed any previous work on Whidbey Island Naval Air Station or any repairs comparable to the IFB repairs on building 13.

8. Triax's 21 August 1989 letter to its prospective subcontractor Ray LaVoie requested price quotations on IFB

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specification sections 07530, 07600 and 07220 (R4, tab 4).

9. On 29 August 1989 Ray LaVoie gave Triax price quotes by telephone of $16,000 for IFB item 07530, $15,480 for item 07600, and $12,000 for item 07220, totalling $43,480 (R4, tab 11; LaVoie affidavit, ¶ 4).

10. Triax included LaVoie's "numbers" in Triax's IFB bid (tr. 1/118-19). Triax's 27 December 1989 computer printout was designated "Triax's original bid documents." Its "ESTIMATE" and "SUBCONTRCT" [sic] columns contained $16,000 for item 07530, $15,480 for item 07600, and $12,000 for item 07220. (R4, tab 11; tr. 1/73)

11. At the 29 August 1989 IFB opening, the bid prices and respondent's pre-bid estimate were:

Bid Price	Bidder	Bidder's Location
$1,347,720	Respondent's estimate	
$1,370,000	Triax Pacific, Inc.	Alpine, UT
$1,589,000	Tempo Construction	Bellingham, WA
$1,620,000	P&L General Contr's	Oak Harbor, WA
$1,622,900	J. P. Francis & Assoc.	Kent, WA
$4,784,280	Allied Production Mgt.	Vacaville, CA

Triax's lump sum low bid was not broken down by specification or work items. It varied from respondent's pre-bid estimate by 1.63%, from the second low bid by 13.78%, and from the average of the second, third and fourth low bids by 14.94%. (R4, tab 5; tr. 1/69)

12. A day or two after bidding and two weeks before contract award, Triax received from a roofing contractor a quote "dramatically higher" than LaVoie's quote (tr. 1/120, 126). Triax's bid estimator Kayl W. Smith tried to obtain a written confirmation of LaVoie's $43,480 price quotation without success (R4, tab 11). Smith could not recall whether he obtained any confirmation prior to contract award to Triax (tr. 1/94). Triax gave respondent no pre-award notice of any suspected error in the roofing cost in its bid.

13. Catherine J. Collins, the contracting officer for the IFB, sought no current bid or market price information on the Building 13 repair work, since it was new, not follow-on work, and was unlike any other job (tr. 2/87-88). She knew of no economic conditions impacting bid prices in the Seattle area in August of 1989 (tr. 2/82, 84). At the 100% Design Submission stage she reviewed the specification's Division 1 and the drawing list against a Navy "guide specification." Before bidding she was unaware of any budget-motivated reduction of Tsang's work scope for IFB repairs. After bid opening she had no actual knowledge of any mistake in Triax's bid or in PWE's estimate. She testified that since Triax's price was not out of line with the Government estimate or the second low bid, she had no reason to suspect a bid mistake. (Exh. G-2; tr. 2/10-14, 77-78, 82, 87, 229).

14. Irene D. Thomas, the assigned contract specialist for the IFB, testified that:

> Prior to receiving a letter from Triax ... we had no reason to believe that there was a problem .... I remember when I opened the bids thinking that there were several contractors I had never seen before. So the fact that an apparent low was one I had never heard of before, from out of state, just led me to believe either someone was attempting to buy the bid, someone had knowledge that there was an opportunity there to get into the local area. Since we had never done any work with Triax, I thought maybe they just wanted government business. So there are a lot of different reasons why someone would come in relatively low. So there was no reason for me to believe that there was anything wrong with that particular bid.
>
> * * *
>
> Q: When someone from out of state, or you're not familiar with him, does that ever prompt you to ask for a verification more than ... if the person were a local bidder?
>
> A: Not necessarily ... if you see someone from out of state, I think the first reaction, if their bid is low, is that they probably didn't do a site visit, and that might be one of the problems. But other than that ... that would not give us reason to ask for verification more than anyone else ....
>
> * * *
>
> Q: You mentioned buying the bid .... inasmuch as Triax's bid was over the government estimate, would you characterize it a[s] being a low bid?
>
> A: In comparison to the others it was obviously low. But because it was higher than the government estimate, that to me was not necessarily a red flag at all.

(Tr. 3/10, 13-14, 15, 17).

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15. The PWE architectural branch chief, Willard Aldridge, testified that he had no indication of any error in the Government cost estimate and no reason to suspect an error in Triax's low bid. He checked the significant cost items in the Government estimate for errors in quantities and unit costs. (Tr. 2/218, 229-32).

16. Tsang Partnership's design architect Lee Davenport was unaware of any errors in Tsang's IFB cost estimate (tr. 2/184).

17. Respondent did not ask Triax to verify its bid price and executed contract N62474-89-C-1175 (contract 1175) on 14 September 1989 at Triax's $1,370,000 bid price (R4, tab 2; tr. 2/58-59, 3/9).

18. On 4 December 1989, when Triax was preparing submittals, approving and ordering materials, Ray LaVoie first notified Triax of his roofing bid mistake. Triax's 6 December 1989 letter notified respondent of LaVoie's mistake, requested rescission or reformation of contract 1175 and stated, "When the overhead costs and markup actually used in Triax's bid are applied to [LaVoie's $150,000 mistake], the total error in Triax's bid caused by this amounts to $219,000." (R4, tab 9; exh. A-35; tr. 1/45, 123) The dollar difference between the low and second low bids is exactly $219,000. Triax also made a judgmental error of an undisclosed amount in the mechanical area of its IFB bid price, but made no claim therefor because it believed it could not be remedied (tr. 1/140).

19. Triax's 27 December 1989 letter to respondent submitted a Ray LaVoie affidavit of even date stating that he discovered his Whidbey Island roofing bid error on about the first of December 1989; at the time of his 29 August 1989 telephone quote to Triax, his left eye cataract, undiagnosed loss of motor control and pressure to submit three other bids caused him to confuse a $193,000 Whidbey bid with a $43,480 Fernley, Nevada, swimming pool bid; he considered adding $10,000 to his Whidbey bid, but decided upon a rounded amount of $193,000; and the Fernley specifications are "kind of similar" to the Whidbey specifications. LaVoie stated:

> I have spent a substantial amount of time since I discovered the mistake looking for my bid documentation to prove the error and how it was made. I have been able to locate the sheet of paper on which I actually calculated what I intended to bid. I had used the plans and specifications to determine what was required and then applied the cost of doing each work element to the area affected. I have not been able to find the scratch sheets that I used for adding up the amounts but the sheet I have is where I actually figured the bid. I am continuing to look for the other papers.

(R4, tab 11)

20. Triax's 27 December 1989 letter to respondent submitted what it represented were three "original documents of LaVoie's quote," stating:

[Document 1]

8/28 [or 29, writing very faint]/89 8:05 AM
[Unintelligible word] $6,000 Demo
$43,480

BLDG INSULATION	7220	12,000	
SHEET METAL	7600	15,480	
ELASTOMERIC	07530	−16,000	[sic]
		43,480	

[Document 2]

2" 284	− 71 00 =	20,164
2½ 284	79 00	22,436
½ 284	14 00	3976
284 Hy		
120.00		34,080
		80,656
		203,000

[Document 3]

Bld.	287
Round	300
Labor Hy.	X60
	18,000.00
Insulation	180X
	54,000.00
REMOVE	70X

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Bid	193,000	old roofin	21,000.00
		Profit	
		Overhead & Dump	20,000.00

The document 3 figures total 113,000. The sum of 80,656 on document 2 and 113,000 on document 3 is 193,656. Triax represented that document 3 is the reverse of document 2. (R4, tab 11) We find that the writing on the left on unlined paper on documents 2 and 3 was written by the same person, and the writing on the right on lined paper was written by another person(s) and superimposed on the unlined paper by photocopying. We assign the lined paper portion no probative weight.

21. Construction specifications use common section numbers for similar kinds of work (exh. A-30; tr. 1/62, 123). The Fernley, Nevada, swimming pool specification and its section numbers are not in evidence. LaVoie did not explain why documents 2 and 3 omit a § 07600 sheet metal price. He did explain that "Hy" means "hypalon" and the "287" or rounded "300" factor in document 3 by which he derived labor, insulation and roofing estimates, is the "square." (R4, tab 11) One roofer's square is 100 square feet. Thus, 287 squares are 28,700 square feet, somewhat more than the 23,400 or 23,720 square feet Tsang estimated (findings 4, 5), but not grossly discrepant. The probative portions of documents 2 and 3 corroborate that they were LaVoie's intended Whidbey roofing bid.

22. In early January 1990 Triax sought respondent's decision on its request to rescind or reform contract 1175. Respondent denied that request on 26 January 1990. (R4, tabs 12-15, 17)

23. Triax submitted to respondent a 29 January 1990 claim for $218,000 certified by its president William M. Nixon (R4, tab 18). Triax later stated that such amount was erroneous and recomputed a $181,188 difference between the mistaken and intended roofing bids, or $165,000 plus bond and insurance cost (exh. A-36; tr. 1/146-51).

24. Cal Stevens, Triax's contract 1175 superintendent; Lee Davenport; Paul Cook, Assistant Resident Engineer in Charge of Construction; and a man from Scholton Roofing, Triax's actual roofing subcontractor, conferred on 24 April 1990. According to Stevens' 18 June 1992 affidavit, after Cook left the conference, Davenport told Stevens that the Government estimate was mistaken by more than $100,000 due to mechanical cost errors of which the Navy was aware before bid opening (exh. A-34). Stevens testified that he immediately wrote down his recollection of that statement (tr. 1/30-31, 52-53, 55). No April 1990 record of such conversation by Stevens is in evidence, only his June 1992, post-litem affidavit.

25. Davenport and Cook testified that they left the conference at the same time (tr. 2/186, 210-11). Davenport denied that he told Stevens that respondent's IFB estimate was in error after the conference and that respondent was aware of an error in its estimate (exh. G-3; tr. 2/185-86).

26. Considering the foregoing conflicting testimony and its relative corroboration, we find that the alleged April 1990 Stevens-Davenport conversation does not prove a $100,000+ mistake in Tsang's Division 15 cost estimate.

27. Appellant completed performance of contract N62474-89-C-1175 (exh. A-33; tr. 1/46, 71, 135).

28. On 10 August 1990 Triax received the contracting officer's 8 August 1990 final decision denying its claim (R4, tab 20). Triax timely appealed that final decision to the Board on 5 November 1990 (R4, tab 21).

29. Ray LaVoie died on 18 May 1992 (exh. A-32) before the hearing.

DECISION

The regulations with respect to a contracting officer's duty to examine bids for mistakes and a contractor's right to correct a mistaken bid are set forth in our interlocutory decision, 93-1 BCA at 126,692-93. We summarize here the salient regulatory requirements:

> FAR 14.406-1: [C]ontracting officers shall examine all bids for mistakes. In cases ... where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake.
>
> * * *
>
> FAR 14.406-4(b): [A]gencies are authorized to make a determination—
>
> (1) To rescind a contract;
>
> (2) To reform a contract (i) to delete the items involved in the mistake or (ii) to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids ....

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(c) Determinations under subparagraphs (b)(1) and (2) above may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was . . . if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

Since contract 1175 has been performed (finding 27), deleting the roofing work or rescinding the contract cannot be done. The only relief available, if Triax proved its elements, is reformation. To reform contract 1175, Triax must prove by clear and convincing evidence: (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut clerical or mathematical error or misreading of the specifications and not a judgmental error; (3) prior to award the Government knew or should have known that a mistake had been made; (4) the Government's request for bid verification, if any, was inadequate; and (5) proof of the intended bid was established. *Triax Pacific, supra,* 93-1 BCA at 126,693.

There is no real dispute that Ray LaVoie confused his Whidbey and Fernley swimming pool roofing bids and quoted the wrong price to Triax on 29 August 1989 (findings 18, 19), which wrong roofing price Triax included in its bid to respondent on the IFB (finding 10), establishing reformation element (1). LaVoie's quoting from the wrong paper (finding 19) was not judgmental; it was akin to a clerical error, establishing reformation element (2). Since respondent requested no verification of Triax's bid (finding 17), reformation element (4) is not applicable; the question is whether respondent had a duty to request it. While not absolutely conclusive, LaVoie's affidavit and bid papers substantiate his intended $193,000 bid (findings 19-21), establishing reformation element (5).

The dispute centers on whether respondent knew or should have known that Triax made a mistake in its bid, reformation element (3). All bidders made a pre-bid site visit; in 1982 Triax had installed a roof similar to the roof specified by the IFB; and there is no evidence whether any other bidder performed any previous work at Whidbey Island Naval Air Station or repairs comparable to the IFB repairs (finding 7). Contracting Officer Collins (a) sought no current bid or market price information on the IFB repair because it was new, not follow-on work, and was unlike any other job; (b) knew of no economic conditions impacting bid prices in the Seattle area in August 1989; and (c) had no actual knowledge of a mistake in Triax's $1,370,000 lump sum bid, which had no price breakdown by specification or work item, or an error in PWE's IFB cost estimate (findings 10, 13). Contract specialist Thomas testified that "there was no reason for me to believe that there was anything wrong with [Triax's] bid" (finding 14). She conjectured that Triax may have bid low to buy in, or because it did not make a site visit (*id.*). Her unsubstantiated conjectures are not proof that she suspected a mistake in Triax's bid, despite Triax's argument to the contrary.

Triax argues that the contracting officer should have suspected a mistake because Triax's bid was out of line with the closely grouped bids of the Washington State second, third and fourth low bidders, and she should have known that the PWE estimate was erroneous by $100,000+. Such arguments are not supported by record evidence. All bidders made site visits and there is no proof that the Washington State bidders were more familiar with Whidbey Building 13 repairs than Triax (finding 7). From their in-state proximity to the work site one cannot infer that Triax's lower bid was suspect (finding 14). There is no convincing evidence that respondent's estimate was erroneous by $100,000+ (findings 5, 13-16).

When the low bid was within one percent of the Government estimate and the contracting officer had no actual knowledge of any mistake in the low bid or in the Government estimate, then, absent facts which reasonably would alert one to suspect a mistake in bid, such as prior costs for an identical construction project, the contracting officer has no duty to ask the low bidder to verify its bid or to review the Government estimate for error. *Howard DeLozier Construction, Inc.,* PSBCA No. 928, 81-1 BCA ¶ 15,007.

Similarly, in *RMB Manufacturing Co.,* ASBCA No. 24232, 81-1 BCA ¶ 15,157, the Government estimated $26,150 and received three bids: $28,357, $36,998 and $47,868. The Government rejected the low bid as nonresponsive and awarded to the second low bidder. The contracting officer did not believe that the second low bid was out of line since it exceeded the Government estimate. He suspected no mistake and sought no verification from the awardee. The awardee contended that the Government estimate was inaccurate. We denied relief, concluding, 81-1 BCA at 74,991:

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> Even assuming *arguendo* that the Government estimate [was] inaccurate, appellant overlooks the fact that it is not a . . . guarantee of accuracy. As the Comptroller General has noted, a low bidder "has no right to assume that a Government estimate is any more accurate than any of the other bids." . . . B-194610, 80-1 CPD ¶ 242 [59 Comp. Gen. 363 (1980)].

The decisions in which there were higher bids grouped within a close range do not help Triax. In *MKB Manufacturing Corp.*, 59 Comp. Gen. 195 (1980), three bids were below the Government's estimate; the low bid was 28 percent below the Government estimate; the low and second low bids differed by 25 percent; and the low bid and the average of the next three low bids, grouped within less than 14 percent, differed by 42 percent. The Government sought no verification. The Comptroller held that there was constructive notice of a mistake. Triax's facts are distinct. No bid was lower than respondent's estimate. Triax bid only 1.63 percent higher than the Government estimate, 13.78 percent lower than the second low bid, and 14.94 percent lower than the average of the second-fourth low bids (finding 11).

In *Hankins Construction Co. v. United States*, 838 F.2d 1194 (Fed. Cir. 1988), the Government received three low bids (Hankins' $1,280,000 low bid to $1,353,000) and three high bids ($2,446,000 to $2,298,922). Hankins' bid included a $340,000 sprinkler subcontract bid. After bid opening but before award, Hankins received a $999,999.98 sprinkler bid, which it ignored as "fictitious." The Government verified no bid. After contract award, the sprinkler subcontractor discovered and reported a major mistake. Hankins argued that the Government had reason to suspect a mistake because of the unusual clustering of bids and because Hankins' bid fell well below the Government estimate (not disclosed in the reported decision). The Federal Circuit court held that Hankins assumed the risk of its sprinkler subcontractor's mistake because it failed to investigate thoroughly why the mistaken sprinkler bid was so much lower than the belated sprinkler bid, citing *Restatement (Second) Contracts*, § 154(b) (1981). The existence of two other bids of roughly the same amount tended to confirm the reliability of Hankins' bid, rather than to raise a suspicion about it, and in the preceding two years bidders had typically bid below the Government estimate.

We hold that under the facts and circumstances we have found, prior to award respondent did not know, nor should it have known, that a mistake had been made in Triax's bid, and, therefore, respondent had no duty to seek verification of that bid. We also hold that Triax assumed the risk of LaVoie's mistaken roofing subcontract quote because it failed to investigate thoroughly the "dramatically higher" roofing quote it received a day or two after bid opening, two weeks before award of contract 1175 (finding 12).

We deny the appeal.

[¶ 26,381] Federal Boiler Company

ASBCA No. 40314, September 23, 1993. Contract No. F08650-89-C-0043.

Acceptance of Performance—Alternatives to Rejection—Price Reduction.—Under a contract for the installation of hot water boilers with water treatment systems, the government was entitled to a price reduction for its qualified acceptance of nonconforming filters rather than termination of the contract, despite the contractor's contention that the specified system was not necessary to the boilers, because the evidence showed that the specified filters performed a return water filtration function not addressed by other systems. The contractor failed to provide any evidence in support of its contention that the specified system was incompatible with the other boiler requirements. The government was entitled to realize the savings incurred as a result of the contractor's performance in a less costly manner than required by the contract. However, the government failed to show entitlement to damages or liquidated damages associated with late delivery.

For the appellant: John W. Pike, Vice President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Diana S. Dickinson, Trial Attorney.

Before YANNELLO, RUBERRY, and SPECTOR, Administrative Judges.

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YANNELLO, Administrative Judge: Issues of entitlement only are before the Board. A hearing was held after which post-hearing briefs were filed.

FINDINGS OF FACT

The solicitation for the subject contract called for installation of 4 hot-water boilers, 2 30-HP boilers and 2 50-HP boilers. The specifications described a York Shipley boiler, and provided for substitution of an "equal" product, setting forth the required characteristics. Essentially, some characteristics of the boilers can be summarized as follows:

> Water Treatment: Boiler shall be equipped with a complete 4-quart chemical feeder package *and* a bag filter *equal to* Rosedale Model 8 bag filter with dual-stage straining/filtering action (one a strainer basket, the other a filter bag basket); other features: 3" flanged connections, 30" basket depth, 150-PSI rated housing, baskets 40 mesh lined, bag 40 to 80 micron size, and housing made of 316 stainless steel. [Emphasis supplied]
>
> The solicitation further required that:
>
> Bidders offering an "equal" product must submit descriptive literature in accordance with DOD FAR SUP 52.230-7000, "Brand Name or Equal" (Section L), with their bid.

Appellant's bid, prepared by Kris Iyengar and signed by John Pike, was submitted on 11 October 1988. A cover letter to this bid noted that the offer varied from the specifications in certain respects (the product offered did not bear the "U/L B" label but did conform to U/L requirements; the burners did not have a triple oil nozzle arrangement). The bid and accompanying documentation did *not* state that the boilers did not have a Rosedale Model 8 bag filter or equivalent, nor did it describe a Guardian filter system. Messrs. Iyengar and Pike, while acknowledging that the boilers required by the Government were standard products, stated that they had not heard of the Rosedale bag filters and/or were not familiar with a chemical feeder package. Appellant did not inform the Government that it did not intend to provide a Rosedale bag filter or equivalent.

As described by the Government, the boilers had two distinct treatment systems. The purpose of the chemical feeder package was to allow the boiler operator access to the waterside of the system in order to feed water-treatment chemicals into the boiler; this package contained a bag to strain out particles in the feeding process. The Government agrees that the chemical feeder package furnished by appellant conformed to contract requirements. The purpose of the Rosedale water treatment filter package described in the contract was to remove impurities from the complete heating system including the system return water; this system did not have to be attached to the boiler. It is this system which is at issue here.

Appellant believed the specification, requiring the Rosedale Model 8, to be in error, but did not address any pre-bid inquiry to the Government.[1] Nor is there any record of inquiry by any bidders concerning the requirement.

The Government initially rejected appellant's bid because of the two described exceptions or deviations from the specifications. Appellant responded, but did not raise the matter of the Rosedale bag filters; bid consideration was extended through March 1989. The contract was awarded on 8 March 1989, and the boilers were to be delivered within 60 days.

The contract contained the standard CHANGES (FAR 52.243-1) clause, and incorporated by reference the INSPECTION OF SUPPLIES—FIXED-PRICE (FAR 52.246-2 (Jul 1985)), RESPONSIBILITY FOR SUPPLIER (FAR 52.246-16 (Apr 1984)), and WARRANTY OF SUPPLIES OF A COMPLEX NATURE (FAR 52.246-18 (Apr 1984)) clauses.

On 7 April 1989 appellant requested a 36-day extension (12 days due to alleged late receipt of the contract [2] and 24 days due to supplier delays for which the contractor would not consider a deduction in contract price).

[1] Mr. Iyengar's testimony, that he contacted Government personnel to get information about the Rosedale bag filters, is not persuasive inasmuch as he could not identify the personnel contacted and such records as exist and/or were produced before the Board do not memorialize or corroborate any such inquiry. It is found that appellant's first request for literature on the Rosedale bag filters was 18 August 1989.

[2] The contractor contemporaneously acknowledged receipt of the contract on 20 March 1989. During hearing, appellant alleged that receipt was on a later date but, in response to the Board's invitation to supplement the evidentiary record, appellant has offered no evidence in support of this contention.

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On 11 April, appellant received from a supplier, Combustion Heat & Power, Inc., a quote and descriptive literature for a Guardian Model No. VTF-2 bypass feeder with Filter Bag Kit Model No. FBK-2. On 12 April, appellant requested a quote from Klenzoid, Inc., for the product described in the contract.

On 19 May, the Government issued a Show Cause Notice. Appellant responded on 26 May stating that it had scheduled delivery of the boilers for 12 June; it cited as a reason for the delay, the delay of its suppliers or subcontractors. Appellant also offered to supply additional factual information which the Government requested on 1 June; this information was not forthcoming.[3]

On 12 July, appellant promised delivery of the boilers within days. On 19 July, appellant provided the TCO with further information concerning its subcontractor's delay.

The four boilers were delivered on 20 July 1989. On 24 July the contracting officer (CO) discussed with appellant the failure of the boilers to meet the specifications (particularly with respect to the Rosedale Model 8 bag filters). Appellant acknowledged that it had not complied with the specifications but stated that it had provided a product standard within the industry, specifically, one with a Guardian treatment unit.

On 18 August 1989, following the controversy about the boilers furnished by appellant, appellant asked for literature concerning the Rosedale system; this information was furnished by the Government on 24 August and 5 September.

The Guardian system furnished by appellant had a 3/4-inch rather than a 3-inch flanged connection. The Guardian system contained only one basket and did not contain a second or a filter basket. The Guardian housing was black (or carbon) steel, not stainless steel. Appellant's Mr. Iyengar had not personally compared the Guardian characteristics with the contract requirements but had relied upon his supplier's representation of equivalency.

In late August and early September 1989, the CO notified appellant that, in order to mitigate damages, it was considering acceptance of appellant's boilers with a reduction in the contract price. Appellant was given an opportunity to correct the deficiencies in its boilers but, on 15 September, declined to do so stating that it believed the Rosedale Model 8 bag filters to be unnecessary.

On 28 September 1989, the Government issued a unilateral contract modification reducing the contract price by $15,899.75. Of this, about $1,300 was assessed for late delivery and the remaining $14,599.79 was assessed for the cost of obtaining and installing the Rosedale Model 8 bag filters (based on a quote from a manufacturer of that system, Waco Industries, of $3,613.30 per filter plus installation).

Appellant contested the price reduction and demanded payment in a claim letter of 2 November,[4] and a final decision was issued by the CO on 22 November 1989. On 31 January 1990, appellant appealed from that decision.

As of the submission of this appeal for decision, no Rosedale Model 8 bag filters have been supplied. The Government has installed the 2 30-HP boilers without the Rosedale Model 8 bag filters (apparently due to funding constraints); the 2 50-HP boilers have been stored (apparently due to other civil engineering priorities at the base).

Issues of entitlement only are currently before the Board.

DECISION

There is no real dispute here that the contract required four boilers with water treatment systems containing Rosedale Model 8 bag filters, or that appellant did not supply such Rosedale systems.[5] Thus, the Government has made a *prima facie* showing of entitlement to a reduction in the contract

(Footnote Continued)

In a contract modification of 16 May, the contract completion date was extended 12 days or until 19 May.

[3] On 19 June, the Government sent a form to appellant, identifying the boilers required under the contract and requesting a response by 2 August. On 6 July 1989, the Government terminating contracting officer notified the appellant that consideration was underway to terminate the contract for default. In view of subsequent developments, the Government stopped further consideration of contract termination.

[4] During hearing, appellant's personnel contested the reasonableness of this price but had not actually priced such filters; appellant has offered no evidence in this regard.

[5] Appellant has made no showing that the Guardian chemical treatment package which it did supply fulfilled the purpose of or was otherwise equivalent to the specified water treatment with Rosedale Model 8 bag filters; indeed appellant acknowledges that its system was not equivalent to Rosedale.

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price for its acceptance of the non-conforming goods.

Appellant has contended that the Rosedale system was not necessary to the boilers. However, the evidence establishes that the Rosedale system performed a function not addressed by the boilers or other appurtent systems (*i.e.,* filtration of return water).

In a similar context, appellant also contends that it did not expect to furnish the Rosedale system because it was incompatible with the other specified boiler requirements; however, appellant offers little if any support for this contention. Moreover, assuming, without deciding, that this were the case, the specification requirements for two incompatible products would render the specification patently ambiguous and would require a pre-bid inquiry from appellant. Absent such inquiry, appellant cannot now be heard to contend that the Rosedale system was not required.

Appellant also contends that the Government is not entitled to reduce the contract price, by reason of the contractor's failure to provide the Rosedale Model 8 bag filters, because the Government has not been damaged thereby, has not in fact installed the filters, and has incurred no increased costs. This contention too is wide of the mark. We have held that, when a contractor performs in a less costly manner than required by the contract, the Government is entitled to realize these savings; the change in cost of performance to the contractor, and not damages to the Government, is the basis of adjustment (even when the contractor's bid did not anticipate incurrence of the costs). *See, e.g., Davis Constructors, Inc.,* ASBCA No. 40630, 91-1 BCA ¶ 23,394; *Anderson (Bruce) Co. Inc.,* ASBCA Nos. 29412 et al., 89-2 BCA ¶ 21,872.

Appellant has argued that, should the Board find that the Rosedale Model 8 filters are required by the contract, appellant should be given an opportunity to supply them rather than sustain a reduction in the contract price. We reject this contention in view of the ample opportunity previously afforded the contractor to correct the deficiencies in its performance.

Finally, we turn to the Government's arguments concerning its eventual qualified acceptance of appellant's non-conforming goods, by way of mitigation, rather than electing to terminate the contract. We agree that such decision by the Government was proper and was timely exercised without any waiver by the Government of its rights under the contract.

However, with respect to its reduction in the contract price of about $1,300 which it attributes to "late delivery," some questions do arise. The Government has pointed to no provision in the contract for liquidated damages. Likewise, it has asserted no basis for a finding of actual damages by reason of the late delivery (such as, for example, rental of temporary boilers pending delivery).

Accordingly, the Government has not shown that it is entitled to a price reduction by virtue of the late delivery.

CONCLUSION

Based on the foregoing, the appeal is sustained to the extent that the Government reduced the contract price by reason of late delivery, and is otherwise denied. The matter is referred to the parties for a computation of quantum plus interest as provided in the Contract Disputes Act from the date the Government received appellant's claim of 2 November 1989.

[¶ 26,382] Service Engineering Company

ASBCA No. 40275, September 27, 1993. Contract No. N00033-84-C-001.[1]

Quality—Reasonableness of Standard—Absence from Contract.—Under a ship repair contract, the government's direction to the contractor to correct a noticeable declivity appearing at the center line of the deck constituted a constructive change because the government failed to prove that the deck was outside the limits of acceptable marine practice. The contract contained no declivity tolerance requirements, but it did require that all workmanship under the contract be in accordance with the best commercial marine

[1] In the four decisions we have issued thus far, we inadvertently used the contract number for the Master Ship Repair Contract (N00033-70-C-078). Job Order No. N00033-84-3-001 was the contract number assigned to the SPICA overhaul.

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practice. The contract did not define "best commercial" or "good" marine practice. The government took the position that a military standard could be used as a guide to what constituted good marine practice. The deck, as installed, was not within the tolerance of this standard. The board, however, refused to impose this standard on the contractor, because the standard did not appear in the contract. If the government wanted this standard to be the baseline of what constituted the best marine practice, it should have referred to the standard in the contract specifications. Further, the government failed to prove that the declivity resulted from the contractor's welding or underdeck installations.

Pricing of Adjustments—Actual Costs—Deck Repair.—In determining the amount of recovery due a ship repair contractor for complying with a directive to repair a declivity in the deck span, the contractor was allowed to recover its stated labor hours because the hours claimed by the contractor were found to be a reasonable estimate of the labor hours expended in effecting the deck repair. The overtime labor hours claimed by the contractor were denied by the board because the estimate of overtime hours was supported by no more than a generalized estimate from the ship superintendent.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Pipe Installation.—Under a ship repair contract calling for the installation of an aviation fuel system, a contractor's interpretation that it could install vent lines for water ballast tanks along the extreme upper side of the tanks rather than through the top of the tanks was rejected because the contract, when considered as a whole, required the installation of the vent lines through the top of the tanks. In installing the vent lines for the ballast tanks, the contractor was required to meet American Bureau of Shipping regulations, which required vent pipes to be located at the highest part of the tank. The contractor's installation of the vent lines at the uppermost side of the tanks was not considered by the board to be at the highest part of the ballast tanks. Further, the contractor's reliance on a specification provision stating that all pipe lines should enter as near to the top of the tank as practicable was not justified. This provision, when read in context, applied to fluid-carrying pipes, and the vent pipes in question were not fluid-carrying pipes.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Insulation of Pipes.—A ship repair contractor's position that it was not required to insulate vent pipes that had been rerouted through reefer areas was rejected because the contract clearly required that surfaces exposed to refrigerated spaces, such as the reefer area, were to be insulated. To correct installation deficiencies, the contractor rerouted vent pipes to water ballast and storage tanks through the reefer areas. The contractor's ship superintendent conceded that any time a vent line went into a reefer space, the vent line had to be insulated.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Pipe Guards Installation.—A ship repair contractor's interpretation that it was not obligated to install pipe guards unless the contract documents specifically identified the locations where the pipe guards were required was rejected because the piping specifications generally described the need for pipe protections. The piping specifications provided that all pipes exposed to damage from mechanical equipment, including trucks and forklifts, were to be adequately protected. It was clear from a reading of this specification that pipe guards were to be installed at various locations where potential damage to the installed piping system was likely to occur.

Modifications—Bar to Claims—Scope of Agreement.—Under a ship repair contract, the government's contention that a contract modification providing for the replacement of a leaking drainage line barred the contractor's claim for the costs of cleaning up the leak in the deck area where the leak occurred was rejected because there was no indication that the parties intended the modification agreement to cover the cleanup work. There was no indication that the parties' negotiators discussed the cleanup matter prior to reaching agreement on the price of the modification.

Pricing of Adjustments—Particular Costs—Cleanup Costs.—In calculating the amount of a price adjustment due a ship repair contractor for cleaning up water after a drainage leak, the board found that the contractor had established that it had cleaned up the water leakage twice a day for 16 days. The government contended that the hours

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claimed by the contractor for cleanup were not shown as a part of the hours included in a modification providing for the replacement of the leaking drainage line. There was no reason for the cleanup hours to be shown as part of the modification, however, because the cleanup work was not part of the modification.

Performance—Secondary Obligations—Repair and Maintenance.—Although a ship repair contractor contended that a portion of the vessel's ventilation system was inoperable when the vessel was delivered, it was not entitled to recover repair costs incurred to make the system operable, because it failed to overcome the presumption that the ventilation system became defective while in its care. Since the specifications required that the contractor conduct a survey of the vessel's equipment and systems when the vessel was delivered for upgrade, it was presumed that any defects found in the equipment occurred while the equipment was in the contractor's care. The contractor conceded that it had checked the hood fans of the ventilation system but that it had not checked the hood washdown system, the emergency shutoff system, or the main controller. In the course of rendering the system operable, the contractor repaired a junction box in the main controller, rewound a damper solenoid in the hood system, and tightened loose lugs and wires. The contractor alleged that these deficiencies were pre-existing but offered no credible proof that the main controller or hood system was inoperable when the vessel was delivered.

Performance—Secondary Obligations—Radar Equipment Repair.—A ship repair contractor was responsible for correcting deficiencies in the vessel's radar system, even though there was no indication that it had caused the radar failure, because it failed to overcome the presumption that the radar system became defective while in its care. In view of the fact that the contractor was given the opportunity to conduct a predelivery survey and to note defects on the vessel, a presumption arose that the defects found in the vessel's radar system occurred while the vessel was in the contractor's care. It was shown that the vessel's radar and navigational systems were working when the vessel was turned over to the contractor. In the absence of evidence to the contrary, the board concluded that the short circuit that caused the radar failure occurred when the vessel was in the contractor's care.

Performance—Directions by Government—Relocation of Lights.—Under a ship repair contract, the government's direction that the contractor relocate deck edge lights in accordance with a new drawing was found to be a constructive change because the government failed to explain what was wrong with the drawing the contractor used to locate the deck lights. A government inspector determined that the deck light locations shown in the original drawing were incorrect and that unless they were corrected, the helicopter deck would not be certified by Naval Air System Command. The government inspector, however, did not testify regarding the problem with the drawing. Without an explanation of what was wrong with the original drawing, which the specifications directed the contractor to follow, the board concluded that the government direction was a change.

Interpretation of Contracts—Electrical Work—Lineup Light Bars.—The government's direction that a ship repair contractor modify extended lineup light bars on the deck to make them movable and thereby readily accessible for maintenance was not a constructive change, because the contract, when read as a whole, clearly required that the light bars be accessible for work, repair, and maintenance. The Electrical Systems clause stated that all electrical equipment be readily accessible for repair and removal. The Access and Maintenance clause required that equipment be designed and constructed to permit ready access to all parts for inspection, operation, maintenance, and repair. Although the extended light bar installation specification did not specifically refer to these clauses, the General Conditions clause clearly stated that these clauses set out minimum requirements to be followed for all work under the contract.

Property—Government-Furnished Equipment—Components.—The costs incurred by a ship repair contractor in repairing government-furnished components needed to make the vessel's lighting and visual approach system operable were recoverable because the government-furnished components were found to be defective. Upon testing the lighting and visual approach system, the contractor found that the system did not work. The contractor isolated the problem to defects in certain government-furnished components, such as a flash

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sequencer, several motor driven variable transformers, and a glide scope indicator. There was no indication that the contractor improperly installed the components.

Property—Government-Furnished Equipment—Incompatible Equipment.—The costs incurred by a ship repair contractor in attempting to hook up 60 hertz and 400 hertz wind speed indicator components were recoverable, because these government-furnished components were not compatible. The government insisted that the 400 hertz wind speed indicator equipment could have been connected to 60 hertz equipment, but the record did not support the government's position. The government's expert conceded that it was unusual for equipment to have input and output of different frequencies.

Modifications—Bar to Claims—Inclusion in Release.—A ship repair contractor's claim for costs incurred in attempting to hook up incompatible government-furnished components for a wind speed indicator was not barred by the release contained in a bilateral modification regarding the components, because the problem of the incompatible components did not come about until after the execution of the contract. At the time the parties executed the modification, the contractor did not know that the equipment delivered by the government would be a mixture of incompatible components. Given the government's failure to deliver its part of the bargain, the contractor's claim was not barred by release.

For the appellant: Seyfarth, Shaw, Fairweather & Geraldson, San Francisco, California, by D. Whitney Thornton II. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, Stephen R. O'Neil, Associate Chief Trial Attorney, Stephanie Cates-Harman, Senior Trial Attorney, and Alan W. Mendelsohn, Trial Attorney, Military Sealift Command, Washington, D.C.

Before TING, RUBERRY, and RIISMANDEL, Administrative Judges.

TING: Administrative Judge: This is the fifth (hence the "5-" designations in our findings below) of many decisions which we will issue concerning the claims, known as Requests for Equitable Adjustment (REAs), submitted by Service Engineering Company (SECO), arising out of the overhaul of a Military Sealift Command (MSC) vessel known as the USNS SPICA. The background of this overhaul was set out in our first decision, *Service Engineering Company,* ASBCA No. 40272, 92-3 BCA ¶ 25,106, and will not be repeated here.

This decision deals with REA Nos. 8, 121, 115, 120, 24, 6, 53 and 105. These REA claims and many other REA claims were submitted to the MSC contracting officer. The contracting officer never issued a decision. By letter dated 20 October 1986, SECO appealed to the Board upon the contracting officer's failure to issue a decision. The Board deemed SECO's various REA claims as having been denied by the contracting officer, and docketed the appeal as ASBCA No. 33787.[2]

Thereafter, the parties agreed to litigate the REAs grouped by Items of the specifications. With few exceptions, mainly to accommodate witnesses, each REA was separately heard to its conclusion before commencing on the litigation of another REA. For purposes of briefing and decision, the Board assigned ASBCA No. 40275 to the 8 REAs in this decision.

FINDINGS OF FACT

REA No. 8

5-001. Section 500 of the SPICA specifications related to "HELICOPTER FACILITY UPGRADE." Item No. 501, "Overall Intent, Scope and General," provided, in part, as follows:

> It is the intent of this Item to outline the steps necessary to update the existing ship's helicopter installation to meet the following levels and classes of helicopter operations as defined in Naval Air Systems Command (NAEC 91122) "Air Capable Ship Aviation Facilities" Bulletin 1E All helicopter facility modifications accomplished by the Contractor shall meet or exceed the current certification requirements for the levels/classes/helicopter listed below, and shall be shown certifiable by the Contractor to the COMSC CONREP and the Naval Air Engineering Center (NAEC)....
>
> * * *

(Exh. G-3 at 501-1)

[2] We dismissed ASBCA No. 33787 as duplicative by order dated 19 March 1993.

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5-002. Item No. 502 of the specifications required SECO to remove the existing 02 Deck structure and replace it with a new deck structure. Item 502.H., "TESTING," provided, in part, that:

> 2. All work accomplished by this Item shall be shown certifiable by the Contractor to the COMSC CONREP and the Naval Air Engineering Center (NAEC).

(Exh. G-3 at 502-11)

5-003. Item 502.E.1. provided:

* * *

> All materials and workmanship shall be subject to inspection and approval of the COMSC CONREP at all times. Workmanship and materials found to be defective, not in conformity with *good marine practice*, regulatory requirement, or not in accordance with this Specification and its associated approved plans shall be cause for rejection and removal. (Emphasis added]

(Exh. G-3 at 502-5)

5-004. Clause 5, "INSPECTION AND MANNER OF DOING WORK" of the Master Ship Repair Contract (N00033-70-C-0078) provided that:

> (b) Unless otherwise specifically provided in the job order ... all workmanship ... in the performance of work ... shall be in accordance with the rules and requirements of the American Bureau of Shipping, the U.S. Coast Guard, and the American Institute of Electrical Engineers, in effect at the time of the Contractor's submission of bid ... and the *best commercial marine practices* .... [Emphasis added)

(R4, tab 135)

5-005. SECO subcontracted the fabrication of the helicopter deck structure to Kaiser Steel Corporation (Kaiser) (exh. G-170S). The deck structure was installed in four separate sections. Each section covered the width of the vessel and weighed between 25 to 40 tons. (Tr. 22/125-26) The deck was designed to slope away water (tr. 22/136).

5-006. Section 1 and Section 2 of the deck were welded together at Frame 26 of the vessel. Section 2 and Section 3 were welded together between Frames 19 and 17. (Tr. 22/170, 73) Sections 2 and 3 of the deck were welded together in early November, 1984 (tr. 22/126, 128-29).

5-007. After Sections 2 and 3 were welded together, the Chief Mate of the vessel complained to MSC that "there was a dip in the deck where the butt between the 2 and 3 sections came together" (tr. 22/131). This "dip" occurred "at center line of the helo deck out 10 feet ... to the port and 10 feet to the starboard" side of the vessel in the no-camber areas of the deck (tr. 22/131). It was a gradual "dip" that went down fore and aft in the deck plating (tr. 22/132; see sketch, exh. A-64).

5-008. Two representatives from Kaiser visited the vessel to evaluate the problem on 8 November 1984. According to the SECO Project Officer's diary, neither SECO nor Kaiser knew to what tolerances the deck sections were built (app. supp. R4, tab 135 at 37). It was determined that there was a "dip" or declivity of "almost an inch and half maximum on the port side and approximately an inch maximum on the starboard side" (app. supp. R4, tab 135 at 38; tr. 22/224). SECO and Kaiser agreed that the "dip" was "noticeable" (tr. 22/223).

5-009. The CONREP arranged to have an NAEC representative visit the vessel the next day, 9 November 1984. The NAEC representative brought with him "a graph that had deck frames, distances along one side and inches along another side" (tr. 22/228). The graph showed that for the deck thickness involved and 24-inch distance between frames, a tolerance of between $1/4$-inch and $3/8$-inch would be allowed. Based on this graph, and the measurements taken between frames, the NAEC representative found that the deck "was within tolerance." According to the SECO Project Officer's diary, the NAEC representative stated that "he knew of no reason NAEC wouldn't certify the deck with the dip" (app. supp. R4, tab 135 at 39).

5-010. The CONREP confirmed during the hearing that the NAEC representative did not have a reference to measure whether the "dip" was acceptable over the span of the deck. However, based upon measurements "between frames ... none of the deformation between frames was out of NAEC tolerance." Although the NAEC did not certify the deck that day, the CONREP acknowledged that the NAEC representative "could find no rationale to not certify the deck when the time came because of that particular problem" (tr. 22/278).

5-011. The CONREP's diary contained the following entry for 9 November 1984:

* * *

> Deformation found in helo deck was actually within limits set by NAEC. Don Cooper, NAEC rep. in Alameda, saw and

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participated in measurement. Actually the deformity doesn't look that bad—The ship's force are [sic] clamoring that it looks like a ski jump—They're expecting perfection and doing some after the fact engineering.

(R4, tab 143 at 123)

5-012. By letter dated 12 November 1984, the CONREP advised SECO that notwithstanding the NAEC's finding, the quality of the deck was "unacceptable." The CONREP took the position that "the flaw is not entirely in the deck plating but in the underdeck structure ... and outside the limits of acceptable marine practice." The CONREP stated that if the deficiency was not rectified by Kaiser, "SECO must bear the responsibility of the consequences." (App. supp. R4, tab 8 at exhibit No. 2)

5-013. The Government offered no proof that any underdeck structure contributed to the "dip" in the deck. There is no evidence that the weight of the deck sections caused the "dip" (tr. 22/256). Nor did SECO's welding cause the "dip" because, if that were the case, "the dip would've been just between the frames" (tr. 22/249).

5-014. SECO advised the CONREP by letter dated 13 November 1984 that it "will take immediate steps to make that area ["the deck seam area between pieces number two (2) and three (3)"] more nearly level," and that the work "may be the subject of a future REA" (app. supp. R4, tab 8 at exhibit No. 3).

5-015. In the meantime, the CONREP was apparently attempting to locate a tolerance to which SECO could be required to comply. His diary for 16 November 1984, reflected this effort:

* * *

Attempts to locate acceptance guidelines for deck structure dishing have been futile. NAVSEA has none, NAEC has none, ABS & USCG have none and we don't address it in our specifications.

* * *

(R4, tab 143 at 128)

5-016. In a letter dated 20 November 1984, the CONREP advised SECO that "Deviation Standards do exist for the acceptability of Helicopter Deck new construction." The CONREP referred to MIL STD 1689 SH. According to the CONREP, this standard required a tolerance of 1/4 inch in a situation, as in this case, where "the deep beam is 24 inches and the span of the dishing was approximately 20 feet." (App. supp. R4, tab 8.1; tr. 22/237)

5-017. There is no dispute that MIL STD 1689 SH was not referenced in the SPICA specification (tr. 22/237). The Government's expert witness acknowledged at the hearing that if MSC wanted MIL STD 1689 SH as a guide of "what good marine practice would be," it would have been "preferable," to refer to the standard in the specifications (tr. 22/301-02)

5-018. SECO advised the CONREP by letter dated 23 September 1984 that it was unable to find MIL STD 1689 SH in the specifications (app. supp. R4, tab 8.2).

5-019. By letter dated 26 November 1984, the CONREP advised SECO that MIL STD 1689 SH was provided in response to SECO's inquiry of what constituted "good marine practice," and not as a standard to which SECO must contractually comply. The CONREP stated that he had rejected the deck for the following reasons:

SECO was apparently not convinced that the consequential accumulation of water in and the movement of heavy lifts across the deck deformation would constitute an inconvenience to MSC. The CONREP rejected the structure both for said inconvenience and for the fact that the deck was an eyesore that one should normally expect the contractor to rectify without question.

(App. supp. R4, tab 8.4)

5-020. There is no evidence that the "dip" caused water to accumulate on the deck. SECO explained that "that portion of the deck is sloped away. And it's all going to drain off to the drains around the perimeter of the helo deck" (tr. 22/150, 239). There is no evidence that the "dip" impeded the movement of heavy lifts on the deck.

5-021. Agreeing with SECO that in the absence of a more definitive tolerance in the contract documents, "normal Navy standards" would apply, the Government's expert witness asserted in his report introduced during the course of the hearing that the standards referred to in NAVSEA 099-LP-097-4010, *i.e.*, NAVSEA 0900-LP-014-5010 and NAVSHIPS 0900-000-1001 should apply. These Navy publications are said to set out the following maximum deck deflection standards over the span of the deck:

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Deflection or Unfairness

STANDARD	24" spacing	36" spacing	Max. shown
MIL STD 1689 SH	1/4"		
0900-LP-014-5010	1/8"	1/4"	1/2"
0900-000-1001	3/8"	5/8"	3/4"

(Exh. G-108A, REA No. 8 at 12)

5-022. We find that the SPICA specifications did not require SECO to comply with "normal Navy standard."

Deck Repair

5-023. To correct the "dip" in the deck, SECO had to cut the welding between Sections 2 and 3 "all the way through" (tr. 22/159). In addition, SECO had to cut the structural members below and install temporary supports. SECO then jacked up the deck with a 50-ton hydraulic jack, and proceeded to "heat the plating and ... bend it up" (tr. 22/160). After the deck had been made more "fair," SECO had to "reconnect all the steel structures" (tr. 22/161).

5-024. SECO's repair effort took "a couple of weeks and multiple shifts"—day and swing shifts (tr. 22/161). SECO did not eliminate the "dip" totally. MSC ultimately accepted a 3/4-inch "dip" on the portside, as opposed to the original 1 1/2-inch "dip" (tr. 22/279).[3] The CONREP conceded that in light of the fact that he did not have a "specific handle" on the deck tolerance, he would have "liked to have accepted the inch and half dip." He accepted the 3/4-inch dip because it "didn't look quite so bad" (tr. 22/279). He testified further that he did not accept the original deck installation because the Chief Mate and the SPICA crew were the ones that "had to live with this" (tr. 22/280).

Impact

5-025. When the deck repair was being performed, SECO had to reassign 30 to 40 men who would otherwise be working in the areas below the deck (tr. 22/162, 167). The installation of studs for insulation, hangers for electrical wireways and piping runs had to be postponed (tr. 22/162).

Claim

5-026. SECO by letter dated 28 October 1985, designated as REA No. 8, claimed $29,689 as increased costs in repairing the helicopter deck. SECO contended that the specifications did not reference MIL STD 1689 SH, and that the CONREP's requirement that the deck structure not exceed 1/4-inch in tolerance was in excess of the contract requirement, constituting a constructive change for which it was entitled to an equitable adjustment. (App. supp. R4, tab 8) Pursuant to SUPSHIP, San Francisco's instructions, SECO, in 1986, removed from REA No. 8 the cost component relating to disruption. This cost component was ultimately consolidated with other disruption equitable adjustment requests in REA No. 132. (Tr. 22/121-22) REA No. 8 was revised to $20,281 by letter dated 14 June 1989 (app. supp. R4, tab 8.4; tr. 22/121-22). At the hearing, SECO corrected a $250 error and revised its claim to $20,007 (tr. 22/123).

Quantum Proof

5-027. Of the $20,007 claimed, $320 was for materials. No invoices or material requisition chits were submitted in support of the material costs claimed.

5-028. "Just about every craft," including "boilermakers, shipfitters, welders, electricians, riggers, laborors, painters" were involved in the deck repair (tr. 22/165).

5-029. Based on the information furnished to him, and his own observations of the repaired areas, SECO's Contract Administrator, whom we have found to be a credible and competent estimator (see findings 3-034 to -035, ASBCA No. 40274), estimated that 484 labor hours would have been consumed in the repair effort. (Tr. 22/163, 258)

5-030. The various trades had to "cut loose Seams & Butts" of the affected deck sections, fabricate "strongbacks" and protect the areas underneath the deck. After the deck had been "jacked" up, SECO's trades had to rebevel and reweld the seams and butts, and prime and paint the repaired areas. SECO then had to remove the temporary strongbacks before cleaning up. Based upon the contract administrator's estimate, and the lack of serious challenge from the Government, we find 484 labor hours to be reasonable in effecting the deck repairs.

5-031. The contract administrator estimated that 100 labor hours of overtime were

[3] The record is not clear to what extent, if at all, SECO corrected the "dip" on the starboard side.

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incurred. The overtime claimed was supported by no more than a generalized estimate from the ship superintendent. Without any corroborating evidence, we find that the evidence is insufficient to support a finding that overtime hours were incurred and, if incurred, were incurred specifically in connection with the deck repair work which is the subject of REA No. 8.

5-032. In our third SECO decision (ASBCA No. 40274), we found that "For purposes of equitably adjusting those REAs for which we find entitlement, we will apply a composite labor rate of $34 an hour" (see finding 3-009, ASBCA 40274).

DECISION

The new helicopter deck SECO was required to install had to be "certifiable by the Contractor to the COMSC CONREP and the Naval Air Engineering Center (NAEC)." The deck SECO installed contained a "noticeable" "dip" or "dishing" occurring at the center line where Sections 2 and 3 of the deck were welded together, and extending 10 feet to the port and starboard sides of the vessel. It was determined that Sections 2 and 3 of the deck, as installed, had a maximum declivity of almost $1\frac{1}{2}$ inches on the port side and approximately 1-inch maximum on the starboard side (finding 5-008).

The SPICA contract contained no declivity tolerance requirements over the span (*i.e.*, 20 feet in this case) of the deck. Nor has the Government shown that NAEC, American Bureau of Shipping ("ABS"), or U.S.C.G. had any such guidelines. (See findings 5-010, -015). The NAEC apparently did have a deck tolerance standard between individual frames. Based on that standard, the NAEC determined that the deck "was within tolerance," and certifiable (findings 5-009, 010).

The CONREP nevertheless required SECO to repair the deck because it was "outside the limits of acceptable marine practice" (findings 5-012, -019).

As for "good marine practice," Clause 5 ("INSPECTION AND MANNER OF DOING WORK") of SECO's Master Ship Repair Contract required all workmanship in the performance of work to be in accordance with "the best commercial marine practice," and Item 502.E.1. of the specifications stated that workmanship and material found to be defective and not in conformity with "good marine practice" would be rejected. Neither the Master Ship Repair Contract nor the SPICA specifications defined "best commercial" or "good" marine practice.

The Government took the position that MIL STD 1689 SH could be used as a guide as to what constituted "good marine practice" (finding 5-017). This standard allowed a $\frac{1}{4}$-inch tolerance for the 20-foot deck span with 24-inch frames (finding 5-021). We cannot impose on SECO the requirements of MIL STD 1689 SH. This standard was not referenced in the SPICA specifications (finding 5-017). As the CONREP himself recognized, MIL STD 1678 SH was not a standard to which SECO must contractually comply (finding 5-019). Furthermore, the Government expert witness conceded that if the Government wanted MIL STD 1689 SH to be the baseline of what constituted "good marine practices," it would have been "preferable" to refer to the standard in the specifications (finding 5-017).

The Government alleged but failed to prove that SECO's underdeck installations or welding caused the "dip" (finding 5-013). The Government also failed to prove that the "dip" accumulated water or impeded the movement of heavy lifts across the deck (finding 5-020). From a workmanship standpoint, there is insufficient evidence for us to conclude that Sections 2 and 3 of the deck were not installed in accordance with "good marine practice" or "best commercial marine practice."

The Government next argues that SECO must install the deck in accordance with "normal Navy standards." The Government contends that "normal Navy standards" for deck deflection were set forth in several Navy publications such as NAVSEA 099-LP-097-4010, NAVSEA 0900-LP-014-5010 and NAVSHIPS 0900-000-1001 (finding 5-021). We cannot impose upon SECO standards that are not required in its contract.

We conclude that the Government has failed to prove that Sections 2 and 3 of the helicopter deck, as originally installed, were not certifiable by the NAEC or otherwise not in accordance with "good marine practice." Therefore, the government-directed corrective repairs to achieve a higher standard of tolerance was a constructive change as to which SECO is entitled to an equitable adjustment. *Williams & Dunlap, General Contractors*, ASBCA 6145, 1963 BCA ¶ 3834 (imposition of excessive tolerances permitted recovery of additional costs); *AGH Industries, Inc.*, ASBCA No. 25848, 26535, 85-1 BCA ¶ 17,784.

In accordance with our previous decision, we disallow $320 in material costs for lack of proof. *Service Engineering Co.*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,112. We also disallow 100 labor hours of overtime for insufficient proof. We have held in this connection that generalized conclusory, unsupported opinion type testimony does not demand weight when the testimony is little more than self-serving conclusion. *Newell Clothing Co.*, ASBCA No. 28306, 86-3 BCA ¶ 19,093, *aff'd, Newell Clothing Company, Inc. v. United States*, 818 F.2d. 876 (Fed. Cir. 1987) (table).

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We have found 484 labor hours to be a reasonable estimate of the labor hours expended in effecting the deck repair (finding 5-031). Accordingly, we hold that SECO is entitled to an equitable adjustment in the amount of $18,102 computed as follows:

Labor, 484 hours × $34	$16,456
Profit @ 10 percent	1,646
Total	$18,102

Section 12 (41 U.S.C. § 611) interest on this amount is to run from 1 November 1985, the probable receipt date of REA No. 8 by the Government (see finding 5-026) until paid.

FINDINGS OF FACT

REA No. 121

5-033. Section 500 of the SPICA specifications pertained to "Helicopter Facility Upgrade." Item 510 required SECO to install an aviation fuel system known as the "JP-5" Fuel System (exh. G-3 at 510-1). The JP-5 Fuel System was used for fueling and defueling helicopters (tr. 23/11).

5-034. As part of the JP-5 Fuel System, SECO was required to build four tanks—two storage tanks and two service tanks—from an existing water ballast tank, a pump room and pumping facilities to pump fuel up to the flight deck of the vessel (tr. 23/11).

5-035. The JP-5 tanks were located on the No. 4 and No. 5 Decks below the No. 7 Lift Trunk and Reefer Boxes "H" and "K" between frames 55 to 60 (exh. A-14; tr. 23/12-13). The storage tanks contained fuel not yet purified; the service tanks contained useable fuel (tr. 23/30).

5-036. The water ballast tank required two vent lines. Each of the storage and service tanks required one vent line (tr. 23/35). A vent pipe permits air and gases to be displaced to the atmosphere, thereby preventing pressure build-up in the tank (tr. 23/45, 60).

5-037. The JP-5 Fuel System was schematically shown in Guidance Drawing COMSC Dwg. T-AFS 9-800-4845739 (Guidance Drawing 5739). There is no dispute that Sheet 3 of the Guidance Drawing showed vent pipes, referred to as "Air Escape & Overflow" lines, "coming through ... the tops of the tanks and up to the bell mouths" on the No. 1 Deck (exh. G-106; tr. 23/16-17).

5-038. Item 201, "Regulatory Bodies, Standards And Certificates," of the SPICA specifications required that "The ship as modified and redelivered to the Government shall comply with ... the requirements of the various regulatory bodies and rules in issue at the time of the contract." Included among the regulations listed was the "Rules for Building and Classing Steel Vessels" of the American Bureau of Shipping, or ABS (exh. G-3 at 201-1).

5-039. ABS § 36.39, Vent Pipes, provided in part, as follows:

> 36.39.1 General
>
> In all vessels the structural arrangement in double-bottom and other tanks is to be such as to permit the free passage of air and gases from all parts of the tanks to the vent pipe. Tanks having a comparatively small surface, such as fuel-oil settling tanks, need be fitted with only one vent, while tanks having a comparatively large surface are to be fitted with at least two vent pipes, one of which is to be located at *the highest part of the tank* ... All vent and overflow pipes on the open deck are to terminate by way of such return bends.

(Emphasis added); (app. supp. R4, tab 121, exhibit No. 2).

5-040. SECO understood "the highest part of the tank" to mean side discharge near the top of the tank was acceptable because the ABS Vent Pipe provision "doesn't say through the top" (tr. 23/81).

5-041. Item 510.E.3.a. of the SPICA specifications provided:

> All pipe lines entering JP-5 storage or JP-5 services tanks shall enter as near to the top of the tank as practicable. Where pipe lines emanate from the tanks at such a level that they will be subject to a static head of JP-5 in the tank, they shall be installed with positive closing valves located at the tank or where the pipeline enters the JP-5 Pump Room ....
>
> * * *

(Exh. G-3 at 510-4) Based upon the evidence in the record, we find that this provision, when read in context, applied to fluid-carrying pipes. Vent pipes are not fluid-carrying pipes. (Tr. 23/185)

5-042. As shown by the original working drawings, M. Rosenblatt & Son, Inc. (Rosenblatt), SECO's design engineer on the SPICA overhaul project, designed the storage, service and water ballast tank vent pipes through the top of the tanks as shown in Guidance Drawing 5739. The original "through-the-top" working drawing was approved by MSC and ABS (tr. 23/22).

5-043. There was no problem routing the vent pipes from the top of the service tanks. According to SECO, Rosenblatt's layout

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with respect to the water ballast and storage vent pipes was not "practicable" because they would run into interferences in the reefer spaces, and "out at the shell of the ship" (tr. 23/17-18, 64).

5-044. SECO's ship superintendent responsible for the helicopter facility upgrade suggested that a better routing for the water ballast and storage tanks would be to install the vent pipes "through the side bulkheads [of the tanks] rather than through the top platings of the tanks. The vent pipes would then be routed to an area between the lift trunk and outside the reefer boxes. By routing the pipes in that manner, there would be a "straight shot from the fourth deck all the way up without any bent pieces of pipe" (tr. 23/19).

5-045. SECO's ship superintendent testified that he discussed the suggested vent pipe routing with Rosenblatt, as a result of which Rosenblatt revised the already approved working drawings (tr. 23/68, 94). The revised working drawings were said to have been approved by MSC and ABS (tr. 23/7, 53). The allegedly approved revised working drawings were said to have been returned to Rosenblatt between 3 December 1984 and 7 January 1985 (tr. 23/122-23).

5-046. SECO did not put into evidence the allegedly approved revised working drawing. The Government disputes its existence. The Government referred to Rosenblatt's Design Liaison Memorandum (DLM) which traced the monthly status of development of working drawings including those for "JP-5 Mods. Incld. Helo Upgrade." The DLMs showed that only one set of JP-5 drawings were developed and approved by MSC and ABS (tr. 23/182; app. supp. R4, tab 121.6 to 121.9). We find that SECO has not shown, by a preponderance of the evidence, that MSC and ABS approved its alternate routing of the vent pipes.

5-047. SECO immediately began work on the JP-5 Fuel System when the vessel arrived. Fitting vent pipes began in mid-October 1984. (Tr. 23/13) SECO completed the installation of vent pipes in late December 1984 or early January 1985 (tr. 23/31).

5-048. On 10 January 1985, MSC, referencing Guidance Drawing 5739, issued Deficiency Report (DR) No. 140. The DR stated:

> Vents for #1, #2 JP-5 Storage Tks ... have not been installed according to the above Dwg & do not meet ABS 36.39.1 Reg.

(App. supp. R4, tab 121, exhibit No. 3)

5-049. On 11 January 1985, MSC issued DR No. 141. This DR stated:

> Vents for the water ballast tank aft of the JP-5 tanks are not installed IAW ABS regulations 36.39.1.

(App. supp. R4, tab 121, exhibit No. 4)

5-050. SECO responded to both DRs on 15 January 1985. The responses stated that "Contractor will investigate and make any required repairs/alterations" (app. supp. R4, tab 121, exhibit Nos. 3 and 4). SECO began ripping out the water ballast and storage tank vent lines within a day or two after receipt of the DRs (tr. 23/86, 98).

5-051. As originally installed, the storage tank vent pipes were not installed through the top of the tanks, but installed through the side bulkheads of the tanks. SECO's Project Officer testified that the vent lines entered the storage tanks on the inboard bulkheads at "approximately a half an inch below the top of the tank. And [the pipes] extended into the tank approximately a half an inch" (tr. 23/199). By routing the storage tank vent lines from the side bulkheads, SECO was able to bypass the interferences in the reefer spaces (exh. A-65).

5-052. SECO also installed the vent lines of the water ballast tank from its side bulkhead. By doing so, SECO was able to go "around the corner of the reefer boxes" and bypassed the interferences inside the reefer spaces. (Tr. 23/25, 44, 51-52; exh. A-65).

5-053. To accomplish the tank-top vent line installation for the JP-5 storage tanks required by MSC, SECO had to remove the installed piping from the tank bulkheads and weld them closed with steel inserts. Installation of vent pipes on top of the tanks required "removal of all of the refrigeration, bulkheads, battens, decking material and all the insulation behind them." The pipes were then routed into the reefer spaces, traversed across the ship into the lift trunk and tied into the vent pipes already installed there. After installation, the storage tanks had to be re-tested, and painted with a "three coat paint system." The newly routed vent pipes had to be hydrostatically tested again. (Tr. 23/40-42; exh. A-65)

5-054. To accomplish the tank-top installation for the water ballast tank required by MSC, SECO had to route the vent pipes through the reefer boxes on the No. 3 and No. 4 Decks, and the cargo hold on the No. 2 Deck (tr. 23/24, 52).

5-055. The two JP-5 service tanks were located directly underneath the lift trunk. Thus, there was no need to route their vent

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pipes around the reefer box interferences. The service tank vent lines were installed through the top of the tanks, as Rosenblatt had originally designed. (Tr. 23/40)

5-056. Vent pipes are located at the highest point of a tank because "that's where the air is going to be displaced upon the filling of fluid" (tr. 23/183). Vent pipes installed on the side of a tank may be partially blocked. Partial blockage would have diminished the effectiveness of the vent. Furthermore, vent pipes are sized "to allow for escape of gases at a certain rate" (tr. 23/184). Based on these engineering reasons, we find the Government expert's testimony to the effect that it is unusual to install vent pipes on the side bulkheads of tanks to be persuasive. We find that vent pipes are normally installed through the top of tanks.

5-057. By letter dated 5 August 1986, SECO submitted a claim, in the amount of $101,411. The claim, designated as REA No. 121, was for costs allegedly incurred in rerouting the storage and water ballast tank vent lines as a result of DR Nos. 140 and 141. SECO alleged that its original installations locating the vent pipes "at the highest point in the tanks along the extreme upper side of the tanks" complied with ABS § 36.39.1. (app. supp. R4, tab 121). SECO contended that the Government's direction to reroute the vent pipes constituted a constructive change to the contract. SECO acknowledged at the hearing that REA No. 121 was a direct cost claim with no associated impact costs (tr. 23/8).

5-058. The contracting officer never issued a decision. By letter dated 20 October 1986, SECO appealed to the Board upon the contracting officer's failure to issue a decision. The Board deemed SECO's various REA claims, including REA No. 121, as having been denied by the contracting officer and docketed the appeal as ASBCA No. 33787. After the hearing, REA No. 121 and 7 other REAs were assigned ASBCA No. 40275 for purposes of briefing and decision.

DECISION

There is no dispute that in installing the vent lines for the JP-5 storage tanks and the water ballast tank, SECO was required to meet ABS requirements. ABS § 36.39.1 required vent pipes to be located at "the highest part of the tank" (finding 5-039). The Government required SECO to install the storage and water ballast tank vent pipes through the top rather than through the side but near the top of the tanks. SECO contends that the Government misinterpreted the ABS requirement, and that installing the vent pipes along the extreme upper side of the tanks complied with contract requirements.

We do not agree with SECO's contentions. SECO's Project Officer acknowledged that the vent pipes entered the storage and water ballast tanks "approximately a half an inch below the top of the tank" (finding 5-051). Half an inch below the top of the tanks is not "the *highest* part of the tank." We note that Rosenblatt, SECO's design engineer, agreed with our interpretation. As reflected in its approved working drawing, Rosenblatt designed the vent pipes to go through the top of the JP-5 storage and service tanks, as well as the water ballast tanks as schematically shown in Guidance Drawing 5739, Sheet 3 (finding 5-042).

SECO alleges that Rosenblatt subsequently revised the working drawings to provide for side entry, and that the revised drawings were approved by MSC and ABS. We do not find this allegation credible, in light of SECO's failure to put into evidence the alleged revised drawing or any other supporting documentation. The Government has shown that only one set of working drawings was approved by MSC and ABS. (Finding 5-046)

Nor are we persuaded that Item 510.E.3.a. permitted SECO's original side installation. The pertinent language that SECO relied upon states "All pipe lines entering JP-5 storage or JP-5 service tanks shall enter as near to the top of the tank as practicable." We observe that the quoted language by its terms did not apply to the water ballast tank. We agree with the Government that when read in context, the language applied to fluid carrying pipes "subject to a static head." Vent pipes were not subject to any static head. (Finding 5-041) Even if the provision could arguably apply to the JP-5 storage tanks, SECO has not shown that it was impracticable to run the vent pipes through the top of the storage tanks. As demonstrated by SECO's successful re-routing of the storage vent lines through the reefer spaces, although tank-top installation required more work, it was not impracticable.

We conclude that by requiring SECO to correct its original installation, the Government was merely requiring SECO to perform in accordance with contract requirements.

The water ballast tank was designed with two vent lines. Although SECO has not raised the issue, we have not overlooked that ABS § 36.39.1 required only one vent

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pipe "to be located at the highest part of the tank." While the ABS regulation clearly required at least one vent pipe to be installed through the tank top, it did not prohibit both from being so installed. When Rosenblatt originally designed the installation, both water ballast tank vent pipes were to be installed through the tank top (finding 5-042). Tank top installation was also shown in Guidance Drawing 5739 (finding 5-037). The Rosenblatt design was approved by MSC as well as ABS (finding 5-042). In the absence of evidence to the contrary, we assume that Rosenblatt was aware of the ABS requirements and had an engineering reason for its design. Therefore, on the basis of the record before us, we cannot conclude that requiring both water ballast tank vent lines to be installed through the top of the tank constituted a constructive change.

Accordingly, the claim which is the subject of REA No. 121 is denied.

FINDINGS OF FACT

REA No. 115

The Vent Pipes Insulation Claim

5-059. Item 207 of the SPICA specifications pertained to "INSULATION AND LAGGING." Item 207.H. specified "INSULATION AND LAGGING FOR PIPING AND MACHINERY." Item 207.H.5.a., "Application of Insulation and Lagging—Low Temperature (−30 to 125 Degrees Fahrenheit)" provided, in part, that:

> Surfaces with a temperature of −30 to 55 degrees Fahrenheit shall be insulated to the minimum thickness listed in tables 207A, 207A1, 207B, 207B1, 207C and 207C1.

(Exh. G-3 at 207-7)

5-060. As originally designed by Rosenblatt, the water ballast and JP-5 storage tank vent pipes would traverse through the reefer spaces (tr. 23/239). SECO's ship superintendent in charge of the helicopter facility upgrade conceded that, when a vent pipe goes through a reefer space, the pipe would have to be insulated (tr. 23/220, 23).

5-061. To correct its water ballast and JP-5 storage tank vent pipe installations as a result of DR Nos. 140 and 141, SECO rerouted the water ballast and storage tank vent pipes through the reefer spaces. In doing so, it did not insulate them. Between 27 February and 17 March 1985, MSC issued a number of deficiency reports to the effect that SECO had failed to insulate the vent pipes in reefer box "K" (see DR Nos. 326, 327, 559 and 561; exh. G-108A, REA No. 115 at tab 8).

5-062. To correct the deficiencies stated in the DRs, SECO insulated over 40-feet of vent pipes installed inside the reefer spaces (tr. 23/208).

The Pipe Guard Claim

5-063. Item 210 of the SPICA specifications pertained to "Hull Piping." Item 210.A. provided, in part, that:

> All piping subject to mechanical damage shall be adequately protected. All guards shall be bolted in place so that they may be removed for repairs to piping.

(Exh. G-3 at 210-1)

5-064. The specifications classified "Overflows, Air Escape, And Sounding Tubes" (Item 210.C) as part of "Hull Piping" (exh. G-3 at 210-4 and -5). We find that the JP-5 vent pipes (for air escape) and sounding tubes are "hull piping."

5-065. Item No. 211 of the SPICA specifications pertained to "Pressure Piping." Based on the Government expert report, we find that helicopter JP-5 fueling and defueling lines are pressure piping (see exh. G-108A, 92A No. 115 at 6).

5-066. With respect to pressure piping, Item 211.A.2., "Installation," provided in part that:

* * *

> All pipe exposed to damage shall be adequately protected . . . .

(Exh. G-3 at 211-3)

5-067. On 13 February 1985, MSC issued DR No. 256 which stated:

> Hold 4 2 to port of elev trunk, forklift/cargo guards not installed around new sounding tubes/vent lines (cement has already been poured on deck making installation difficult.)

(exh. G-108A, tab 8)

5-068. On 17 March 1985, MSC issued DR No. 562 which stated:

> JP-5 piping (vent?) next to #2 lift port must be protected. The freeze box doors hit it now, #3 & 4 decks.

(Exh. G-108, REA No. 115 at tab 8)

5-069. The purpose for installing pipe guards is "to prevent mechanical damage to the pipes from objects [such as a forklift] running into and bending or denting the pipes and breaking it" (tr. 23/212, 34, 41).

5-070. As a result of the deficiency reports issued by MSC, SECO custom fabricated and

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installed the pipe guards at various JP-5 locations where potential damage to the installed JP-5 piping system was likely to occur (tr. 23/212, 17).

5-071. Helicopter fueling and defueling lines traverse from the JP-5 tanks up through the spaces between the lift trunk and the outside bulkhead of the reefer boxes from the No. 4 Deck to the cargo hold on the No. 2 Deck. From there, the fueling and defueling lines "traversed aft to go to the helo deck area where the servicing nozzles and things were." To protect these lines, SECO "put guards in those areas where MSC wanted guards placed because they thought damage could result to the piping." (Tr. 23/213)

5-072. Approximately 40-feet of pipe guards were installed to protect the overhead fueling and defueling pipes traversing aft in the No. 2 Deck cargo hold to "prevent [the pipes] from getting dented" (tr. 23/217-18).

5-073. A mechanical guard was installed to protect the sounding tubes in the No. 2 Deck cargo hold area (tr. 23/213).

5-074. In addition, to correct the deficiency identified in DR No. 256, SECO installed pipe guards around the JP-5 vent lines in Hold No. 4, No. 2 Deck, port of the elevator trunk (tr. 23/212).

5-075. SECO does not contend that the pipe guards it was required to install were unnecessary.

5-076. By letter dated 23 May 1986, SECO submitted a claim, designated as REA No. 115, in the amount of $19,672, for having to fabricate and install "protective steel enclosures for approximately 108 linear feet of the systems piping." SECO contends that the specifications failed to "unambiguously" designate the exact locations of the required pipe guards, and to the extent it was required to fabricate and install them, the Government had constructively changed the contract. SECO's cost estimate included a line item for "Insulate (2) Vent Lines." (App. supp. R4, tab 115) At the hearing, SECO revised its claim downward to $13,221 (app. supp. R4, tab 115.2). The contracting officer never issued a decision. REA No. 115 was appealed under the same circumstances as other REAs already discussed.

DECISION

The Vent Pipe Insulation Claim

SECO contends that since Item 510 of the specifications (JP-5 Fuel Facilities) neither itself contained an insulation requirement nor specifically referred to Item 207 (pertaining to insulation requirements of the vessel), it had no obligation to insulate the vent pipes in the reefer spaces (tr. 23/242). In our first SECO decision, we considered and rejected a similar argument made and held that requirements of a contract must be determined from reading the contract as a whole. *Service Engineering Co.*, ASBCA No. 40272, 92-3 BCA ¶ 25,106 at 125,182, *citing Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965).

Item 207.H.5.a. of the specifications clearly required that surfaces in refrigerated spaces such as reefer "K" be insulated. SECO's ship superintendent conceded that any time a vent line goes into a reefer space, the vent line must be insulated. In this case, in order for SECO to properly install the water ballast and JP-5 storage tank vent lines, it had to route them through the reefer boxes. It follows that insulating the reefer space vent lines was a part of the contract work, not compensable as a constructive change. We note that if SECO had installed the water ballast and JP-5 storage tank vent lines as originally designed by Rosenblatt, it would have had to insulate the reefer space vent lines.

The Pipe Guard Claim

SECO appears to be arguing that unless the contract documents specifically identified the locations where pipe guards were required, it was not obligated to install them even though they may be required to protect the pipes from damage. We cannot accept this argument. It is sufficient that the piping specifications such as Item 210.A. and Item 211.A.2. generally describe the need for pipe protection.

In this case, SECO was required to install pipe guards to protect (1) JP-5 fueling and defueling lines, (2) JP-5 sounding tubes, and (3) JP-5 vent pipes.

Helicopter fueling and defueling lines are pressure piping. Item 211.A.2. clearly required that they be protected (finding 5-066). Vent pipes and sounding tubes are hull piping (finding 5-064). Item 210.A. required that they be protected (finding 5-063).

We conclude that the pipe guards SECO installed were required by the contract. There was, therefore, no constructive change.

Accordingly, the claims which are the subject of REA No. 115 are denied.

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FINDINGS OF FACT

REA No. 6

5-077. Item 502 of the SPICA specifications pertained to "HELICOPTER DECK STRUCTURE." Under this item, SECO was required to remove the existing 02 Deck structure and replace it with a new deck structure. (Exh. G-3 at 502-1)

5-078. As part of the Item 502 work, SECO had to install two large steel beams. These beams were to be welded in place with support stanchions. (Tr. 25/88)

5-079. Fire Station 2-62 was located on the No. 2 Deck, aft, near the forward bulkhead of the petty officers' lounge (tr. 25/87). There is no dispute that Item 502 did not require any repairs to the fire station (tr. 25/89). So that the beams could "go across" the vessel, the existing sprinkler system piping that went aft from the fire station into the lounge area had to be removed and later reinstalled (tr. 25/88).

5-080. When SECO removed the joiner bulkhead around the fire station, it became obvious that there had been a leak there "for some time" (tr. 25/89). The leak occurred at "the back side of a drain pipe that was associated with the firestation" (tr. 25/90). There is no dispute, and we find, that the leak existed prior to SPICA's arrival at SECO on 7 September 1984 (tr. 25/101, 113).

5-081. In our third SECO decision (ASBCA No. 40274), we found that Item 111.B. of the specifications, as amended by Addendum VI, required the parties to conduct a joint survey to ascertain the operational status of all equipment and systems onboard the vessel prior to delivery of the vessel to SECO. A joint survey was conducted. The survey report, however, could not be found (see findings 3-078 to -083). Inasmuch as the fire station leakage was inside an enclosed fire station locker, and at the back side of a drain pipe, and the leak was discovered only upon removal of the joiner bulkhead to allow access of two large beams, we find that SECO could not reasonably have been expected to discover the leak during the pre-delivery survey in any event.

5-082. Item 111.B. also provided that:

* * *

> The Contractor shall clean the entire ship on a daily basis. All parts of the ship shall be kept in a clean and sanitary condition. All debris and garbage shall be removed daily (including Saturdays, Sundays and holidays)....
>
> * * *

(Exh. G-3 at 111-2)

5-083. By CIR No. 248 dated 26 September 1984, SECO advised MSC that:

> In the process of draining down the sprinkler system (Station 2-6-2) to modify it, we discovered the $1\frac{1}{4}$" drainline to be holed thru & leaking. We suggest renewing drainline from deck flange to valve with new piping. We therefor [sic] request a C/O to do this. This station not useable as is.

(App. supp. R4, tab 6, exhibit No. 1)

5-084. MSC apparently acknowledged that a change was in order. It responded by CRO No. 382 which stated "A change order will be issued to fix the pipe under category 'B'" (app. supp. R4, tab 6, exhibit No. 1). Under the so-called "B" category items, MSC was entitled to draw upon "B" items during contract performance at unit prices SECO proposed to obtain the contract (tr. 25/92-93).

5-085. On 28 September 1984, MSC issued Work Statement No. 1679-088 (W/S No. 088). It required SECO to provide all labor and material to:

> Install a new drainline at sprinkler stat. 2-6-2 from deck flange to valve. With new $1\frac{1}{2}$ schedule 80 Galvanized Steel Piping approximately $3\frac{1}{2}$ feet long, includ. New union, Flange, gasket and bolt. Prine [sic] and paint red to match existing.

(App. supp. R4, tab 6.1)

5-086. The parties were unable to reach agreement on a price for the W/S No. 088 work. On 11 October 1984, 16 days after the leak was discovered SECO finally agreed to accept $806 for the W/S No. 088 work (tr. 25/106; app. supp. R4, tab 6.1). No fire station repairs were performed in the meantime. SECO's Project Officer explained that during the early stages of the overhaul, he was following the CONREP's instructions "that Change Orders were not to be worked until such time as there was an agreed price—a pre-priced Change Order" (tr. 25/106).

5-087. The work described in W/S No. 088 and 22 other work statements were subsequently definitized and settled by a bilateral modification—JOM No. 5. JOM No. 5 increased the contract price by $148,520, of which $806 was for W/S No. 088. JOM No. 5, signed by SECO's authorized Contract Administrator on 27 November 1984, con-

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tained at Paragraph 4, the following standard Navy release clause:

> 4. The change in delivery dates, price, or cost and fixed fee described above is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims *arising out of this modification* and any other modification or change orders indicated above, including all claims for delays and disruption resulting from, caused by, incident to such modifications or change orders.

(Emphasis added) (exh. G-169 at tab 5)

5-088. SECO's Project Officer described the fire station leak as "more than a drip and not a spurt" (tr. 25/90). Concerned that the water leak might damage the tiles in the lounge area, SECO built a dam with putty and attempted to contain the water seepage with plywood (tr. 25/91). Between 26 September 1984, when the leak was first discovered, and 11 October 1984, when the parties agreed on price on W/S No. 088 (16 days), SECO used laborers to "re-duct-tape" the plywood and clean up twice a day (tr. 25/94-95). Shutting off the water was not an alternative. For fire safety, the parties had agreed that SECO was "to keep the firemain sprinkler system charged at all times during the overhaul" (app. supp. R4, tab 6).

5-089. By letter dated 28 October 1985, SECO submitted a claim, designated as REA No. 6, in the amount of $1,781. The claim was to recover the costs incurred "to continuously monitor and clean the deck area around Fire Station 2-6-2." (App. supp. R4, tab 6) The contracting officer never issued a decision. REA No. 6 was appealed under the same circumstances as other REAs already discussed.

5-090. SECO subsequently revised its claim to $1,269. The amount was derived by charging 2 hours for labor a day at $34 per hour for 16 days. SECO also added $10 for material, $56 for overtime, and profit at 10 percent. (App. supp. R4, tab 6) There is no documentary proof of the materials claimed. SECO's justification for the 4 hours of overtime claimed was that the clean-up "spans a weekend" and it had to pay a $14.12 premium for weekend labor (tr. 25/119, 128). According to the Government, SECO's own Manpower Utilization Report showed no "premium hours" for W/S No. 088 (tr. 25/129-130). We find, however, that clean-up work was not the same as W/S No. 088 work. There is no evidence that the scope of work specified by the Government included clean-up.

DECISION

Entitlement

The Government raised the affirmative defense of release, contending that the fire station clean-up claim is barred by JOM No. 5. We do not agree. The standard Navy release clause by its terms bars only "all claims arising out of this modification." In this case, the modification as specified in W/S No. 088 provided for the replacement of a leaking drainline. The drainline leak itself was a pre-existing condition; it did not result from, nor did it arise out of the modification to replace the leaking drainline. Once the drainline was repaired, the leak stopped. We conclude, therefore, that SECO's clean-up work was not barred by the JOM No. 5 release clause.

Nor are we persuaded that the parties intended W/S No. 088 or JOM No. 5 to cover the costs of the clean-up. There is no evidence that the parties' negotiators discussed the matter prior to reaching agreement on price on 11 October 1984 or prior to execution of JOM No. 5 in late November, 1984.

The Government contends next that the clean-up was a part of SECO's Item 111 "Delivery, Care And Redelivery Of The Ship" responsibilities. The joint survey of "the operational status of all equipment and systems" of the vessel under Item 111.B. had been lost. Thus, neither MSC nor SECO was able to establish whether the fire station leakage was noted when the SPICA was delivered to SECO on 7 September 1984. Inasmuch as the fire station leakage was inside an enclosed fire station locker, and the leakage was only discovered upon removal of the joiner bulkhead, we conclude that SECO could not reasonably have discovered the leak during the predelivery survey in any event.

Nor are we persuaded by the Government's reliance on Item 111.B. of the specification which required SECO to clean the entire ship on a daily basis. When read in context, that provision clearly applied to debris and garbage generated during the course of the overhaul. Leaking fire station water, required to be maintained for fire safety, was not the type of clean-up contemplated by the item 111.B. clean-up provision.

We conclude that SECO's clean up of the fire station water leaks was above and beyond the requirements of its contract. SECO is, therefore, entitled to an equitable adjustment.

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Quantum

Because of their disagreement on price, it took 16 days (26 September through 11 October 1984) to resolve what the Government conceded to be a valid change to the contract (W/S No. 088). On the record before us, we cannot conclude that either party was responsible for the delay. In light of the CONREP's instruction not to work on changed work until there had been an agreement on price, we believe SECO was justified in not repairing the leak until after 11 October 1984. We also believe that SECO prudently cleaned up the water twice a day to prevent water damage to the vessel. We conclude that SECO has established by a preponderance of the evidence that it cleaned up the water leakage twice a day for 16 days. In view of the need to "re-duct-tape" the plywood, we consider one hour for each clean-up reasonable.

SECO's justification for the 4 hours of overtime was that the clean-up work "spans a weekend," and that it had to pay $14.12 extra an hour for premium time. The Government's only challenge was that SECO's Manpower Utilization Report showed no "premium hours" for W/S No. 088. We have found, however, that the water clean-up work was not a part of W/S No. 088. Accordingly, there was no reason for the clean-up hours to be shown as a part of the W/S No. 088 hours. Based on the evidence in the record, we allow 4 hours of premium time for SECO's weekend clean-up effort.

There is no documentary support for the $10 incurred for materials. Consistent with our previous holding, we disallow the $10 claimed for materials. *See Service Engineering Co.*, ASBCA 40274, 93-1 BCA ¶ 25,520, at 127,112.

We conclude that for REA No. 6, SECO is entitled to an equitable adjustment in the amount of $1,258, computed as follows:

Labor	
16 days × 2 hours × $34	$1,088
Weekend premium hours	
$14.12 × 4 hours	56
Subtotal	$1,144
Profit at 10 percent	114
Total	$1,258

In connection with REA No. 6, SECO is entitled to $1,258 with CDA interest running from 1 November 1985 until paid.

FINDINGS OF FACT

REA No. 24

5-091. In our third SECO decision, we made a number of findings which are pertinent to this REA. For convenience, these findings are summarized here: To avoid arguments at the end of the overhaul, MSC amended Item 111.B. of the specifications to require a joint survey of all equipment and systems aboard when the SPICA arrived at SECO's facility. Although not all equipment and systems were checked, a 3-day joint survey was conducted beginning 7 September 1984 when the vessel was delivered to SECO. SECO subsequently submitted an arrival condition report of the joint survey to MSC. According to the CONREP, "everything on the list survey was found operable except that which was noted." The arrival condition survey report has been lost. (See findings 3-077 to -080, -083, *Service Engineering Co.*, ASBCA No. 40274, 93-1 BCA ¶ 25,520)

5-092. This REA concerned the vessel's Gaylord hood systems in (1) the Officers' Pantry located on the 01 level, and (2) the Crew's Galley on the No. 1 Deck (tr. 24/207; exh. A-14). A Gaylord hood is the termination point of an exhaust vent system. An exhaust fan, a KPK foam washdown, and an emergency shut-off system were all parts of the Gaylord hood fire fighting systems installed on the SPICA. (Tr. 24/270, 333, 25/17, 33)

5-093. SECO only checked the fans of the Gaylord hood systems during the joint survey. There is no dispute that the fans worked and that they worked at the time of re-delivery of the vessel. SECO did not test the washdown system. (Tr. 24/303-04; 25/7, 8) To determine that the entire Gaylord hood system worked, SECO would have had to test the washdown system, the emergency shut-off, and the Main Controller (tr. 25/28).

5-094. Item 502 of the SPICA specifications required SECO to "remove the existing No. 2 Deck structure and replace it with a new structure" (exh. G-3 at 502-1).

5-095. In the Officers' Pantry, all of the equipment, the Gaylord hood washdown controller, the piping, the ventilation ducts and the cabling were removed. The fan for the Gaylord hood system, and the Main Controller, however, were not removed (tr. 24/327, 44, 25/12, 15). The Gaylord hood itself was removed in sections and stored by SECO (tr. 24/327).

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5-096. In the Crew's Galley, the Gaylord hood system was not removed (tr. 24/344).

5-097. Item 111.B., "Care Of The Ship," provided, in part:

* * *

> The Contractor is responsible for the entire ship, including layup of all equipment and parts of the ship not affected by the modification, from the time the ship is delivered to the Contractor until it is accepted for redelivery by the COMSC CONREP. All ships parts, equipment, systems, etc., damaged or destroyed by the Contractor shall be repaired or replaced at the Contractor's expense.

* * *

(Exh. G-3 at 111-12)

5-098. After the new helicopter hangar was installed, SECO found, during re-installation of the Officers' Pantry Gaylord hood system that there were no "internal components" to the washdown enclosure (tr. 24/271). In discussing the matter with the SECO electrician who originally took the Gaylord hood system apart, SECO's ship superintendent was told that the controller box had no internals or "guts" when the vessel arrived (tr. 28/272-73). According to SECO, the Gaylord hood would work even without the washdown enclosure "as long as the fan, the exhaust system itself, is running" (tr. 24/275).

5-099. SECO reported the missing "internals" to MSC. By CIR No. 678, dated 14 February 1985, SECO advised as follows:

> We find that during removal of "Gaylord Hood" wash down controller the timer & selector switch was not mounted in controller box. Request C/O to trouble shoot & make system operable.

(App. supp. R4, tab 24 at exhibit No. 2)

5-100. MSC responded by CRO No. 1006, which stated:

> No work statement required. The Contractor is responsible for repairing damaged equipment IAW Item 502.E.1. Note that the arrival inspection found no problems with gaylod [sic] hood or any control boxes.

(App. supp. R4, tab 24 at exhibit No. 2)

5-101. On 20 February 1985, the SPICA's Chief Electrician issued DR No. 293.[4] This DR stated:

> The Gaylord and vent system, main galley and officers' Gaylord and vent Ex. system (that's exhaust system) not in proper operational condition. System was working before AFS upgrade.

(Tr. 24/286)

5-102. As a result of DR No. 293, SECO put together a crew, consisting of electricians, pipefitters and sheet metal workers to troubleshoot the Gaylord hood systems (tr. 24/289).

5-103. In the Officers' Pantry, SECO found a problem in the damper solenoid. The solenoid was disconnected and "rewound" in SECO's shop (tr. 24/348). By getting the solenoid fixed, SECO was able to make the vent and exhaust systems operable. (Tr. 24/291, 348) Having received no change order from MSC, SECO did not repair the internals or "guts" of the washdown system (tr. 24/291).

5-104. From the Officers' Pantry, SECO's trouble-shooting crew went on to the Crew's Galley. There, after 3 or 4 days of troubleshooting, a dispute arose between SECO and the ship's force electricians (tr. 24/292). According to SECO, when its electricians were troubleshooting the Main Controller of the Gaylord hood systems, they found a ship's force electrician making repairs in a junction box on the same loop as the Main Controller (tr. 24/293-94). SECO alleged that the ship's force was actually "completing repairs that were problems that were [there] before the ship came in" (tr. 24/294).

5-105. SPICA's Chief Electrician was said to have accepted responsibilities for the Crew's Galley, and SECO did not, thereafter, follow through with any repairs to the controller (tr. 24/294-95). SECO did not call its own electrician or the two MSC electricians involved in the incident to testify. We cannot determine whether what they were alleged to have said had any basis in fact. We find SECO's allegations of pre-existing deficiencies in the Main Controller not supported by credible first-hand proof. SECO's trouble-shooting crew did, however, find some loose wires and tighten up lugs in the process of troubleshooting the Gaylord hood system in the Crew's Galley (tr. 25/351).

5-106. By letter dated 24 November 1985, SECO submitted a claim, designated as REA No. 24, in the amount of $11,909. SECO al-

[4] DR No. 293 is not part of the record evidence. The content of DR No. 293 was read into the record (tr. 24/286).

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leged that the Gaylord hood systems in the Officers' Pantry and the Crew's Galley were inoperative when the SPICA was delivered to SECO. SECO contended that "MSC's direction for SECO to undertake ... repairs constitutes a constructive change order for which SECO is entitled to be compensated" (app. supp. R4, tab 24). The contracting officer never issued a decision. REA No. 24 was appealed under the same circumstances as other REAs already discussed. SECO subsequently revised its claim to $8,513 (tr. 24/266; app. supp. R4, tab 24).

DECISION

SECO contends that the Gaylord hood systems in the Officers' Pantry and Crew's Galley were inoperable when the SPICA was delivered to SECO in September, 1984.

Item 111.B. of the specifications required that the parties conduct a joint survey of the vessel's equipment and systems when it was delivered for upgrade. The purpose for the survey was to avoid the type of disputes that are now before us. SECO concedes that it only checked the Gaylord hood fans. SECO did not check the Gaylord hood washdown system, the emergency shut-off system and the Main Controller. There is no evidence that it was impossible to check these Gaylord hood subsystems had SECO elected to do so. Had SECO noted the disputed deficiencies it later found, it would not have been held responsible for any repairs or troubleshooting to render the Gaylord hood systems operable.

As it turned out, SECO was not asked to furnish or repair any missing parts to the Main Controller. In the course of trying to make the Gaylord hood systems on the Officers' Pantry and the Crew's Galley operable, SECO did have to tighten some loose lugs and wires and "rewound" a damper solenoid. We consider such work to have been a part of re-installation routines to meet its redelivery obligations under Item 111.B.

In our third SECO decision, we said with respect to REA No. 3, that:

> ... SECO had the right to check and to take exception to all equipment and systems that it did not wish to take responsibility for upon delivery of the ship. In this case, a joint survey of the SPICA's operating system was conducted while the ship was en route to SECO from Oakland. After the ship arrived at SECO, the joint survey continued for 3 days. There is no evidence that the Main Regulator Valve was defective when the ship was turned over to SECO....
>
> We conclude that, to the extent that the Main Steam Regulator Valve and the two scullery valves were found defective, after the vessel had been in SECO's custody for over 6 months, it must be presumed that the valves became defective while in SECO's care....

Service Engineering Co., ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,124-25.

As in REA No. 3, the presumption is not here overcome by the evidence in the record. We have found SECO's allegations of pre-existing deficiencies in the Gaylord hood system not supported by credible first-hand proof. There is no evidence that the damper solenoid of the Officers' Pantry Gaylord hood system or the Main Controller of Galley Gaylord hood system were inoperable when the vessel was delivered to SECO in September 1984. Therefore, SECO was required to redeliver the Gaylord hood systems in the same operable condition in which they were received.

Accordingly, the claim which is the subject of REA No. 24 is denied.

FINDINGS OF FACT

REA No. 53

5-107. As part of the SPICA upgrade, SECO was required to furnish and outfit a new TACAN (Tactical Air Navigation) Room. Item 505.D., "Removals," of the specification provided:

> Remove the cables in the cableway, starboard side of the mast, frame 120, 05 Deck and above which are in way of new TACAN Room as follows. Disconnect and remove the power cables to the three AS-390/SRC antennas on the yardarm. Disconnect the remaining cables from navigation lights, etc. on the mast and remove to a point below the overhead of the new TACAN Room. Reserve for reconnection to a new J-box in the TACAN Room overhead.

(Exh. G-3 at 502-2)

5-108. By CIR No. 246 dated 24 September 1984, SECO advised MSC that in addition to the cables to be removed as directed in Item 505.D., there were a waveguide run to "x" band radar antenna and a heliax cable run to "s" band radar antenna. Inasmuch as neither the waveguide nor the heliax cable could be re-installed through use of a junction box, SECO requested that the following additional work be directed:

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2.1. Disassemble waveguide run in way of TACAN Rm. installation.

2.1.1. Modify waveguide sections between transmitter 04 lvl. and mast. Reinstall waveguide.

2.2. Disconnect and remove heliax cable in way of TACAN installation; reroute and reconnect.

(R4, tab 169.2)

5-109. In response, MSC issued Work Statement No. 505-086 (W/S No. 086) on 26 September 1984. It stated:

The Contractor shall provide all labor and material to accomplish the following work:

1. Disassemble waveguide run in way of Tacan Rm. After the Tacan Rm. installation[,] re-install the waveguide run.

2. Disconnect and remove Heliax cable in way of Tacan Installation. Re-route and reconnect after Tacan Rm. Installation.

(R4, tab 169.2)

5-110. Thereafter, the parties negotiated and agreed on $2,540 as the price for W/S No. 086. W/S No. 086 and 19 other negotiated W/Ss were settled by a bilateral modification—JOM No. 2—in October 1984. JOM No. 2 contained, as Paragraph 4, the standard Navy release clause. (Exh. G-169.2; tr. 25/146, 48, 244)

5-111. On the SPICA, the Signal Shelter and the TACAN Room were located between frames 122 and 117 on the 05 level (tr. 25/151). These rooms sit atop the vessel's chartroom located approximately at frame 125 "behind the wheelhouse . . . on the starboard side" on the 04 level. (Tr. 25/151-52)

5-112. The 10 CM and 3 CM radar antennas were located "roughly 30 feet above the 06 level" slightly in front of the TACAN mast (tr. 25/151, 195).

5-113. A "waveguide" projects images down from a radar antenna to the radar screen (tr. 25/148). There were two types of waveguides on the SPICA: a 10 CM waveguide and a 3 CM waveguide. The 10 CM waveguide used a heliax cable as a transmitter (tr. 25/149). The 3 CM waveguide transmitted images by means of a rectangular "solid-type tube" (tr. 25/148). There is no dispute concerning the 3 CM radar (tr. 25/173-74).

5-114. The 10 CM radar heliax cable came down the starboard side of the mast, penetrated the overhead and the deck of the TACAN room, "then wove itself down into the overhead of the chartroom, down and into the connector box" (tr. 25/160). The heliax cable penetrated the overhead and deck in a "stuffing tube." The tube was "packed with a stuffing to prevent . . . leakage through and holds the cable in place" (tr. 26/161).

5-115. To implement W/S No. 086, SECO disconnected the 10 CM heliax cable from the radar panel in the chartroom. The cable was pulled through the stuffing tube onto the deck in the 05 level where it was laid out, rolled up in large coils, wrapped in plastic designed to keep "dust, dirt and moisture out," and "placed it up on the antennas [mast] as it was coiled up." (Tr. 25/146-47, 224, 246) The end piece of the cable was separately wrapped with electrical tape and arranged to point downward (tr. 25/185, 225).

5-116. The 10 CM heliax cable remained in its covered condition from late September 1984 until March 1985 when SECO was ready to re-install it (tr. 25/148, 201). SECO's ship superintendent in charge of the installation of the Signal Shelter and the TACAN room testified that in March 1985, he saw no damage to the plastic wrap (tr. 25/253). The end of the cable was still wrapped in tape (tr. 25/254).

5-117. During the course of the overhaul, SECO was working in the vicinity where the wrapped heliax cable was strapped to the mast. SECO was installing a mast to hold the TACAN antenna and was "beefing up" the platform (tr. 25/198-99). There is, however, no evidence that SECO in any way damaged the plastic wrapping or the heliax cable contained therein.

5-118. Upon re-installation of the heliax cable in March, 1985, a "distorted picture" was obtained on the 10 CM radar screen (tr. 25/164). When advised of the radar problem, the CONREP instructed SECO to "get a radar technician in to trouble-shoot the system" (tr. 25/165).

5-119. SECO used its own electronics technicians to check out the radar system first, and then contacted Baytronics Corporation (Baytronics), a Bay Area contractor specializing in marine electronics (tr. 25/165).

5-120. Baytronics, with the assistance of SECO personnel, worked on the 10 CM radar on or about 20 March 1985 (tr. 25/217). Baytronics's 27 March 1985 invoice (for $1,632) recorded what was done to correct the radar distortion:

Energized unit. Found no picture on crt. Isolated problem to MTR. T/S found no video signal. Isolated problem to Magnatron. Remove maggie & found water (from

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wave guide) throughout front end assy. Remove assy & maggie. Cleaned & dried assy. Installed new maggie & reinstalled front end assy. Tuned IF assy. TESTED—SAT.

Found leakage in wave guide at ant.—appeared to be leaking for sometime.

(App. supp. R4, tab 53)

5-121. No one from Baytronics testified. Based on the testimony of SECO's ship superintendent, and Baytronics' diagnoses above, we find that the 10 CM radar distortion was caused by a "short-out" in the Magnatron. This short was caused by condensation in the heliax cable. The condensation was caused by a leak at the base of the antenna. (Tr. 25/167, 173) Baytronics sealed the leak with silicone (tr. 25/167).

5-122. As one of its defenses, the Government invoked the "Care Of The Ship" provision of the contract. Item 111.B. provided, in part, the following:

* * *

The Contractor is responsible for the entire ship, including layup of all equipment and parts of the ship not affected by the modification, from the time the ship is delivered to the Contractor until it is accepted for redelivery by the COMSC CONREP. All ships parts, equipment, systems, etc., damaged or destroyed by the Contractor shall be repaired or replaced at the Contractor's expense.

* * *

The Contractor shall be responsible for the protection of the ship's interior, including but not limited to, machinery, piping, electric cables, insulated refrigerated storerooms, compartments, bulkheads, decks and ducting from weather, fire, damage by shipyard personnel, theft, dirt, foreign substances, etc.

(Exh. G-3 at 111-2 to 3)

5-123. There is in evidence a series of DRs each indicating water problems somewhere aboard the vessel.[5] Except with respect to DR No. 417, none of the DRs show water intrusion anywhere near the chartroom where the 10 CM radar was located.

5-124. DR No. 417 was dated 7 March 1985, just two weeks prior to discovering distortion in the 10 CM radar. An overhead leak was identified on the 04 Deck, near Frame 122 (exh. G-178). The location is identified as "six feet after the chartroom and inboard by about 12 feet" (tr. 25/234). According to DR No. 417, overhead leaks occurred "after long, steady rain." The report indicated that SECO corrected the problem on 25 March 1985, after repacking the stuffing tube through which water had leaked. (Exh. G-178) We find that the leaks identified in DR No. 417 are sufficiently close in time and place to have caused the accumulation of condensation in the Magnatron.

5-125. There is no evidence that the ship's radar system was found to be inoperable or was showing distorted images in the arrival condition report submitted by SECO after the three-day pre-delivery survey. To the contrary, the radar and the ship's navigational system were working when it was delivered to SECO in September 1984 (tr. 25/206, 226). Based upon expert testimony, we find that it was unlikely that the heliax cable or the Magnatron had water in them when the vessel arrived. If that had been the case, the 10 CM radar would have shown distortions at that time (tr. 25/245).

5-126. By letter dated 15 January 1986, SECO submitted a claim, in the amount of $4,877, designated as REA No. 53. SECO contended that it was "entitled to be reimbursed for the costs that it and its subcontractor, Baytronics, incurred in troubleshooting and repairing the 10 cm Radar." SECO maintained that the radar failure was not attributable to it but was caused by "a seal leak in the antenna and not by SECO's pulling back of the cable during the TACAN installation" (app. supp. R4, tab 53). The contracting officer never issued a decision. REA No. 53 was appealed under the same circumstances as other REAs already discussed. SECO subsequently revised its claim to $3,974 (app. supp. R4, tab 53).

DECISION

When SECO re-installed the heliax cable to the 10 CM radar in the chartroom, it was discovered that the radar was receiving distorted images. The Government contends that SECO is responsible for the repairs because the heliax cable might have been damaged during the time it was stored in plastic wraps on the mast of the vessel. We have found that there is no evidence that SECO in any way damaged the plastic wrapping or the heliax cable wrapped inside (finding 5-117).

We have found that the 10 CM radar distortion was caused by a "short-out" in the

[5] See Exh. G-171 (DR No. 042), G-172 (DR No. 047), G-173 (DR No. 55), G-174 (DR No. 100), G-175 (DR No. 114), G-176 (DR No. 235), G-177 (DR No. 244); tr. 25/230-34.

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Magnatron. The short was caused by condensation in the heliax cable. The condensation came about as a result of a leak at the base of the antenna. (Finding 5-121)

The REA before us is controlled by the result reached in *Service Engineering Company*, ASBCA No. 40274, 93-1 BCA ¶ 25,520. In that case, we held, in connection with REA No. 3, where SECO was given the opportunity to conduct a pre-delivery survey and to note any defects on the vessel, it was presumed that certain valves which were later found to be defective, became defective while the vessel was in SECO's care.

In connection with this REA, the evidence shows that the vessel's radar and navigational systems were working when the vessel was turned over to SECO in September 1984. In the absence of evidence to the contrary, we conclude that the antenna seal began to leak when the vessel was in SECO's care. We conclude therefore, that it was SECO's responsibility to repair the leak and the 10 CM radar at its expense.

Accordingly, the claim which is the subject of REA No. 53 is denied.

FINDINGS OF FACT

REA No. 120

Deck Edge Light Relocations

5-127. Item 513 of the SPICA specifications pertained to "Lighting And Visual Approach" (LVA). It required SECO to install visual landing aid equipment and material in accordance with the requirements of Reference 1 through 30. (REA No. 120, exhibit No. 3 at 513-1, 3).

5-128. As a part of the LVA system, SECO was required to install 13 helicopter deck edge lights. NAEC Drawing 80020-621927—Visual Landing Aids Installation—Clearance Requirements (NAEC Drawing 1927) was applicable to the installation of these deck edge lights (tr. 24/10-11). NAEC 1927 was not a generic drawing; its "T-AFS-8 Configuration" designation showed that it was specifically drawn for the SIRIUS class vessel (tr. 24/238-39). The SPICA was a sister ship of the SIRIUS.

5-129. NAEC Drawing 1927 was sufficient, by itself, to fix the locations of the deck edge lights. The drawing provided locations "in a longitudinal sense by measuring from . . . the back end of the hangar, as the beginning reference point . . . starting 18 inches aft of that bulkhead" (tr. 24/242).

5-130. Even prior to the arrival of the SPICA at MSC's facility in September 1984, MSC had instructed SECO to use NAEC Drawing 1927 to locate lights. By CIR No. 179, SECO advised MSC that there was a conflict between the Guidance Drawing location of OVBD floodlights with the location shown on the NAEC Drawing 1927. MSC responded by CRO No. 284, stating "NAEC 621927 has dimensions on the dwg. for the lights and should therefore be used" (exh. G-108A, REA No. 120, exhibit No. 3).

5-131. SECO began installation of the deck edge lights in mid-January 1985 (tr. 24/11, 113). SECO positioned the deck edge lights in accordance with NAEC Drawing 1927 (tr. 24/13, 15, 18, 112-13, 22). Installations were made without working drawings (tr. 24/219). No working drawings for the installation of the deck edge lights were prepared (tr. 24/237).

5-132. To install a deck edge light, SECO had to drill or burn a hole at the proper location. The housing for the light had to be welded in place. Electricity for the light was fed from transformers and cables installed below deck. (Tr. 24/90)

5-133. When installation of the deck edge lights was 90 percent complete, a disagreement developed between an NAEC inspector and the MSC Assistant CONREP (tr. 24/12). The NAEC inspector had a problem with the locations where some of the deck edge lights were placed (tr. 24/16). The Assistant CONREP took the position that the correct edge light locations were shown in NAEC Drawing 1927 (tr. 24/118). The NAEC inspector took the position that the edge light locations shown in NAEC 1927 were incorrect and unless corrected, the helicopter deck would not be certified (tr. 24/114-15, 119).

5-134. Neither the Assistant CONREP nor the NAEC inspector testified. What was wrong with the deck edge light locations as reflected in NAEC Drawing 1927 remained unexplained.

5-135. SECO was subsequently directed to install the deck edge lights in accordance with a new drawing. This new drawing "moved the lights six to eight inches either forward [or] aft of where the [NAEC Drawing 1927] put them" (tr. 24/123-24). This drawing was described as "a binder sheet of paper with a drawing on it" (tr. 24/119-21). This new drawing is not in evidence.

5-136. When MSC's direction to relocate the deck edge lights came, SECO had already installed the lights, and the wiring

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underneath. The transformers had been welded in place and banding of the cables had been accomplished (tr. 24/240).

5-137. Out of the 13 deck edge lights, SECO had to relocate 10. In addition, SECO had to relocate seven connection boxes or transformers. (Tr. 24/160-61) Those lights that had to be moved were moved between six to eight inches fore or aft (tr. 24/150, 246).

5-138. To relocate the installed edge lights, SECO had to remove the lights and save the fixtures used. The existing openings had to be blanked off. New penetrations through the deck had to be cut. The light fixtures had to be re-welded back into the new deck locations. In addition, some but not all of the below-deck transformers and cabling had to be moved. (Tr. 24/126, 150-51)

5-139. Relocation of the deck edge lights took between two to three weeks (tr. 24/126). SECO used between three to five electricians. In addition, pipefitters, welders, painters and laborers were also used (tr. 24/126). The helicopter deck, including the deck edge lights was ultimately certified by NAEC (tr. 24/26).

5-140. The Government contends that SECO should not be allowed to recover because it failed to prepare working drawings in accordance with Item 103.D.1. (see exh. G-3 at 103-2). The Government expert conceded that the information in NAEC 1927 "appeared to be sufficient to at least spot the locations of the lights" (tr. 24/219). Even though working drawings might show how the light housing attached to the deck and how electrical connections were made (tr. 24/220), we find that the only problem identified by the NAEC inspector related to the need for fore and aft relocations of some of the deck edge lights. There were no other installation problems. Without an explanation from the Government as to why NAEC 1927 was incorrect, we cannot find that SECO could have avoided the light location problem had it installed them in accordance with working drawings.

5-141. The Government does not dispute that SECO was required to relocate some of the deck edge lights after they were installed. As in the case of other REAs, SECO's trades that worked on the re-installation did not keep records of the additional effort required of them. Based upon information furnished by those who had first-hand knowledge of the work involved, SECO's Contract Administrator estimated that (1) 240 labor hours of various trades (including welders, shipfitters, painters, electricians and laborors) would have been consumed in relocating 10 lights; (2) 112 labor hours of various trades would have been consumed in relocating 7 transformers; (3) 112 labor hours would have been consumed in relocating cables; and (4) 240 labor hours would have been consumed in furnishing and installing 10 deck inserts. The total labor hours claimed was 704 hours.

5-142. The bulk (or 67 percent) of the hours claimed (474 hours) were electrician hours. Electricians typically worked in pairs (tr. 24/132, 346). In light of testimony in the record that between three to five electricians were used, we find it is fair to consider that four electricians were used during the entire light relocation period. Furthermore, in light of testimony that it took 2 to 3 weeks to correct the problem, we consider 480 total electrician hours or less to be reasonable (4 men × 8 hours × 15 days). The Government did not challenge the reasonableness of the hours said to have been incurred by the supporting trades. We find them (230 hours) to be reasonable. At $34 per hour, we find that SECO incurred an estimated additional labor cost of $23,936 ($34 × 704 hours) (exh. A-68)

5-143. SECO claimed $1,560 in material costs. Such costs are not supported by invoices or shop chits. (Exh. A-68; tr. 24/182) Although SECO's electrical leadman testified that he believed that he was working "eight hours a day, six days a week" (tr. 24/127) at the time, there is no evidence that any overtime hours were attributable to the relocation of the deck edge light relocation effort.

Extended Lineup Light Bars

5-144. Item 101.D.1.b. of the SPICA specifications provided:

> D. *GENERAL CONDITIONS AND DEFINITIONS*
>
> * * *
>
> b. Section 200, General Requirements, Technical, sets forth in detail the minimum requirements (procedures, techniques, materials, etc.) to be followed for all work covered by this Specification. All work performed by the Contractor under this Job Order shall comply fully with the technical requirements outlined in Section....

(Exh. G-3 at 101-2)

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5-145. Item 213 of the specifications pertained to "Electrical Systems." It provided, in part:

A. *GENERAL*

1. *Intent and Scope*

It is the intent of this Item to describe the general requirements as a whole for electrical work covered by this Specification.

* * *

2. *Arrangement of Equipment*

All electrical equipment shall be located so as to be *readily accessible for repair and removal,* and to reduce to a minimum the danger that equipment may be damaged by other systems in the vicinity. Equipment shall be protected from possible sources of heat, water, steam, or other hazardous substances.

(Emphasis added) (exh. G-3 at 213-1)

5-146. Item 202 pertained to "ACCESS AND MAINTENANCE REQUIREMENTS." It provided in part, that:

The structure and layout of the machinery and *equipment shall be designed and constructed to permit ready access to all parts for inspection, maintenance, operation, and repair* without disturbance of other structure or equipment....

(Emphasis added) (exh. G-3 at 202-1)

5-147. As part of the LVA system under Item 513, SECO was required to install two extended nine-foot lineup light bars at the stern of the vessel. The lineup bars with lights were used to provide helicopter pilots orientation for landing when the helicopter approached the vessel from the rear (tr. 24/45, 68).

5-148. The LVA equipment was required to be installed in accordance with the requirements of Reference 1 through 30 of Item 513. Reference 2 was "NAVAIRSYSCOM (NAEC 91122)—Air Capable Ship Aviation Facilities." Paragraph 12.4.6.2, "AFT EXTENDED LINEUP LIGHTS (RED)" provided as follows:

A vertical drop-line light bar assembly shall be installed aft and extended below the flight deck level. When mounted outside a ship's hull, the light bar assembly *may* be portable. The light bar requires a single step-down transformer which shall be wired to a dimmer control.

(App. supp. R4, tab 120, exhibit No. 4)

5-149. Six evenly spaced low voltage lights were mounted on a steel channel which was mounted on a steel foundation hung vertically down from the end of the helicopter deck (tr. 24/27). The low voltage sealed beam lights normally last for a year (tr. 24/127-28).

5-150. SECO installed the lineup light bars in late January or early February 1985 (tr. 24/28). As originally installed, the lineup light bars were not "portable." Portability means that the light bars were built so that they were moveable in themselves (tr. 24/30).

5-151. The Assistant CONREP directed SECO to make the lineup light bars portable (tr. 24/33). To render the lineup light bars portable, SECO plug-welded the existing holes, mounted the lights on a 10-foot aluminum channel, and milled a "long slot" on both sides of the channel. This permitted the aluminum channel to slide up and tilt-over over the top of the helicopter deck. (Tr. 24/37-38) This modification took about a week to accomplish (tr. 24/39).

5-152. SECO conceded that the lineup lights of the light bars must be accessible. In this case, SECO took the position that access by ladders, doors, manholes, scuttles or bolted plates was not feasible (tr. 24/107).

5-153. SECO took the position however, that its original lineup bar installation did provide ready access. According to SECO, for the first three lights on the bars, one could reach them by jumping into the safety net around the helicopter deck. With respect to the next three lights, they are accessible by means of a boatswain's chair. (Tr. 24/67) On the SPICA, the safety net was installed some 40 to 50 feet above water (tr. 24/67). The safety net was not designed for the purpose of allowing the ship's force to maintain the lineup lights.

5-154. A boatswain's chair is a wooden seat suspended over the side of a ship by ropes. It is used for "reaching difficult areas over the side of a ship for work, repair maintenance, painting." (Tr. 24/128)

5-155. Based on the evidence in the record, we do not find that a boatswain's chair provided ready access to the lights on the lineup bars. Using a boatswain's chair is usually "a two to three men operation." Men have to put on safety harnesses. (Tr. 24/71, 74) With a portable lineup bar, burnt-out bulbs can be changed in 20 minutes; using a boatswain's chair would take "[p]robably an hour" (tr. 24/82). There is also some question as to whether a boatswain's chair can be used safely when the ship is underway (tr. 24/36).

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5-156. SECO provided no boatswain's chair as part of the lineup light bars. According to the Government, even if a boatswain's chair was provided, access to the lineup bars still could not be readily obtained because the boatswain's chair would have to be set up (tr. 24/62).

5-157. SECO estimated that it incurred over 300 labor hours and $450 in material costs in rendering the lineup light bars portable (app. supp. R4, tab 120).

LVA Government Furnished Equipment (GFE)

5-158. Item 110 of the SPICA specifications pertained to "RECEIPT, CARE AND HANDLING OF GOVERNMENT FURNISHED MATERIAL." Item 110.B. provided in part:

B. *RECEIPT OF MATERIAL*

* * *

2. The Contractor shall inspect the GFM at the time of receipt and note any damage or other adverse condition. The Contractor shall notify the COMSC CONREP immediately of any observed damage.

* * *

F. *REPORTS*

* * *

3. *Damage Report*

a. Any damage to GFM in the Contractor's care shall be immediately reported to the COMSC CONREP for joint survey.

b. The Contractor shall prepare a damage report outlining the damage conditions which led to the damage, and the proposed method of repair. Concurrence of the COMSC CONREP is required prior to initiation of recommended repairs.

* * *

(Exh. G-3 at 110-1 and 3)

5-159. We find that Item 110 did not require SECO to conduct any tests upon receipt of the GFE to ascertain whether there was any internal damage to the equipment not readily observable.

5-160. For Item 513 (LVA), Item 110 listed 27 items of GFE. This REA concerned four of the items:

* * *

	QTY
8. Motor Driven Variable XFMR, 22 amperes	2
9. Motor Driven Variable XFMR, 10 amperes	5
* * *	
11. Glide Scope Indicator System Kit (Automatic Bus Transfer or ABT)	1
* * *	
13. Flash Sequencer	1

* * *

(Exh. G-3 at 110-6 and 7)

5-161. The evidence showed that the foregoing GFE was kept in SECO's "receiving cage" and delivered to the vessel when needed (tr. 24/136). SECO's electrical leadman involved in the installation of the GFE testified that he first saw the GFE when it landed on the flight deck. The GFE were in shipping crates and on pallets. No damage to the shipping crates was observed. During installation of the GFE in question, no damage to the exterior of the equipment was observed. (Tr. 24/132-33)

5-162. SECO began installing the LVA system in January 1985 (tr. 24/92-93). No tests of the GFE were conducted until SECO was "lighting off things" in March 1985 when installation of the LVA system was completed (tr. 24/93, 149).

5-163. Upon testing of the entire LVA system, SECO found that the system did not work. Troubleshooting isolated the problem to (1) the flash sequencer, (2) three of the seven motor-driven variable transformers (or VARIACs for short), and (3) the Automatic Bus Transfer (ABT) of the Glide Scope Indicator. (Tr. 24/41)

5-164. The lineup lights were flashing out of sequence. SECO traced the problem to the flash sequencer (tr. 24/131). SECO found wires disengaged from the switches and wired to the "wrong locations on terminal boards" (tr. 24/148).

5-165. With respect to the VARIACs, SECO found that the motors would not turn. Consequently, SECO had "no control over dimming the lights" (tr. 24/131).

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5-166. With respect to the ABT, SECO found internal wiring problems which caused the transformer not to switch to emergency power upon loss of power (tr. 24/96, 132).

5-167. When the Assistant CONREP was told about the defective GFE, he took the position that it was SECO's responsibility to repair them (tr. 24/40).

5-168. The Government offered no proof that SECO failed to install the GFE components properly.

5-169. Repairs to the defective GFE were accomplished in March 1985 (tr. 24/41, 133). Based upon information furnished to him, SECO's Contract Administrator estimated that 40 electrician hours would have been consumed in repairing each of the 3 defective GFE's. In addition, it was estimated that SECO spent 40 electrician hours to troubleshoot and isolate the LVA problems to the GFE in question. (Exh. A-68) The Government did not challenge the reasonableness of the hours claimed. We find that SECO had incurred $5,600 ($34 × 160 hours) in labor costs in repairing the GFE.

5-170. SECO also claimed $150 in material costs. As in other cases, SECO provided no supporting invoices or shop chits (exh. A-68).

5-171. By letter dated 6 June 1986, SECO submitted a claim, in the amount of $62,099, designated as REA No. 120. SECO contended that it was entitled to an equitable adjustment for (1) relocating 10 deck edge lights, (2) modifying the extended lineup light bars for portability, and (3) repairing defective GFE to render the VLA system operable. (App. supp. R4, tab 120) SECO counsel stated at the hearing that there was no project impact associated with REA No. 120 (tr. 24/7). The contracting officer never issued a decision. REA No. 120 was appealed under the same circumstances as other REAs already discussed. SECO subsequently revised its claim to $50,692 (exh. A-68).

DECISION

The Deck Edge Light Relocation Claim

There is no dispute that the SPICA specifications required SECO to install deck edge lights in accordance with NAEC Drawing 1927. NAEC Drawing 1927 was not a generic drawing but one drawn specifically for the SIRIUS-class vessel to which the SPICA belonged. Furthermore, deck edge light locations could be determined longitudinally by reference to NAEC Drawing 1927.

SECO used NAEC Drawing 1927 to fix the locations of 13 deck edge lights. When installation was 90 percent complete, the MSC Assistant CONREP directed SECO to relocate 10 of the deck edge lights. The evidence shows that a NAEC inspector had determined that the deck edge light locations shown in NAEC Drawing 1927 were incorrect. SECO subsequently received from MSC a new drawing. SECO relocated 10 of the lights by six to eight inches either fore or aft from their previously installed locations.

Neither the Assistant CONREP nor the NAEC inspector testified at the hearing of this REA. We are left with no explanations as to what was wrong with NAEC Drawing 1927 which the specifications specifically directed SECO to follow.

Without such explanation, we conclude that the Government constructively changed the contract when it directed SECO to relocate a number of the installed edge lights so that it could receive NAEC certification of the helicopter deck.

We are not persuaded by the Government's argument to the effect that, had SECO prepared working drawings, it could have avoided the light location problems. While a shop drawing might show additional installation details, there is no showing that it could have corrected the alleged fore-and-aft dimension errors in NAEC Drawing 1927. We note that the Assistant CONREP for MSC had maintained that the correct edge light locations were shown in NAEC Drawing 1927. Moreover, there was no requirement that NAEC approve any edge light working drawings even if they had been prepared.

We conclude that clear proof of injury exists, and the evidence is sufficient for us to make a reasonable and fair approximation of the damages. *Dawco Const., Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 882 (Fed. Cir. 1991); *Service Engineering Co.*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,112.

We have no problems with the labor hours (230) estimated to have been incurred by the various support trades. We have found 480 electrician hours reasonable. We conclude that SECO is entitled to an equitable adjustment of $23,936 ($34 × 704 hours) in labor costs for having been required to relocate 10 deck edge lights and their associated electrical components. (See findings 5-141 to -142)

SECO's material costs of $1,560 are not supported by invoices or shop chits. In accordance with our holding in *Service Engineer-*

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ing Co., ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,112, SECO's claim for material costs is denied. SECO's claim for overtime hours is also denied for lack of support.

The Extended Lineup Light Bars Modification Claim

SECO was required to modify the lineup light bars to make them portable so that there would be ready access to change the lights when necessary. Item 213 of the specifications required all electrical equipment to be located so as to be "readily accessible for repair and removal" (finding 5-145). Item 202 required equipment to be designed and constructed to "permit ready access" (finding 5-146).

SECO contends that there was nothing in Item 513, of which the installation of the extended lineup light bars was a part, that required compliance with Items 202 and 213. We have rejected the same argument SECO raised in the past, and we reject it now. We have said in our first SECO decision that the requirements of a contract must be determined from a reading of the contract as a whole. *Service Engineering Co.*, ASBCA No. 40272, 92-3 BCA ¶ 25,106 at 125,182. Furthermore, even though Item 513 did not specifically refer to Item 202 or 213, Item 101.D.1.b. stated in no uncertain terms that Section 200 (which included Items 202 and 213) set out the minimum requirements "to be followed for all work covered by this Specification."

SECO argues next that, in any event, there was ready access to change the lights of the lineup bars as originally installed. SECO argues that ready access is obtainable by using a boatswain's chair. We do not agree. The evidence shows that using a boatswain's chair would be a "two to three men operation," requires set up and takes an hour to change the lights. In our view, such a procedure did not meet the requirement of ready access.

We conclude that the Government did not constructively change the contract requirement by requiring SECO to modify the extended lineup light bars to make them portable, and thereby provide ready access for maintenance. Accordingly, SECO's claim arising out of the modification of the extended lineup light bars is denied.

The Defective GFE Claim

Based on the evidence in the record, we conclude that the (1) flash sequencer, (2) the VARIAC transformers and (3) the ABT of the Glide Scope Indicator were defective. Therefore, we hold that SECO is entitled to an equitable adjustment for repairing the defective GFE. We have so held in connection with REA No. 19 (A/C units in the helicopter support spaces). *Service Engineering Co.*, ASBCA No. 40272, 93-1 BCA ¶ 25,520.

We conclude that clear proof of injury exists, and the evidence is sufficient to make a reasonable and fair approximation of the damages. *Dawco Const., Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 882 (Fed. Cir. 1991); *Service Engineering Co.*, ASBCA No. 40272, 93-1 BCA ¶ 25,520 at 127,112.

We conclude that SECO is entitled to $5,600 ($34 × 160 hours) for troubleshooting and repairing the defective GFE. SECO's claim for material costs is denied.

Summary

Under REA No. 120, SECO is entitled to $32,490 computed as follows:

Relocating Deck Edge Lights	$23,936
Repairing GFE	5,600
Subtotal	$29,536
Profit at 10 percent	2,954
Amount due SECO on REA No. 120	$32,490

As for REA No. 120, SECO is entitled to $32,490, plus CDA interest running from 9 June 1986 until paid.

FINDINGS OF FACT

REA No. 105

5-172. Item 505 of the SPICA specifications required SECO to install a Type F Wind Direction and Speed Indicator (wind speed indicator). The wind speed indicator was listed as part of the GFE MSC was to furnish. (Exh. G-3 at 505-2) The wind speed indicator was to be installed on top of the helicopter control room and hooked into an existing British system (tr. 26/4).

5-173. Before the SPICA was delivered to SECO in September 1984, SECO was advised by Rosenblatt that the GFE specified was not compatible with the existing British wind speed indicator system (tr. 26/4).

5-174. By CIR No. 202, SECO recommended to MSC that the existing indicator

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be "reinstalled in the new helo control RM and reconnected as existing" (app. supp. R4, exhibit No. 2).

5-175. MSC did not respond to CIR No. 202. Instead, it issued W/S No. 505-084 (W/S No. 084). W/S No. 084 required SECO to "furnish" and install a "Wind, Speed and Direction Indication System to accomodate [sic] Two Government Furnished Type 'F' Transmitters." SECO was told that the components required were available from Belfort Instrument Company. (App. supp. R4, exhibit No. 3)

5-176. SECO did not understand what MSC wanted in W/S No. 084. It provided MSC a sketch and asked MSC to clarify what was required (tr. 26/15).

5-177. According to MSC, W/S No. 084 was issued to correct the incompatibility between the British and American wind speed indicator systems, and require SECO to furnish and install an entire American wind speed indicator system (tr. 26/153). In addition, W/S No. 084 was issued because MSC could not locate its Government-furnished wind speed indicator components (tr. 26/154, 155).

5-178. Subsequently, SPICA's crew found the wind speed indicator components (tr. 26/154). As a result, on 5 October 1984, MSC issued W/S No. 097. W/S No. 097 cancelled W/S No. 084. W/S No. 097 required SECO to:

* * *

2. Install a Government Furnished Wind Direction and Speed Indicating System including (1) Type "F" Detector, (1) Transmitter, (2) Indicators and Contractor Furnished Selector Switch and Associated Cabling.

3. *Install the Detector IAW Item 505, in the same approximate location as the existing Detector.* Install the transmitter in the Pilot House. Install the indicators, one in the Pilot House and *one in the Helo Control House* IAW Guidance Dwg. T-AFS-9-800-4845709 [emphasis in original].

* * *

5. Retain the existing British WS&D Indicating System. Box off the heads to the Station #9 indicator and turn over the removed indicator to the Chief Engineer as spare.

(App. supp. R4, exhibit No. 4; tr. 26/18, 58)

5-179. A few days later, on 9 October 1984, MSC modified W/S No. 097, eliminating Paragraph 5 and replacing it with the Paragraph 6 which stated as follows:

6. Install Two 12" × 12" fixed windows in the FWD Bulkhead of the Control Room, Port and Starboard of the door and sufficiently high for the Operator to view the Helicopter during operations.

(App. supp. R4, exhibit No. 5; tr. 26/57, 58)

5-180. The parties reached agreement with respect to the price of W/S No. 097 on 23 October 1984 in the amount of $21,821 (app. supp. R4, tab 105.1; tr. 26/19). The parties' agreement was subsequently confirmed in writing on 7 November 1984 (app. supp. R4, tab 105.1; tr. 26/20).

5-181. At the time W/S No. 097 was negotiated and priced, MSC had not delivered the GFE wind speed indicator components (tr. 26/21). The GFE was delivered to SECO sometime in late November 1984 (tr. 26/22).

5-182. MSC delivered the GFE wind speed indicator components to SECO in November 1984. What SECO received consisted of (a) a 60 hertz detector; (b) a 400 hertz transmitter; and (c) two 60 hertz indicators. (Tr. 26/23, 25, 62, 105, 162) According to SECO, what should have been furnished by MSC was all 400 hertz equipment. MSC also did not furnish any technical manual for installation. (Tr. 26/23)

5-183. The CONREP stated that he would attempt to obtain the technical manual and instructed SECO to proceed to install the furnished equipment in the meantime (tr. 26/24).

5-184. By January 1985, it became clear to SECO that it could not install the wind speed indicator system to make it work (tr. 26/30). Around the third week of January, 1985, SECO decided to hire Golden State Marine, to install the wind speed indicator system. As of the third week of January, 1985, wiring of the wind speed indicator system was completed. The detector was mounted on the mast. The indicator was mounted in the pilot house. The transmitter was installed. (Tr. 26/31)

5-185. Shortly after SECO hired Golden State Marine, MSC furnished SECO a 400 hertz detector. No technical manual was furnished, however. (Tr. 26/32-33). After MSC furnished the 400 hertz detector, SECO had to remove the 60 hertz detector already installed on the yard arm and replace it with the 400 hertz detector (tr. 26/41). Part 2 of SECO's claim was for this replacement work. Welders and shipfitters were used in the replacement effort (tr. 26/5, 7, 40).

51-186. In February 1985, Golden State Marine wrote SECO seeking instructions as

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to how to electrically connect the wind speed indicator equipment furnished (tr. 26/35). MSC finally furnished a technical manual but took the position that proper electrical hook-up was SECO's responsibility. (Tr. 26/35) The manual, however, did not tell SECO how to connect a 400 hertz detector, a 400 hertz transmitter and a 60 hertz indicator (tr. 26/36).

5-187. As finally completed by Golden State Marine, there were two wind speed indicator systems installed aboard the SPICA: an American system consisting of entirely 400 hertz components, and a redundant 60 hertz British system (tr. 26/45-46).

5-188. After SECO and Golden State Marine installed the 400 hertz wind speed indicator system in March, 1985, they "still could not get a signal from the detector to the indicators" (tr. 26/41). After troubleshooting and investigating for 3 days, SECO found that the spline gear in the 400 hertz transmitter was inoperative (tr. 24/42, 87-88, 91).

5-189. The CONREP acknowledged that repairs to the spline gear were performed and took the position at the time that SECO should do whatever was necessary to render the wind speed indicator system operative (tr. 26/42). In mid-March 1985, SECO fabricated a new spline gear and installed it. The Government's expert acknowledged that the defect in the transmitter could not be discovered upon receipt of the GFE. (Tr. 26/40, 192)

5-190. It took SECO's electricians and machinists three to four days to repair the spline gear (tr. 26/89). It was necessary to get up on the mast of the vessel and check all connection points and tighten them (tr. 26/88).

5-191. On 24 April 1986, SECO submitted a $13,605 claim, designated as REA No. 105. The claim alleged that uncertainties and installation problems relating to the wind speed indicator resulted in extensive delay and disruption to SECO's contract performance. The claim further alleged that the GFE the Government furnished was defective resulting in additional troubleshooting and installation expenses. (App. supp. R4, tab 105) The contracting officer did not issue a decision. REA No. 105 was appealed under the same circumstances as other REAs.

5-192. At the hearing, SECO abandoned its delay and disruption impact claim (tr. 26/80-81). It refined its claim into 3 parts: (1) costs allegedly incurred in troubleshooting due to the lack of installation manual; (2) costs allegedly incurred in replacing the already installed 60 hertz equipment with 400 hertz equipment; and (3) costs allegedly incurred in troubleshooting and repairing the spline gear in the 400 hertz transmitter (tr. 26/5-8).

5-193. As in other REAs, SECO did not keep contemporaneous written records of the additional costs incurred. At the hearing, SECO revised its claim to $7,816. SECO estimated its claim by its contract administrator whom we have previously determined as an experienced and qualified estimator. The estimate was based upon his observation of the work completed and interviews with those who had first-hand knowledge (tr. 26/47).

5-194. Of the $7,816 claimed, SECO estimated that it incurred $50 in incidental material in fabricating the new spline gears (tr. 26/128). As in other REAs, the claim was not supported by invoice or shop chits.

5-195. SECO also claimed an estimated 47 labor hours in overtime. There is no evidence that SECO was working on the wind speed indicator specifically, only that the overtime was incurred during February 1985 when SECO's trades were working 10-hour days (tr. 26/126). We find insufficient support to allow overtime.

5-196. There is no dispute that SECO investigated and found a defective spline gear and subsequently repaired it. Thirty (30) machinist hours, 10 electrician hours and 2 quality control hours were estimated to have been incurred in repairing the defective spline gear. We find 40 labor hours would reasonably have been incurred in repairing the spline gear. There is no support for the quality control hours.

5-197. The Government contends that SECO could have connected 400 hertz wind speed detector equipment to 60 hertz equipment. This contention was not supported by the evidence in the record. The Government's expert conceded that "it is not usual for equipment to have input and output of different frequencies" (tr. 26/183). We find that the Government failed to furnish suitable GFE. In addition, we find that the Government also failed to furnish the proper installation manuals. These failures required SECO to spend labor hours troubleshooting the wind speed indicator system. SECO estimated that seven or eight days total was spent in researching the problem and attempting to hook up the wind speed indicator. The evidence also showed that SECO's electricians worked in pairs.

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(Tr. 26/124) In light of the foregoing evidence, we find that SECO reasonably estimated that 120 labor hours would have been incurred in troubleshooting and trying to make the wind speed indicator system work. The 120 labor hours included the time required by welders, shipfitters and electricians in changing out the 60 hertz detector on the mast.

5-198. The Government contends that SECO's claims in REA 105 were released by a bilateral modification—JOM No. 4 (Gov't. br. at 31). The work described in W/S No. 097 and a number of other work statements were subsequently definitized and settled by a bilateral modification—JOM No. 4. JOM No. 4, dated 29 November 1984, contained the following standard Navy release clause:

* * *

> The change in delivery dates, price, or cost and fixed fee described above is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims arising out of this modification and any other modification or change orders indicated above, including all claims for delays and disruption resulting from, caused by, incident to such modifications or change orders.

(Exh. G-169 at tab 4)

DECISION

The specifications required SECO to install a GFE wind speed indicator. MSC could not find the GFE components and issued W/S No. 084 requiring SECO to furnish and install a wind speed indicator system. MSC subsequently located the GFE wind speed indicator components and issued W/S No. 097 to cancel W/S No. 084.

MSC furnished a mixture of 60 hertz and 400 hertz wind speed indicator equipment. MSC also failed to furnish a technical installation manual. As a result, SECO experienced difficulty in connecting the wind speed indicator components. It expended labor hours in trouble-shooting and investigating ways to make the system work.

In REA No. 105, SECO claimed the costs of (1) attempting to hook up the incompatible wind speed indicator components furnished by MSC; (2) replacing a 60 hertz indicator already installed on the mast of the vessel with a 400 hertz indicator; and (3) repairing the spline gear in the 400 hertz transmitter.

The Government contends that 400 hertz equipment could have been connected to 60 hertz equipment. Based upon the evidence in the record, we have rejected this contention. (Finding 5-197)

The Government contends next that SECO's claims are now barred by release, pointing to the standard Navy release clause contained in a bilateral modification—JOM No. 4. We have found that at the time the parties agreed upon price with respect to W/S No. 097 in late October and early November 1984, the Government had not delivered the GFE. The GFE was delivered in late November 1984. (Findings 5-180, -181) Meanwhile, JOM No. 4 was executed by the parties at about the same time, 29 November 1984 (finding 5-198). The problem of equipment incompatibility did not surface until January and February 1985. Thus, at the time the parties executed JOM No. 4, SECO did not know that the GFE MSC promised to deliver would be a mixture of 60 and 400 hertz components and incompatible with each other. Inasmuch as MSC did not deliver its part of the bargain, we conclude that SECOs claim was not barred by release.

We conclude that, as a result of the unsuitable and defective GFE (including spline gear) furnished, SECO suffered financial injury and the evidence is sufficient for us to make a reasonable and fair approximation of the damages. *Dawco Const., Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 882 (Fed. Cir. 1991); *Service Engineering Co.*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,112.

In accordance with our prior holding in *Service Engineering Co.*, ASBCA No. 40274, 93-1 BCA ¶ 25,520 at 127,112, we conclude that SECO is not entitled to recover unsupported material costs and overtime (findings 5-194, 195).

We conclude that SECO is entitled to recover 120 labor hours for attempting to install incompatible wind speed indicator equipment and for replacing the already installed 60 hertz indicator with the 400 hertz indicator (finding 5-197). We conclude also that SECO is entitled to 40 labor hours for repairing the spline gear (finding 5-196).

At $34 per labor hour, we conclude SECO is entitled to $5,984, plus CDA interest running from 28 April 1986, computed as follows:

160 hrs × $34	=	$5,440
Profit at 10%	=	544
Total		$5,984

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CONCLUSION

As for REA No. 8, SECO is entitled to $18,102, plus CDA interest running from 1 November 1985 until paid.

The claim which is the subject of REA No. 121 is denied.

The claims which are the subject of REA No. 115 are denied.

As for REA No. 6, SECO is entitled to $1,258 plus CDA interest running from 1 November 1985 until paid.

The claim which is the subject of REA No. 24 is denied.

The claim which is the subject of REA No. 53 is denied.

As for REA No. 120, SECO is entitled to $32,490 plus CDA interest running from 9 June 1986 until paid.

As for REA No. 105, SECO is entitled to $5,984 plus CDA interest running from 28 April 1986 until paid.

[¶ 26,383] Bell-Boeing Joint Venture

ASBCA No. 39681, September 23, 1993. Contract No. N00019-83-C-0166.

Contract Disputes, Relief Available—Estoppel—Contractual Basis.—A contractor's claim for costs allegedly incurred as a result of its detrimental reliance upon a prior determination concerning compliance with Cost Accounting standards was not barred as a matter of law, because the claim was based on contract, not on statutory entitlement. Although the U.S. Supreme Court has held that equitable estoppel will not lie against the government for payment of money contrary to a statutory appropriation, the U.S. Court of Appeals for the Federal Circuit in *Burnside-Ott Aviation Training Center v. U.S.*, 38 CCF ¶ 76,479, refused to extend that decision to equitable estoppel claims based on contract.

For the appellant: Crowell & Moring, Washington, D.C., by Terry L. Albertson and Linda S. Bruggeman. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John A. Dietrich, Trial Attorney.

Before TING, RUBERRY, and SPECTOR, Administrative Judges.

Reconsideration denied for 93-2 BCA ¶ 25,791.

TING, Administrative Judge: The Government has moved for Senior Deciding Group reconsideration of the Board's decision of 27 May 1993. In that decision, the Board denied the Government's cross motion for summary judgment on the basis that Bell-Boeing might still be able to recover its FSD proposal preparation costs "if it could demonstrate that [it] reasonably relied to its detriment upon the 1981 CAS determination" *slip op.* at 14.

Citing *Office of Personnel Management v. Richmond,* 496 U.S. 414, 110 S. Ct. 2465, 110 L.Ed. 2d 387 (1990) ("OPM v. Richmond"), the Government contends that our decision was erroneous as a matter of law and contrary to the proposition that "estoppel does not lie in monetary claims against the Government because it would allow the Executive to usurp Congress' powers under the Appropriations clause" (motion at 2).

The Government (Navy) through the Department of Justice had unsuccessfully raised the same defense in *Burnside-Ott Aviation Training Center, Inc. v. United States* [38 CCF ¶ 76,479], 985 F.2d 1574 (Fed. Cir. 1993). In *Burnside-Ott,* the Federal Circuit reversed the Claims Court decision which had barred Burnside-Ott's equitable estoppel claim as a matter of law based on *OPM v. Richmond.*

In *Burnside-Ott,* the Federal Circuit refused to extend *OPM v. Richmond* to equitable estoppel claims based on contract. The Court stated:

> The Claims Court improperly relied on *Richmond* to conclude that Burnside-Ott's equitable estoppel claim is barred as a matter of law. In particular, the Claims Court erred in concluding that *Richmond* stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. The *Richmond* holding is not so broad. *Richmond* is limited to "claim[s] for the payment of money from the Public Treasury *contrary to a statutory appropriation.*" 496 U.S. at 424 (emphasis added). . . .
>
> * * *

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Burnside-Ott's assertion of a right to payment of money from the Public Treasury, however, is not based upon a statutory entitlement. Burnside-Ott's assertion is instead based upon its *contract* with the Navy. Nor does Burnside-Ott claim entitlement contrary to statutory eligibility criteria, as did *Richmond.* Thus, neither the holding nor analysis in *Richmond* is applicable in this case, and Burnside-Ott's equitable estoppel claim is not barred as a matter of law because of *Richmond.* Equitable estoppel may or may not apply in this case depending on facts yet to be established.

(Emphasis added) 985 F.2d at 1581

Bell-Boeing's claim in this case is based on contract, not statutory entitlement. Therefore, *Burnside-Ott* and not *OPM v. Richmond* applies here. We have recently followed *Burnside-Ott* in denying the Government's (Navy's) motion for summary judgment on the basis of issues relating to equitable estoppel. *See Thiokol Corporation Strategic Operations,* ASBCA No. 45348, 93-3 BCA ¶ 26,180 (decided 24 June 1993) *slip op.* at 4.

In light of the foregoing precedents, the Chairman has denied the Government's request for Senior Deciding Group review. The Government's motion for reconsideration is, for reasons stated, denied.

[¶ 26,384] Richards Construction Company

AGBCA No. 88-156-1, September 30, 1993. Contract No. 50-03R6-5-L0050.

Pricing of Adjustments—Proof—Reasonable Basis for Computation.—The government's contention that a contractor failed in its burden to prove damages was rejected because the contractor furnished the board with a reasonable basis for computation. The board found that it was reasonable to use the hourly rates negotiated between the parties as part of a modification for work for which it found the contractor to be entitled, and the hours claimed were obtained from time cards, daily diaries, and certified payrolls, which together constituted adequate proof of quantum. The contractor was not required to prove its damages with absolute certainty.

Contract Disputes, Interest—Starting Date—Adequacy of Claim.—Interest was payable on items for which the contractor requested a final decision from the date of a communication labeled an "invoice," because all the elements of a claim were present at that time. Two weeks prior to its request for a final decision, the contractor submitted a letter that included a list of the items that were in dispute. On the date of this "invoice," the disputed items were claims for purposes of the Contract Disputes Act because the contractor had asserted in writing with sufficient specificity a right to additional compensation, the government had disputed that right, and the contractor had communicated a desire for a contracting officer's decision.

Modifications—Reduction in Requirements or Prices—Delay in Giving Notice.— Although the government allegedly waited four days to notify the contractor that certain work was being deleted, a contract reduction was appropriate because the government is not required to pay for items deleted from the contract. The contractor did not challenge the reasonableness of the amount of the deduction. The four-day delay, which included a weekend, did not amount to an unreasonable suspension of work for which the contractor should be compensated.

Modifications—Changes—Contractor's Request.—The government was not responsible for the costs of tree trimming, because tree trimming was not a performance element or required for performance of a contract, but it was done for the contractor's convenience to expedite progress and to protect its equipment. The contractor did not show that work could not progress with tree limbs present. Although the government was not obligated to trim the trees, it gave permission to the contractor to trim the trees itself.

Modifications—Authority of Government Agents—Government Inspectors.—The government was not bound by an inspector's request to modify a Forest Service contract, because only the contracting officer was authorized to make changes to the contract. The record indicates that the inspector believed the change was necessary, but the

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contractor failed to show that the inspector was authorized to make changes. The contractor also failed to show that the contracting officer required the change or ratified the inspector's direction.

Delay—Causation—Contractor's Error.—A contractor was not entitled to the costs of a four-hour delay, because the delay was necessary to discuss construction of a trail head that did not meet specifications. The contractor would have encountered the delay caused by the discussion in any event and was not entitled to further compensation.

Modifications—Changes—Notice to Contractor.—A contractor was entitled to compensation for unproductive time because the government changed the contract and failed to inform the contractor of the changes or to provide copies of the new plans before the contractor began work. In a contract for the construction of a trail head, the government alleged that the contractor could not have been delayed, because the first item of work was to compact and test the subgrade, and the contractor had not begun that work. However, the stakes did not match the plans in the contractor's possession, indicating that the contractor was prevented from starting to compact the subgrade or from doing other than preliminary tasks.

Modifications—Bar to Claims—Accord and Satisfaction.—A modification did not act as a bar to a contractor's claim for delay costs, because the evidence showed that the parties did not intend for the modification to cover the costs associated with the delay and wasted costs for work performed prior to the issuance of new plans. In order to find accord and satisfaction, there must be agreement between the parties in satisfaction of a claim that is in dispute. The test to be applied is the objective manifestation of intent. In this case, by its terms, the modification covered new plans but did not identify work the contractor had performed under the original plans; there was no reference in the modification to delay or wasted costs, the contractor continued to press the claim, and the government continued to consider it, even after execution of the modification.

Modifications—Constructive Changes—Order to Correct Deficiency.—A government requirement that a contractor patch holes for a second time on campground surfaces was not a constructive change, because the contract was clear in stating that patching was required prior to applying a bituminous surface treatment and that the contractor had first patched the campground more than a month prior to the application of the treatment. The government did not direct the timing of the patching, and under the terms of the contract, the contractor was responsible for the work until final acceptance. There was no basis on which to conclude that the second round of patching was extra work for which the contractor should be compensated.

Modifications—Changes—Contractor's Request.—The government was not responsible for the costs of applying sand on a campground, even though the application was not required by the contract, because the government did not require the contractor to apply sand, but rather it allowed the contractor to apply sand to expedite progress. Five days were necessary for curing the prime coat before the application of a bituminous surface treatment; the contractor wanted to place the surface treatment four days after the application of the prime coat. In order to allow the contractor to do so, the inspector required the application of sand to cover areas of the prime coat that were not completely cured.

Site Conditions—Contract Indications, Category I—Reliance.—A contractor reasonably relied on plans indicating that the narrowest roads in a campground were 14 feet wide, because it was not apparent from a site visit and in preliminary work that concrete posts lining many of the roads were too close together to allow equipment to pass between them. The contractor was entitled to compensation for post removal and for the extra work and delay caused by the errors in the plans regarding road width, including equipment and delay time for the paving equipment, and for overhead and profit based on agreed equipment rates and job records.

Modifications—Constructive Changes—Refusal to Approve.—The use of high-pressure washing to prepare campgrounds for a new bituminous surface treatment layer was beyond the minimum standards demanded by the terms of the contract and constituted a

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constructive change. Although the government averred that no constructive change occurred, because the contracting officer's representative did not order the extra work, the COR's refusal to approve the surface for the application of the new surface treatment until the contractor used the high-pressure washing in effect constituted a direction to use that method. The imposition of this standard for cleaning the surface was not required by the contract or normally used in jobs of similar character and thus entitled the contractor to compensation. The government's contention that the contractor should have performed the work in a more efficient manner was also rejected because the government presented no evidence that an alternative method would have resulted in lower costs.

Pricing of Adjustments—Actual Costs—Contractually Required Element.—The costs of using a power broom were excluded from a price adjustment for a contractor's extra costs of meeting a standard beyond contract obligations in preparing a surface for a new bituminous treatment, because the contractor failed to show that its brooming costs were not required by the contract. Under a contract to repair campgrounds and trails, the government improperly refused to accept the contractor's preparation of a campground surface until the contractor cleaned the surface by pressure washing. The contractor included the costs of brooming the surface as part of its costs for extra work resulting from the government's improper requirement. However, the contract obligated the contractor to remove loose dirt and other material.

Performance—Specifications—Adequacy.—The absence of a construction tolerance class for the construction of a road did not entitle a contractor to compensation, because the lack of a tolerance did not require the contractor to expend extra effort. A contract for the repair of campgrounds and trails required only reasonably close conformity to drawings because working tolerances were not specified. The contract specified that the work and the materials were required to be in reasonably close conformity with lines, grades, cross sections, dimensions, and material requirements shown on the drawings. Although the contractor alleged that it was necessary to work to a closer tolerance than might have been required, the one example cited demonstrated that the government accepted a road meeting the most lenient tolerance, even though it deviated from the stakes by as much as three feet.

For the appellant: Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana, by Dennis E. Lind. For the government: Marcus R. Wah, Office of the General Counsel, U.S. Department of Agriculture, Missoula, Montana.

Before SETO, EATON, and DOHERTY, Administrative Judges.

SETO, Administrative Judge: This appeal arose under Forest Service, U.S. Department of Agriculture (USDA) contract No. 50-03R6-5-L0050, the Seeley Lake Chip Seal, on the Lolo National Forest in Montana. The Forest Service awarded the contract to Richards Construction Company (Appellant) on September 16, 1985, in the amount of $138,888.60.

During performance of the contract Appellant claimed entitlement to several items of additional compensation because of changed conditions and extra work. These items were the subject of claims in September of 1986 and February of 1987, totalling $44,329.73. The claims included:

Deleted Brooming	$ 1,082.00
Tree Trimming	1,000.35
Construction of Kellyhump	345.60
Morrell Falls Trailhead Delay	1,177.20
Morrell Falls Trailhead Unproductive Time	5,011.20
Patching, Big Larch Campground	1,113.75
Blotter Material	864.00
Post Removal, Seeley Lake Campground	2,134.62
Additional Cleaning, Big Larch Campground	23,801.38
Dumpster Aprons	845.78
Obstructions in Subgrade	3,072.60
Tolerance	2,953.80
Sorting Garbage from Borrow Pit	927.45
Total	$44,329.73

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The Contracting Officer (CO) denied all the claims in a letter dated December 10, 1987.

A hearing was held on this appeal in Missoula, Montana, on October 27-28, 1992. The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

The Board has substantially adopted the opinion of its Chief Counsel, M. C. Shager.

FINDINGS OF FACT—BACKGROUND, QUANTUM, AND INTEREST

1. The Forest Service awarded contract No. 50-03R6-5-L0050 to Appellant on September 16, 1985, in the amount of $138,888.60 (Appeal File (AF) D-30). The contract covered the Seeley Lake Chip Seal on the Lolo National Forest in Montana (AF D-29), and consisted of roadbed reconditioning, aggregate base course, and bituminous surface treatment (BST, also known as "chip seal") at Big Larch Campground, Seeley Lake Campground, and the Seeley Lake Ranger Station, and trailhead road loop and parking construction at the Morrell Falls Trailhead (AF D-33). The contract required the contractor to begin performance within 10 calendar days after receiving the Notice to Proceed and to complete performance within 340 calendar days (AF D-29, 57). The Forest Service modified the contract five times. The final contract value, after modifications, was $156,073.78. (AF D-1 through D-25.)

2. The contract incorporated *Forest Service Standard Specifications for Construction of Roads and Bridges* (1979 edition) (*Standard Specifications*) by reference (AF D-35). The contract contained the SUSPENSION OF WORK (Federal Acquisition Regulation, 48 C.F.R. (FAR) 52.212-12), DIFFERING SITE CONDITIONS (FAR 52.236-2), SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (FAR 52.236-3), PERMITS AND RESPONSIBILITIES (FAR 52.236-7), and CHANGES (FAR 52.243-4) clauses (AF D-57, D-63, D-64, D-65, D-68).

3. The contract was substantially complete on July 2, 1986 (AF E-45). Final acceptance occurred on July 10, 1986 (AF E-46). Appellant expended extra effort so that the campgrounds would be usable for the July 4 holiday (Transcript (Tr.) 64-65).[1]

4. As a part of the negotiation of Modification No. 2, the CO and Appellant negotiated and agreed to the proper rates of compensation to be used for eguipment and for overhead and profit. The CO evaluated Appellant's costs in arriving at these agreed rates. The parties agreed to a figure of 35 percent for overhead and profit based on Appellant's cash statement of operation for the year ending November 30, 1985. The CO agreed to an overhead rate higher than customary because there was no separate allowance for a supervisor on the job. (AF D-13 through D-21; Tr. 266-67.) The hourly amounts that Appellant used in presenting its claim were the figures for eguipment and overhead and profit that had been negotiated with the Forest Service for Modification No. 2 (Tr. 246). In determining the exact figures for each claim, Appellant used its daily logs, time cards, and certified payrolls to arrive at the hours expended on the activities (Tr. 91-92; Appellant's (App.) Exhibit (Ex.) 3, 4).

5. On several occasions during performance of the contract, Appellant claimed entitlement to compensation for extra work (AF F-2, F-6, F-7, F-11, F-14, F-15, F-17 through F-19). The Forest Service explicitly disputed aspects of these claims (AF F-6, F-7; *see* Findings of Fact (FF) 25, 27, *infra*). On September 8, 1986, Appellant presented the Forest Service with an "invoice" requesting compensation for these disputed items of additional work, *i.e.*, tree trimming, Morrell Falls Trailhead delay, Morrell Falls Trailhead unproductive time, patching, blotter material, post removal, and additional cleaning at Big Larch Campground[2] (AF B-9). On September 21, 1986, Appellant requested a CO's decision on the invoice (AF F-20). The CO denied compensation for all the items in a letter dated September 26, 1986. The letter was not designated a CO's final decision. (AF F-21, F-22.) After several meetings at which the parties further discussed payment for the extra work, and which resulted in no resolution, Appellant submitted a claim dated February 2, 1987 (AF C-14).

[1] The contract required the campgrounds to be completed by July 2 (AF D-57). The extra cleaning required on the Big Larch Campground, however, necessitated the extra effort to meet this deadline. *See* Discussion of Additional Cleaning, Big Larch Campground, *infra*.

[2] The invoice requested compensation for other items as well. The Forest Service subsequently paid Appellant for these other items, and they are not at issue here.

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The February claim included:[3]

Deleted Brooming	$ 1,082.00
Tree Trimming	1,000.35
Construction of Kellyhump	345.60
Morrell Falls Trailhead Delay	1,177.20
Morrell Falls Trailhead Unproductive Time	5,011.20
Patching, Big Larch Campground	1,113.75
Blotter Material	864.00
Post Removal, Seeley Lake Campground	2,134.62
Additional Cleaning, Big Larch Campground	23,801.38
Dumpster Aprons	845.78
Obstructions in Subgrade	3,072.60
Tolerance	2,953.80
Sorting Garbage from Borrow Pit	927.45
Total	$44,329.73

(AF B-1 through B-8.)

The CO denied compensation for every item in Appellant's claim on December 10, 1987 (AF C-1). Appellant filed its appeal on January 26, 1988 (AF B-1). Although not in chronological order, the Board will address Appellant's claims in the same order Appellant presented them.

DISCUSSION—BACKGROUND, QUANTUM, AND INTEREST

The Government alleges that even if the Board finds entitlement in this case, Appellant has completely failed in its burden to prove damages. The Government cites *Wunderlich Contracting Co. v. United States* [11 CCF ¶ 80,069], 173 Ct. Cl. 180, 351 F.2d 956 (1965) for the proposition that Appellant bears the burden of proof. The Board agrees that Appellant bears the burden of proving quantum, but notes as well that the court in *Wunderlich* stated:

> A claimant need not prove (its) damages with absolute certainty or mathematical exactitude. It is sufficient if [it] furnishes the court with a reasonable basis for computation, even though the result is only approximate.

Wunderlich, 173 Ct. Cl. at 199, 351 F.2d at 968 (citations omitted).

The Government here complains that Appellant's claimed amounts are mere allegations without proof. In Modification No. 2, however, the parties negotiated the hourly rates for equipment to be used for compensating Appellant for extra work, as well as overhead and profit. The Board finds it reasonable to use these figures for any additional work for which the Board finds entitlement. Appellant obtained the hours claimed for the various items from its time cards, daily diaries, and certified payrolls (FF 4). The Board finds this to constitute adequate proof of quantum.

Appellant requested interest on its claims from September 8, 1986. The Board thus addresses when the "claim" was filed for purposes of the CDA. Some of the items included in Appellant's letter of September 8, 1986 were disputed at the time of that letter, *i.e.,* tree trimming, Morrell Falls Trailhead delay, Morrell Falls Trailhead unproductive time, patching, blotter material, post removal, and additional cleaning at Big Larch Campground (FF 5).

Appellant requested a final decision less than 2 weeks later. Notwithstanding the fact that Appellant labeled the communication an "invoice," the Board finds that these disputed items were the subject of a CDA claim on September 21, 1986, when Appellant requested a final decision, because all the elements of a claim were present at that time. *See generallv Transamerica Ins. Corp. v. United States* [38 CCF ¶ 76,374], 973 F.2d 1572 (Fed. Cir. 1992) (the elements of a CDA claim are (1) the contractor has asserted in writing with sufficient specificity a right to additional compensation, (2) the Government has disputed that right, and (3) the contractor has communicated a desire for a CO's decision). The remaining items were not in dispute and made the subject of a written demand for a sum certain until Appellant's letter of February 2, 1987;[4] they became the subject of a CDA claim on that date.

[3] *See* note 2, *supra.*

[4] The claim items from the September 8, 1986 claim were restated in this letter because the CO consistently refused to pay them.

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FINDINGS OF FACT—DELETED BROOMING AT SEELEY LAKE AND BIG LARCH CAMPGROUNDS

6. *Standard Specifications* Section 410.09 requires final brooming of the entire BST surface after the end of the maintenance (application) period to remove "excess aggregate."

7. Final brooming was not a line item in Appellant's contract (AF D-31, 32).

8. In areas where traffic will proceed at low speed, it is less important to perform a final brooming because low speed traffic is not likely to throw the excess aggregate up on the windshields of following traffic. In addition, final brooming will remove some of the desired aggregate. (Tr. 97.)

9. The weather was wet after the completion of the chip seal application at the Seeley Lake and Big Larch Campgrounds, which resulted in longer than usual curing time. Appellant began to perform final brooming in these areas, but the less-than-complete curing would have resulted in damage to the BST surface if brooming had continued. (Tr. 97.)

10. As stated above (FF 3), the contract was substantially complete on July 2, 1986 (AF E-45). On July 10, 1986, the Forest Service decided to wait until the following Monday, July 14, 1986, to determine whether to delete the final brooming (AF E-46, 47). Appellant was required to keep the broom available until the Forest Service made its decision (Tr. 99-100).

11. The Forest Service determined that excess aggregate was not a problem because of the low-speed traffic, and instructed Appellant not to perform the final brooming. The Forest Service thus deducted $1,082 from Appellant's final payment, the amount it estimated this operation would have cost. (Ex. 1 to App. Complaint; AF C-8.) The Government estimated that this work would take 8 hours (AF C-61). Appellant's subcontractor owned the broom. Appellant paid for this extra possession of the broom. (Tr. 99-100.) Appellant did not provide information on this cost, but was willing to be repaid the amount deducted from the final contract payment.

DISCUSSION—DELETED BROOMING AT SEELEY LAKE AND BIG LARCH CAMPGROUNDS

The Forest Service need not pay for items deleted from the contract. *Porshia Alexander of Am.*, GSBCA No. 9604, 91-1 BCA ¶ 23,657. The contract deduction was thus appropriate. Appellant did not challenge the reasonableness of the amount of the deduction, but rather claimed that no deduction should be allowed because the Forest Service waited 4 days to notify it that the brooming was deleted. In these circumstances, mere delay in deleting the brooming does not negate the appropriateness of the deduction for work not performed.

The Forest Service delay in deleting the brooming, which included a weekend, does not rise to an unreasonable suspension of work for which Appellant should be compensated. This is especially true where wet conditions required the Forest Service to take additional time to make this decision (FF 9). This delay, therefore, does not require compensation. In addition, Appellant's willingness to settle for the amount the Forest Service deducted from the contract price does not provide an adequate measure of the damages Appellant sustained from the suspension.

The claim is denied.

FINDINGS OF FACT—TREE TRIMMING

12. Contract provision C-16(a) stated:

> The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place.

(AF D-66.)

13. On May 7, 1986, Appellant expressed concern to the Forest Service that the branches of several trees were hanging over the road in the Seeley Lake Campground and obstructing its equipment. Although the inspector did not necessarily agree that the branches constituted an obstruction, the Forest Service offered to remove the offending branches if Appellant flagged them. (Ex. 3 to App. Complaint; AF E-7.)

14. The Forest Service did not cut the branches, but gave Appellant permission to cut them itself, which it did (Tr. 107-108, 249). Appellant claimed $1,000.35 for trimming the trees, which consisted of 3 hours of grader time, 6 hours of loader time, 6 hours for a saw, and 6 hours of labor. Appellant included the grader time because it had to avoid the branches and then redo those areas (Tr. 108-109).

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DISCUSSION—TREE TRIMMING

Trimming the trees was not a performance element or required for performance of this contract; Appellant requested that the trees be trimmed for its convenience to expedite its progress and to protect its equipment.[5] Appellant has not shown that work could not progress in the presence of the tree limbs. The Forest Service was thus not obligated to trim the trees, but gave Appellant permission to trim the trees itself. Because trimming the trees was not necessary for contract performance, the Forest Service is not responsible for these costs.

The claim is denied.

FINDINGS OF FACT—CONSTRUCTION OF KELLYHUMP

15. The contract called for the portion of the road past the new trailhead at Morrell Falls to be obliterated by scarification to a depth of 2 inches and for grass to be planted (AF D-31, D-48; Tr. 111). Appellant placed Forest Service-provided reflectors at the end of the usable road to alert visitors that the old road was no longer to be used. Nevertheless, individuals continued to knock down the reflectors and drive the old road to save a walk of a few hundred yards to the Falls. (Tr. 112.)

16. The inspector believed that some action needed to be taken to prevent the vehicles from destroying the seeding Appellant had done. The inspector requested Appellant to build a "kellyhump" with sides steep enough to prevent four-wheel-drive vehicles from entering the old road. (Tr. 113, 292.) Appellant constructed the kellyhump and requested compensation of $345.60, which included 2 hours for a loader and bulldozer, plus overhead and profit (Tr. 114).

17. The contract provides in Section C-21 - Changes, that the CO may, by written or oral order, make changes within the general scope of the contract for which the contractor will be compensated (AF D-68).

DISCUSSION—CONSTRUCTION OF KELLYHUMP

The Government argues that it is not bound by the inspector's request because only the CO was authorized to make changes to the contract, citing *Morrison-Knudsen Co.*, ASBCA No. 16483, 72-2 BCA ¶ 9733. Although the record indicates that the inspector believed the kellyhump was necessary, Appellant has not shown that the inspector was authorized to make changes to the contract. Appellant failed to show that the CO required Appellant to build the kellyhump, or ratified the inspector's direction.

The claim is denied.

FINDINGS OF FACT—MORRELL FALLS TRAILHEAD DELAY

18. On May 8, 1986, the inspector painted the edges of the designed roadway and parking areas at the Morrell Falls Trailhead. The inspector noted that Appellant did not clear to the clearing flags in the overflow parking area. (AF E-9.)

19. On May 10, 1986, Appellant returned to the trailhead to continue working. The paint and flags did not match the work Appellant had done. Appellant then called the Forest Service to inform it that Appellant could not decipher how it wanted construction to progress. (Tr. 117, 120.)

20. After discussions between Appellant and the CO's Representative (COR) on May 12, 1986, the parties decided to leave the widths essentially as Appellant had constructed them and to allow Appellant to complete the remaining work in the same manner as the work already completed. Appellant alleges that this result was necessary to keep from needlessly scarring the natural setting. (AF E-13; Tr. 117.)

21. Appellant claimed compensation for 4 hours' delay for its grader, roller, and loader as a result of not being able to work on May 10, 1986, a total of $1,177.20 including overhead and profit (Tr. 118).

DISCUSSION—MORRELL FALLS TRAILHEAD DELAY

Appellant's construction at the trailhead did not match the plans (FF 18). After discussing this situation with the Appellant, the Forest Service agreed to allow Appellant's construction to remain. The Forest Service, however, would have been within its rights to insist either that Appellant construct the trailhead to the plans or, if the construction was adequate for its intended purpose, to reduce the contract price. *Granite Constr. v. United States* [36 CCF ¶ 76,290], 962 F.2d 998 (Fed. Cir. 1992), *cert. denied,* 113 S. Ct. 965 (1993). The Forest Service's actions thus saved Appellant addi-

[5] Trees in a national forest accessible for pre-bid observation cannot constitute a differing site condition. *Wilson Constr., Inc.*, AGBCA No. 89-178-1, 92-2 BCA ¶ 24,798; *Schmalz Constr., Ltd.*, AGBCA Nos. 86-207-1, 86-229-1, 91-3 BCA ¶ 24,183.

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tional work, and Appellant would have encountered the delay caused by the discussion in any event. In such circumstances the Board finds that Appellant is not entitled to further compensation.

This claim is denied.

FINDINGS OF FACT—MORRELL FALLS TRAILHEAD UNPRODUCTIVE TIME

22. The Forest Service issued a Notice to Proceed on October 14, 1985 (AF C-6). The pre-work meeting was held on November 7, 1985. During the pre-work meeting, Appellant indicated that it intended to begin work on the Morrell Falls Trailhead the following week. (AF C-6, C-21; Tr. 63-64, 121-22, 359.) Appellant's daily diaries for November 11 through 14 indicated that Appellant moved into the Morrell Falls site with numerous pieces of equipment, plowed snow to the site, opened the borrow pit, inspected the site, and began clearing and grubbing (AF C-23, C-24, C-25). When Appellant arrived at the site on November 11, 1985, the plans and staking did not match. Appellant was unable to reach Forest Service personnel until November 13, 1985, when it reached the COR at home. (Tr. 122, 327, 360.) Appellant's diaries noted that the "plans don't agree with" the site and that "Mike" (the COR) stated during a telephone call on November 13 that "new drawings make changes in parking loop; he will get plans to us tomorrow" (AF C-23, C-25). Although the Forest Service had modified the plans approximately a week before Appellant arrived on site and started work, the Forest Service did not provide Appellant with the new plans before Appellant started work (Tr. 360). The Forest Service acknowledges that it changed the trailhead layout without Appellant's knowledge (Tr. 327-28).

23. The Forest Service's staking at the site matched the revised plans that the Forest Service provided to Appellant on November 14, 1985. The Forest Service also performed additional staking. Although Appellant was able to perform some work during this period, the equipment it brought to the site was not used productively for a number of hours because the staking and plans did not agree. (AF C-23, C-24, C-25, C-29; Tr. 124.) If the plans and staking had agreed, Appellant would have spent this time placing and compacting the subgrade (Tr. 126).

24. The CO acknowledged that only approximately 1 day's useful work was completed during this period (AF C-9, F-7).

25. Appellant requested compensation for 30 hours of unproductive time on November 25, 1985 (AF F-2).

26. On December 11, 1985, the Forest Service issued Modification No. 1, which formally substituted the plans for the Morrell Falls Trailhead. The modification substituted sheet 10 of the plans and changed the quantities in the line items for clearing and grubbing, excavation placement, borrow excavation, hauling, and seeding associated with the new sheet, for a net increase in price of $475.01. The modification was issued under the authority of the Changes clause and stated:

> Refer to the contract plans;
> Delete sheet 10 and substitute the attached sheet for the original.
> The following items will be changed due to the above change.
>
> | | |
> |---|---|
> | Item 201(01) – increase quantity by (+) 0.27 acre with same unit cost of $2500/acre | (+) 675.00 |
> | Item 203(06)3 – decrease quantity by (–) 2.11 sta. with new unit cost of $335.66/sta. | (+) 1360.01 |
> | Item 203(08)3 – decrease quantity by (–) 272 c.y. with same unit cost of $5.00/c.y. | (–) 1360.00 |
> | Item 205A(02) – decrease quantity by (–) 248 c.y.m. with same unit cost of $0.50/c.y.m. | (–) 124.00 |
> | Item 625(05) – decrease quantity by (–) 0.38 acre with same unit cost of $200/acre | (–) 76.00 |
> | Net changes this modification | (+) 475.01 |

(AF D-22 through 25.) The modification contained a printed statement that it covered the work *to be* performed, prices to be paid, and contract time as shown, but contained no language constituting a release (AF D-24) (emphasis added).

27. The CO and Appellant met to review and discuss Appellant's November 25 claim on January 9, 1986. The CO determined that at most the FS could have contributed to inefficient work by two pieces of Appellant's equipment during the time before Appellant received the new plans. (AF F-6.) On March 14, 1986, the CO formally denied Appellant's November 25 claim. The CO denied any liability for extra costs Appellant incurred during this time. (AF F-7.) As discussed in FF 5, *supra*, the Forest Service and

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Appellant continued to discuss and evaluate this claim as a part of Appellant's other claims.

28. Appellant claimed $5,011.20 for this unproductive time: two dump trucks for 10 hours each ($1,080), a dozer and loader each for 16 hours ($2,432), and two pick-up trucks for 20 hours each ($200), plus overhead and profit of 35 percent (Tr. 133).

DISCUSSION—MORRELL FALLS TRAILHEAD UNPRODUCTIVE TIME

The Forest Service changed the layout of the trailhead and prepared new plans before work began on this contract. It knew when Appellant intended to begin work, yet failed to inform Appellant of the changes or provide copies of the new plans before Appellant began work. The Government does not dispute that Appellant's equipment was on the site for the 4 days at issue, and the CO acknowledged that only 1 day of work was completed during this time (FF 24). Absent contradictory information, Appellant was entitled to rely on the plans in the contract. *See United Dominion Indus.,* ASBCA No. 43338, 92-2 BCA ¶ 24,911; *C.F.I. Constr. Co.,* DOTCAB Nos. 1782, 1801, 87-1 BCA ¶ 19,547. Appellant is entitled to compensation for its unproductive time.

The Government claims that Appellant could not have been delayed because the first item of work in this area was to compact and test the subgrade, and Appellant had not begun such work during this time. The changes to the layout of the work, however, and the fact that the stakes did not match the plans in Appellant's possession, indicate that Appellant was, in fact, prevented from starting to compact the subgrade or from doing other than preliminary tasks.

The Government also claims that Modification No. I operated as an accord and satisfaction regarding this issue.[6] Accord and satisfaction is an affirmative defense; as such the Government bears the burden of proof: *Community Heating & Plumbing Co.,* ASBCA Nos. 37981, *et al.,* 92-2 BCA ¶ 24,870, *aff'd,* 987 F.2d 1575 (Fed. Cir. 1993). An accord and satisfaction requires proper subject matter, competent parties, meeting of the minds of the parties, and consideration. *Mil-Spec Contractors, Inc. v. United States* [34 CCF ¶ 75,412], 835 F.2d 865 (Fed. Cir. 1987). This generally means that:

> To reach an accord and satisfaction there must be mutual agreement between the parties in satisfaction of a claim or demand [that) is a bona fide dispute.

Chantilly Constr. Corp., ASBCA No. 24138, 81-1 BCA ¶ 14,863 at 73,397 (citations omitted).

At issue here is whether a meeting of the minds existed, so that the agreement was mutual. The test to be applied on this issue looks not to the parties' subjective intent, but to the objective manifestation of that intent. *Keel & Assoc.,* VABCA No. 3769, 93-3 BCA ¶ 26,044, 1993 WL 135428 (April 28, 1993). Important evidence of the parties' intention is the contract document itself. *American Tel. & Tel. Co., Fed. Sys. Advanced Technologies,* DOTCAB No. 2479, 93-3 BCA ¶ 26,250, 1993 WL 290113 (July 27, 1993). The Forest Service issued Modification No. 1 under the authority of the Changes clause and substituted sheet 10 of the plans; the modification thus covered all the line items of work *changed* by that sheet (FF 26). By its terms the modification covered the new plans and associated changes necessitated thereby, but did not identify work Appellant performed attempting to begin construction under the original plans prior to receiving the new plans. *Chantilly Constr. Corp.,* ASBCA No. 24138 81-1 BCA ¶ 14,863 at 73,397. There was no reference in the modification to delay or wasted costs. *See Westerhold v. United States,* 28 Fed. Cl. 172 (1993).

Although the language of the modification itself serves an important evidentiary function, the focus of the analysis remains the intent of the parties. *NRM Corp. v. Hercules, Inc.,* 758 F.2d 676 (D.C. Cir. 1985). Here, a strong indication of the parties' intent is reflected by the fact that Appellant continued to press the claim, and the Forest Service continued to consider it, after execution of the modification (FF 27). This constitutes evidence that the parties did not intend the modification to satisfy Appellant's claim. *Community Heating & Plumbing Co. v. Kelso* [38 CCF ¶ 76,488], 987 F.2d 1575 (Fed. Cir. 1993); *Western Commerce Corp.,*

[6] The Board notes that its Rule 6(b) requires affirmative defenses to be pleaded in the Government's Answer. This was not done in this case. It would thus be within the Board's discretion to refuse to consider this late argument. *Solar Foam Insulation,* ASBCA No. 46278, 94-1 BCA 26,288, 1993 WL 306767 (August 6, 1993); *Eagle Contracting, Inc.,* AGBCA No. 88-225-1, 92-3 BCA ¶ 26,018, *reconsideration denied,* AGBCA No. 92-197-R, 93-1 BCA ¶ 25,320.

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AGBCA Nos. 85-146-1, 85-147-1, 87-2 BCA ¶ 19,914.

In this appeal the Board is faced with evidence that the parties did not intend the modification to cover costs associated with work prior to issuing the new plans, and a dearth of evidence that they did so intend. In such circumstances, the Government's after-the-fact testimony that it intended the modification to cover wasted costs is unavailing. The Board finds that the modification did not act as an accord and satisfaction.

Appellant's claim essentially requests compensation for 2 days' wasted effort for several pieces of equipment based on agreed equipment rates and job records (FF 4). The Board finds this reasonable. The claim is thus granted in the amount of $5,011.20.

FINDINGS OF FACT—PATCHING, BIG LARCH CAMPGROUND

29. Note 2 on the Typical Sections and Notes for the Big Larch Campground stated in part:

> All holes in the existing BST surface shall be patched with acceptable asphaltic material and rolled with a smooth-wheeled roller or a two-axle, power-patching roller.

(AF D-113.)

30. The contract specified that the Big Larch Campground could be closed to the public for up to a maximum of 3 days, but not on successive weekends (AF D-57; Tr. 208). The contract's PERMITS AND RESPONSIBILITIES clause stated that "[t]he Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work" (AF D-65).

31. On May 16, 1986, Appellant patched holes in the Big Larch Campground. At the end of this operation, the inspector did not see any holes remaining to be patched. (AF E-19.)

32. Appellant alleges that the Forest Service required it to patch additional holes on June 23, 1986. Appellant complains that the presence of the public between its patching operation on May 16 and June 23 resulted in additional damage to the surface. (Tr. 135, 210.) Appellant was aware that the contract specified that the campground could not be closed for the time it took to complete the project (Tr. 211). Appellant claimed $1,113.75 for the additional patching, including overhead and profit (Tr. 138).

DISCUSSION—PATCHING, BIG LARCH CAMPGROUND

The contract is clear that patching was required prior to applying the BST surface. The contract is likewise clear that the campground would remain open to the public during most of Appellant's performance; it was not reasonable for Appellant to expect that the public would not use the campground while it was open. There is nothing in the record to suggest that the Forest Service directed the timing of the patching, *i.e.*, told Appellant to patch the campground more than a month prior to the application of the BST. Under the terms of the contract (FF 30), Appellant was responsible for the work until final acceptance, which occurred on July 10, 1986 (FF 3). In such circumstances, there is simply no basis on which to conclude that the second round of patching was extra work for which Appellant should be compensated.

This claim is denied.

FINDINGS OF FACT—BLOTTER MATERIAL

33. The *Standard Specifications* do not contemplate the application of blotter material in a BST project. Blotter material (sand) is contained in a separate section of the *Standard Specifications*, Section 408—Prime Coat; such material is used to cover unabsorbed bituminous material. Blotter material is considered a pay item under Section 408. The *Standard Specifications* for BST, Section 410.07, require at least 5 days for curing of the prime coat (surface preparation treatment) before application of the BST surface, unless a shorter period is approved.

34. Although not clear from the record, it appears that Appellant placed the prime coat on the Seeley Lake Campground on June 22, 1986 (AF E-32).

35. The inspector's diary for June 25, 1986 indicated that the Seeley Lake Campground needed blotter material (AF E-34).

36. On June 26, 1986, Appellant placed sand on the Seeley Lake Campground (AF E-35). The inspector's diary for June 26 indicated that Appellant intended to apply the BST on that date but ran into problems with the refinery delivering the oil to the site (AF E-35). Appellant testified that the Forest Service instructed it to place blotter material, but did not identify the Forest Service employee who gave the instruction (Tr. 140).

37. Appellant claimed $864 for placing the blotter material, including equipment, sand, labor, and overhead and profit (Tr. 141).

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DISCUSSION—BLOTTER MATERIAL

Five days for curing the prime coat are necessary before application of a BST surface (FF 33). The record indicates that Appellant wanted to place the BST surface 4 days after application of the prime coat. In order to allow Appellant to do so, it appears the inspector required application of sand to cover areas of prime coat that had not completely cured. It thus appears that the Forest Service allowed Appellant to apply sand in order to expedite its progress, rather than required it to apply sand not called for in the contract. Because application of the sand was for Appellant's convenience rather than extra work required by the Forest Service, the Forest Service is not responsible for these costs.

The claim is denied.

FINDINGS OF FACT—POST REMOVAL, SEELEY LAKE CAMPGROUND

38. The Typical Sections and Notes for the Seeley Lake Campground showed three roadway widths: 24 feet with total width including shoulders of 26 feet, 16 feet with a total width of 18 feet, and 12 feet with a total width of 14 feet (AF D-115). Sheet 5 of the plans showed the road in sections B to E and G to H to have a total width of 14 feet including shoulders (AF D-114, 115).

39. There were concrete posts lining many of the roads in the Seeley Lake Campground that were not shown on the plans. The fact that the posts existed, however, was obvious from a visual inspection. Nothing in Appellant's site visit, or in its preliminary work in the campground, alerted it to the fact that the posts might be closer together than the 14-foot road width indicated on the plans. (Tr. 143, 255.) Appellant did not include in its bid any amount for removing the posts (Tr. 146).

40. Appellant's chipper would not fit between the posts in road sections B to E and G to H, where in some cases the posts were only 12 feet apart (Tr. 144-45). The inspector's daily diary for June 27, 1986 indicated that a delay was caused by barrier posts being too close together to allow the chip box to pass between them, and that the Appellant used a backhoe to pull them out (AF E-36).

41. Appellant claimed $2,134.62 for the extra work and delay resulting from this problem, including backhoe for 8 hours, 18 hours of labor, distributor for 2 hours, chipper and rollers for 1 1/2 hours, chockers and slings at a total price of $85, and 35 percent overhead and profit (Tr. 147).

DISCUSSION—POST REMOVAL, SEELEY LAKE CAMPGROUND

The plans showed that the narrowest roads in the Seeley Lake Campground were 14 feet wide, including shoulders. Appellant should have been able to rely on this representation in preparing its bid without conducting its own measurements. *Simpson Constr. Co.*, VABCA No. 3176, 91-1 BCA ¶ 23,630 at 118,391.

The posts in sections B to E and G to H were not 14 feet apart; some were as close together as 12 feet. In its site visit and in its preliminary work on this campground, Appellant did not notice that the posts were so close together (FF 39). It was not until Appellant attempted to move the chipper over the roads that the problem became apparent. This condition thus escaped Appellant's reasonable attention.

Appellant is entitled to compensation for the extra work and delay caused by the errors in the plans regarding the road width. Appellant claimed 8 hours for a backhoe and 18 hours of labor to conduct this work, equipment, delay time for the paving equipment of 1 1/2 and 2 hours, and overhead and profit based on agreed equipment rates and job records (FF 4). These costs appear reasonable. The claim is granted in the amount of $2,134.62.

FINDINGS OF FACT—ADDITIONAL CLEANING, BIG LARCH CAMPGROUND

42. The contract required that all surfaces that had previously received BST treatment were to receive another BST surface over the full width of the previous treatment (AF D-113). Before application of the BST, a clean surface must be prepared to allow the chip seal treatment to adhere to it (Tr. 26, 185). The *Standard Specifications*, Section 410.07, require that "loose dirt and other objectionable material shall be removed from the existing surface" before application of the BST. The customary method of preparing for a chip seal job is to blade,[7] broom,

[7] Appellant's expert testified, however, that in his 45 years of experience he has never needed to use a blade to prepare a surface for a chip seal project (Tr. 19).

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sweep, and wash[8] the surface (Nicholson Dep. at 18), or to use a blower on the surface (Tr. 15). If the material cannot be removed with a power broom, it provides a sufficient surface for a chip seal application (Nicholson Dep. at 15, 22, 44, 46, 64, 65). A surface requiring power washing prior to being acceptable for chip seal treatment in this area was unheard of and unexpected (Nicholson Dep. at 25, 27, 28; Tr. 21, 23, 24, 70, 351).

43. The *Standard Specifications* for BST, Section 410, require the same equipment as in Section 409.07, Seal Coat, *i.e.*, a distributor for heating and applying bituminous material; a rotary power broom and/or blower, drag broom, or blade-mounted broom; a minimum of one steel-wheel roller and one pneumatic-tire roller (or two pneumatic-tire rollers where approved); and self-propelled aggregate spreaders.

44. Appellant's site visit consisted of a drive-through of the area, with stops to check conditions more closely outside the vehicle by kicking and scraping (Tr. 56-58, 188-89). Appellant noticed nothing that would pose an unusual problem (Tr. 58-59, 69, 192-93). The sole other bidder on this job did not recall that the site appeared to be unusual for this area, and believed that only blading or brooming would have been necessary to prepare the surface (Nicholson Dep. at 14, 19, 33, 36). The color of the areas where problems occurred was very similar to those where no problems occurred (Tr. 350).

45. On June 25, 1986, Appellant began to broom the Big Larch Campground; the Forest Service inspector noted that the broom was "not doing job" (AF E-34). From June 25 through July 2, 1986, the inspector's daily diaries indicated that Appellant was cleaning this area, and that the cleaning was not to the COR or inspector's satisfaction (AF E-34 through 41). Appellant broomed the surface numerous times in attempting to prepare the surface to the satisfaction of the Forest Service (Tr. 75, 87, 353). The result of the brooming was a "dusting" effect (Tr. 193). Appellant also used a blade, but even this was insufficient to achieve a surface acceptable to the Forest Service (Tr. 80, 354). Appellant eventually used high-pressure washers to prepare the surface (Tr. 84, 357). Although the COR did not specifically require use of high-pressure washing, he would not approve the surface until Appellant used this procedure (Tr. 319, 357-58). The blading and pressure washing removed portions of the previous BST layer (Tr. 83, 86). Appellant informed the Forest Service that such high-pressure washing was additional work for which it would request compensation (Tr. 85).

46. Appellant agreed that the surface immediately after initial brooming would not have been conducive to adhesion of the specified oil emulsion (Tr. 74, 195). Use of another grade of emulsion than that specified, or application of a prime coat before the emulsion, however, might have produced satisfactory results (Tr. 21, 38, 71). The COR testified that he did not consider any other solution to the problem because it was not his responsibility to direct Appellant's work (Tr. 355). The COR on this project had no previous experience on a BST job applied over an existing BST surface (Tr. 344).

47. Appellant claimed $23,801.38 ($17,630.65 plus $6,170.73 overhead and profit) as compensation for the extra work required to clean the surface. As discussed above (FF 4, *supra*), the hours were taken from diaries, time cards, and payroll records; the hourly rates were those negotiated by the parties. Appellant claimed the following time:

Equipment	Hours
Backhoe	26
Dump truck	12
Labor	145.5
Supervisor	71
Foreman	17
Broom	21
Water trucks	78
Broom operator	21
Grader	11.5
Pumper	74
Pickups	120
Lowboy	3.5

(AF B-6, 7.) The amount Appellant claimed for the broom and broom operator was $1,790.25. The supervisor, for whom Appellant claimed 71 hours at $2,662.50, was Appellant's president (AF B-6; App. Ex. 3).

DISCUSSION—ADDITIONAL CLEANING, BIG LARCH CAMPGROUND

Prior to application of the new BST layer, the contract required Appellant to clean the old BST of loose dirt and other objectionable material. The contract did not require Appellant to remove the existing BST layer

[8] "Wash" in this context means using a water truck with nozzles like a street sweeper, rather than using water under high pressure (Nicholson Deposition (Dep.) at 18). Mr. Nicholson was the sole other bidder on this contract, and had performed "dozens" of chip seal jobs (Nicholson Dep. at 6).

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itself. (FF 42.) In using the high-pressure washing, however, Appellant removed a portion of the existing BST surface (FF 45). This was extra work not required by the contract and constituted a constructive change, *i.e.,* performance ordered by the Government that was beyond the minimum standards demanded by the terms of the contract. *OFEGRO,* HUDBCA Nos. 88-3410-C7, 89-4469-C7, 91-3 BCA ¶ 24,206.

Cleaning down into the existing BST layer was not required by the contract's requirement to remove objectionable material. The contract required cleaning sufficient to allow adhesion of the new BST application. Testimony of an individual well experienced in this business indicated that if surface material cannot be removed from an existing BST surface by brooming, the surface is suitable for application of another BST surface (FF 42).

Although the Government claims that no constructive change occurred because the COR never "ordered" the extra work, the COR's refusal to approve the surface for application of the new BST until Appellant used high-pressure washing in effect constituted direction to use that method. A direct order is not necessary. *See Al Johnson Constr. Co. v. United States* [36 CCF ¶ 75,850], 20 Cl. Ct. 184 (1990). Testimony of individuals experienced in paving work in the Missoula area uniformly indicated that the necessity of using power washing equipment to remove excess material from a BST surface was unheard of (FF 42). The imposition of this standard for cleaning the surface, which was not required by the contract or normally used on jobs of similar character, entitles the Appellant to compensation. *Robert E. Moore Constr.,* AGBCA No. 85-262-1, 90-2 BCA ¶ 22,803.

Because the Board finds Appellant entitled to an equitable adjustment for the constructive change to the contract, we need not discuss whether a differing site condition existed as claimed by Appellant.

The Government alleges that Appellant should not be compensated for this work because it could have performed the work in a more efficient manner. The Government alleges, for example, that use of a small "bobcat" might have been more efficient than use of a blade to scrape the surface. The Government presented no evidence, however, that this would have resulted in lower cost. The record shows that Appellant worked essentially night and day to complete this cleaning so that the campground could be open for the July 4 holiday. While circumstances might exist where a contractor's recovery is limited because of inefficient work, the Board does not believe this is such a situation.[9]

The Government also argues that some of Appellant's employees were performing tasks in other locations at the same time as the claimed work was being performed. This, alleges the Government, indicates that Appellant's calculations are inaccurate. Contrary to the Government's allegation, Appellant did not claim that all its employees were working on the cleaning during the period from June 26 through July 2, 1986, but rather stated that all its claimed costs during this time related to this work. The fact that employees were working in more than one location does not negate the claimed work.

The damages claimed by Appellant, taken from time records and based on agreed hourly rates (FF 4) appear reasonable. The Board finds, however, that deductions are appropriate from Appellant's damage calculation. The record shows that Appellant should have expected to broom the surface prior to placing the new BST surface. The record is not clear that the brooming claimed by Appellant was other than that required by the contract. The Board thus deducts $1,790.25 from Appellant's claimed figure. The Board also believes that Appellant's president, who was acting as supervisor, would have been on the site even if no problem with cleaning had occurred. Appellant appears to have claimed all the time its president was on site during this time. The Board finds this inappropriate, as a supervisor's cost is in the nature of overhead. *See Jack L. Olsen, Inc.,* AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767. In addition, the overhead and profit rate of 35 percent was determined in part by the fact that it was

[9] The Government argues, as well, that the Site Investigations and Conditions Affecting the Work clause precludes Appellant's recovery. This clause states that, in bidding, Appellant represents that it has taken steps reasonably necessary to ascertain the nature and location of the work. This type of broad exculpatory clause does not preclude recovery where a contractor has demonstrated entitlement to compensation for changed work. *Foster Constr. v. United States* [15 CCF ¶ 84,163], 193 Ct. Cl. 587, 435 F.2d 873 (1970); *Blaze Constr. Co.,* IBCA No. 2863, 91-3 BCA ¶ 24,071. In addition, Appellant's investigation of the nature and location of the work would not have alerted it to the possibility of being required to perform additional work.

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intended to cover the cost of supervision (FF 4). The supervisor's time in the amount of $2,662.50 is deducted in its entirety. This claim is thus granted in the amount of $17,790.17 ($17,630.65 − $4,452.75 = $13,177.90 × .35 overhead and profit).

FINDINGS OF FACT—DUMPSTER APRONS

48. Refuse dumpsters in the Seeley Lake Campground sat on concrete pads that were attached to the roadways with sloping asphalt aprons (AF E-17; Tr. 150). The dumpster aprons were apparent on viewing the site (Government Ex. 3).

49. Note 1 of the Typical Sections and Notes for the Seeley Lake Campground stated that the existing asphalt surfaces were to be scarified to a depth of 2 inches (AF D-115; Tr. 145). Appellant was concerned that scarification of the edges of the dumpster aprons might result in pulling them out of place (AF E-7), which in fact occurred with one dumpster apron on May 12, 1986 (AF E-12).

50. The Forest Service and Appellant agreed that the aprons would remain in place; Appellant thus took extra time to avoid the edges of the dumpster aprons (Tr. 151-52). Appellant claimed $845.78 for this extra work (Tr. 156).

DISCUSSION—DUMPSTER APRONS

The dumpster aprons were apparent on inspection of the campground; Appellant should have been aware of the aprons' existence and have included in its bid a sufficient amount to complete this work. The dumpster aprons did not constitute a differing site condition or result in work not contained in the contract.

The claim is denied.

FINDINGS OF FACT—OBSTRUCTIONS IN SUBGRADE

51. Appellant claims it encountered several stumps and a wire in the subgrade in the Seeley Lake Campground and Morrell Falls Trailhead, and that these obstructions caused Appellant to spend extra time on the work (Tr. 156-59). The inspector's diary indicated that Appellant dug up a light-duty wire at the entrance to the Seeley Lake Campground on May 7, 1986 (AF E-7). Appellant claims that these obstructions were discussed with the CO and an agreement was reached to work around them on May 12, 1986. Appellant admits that some of the stumps at the Morrell Falls Trailhead were apparent on its site visit. (Tr. 157.) Appellant did not submit its daily diaries supporting these claimed problems.

52. The CO's Inspection Report for May 12, 1986, contains the notation that "downed logs" existed in the area to be filled at the Big Larch Campground, and that Appellant would provide a price for removing the logs and hauling them to the dump. The CO also noted that the thin wire torn out at the Seeley Lake Campground should not be replaced. (AF E-43, 44.) The record is inadequate to determine whether Appellant provided a price for moving logs to the dump and whether the moving took place.

53. Contract Modification No. 1 included an increase in clearing and grubbing in the Morrell Falls Trailhead, which, under the contract included dealing with stumps (AF D-24, 31).

54. Appellant claimed $3,072.60 for extra work required to deal with the underground obstructions (Tr. 159).

DISCUSSION—OBSTRUCTIONS IN SUBGRADE

Although Appellant claims that it encountered numerous obstructions, the record does not support this conclusion. Appellant failed to prove snagging one wire would result in a delay to the progress of the work. The Board finds, as well, that Appellant was compensated by Modification No. 1 for the stumps apparent at the site visit at the Morrell Falls Trailhead. The record is simply inadequate for the Board to conclude that further obstructions existed that caused delays or extra work. Appellant has thus failed in its burden to demonstrate entitlement to compensation for obstructions.

The claim is denied.

FINDINGS OF FACT—TOLERANCE

55. Section 203.16 of the *Standard Specifications,* Construction Tolerances, contains six levels of road tolerance labeled A through F, with A being the strictest. This section states that "[t]he tolerance class shall be *as* SHOWN ON THE DRAWINGS" (emphasis added).

56. Contract Section E-5, Conformity with Drawings and Specifications, stated:

> Unless working tolerances are specified, all work performed and materials furnished shall be in a reasonably close conformity with lines, grades, cross sections, dimensions, and material requirements shown on the drawings, indicated in the

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specifications or designated on the ground. "Reasonably close conformity" is compliance with reasonable and customary manufacturing and construction tolerances.

(AF D-95.)

57. The contract drawings contained no tolerance class (AF D-110 through D-122). Appellant did not notice this fact until after the Forest Service awarded the contract (Tr. 221).

58. Appellant requested a tolerance class from the Forest Service because the tolerance determines the effort a contractor must expend and thus is a cost factor (Tr. 162-63). Appellant claims the absence of a tolerance in this contract forced it to expend extra effort to reach a closer tolerance than might have been required (AF 164).

59. At the Morrell Falls Trailhead, the Forest Service approved the road although it deviated from the stakes by as much as 3 feet (*see* Morrell Falls Trailhead Delay Claim, *supra*) (Tr. 161-62).

60. Appellant claimed $2,953.80 as compensation for the extra work expended by not having a tolerance class for this job (Tr. 165).

DISCUSSION—TOLERANCE

The *Standard Specifications* do not require a tolerance class, but state that if one is included it shall be as shown on the drawings. The contract contemplated that tolerances would not be specified, and thus required "reasonably close conformity" with the drawings. The Forest Service was not required to provide Appellant with a tolerance.

Although Appellant alleged that it was necessary to work to a closer tolerance than might have been required, the one instance cited by Appellant demonstrated that the Forest Service accepted a road meeting the most lenient tolerance (FF 59). The contract's lack of a tolerance did not require Appellant to expend extra effort in constructing the roads, and thus caused Appellant no damage. In addition, Appellant could not have relied on the lack of tolerance class when preparing its bid, because Appellant was unaware of this fact until after award.[10]

This claim is denied.

FINDINGS OF FACT—SORTING GARBAGE FROM BORROW PIT

61. The borrow source designated for this contract was the "Old Dump Pit" (AF D-121). Forest Service personnel referred to this pit as the "Old Dump Pit" (AF E-13). People in the area know this area as the old dump (Tr. 222).

62. Appellant admits that it was aware that the pit was a former dump because it had used this pit when it originally built these roads in 1979, and had encountered trash at that time. Appellant claims that it encountered garbage in the pit that it did not expect even after its previous experience with this pit and its site investigation. (Tr. 166-67, 225.)

63. Appellant claimed $927.45 for the additional time required to sort the trash from the pit (Tr. 170).

DISCUSSION—SORTING GARBAGE FROM BORROW PIT

With a name such as the "Old Dump Pit," it was unreasonable for Appellant to expect not to find trash in this borrow source. This is especially so where Appellant had prior experience finding trash in the same pit.

This claim is denied.

DECISION

The claim for Morrell Falls Trailhead unproductive time is granted in the amount of $5,011.20; the claim for post removal on the Seeley Lake Campground is granted in the amount of $2,134.62; and the claim for additional cleaning at the Big Larch Campground is granted in the amount of $17,790.17, with interest to run on all three claims from September 21, 1986. The remainder of the claims are denied.

In its brief Appellant also requested payment of attorneys' fees. The award of attorneys' fees and expenses requires specific statutory authority such as the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and a separate application by a prevailing party. EAJA, and USDA's implementing regulations at 7 C.F.R. § § 1.180 *et seq.*, prescribe requirements for recovery, one of which is that the decision must be final. 7 C.F.R.

[10] In any event, had Appellant been aware of the lack of a specified tolerance, under Appellant's theory it would have submitted a higher bid.

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§ 1.193(a). This decision is not yet final; the claim is dismissed as premature. *See Baldwin/Thomas Designers and Planners*, AGBCA No. 92-103-3, 92-2 BCA ¶ 24,787.

[¶ 26,385] **Delfour, Inc.**

VABCA Nos. 3803, 3832, 3897, 3901, October 6, 1993. Contract No. V523C-1050.

Labor—Davis Bacon Act—Withheld Funds.—A construction contractor's assertion that the contracting officer had no right to withhold payments otherwise due the contractor against its liability for payment of back wages until a court of competent jurisdiction had found the contractor to have violated wage rate requirements was without merit, because the contract provided that the contracting officer could, upon written request of the Department of Labor, withhold amounts necessary to pay back wages. The contractor's position was that it did not violate the Davis-Bacon wage requirements. The board was without jurisdiction to determine whether the contractor had paid the proper wages.

Labor—Disputes Concerning Labor Standards—Default Terminations.—Although the board did not have jurisdiction over a contractor's assertion that it had not violated the Davis-Bacon wage requirements, the board did have jurisdiction over the contractor's assertion that the government breached the contract by terminating the contract for labor standards violations, because at the heart of the termination of a contract for default are the parties' contractual rights and obligations, not the enforcement or administration of wage provisions. Further, even though the Disputes Concerning Labor Standards clause provides that resolution of disputes concerning labor standards will be under Labor Department procedures and not under the Disputes clause, the Contract Termination-Debarment clause simply provides that a breach of the labor standards provision may be ground for termination of the contract. An appeal of a default termination of a contract for violation of labor provisions is not a dispute concerning labor standards; therefore, the issue of the agency's default termination of the contractor by reason of the contractor's alleged labor violations was properly before the board under both the Contract Disputes Act and the Disputes clause.

Contract Disputes, Claims—Quantum—Sum Certain.—Although the board had jurisdiction over portions of a contractor's appeal that were defenses to the agency's default termination claim, it was without jurisdiction over portions of the appeal concerning the contractor's entitlement to monetary judgments for delay, changes, and breach of contract, because the contractor's claim did not include a sum certain. The contractor's first letter demanded a final decision on a litany of eight broad categories of government failures and contained no monetary claims. Three days later, the contracting officer's response to the contractor's letter requested more specificity of the contractor's claims in order to permit him to render a final decision. The contractor responded to the contracting officer's request by referring him to the entire contract correspondence file while maintaining its willingness to meet for the purposes of resolving the problems it had identified.

Contract Disputes, Claims—Statement Adequacy—Termination Claim.—Although the board did not have jurisdiction over a contractor's initial assertion of its claim on the ground that the claim lacked a sum certain and was not certified in accordance with the Contract Disputes Act, the board did have jurisdiction over the contractor's termination claim because it met the four jurisdictional prerequisites to a valid claim. The contractor had placed the agency on clear notice that it believed the agency to be in breach of contract the contractor took the extreme measure of threatening to walking off the project and the agency had taken the equally extreme measure of terminating the contract for default. The contractor's subsequent submission of a certified claim for amount due it resulting from the alleged breach of contract provided the agency with adequate notice of both the basis and amount of the contractor's claim and obligated the contracting officer to respond to the claim as provided for in the CDA. The board rejected a contention by the agency that the termination claim was nothing more than a premature termination settlement proposal under the Termination for Convenience clause.

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For the appellant: Gaetano J. DeLuca, Hingham, Massachusetts. For the government: Paul A. Embroski, Office of General Counsel, Washington, D.C., Department of Veterans Affairs, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas Jr. Assistant General Counsel, of Counsel.

Before KREMPASKY, ANDERS, and PULLARA, Administrative Judges.

KREMPASKY, Administrative Judge: Respondent, Department of Veterans Affairs ("VA" or "Government") has filed a Motion to Dismiss Counts III and IV of Appellant's, Delfour, Inc. ("Delfour"), nine count Complaint in VABCA No. 3832 for lack of jurisdiction. In addition, the Board, *sua sponte*, on July 15, 1993, ordered Delfour to show cause why the quantum portion of Counts I, VII and VIII and all of Counts II, III, IV, and V of its Complaint should not be dismissed for lack of jurisdiction.

On May 24, 1993, the Board received and docketed as VABCA No. 3832, Delfour's appeal from the VA's May 18, 1993, termination of Contract No. V523C-1050 for default. On June 2, 1993, the Board received Delfour's Complaint in VABCA No. 3832; the VA's Answer and Motion to Dismiss were both filed on July 9, 1993. Delfour responded to the Motion to Dismiss and the Order to Show Cause on August 10, 1993. The VA replied to the Appellant's responses to the Motion and Order on August 30, 1993.

By Order dated July 15, 1993, the Board consolidated VABCA No. 3832, for the purpose of further processing, with the appeal in VABCA No. 3803 and suspended all proceedings in the two appeals except for the parties' responses to the Motion to Dismiss and Order to Show Cause. The appeal in VABCA No. 3803, docketed on March 9, 1993, is from a Contracting Officer's final decision denying Delfour's $15,109 equitable adjustment claim relating to flooring installation under Contract No. V523C-1050.

On September 29, 1993, the Board received and docketed five appeals of the CO's deemed denial of Delfour's monetary claims relating to the VA's alleged breach of contract. These appeals were docketed as VABCA Nos. 3897-3901. By Order, dated October 1, 1993, the Board consolidated these appeals with the appeals in VABCA Nos. 3803 and 3832 for further processing and incorporated the relevant counts of the Complaint and Answer in VABCA No. 3832 as the pleadings in those appeals.

Appellant maintains that we have jurisdiction over the entirety of its Complaint in VABCA No. 3832 and over VABCA Nos. 3897-3901 since Delfour is simply responding to the Government's default claim. The VA avers that we have jurisdiction only over the portions of the Complaint in VABCA-3832 dealing with the propriety of the termination for default.

The record before the Board consists of the Complaint and Answer in VABCA No. 3832 (cited as "Cmplnt. Cnt. __, ¶__" or "Answer. Cnt. __ ¶__"); the Appeal File (cited as "R4, tab __") consisting of 252 exhibits (Exhibits 1-180 were submitted by the Government and Exhibits 181-252 were submitted by Delfour); the VA's Motion to Dismiss; Delfour's Response to the Motion to Dismiss; Delfour's Response to the Order to Show Cause; Government's reply to Appellant's Response to the Motion to Dismiss; and, the Government's Response to the Order to Show Cause. For the purposes of this opinion, we will consider the applicable portions of the Complaint and the entire Appeal File submitted for VABCA No. 3832 as the record in VABCA Nos. 3897-3901. References to the Federal Acquisition Regulations ("FAR") and the Department of Veterans Affairs Acquisition Regulations ("VAAR"), refer, respectively, to the acquisition regulations published in 48 C.F.R. Chapters 1 and 8.

FINDINGS OF FACT FOR THE PURPOSES OF RULING ON THE JURISDICTION OF THE BOARD

The following findings of fact are made for the purposes of this decision only.

Contract No. V523C-1050 ("Contract") for the renovation of the animal facility at the VA Medical Center, Boston, Massachusetts ("VAMC Boston") was awarded to Delfour on October 5, 1992. The Contract was a firm fixed-price construction contract with an initial Contract price of $294,928. (R4, tab 4)

The Notice to Proceed with the construction was received by Delfour on October 23, 1992; the Contract provided for completion 300 days after this date. Thus, the initial Contract completion date was August 19, 1993. (R4, tab 5).

The Contract contained the usual provisions found in VA construction contracts including the following clauses:

WITHHOLDING OF FUNDS, FAR 52.222-7 (FEB 1988);

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CONTRACT TERMINATION-DEBARMENT, FAR 52.222-12 (FEB 1988);

DISPUTES CONCERNING LABOR STANDARDS, FAR 52.222-14 (FEB 1988);

DISPUTES (ALTERNATE I), FAR 52.233-1 (DEC 1991);

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I), FAR 52.249-2 (APR 1984)

DEFAULT (FIXED-PRICE CONSTRUCTION), FAR 52.249-10 (APR 1984). (R4, tab 180)

On March 26, 1993, the Regional Administrator of the U.S. Department of Labor Employment Standards Administration, Wage and Hour Division ("DOL") notified the VA Contracting Officer ("CO") that it was investigating whether Delfour's wage payments complied with the applicable requirements of the *Davis-Bacon Act*. In light of this investigation, DOL requested that the CO withhold $12,840 from payments due Delfour under the Contract "until the matter of back wages is resolved." DOL increased its withholding request to $30,877 on May 13, 1993. (R4, tabs 120, 165)

On March 31, 1993, Delfour submitted its Payment Requisition ("PR") No. 4 in the amount of $8,875. The CO, in an April 6, 1993, letter, cited the DOL's withholding request and informed Delfour that the entire amount of PR No. 4 was being withheld. Delfour's response, by letter dated April 15, 1993, requested the payment of the full amount requested in PR No. 4 and stated that it would not proceed with the work until such payment was made. (R4, tabs 121, 122, 133)

Responding to Delfour's letter, the CO issued a Cure Notice on April 19, 1993. (R4, tab 136) Delfour replied to the Cure Notice with an April 26, 1993, letter stating that Delfour would proceed with the work if the VA would release certain areas of the project site for construction. (R4, tab 143)

In an April 27, 1993, letter, entitled: "Resolution of Problems, Contract Administration, Request for a Written Decision", Delfour stated, in pertinent part, as follows:

> With reference to the above captioned project, subject and pursuant to the Contract Disputes Clause, Title 41 USCA Section, 601-613, inclusive, the contractor, Delfour, Inc., herein requests a written decision from the contracting officer in regards to the following:
>
> 1. government's failure to process paperwork;
> 2. government's failure to approve shop drawings and/or submittals;
> 3. government's failure to turn over work areas;
> 4. government's failure to process change order requests;
> 5. government's failure to answer and attempt to resolve and/or respond to ongoing job problems;
> 6. government's failure to timely process payment requests;
> 7. government's issuance of defective and/or incomplete specifications;
> 8. government's overall administration of the contract.

(R4, tab 145)

The CO responded to this request for final decision on April 30 as follows:

> Acknowledgment is made of your request for a written decision from the Contracting Officer in regards to the various ways the Government has allegedly failed to proceed administratively or otherwise. To assist in generating a decision, please provide the Contracting Office with specific supporting documentation so that the issues may be properly addressed. (R4, tab 150)

On the same day, responding to the CO's request, Delfour suggested that the CO review all of Delfour's Contract correspondence to ascertain the specifics of its claim. Delfour concluded this letter by stating its willingness to meet to resolve the problems outlined in its correspondence.

(R4, tab 151)

Delfour submitted PR No. 5 on May 3, 1993, in the amount of $8,000. On May 13, 1993, the CO informed Delfour that the validity of $7,000 of PR No. 5 was being questioned and that payment of the remaining $1,000, acknowledged by the VA as otherwise being due, was being withheld pursuant to the DOL request. (R4, tabs 152, 166)

By letter, dated May 13, 1993, Delfour informed the CO that it considered the VA to be in breach of the Contract because of the VA's failure to release areas on the 2nd floor of the building for Delfour's performance, the VA's failure to process Delfour's pay requisitions, change order requests, shop drawings, and Contract submittals in a timely manner. Because of these alleged breaches of contract, Delfour asserted that it had no choice but to leave the project. In its letter, Delfour stated that it was "tabulat-

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ing" its costs resulting from the Government's breach and that it would submit those costs for payment upon their calculation. (R4, tab 169)

In a letter dated May 17, 1993, entitled: "Monies due Delfour," Delfour, referencing its May 13, 1993, letter, detailed four categories of claims for which it was owed $171,778.27. The four categories included: Contract Balance, Work and Materials Not Paid For, Change Order Work, and Delays. The May 17 letter neither demanded a CO's final decision nor was it accompanied by a *Contract Disputes Act (CDA)* claim certification. (R4, tab 171)

The VA terminated the Contract for default by letter dated May 18, 1993; as stated in the letter, the reasons for the default termination were "[f]or failure to perform the contract in accordance with the requirements thereof by abandoning the project as you stated you would in your letter dated May 13, 1993, and violating the *Davis-Bacon Act* as has been determined by the Department of Labor." (R4, tab 172)

On May 19, Delfour furnished a letter to the VA which stated:

> In accordance with our letters and our requests that areas be released so that our work can move forward, and in spite of your failure to comply, Delfour is still ready, willing and able to complete its work. The areas included in Phase II and III of the contract must be released so that our work may proceed forthwith. This request, in addition to our other needs to get this project moving, are detailed in our many letters to you.
>
> Please advise our office when you will vacate these areas so that we may enter and complete our work. (R4, tab 173)

The Government replied to Delfour's May 19 letter by stating, in a letter dated May 21 and received by Delfour on May 25, 1993:

> The Contracting Office is in receipt of your faxed letter dated May 19, 1993, stating "Delfour is still ready, willing and able to complete its work." You are hereby notified that the Government remains by it's Notice of Termination for Default dated May 18, 1993. (R4, tabs 174, 175)

Delfour responded on May 26, 1993, stating:

> Referencing your letter dated May 21, 1993, postmarked on 5-24-93 and received by our office on May 25, 1993, our only comment is that this has been your attitude throughout this project. Your continued refusal to act in the best interest of the government is the reason why this project has been plagued with the problems it has. (R4, tab 175)

Delfour appealed the default termination to the Board; the appeal was received and docketed as VABCA No. 3852 by the Board on May 24, 1993.

On May 25, 1993, Delfour submitted its "Termination Claim" to the CO as follows:

> Pursuant to the Code of Federal Regulations please accept the following as Delfour's Termination Claim.
>
Contract Balances	
Pay Requisition No. 4	$ 8,875.00
Pay Requisition No. 5	8,000.00
Work in Progress	45,000.00
Change Order Work	63,828.07
Costs of Delays	87,825.20
Claim for Losses	
Due for Governments Breach and Improper Termination	2,000,000.00
TOTAL TERMINATION CLAIM	$2,213,528.27

The "Termination Claim" was certified in accordance with the requirements of the *Contract Dispute Act (CDA).* (R4, tab 176) The CO has yet to respond to the "Termination Claim."

Delfour filed its nine count, 67 paragraph Complaint in VABCA No. 3852 on June 2, 1993. Count I of the Complaint asserts that Delfour's performance was delayed because of the VA's refusal, in breach of the Contract, to allow Delfour access to the work site from October 26-December 7, 1992. This count demands $12,000 for "delay damages." (Cmplnt. Cnt. I, ¶ ¶ 1-11)

Count II alleges the VA's breach of the Contract by reason of the VA's unreasonable failures to discharge its responsibilities to properly administer the Contract. These unreasonable actions by the VA, it is asserted, hindered Delfour's performance. Delfour placed the VA on notice that the VA's unreasonable actions jeopardized completion of the Contract; in the face of this notice the

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VA improperly terminated the Contract. (Cmplnt. Cnt. II, ¶ ¶ 12-27)

In Counts III and IV of the Complaint, Delfour asserts its right to be paid for PR Nos. 4 and 5 and that the VA's failure to pay the PRs in full was improper. (Cmplnt. Cnts. III & IV, ¶ ¶ 28-42)

Count V alleges that Delfour had satisfactorily completed work on the Contract for which it is entitled to be paid for $45,000. (Cmplnt. Cnt. V, ¶ ¶ 43-46)

Delfour alleges Contract changes in Count VI not recognized by the VA. Delfour claims entitlement to payment of $63,828.07 as an equitable adjustment for this extra work (Cmplnt. Cnt. VI, ¶ ¶ 47-50)

Count VII asserts the VA's delay, for numerous reasons, of the project from October, 1992-May, 1993. For this delay, Delfour claims $87,825.20. (Cmplnt. Cnt. VII, ¶ ¶ 51-57)

Delfour alleges the VA's wrongful, bad faith termination of the Contract in Count VIII. Also asserted is Delfour's claim for $2,000,000 for damages suffered by Delfour as a consequence of the VA's wrongful termination. (Cmplnt. Cnt. VIII, ¶ ¶ 58-63)

Finally in Count IX, Delfour asserts that VA wrongfully terminated the Contract for default solely to avoid responding to the changes and questions raised by Delfour. (Cmplnt. Cnt. IX, ¶ ¶ 63-67)

On July 9, 1993, the Government filed its Answer to Count's I, II, V, VI, VII, VIII, and IX and its Motion to Dismiss Counts III and IV for lack of jurisdiction.

DISCUSSION

We face, once again, the problem of determining whether an appellant has met the jurisdictional prerequisites necessary to permit us to adjudicate what is obviously a serious dispute between the parties arising out of the Contract. In making our determination, we look to the requirements placed upon an appellant for the submission of claims and the concurrent obligations of the VA to issue a final decision under the CDA, 41 U.S.C. § § 605-613 and the regulatory implementation of the CDA in FAR 33.201 together with the applicable Contract clauses.

In this case, we must look at Delfour's submissions to the CO and the CO's actions in the 31 day period between April 27-May 27, 1993, to determine our jurisdiction. During this period each party took numerous actions. Delfour requested a final decision on numerous alleged Government Contract administration "failures." Delfour asserted that the VA had breached the Contract, due to which, Delfour was leaving the project and for which it would quantify its damages at a later date. The CO informed Delfour that he was considering terminating the Contract for default. Delfour informed the VA that it was owed $171,778.27 for the VA's breach of contract. The VA terminated the Contract for default. Delfour told the VA that it was still willing to complete the project. The VA rejected Delfour's offer to complete and reiterated its termination. Delfour appealed the default termination to the Board. Finally, Delfour submitted its $2,213,528.28 "Termination Claim" to the VA.

We examine this intense flurry of activity over an approximate period of one month to determine whether the monetary demands contained in the Complaint in Delfour's appeal of the VA's default termination are properly before the Board. In doing so, we must first define the relevant parameters with which we must deal in this case. There is no question that the VA terminated the Contract for default by a proper final decision of the CO and that Delfour has filed a timely appeal of that final decision with the Board. However, here, we also have a circumstance where, along with the appeal of the default termination, Delfour has included in its pleading submitted in VABCA No. 3832 monetary claims, not apparently considered in the final decision terminating the Contract for default, relating to its allegations of breach of contract.

The Contract DEFAULT (FIXED-PRICE CONSTRUCTION) clause contains no provisions for monetary recovery by an appellant. The Contract provides that, if a default termination is adjudged improper, the termination will be converted to one for the convenience of the Government. In that case, Delfour's monetary recovery will be measured under the Contract TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I) clause. Here we have a circumstance where Delfour has clearly claimed that the VA has breached the Contract and where Delfour has demanded damages based upon its breach claim.

Delfour's claims for damages resulting from the alleged breach of contract are separate and distinct from the appeal of the default termination and Delfour's assertion that the default termination was improper because of the VA's breach of contract. That the jurisdictional requirements, in VABCA

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No. 3832, over the appeal of the default termination, including Delfour's breach defense, have been met, do not, in themselves, satisfy the jurisdictional prerequisites necessary for our jurisdiction to decide Delfour's affirmative money claims arising out of the alleged breach. *The Sharman Co., Inc. v. United States* [39 CCF ¶76,567], No. 92-5150, 1993 WL 309171 (Fed. Cir. Aug 17, 1993). Consequently, we must examine the record to determine whether Delfour's monetary demands meet the necessary prerequisites to our exercise of jurisdiction over those demands.

Before embarking on the discussion of our jurisdiction to consider Delfour's damage claims, two counts of Delfour's Complaint relate to issues involving the administration of the Contract labor provisions. Since there are separate jurisdictional issues involved in our ability to consider labor disputes, we will first deal with the two counts of Delfour's Complaint relating to the Contract labor provisions.

COMPLAINT COUNTS III AND IV, PR NOS. 4 AND 5

In Counts III and IV of the Complaint, Delfour demands full payment of its PR Nos. 4 and 5, a total of $16,875. The VA withheld payment of these PRs based on a notice from DOL to withhold an initial amount of $12,840, later increased to $30,877, against Delfour's potential liability for payment of back wages due to Delfour's failure to pay required *Davis-Bacon Act* wage rates to its work force.

Delfour maintains that the VA had no right to withhold payments otherwise due Delfour against its liability for payment of back wages until Delfour had both exhausted its appeal rights provided in 29 C.F.R. Parts 5, 6, and 7 and after a court of competent jurisdiction had found Delfour to have violated wage rate requirements. Consequently, Delfour maintains that the Board has jurisdiction over Delfour's payment claims, under the CDA and the *Prompt Payment Act.*

Appellant misapprehends the VA's rights under the Contract to withhold payments for back pay. The applicable terms of the Contract provide, *inter alia,* that: "The Contracting Officer shall ... upon the written request of an authorized representative of the Department of Labor, withhold ... from the Contract ..." amounts "... as may be considered necessary ..." to pay back wages. Nothing in the terms of this Contract requires that there be final judgment of liability for payment of back wages before the CO can withhold payments against potential wage liabilities. We thoroughly explored the issue of Government withholding of contract payments based on a notice directing such withholding from DOL and the Board's jurisdiction over matters relating to issues of the administration and enforcement of labor standards in *Sealtite Corporation,* VABCA No. 2398, 86-3 BCA ¶19,173 where the Board held that the DISPUTES CONCERNING LABOR STANDARDS clause precluded our jurisdiction over a dispute involving the withholding of contract payments due to the contractor's underpayment of wages. Here, Counts III and IV are grounded entirely on Delfour's position that it did not violate the Contract *Davis-Bacon* wage requirements. As we expressed in *Sealtite,* we are without jurisdiction to determine whether or not Delfour paid the proper wages; therefore we have no subject matter jurisdiction over Counts III and IV of the Complaint in VABCA No. 3832. In addition, Delfour on September 29, 1993, appealed the deemed denial of its May 25, 1993, claim for payment of PR Nos. 4 and 5 which the Board docketed as VABCA No. 3897. For the reasons expressed above, we dismiss VABCA No. 3897.

However, the dismissal of Counts III and IV of the Complaint in VABCA No. 3832 and VABCA No. 3897, does not preclude our jurisdiction over the issue of whether the VA's termination for default based on Delfour's labor violations was proper. The DISPUTES CONCERNING LABOR STANDARDS clause provides that resolution of "disputes concerning labor standards" will be through DOL under the procedures contained in 29 CFR Parts 5, 6, and 7 and not the Contract DISPUTES clause. In contrast, the CONTRACT TERMINATION-DEBARMENT clause simply provides that a breach of the labor standards provision may be grounds for termination of the contract. Regulatory guidance for dealing with labor disputes and contract termination for labor violations is provided at FAR 22.406-10 and 22.406-11. FAR 22.406-10 provides instructions to COs on the handling of labor standards disputes through DOL procedures. That guidance identifies six "areas of possible differences of opinion" that may be encountered in the enforcement of construction labor standards; termination of a contract for labor standards violations is not one of these six areas. FAR 22.406-11 distinguishes termination of contracts for labor standards violations from those listed in FAR 22.406-10 by requiring only that a CO notify DOL instead of requiring that appeals of such actions be

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forwarded to DOL for its action. At the heart of the termination of a Contract for default are the parties' contractual rights and obligations, not the enforcement or administration of wage provisions. Therefore, an appeal of a default termination of a contract for violation of labor provisions is not a dispute "concerning" labor standards and, therefore, the issue of the VA's default termination of Delfour by reason of Delfour's alleged labor violations is properly before us under both the CDA and the Contract DISPUTES clause. *Burnside Ott Aviation Training Ctr., Inc.*, 985 F.2d 1574, 1580 (Fed. Cir. 1993); *Sealtite, supra.* at 96,966-67; *Corban Industries, Inc.*, VABCA Nos. 2181, 2559T, 88-3 BCA ¶ 20,843.

COMPLAINT COUNTS I, II, V, VI, VII, VIII, AND IX

In these six counts of its Complaint, Delfour includes demands for a total of $2,208,653.27 for delays, changes, completed work in place, and breach of contract damages. At the outset, we note that we see no question of our jurisdiction concerning the portions of the Complaint asserting Government delays and the VA's breach of contract as *defenses* to the VA's default termination claim. Here, we are concerned with our jurisdiction over the portions of the Complaint concerning Delfour's entitlement to monetary judgments for delays, changes and breach of contract.

Our appellate jurisdiction is predicated on the existence of an appeal from a CO's actual or deemed final decision during a valid claim. A claim on which a final decision is based must meet certain prerequisites. For a valid claim to exist, at least three conditions must be satisfied: 1) a contractor must assert in writing, with sufficient specificity as to any amount claimed, its right to seek additional compensation; 2) the government must dispute that right; and, 3) the contractor must communicate a demand for a contracting officer's final decision. *George Hyman Construction Company, Inc.*, VABCA No. 3677, 93-2 BCA ¶ 25,823; *Transamerica Ins. Corp., Inc. v. United States* [38 CCF ¶ 76,374], 973 F.2d 1572 (Fed. Cir. 1992). For claims exceeding $50,000, a proper certification must also be provided. *Ball, Ball & Brosamer, Inc. v. United States* [35 CCF ¶ 75,681], 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W.H. Moseley Co. v. United States* [29 CCF ¶ 82,467], 677 F.2d 850, 852 (Ct. Cl.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81 (1982).

There are four documents on which our jurisdiction over Delfour's monetary demands will stand or fall: 1) the April 27, 1993, demand for final decision on a variety of issues; 2) Delfour's May 13, 1993, notice to the VA that it considered the VA to be in breach of contract and that Delfour was leaving the project; 3) the May 17, 1993, "Monies Due Delfour" letter to the CO; and 4) the May 25, 1993, "Termination Claim."

Delfour's April 27 letter demanded a final decision from the Contracting Officer on a litany of eight broad categories of "government failures." This letter contained no monetary claims. Three days later, the CO's response to Delfour's letter requested more specificity of Delfour's claims to permit him to render a final decision. Delfour cavalierly responded to CO's request by referring him to the entire Contract correspondence file while maintaining its willingness to meet for the purposes of resolving the problems it had identified.

Delfour's April 27 letter was not a valid claim since it included no "sum certain" for what were, by their very nature, monetary claims. *George Hyman, supra.; Winding Specialists Co.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737. Moreover, the claims made in the letter were too vague and general to meet the necessary specificity prerequisites for a claim that would obligate the CO to issue a final decision. *Bridgewater Construction Corp.*, VABCA Nos. 2866 *et al.*, 90-2 BCA ¶ 22,764; *R&R Enter.*, ASBCA No. 41382, 91-2 BCA ¶ 23,707. Thus, the April 27 letter cannot support our jurisdiction over the monetary demands in Delfour's Complaint.

On May 13, 1993, Delfour explicitly notified the VA that it considered the VA to be in breach of the Contract and, as a result, Delfour was terminating its performance. The May 13 letter contained no monetary demand; rather, it informed the VA that Delfour would be submitting its costs resulting from the breach at a later date. Because of the absence of a monetary demand in a sum certain, Delfour's May 13 letter cannot serve as a claim under the CDA. The letter serves only as a notice to the VA of Delfour's exercise of its common law right to unilaterally abandon its performance because of the Government's material breach of the Contract. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

On May 17, Delfour, citing its May 13 letter noticing the breach, submitted a detailed tabulation of costs for the VA's payment. Ostensibly a quantification of the breach claim, the May 17 letter, in conjunction with the May 13 letter could have served as a valid CDA claim but for the fact

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that the total demand was $170,000. The claim, being in excess of $50,000, was statutorily required by the CDA to be certified. It was not. The absence of certification precludes our jurisdiction.

In response to the VA's default termination of May 18, 1993 and subsequent to its appeal of the default termination, Delfour submitted its "Termination Claim" on May 25, 1993. The claim was for $2,213,528.27 and was accompanied by the appropriate CDA certification. The CO has never responded to this claim.

The May 25, 1993, "Termination Claim" meets the four jurisdictional prerequisites noted above for a valid claim. In making this determination we look at the totality of the parties' communications relating to the claim. *George Hyman, supra.*

At the time Delfour's May 25 claim was submitted, Delfour had already, in its May 13 and May 17 letters, asserted that the VA had breached the Contract, exercised its common law right to cease performance because of the breach, and submitted to the VA the amount to which it felt it was entitled as a result of the breach. Subsequent to these assertions by Delfour, the VA terminated the Contract for default by a final decision grounded, in part, on a rejection of Delfour's claim that it had a right to cease performance because of the VA's alleged breach.

In the context of this record, where: Delfour had placed the VA on clear notice that it believed the VA to be in breach of contract; Delfour took the extreme measure of walking off (or at least threatening to walk off) the project; and the VA had taken the equally extreme measure of terminating the Contract for default, Delfour's submission of the May 23 certified claim for amounts due it resulting from the alleged breach of contract provided the VA with adequate notice of both the basis and amount of Delfour's claim and obligated the CO to respond to the claim as provided for in the CDA. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987); *George Hyman, supra.; Bill Strong Enter., Inc.*, ASBCA No. 42946 *et al.*, 93-3 BCA ¶ 25,961.

The VA asserts that we have no jurisdiction over the monetary claims because Delfour's May 25 claim is nothing more than a premature termination settlement proposal under the Contract TERMINATION FOR CONVENIENCE OF THE GOVERNMENT clause. The VA bases its assertion on paragraph (c) of the Contract DEFAULT (FIXED-PRICE CONSTRUCTION) clause providing that the rights and obligations of the parties will be determined under the TERMINATION FOR CONVENIENCE OF THE GOVERNMENT clause if the Contractor was not in default. The VA concludes that these two provisions must be read collectively and preclude a contractor from asserting a monetary claim when a contract has been terminated for default until a final determination on the propriety of a default termination has been reached.

We reject the overreaching interpretation suggested by the Government. The Contract DEFAULT clause cannot be used to limit rights provided by the CDA permitting a contractor to submit a claim arising under a contract and to obtain resolution of that claim before either a Board of Contract Appeals or the United States Court of Federal Claims simply because the Government decides to issue a default termination. Paragraph (c) of the DEFAULT clause specifies, as a matter of contract agreement, that a contractor is entitled to a monetary recovery if it did not default on its contract and the method by which such recovery will be measured. The DEFAULT clause does not preclude a contractor from asserting a monetary claim resulting from an improper default termination. Moreover, since a breach of contract claim by a contractor does not arise out of the DEFAULT clause, that clause can not be used to prevent a contractor from asserting a claim for breach damages.

Consequently, upon receipt of Delfour's May 25 certified claim, the CO was obligated to either issue a final decision or to inform Delfour when a final decision was going to be issued within 60 days of its receipt of Delfour's claim. The record does not reveal when the CO received the claim. However, assuming a reasonable period for delivery to the CO, we determine that the claim was in the hands of the CO not later than June 1, 1993. Thus, the CO was obligated to respond to the claim by July 30, 1993. No such response was made.

Our jurisdiction over an appeal, for the most part, is determined on the facts existing at the time an appeal is filed. *See Sharman*, 1993 WL 309171, at *4. This appeal was filed May 18, 1993, the date of mailing (see Rule 1), and, on its face, was an appeal solely from the Government's default termination on that date. On May 18, Delfour had not yet submitted a valid monetary claim which could support our jurisdiction over the monetary claims in this appeal.

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Thus, we have no jurisdiction in VABCA No. 3832, over Delfour's monetary claims. However, any issues of our jurisdiction over the monetary claims asserted in the Complaint in VABCA No. 3832, were rendered moot with Delfour's submission of the appeals of the CO's deemed denial of Delfour's May 25, 1993, claims. Consequently, Delfour's monetary claims are properly before us in VABCA Nos. 3898-3901.

DECISION

For the foregoing reasons the Government's Motion to Dismiss Counts III and IV of the Complaint in the Appeal of Delfour, Inc., VABCA No. 3832 under Contract No. V523C-1050 is GRANTED. Since Delfour has reiterated the same demands made in Counts III and IV of the Complaint in VABCA No. 3832, for payment of the amounts withheld at the direction of the Department of Labor in the appeal docketed at VABCA No. 3897, the appeal in VABCA No. 3897, in addition to Counts III and IV of the Complaint in VABCA No. 3832, are DISMISSED, pursuant to Rule 5, for lack of subject matter jurisdiction.

With the docketing of Delfour's appeals in VABCA Nos. 3798-3901, Count I, ¶ 11; Count V; Count VI; Count VII, ¶ 57; and Count VIII of the Complaint in VABCA No. 3832 are DISMISSED as moot. Appellant, Delfour, Inc.'s monetary claims arising out of the Department of Veterans Affairs alleged breach of contract and improper default termination are properly before the Board in the appeals in VABCA Nos. 3798-3901.

Therefore, the Board now has before it the following appeals arising out of Contract No. V523C-1050:

DOCKET NO.	DESCRIPTION	AMOUNT
VABCA No. 3803	Dex-O-Tex Flooring	$ 14,422.00
VABCA No. 3832	Default Termination	N/A
VABCA No. 3898	Work In Progress	45,000.00
VABCA No. 3899	Change Order Work	63,828.07
VABCA No. 3900	Cost of Delays	87,825.20
VABCA No. 3901	Breach of Contract Damages	2,000,000.00

The Board will, by separate Order, issue instructions for the further processing of these appeals.

[¶ 26,386] River Road Construction, Inc.

ENG BCA No. 6040, September 29, 1993. Contract No. DACW29-91-C-0007.

Interpretation of Contracts—Contract as a Whole—Meaning to Every Part.—Under an embankment placement contract, a contractor was not entitled to an equitable adjustment for placement of uncompacted fill, because the contract, read as a whole, clearly and unambiguously indicated that the cost of the fill included uncompacted wave berm fill and the contract provisions were susceptible to only one reasonable interpretation. The bid invitation, as amended, clearly stated that the two feet of uncompacted fill measured perpendicularly to the gabion bottom slope were considered gabion bedding and, as such, were included in the square yard cost for fill. Although the contractor contended that the contract raised a patent ambiguity regarding payment for uncompacted fill, the contractor failed to seek clarification of any alleged conflict in the specifications.

For the appellant: Moore, Costello & Hart, Minneapolis, Minnesota, by William M. Beadie. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Joseph A. Towers and Anthony C. Occhipinti, Government Trial Attorneys, New Orleans, Louisiana.

Before JOCKISCH, SOLIBAKKE, and KETCHEN, Administrative Judges.

JOCKISCH, Administrative Judge: In this timely appeal under the Contract Disputes Act of 1978, River Road Construction Inc., Appellant, seeks to recover $118,995 for the placement of "23,799 cubic yards (cu.yds.) of uncompacted fill within the upper two feet under the gabion," because of alleged ambiguous Government specifications. The parties elected to process the appeal under Board Rule No. 11, Submission Without a Hearing.

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The record before the Board, which includes the Complaint, Answer, Rule 4 file, stipulations, and briefs, was closed in the middle of September, 1993. The parties have stipulated that, if the Board finds entitlement for Appellant, the Respondent will pay Appellant $118,995 plus Contract Disputes Act interest as full compensation. (Stip. No. 3).

FINDINGS OF FACT[1]

1. The invitation for bids for "New Orleans to Venice, La., West Bank Mississippi River Levee, Hurricane Protection Levee, First Enlargement, B/L Sta. 624+70 to 764+00, Plaquemines-Parish, La.," was issued on August 10, 1990. The work consisted of "clearing and grubbing; placing of semicompacted and uncompacted embankment; armorment of uncompacted wave berm using riprap/stone or gabions; mulching, fertilizing, and seeding; cutting, splicing, and driving steel sheet piles; surfacing of levee crown; and other incidental work." (Stip. No. 6).

2. Three amendments were issued to the solicitation. (Stip. No. 7). The one pertinent to this appeal was amendment No. 002, which stated in pertinent part the following:

C2L-7. MEASUREMENT. Measurement shall be by the square yard of gabion placed as per the drawing and specifications. *Two feet (measured perpendicular to the gabion bottom slope) of uncompacted wave berm fill is considered gabion bedding and as such is included in the square yard cost of the armorment gabions. This fill will not be measured for payment.* (Emphasis added).

C2L-8. PAYMENT. *Payment for all work done in accordance with this section of the specifications shall be made at the applicable contract unit price per square yard for "Armorment, (Gabion)." Price and payment shall constitute full compensation for furnishing all plant, labor, equipment and material including the* gabion baskets, stone, anchors, filter cloth, *uncompacted earth material,* foundation preparation, placing the filter cloth, anchoring, placing and fabrication of gabion baskets and filling the gabions to the required grade and tolerances as per the specifications and drawings. (Emphasis added).

Further, Amendment No. 002 eliminated the entire existing Section C2L-Embankment Protection and replaced it with an entirely new Section C2L-Embankment Protection, of which the above quoted paragraphs were a part. Also, in Amendment No. 002, bid Item No. 0005AC, Armorment (Gabion), was renumbered as Item No. 0005 under Option No. 2. Appellant bid on Option No. 2.

3. Contract DACW29-91-C-0007 was awarded by the Government to River Road Construction, Inc. on November 6, 1990, in the amount of $3,578,390. Notice to proceed was issued on December 11, 1990. The start of work was delayed until March 25, 1991, because of high river stages. Appellant completed the project on December 30, 1992. (Stip. No. 4).

4. Besides the usual General Provisions which were included in the contract, the following contract provisions are pertinent to this appeal:

a. "Bidding Schedule," as bid by Appellant:

Item No.	Description	Estimated Quantity	Unit	Unit Price	Est. Amt.
0001.	Mobilization and Demobilization	Lump Sum	LS	—	161,675.00
0002.	Clearing and Grubbing	Lump Sum	LS	—	175,000.00
0003.	Embankment, Semicompacted Fill	266,000	CY	6.00	1,596,000.00
0004.	Embankment, Uncompacted Fill	97,000	CY	5.00	485,000.00
	Option 1				
0005.	Armorment				
* 0005AA.	Armorment (Riprap/Stone)	50,000	TONS	—	—
* 0005AB.	Armorment (Bedding Material)	13,000	CY	—	—
	Option 2				
* 0005.	Armorment (Gabion)	39,800	SY	25.00	995,000.00
0006.	Mulching	28	AC	680.00	19,040.00
0007.	Fertilizing and Seeding	45	AC	300.00	13,500.00

[1] The parties have agreed that essentially all the facts pertinent to this appeal are not in dispute and that the issue before the Board is one of contract interpretation.

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0008.	Cut, Splice and Drive Sheet Piling, Empire Locks	Lump Sum	LS	—	20,000.00
0009.	Surfacing				
	Option 1				
0009AA.	Shell or Sand-Clay-Gravel	4,600	CY	—	—
	Option 2				
0009AB.	Crushed Stone	3,600	CY	27.75	99,900.00
	Option 3				
0009AC.	Calcium Sulfate Hemihydrate	3,300	CY	—	—
0010.	Erosion Control	2,300	LF	2.75	6,325.00
0010AA.	First 2,300 LF	1,000	LF	2.75	2,750.00
0010AB.	All Over 2,300 LF	42	SY	100.00	4,200.00
* 0011.	Landside Armorment (Gabion)				
	TOTAL				$3,578,390.00

b. Technical Provisions

(1) Section C2D-Embankment * * *

* * *

Part 3-Execution

* * *

C2D-15. MEASUREMENT.

C2D-15.1 *Embankment and Berms*

C2D-15.1.1 *Unless otherwise specified,* semicompacted fill, uncompacted fill and required fill and backfill materials of any description specified in this section except inspection ditch backfill as specified in C2D-9 and the tie-in embankments specified in C2D-14 will be measured for payment by the cubic yard, and quantities will be determined by the average end area method. The basis for the measurement will be cross sections of the areas to be filled taken prior to clearing, grubbing, and vegetation removal operations and the theoretical design cross sections of the completed levee constructed within the specified tolerance. (Emphasis supplied).

(2) Section C2L-Embankment Protection, particularly paragraphs C2L-7, Measurement, and C2L-8, Payment. *See* Finding No. 2.

5. After Appellant commenced work under the contract, the Government's project engineer computed quantities for each of the major pay items listed in the Bid Schedule. He included all uncompacted fill (including the upper two feet immediately under the gabion) under Bid Item No. 0004-Embankment, Uncompacted Fill. (Stip. No. 9). Thereafter, River Road learned that the Government would not pay for the upper two feet of uncompacted fill supporting the gabion under Bid Item No. 0004, as it considered the cost of that quantity of fill to be within the unit price to be paid for each square yard of gabion placed under Bid Item No. 0005. (Stip. No. 10).

6. By letter dated December 6, 1991, Appellant requested payment for all uncompacted fill used as bedding beneath the gabions placed on the wave berm, under Item No. 0004, Embankment, Uncompacted Fill. The Contractor asserts that the cost for the two feet of uncompacted fill under the gabions was covered in Item No. 0004 of his estimate. Appellant's letter stated, in part, the following:

> We have recently been made aware that the two feet of uncompacted fill that lies directly beneath the gabion will be deducted from the pay quantity for bid item No. 0004 Embankment, Uncompacted Fill. You are making that deduction because you are treating the cost of placing that two feet of fill as included in our unit price for bid item No. 0005 Armorment (Gabion).
>
> Our bid unit prices assumed payment in full for all uncompacted fill actually placed. Our unit price for gabion did not include anything for underlying uncompacted fill . . . .
>
> *When you issued Addendum 2 you changed the specified method of measuring the gabion quantity for payment (by including the underlying two feet of uncompacted fill) but you made no corresponding changes to the specified method of measuring uncompacted fill for payment, no changes to the drawings and no change to the estimated quantity of uncompacted fill shown in the Bid Schedule.* Therefore, even after Addendum 2, the contract continued to provide that payment would be made for *all* uncompacted

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fill placed to the extent of the lines and grades shown on the drawings. Furthermore, the drawings, including Detail K (the typical section for gabion armorment), did not denote either the two feet of gabion bedding or any change in the lines and grades defining the limits of uncompacted fill ....

However, when you wrote in the change to section C2L-7 (adding two feet of underlying fill to the gabion unit price) you did not make any of the necessary corresponding changes to the specifications, drawings or bid schedule covering placement of uncompacted fill. As a result, the two sections are inconsistent at best and, at worst, would lead to double payment for two feet of fill ....

With the confusion created by these specifications, we ask that you pay us in full for placement of all uncompacted fill as defined by ¶ C2D-15 at our unit price for bid item No. 0004. Paying us for less than actual quantities would be contrary to the specifications and a change for which a claim could be made .... (Emphasis supplied).

(R.4, Tab C-11).

7. By letter dated January 24, 1992, the Respondent denied Appellant's request, in part, as follows:

Theoretical quantity computations for Pay Item No. 4, Embankment, Uncompacted Fill, was computed without the measurement of gabion bedding material. As clearly stated in Amendment 002, which you acknowledged on September 10, 1990, there will be no measurement for the 2-foot of uncompacted wave berm fill located directly under the gabion baskets and all costs associated with said fill is to be included in the square yard cost of the armorment gabions.

Note 13 on Drawing 5 of 22 refers to cut sections in the vicinity of levee setbacks and states that the gabion armorment will be placed directly on the cut section. Note 14 on Drawing 5 of 22 refers to semicompacted fill within the wave berm in the vicinity of the turnaround area. As detailed on the actual cross section rolls, no gabion armorment is required to be placed on this semicompacted fill ....

Furthermore, the contract clear[ly] outlines measurement and payment of embankment quantities and does not create confusion as you indicate ....

(R.4, Tab C-12).

8. By letter dated March 17, 1992, Appellant claimed a "maximum estimated amount" of $132,666 for payment of the uncompacted fill placed under the gabions, certified the claim, and requested a Contracting Officer's final decision. (R.4, Tab C-13).

9. At a meeting held on April 23, 1992, Appellant referenced data from the Government's Engineering Division which was used to compute the amount of uncompacted fill needed for Item No. 0004. The data showed only 77,500 cubic yards were needed for Item No. 0004; and, since the advertised quantity was for 97,000 cubic yards, Appellant contended the remaining 19,500 cubic yards were for the two feet of fill required under the gabions. Respondent stated that the 77,500 cubic yards was the computed yardage needed for item 0004, but a factor for settlement was applied to raise the quantity to the advertised estimate amount of 97,000 cubic yards.

10. Appellant requested and Respondent granted a review of the contract documents and the design quantities used to compute the contract quantities on the subject contract. Included in the material reviewed was a complete copy of the data used to compute the quantity of material needed for Item No. 0004, showing a settlement factor of 25% having been added to the 77,500 cubic yards to bring the quantity to 96,875 cubic yards. This figure was rounded to 97,000 cubic yards, representing the advertised contract quantity under bid Item No. 0004, Embankment, Uncompacted Fill. (R.4, Tab C-14).

11. By letter dated May 20, 1992, Appellant requested that it be allowed to review contract documents from several different contracts that required armorment of the wave berm by riprap/stone or gabion. (R.4, Tab C-15). Because of the volume of the documents requested, Respondent informed the Appellant that such a request should be made under the Freedom of Information Act (FOIA). By letter dated June 11, 1992, Appellant requested the information under FOIA. (R.4, Tab C-16).

12. After reviewing the various records, the Appellant informed the Respondent, by letter dated August 31, 1992, that it still believed the Government was in error, and that it should be paid for all uncompacted fill used as bedding beneath the gabions under Item No. 0004, Embankment, Uncompacted Fill. (R.4, Tab C-18). Appellant noted that Respondent changed *Option 2* of the bid schedule on later contracts to include an item for uncompacted fill used in connection with armorment gabion construction rather

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than include uncompacted fill and gabion construction in one unit price. The change was reflected as follows:

Item No.	Description	Estimated Quantity	Unit	Unit Price	Est. Amt.
	Option				
* 0006AC	Armorment (Gabion with Stone)		SY		
* 0006AD	Armorment (Additional Uncompacted Fill)		CY		
* 0006AE	Armorment (Additional Fertilizing & Seeding)		AC		

(R.4, Tab C-11; Stip. No. 13).

13. Following an exchange of correspondence in September, 1992, the Contracting Officer, on November 30, 1992, issued his final decision denying the Contractor's claim. (R.4, Tab B). Appellant timely appealed. (R.4, Tab A).

POSITIONS OF PARTIES

Appellant postulates that: (1) in spite of the language contained in Amendment No. 002 to the invitation for bids, a reading of the contract document as a whole leads to only one reasonable interpretation, which is that all uncompacted fill would be paid for under Item No. 0004, Embankment Uncompacted Fill, of the bid schedule; (2) the only interpretation of the contract other than as stated in (1) above would be that payment would be made twice under Items No. 0004 and 0005 of the bid schedule which would be unreasonable; (3) since Respondent did not change any other parts of the contract plans and specifications, such as the estimated amount of uncompacted fill in the contract, the intent of Respondent was to pay for all uncompacted fill under Item No. 0004; (4) the contemporaneous interpretation of Respondent's project engineer confirmed Appellant's interpretation of the plans and specifications; and, (5) the Respondent's changes in later contracts to reflect another method of payment for uncompacted fill located under the gabion armorment option clearly illustrates the confusion/ambiguity created by the specifications in the contract which is the subject of this dispute.

Respondent counters that: (1) Amendment No. 002 is clear and unambiguous in requiring a bidder (Appellant) to include the two feet of uncompacted fill in the bid price for gabion armorment; (2) Appellant's interpretation requiring payment for the two feet of uncompacted fill under both Item No. 0004, uncompacted fill, and Item No. 0005, armorment (gabion), would create an obvious patent ambiguity for which Appellant had a duty to inquire; (3) Respondent did not change the other parts of the specifications, such as the estimated amount of uncompacted fill, in the amendment because it always intended to have the two feet of uncompacted fill under the gabion included in the gabion armorment bid Item No. 0005; (4) the project engineer did not agree with Appellant's position that the two feet of uncompacted fill under the armorment was to be paid for under Item No. 0004, uncompacted fill, and, even if he did, he had no authority to change a clear contract requirement; (5) Respondent changed later contracts to include a specific price for the uncompacted fill under the gabion armorment option because it had made a decision to break out this item from the armorment cost.

DECISION

Though a number of ancillary issues have been raised by the parties, the appeal's key is whether the bid invitation as amended clearly and unambiguously required a bidder to include the cost of placing the two feet of uncompacted fill located beneath the gabion armorment in Item No. 0005, Armorment (Gabion), of the unit price schedule. In their briefs, both parties assert the same general legal concepts as being applicable to this appeal. These are:

(1) The contract must be read as a whole, giving meaning to all parts so as to make none of the provisions mere surplusage.

(2) The doctrine *contra proferentem* requires that a latent ambiguity be construed against the drafter (Respondent), and its corollary that an obvious, patent ambiguity places a duty of inquiry upon the bidder (Appellant).

The Board concludes that Respondent's position is the more persuasive. The language of Amendment 002 is clear, unambiguous, and susceptible to only one reasonable interpretation. Paragraph C2L-7, Measurement, of Amendment No. 002, states clearly

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and unambiguously that the two feet of uncompacted wave berm fill, measured perpendicular to the gabion bottom slope, is considered gabion bedding and, as such, is included in the square yard cost for armorment gabion. It further states that, "this fill will not be measured for payment." It is difficult for the Board to imagine a clearer direction to a bidder. Appellant was on notice of the above requirement as it was highlighted as a pre-bid amendment to the specifications. The payment provision, C2D-15.1.1, on which Appellant relies, begins with the expression "Unless otherwise specified," which placed a prospective bidder on notice of potential changes to the general requirement in that payment provision in/by other sections of the bid invitation.

Also, Paragraph C2L-8, Payment, states that payment for all work on the armorment gabions under Option 2, Armorment (Gabion), will be included in the "contract unit price per square yard for 'Armorment (Gabion),' ... including the ... uncompacted earth material ..." Again, the Board finds clear and unambiguous this direction to a potential bidder (Appellant) as to where the cost for the two feet of uncompacted fill beneath the gabion armorment is to be included in the unit price schedule.

In its brief, Appellant asserts that,

> "All the Government's trying to do [by Amendment 0002] is move this two feet of fill from one pay item to another, like a pea under a shell. Why? There is no apparent reason."

However, whether the Government had a good reason or not is not the issue. The issue is whether the Government clearly and unambiguously accomplished its intent to have the fill under the gabion armorment bid and paid for under the unit price for armorment gabion. Appellant asserts, in its reply brief, that a bidder would need to understand Respondent's "subjective intent" in order to understand the amendment. The Board, however, finds the amendment clear and Appellant's attempts to create a conflict and/or ambiguity by ignoring the clear and concise statement in the amendment forced.

As the contract specifications are clear and unambiguous, provide meaning to all parts of the contract without conflict, and give all words their normal, accepted meaning, there exists no ambiguity to be construed against the drafter of the contract. *See Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶ 72,885], 169 Ct.Cl. 364, 351 F.2d 972 (1965); *Perini, Horn, Morrison-Knudsen, (JV)*, ENG BCA No. 4621, 87-1 BCA ¶ 19,545. *United States v. Johnson Controls, Inc.* [31 CCF ¶ 71,374], 713 F.2d 1541 (Fed. Cir. 1983).

Though the Board's decision is concluded by the previous conclusions and discussion, the Board will address briefly other issues raised, as the parties have spent considerable time and effort on them.

Appellant's attempt to create a latent ambiguity fails from its own presentation. If, as it asserts, Amendment No. 002 would require the Government to pay for the same uncompacted fill under the gabion armorment twice in the bid schedule as Uncompacted Fill and as Armorment (Gabion), and if, as it asserts, it determined that the Government would have changed other parts of the contract if it really meant Amendment No. 002 to mean what it said, the Appellant has created and recognized an obvious inconsistency and/or ambiguity by its interpretation. Obviously, as observed by Appellant, the Government did not intend to pay twice for the same material. At this juncture, Appellant had the duty to inquire, if it had in fact made such interpretation of Amendment No. 002. *See S.S. Mullen Inc. v. United States* [12 CCF ¶ 81,590], 182 Ct. Cl. 1, 9 (1968); *Henry Shirek d/b/a/ Shirek Construction Company*, ASBCA No. 28414, 86-1 BCA ¶ 18,560; motion for recon. denied, 87-1 BCA ¶ 19,392; *George E. Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647, 649 (Ct.Cl. 1982).

When Appellant did not request clarification from the Respondent of its interpretation of the patent ambiguity or conflict in the specifications, it accepted the risk of choosing between the conflicting requirements it interpreted into the specification and the consequences of its choosing incorrectly or differently from the Government (drafter). *See HRH Construction Corp. v. United States* [15 CCF ¶ 83,780], 192 Ct.Cl. 912 (1970); *See Beacon Construction Co. v. United States* [9 CCF ¶ 72,018], 161 Ct.Cl. 1 (1963); *Lord & Sons Construction, Inc.*, ASBCA No. 42700; 93-1 BCA ¶ 24,346; *Master Mechanical Contractors, Inc.*, ASBCA No. 33304, 87-2 BCA ¶ 19,799; *Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647, 230 Ct.Cl. 301 (1982); *Monarch Painting Corporation v. United States* [35 CCF ¶ 75,623], 16 Cl.Ct. 290 (1989).

Appellant's further assertion that the contemporaneous interpretation of Respondent's project engineer, being consistent with Appellant's interpretation, demonstrates the validity of its position, is unavail-

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ing. Since Appellant's assertion of a latent ambiguity has been found by the Board to be unreasonable, the project engineer could give it no validity.

Appellant also asserted that Respondent's change in the bidding schedule for pricing uncompacted fill located under the gabion armorment in later contracts supports its view that the bidding schedule in this contract was ambiguous. At most, Respondent simply took a reasonable step to make clearer that which was already clear to avoid future litigation. Further, the Respondent did not clarify an alleged ambiguous specification, rather it changed entirely the concept of pricing the uncompacted fill located under the gabion armorment. Respondent's actions do not support Appellant's assertion of a recognition of an ambiguous specification. *See Martin Lane Co. v. United States* [15 CCF ¶ 83,669], 193 Ct.Cl. 203 (1970); *River Equipment Co., Inc.*, ENG BCA No. 5934, 93-2 BCA ¶ 25,804; *Weiss Pollution Control Corporation*, ENG BCA No. 3505, 76-1 BCA ¶ 11,925.

SUMMARY

As the specifications are clear, unambiguous, and susceptible to only one reasonable interpretation, Appellant's Appeal is DENIED.

[¶ 26,387] ViGYAN, Inc., and Modern Technologies Corporation v. National Aeronautics and Space Administration; United International Engineering, Inc., I-NET, Inc., and NYMA, Inc., Intervenors

GSBCA Nos. 12545-P, 12556-P, September 3, 1993. Solicitation No. 3-349555.

Protests, GSBCA—Protective Order—In-House Attorney.—The in-house attorney and vice president of a protester/intervenor was granted access to protected material because he neither engaged in nor gave advice regarding the competitive decisionmaking of his corporation. The nature of the advice he provided as in-house attorney, as described in his detailed request for access, did not constitute advice on competitive decisionmaking. His role in reviewing solicitations was limited, he did not advise the corporation on whether to respond to solicitations, and he did not participate in proposal preparation. Rather, he advised the corporation on how to comply with statutory and regulatory requirements. It was found that his position as sole in-house attorney and vice president did not necessarily impose upon him the role of competitive decisionmaker. Allegations of other protesters that his status inevitably involved advice and participation in the corporation's pricing, marketing, and other decisions were rejected because the allegations were based solely on perceptions of this individual's status and were contradicted by the statements contained in the request for access.

For the protester/intervenor, ViGYAN, Inc.: Barton, Mountain & Tolle, McLean, Virginia, by John R. Tolle, William B. Barton, Jr., and William T. Welch. For the protester/intervenor, Modern Technologies Corporation: Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., by James J. McCullough, Joel R. Feidelman, and Deneen J. Melander. For the government: Sumara M. Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C., and Jerald J. Kennemuth, Office of the Chief Counsel, Lewis Research Center, Cleveland, Ohio. For the intervenor, United International Engineering, Inc.: Uhrig, Munger & Howard, Huntsville, Alabama, by Don A. Howard. For the intervenor, I-NET, Inc.: David W. Wells, Vice President and General Counsel, and Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., by Richard J. Webber and John J. O'Brien. For the intervenor, NYMA, Inc.: Manatt, Phelps & Phillips, Washington, D.C., by James H. Roberts III, Suzanne M. Dohrer, and Martin Shulman.

Before GOODMAN, Administrative Judge.

GOODMAN, Board Judge: On August 20, 1993, ViGYAN, Inc. (ViGYAN) filed the instant protest challenging the award of a contract by the National Aeronautics and Space Administration (NASA or respondent) to NYMA Corporation (NYMA) pursuant to solicitation no. 3-349555. On August 25, 1993, Modern Technologies Corporation (MTC) filed its protest of the same contract award. NYMA, United International Engineering, Inc. (UIE), and I-NET Corporation (I-NET) have intervened in both protests,

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and ViGYAN and MTC have also intervened in each other's protests. The protests have been consolidated by the Board.

This matter comes before the Board on the request for access to protected material made by I-NET's general counsel and vice president, Mr. David W. Wells. ViGYAN, NYMA, and respondent oppose the Board's granting Mr. Wells access to protected material.

Mr. Wells' application for access to protected material reads in relevant part:

1. I serve as Vice President and General Counsel for I-NET. In that position, my responsibilities include providing general legal advice to I-NET. Specifically, if I-NET is in a position where legal advice is needed, I render that advice. Typically these situations involve areas of contract performance, Federal and state tax questions, human resource matters, or interpretation of Federal regulatory issues. When a situation arises, I will advise the President of the Company and the company then makes a reasoned decision as to how to proceed. Where appropriate, I will engage and manage outside counsel.

2. My role in reviewing solicitations is very limited. Specifically, I will review requests for proposals or invitations for bids to determine what level of legal compliance is required. For example, if the Service Contract Act applies to a specific RFP, I will then advise the President of the Company to ensure that the proposal team complies with the Service Contract Act in its proposal. As another example, if the Solicitation discusses security clearances, I would inform the President or the Security Officer to ensure that the proposal team makes arrangements for the proper security clearances.

3. I do not participate or advise I-NET in determining whether to submit a proposal in response to the RFP.

4. I do not provide advice or participate in the proposal preparation process for I-NET. I have no role in the pricing, product design, or product selection for I-NET. Further, I am not otherwise involved in the preparation or structure of proposals or bids submitted by I-NET. Additionally, I do not participate in meetings or discussions where assessments of potential competitors or their products occur concerning any Federal procurements.

5. I am never involved in deciding whether I-NET should enter into teaming, OEM, subcontract, or other agreements. I review the respective agreements from a legal perspective to determine whether there are any problems legally with I-NET's entering into any given agreement.

6. My position does not involve participation in "competitive decision-making" for I-NET. For purposes of the foregoing statement, the term "competitive decision-making" is used in the sense as discussed in *U.S. Steel Corporation v. United States,* 730 F.2d 1465, 1468 (Fed. Cir. 1984).

7. I do not have, nor do I expect to have, any problems upholding the terms of the Board's Protective Order. While I know I-NET's employees who work in marketing, pricing, and contract functions, and while many of them work in the same building in Bethesda, Maryland, I do not participate or provide advice to those individuals concerning their job functions.

8. I have previously been granted access to protected material in connection with prior protests before the Board. *See International Data Products Corp. v. Dept. of Health and Human Services,* GSBCA 12269-P, 93-2 BCA ¶ 25,807 1993 BPD ¶ 44; *Challenger Engineering, Inc. v. Defense Information Systems Agency,* GSBCA No. 12207-P, 93-2 BCA ¶ 25,769 (access granted under protective order dated December 11, 1992).

9. I agree that my access to protected materials will be limited to information received orally or viewed in the offices of Arent Fox Kintner Plotkin & Kahn, or during a hearing, deposition, or other related proceedings. At no time will I maintain physical possession of protected materials in I-NET's offices.

Request for Access to Protected Material of David W. Wells at 1-4.

ViGYAN opposes Mr. Wells' application because I-NET is a small business and "therefore is likely to make greater use of in-house counsel on competitive legal issues." ViGYAN Objection to Request for Access to Protected Material Filed by David W. Wells at 3. ViGYAN also expresses concern that in Mr. Wells' role of advising the president of I-NET with respect to ensuring that I-NET's proposal team complies with the Service Contract Act when responding to solicitations, his actions may directly impact I-NET's competitive decisionmaking.

NYMA bases its opposition to Mr. Wells' request for access to protected material on the assertion that because Mr. Wells is the sole in-house attorney and is also a vice pres-

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ident of I-NET, and because his interaction with other I-NET personnel is extensive, this "... by any reasonable definition, makes him a decisionmaker." NYMA Inc. Objection to Request for Access to Protected Material Filed by I-NET, Inc. at 2.

NASA's opposition to Mr. Wells' request for access to protected material is based on its contention that Mr. Wells' position as vice president and general counsel "... must inevitably involve advice and participation in motions pertinent to the corporation's pricing, product design, marketing or other decisions." Respondent's Objection to Intervenor I-NET's Request for Access to Protected Material at 1-2.

I-NET argues that Mr. Wells, in his current capacity as general counsel and as vice president, was granted access to protected material in prior protests, including *International Data Products Corp. v. Department of Health and Human Services,* GSBCA 12269-P, 93-2 BCA ¶ 25,807, 1993 BPD ¶ 44, and that the objecting parties have not raised sufficient grounds for excluding Mr. Wells from having access to protected material in this protest.

Discussion

Whether in-house counsel is precluded from having access to protected material is determined by whether counsel is engaged in competitive decisionmaking, i.e., advising or participating in any or all of the client's decisions such as pricing or product design, made in light of similar or corresponding information about a competitor. Such a determination cannot be made to exclude an individual from having access to protected material solely based upon the individual's status as in-house counsel. Rather, a determination must be made as to whether an unacceptable opportunity for inadvertent disclosure exists, based upon a review of the facts in each case. *U.S. Steel Corp. v. United States,* 730 F.2d 1465 (Fed. Cir. 1984). The standard to be applied in making such a determination is not whether in-house counsel has regular contact with individuals involved in competitive decisions, but instead whether counsel renders advice and participates in competitive decisionmaking. *Matsushita Electric Industrial Co. v. United States,* 929 F.2d 1577 (Fed. Cir. 1991)

We recently granted Mr. Wells access to protected material in *International Data Products Corp.* based upon substantially identical representations as have been made by Mr. Wells in this protest. The Board has reviewed Mr. Wells' request for access to protected material in the instant protest, and concludes that Mr. Wells has demonstrated that he neither engages in nor gives advice regarding the competitive decision making of his corporation. The arguments put forth by ViGYAN, NYMA and respondent contain assumptions based solely upon Mr. Wells' status as in-house counsel which do not provide a factual basis for their assertions that Mr. Wells is engaged in competitive decisionmaking. There has been no showing that I-NET's size makes it more likely that I-NET will make use of Mr. Wells on competitive legal issues, as alleged by ViGYAN. Mr. Wells' position as sole in-house attorney and a vice president and interaction with other I-NET personnel does not necessarily impose upon him the role of competitive decisionmaker, as alleged by NYMA. Similarly, NASA's allegation that Mr. Wells' status "must inevitably involve advice and participation in motions pertinent to the corporation's pricing, product design, marketing or other decisions" is speculative assumption based solely upon Mr. Wells' status and contradicted by the factual statements contained in Mr. Wells' request for access to protected materials.

Mr. Wells has established the requisite factual basis for being granted access to protected material in the instant protest. The nature of the advice he provides as general counsel as detailed in his request for access does not constitute advice on competitive decisionmaking. His role in reviewing solicitations is limited. He neither participates nor advises the company in determining whether to submit a response to a solicitation. He does not provide advice or participate in proposal preparation. Mr. Wells does not suggest the products or determine pricing to be included in a proposal. Rather, he advises I-NET on how to comply generally with statutory and regulatory requirements.[1]

[1] ViGYAN expresses concern as to Mr. Wells' statement that if the Service Contract Act applies to a solicitation, he advises the "... President of the Company to ensure that the proposal team complies with the Service Contract Act." Such general, cautionary advice as described by Mr. Wells does not equal the level of activity discussed in *Advanced Management Inc.,* GSBCA 11851-P, 1992 BPD ¶ 150, 92-3 BCA ¶ 25,108, cited by ViGYAN. In that case, a senior administrator was denied access to protected material because he took specific action which affected the contents of the firm's proposals, that included calculation of burden rates and advice as to the extent to which

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The fact that Mr. Wells has regular contact with those who are engaged in competitive decisionmaking is not of itself a basis for denying one access to protected material. Mr. Wells has proposed that he would review protected material at the offices of outside counsel, and would not review such protected material at I-NET's offices. Under such circumstances, the Board finds that allowing Mr. Wells access to protected materials would not create an unacceptable risk of inadvertent disclosure. *Matsushita Electric Industrial Co.; Grumman Data Systems Corp. v. Department of the Air Force,* GSBCA 11635-P, 92-2 BCA ¶ 24,999, 1992 BPD ¶ 1. Accordingly, we grant Mr. Wells access to protected material under the terms he has proposed.

ORDER

The Board overrules the objections of VIGYAN, NYMA, and respondent and GRANTS the application of David W. Wells, Esquire, for access to protected material. As he has proposed, Mr. Wells' access to protected material "will be limited to information received orally or viewed in the offices of Arent Fox Kintner Plotkin & Kahn, or during a hearing, deposition, or other related proceedings." Request For Access to Protected Material at 3. Physical possession of protected material will not be maintained in I-NET's offices.

[¶ 26,388] Systems Resources, Inc. v. Department of the Navy; Defense Priority Equipment Reconditioning Corporation

GSBCA No. 12536-P, September 13, 1993. Solicitation No. M67443-92-R-0002.

Selection of Contractor—Evaluation Factors, Disclosure—Cost Savings Adjustment.—A solicitation for maintenance support services for ADPE that failed to disclose the fact that a cost savings adjustment would be applied to those portions of an offeror's technical proposals that exceeded requirements was improper because the cost savings adjustment was a significant factor in the evaluation of the competitive proposals. Under the Competition in Contracting Act, a solicitation for competitive proposals must include a statement of all significant factors that the agency reasonably expects to consider in evaluating proposals. The solicitation here provided that technical proposals would be evaluated only on an acceptable/unacceptable basis. There was no indication that the evaluation committee would look beyond that articulated rating system and examine whether an offeror's technical proposal exceeded the stated requirements. In finding that the cost savings adjustment was in fact a significant factor requiring disclosure, the board noted that offerors would have structured their proposals differently and included additional features in their proposals if this cost savings factor had been disclosed.

Selection of Contractor—Evaluation Factors, Disclosure—Added Value.—A procuring agency's contention that a solicitation for maintenance support services preserved the agency's discretion to determine whether any added value in a potential offeror's technical proposal was worth a cost adjustment was rejected because the solicitation did not alert offerors to the fact that the government intended to consider enhancements in technical proposals and, thereby, conduct a technical/price tradeoff. The government pointed to an amendment to support its position that the solicitation evinced its intent to consider proposals that provided added value. The amendment stated that proposals would be rated as either acceptable or unacceptable and that there was no explicit relationship between cost and technical considerations. This could only have led a prudent potential offeror to believe that there would not be a tradeoff between technical and cost factors. Similarly, the mere fact that the solicitation specifically stated that the award would be made to the offeror whose proposal represented the best value could not reasonably have informed offerors that there would be a technical/price tradeoff.

(Footnote Continued)

corporate benefits were "benefits" for purposes of the Service Contract Act, both of which had a bearing on the company's cost proposals.

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Timeliness of Protest, GSBCA—Knowledge of Basis—Cost Savings Factor.—A protest alleging that a solicitation failed to disclose that a cost savings adjustment would be applied to technical proposals was timely because the protester had no way of knowing that the cost savings adjustment would be applied until after it was notified of the award. The government's position that the protest involved alleged improprieties in the solicitation that were apparent before the closing time for receipt of proposals was a misinterpretation of the protester's complaint. The basis of the complaint was that an undisclosed cost saving adjustment factor was applied in making the award. The protester did not even know that the cost savings factor would be applied until after the award. Thus, the impropriety the protester alleged was not apparent before initial proposals were due.

For the protester: Doyle & Bachman, Washington, D.C., by Gerard F. Doyle, Scott A. Ford, Ron R. Hutchinson, and Alexander T. Bakos. For the government: Charles M. Stinger and Jill A. Eggleston, Defense Finance and Accounting Service, Kansas City, Missouri, and Robert T. Cali and George N., Brezna, Office of Counsel for the Commandant, U.S. Marine Corps, Department of the Navy, Arlington, Virginia. For the intervenor, Defense Priority Equipment Reconditioning Corporation: Blumenfeld, Kaplan & Sandweiss, St. Louis, Missouri, by Jeffrey L. Michelman and Timothy T. Sigmund.

Before LABELLA, NEILL, and DEGRAFF, Administrative Judges.

LABELLA, Administrative Judge: Systems Resources, Inc. (protester) has protested the proposed award of a contract by the Department of the Navy, Marine Corps Support Activity (respondent), and has filed a motion for summary relief. The respondent has filed a cross-motion to dismiss the protest for untimeliness. As explained below, we grant protester's motion in part and deny respondent's motion.

Background

Terms of the Solicitation

Respondent issued Solicitation No. M67443-92-R-0002 on June 15, 1992 for procurement by negotiation of maintenance support services for automated data processing equipment (ADPE). The procurement requires the furnishing of supplies and services required to maintain the equipment items listed in the solicitation. Protest File, Exhibit 7.

The solicitation required offerors to submit separate technical and cost proposals. Protest File, Exhibit 7. Section M-5.2 of the solicitation stated that the technical and cost proposals would be evaluated separately. Protest File, Exhibit 7. The technical proposal would be reviewed in detail to determine if it met all mandatory requirements and would be assigned a technical rating of either "ACCEPTABLE" or UNACCEPTABLE". Protest File, Exhibit 7.

An acceptable proposal was defined as:

> . . . meets minimum RFP [request for proposal] requirements and is acceptable. The approach is generally comprehensive and complete in all details. There are no significant deficiencies. The methodology is presented in sufficient detail to assure the probability of meeting the requirement with little risk of disruption of operation, increase in costs or degradation of performance.

Id.

An unacceptable proposal was defined as:

> . . . not comprehensive and complete in all detail. It fails to achieve one or more of the requirements. It is highly likely to cause significant disruption of operations, increase in costs or degradation of performance.

Id.

Cost proposals were evaluated on the basis of a thirty-six month life cycle. *Id.* The total evaluated cost of each offer was the basis for determining the low offered price. *Id.*

Section L.20 of the solicitation contained Alternate III of the standard Federal Acquisition Regulation (FAR) clause found at 48 CFR 52.215-16, which is required to be included in all requests for proposals when it is anticipated that award will be made without discussion on the basis of initial proposals. The clause provides that the Government intends to evaluate proposals without discussion and may accept other than the lowest offer. Protest File, Exhibit 7. The contract is to be awarded to the responsible offeror whose offer would be "the most advantageous to the Government, cost or price, and other factors, specified elsewhere in this solicitation, considered." *Id.* Section M-10 of the solicitation went on to state that the award would be made to "[t]he offeror whose proposal meets all mandatory requirements, is determined to be technically

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acceptable and represents the best value to the Government." *Id.*

In Amendment No. 2 to the solicitation, the contracting officer provided written responses to the following questions regarding the solicitation:

> 1. Section M, Source Selection: How will the technical rating be used in the award decision?
>
> Response: Each proposal will receive a technical rating of "Acceptable" or "Unacceptable". Those offers which are determined to be technically acceptable will be included in the cost evaluation. Award will be made to an offeror whose proposal is most advantageous to the Government.
>
> 2. What is the relationship between technical and cost?
>
> Response: There is no explicit relationship between costs and technical considerations.

Protest File, Exhibit 7.

Award of the Contract

Initial technical and cost proposals were submitted to the contracting officer on September 21, 1992. The Source Advisory Committee (SAC) found that both Defense Priority Equipment Reconditioning Corporation's (DPER's) and protester's proposals were technically acceptable and were equal in most respects. Protest File, Exhibit 4. SAC's report went on to note that DPER's proposal exceeded the Government's minimum needs in some areas. *Id.*

SAC also conducted a cost comparison of the two proposals. *Id.* On the basis of the initial proposals, protester's life cycle cost was lower than DPER's. *Id.* However, SAC went on to assign a dollar value to the aspects of DPER's technical proposal which exceeded the Government's minimum needs and applied this cost savings adjustment to DPER's life cycle cost. *Id.* When the cost savings adjustment was subtracted from DPER's life cycle cost, DPER became the low offeror. SAC did not apply a cost savings adjustment to protester's life cycle cost. *Id.*

In a letter dated August 11, 1993, protester was notified that DPER would be awarded the contract. Protest File, Exhibit 3. Protester was informed that its proposal was technically acceptable and met the Government's requirements. *Id.* However, the letter added that DPER's proposal "exceed[ed] the Government's requirements and offered the best overall value to the Government, price and other factors considered." *Id.*

Discussion

Protester's Motion for Summary Relief

This protest involves alleged violations of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2301-2305, and regulations derived therefrom. In protests, summary relief is granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *C3, Inc.*, GSBCA 10066-P, 89-3 BCA ¶ 22,053, at 110,949, 1989 BPD ¶ 189, at 11. The material facts relevant to protester's motion are not in dispute.

Disclosing Factors to be Considered in Evaluating Proposals

The CICA provides that agencies must obtain full and open competition when conducting a procurement for property or services. 10 U.S.C. § 2304(a)(1) (1988). A solicitation for competitive proposals must include at a minimum:

> (A) a statement of—
>
> (i) all significant factors which the head of the agency reasonably expects to consider in evaluating . . . competitive proposals (including cost or price); and
>
> (ii) the relative importance assigned to each of those factors[.].

10 U.S.C. § 2305(a)(2) (1988). The FAR provides:

> The solicitation shall clearly state the evaluation factors, including price or cost and any significant subfactors, that will be considered in making the source selection and their relative importance . . . . The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

48 CFR 15.605(e) (1992). The agency must award the contract to the responsible source whose proposal is most advantageous to the Government, "considering only price and the other factors included in the solicitation." 10 U.S.C. § 2305(b)(4)(D) (1988).

In the instant case, the Marine Corps did not comply with the statutory and regulatory mandate that all significant factors to be considered when evaluating competitive proposals and the relative importance of these factors be disclosed to offerors. The solicitation provided that technical proposals would be evaluated on an acceptable/unacceptable basis only. There was no indication that SAC would look beyond the articulated rating system and examine whether, and by how much, an offeror's technical proposal exceeded the Govern-

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ment's needs as described in the solicitation. Moreover, not only did SAC examine whether the technical proposals exceeded the Government's needs, but it then assigned a dollar value to the aspects of the proposal which it determined exceeded the requirements of the solicitation and discounted the offered price by that amount. Again, the fact that SAC would be assessing a cost savings adjustment to the proposals was not disclosed to the offerors. In fact, respondent's responses to vendor's questions which were included in the amendment to the solicitation indicated that there would not be such a tradeoff, as there was to be no relationship between cost and technical considerations.

The Board has held that any factor which significantly contributes to how a potential offeror structures its proposal or which affects the selection of an awardee should be disclosed in the solicitation. *Systemhouse Federal Systems, Inc.*, GSBCA 9313-P, 88-2 BCA ¶ 20,603, at 104,122, 1988 BPD ¶ 33, at 13. The fact that SAC would be examining the technical proposals to determine whether they exceeded the requirements of the solicitation and would be assigning a dollar value to those elements is such a significant factor. Offerors may structure their proposals differently and may include additional features in their proposals based on this knowledge. The proposal an offeror submits based on the terms of this solicitation could be markedly different than the proposal which may have been submitted if the evaluation factors and cost savings adjustment had been disclosed. Thus, the fact that proposals would be examined to determine if they exceeded the requirements of the solicitation and the fact that a cost savings adjustment would be applied to those elements which exceeded the requirements should have been disclosed in the solicitation.

Best Value

Respondent argues that the solicitation specifically states that the award would be made to the offeror whose proposal represents the best value to the Government, and not to the offeror who had the lowest priced, technically acceptable offer. The respondent contends that various contract provisions demonstrate the Government's intent to evaluate terms of proposals which provided added value and to compare that added value against the terms offered in other proposals. Among the contract provisions cited by the respondent to support its argument is Amendment No. 2 of the solicitation. The contracting officer issued the amendment to respond to questions concerning how the technical aspects of the proposal would be rated and the nature of the relationship between cost and technical. As quoted above, respondent's replies indicated that technical proposals would be rated either acceptable or unacceptable and that there was "no explicit relationship between cost and technical considerations." Protest File, Exhibit 7.

Rather than preserving the evaluating team's discretion in determining whether any added value in a proposal was worth an increase in cost as respondent argues, the amendment could only have led a prudent potential offeror to believe that there would not be a tradeoff between technical and cost factors. In these circumstances, more than a mere reference to the phrase "best value" was needed in order to alert potential offerors that there would be a tradeoff between cost and technical factors. In order to comply with CICA's mandate that all significant factors be disclosed, the agency needs to articulate, directly or indirectly, that it intends to consider enhancements in the technical proposals and thus conduct a technical/price tradeoff. Without any elaboration by the agency, potential offerors could not reasonably have understood best value to mean there is a tradeoff or how the relevant factors would be assessed in the tradeoff

An example of a solicitation which elaborated on these factors in a best value procurement is found in *Lockheed Missiles & Space Co. v. Department of the Treasury*, GSBCA 11776-P, et al., 93-1 BCA ¶ 25,401, 1992 BPD ¶ 155, *aff'd sub nom. Lockheed Missiles & Space Co. v. Bentsen* [39 CCF ¶ 76,563], No. 92-1566 (Fed. Cir. Aug. 30, 1993) (*TMAC II*). In *TMAC II*, Lockheed Missiles and Space Co., Inc. (Lockheed) and International Business Machines Corp. (IBM) protested the award of the Treasury Multi-User Acquisition Contract (TMAC) by the Department of the Treasury, Internal Revenue Service (IRS) to AT&T Federal Systems (AT&T). TMAC was a procurement of office automation systems and software, as well as maintenance and support services. *TMAC II*, 93-1 BCA at 126,498, 1992 BPD ¶ 155, at 2.

The TMAC solicitation included an evaluation scheme which provided, in part:

> Award will be made to that offeror whose proposal, containing the combination of technical, management and support, and cost features, offers the best overall value to the Government. The Government is more concerned with obtaining superior

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technical (technical and management and support) features than making award at the lowest price. Award will be determined by comparing differences in the value of technical features with difference in overall cost to the Government (overall cost to the Government includes the offeror's prices for equipment, software, maintenance, support and any other solicited[)]. However, the Government will not make an award at a significantly higher overall cost to the Government to achieve slightly superior technical features.

TMAC II, 93-1 BCA at 126,498, 1992 BPD ¶ 1551 at 2. The TMAC solicitation put all potential offerors on notice that a best value procurement was intended and that technical features were more important than cost considerations. In fact, the IRS awarded the contract to AT&T because of its technical features even though its evaluated cost was over one-half to three-quarters of a billion dollars more than that of Lockheed and IBM, respectively. *TMAC II,* 93-1 BCA at 126,508, 1992 BPD ¶ 155, at 4.

Furthermore, respondent's oblique reference to best value does not put offerors on notice that a cost savings adjustment would be applied to elements of the technical proposals which exceeded the requirements of the solicitation. Potential offerors were not made aware that technical proposals would be evaluated to determine if they exceed the requirements of the solicitation, let alone that a cost savings adjustment would be applied to the factors that did exceed the requirements. Given this fact, it is difficult to believe use of the phrase "best value" adequately informed potential offerors as to the nature of the evaluation in which respondent engaged.

While respondent argues that the Government's intent to conduct a best value procurement was evident from the provisions of the solicitation, this intent was ambiguously stated at best. Clearly, there was confusion about the meaning of best value in reference to this solicitation or there would not have been questions concerning how the technical evaluation would be used in the award decision and the relationship between technical and cost factors. Respondent may have tried to rectify the situation by issuing Amendment No. 2, but its efforts to shed light on the subject effectively rendered meaningless any previous passing reference in the solicitation to best value. Respondent is not precluded from conducting a best value procurement, but must put all potential offerors on notice that this is what is intended.

Respondent's Motion to Dismiss Due to Untimeliness of the Protest

Respondent filed a motion to dismiss the protest for untimeliness. Based on its contention that the solicitation was clearly for a best value procurement and in accordance with Rule 5(b)(3)(i) of the Board's Rules of Procedure, the respondent argues that protests based on alleged improprieties in a solicitation which are apparent before the closing time for receipt of initial proposals must be filed prior to closing time of initial proposals. Thus, says respondent, protester should have filed its protest prior to September 21, 1992, in order to contest the language of the protest.

As in *Systemhouse Federal Systems,* respondent's arguments misinterpret the nature of protester's complaint.

> The basis for [SRI's] protest is that "hidden criteria" were applied to its offer. [Protester] could not have known, prior to closing time for receipt of initial proposals, that the [cost savings adjustments] would be applied in the manner that they were [or that they would even be applied in the first instance]. Thus, the impropriety that [protester] alleges were not apparent before initial proposals were due.

Systemhouse Federal Systems, GSBCA No. 9313-P 88-2 BCA, ¶ 20,603 at 104,120, 1988 BPD ¶ 33, at 10-11.

The appropriate rule to be applied is Rule 5(b)(3)(ii), which provides that "[a] protest, other than one covered in subparagraph (b)(3)(i) of this rule, shall be filed no later than 10 days after the basis for the protest is known or should have been known, whichever is earlier." Because protester could not have known that the technical proposals would be evaluated as they were, or that a cost savings adjustment would be applied, until after being notified that DPER would be awarded the contract, the protest is timely. Respondent's motion to dismiss is denied.

Decision

For the reasons stated above, protester's motion is GRANTED IN PART and respondent's motion is DENIED. Respondent must revise its solicitation to provide clear notice that it will be conducting a best value procurement in which technical enhancements over the Government's minimum requirements will permit a cost/technical tradeoff, if this is what respondent intends. Respondent shall then obtain revised proposals from all offerors.

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In its motion, protester essentially requested that a directed award be granted. However, a directed award is not the proper relief in this case. The proper relief is for respondent to revise its solicitation and for offerors to resubmit proposals on the basis of the revised solicitation.

[¶ 26,389] Global Radon Testing Services, Inc. v. General Services Administration

GSBCA No. 12517, August 27, 1993.

Timeliness of Appeals to Boards—Filing—Ninety Day Deadline.—A contractor's appeal seeking a price adjustment for alleged extra work was untimely because the contractor did not file the appeal until 139 days after receiving the contracting officer's final decision. Although it was clear that the appeal was filed 144 days after the final decision was written, it was not clear as to when the final decision was actually received. Under the circumstances, the board presumed that receipt of the final decision occurred five days after the decision was mailed.

For the appellant: Paul Jarrett, President. For the government: Emily C. Hewitt, General Counsel, General Services Administration, Washington, D.C.

Before DANIELS, PARKER, and NEILL, Administrative Judges.

DANIELS, Administrative Judge: After performing work under a contract for the provision of diagnostic radon mitigation surveys of several Government buildings, the contractor, Global Radon Testing Services, Inc. (Global), asked the General Services Administration (GSA) to pay $2,801 more than the contract amount of $5,170. Global contended that it had performed work additional to what was required by the contract, and that the extra sum represented the fair value of that work.

By letter dated March 8, 1993, the GSA contracting officer refused to pay more than the contract amount. He contended that the work for which Global requested $2,801 was within the scope of the contract. The letter, citing the Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (West Supp. 1992), advised Global that the firm could appeal this contracting officer's decision to this Board within ninety days of its receipt. The letter further advised Global that it could alternatively contest the decision by filing suit in the Court of Federal Claims within one year of the date of receipt. *See* 41 U.S.C.A. § 609(a) (West Supp. 1992).

On July 30, the Board received a letter from Global, dated July 27, enclosing the contracting officer's decision and asking that we expedite payment of the contested amount. Attached to this letter is a compendium of documents entitled "How Someone at GSA, Atlanta Is Raping a Small Business While Trying to Cover His Bureaucratic Posterior."

We docketed Global's letter as an appeal of the contracting officer's decision. In so doing, we directed Global's attention to the statutory requirement that an appeal to a board of contract appeals be filed "[w]ithin ninety days from the date of receipt of a contracting officer's decision." 41 U.S.C. § 606 (1988). We ordered Global to show cause why the appeal should not be dismissed because it was filed too late.

In response to our order, Global's president stated that he has "done everything possible to work with GSA" and that even after the contracting officer's decision was issued, he "was led to believe [by GSA officials] that there was no reason to file a complaint with the Board." The president concluded, "I would feel very relieved if I could get my day in court."

Unfortunately for Global, that day cannot come before this tribunal. The statutory deadline for filing an appeal with a board of contract appeals has been strictly construed by the Court of Appeals for the Federal Circuit, because the authorization to make the filing is a waiver of sovereign immunity. A late-filing divests the board of jurisdiction to consider the case on its merits. *Cosmic Construction Co. v. United States* [30 CCF ¶ 70,732], 697 F.2d 1389 (Fed. Cir. 1982); *Elden-Rider, Inc.*, GSBCA 8643, 90-2 BCA ¶ 22,878, at 114,901, *aff'd*, 935 F.2d 281 (table) (Fed. Cir. 1991); *George's Lawn & Rental Service, Inc.*, GSBCA 10087, 89-3 BCA ¶ 22,081. Global did not file this appeal until 144 days after the contracting officer's

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decision was written. We have no evidence as to when the decision was actually received. In such circumstances, we presume that receipt occurred five days after mailing. *Berkshire Computer Products,* GSBCA 11539-P, 92-1 BCA ¶ 24,587, at 122,686, 1991 BPD ¶ 302, at 4 (citing *Maykat Enterprises, N.V.,* GSBCA 7346, 84-3 BCA ¶ 17,510, at 87,213). We cannot consider an appeal filed 139 days after receipt, no matter how significant its allegations.

Decision

This appeal is DISMISSED FOR LACK OF JURISDICTION.

[¶ 26,390] Metropolitan Technical Services, Inc. v. Defense Information Systems Agency; Computer Management Corporation, Intervenor

GSBCA No. 12490-P, September 3, 1993. (The text below is the redacted version issued to the public on September 14, 1993.) Request for Proposals No. DCA-100-93-R-0042.

Protests, GSBCA—Interested Party—Responsiveness.—An intervenor's motion to dismiss a protest on the ground that the protester, having failed to present a proposal that complied with certain requirements, was not an interested party was denied as premature because the contracting officer had not determined that the protester's proposal was noncompliant. In fact, the government had not indicated to the board that it concurred with the contentions stated in the intervenor's motion to dismiss. In light of the absence of a government determination on the issue of noncompliance, coupled with the government's silence with respect to these matters, the board determined that the awardee's allegations of noncompliance were not ripe for review.

Protests, GSBCA—Procedure—Striking Amended Complaint.—A government motion to dismiss four additional counts of a protester's amended complaint was granted because the issues presented in the amended complaint were not relevant to the resolution of the original protest complaint. The allegations of the amended complaint, such as noncompliant equipment, improper evaluation, and failure to acknowledge amendments to the solicitation, did not need to be proven by the protester in order for the protester to prevail in the protest. If the protester prevailed on the issue of noncompliant equipment raised in the original complaint, the government would be directed by the board to reevaluate the protester's proposal and make an award consistent with the terms of the solicitation. Conversely, if the protester did not prevail in its original protest complaint and the board determined that the government had properly evaluated the protester's proposal, the protester, having been found to be a noncompliant offeror, would lack standing to raise the allegations contained in the amended complaint.

For the protester: Elizabeth N. Forgotson, Bethesda, Maryland, and Johnson & Roche, McLean, Virginia, by Jon E. Shields. For the government: Roger B. Sabin, Eileen P. Manley, and Capt. Daniel M. Kline, Office of General Counsel, Defense Information Systems Agency, Arlington, Virginia. For the intervenor, Computer Management Corporation: Kinosky & Associates, Arlington, Virginia, by Barbara S. Kinosky and Dale M. Race.

Before GOODMAN, DEVINE, and NEILL, Administrative Judges.

GOODMAN, Administrative Judge: On July 8, 1993, Metropolitan Technical Services, Inc. (MTS or protester) protested the award by the Defense Information Systems Agency (DISA or respondent) of a contract pursuant to RFP DCA-100-93-R-0042 (the solicitation) for personal computers. The awardee, Computer Management Corporation (CMC or intervenor), has intervened in this protest as an intervenor of right. On August 5, 1993, protester filed an amended protest complaint.

Protester's amended complaint incorporates by reference the allegations of its original protest complaint and includes four additional counts. CMC has filed a motion to dismiss the original protest complaint, as well as the four additional counts of the amended complaint. Respondent has also filed a motion to dismiss the four additional counts of the amended complaint. As discussed below, the Board denies intervenor's motion to dismiss the original protest complaint and dismisses, *sua sponte*, the amended complaint.

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Background

The Solicitation

1. The solicitation calls for 200 486/33 ET personal computer systems or equal, and is a total set-aside for small business. Pursuant to 48 CFR 15.610(a) (Federal Acquisition Regulation (FAR) 15.610(a)), the contract was to be awarded without discussions. Closing date for receipt of proposals was originally February 18, 1993. Protest File, Exhibits 2, 3, 4, 7.

2. The solicitation contains a list of salient characteristics[1] for the equipment to be procured, which includes:

> 486/33E Mid size tower w/16MB RAM on the motherboard; expandable to 64MB on the motherboard
>
> baseline performance requirements: Norton computing index 72+, Disk Speed 10+
>
> 21 inch, .28 dot pitch, flat display multifrequency color monitor with 1024 × 768 resolution
>
> 256 color display video card; SVGA adapter with 1MB VRAM
>
> Mid Tower full metal case

Protest File, Exhibit 2.

3. The solicitation was amended three times. Amendment 0001, dated January 25, 1993, responded to several pre-closing vendor questions. Protest File, Exhibit 3. Amendment 0002, dated February 16, 1993, extended the closing date to March 9, 1993. Protest File, Exhibit 4. Amendment 0003, dated February 25, 1993, extended the closing date to March 16, 1993. Protest File, Exhibit 7.

Evaluation of Proposals

4. offerors responded to the solicitation. offerors, including protester, submitted price proposals lower than CMC's price, but were determined to be technically unacceptable.[2] Protest File, Exhibit 14 at 3.

5. According to the contracting officer, a "sanitization process" was performed by which all references to price were removed from the proposals before the proposals were reviewed by the technical evaluation team. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit A at 12-13, 48-49.[3]

6. Mr. Thomas F. Bennett, the chairman of the technical evaluation team that evaluated the technical proposals, described the evaluation procedures as they related to the MTS proposal. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 62-63; Deposition of Thomas F. Bennett (Bennett Deposition) (August 4, 1993) at 62-63, 76-99.

The MTS Proposal

7. The MTS proposal contains a cover letter dated March 15, 1993. This letter reads, in relevant part:

> Enclosed you will find technical specifications for components comprising the quoted system. All components meet or exceed the requirement in Exhibit A (salient characteristics), and the questions and answers sections of the amendments.
>
> We have also tested our assembled system using

Protest File, Exhibit 8.

8. The MTS proposal also contains the salient characteristics sheet from the solicitation with handwriting by MTS on the sheet, together with seven pages of descriptive literature. The salient characteristics sheet contains a reference to a "mid size tower" and "mid tower full metal case." Protest File, Exhibit 8.

9. The March 15, 1993, cover letter from MTS and the salient specifications sheet with handwriting by MTS on the sheet, together with the seven pages of descriptive literature, was transmitted from the contracting officer to the technical evaluation team. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit A at 48-49.

10. According to Mr. Bennett, the evaluation team considered the MTS cover letter and the MTS annotated salient characteristics sheet as part of the MTS technical pro-

[1] The list of salient characteristics was prepared by Mr. Thomas F. Bennett, the chairman of respondent's technical evaluation team. Deposition of Thomas F. Bennett (Bennett Deposition) (August 4, 1993) at 12.

[2] The other offerors were found to be technically unacceptable because

[3] To support its response to the motions to dismiss, protester submitted portions of the depositions of the contracting officer, Ms. Barbara G. Redina, and the chairman of the technical evaluation team for the solicitation, Mr. Thomas F. Bennett. The Board requested complete copies of the depositions.

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posal. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 62-63.

11. Unless contradicted by other technical specifications provided by protester, the evaluation team's methodology was to accept the salient characteristics sheet as indicating that the components listed in the salient characteristics were offered by MTS. Nothing in the descriptive literature submitted by MTS contradicted either the annotated salient characteristics sheet or the cover letter, nor did either indicate that MTS did not offer the components listed therein. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 25-28, 30-33, 77-81; Protest File, Exhibits 8, 9, 37.

12. In the descriptive literature supplied by MTS in its proposal, the manufacturer of the hard drive included the phrase "[s]pecifications subject to change without notice" at the bottom corner of its description of the product. Protest File, Exhibits 8 at 39th unnumbered page, 37 at 4th unnumbered page. Likewise, another manufacturer printed on its description of the monitor "Specifications Subject to Change Without Notice." *Id.*, Exhibits 8 at 44th unnumbered page, 37 at 9th unnumbered page.

13. MTS alleges that it submitted separate technical and cost proposals as required by section L-500(b) of the solicitation. Protest File, Exhibit 2 at 25th unnumbered page; Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit C.

Evaluation of the MTS Proposal

14. The technical evaluation team determined MTS's proposal was technically unacceptable because rather than a . Protest File, Exhibit 12.

15. The technical evaluation team's finding that MTS's proposal was technically unacceptable was based upon its determination that the only indication of in the MTS technical proposal was on the technical specification sheet for the Main Board, where, included among the list of technical components or characteristics, was a reference to . Protest File, Exhibit 28.

16. After reviewing the entire technical specification sheet for the mainboard, the technical evaluation team determined that the specification of the referred to the size of the , not just to the . As such, the technical evaluation team determined that MTS was offering a rather than a as required by the solicitation. Protest File, Exhibit 28.

17. The chairman of the technical evaluation team did not know at what point the team terminated its evaluation of protester's technical proposal. Bennett Deposition at 99.

18. Mr. Bennett testified that a could fit into a and that there is no requirement that a be installed in any particular Bennett Deposition at 87.

The Original Protest Complaint

19. Protester alleges in its original protest complaint that it submitted a technically compliant proposal. It alleges that it did not offer a and that the Government misevaluated the proposal. Complaint ¶¶ 8-10.

The Amended Protest Complaint

20. Protester's amended complaint incorporates by reference the allegations of its original protest complaint and includes four additional counts. Count I of the amended complaint alleges that CMC did not offer a compliant video graphics adapter. Count II alleges that respondent improperly accepted CMC's proposal because CMC acknowledged an amendment without returning all pages of the amendment. Count III alleges that respondent required an expensive large memory component but would accept a less expensive component with a smaller memory, i.e., that respondent stated that it required 1Mb VRAM but actually would accept 1Mb Video RAM. Count IV alleges that respondent improperly determined that CMC's proposal complied with specifications for the Norton computing index.

Discussion

CMC has filed a motion to dismiss the original protest complaint and a motion to dismiss the amended complaint. CMC's motion to dismiss the amended complaint incorporates its arguments from its motion to dismiss the original protest complaint. Respondent has also filed a motion to dismiss the amended complaint. For purposes of clarity, we will consider the motions of the

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parties as they relate to the allegations of the original protest complaint and the four additional counts of the amended complaint.

The Original Protest Complaint

The basis of CMC's motion to dismiss the original protest complaint is that MTS is not an interested party, and, therefore, lacks standing, because the MTS proposal is nonresponsive. *United States v. IBM Corp.*, 892 F.2d 1006 (Fed. Cir. 1989).[4] CMC, citing *RGI, Inc. v. Department of the Navy*, GSBCA 11752-P, 93-1 BCA ¶ 25,402, 1992 BPD ¶ 156, argues further that even though the Government did not list all of the numerous deficiencies in its evaluation of the MTS proposal, this Board has a duty to determine whether or not a protesting party is compliant.

CMC's motion to dismiss does not address the allegation of the protest complaint, i.e., that protester and that respondent erroneously interpreted the MTS proposal to offer a . CMC's motion assumes *arguendo* that protester "supplied the proper tower and was totally compliant in that respect."[5] Intervenor's Motion to Dismiss at 2. CMC asserts instead that this protest must be dismissed because the MTS proposal is noncompliant in other respects, as MTS allegedly did not propose to provide or left unspecified the following requirements listed in the solicitation:

CMC also alleges that restrictive language stating "subject to change without notice" contained in the descriptive literature which was included in the MTS proposal as to the Hard Drive and the monitor, Finding 12, renders the proposal noncompliant, as this language makes the proposal a conditional offer. Finally, CMC alleges that the MTS proposal is noncompliant because protester failed to submit separate cost and technical proposals.

In *RGI, Inc.*, upon which CMC relies in its motion, this Board found protester's proposal noncompliant despite a contrary conclusion by the contracting officer. The instant protest is distinguishable from the situation presented to the Board in *RGI*.

In the instant protest, CMC alleges that the Government did not review protester's proposal further once it determined that protester had not offered and, therefore, found protester noncompliant only on one salient characteristic. Intervenor's Motion to Dismiss at 4. The chairman of the technical evaluation team contradicted this allegation, stating that he did not know at what point the team terminated its evaluation of protester's technical proposal. Finding 17.

Unlike the situation in *RGI, Inc.*, the deficiencies in the MTS proposal alleged by the intervenor have not been the subject of a contracting officer's determination. We find it significant that, with regard to the intervenor's allegations of noncompliance, respondent has neither determined the MTS proposal noncompliant for these reasons, nor moved to dismiss the protest on these grounds. In fact, respondent has not indicated to the Board that it concurs in the arguments stated in intervenor's motion to dismiss. In light of the absence of respondent's evaluation of the proposal on these issues and its silence with regard to these matters in this protest, we find intervenor's allegations of noncompliance to be premature and certainly not ripe for review in conjunction with this protest.

In further support of its motion to dismiss the protest complaint, CMC states that "[t]here were vendors who were found to meet the technical requirements in the solicitation .... In order for Protester to prevail it must prove not only that its technical proposal was fully compliant with the solicitation, but it must also prove that the other vendors are not compliant." CMC's Motion to Dismiss at 6. This statement is erroneous. To prevail in this protest,

[4] CMC argues that the issue is responsiveness, as this is a negotiated procurement awarded without discussions pursuant to FAR 15.610(a). We will discuss the issue in terms of offeror compliance with the terms of the solicitation.

[5] CMC has not established the correctness of respondent's determination that the MTS proposal is noncompliant because it offered a
The list of salient characteristics submitted by MTS indicated a
This list was considered part of the technical proposal by the evaluation team. Findings 8-10. The technical evaluation team interpreted the phrase
even
though Mr. Bennett testified that a mainboard could fit into a mid-size or full-size tower. Finding 18. The record for this protest remains unclear as to respondent's basis for considering the phrase in the descriptive literature of the mainboard to be a reference to the

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MTS need only prove that the contracting officer erred in the conclusion that MTS offered a baby tower and was, therefore, noncompliant. The other five offerors whose offered prices were lower than CMC's price have already been found noncompliant by respondent. Finding 4. If protester's proposal is determined to be compliant, protester is the lowest-priced, technically-compliant offeror. Protester need not prove that all other vendors which were found to be compliant were, in fact, not compliant. *RMTC Systems, Inc. v. Department of the Army*, GSBCA 12303-P, 93-2 BCA ¶ 25,890 1993 BPD ¶ 83 (Mar. 18, 1993).

For the foregoing reasons, we deny CMC's motion to dismiss the original protest complaint.

The Amended Protest Complaint

In counts I through IV of the amended protest complaint, protester alleges that the video graphics adapter offered by CMC was noncompliant, that CMC failed to properly acknowledge one of the amendments to the solicitation, that respondent's requirement for the memory of the video graphics adapter was overstated, and that respondent improperly evaluated CMC's proposal with regard to the requirement of the Norton computing index.

CMC and respondent have moved to dismiss the amended complaint on various grounds. We have reviewed the allegations of these counts, together with the procedural posture of the protester in this appeal, and have determined that these counts need not be resolved in the context of this protest.

If this Board determines that respondent improperly evaluated protester's proposal as to the issue of the offered, protester will prevail in its original protest complaint. Respondent would be directed by the Board to reevaluate protester's proposal and make an award consistent with the terms of the solicitation, or, if it determined that the solicitation did not reflect respondent's needs, revise the solicitation to accurately reflect its current justifiable needs, or otherwise proceed in accordance with statute and regulation. The allegations of the amended complaint need not be proven by protester to prevail in this protest, and are, therefore, not relevant to the resolution of the original protest complaint.

Conversely, if protester does not prevail in its original protest complaint, and this Board determines that respondent properly evaluated protester's proposal and that the MTS proposal is noncompliant, protester, as a noncompliant offeror, will lack standing to raise the allegations contained in the amended complaint.

Accordingly, the Board dismisses, *sua sponte*, the amended protest complaint as not relevant to this protest. For the foregoing reasons, we need not address intervenor's and respondent's motions to dismiss the amended complaint.

Decision

Intervenor's motion to dismiss the original protest complaint is DENIED. The amended protest complaint is DISMISSED, *sua sponte*, by the Board.

[¶ 26,391] Integrated Systems Group, Inc. v. Department of the Army

GSBCA No. 12489-P, September 10, 1993.

Responsiveness—Deviations from Requirements—Used Equipment.—A protester's offer of used equipment under a solicitation for automatic data processing equipment did not render the bid nonresponsive, because there was no indication in the solicitation that offerors were required to provide new equipment or to obtain advance permission from the contracting officer before offering used equipment. The government read several solicitation clauses as requiring the offeror either to obtain the contracting officer's permission to offer used equipment or to provide new equipment if permission was not given. The clauses relied upon by the government, however, related to disclosure requirements, which were designed to ensure that the contracting officer knew whether an offeror was providing new or used equipment. The protester was found to have complied with these clauses by clearly disclosing its intent to furnish used equipment.

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For the protester: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick. For the government: Vera Meza, Department of the Army, Alexandria, Virginia.

Before DEVINE, DANIELS, and LABELLA, Administrative Judges.

DEVINE, Administrative Judge: The Government issued a solicitation for automated data processing equipment. Protester bid used equipment, labelling it as such in its offer. The Government found the bid to be nonresponsive because protester had offered used equipment without first getting the contracting officer's permission to do so. The Government has made no award.

Findings of Fact

On December 28, 1992, the Department of the Army issued an invitation for bids in connection with its acquisition, on behalf of a foreign government, of certain automated data processing equipment and related software. Protest File, Exhibit 1. As stated in its bid, protester offered equipment that "is used, refurbished, warranted as new." Protest File, Exhibit 4. The Army rejected protester's bid as nonresponsive on the ground that the offered equipment was not new, and that the offer of used equipment had not been authorized in advance by the contracting officer. Government's Brief at 4. Both sides point to certain badly written clauses of the Federal Acquisition Regulation incorporated into the solicitation by reference, to support their respective views.

The first is FAR 52.210-5, NEW MATERIAL (APR 1984) (hereinafter Clause 5), which reads:

> Unless this contract specifies otherwise, the Contractor represents that the supplies and components, including any former Government property identified under the Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property clause of this contract, are new, including re-cycled (not used or reconditioned) and are not of such age or so deteriorated as to impair their usefulness or safety. If the Contractor believes that furnishing used or reconditioned supplies or components will be in the Government's interest, the Contractor shall so notify the Contracting Officer in writing. The Contractor's notice shall include the reasons for the request along with a proposal for any consideration to the Government if the Contracting Officer authorizes the use of used or reconditioned supplies or components.

The second is FAR 52.210-6, LISTING OF USED OR RECONDITIONED MATERIAL, RESIDUAL INVENTORY, AND FORMER GOVERNMENT PROPERTY (APR 1984) (hereinafter Clause 6), which reads:

> (a) If the offeror proposes to furnish items or components which are used or reconditioned material, residual inventory resulting from terminated Government contracts, or former Government surplus property, the offeror shall provide the following information as an attachment to the offer: a complete description of the items or components; quantity; name of Government agency from which acquired; and date of acquisition, if applicable. No used, reconditioned, residual inventory, or former Government surplus property other than that listed on the attachment shall be furnished under the resulting contract unless authorized in writing by the Contracting Officer.
>
> (b) All items to be furnished under the resultant contract must comply with the terms and specifications contained in the contract.

The third is FAR 52.210-7 USED OR RECONDITIONED MATERIAL, RESIDUAL INVENTORY, AND FORMER GOVERNMENT SURPLUS PROPERTY (APR 1984) (hereinafter Clause 7), which reads:

> (a) The Contractor shall not furnish any item or component which is used or reconditioned material, residual inventory resulting from terminated Government contracts, or former Government surplus property, unless such item or component was listed in the applicable attachment to the offer and approved by the Contracting Officer or unless otherwise authorized in writing by the Contracting Officer.
>
> (b) All items or components furnished under this contract shall comply with the terms and specifications contained in the contract.

The Government reads Clauses 6 and 7 as requiring the offeror to have the contracting officer's permission to offer used equipment before it sends in a bid. The Government contends that since protester did not do so, it was bound to offer only new equipment, as required by Clause 5.

Protester says simply that Clause 6 allowed it to propose used equipment "by its clear language." Protester's Brief at 3.

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Discussion

The language of the clauses that the Government relies on simply does not support the Government's view of what is required with respect to an offer of used equipment.

The first sentence of Clause 5, dealing with new material, says, in essence: "unless this contract specifies otherwise, the Contractor represents that the supplies and components, ... are new ...." The use of the word "contract" where only the word "solicitation" makes any sense aside, this language can only mean that unless the offer says otherwise, the contractor must offer new goods. Protester passes this hurdle without difficulty. It made clear from the outset that its equipment was second hand.

The second sentence says, in essence, that if the contractor feels that used equipment can do the job the contractor should tell the contracting officer about it in writing. The language is curious, but a written offer to supply used equipment surely conveys, at least implicitly, the contractor's belief that used equipment will do the job.

The third sentence is equally curious. It speaks of a requirement that the contractor's "notice" shall give reasons for the "request," although the two are the same, and implies that since the equipment is second hand, a price break is in order. This, of course, makes little sense since presumably any price break will already have been reflected in the amount of the original offer. This sentence also appears to require that the offer of used equipment must be authorized by the contracting officer. Presumably, the contracting officer will show his approval of used equipment by accepting the offer (if the bid is low). He cannot reject it, because the solicitation does not call for new equipment. Nowhere in the clause is there any indication that equipment clearly labelled as used requires the advance permission of the contracting officer before a responsive offer can be made.

The next two clauses to be considered are very similar to one another in language. Both have two paragraphs labelled (a) and (b), and both (b) paragraphs use identical language to require that whatever is furnished under "this contract" comply with the contract's specifications.

The (a) paragraphs are also quite similar. Clause 7(a) in essence forbids an offeror from offering "used or reconditioned material, residual inventory resulting from terminated Government contracts or former Government surplus property, unless such item or component was listed in the applicable attachment to the offer and approved by the Contracting Officer or unless otherwise authorized in writing by the Contracting Officer." Clause 6(a) says about the same thing, but it also requires that an offeror proposing used, residual inventory, or Government surplus property must not only list it but also describe it in some detail.

What we have already said with respect to Clause 5 also applies to Clauses 6 and 7. We find all three to be primarily disclosure requirements. They are designed to insure that the contracting officer knows who is offering new equipment and who is not, and what the offered equipment consists of. Once the disclosure is made the offeror has complied with these clauses. Thereafter the contracting officer is free to accept the most competitive bid, but may not reject non-new goods as non-responsive solely because they are not new, unless the solicitation calls for only new equipment. That is not the case in the solicitation before us. *Integrated Systems Group, Inc. v. Department of Commerce,* GSBCA 12420-P, 93-3 BCA ¶ 26,321, 1993 BPD ¶ 215 (July 16, 1993).

Decision

The protest is **GRANTED.** The suspension order heretofore entered lapses by its terms.

[¶ 26,392] OAO Corporation v. General Services Administration; Computer Data Systems, Inc., and CBIS Federal, Inc., Intervenors

GSBCA No. 12484-P, September 3, 1993. (The text below is the redacted version issued to the public on September 14, 1993.)

Protests, GSBCA—Jurisdiction—Reverse Protests.—The board's protest jurisdiction encompasses the so-called "reverse protest," in which an awardee challenges the retraction of a contract award rather than the making of one, because reverse protests address the same issues as conventional protests. In both types of protests, the protester raises alleged violations of procurement law and challenges an agency's decision not to award

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a contract to the protester. Although the decision not to contract with the protester came in the form of a termination for convenience in this case because the government had already awarded the contract, that form did not alter the fundamental nature of the protest. Form does not govern over substance.

Selection of Contractor—Personnel—Key Personnel Availability.—The government was entitled to terminate the contract of an awardee that had misled the government about the current status and availability of its proposed key personnel, because the deception invalidated the award. The solicitation required that certain key personnel be employed by or be under employment agreement with the awardee at the time of the award; this was a mandatory, highly material requirement and was reiterated throughout the solicitation. The awardee failed to inform the government when several of its proposed key personnel left its employ, and it maintained, inaccurately, that stale commitment letters from some of the former employees constituted valid employment agreements. The awardee thereby violated a mandatory solicitation requirement, rendering the award improper.

For the protester: Williams & Connolly, Washington, D.C., by Terrence O'Donnell, F. Whitten Peters, Ari S. Zymelman, Stephen D. Raber, Kevin M. Hodges, Eric J. Moss, and John T. Parry. For the government: Seth Binstock, Pamela J. Reiner, Tenley A. Carp, and John Sawyer, Office of General Counsel, General Services Administration, Washington, D.C. For the intervenor, Computer Data Systems, Inc.: Charles B. Machion and Robin McCune and Doyle & Bachman, Washington, D.C., by Gerard F. Doyle, Scott W. Woehr, and Alexander T. Bakos. For the intervenor, CBIS Federal, Inc.: Susan Warshaw Ebner and Petrillo & Hordell, Washington, D.C., by Joseph J. Petrillo, Jessica C. Abrahams, and Laurel A. Heneghen.

Before PARKER, HENDLEY, and HYATT, Administrative Judges.

PARKER, Administrative Judge: OAO Corporation's contract to provide automatic data processing (ADP) support services was terminated for convenience by the General Services Administration (GSA) as a result of GSA's admitted violations of statute and regulation in connection with the award. OAO protests the termination, maintaining that the original award was proper in all respects. GSA, with the help of two offerors which have intervened in the protest, maintains that its original grounds for terminating the contract were correct. In addition, GSA and the intervenors argue that the termination was proper because OAO's proposal did not comply with material requirements of the solicitation and, thus, was not eligible for award.

We need go no further than to agree with GSA and the intervenors that OAO's proposal was not eligible for award. OAO misled the Government as to the status and availability of its proposed key personnel. In addition, OAO failed to comply with solicitation provisions requiring that such personnel be "employed by, or under employment agreement" with the offeror, and that the employees be available for assignment on the date of award. As described more fully below, OAO failed to comply with these requirements with respect to six of the seven individuals to which the requirements were addressed.

Because OAO's proposal did not comply with these key solicitation requirements, OAO should not have received the award. Termination of the contract was thus appropriate.

Findings of Fact

1. On November 21, 1991, GSA solicited proposals for ADP technical support services for Federal agencies in a geographical area known as the Central Zone. The solicitation contemplated award of a requirements type contract with fixed labor rates, and was for a one-year period, with four one-year options. Protest File, Exhibit 1. Approximately 700 contractor personnel will perform the services for this contract, which is worth in excess of $150,000,000.

2. The contract was awarded to OAO on June 1, 1993. On June 11, Computer Data Systems, Inc. (CDSI), protested the award. CDSI claimed that it had been misled during price discussions in that the contracting officer induced CDSI to raise its prices and then awarded the contract to a lower-priced offeror. CDSI also alleged that OAO's rates were unreasonably low, that GSA had misevaluated CDSI's proposal, and that OAO was ineligible for award because its proposed Program Manager was not available for assignment to the contract. Protest File, Exhibit 286. Shortly thereafter, CBIS Federal Inc. (CBIS) also filed a protest. CBIS alleged

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that OAO's prices were unreasonable and unrealistic. *Id.*, Exhibit 288. Two other losing vendors, CTA, Inc., and ARC Professional Services, intervened on the side of the protesters.

3. On June 17, GSA terminated the contract with OAO. Protest File, Exhibit 290. On June 28, GSA, CDSI, CBIS, ARC and CTA filed a Joint Stipulation of Dismissal with the Board. The Joint Stipulation provided in pertinent part as follows:

> The Parties jointly stipulate that GSA evaluated the offers in a manner inconsistent with the evaluation criteria during the competition for the Contract and that this constitutes a violation of the Competition in Contracting Act. In addition, GSA stipulates that it (i) failed to conduct meaningful discussions with the offerors during the competition for the Contract; and (ii) provided information which reasonably led offerors to believe that if changes were made in their rates for skill categories included in the requirement, that such changes would improve the offeror's chances for award, while in actuality, the offeror's chances for award were negatively affected as a result of making such changes. GSA stipulates that the above constitute violations of the Competition in Contracting Act of 1984.

The Board dismissed the protests as the protesters and the Government requested. *Computer Data Systems, Inc. v. GSA*, GSBCA 12455-P et al., 1993 BPD ¶ 179 (June 30, 1993). OAO, which had intervened on GSA's side, did not participate in the settlement or the request for dismissal. On July 2, 1993, OAO filed the instant protest, contesting GSA's decision to terminate the contract.

Solicitation Requirements

4. Section C of the solicitation (the statement of work) stated that:

> Certain senior professional and managerial personnel are essential for successful contractor performance. The contractor shall assign specific individuals, by name, to the key positions of Program and Group Managers. Key personnel shall be available for full-time assignment under this contract on the award date of the contract.

Protest File, Exhibit 1 at C-16. Similarly, section C.9.1.a provided that "[t]he proposed Program Manager and the Group Manager(s) shall be available for assignment to this contract on the effective date of the contract, and remain in their respective positions for a minimum of twelve (12) months." *Id.* at C-17.

5. The solicitation contained six technical evaluation criteria, one of which was "Personnel":

> This area will be evaluated as a whole as acceptable or unacceptable. To be acceptable, an offer must have acceptable resumes for all required positions.
>
> (1) Individual resumes must be submitted for the Program Manager (1), and the Group Managers (6), that will be assigned initially to the contract.... All resumes submitted must meet the minimum requirements for the offeror to be evaluated as acceptable in this factor. The Offeror and individual shall certify that the information on each resume is true and complete, and that the individuals named shall be available for assignment on the date the contract is effective.
>
> ....
>
> (4) If any of the following conditions are not met, the resume will be evaluated as unacceptable:
>
> ....
>
> (c) Is employed by, or under employment agreement, with the firm,
>
> (d) Is committed by the firm to be provided, if required, on the award date of the contract; for Program Manager and Group Managers, for the first twelve months of the contract.

Protest File, Exhibit 1 at L-15—L-16. According to the contracting officer, the solicitation did not permit award of the contract to an offeror which did not have the Program Manager and the Group Managers available on the date of award. Transcript at 1284-86, 1288.

The Program Manager

6. In its initial proposal of February 19, 1992, OAO proposed as its Program Manager. Mr. Sherrer was at that time an OAO employee and had agreed orally to serve as Program Manager in the event OAO won the contract. Transcript at 493. OAO submitted Mr. Sherrer's resume, which stated that he was currently an OAO employee, and was "available immediately." Protest File, Exhibit 14. The proposal further stated that OAO's key personnel "are willing and committed to be available on the award date of the contract and for the first twelve months of the contract." *Id.*, Attachment G at 6-1.

7. Mr. Sherrer resigned from OAO by letter of February 15, 1993. The letter stated:

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> I will not be continuing my employment with OAO upon completion of my five year employment contract. Accordingly, I tender my resignation effective 3/7/93.

CDSI Protest File Supplement, Exhibit 36. On March 15, Mr. Sherrer went to work for a company called Calspan, in Tullahoma, Tennessee. *Id.*, Exhibit 41. OAO never informed GSA (by updating his now-incomplete resume, or otherwise) that Mr. Sherrer was no longer an OAO employee, even though OAO submitted two subsequent best and final offers (BAFOs). Transcript at 933-34. OAO did not propose a substitute Program Manager (prior to award), either.

8. OAO never discussed the Program Manager position with Mr. Sherrer again until May 31, three days after OAO was informed that it had been awarded the contract. Transcript at 209, 503, 731. OAO's Senior Vice President called Mr. Sherrer on May 31 to discuss the contract award and Mr. Sherrer's availability to serve as Program Manager. The next day, OAO's Senior Vice President called the contracting officer and told her that Mr. Sherrer was "unavailable" because he was working for another company. *Id.* at 282.[1] The Senior Vice President sensed that the contracting officer was disappointed. *Id.* at 751. Nevertheless, OAO confirmed the notification in a letter of June 1, which stated that "Mr. Sherrer is no longer available for this assignment." CDSI Protest File Supplement, Exhibit 37. OAO brought a substitute Program Manager to the "kickoff" meeting with GSA on June 4.

9. On June 7, OAO's Senior Vice President attempted to set up a face-to-face meeting with Mr. Sherrer. Transcript at 750. The meeting occurred on June 15, four days after CDSI had filed its protest alleging, among other things, that OAO was ineligible for award because its proposed Program Manager was unavailable. On the same date, two weeks after award of the contract, OAO entered into a employment contract with Mr. Sherrer. CDSI Protest File Supplement, Exhibit 39. The agreement provides for a salary of for the first year and for the second year. This is and thousand dollars, respectively, more than Mr. Sherrer is paid at Calspan.[2] The employment agreement also provides that OAO will reimburse Calspan for Mr. Sherrer's relocation from Pasadena, California, to Tullahoma, Tennessee, and pay up to an additional for a further relocation from Tullahoma to Huntsville. *Id.* These terms were all proposed by Mr. Sherrer and OAO accepted them without negotiation. According to OAO's Senior Vice President, OAO's President agreed to the terms because he is "very fond of Mr. Sherrer." Transcript at 765.[3]

The Group Managers

10. In January of 1992, OAO's Senior Vice President sent by electronic mail the following message to OAO's President and its Chief Operating Officer:

> The RFP for the 700-person job requires us to provide resumes for the PM [Program Manager] and nine GMs [Group Managers]. We are resuming [sic] Jim Sherrer for the PM position.
>
> ....
>
> The nine GMs have to have 10+ years of experience in the business including two years managing at least 20 people performing both business and scientific software development tasks in diverse locations. This is a difficult requirement and we have looked throughout the company to find nine that qualify .... *When we win the job, it is our intention to do everything we can to hire the incumbent managers, since that is far less costly than moving these individuals and certainly less disruptive to our current operations.*
>
> The scoring for the resume section is pass or fail. If we fail, we are essentially out of the competition, so we do not want to skimp onn [sic] the talent ....

CDSI Protest File Supplement, Exhibit 13 (emphasis added).[4]

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[1] OAO's Senior Vice President and Mr. Sherrer went to great lengths to explain that Mr. Sherrer was under an oral employment agreement and thus "available" immediately to perform the contract. Moreover, according to OAO's Senior Vice President, when he told the contracting officer that Mr. Sherrer was unavailable, he really did not mean it in that sense. *See* Transcript at 733-38. The facts, however, speak for themselves. We simply do not find OAO's after-the-fact explanations to be credible.

[2] Although Mr. Sherrer was paid a similar salary when he worked for OAO in Pasadena, California, he was surprised that OAO agreed to pay him so much to work in Huntsville, Alabama, where the cost of living is much lower. He had expected, and would have accepted, much less. Transcript at 510, 530, 538, 554, 764.

[3] In its proposal, OAO had proposed a salary of approximately per year for the Program Manager, which is the Transcript at 537, 764.

[4] As it does with virtually every event involved in this case, OAO attempts to "explain away" the significance of this message. OAO's Senior Vice

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11. In its initial proposal of February 19, 1992, OAO proposed six Group Managers, as required by the solicitation (as amended). At that time, all six were OAO employees; five of the six were currently working on OAO's Western Zone contract with GSA. Transcript at 720-21. All had agreed that OAO could propose them for the Central Zone contract.

12. In the Summer of 1992, OAO lost the Western Zone contract to CDSI. Five of OAO's six proposed Group Managers were laid off. Transcript at 720-21. OAO never informed GSA (either by correcting their now-incomplete resumes, or otherwise) that these five proposed Group Managers were no longer employed by OAO, even though OAO went through extensive negotiations and submitted two subsequent BAFOs. OAO did not propose substitute Group Managers, either.

13. When the five proposed Group Managers left OAO's employ in early July 1992, OAO had them sign letters of commitment. Four of the letters said exactly the same thing:

> This confirms my commitment to work for OAO as a Group Manager on the GSA Central Zone Business/Science Contract. This agreement is contingent upon OAO being awarded the contract by GSA.

Protester's Exhibit (Lohfeld) 8. The fifth letter said substantially the same thing. *Id.* The letters of commitment were not signed by OAO, and do not contain any terms of employment such as salary, benefits, start date or duration.

14. Three of the proposed Group Managers, Messrs. do not believe that they have employment agreements with OAO. They consider their letters of commitment as an indication of their willingness in 1992 to consider offers from OAO for a Group Manager position on the Central Zone contract. Transcript at 1354, 1361 , 1372-76, 1378 1405 . Mr. who has a tenuous job situation, believes that he has some sort of agreement with OAO. *Id.* at 835, 1803-06.[5] Mr. the fifth of the laid off Program Managers, did not testify.

15. Even though OAO continued to propose these people for the Group Manager positions ("willing and committed to be available on the award date of the contract"), OAO never followed up to see whether these former employees were still available to work on the contract. The proposed managers (with one possible exception) were not even contacted until after award—almost a year after they had left OAO. Transcript at 828, 1354, 1374, 1407; Protester's Exhibit (Lohfeld) 8. The current availability of the proposed Group Managers is varied and at present uncertain.

Discussion

Jurisdiction

This protest is what is commonly referred to as a "reverse" protest. Such protests involve a challenge by the contract awardee to an agency's decision to terminate a contract based upon improprieties in the award process. GSA argues that the Board lacks protest jurisdiction over challenges to such terminations, even where the propriety of the award underlies the determination to terminate. We disagree.

We have held that the Brooks Act "permit[s] an interested party to file with ... [the Board] a complaint against an agency's termination of an ADPE contract for the convenience of the Government based upon a determination by the agency that the procurement process failed to conform with law." *Diversified Systems Resources, Ltd.*, GSBCA 9493-P, 88-3 BCA ¶ 20,897, 1988 BPD ¶ 119. Thus, the Board's jurisdiction includes the so called "reverse" protest:

> We hold that a protest, as that term is defined in the Brooks Act, encompasses an objection by an interested party to the retraction as well as the making of an award of a contract, where the retraction is based on an agency determination that improprieties occurred in the procurement pro-

(Footnote Continued)

President explained that the message was not reflective of OAO's actual intentions and that OAO understood that this language was not consistent with the solicitation. Transcript at 715, 814. Like many other of OAO's "explanations," this one strikes us as an after-the-fact rationalization, rather than a credible explanation.

[5] Although Messrs. and currently work for CDSI on the Western Zone contract, the Board finds their testimony to be highly credible. In the Board's opinion, these mid-level employees answered each question honestly and appeared to be under no pressure from CDSI. The Board also found the testimony of Mr. to be credible. After listening to all of the testimony on this subject, we cannot help but feel that each individual's perceptions as to whether he had an employment agreement with OAO depended to a large extent on the degree to which that person desired the job.

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> cess. This holding recognizes that in effect, the agency, where such a retraction has occurred, has already objected to the award, and the awardee is simply challenging the agency's objection. The case is thus here on precisely the same issues on which it would be here if the award had been made to another firm and that protester had elected to protest that. The fundamental issue is in both situations whether the award was made in accordance with applicable statutes and regulations. The protester still bears the burden of proving its case by a preponderance of the evidence, but the Brooks Act entitles it to be heard.

88-3 BCA at 105,655, 1988 BPD ¶ 119 at 7. As we pointed out in *Diversified,* the General Accounting Office has, for many years, been deciding such protests. *See, e.g., Service Industries, Inc.; Merchant's Building Maintenance Co.,* B-183535, 75-2 CPD ¶ 345 (Nov. 24, 1975); *Norfolk Shipping and Drydock Corp.,* B-219988.3, 85-2 CPD ¶ 667 (Dec. 16, 1985).

Here, as in many "regular" protests, a disappointed offeror (OAO) is challenging an agency's (GSA's) decision not to award it a contract. The fact that GSA's decision came in the form of a termination for convenience (because GSA initially awarded the contract to OAO) does not change the fundamental nature of that challenge. To dismiss such a protest for lack of jurisdiction would inappropriately emphasize form over substance—something we are confident that the Congress, in enacting the Brooks Act, did not intend for us to do. GSA's motion is denied.

The Merits

OAO maintains in this protest that the award was made in accordance with statute and regulation and, thus, should not have been terminated by GSA. We hold that the termination was proper. As discussed below, we find that OAO's proposal was ineligible for award and should not have been accepted. OAO misled GSA as to the status and availability of its proposed key personnel. In addition, OAO's proposal failed to comply with material requirements of the solicitation.

The solicitation required each offeror to submit seven resumes as part of its proposal. These seven people would be supervising approximately 700 people involved in performing a contract worth more than $150,000,000. The solicitation required that the resumes be certified as "true and complete," and that "the individuals named shall be available for assignment on the date the contract is effective." Finding 5. The solicitation further provided that a resume would be unacceptable if the proposed person was not "employed by, or under employment agreement with, the firm" and "committed by the firm to be provided, if required, on the award date of the contract ...." *Id.*

In its initial proposal, OAO told GSA that its proposed Project Manager and its six proposed Group Managers were employees of OAO and were "willing and committed to be available on the award date of this contract and for the first twelve months of the contract." Findings 6, 11. This may well have been true at the time OAO submitted its initial proposal.

Things changed drastically during the course of the procurement, however. OAO's proposed Project Manager and five of the six proposed Group Managers left OAO to work for other companies. Findings 7, 12. Yet OAO said nothing about it to GSA. OAO did not update the now-incomplete resumes or otherwise inform GSA during negotiations or in either of OAO's two BAFOs. *Id.* OAO simply let GSA believe that its key personnel were still employed by OAO and "willing and committed to be available on the award date of the contract and for the first twelve months of the contract." In fact, they were neither.

In *RGI, Inc. v. Department of the Navy,* GSBCA 11752-P, 93-1 BCA ¶ 25,402, 1992 BCA ¶ 156, a case remarkably similar on its facts to the instant case, we held:

> When a significant segment of the evaluation of a technical proposal is based upon the qualifications of the proposed key personnel, offerors must determine that the personnel they propose are, in fact, available. Merely to assume that former employees are available to return to their former employment, based on information months old, is not reasonable.

93-1 BCA at 126,514, 1992 BPD ¶ 156 at 8. In *RGI,* the Board followed numerous Board and Comptroller General decisions which have invalidated contract awards on the basis that the awardee proposed key personnel it had no assurance that it could deliver. *See Sterling Federal Systems, Inc.,* GSBCA 10381-P, 90-2 BCA ¶ 22,802, 1990 BPD ¶ 70; *Electronic Data Systems Federal Corp.,* GSBCA 9689-P, 89-2 BCA ¶ 21,655, 1989 BPD ¶ 69, *aff'd in part, vacated in part sub nom. Planning Research Corp. v. United States* [38 CCF ¶ 76,383], 971 F.2d 736 (Fed.

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Cir. 1992); *CBIS Federal, Inc.*, B-245844, 92-1 CPD ¶ 308 (Mar. 27, 1992) (assumption that proposed personnel would be available for contract performance because offeror heard nothing to the contrary was unreasonable); *Mantech Field Engineering Corp.*, B-245886, 92-1 BPD ¶ 309 (Mar. 27, 1992) (failure of awardee to ascertain current availability of proposed personnel invalidated award; offeror has responsibility to determine whether its proposed personnel are available when proposal is evaluated on the qualifications of those individuals); *see also Omni Analysis*, B-233372, 89-1 CPD ¶ 239 (Mar. 6, 1989) (an offeror's failure to inform an agency that a proposed key person is no longer available and to provide a substitute constitutes a misrepresentation warranting a termination, even though it is not clear if the selection decision would have been different had the offeror accurately reflected the true status of the key person).

Here, notwithstanding its protestations to the contrary, OAO had no reasonable assurance that its proposed Program Manager and five of its six proposed Group Managers would be available to perform the contract. All of them had other jobs, and OAO had not spoken to most of them in almost a year. Finding 15. This was precisely the situation we found in *RGI* to render that firm ineligible for award.

OAO argues that the solicitation did not really require the proposed personnel to be available on the date of award because there was not enough work for all of them to do during the contract transition period. Even if OAO's reading of the solicitation could be considered reasonable, which neither we nor the contracting officer consider it to be, OAO's proposal still failed to comply with the availability requirements. Given the employment situations that existed prior to award, OAO could not reasonably have believed that its key personnel were available *at all*, much less on the date of award.[6]

OAO also maintains that key personnel availability was not a mandatory requirement of the solicitation. Under OAO's theory, OAO's failure to assure the availability of proposed key personnel should result in at most a point reduction in its technical score, points being the number of points assigned to the "Personnel" section. Again, we agree with the contracting officer and disagree with OAO. First, the requirement that proposed key personnel be available on the date of award was not confined to the "Personnel" section, which was worth technical points; the requirement appeared throughout the solicitation. *See* Findings 4, 5. More important, however, is the mandatory nature of the solicitation language. The solicitation uses the terms "shall" and "must" throughout when referring to the personnel availability requirement. *Id.* In a contract for services of this magnitude, it is hard to imagine a provision more material than one which requires the offeror to have acceptable key personnel available to work on the contract.[7] OAO's failure to ensure that its proposed key personnel were in fact available rendered its proposal unacceptable.

OAO's proposal was unacceptable for another reason—its proposed Program Manager and five of its six Group Managers were not "employed by, or under employment agreement, with the firm," as required by the solicitation. OAO maintains that its oral agreements with the proposed Program Manager and Group Managers while they were employees of OAO constituted employment agreements which continued to exist after the employees left OAO. OAO views the letters of commitment signed by the Group Managers as confirmations of those oral employment agreements. The terms of the employment agreements are said to include a "reasonable" salary and "standard" benefits.

OAO did not have "employment agreements" with either its proposed Program Manager or its proposed Group Managers. First, we point out that OAO uses actual employment contracts; the proposed Program Manager had one before he resigned from OAO, and he has one now. Findings 7, 9. Mr. Sherrer's current employment agreement was signed by both Mr. Sherrer and OAO, and it sets forth Mr. Sherrer's salary, the duration of the agreement, and his bene-

[6] We do not view the fact that OAO ultimately was able to "buy back" its proposed Program Manager as proving that he was available. *See Informatics, Inc.*, 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53 (it is inappropriate to take note of an offeror's post-selection recruitment efforts when these personnel were not committed at the time of award). If offerors were permitted to propose personnel without regard to preaward availability, the integrity of the procurement process would be destroyed.

[7] Under OAO's theory, for example, a contractor could fail to propose *any* personnel for the Program Manager and Group Manager positions and still win the contract award on points. Such a reading of the solicitation is unreasonable.

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fits, including his two relocation allowances. Finding 9. At the time of award, however, Mr. Sherrer did not have one of these agreements; in fact, when he left OAO, the two parties never again discussed the status of Mr. Sherrer's oral agreement to serve as Program Manager for the Central Zone contract. Mr. Sherrer simply went on to his new job at Calspan. Finding 7. We reject OAO's self-serving characterization of Mr. Sherrer's status at the time of award as being under an "employment agreement."

The proposed Group Managers were in similar situations. As OAO employees, they agreed to serve as Group Managers in the event OAO won the contract. When they left, however, at least three of them reasonably considered their letters of commitment to be nothing more than indications of their willingness to consider offers from OAO. Finding 14. Such an unsettled situation is entirely consistent with OAO's original plan to hire as many incumbent managers as possible, after award. Finding 10.

Read in the context of the entire solicitation, the requirement for employment agreements for non-employees of the offerors was a method of attempting to assure that the Government would actually receive the services of the personnel upon which it based its award decision. OAO's stale commitment letters did not serve that purpose. We agree with the contracting officer that an employment agreement is something more than a commitment letter. Transcript at 225.

Decision

GSA's decision to terminate OAO's contract was reasonable. OAO misled GSA as to the status and availability of its proposed key personnel. In addition, OAO's proposal failed to comply with material requirements of the solicitation and was, therefore, ineligible for award of the contract. Accordingly, the protest is **DENIED.**

[¶ 26,393] Dawson Construction Co., Inc. v. General Services Administration

GSBCA No. 12480, September 20, 1993. Contract No. GS-07P-91-JXC-0117.

Protests, GSBCA—Procedure—Dismissal with Prejudice.—In a case in which a contractor had filed a claim for an equitable adjustment but in which the contract had not been completed and additional claims were expected, the board dismissed the contractor's appeal with prejudice, because the contracting officer had pledged in writing that he would reconsider the contractor's claim in light of more complete and accurate information expected to be available after contract completion and would issue a new decision at that time. When the contracting officer issues a new decision and if the contractor does not agree with that decision, the contractor may then appeal from the new decision.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Patrick A. Thompson. For the government: Gerald L. Schrader, Office of General Counsel, General Services Administration, Washington, D.C.

Before HYATT, DEVINE, and DEGRAFF, Administrative Judges.

HYATT, Administrative Judge: This appeal is of a contracting officer's decision denying appellant's claim for an equitable adjustment under the Changes clause of a contract for construction work in the U.S. Courthouse in Denver, Colorado. The contract giving rise to the claim, GS-07P-91-JXC-0117, has not yet been completed, and additional claims are expected to be asserted by appellant. Completion of contract work is not expected to take place until some time in the early spring of 1994. Both parties would like to postpone the pursuit of this appeal until such time as the contract has been completed and Dawson's claims can be considered as a whole.

The parties differ, however, in their proposed approaches to this objective. Respondent has filed a motion to dismiss the appeal without prejudice. The basis for this request is that the contracting officer has formally rescinded his decision in a letter explaining that the merits of Dawson's claim should more properly be considered upon contract

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completion when the full effect of alleged delays can be ascertained.[1]

Appellant opposes respondent's motion, expressing concern that its rights may nonetheless be affected by dismissal of the appeal at this time. Appellant would prefer that the Board suspend the appeal until such time as the contract has been completed and all claims arising out of it have been presented to the contracting officer for decision.[2]

After considering the stated concerns of the parties, and the Board's interest in judicial efficiency and economy, we conclude that it is appropriate to follow the approach taken in *PRC, Inc. v. Department of Commerce*, GSBCA 11979-COM (Sept. 1, 1993), and dismiss this action with prejudice. We believe that neither respondent nor appellant will suffer any disadvantage as a consequence of this action. Respondent's contracting officer has pledged in writing that he will reconsider appellant's claim in light of more complete and accurate information expected to be available after contract completion and will issue another decision at that time. When the contracting officer issues a new decision, and if appellant does not agree with the new decision, appellant may appeal from the new decision. Under these circumstances, we believe it is proper to dismiss this appeal with prejudice.

Decision

Accordingly, this appeal is **DISMISSED WITH PREJUDICE.** Rule 28(b). This dismissal does not operate as an adjudication upon the merits of the underlying claim, however.

[¶ 26,394] Electronic Data Systems Corporation v. Department of Energy; Unisys Government Systems, Inc., Intervenor

GSBCA No. 12454-P, August 16, 1993. (The text below is the redacted vesion issued to the public on September 14, 1993.)

Selection of Contractor—Personnel—Compensation Plan.—An incumbent's appeal alleging that offerors' compensation plans should have been evaluated as part of the scoring of technical proposals, as well as in the cost evaluation, was denied because the incumbent's argument rested on unconvincing expert testimony comparing the successful offeror's rates for exempt professional employees with current compensation charged by the incumbent on its contract. The government evaluated offerors' compensation plan summaries rather than the total compensation offered, which was fully in accord with the terms of the RFP.

For the incumbent: Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C., by Ronald K. Henry, Peter C. Condron, and Laura E. Jehl. For the government: Paul L. Lewis and Patricia D. Graham, Office of Assistant General Counsel for Procurement and Finance, Department of Energy, Washington, D.C. For the intervenor, Unisys Government Systems, Inc.: McKenna & Cuneo, Washington, D.C., by C. Stanley Dees, Thomas C. Papson, Victoria McEneney, and and Mark J. Meagher.

Before BORWICK, HENDLEY, and DEGRAFF, Administrative Judges.

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[1] Respondent urges that the rescission of the contracting officer's decision which prompted Dawson's appeal avoids any concerns that might properly be raised by appellant in light of the decision in *Inslaw, Inc.*, DOT BCA 1609 et al., 92-1 BCA ¶ 24,550 (1991). In that decision, the Department of Transportation Board observed, in dicta, that a dismissal without prejudice might have the effect of forever terminating an appellant's right to litigate at the board once the ninety day appeal period established under the Contract Disputes Act had passed. 92-1 BCA at 122,501-02.

[2] On September 9, 1993, the Board convened a telephonic conference of the parties in an attempt to reconcile their positions. The Board informed counsel that in a similar matter, the parties were willing to dismiss an appeal with prejudice as a result of the contracting officer's withdrawal of his decision. This was because the appellant would still be able to appeal any subsequent contracting officer's decision involving its claim. *PRC, Inc. v. Department of Commerce*, GSBCA 11979-COM (Sept. 1, 1993). Counsel for appellant indicated that, while he understands the Board's position, he still could not agree to dismissal, either with or without prejudice. He added, however, that he would appreciate inclusion of language recognizing the right to appeal a new decision, similar to that used in *PRC, Inc.*, should the Board elect to adopt this approach here.

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BORWICK, Administrative Judge:

Background

On June 11, 1993, Electronic Data Systems Corporation (EDS) protested the award of a contract under Request for Proposals No. DE-RP01-92EI21967 (RFP) by the Energy Information Administration of the Department of Energy (EIA) to UNISYS Government Systems, Inc. (Unisys). Protester filed a seven count complaint, but the allegations as refined revolve around five issues: (1) Alleged "wage busting" of compensation to be paid to professional employees exempt from the provisions of the Service Contract Act; (2) unequal treatment of escalation rates; (3) organizational conflict of interest; (4) uncompensated overtime hours and (5) evaluation of corporate references. EDS alleges that respondent's technical and cost evaluations did not recognize the alleged "wage busting," accorded different treatment to EDS escalation rates, did not downscore Unisys' technical proposal for organizational conflict of interest, did not score corporate references and did not give EDS proper credit for uncompensated overtime. The first issue was the primary issue.

We deny the protest. Unisys' evaluated price was lower than EDS evaluated price. EDS has not proven that Unisys' lower evaluated price was due to "wage busting" of professional employees. In fact, the record shows that direct labor costs proposed by Unisys and EDS were

EDS has not proven that it is entitled to prevail on the other issues.

Findings of Fact

The Terms of the RFP

1. The scope of work of the RFP required the successful offeror to provide support maintenance and operation for respondent's mainframe system, associated personal computers, a related data communications facility, and related local area networks. Protest File, Exhibit 3, Attachment B at 2-4.[1] The successful offeror was also to provide software and equipment maintenance and inventory maintenance for respondent's facility. *Id.* Additionally, the successful offeror was to propose options and recommendations for evaluating, ordering, installing, repairing and maintaining information systems and automated support systems to satisfy respondent's informational requirements. *Id.* The RFP contemplated a cost plus award fee contract for a base year and four option years. Protest File, Exhibit 2 at 2.

2. Respondent estimated 199,020 (plus or minus ten percent) direct productive labor hours would be required to perform the services required. Protest File, Exhibit 2, ¶ B.007 at 3. The RFP specified 107 positions for the base year (growing to 125 positions at option year four), in 40 labor categories. *Id.*, Section J, Attachment 1 at 000409-418.

3. Section L of the RFP set forth the proposal format required of each offeror. Section L.47 (Preparation of Technical/Business Proposals) states in part that, "In order that your Technical/Business Management Proposal may be evaluated strictly on the merit of material submitted, *no contractual cost information is to be included in your Technical/Business Management Proposal.*" Protest File, Exhibit 3, ¶ L.047 at 99.

4. Section L.049 (Preparation of Cost Proposals) stated in part that, "The Cost/Price Proposal .... *Contractual cost information is not to be included in the Technical Proposal.*" *Id.*, ¶ L.049 at 109. Labor rates for proposed individuals and categories were to be put in the cost proposal. *Id.*

5. The evaluation factors read in pertinent part:

M.0001 *GENERAL*

....

(b) Award will be made to that responsible offeror whose offer, conforming to this RFP is considered most advantageous to the Government, considering the evaluation criteria in this Section M.

....

M.006 *OVERALL RELATIVE IMPORTANCE OF EVALUATION CRITERIA*

(a) The Technical and Business Management proposal is of greater importance than the cost proposal. However, if, after evaluation of the Technical and Business Management and cost proposals, two or more competing proposals are within the competitive range, evaluated probable cost to the Government may be the deciding factor for selection, depending on whether

[1] Page number citations are to exhibit page numbers. Where there are no exhibit page numbers, citations are to Bates Stamps numbers.

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the most acceptable proposal (excluding cost consideration) is determined to be worth the cost differential, if any.

Protest File, Exhibit 2.

6. The evaluation criteria for the technical and business management proposals were, in descending order of importance:

(1) Capability and Experience

(2) Corporate Resources

(3) Key Personnel

(4) Project Management

Protest File, Exhibit 3, ¶ M.006(b) at 125-26.[2]

7. Section M.009 described the basis for the application of the evaluation criteria. Capability and experience "will be evaluated on the basis of the demonstrated experience and performance on both past and current contracts similar in both size and scope as solicited by this RFP." The evaluation would place particular emphasis on experience in the areas of supporting Multiple Virtual Systems (MVS) and Virtual Machine (VM) operating systems. *Id.*, ¶ M.009.

8. The Corporate Resources criterion would be evaluated on the basis of:

> [A]vailability of personnel resources and staffing, including additional resources for special situations. The evaluation will consider the ability to provide and retain the required number of qualified resources by labor category; the offeror's commitment to and accomplishment of staff training and development; the offeror's labor relations and compensation plan; the offeror's overall management system organization.

Id.

9. Key personnel:

> will be evaluated based on their qualifications as demonstrated by education, technical, and professional experience (to include demonstrated leadership capabilities and experience necessary to perform as a key person) relevant to the Statement of Work and generic position descriptions, and the timely availability and commitment of the key personnel proposed.

Id.

10. Paragraph M.013 of the RFP concerns the evaluation of compensation plans for professional employees. Because of the importance of this section to the issues presented, we set it forth in full:

> (1) Recompetition of service contract may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance. It is therefore in the Government's best interest that professional employees, ... be properly and fairly compensated. As a part of their defined proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract. The Government will evaluate the plan to assure it reflects sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation. Supporting information will include data, such as recognized national and regional compensation surveys and studies of professional, public and private organizations, used in establishing the total compensation structure.
>
> (2) The compensation levels proposed should reflect a clear understanding of work to be performed and should indicate the capability of the proposed compensation structure to obtain and keep suitable qualified personnel to meet mission objectives. The salary rates or ranges must take into account differences in skills, the complexity of various disciplines, and professional job difficulty. Additionally, proposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees. Offerors are cautioned that lowered compensation for essentially the same professional work may indicate lack of sound management judgement and lack of understanding of the requirement.

[2] By amendment 0001, respondent reduced the number of key personnel from 19 to 3, and restructured the evaluation criteria to reflect the reduction in key personnel. The corporate resources criterion became the second most important, where before it had been third. *Compare* Protest File, Exhibit 2 *with* Protest File, Exhibit 3.

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(3) The Government is concerned with the quality and stability of the work force to be employed on this contract. Professional compensation that is unrealistically low or not in reasonable relation to the various job categories, since it may impair the Contractor's ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements.

(4) The compensation plan may be utilized during the Government's evaluation of proposals under evaluation Criterion 2, Corporate Resources.

Protest File Exhibit 3, at 128-29.

EDS Proposal

11. In the corporate resources portion of its BAFO, EDS

Unisys Proposal

Acquiring the staff to fulfill the contract

12. In the corporate resources portion of its BAFO, Unisys outlined its strategy for acquiring the staff to fulfill the requirements of this contract.

Retaining the staff to fulfill the contract

13. In the corporate resources portion of its BAFO, Unisys outlines its strategy for retaining the staff necessary to fulfill the requirements of this contract.

14.

15.

16. Prior to submission of its BAFO, Unisys received a list of questions/clarifications from the Department of Energy (DOE).

17. In response, Unisys stated:

Id.

Evaluation Methodology

18. Respondent used formal source selection procedures in conducting the procurement. The Source Evaluation Board (SEB) evaluated the technical and business portion of the offerors' proposals, determined a competitive range of three offerors, and based upon its evaluation, made recommendations to the Source Selection Official (SSO) for award. The SSO adopted the position of the SEB and determined that Unisys is "a responsible offer, whose offer is most advantageous to the Government." Protest File, Exhibit 45 at 4.

Scoring Plan

19. The technical and business evaluation was based upon a point scoring system. A corresponding system of descriptive adjectives was matched with the numeric point score. The technical and business evaluation scoring system for rating the technical and business criteria is as follows:

10 = Excellent
8 = Above Average
5 = Average
2 = Below Average
0 = Unsatisfactory

Protest File, Exhibit 43 at 23.1.[3]

20. The SEB weighted the technical criteria. Capability and experience was the highest rated criterion and worth 50% of the technical and business score. *Id.*, Attachment 6 at 6-1. Corporate resources was the second highest rated criterion and was worth 30% of the technical and business

[3] A detailed analysis of each rating level is at Protest File, Exhibit 43, Attachment 4 at 6-8.

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score. *Id.* Key personnel and project management were valued as the lowest rated criteria and were each worth 10% of the technical and business score. *Id.*

21. Section M.010 of the RFP states that, "cost proposals will be evaluated, but not point scored, to determine the probable cost to the Government. The determination will take into consideration allowability, allocability, reasonableness, realism, and the risks associated with the proposed costs." Protest File, Exhibit 3.

Team Makeup

22. There were seven members of the SEB, of which four were voting members. The voting members consisted of two Computer Specialists, a Supervising Survey Statistician and the Contracting Officer. Protest File, Exhibit 43 at 11. The SEB also had a number of nonvoting procurement, cost, and legal advisors. *Id.*

Evaluation Results

SEB Report

23. The SEB evaluated the BAFO cost proposals against the cost criteria in section M (M.010) of the solicitation taking into account the written and oral discussions and the findings of the person who performed the initial cost analysis. Protest File, Exhibit 43 at 23.1, subpart n.

24. The SEB conducted its technical and business evaluation, applying the ten point scoring system to the four criteria stated in section M.009 of the solicitation. When the final scoring was completed, the SEB combined the technical scores and the cost proposals on a summary scoring form. The scoring form listed the offerors' technical and business scores and proposed and evaluated probable cost.[4] Protest File, Exhibit 43, Attachment 6 at 6-1. The information contained in the scoring form was incorporated into a table of final rankings, which the SEB prepared. The SEB's summary comparison of the final rankings of the top two offerors is as follows:

Offeror	Technical Initial	Rating Final	Proposed Initial $	Costs Final $	Evaluated Cost $
Unisys					
EDS					

Protest File, Exhibit 43 at 5.1.

25. The SEB report states that Unisys and EDS both had the same final technical rating of . *Id.* However, the Evaluated Cost $ column demonstrates that EDS evaluated cost to the Government was $ more than the Unisys evaluated cost ( ). *Id.*

SEB Evaluation of Corporate Resources

26. The SEB Chairman testified that the SEB examined the quality and stability of the proposed workforce in its technical evaluation by examining an offeror's corporate resources. Transcript at 141. The SEB Chairman stated that no comparison between EDS' and Unisys' cost or salary proposals was conducted in evaluating the corporate resources criterion.

27. To consider the quality and stability of an offeror's corporate resources, the SEB considered ability to hire, retain and fill vacancies; training methods and development; fringe benefit plans; compensation plans summaries; management systems and organizational plans. Transcript at 141-42. All of those factors were taken into consideration for the corporate resources factor. Transcript at 141. Specifically, in order to examine the offerors' compensation without looking at their cost proposals, the SEB evaluated the offerors' compensation summaries. Transcript at 141-142. This analysis included the use of surveys that the offerors based their salaries upon. Transcript at 142. The analysis also included a consideration of the reported escalation rates for raises. Transcript at 144.

28. For example, the information in Unisys' corporate resources portion of its BAFO included

See generally Protest File, Exhibit 39 at II.A-2 through II.A-27.

29. Paragraph L.047(b)(I) of the RFP required vendors to provide contract references listing at least three but not more than five of the offerors' most recent computer facilities management contracts, similar in

[4] Unisys' scoring form is at Protest File, Exhibit 43, Attachment 10 at 000235. EDS' scoring form is at Protest File, Exhibit 43, Attachment 10 at 000234.

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size and scope to the proposed contract. Protest File, Exhibit 2 at 100. All offerors in the competitive range received generally good references, with the personnel interviewed stating they would hire the contractors again. Protest File, Exhibit 44. The SEB did not use affirmative or negative remarks in scoring proposals, as those remarks were considered subjective. The corporate references were used to substantiate data in the offerors' proposals as to the offerors' capability and experience. Although the overall criteria (in this case capability and experience) were point scored, the individual elements were not. Protest File, Exhibit 44; Transcript at 166.

Cost Proposals and Subsequent Analysis

30. The RFP specified that direct labor hours were to be proposed in accordance with labor categories and labor hour requirements set forth elsewhere in the RFP. Protest File, Exhibit 3, ¶ L.0491.(c). The RFP indicated that a category or composite rate could be used for unnamed individuals, with named individuals being "separately identified." *Id.*, Exhibit 2, ¶ L.049 at 111.

31. EDS proposed

32. After the issuance of Amendment 0001, reducing key personnel and increasing the importance of the corporate resources criterion, respondent directed EDS

33.

34. In its initial proposal, Unisys proposed

35. Defense Contract Audit Agency (DCAA) conducted an evaluation of the offerors' direct labor categories. The SEB referenced the DCAA report in its cost analysis. Protest File, Exhibit 42. The information included a "BAFO Rate Confirmation Worksheet." *Id.* The worksheet contained DCAA's evaluation of the offerors' labor categories. For the Unisys proposal, DCAA determined that Unisys' direct labor rates, *Id.*, Attachment to Memorandum to the Record at 1. A comparison of the direct labor rates proposed by Unisys and the base rate that DCAA calculated was compiled into a table, which showed:

Direct Labor: FPRA Labor Category	Base Rate Prop.	Base Rate DCAA

Id. The same analysis was conducted for Unisys' subcontractor, . *Id.* DCAA stated that, "all direct labor rates sampled conform to recently audited and approved rates. . . ." *Id.* A table was compiled that compared the proposed base rate and the DCAA base rate. *Id.* The table stated:

Direct Labor: FPRA Labor Category	Base Rate Prop.	Base Rate DCAA

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Id.

36. The contracting officer conducted his own cost evaluation, separate from DCAA. He established an average hourly labor rate per labor category by averaging the rates per category by the thirteen offerors. He then compared each offeror's labor rate per category against the average for that category. Transcript at 221. He concluded that one offeror (not Unisys) was significantly low within all labor categories it had proposed. One offeror was high. The remaining offerors were within a reasonable range of the averages that were calculated and their offers reflected fair and reasonable prices. Transcript at 524. He discerned that the difference between EDS' and Unisys' proposals amounted to $ per hour. The difference between EDS and Unisys' subcontractor was $ per hour. Transcript at 224.

37. Unisys' and EDS' evaluated cost data were as follows:

	Unisys' Evaluated Cost	EDS Evaluated Cost
Direct Labor Cost		
Overhead Cost		
Subcontract		
Other Direct Costs		
Purchases Burden		
General & Admin. (G&A)		
Base Fee		
Award Fee		
Facilities Capital Cost of Money (FCCM)		
-Labor		
-G&A		
Total Estimated Cost Plus Award Fee		

Protest File, Exhibit 43 at 58 & 60. The contracting officer, based upon the DCAA audit and his own analysis, concluded that EDS and Unisys had offered fair and reasonable pricing. Transcript at 229, 233.

Uncompensated Overtime

38. The RFP provided that uncompensated overtime would be evaluated as part of the cost proposal. The RFP stated that use of uncompensated overtime must be adequately supported to receive full consideration in the evaluation of the cost proposal. Protest File, Exhibit 2, ¶ L.051 at 119. There was no technical evaluation of uncompensated overtime and the contracting officer testified that there was no guarantee that a successful contractor would actually give respondent uncompensated overtime hours. Transcript at 283-84.

Source Selection

39. The SSO had been an *ex officio* member of the SEB, but ceased to be a member of the SEB after his assumption of the duties and responsibilities of SSO. Protester's Exhibit 6 at 1. The SSO received and evaluated the SEB report and attended a formal presentation regarding the award of this contract. *Id.* at 2. The SSO selected the Unisys proposal for contract award. *Id.; see also,* Protest File, Exhibit 45 at 4.

The Experts

Intervenor's First Expert

40. Intervenor's first expert was qualified to testify in the areas of compensation, compensation as it applies to high-tech industries, and construction, development and analysis of surveys of compensation. *See* Intervenor's Exhibit 10, Resume of Michael Burniston.

Unisys' Benefits

41. The expert compared and contrasted the benefit programs of Unisys and EDS based upon their benefits handbooks. Transcript at 608. This comparison included pension benefits, 401K benefits, stock purchase plans, medical plans, prescription drug plans, other additional medical plans, dental, vision, sick leave, short and long term disability, life and accident insurance, and retiree medical benefits. Intervenor's Exhibit 15. The expert found that both EDS' and Unisys' benefits package: "have the kind of benefits that an employee would view as almost a minimum condition of employment...." Transcript at 615.

Unisys Direct Compensation (Salaries)

42. The expert analyzed the labor rates for professional labor categories against market rates for similar work. To perform this analysis, the expert examined eleven compensa-

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tion surveys. Intervenor's Exhibit 11 at 1-2. He matched the RFP's labor categories to the survey's labor categories based upon job descriptions (not job titles) as stated in the RFP. Intervenor's Exhibit 12. Column one of the exhibit lists the job code. *Id.* Column two represents the RFP labor category and specifically the title that was in the RFP job descriptions. *Id.* Column four lists the survey that matches the title of the position in the third column.[5] *Id.* The expert then derived the average of the three median salary rates for the applicable labor category. *Id.*

43. The comparisons of Unisys' proposed labor category rates and their corresponding market rates are set forth in intervenor's exhibit 13. The expert took the Unisys rate bid for each labor category and compared it to the average of the three median market rates for that labor category. *Id.* From this comparison, the expert derived Unisys' overall average for exempt employees which was of the average median market rate. The expert also concluded that Unisys' overall average for non-exempt employees was of the average median market rate. *Id.*[6]

44. A similar process was conducted for Unisys'subcontractor Intervenor's Exhibit 14.
The expert concluded from these figures that, "the compensation ... portrayed and proposed by Unisys [is] within the line of prevailing market practices, and adequate to attract and retain qualified personnel to fill the labor categories." Transcript at 581.

Expert's Conclusions

45. The expert found that,
both compensation in the form of direct compensation and overall benefits that are being proposed and provided to employees of Unisys are in line with competitive practices. They are certainly consistent with prevailing market practices and in my view well position the organization to attract and retain qualified people to fill the job categories.
Transcript at 616-17.

Intervenor's Second Expert

46. Intervenor's second expert (a Certified Public Accountant) was qualified as an accountant and an expert in evaluation of cost proposals. Transcript at 731-32. The expert analyzed the cost data submitted in EDS' and Unisys' BAFOs, the DCAA report and the SEB report. *Id.* at 734-35. The SEB report listed the evaluated costs of the offerors.

47.

48. The expert compiled the evaluated cost data into a summary sheet to demonstrate that Unisys' and EDS' direct expenses were similar and that no wage-busting occurred. Intervenor's Exhibit 17. The summary, with all figures listed in millions of dollars, is as follows:

[5] For example, the exhibit's analysis of job code 1 (the Access Control Clerk as stated as a labor category in the RFP), states that there are three surveys with a job that possesses the same or similar job description. Intervenor's Exhibit 12. Those surveys are the Washington Personnel Association Salary Survey, the TCF 1992 Benchmark Survey, and the Wyatt Technical & Skilled Trades 1992. *Id.* The exhibit lists the corresponding survey job titles (Security Guard, Security Guard B and Security Guard Jr.) and lists the salary rate the position pays at the median 50th percentile ( ).

[6] For example, on page 3 of intervenor's exhibit 13, the first job code and labor category listed is the Access Control Clerk. Intervenor's Exhibit 13 at 3. The "FLSA" column states whether an employee's status is exempt or non-exempt. *Id.* The "number of employees" column states the number of employees in this job category required by the RFP. *Id.* The "UGS (Unisys Government Systems) Curr Rate" column shows the average salary Unisys' bid stated it would pay an employee in this labor category. *Id.* The "Mar '93 50th %ile Rt" column lists the average median market rate for the job category as of March 1993. *Id.* The March 1993 rate is the rate that was calculated in intervenor's exhibit 12. For the Control Access Clerk the market rate is . *Id.* The Unisys average rate of pay for an employee in this labor category is . *Id.* The "UGS/50%" column calculates the percentage difference that the Unisys average rate varies from the median market rate. *Id.* Since the median market rate is for the Access Control Clerk and the Unisys average bid rate is , the "UGS/50%" difference is *Id.* On average, for that labor category, Unisys is paying of the median market rate. *Id.* Using the same methodology, the expert then compared market rates for each category and arrived at an average for exempt and non-exempt employees. *Id.*

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	EDS Price	Unisys Price	Unisys Price Advantage
Direct Costs			
Indirect Costs			
Facilities Capital			
Total Cost			
Fee			
Total Price			

Id. The "Direct Costs" row in the summary includes the direct labor cost,[7] the subcontractor cost and the other direct cost from the offerors' evaluated cost data. Transcript at 738. The "Indirect Costs" row includes the overhead, General and Administrative costs (G&A), the purchasers' burden and the G&A rate from the offerors' evaluated cost data. *Id.* at 738-39. The "Fee" row is the award fee from the offerors' evaluated cost data. *Id.* The first two columns of the summary list the corresponding figures for Unisys and EDS. Intervenor's Exhibit 17. The "Unisys Price Advantage" column represents the difference in price between EDS' and Unisys' cost figures as defined in the exhibit.

49.

8

50. The expert also calculated the amount of indirect costs per dollar of direct labor for both EDS and Unisys and presented a comparison of the results. Intervenor's Exhibit 19.

Protester's First Expert

51. Protester's first expert prepared a chart and a series of exhibits, comparing the average EDS BAFO wage rates and the average Unisys BAFO wage rates to the current compensation of the employees performing under the existing contract. Protester's Exhibit 4. The chart compares "current compensation without raises to the two offers planned and budgeted compensation plans for the professionals that they are proposing." Transcript at 392.

52. The analysis determined that the average rates paid by Unisys were lower than the actual rate paid to incumbent personnel currently performing under the contract for every year of the contract. Transcript at 392. The analysis determined that the average rates paid by EDS begin lower, but, in later years of the contract, exceed the actual compensation paid to employees currently performing under this contract. *Id.* The expert concluded that the variance from current compensation between EDS' and Unisys' proposals "is a difference.... On the

53. Although the expert calculated this difference, he was not sure he included all incumbent personnel in his computation of current compensation, which is the basis for his comparison. *Id.* at 439-40. Further, the expert is comparing average rates to actual rates. Average rates, because they are merely an average assessment of the wage rates, do not necessarily compare or correlate directly to an actual rate, because some employees are paid above the average rates and some below the average rates.

[7] Direct labor costs are "the costs that would specifically be used in the performance of the contract as opposed to direct labor which are the general management kinds of things." Transcript at 734. "[E]ach offeror proposed direct labor hours. ... Under the rules, those are charged directly to the contract because they can get identified with the contract." *Id.* This type of a charge does not include fringe benefits, which "is an overhead factor which is later added to the direct labor hours." *Id.*

[8] A comparison of the Unisys and EDS difference in Labor Overhead, G&A, Fee and Facilities Capital is placed in a percentile format as intervenor's exhibit 18.

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54. Intervenor's second expert examined the chart and accompanying data and concluded that, "it's a comparison of an awarded contract against an incumbent salary. It's not a comparison of salaries against the market and here the definition of market, which is where you would expect Unisys and other contractors to have to go to get these services, and the talent to recruit people, is the marketplace." Transcript at 765.

55. Intervenor's second expert also testified that the analysis conducted by protester's first expert, "[i]s not a comparison of compensation plans. It's a comparison of the costs of compensation, which are wholly different things and I think no place more than fringe benefits underscores that problem more dramatically." Lastly, the intervenor's second expert evaluated the chart and accompanying data as "a comparison with plant-wide bid rates, which are all employees against incumbent salaries which are basically singular employees. On average you will have in these proposals the incumbents have the higher salary level than the plant-wide rate, ... I would not represent this analysis to be any kind of a comparison of compensation found in the marketplace." *Id.*

Protester's Second Expert

56. Protester's second expert, called in rebuttal, was qualified as an expert in compensation levels and the computer services industry. Transcript at 808. The expert stated that the intervenor's first expert survey, "fell very short of what I would need in order to make a good determination" of whether an employer has the compensation package necessary to attract, retain and motivate employees. *Id.* The expert concluded that, "Unisys' compensation as proposed under the RFP would not be sufficient to attract, retain and motivate the quality of staff that appeared to be called for under all the exhibits that I looked at." *Id.* at 810.

57. The expert stated that intervenor's first expert's statistical analysis did not include a discussion with the client, did not include getting any other information about what was important on this program and only relied upon the RFP and its job descriptions to determine what was required to do the survey matches. *Id.* at 812. The expert stated that the reasonable starting-point for determining what is the market rate would be to examine the incumbent's (EDS') wage rates. However, the expert admitted that EDS' average bid rates were lower than its own current incumbent's salary rates.

58. The expert also challenged the strength of the intervenor's first expert's survey matches. However, the expert was only able to review two of the eleven surveys relied upon by intervenor's first expert. *Id.* at 821. The expert also challenged using the percentage variance from a median market rate as an indicator of a company's position in the marketplace. *Id.* at 826-27. However, the expert did not verify every survey and job category match that intervenor's first expert made. *Id.* at 835. The expert testified that out of twenty-five matches he recalled examining, only five concerned him. *Id.* at 836.

59. Intervenor's first expert, in surrebuttal, testified that many of the eleven surveys he premised his analysis upon are available to those who participated in the surveys and to nonparticipants. Transcript at 851. In addition, many of the surveys are for sale to the public by the intervenor's first expert's company. *Id.* Therefore, protester's assertion that only two surveys were readily available is inaccurate. In spite of his criticism of intervenor's expert's statistical analysis and methodology, protester's expert admits that intervenor's first expert's survey, "followed practices that are fairly common in the industry for compensation. ..." Transcript at 809.

Organizational Conflict of Interest

60. The RFP required offerors to disclose all relevant facts concerning any past, present, or currently planned interest ... relating to the work to be performed ... bearing on whether the offeror has a possible organizational conflict of interest. ... Protest File, Exhibit 2, ¶ K.26 at 13. The RFP also required organization conflict of interest documents to be provided as part of the offer (Volume I), but separate from the technical and cost portions of the offer. Protest File, Exhibit 2, ¶ L.046 at 97. The offerors provided the information in Volume 1 of their proposals. Protest File, Exhibits 7 and 23.

61. The SEB concluded that "any possible conflict of interest which may develop during the performance of this contract by any of the offerors will be identified and appropriately avoided ...." Protest File, Exhibit 43. The Source Selection Decision noted avoidance of conflict of interest by inclusion of Clause H.020 *Confidentiality of Information*, Clause H.025 *Energy Information Administration Data*, and Clause H.040

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Hardware and Software Exclusion Clause. Protest File, Exhibit 45.[9]

Discussion

Wage Busting and Related Issues

The central issue of "wage-busting" is found in Counts IV, V, VI and VII of the protest complaint. Protester's first argument is that respondent failed to evaluate the compensation plans as required under M.009 and M.013 of the RFP. Protester's Posthearing Brief at 59. This is a restatement of Count V (failure to follow evaluation criteria). We understand protester's argument to be that respondent's technical evaluators were required under the RFP *as part of the scoring of technical proposals* (as well as in the cost evaluation) to evaluate the compensation plans of the offerors. EDS is the incumbent contractor for the facility management contract. Finding 31. EDS argues that the SEB was required by paragraph M.013 to compare the offerors' compensation plans against the compensation of the incumbent contract. Such a comparison, says EDS, should have resulted in a lower score for Unisys' technical proposal based upon alleged lower compensation proposed by Unisys for professional exempt employees.

Protester is correct that the SEB did not evaluate the compensation plans in scoring technical proposals; the SEB evaluated offerors' compensation plan summaries, rather than the total compensation offered. Finding 27. This was fully in accord with the terms of the RFP. The RFP in paragraph L.047 advised offerors that, "In order that your Technical/Business Management Proposal may be evaluated strictly on the merit of material submitted, *no contractual cost information is to be included in your Technical/Business Management Proposal.*" Paragraph L.049 of the RFP further advised offerors that contractual cost information was not to be included in the technical proposal. Findings 3, 4.

The SEB reviewed the summaries in conducting the technical evaluation, including salary surveys the offerors based their compensation summaries upon and wage escalation rates. Findings 27, 28. Protester has not shown that the SEB failed to apply the required criteria in conducting its technical evaluation.

Protester relies on the language of paragraph M.013 as requiring the technical scoring of compensation plans. In support of its interpretation, protester focuses on the references to "evaluation" or "evaluate" throughout that paragraph. Protester's Post-Hearing Brief at 60-61. Indeed, paragraph M.013 speaks of evaluation "to assure [the compensation plan] reflects sound management approach and understanding of the contract requirements." Finding 10. This is fully in accord with the Federal Acquisition Regulation, which provides that cost evaluation is to be used "to determine the offeror's understanding of the work and ability to perform the contract." 48 CFR 15.608(a)(1) (1992).

Furthermore, the RFP's subparagraph four of paragraph M.013 states that, "the compensation plan *may* be utilized during the Government's evaluation of proposals under evaluation Criterion 2, Corporate Resources," Finding 10, *i.e.*, the technical evaluation. Respondent reserved the discretion to use compensation plans during the technical evaluation, but nothing in the RFP required the SEB to evaluate and score the compensation plans.

Protester also argues that respondent's cost evaluation was flawed in that it did not recognize Unisys' alleged "wage-busting." This is Count IV. The legal standard applicable to cost evaluations is settled. The Board will not disturb the Government's cost analysis unless clearly unreasonable. *Program Resources, Inc.*, GSBCA 8879-P, 87-2 BCA ¶ 19,816, at 100,253, 1987 BPD ¶ 65, at 13. In this case the evidence does not establish that Unisys intended to "wage-bust," or that its compensation was unrealistically low.

Unisys based its compensation on its established salary range derived from actual salaries. Finding 14. The contracting officer made a comprehensive cost-analysis, deriving an average wage rate for all labor categories as bid by the thirteen offerors in the procurement. He found Unisys' rates, as well as others, were within a reasonable range of averages of all offerors. He concluded that one offeror (not Unisys) was significantly low within all labor categories it had proposed. Finding 36. The DCAA has also verified Unisys' direct labor category bid rates, which the contracting officer relied upon. Findings 35, 37.

[9] The last clause prohibits the successful contractor from providing to the Government hardware or software which is manufactured, produced, licensed or distributed by the contractor. Protest File, Exhibit 2, ¶ H.040 at 44.

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The experts intervenor and respondent called at the hearing confirmed the reasonableness of the contracting officer's analysis. The expert compensation witness testified that Unisys' exempt direct labor rate was of the average median market rate for comparable or similar labor categories. Finding 43. The expert's testimony was convincing and credible, and not successfully rebutted by EDS' rebuttal expert. EDS' second expert only looked at a part of the data relied upon by the intervenor's first expert. EDS' second expert also relied upon the incumbent contractor's compensation as his starting point. Findings 57, 58

Paragraph M.013 of the RFP, however, did not make "current compensation" the lodestar for any determination of cost reasonableness; thus EDS' expert's methodology was flawed from the outset. The lodestar is broader, *i.e.,* that professional employees be "properly and fairly" compensated. Finding 10. To make that determination, a variety of sources may be used, including "recognized national and regional compensation surveys," "studies of professional, public and private organizations." *Id.* The paragraph warns that proposals envisioning compensation levels "lower than those of predecessor contracts" will be evaluated for program continuity and uninterrupted high quality work. But that does not enshrine the wages paid by the immediately preceding contractor as the benchmark for cost reasonableness. The Government did not so constrain itself in the RFP.

Unisys' evaluated direct labor costs totalled of direct labor plus per subcontract). Finding 37. EDS' direct labor costs totalled (direct labor costs of plus subcontract cost of . Finding 37. There is a (relative to the size of the contract) difference of in the evaluated direct labor costs as recorded by the contracting officer. Unisys' expert accountant established the difference in direct labor cost of taking into account direct labor, subcontract and other direct labor costs. Findings 48, 49. This expert testified that the cost difference lay in EDS' costs. Findings 49, 50. This testimony was persuasive and unrebutted.

In the past, we have found "wage busting" (and an unreasonable cost determination) when (1) the awardee's direct labor costs for various skill levels ranged between 13 and 38 percent below the Government estimate for those levels, (2) when the labor costs fell substantially below General Schedule (GS) wages for comparable skills, and (3) when performance of task orders on underpriced contracts revealed performance problems in retaining and recruiting employees. *Planning Research Corp.,* GSBCA 10697-P, 91-2 BCA ¶ 23,881, at 119,622-24 and 119,628, 1991 BPD ¶ 82, at 10-12, 15. Here, protester's case did not present the plethora of evidence presented in *Planning Research.* Protester's case rests on unconvincing expert testimony comparing Unisys' rates for exempt professional employees against current compensation charged by EDS on its incumbent contract. Findings 51, 52. That testimony did not demonstrate that the cost evaluation was unreasonable. Therefore, the allegations of "wage busting" are insupportable.

Uncompensated Overtime Hours

Count I alleges defective technical evaluation of EDS' proposal. EDS faults the SEB for failing to give credit in the technical evaluation for the uncompensated overtime it proposed. Uncompensated overtime, however, was to be evaluated in the cost proposal. Finding 38. Furthermore, the contracting officer was properly skeptical of credit for uncompensated proposals given EDS has not made a showing that it should have been given credit in the technical evaluation for uncompensated overtime.

In Count VI, EDS alleges among other things failure to conduct meaningful discussions based on the wage busting issue. Protester alleges in this count that respondent determined Unisys' proposal was technically superior to EDS', giving more weight to price factors than to technical factors. This allegation is baseless. The SEB determined the two proposals to be technically equal. Finding 24. The allegation also assumes the truth of the remaining wage-busting allegations, *i.e.,* that Unisys' proposal should have been scored lower for "wage-busting." But, we conclude that there was no wage busting.

Unequal Treatment of Escalation Rates

In Count III of the complaint, EDS complains that the SEB erroneously imposed different burdens on EDS and Unisys by causing EDS to offer a higher escalation rate than Unisys. This was not the case. The Government requested escalation of labor rates from EDS, but did not dictate the rate EDS should use. EDS chose its own rate of Finding 32. The SEB was thus able to evaluate both proposals on a

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common basis as both offerors proposed escalation. Finding 34.

Organizational Conflict of Interest

In Count II (iii), EDS alleges that respondent did not downgrade Unisys in the technical evaluation for alleged conflict of interest. EDS alleges that organizational conflict of interest is a matter for the technical evaluation. The provisions of the RFP provide, however, the organizational conflict of interest was a matter to be separately considered. Finding 60. EDS does not allege that Unisys has a conflict of interest. Rather, it argues that the SEB should have considered the "disabling [e]ffect" that conflicts of interest would have on the ability of Unisys to perform "one of the major functions named in the RFP's scope of work." Protester's Post-Hearing Brief at 72. That function is a recommendatory function; the successful contractor is to propose options and recommendations for evaluating, ordering, installing, repairing and maintaining information systems and automated support systems to satisfy respondent's informational requirements. Finding 1. The presence of the conflict of interest clauses, Finding 61, assures the respondent of the contractor's objective opinion in any recommendation it may make. Protester has not identified any disabling effect that the SEB should have taken into account in evaluating proposals.

Evaluation of Corporate References

In Count I, EDS alleges respondent conducted an improper technical evaluation of EDS' proposal. EDS alleges that the respondent erred in not point scoring corporate references. The SEB evaluated each criterion through use of point scores but did not score each element comprising a criterion. This was true of the corporate references as well. Finding 29. The RFP did not require point scoring of individual elements comprising each criterion. Under paragraph M.009 of the RFP, capability and experience "will be evaluated on the basis of the demonstrated experience and performance on both past and current contracts similar in both size and scope as solicited by this RFP." Finding 7. The RFP did not limit the SEB's discretion on the precise use of the substantiating data. The SEB did not act improperly in its treatment of corporate references. The SEB acted reasonably in its analysis of the corporate references portion applicable to the capability and experience criterion.

Miscellaneous Counts

In Count I of its protest complaint, EDS alleged that respondent under-evaluated EDS' proposal by failing to give adequate consideration to EDS' superior performance on past contracts. In Count II (i) protester alleges that respondent over-evaluated Unisys' proposal by failing to downgrade the proposal for alleged lack of personnel qualified and personnel experienced in the unique requirements of the contract. In Count II (ii), EDS alleged that Unisys was not downgraded for alleged lack of experience and familiarity with various hardware and software features unique to the contract. In Count II (iv), EDS alleges that Unisys was not downgraded for inferior past performance on similar contracts. These issues were not addressed at the hearing or in protester's post-hearing submissions. These counts are denied for lack of proof.

In Count III, EDS alleges that respondent failed to give appropriate credit to EDS' proposal for an indirect rate ceiling. This issue was withdrawn at the prehearing conference of July 20.

Decision

The protest is DENIED. The suspension of respondent's delegation of procurement authority lapses by its terms.

[¶ 26,395] Wood & Company v. Department of the Treasury

GSBCA No. 12452-TD, September 9, 1993.

Interpretation of Contracts—Construction Contracts—Roofing.—Although a contract's very general description of the demolition phase of a construction project did not explicitly direct the contractor to remove all existing shingles from a roof, the contractor was required to do so because the contract, taken as a whole, indicated that the roof was to be completely reshingled. The reasonable interpretation of the contract's directive to provide fiberglass shingles over the entire roof was that all of the old shingles had to be removed and new fiberglass shingles installed. Contract drawings and the practice of experienced roofing contractors supported this interpretation. The fact that portions of the roof

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were fortuitously covered with fiberglass shingles did not excuse the contractor from removing and replacing those shingles.

For the appellant: Milton A. Wood, President. For the government: David H. Brunjes, Office of the Legal Counsel, Federal Law Enforcement Training Center, Glynco, Georgia.

Before DANIELS, Administrative Judge.

DANIELS, Administrative Judge: The Department of the Treasury's Federal Law Enforcement Training Center in Glynco, Georgia, awarded to Wood & Company (Wood) a contract in the amount of $310,012 to renovate a building so that the structure could serve as a child care center. Appeal File, Exhibit 1. During construction, Wood maintained that the contract did not "address the responsibility of procedure for the removal/disposal of the existing roof shingles and metal eave drip." *Id.*, Exhibit 8. The agency responded that removal of those items was necessary to perform work which was clearly specified in the contract. *Id.*, Exhibit 9. Wood ultimately removed and replaced the old shingles and drip edge, but submitted a claim for the cost of the work. Letter from respondent to Board (Aug. 2, 1993); Appeal File, Exhibit 13. The amount of the claim was originally $13,977; Wood later pared it to $9,129 and then to $8,827.24. Appeal File, Exhibits 13, 15; Appellant's Brief at 10-11.

The contracting officer denied the claim, and Wood appealed his decision to this Board. Appeal File, Exhibit 17; Notice of Appeal (June 8, 1993). The Board must now decide whether the removal and replacement of the old shingles and drip edge are encompassed within the contract, or whether the Government's direction to perform this work constitutes a change for which Wood should receive an equitable adjustment. If we decide this question in the contractor's favor, we must also determine the amount of the adjustment.

Because the amount in dispute is $10,000 or less, Wood was entitled to have this case decided under the small claims procedure. The contractor chose to have the Board follow this procedure. Thus, the case is being decided by a single judge within 120 days of the election, and this decision is final but non-precedential; the decision may only be set aside if tainted by fraud. 41 U.S.C. § 608 (1988); Rule 13 (48 CFR 6101.13 (1992)).

We conclude that the Government's interpretation of the contract is reasonable and that the contractor's is not. Accordingly, we deny the appeal of the contracting officer's decision.

Findings of Fact

The contract contains two sweeping statements regarding demolition. In one place, the document says that demolition "generally consists of the following," after which it does not mention anything about the roof. Appeal File, Exhibit 1 at 001. In another place, the contract says that "[t]he Contractor shall perform all demolition work as necessary to incorporate the Scope of Work as indicated on the drawings and specified herein." *Id.* at 033.

The contract contains portions entitled "DEMOLITION," "SHINGLE ROOFING," and "FLASHING AND SHEET METAL." None of these parts contains any specific mention of removal of existing roof coverings or installation of new shingles or drip edge on any particular parts of the building. Appeal File, Exhibit 1 at 033-36, 111-12, 117-21. The "DEMOLITION" provision does contain a general direction which reads, "Remove existing masonry partitions, frames, etc., to the extent required to join in new construction." *Id.* at 034.

Drawing A-5 shows a Roof Plan, which contains the note, "FIBERGLASS SHINGLES OVER EXISTING & NEW ROOF." That drawing and number A-7 both show sections of the roof, with the note "FIBERGLASS SHINGLES & ROOFING FELT ON $^5/_8$" PLYWOOD SHEATHING" pointing to them. They also show, at the edge of the roof, "PREFIN ALUM DRIP EDGE." Drawing A-6 shows existing features of the building—sanitary vent pipes—with instructions for installing metal flashing, roofing felt, and shingles around them. Appeal File, Exhibit 1.

The drawings use the term "existing" not only with respect to the roof, chimney, and vent pipe, but also in several other places. Drawing A-6, for example, designates some brick and windows as "existing," but other items, including fiberglass shingles and an aluminum drip edge, without that prefatory word. In other places, the drawings show interrelationships between existing and new features. Drawing A-5 shows a foundation plan with the note "CONC. TOPPING OVER EXISTING SLAB"; and Drawing A-7 shows a wall jamb with the note "$1^1/_2$" ×

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1 1/2" × 1/8" ALUM ANGLE FROM FTG TO SILL SECURE TO EXISTING BRICK WITH EXP. BOLTS." Appeal File, Exhibit 1.

Neither the contract's specifications nor its drawings indicates the composition of the shingles which were on the roof as it existed prior to renovation under this contract. Indeed, Wood admits that it did not know, prior to contract award, what type of shingles were on the roof. Appeal File, Exhibit 8; Appellant's Brief at 4, 8.

The contract requires the contractor to provide a warranty of the roof system being installed. Appeal File, Exhibit 1 at 027-28, 111. According to experienced roofing contractors, when new shingles are to be installed abutting existing shingles, the contractor should weave one into the other; "[t]he manufacturer will not warrant new shingles over existing." Declaration of William M. Greene (Aug. 4, 1993) ¶ 5 (submitted by Wood); *see also* Affidavit of C.D. Smithson (Aug. 25, 1993), Affidavit of L. Edwin Rock (Aug. 25, 1993) (submitted by the Government).

Discussion

This contract, like most, could have been written more clearly than it was. As Wood suggests, the document contains very general statements about demolition which do not mention anything specific about the roof. If the document had contained statements like "all existing roofing shall be completely removed and replaced" or "demolition work includes removal of all shingles, felt, and metal eave drips," the dispute now troubling the parties could have been avoided. This does not help us, however, to come to a conclusion about what the document as it was written could reasonably be read to mean.

The instrument directs the contractor to "perform all demolition work ... as indicated on the drawings." The critical note on those drawings is "FIBERGLASS SHINGLES OVER EXISTING & NEW ROOF." The contractor would have us believe that this means that when work is completed, there must be fiberglass shingles over the entire roof—both the existing and newly built portions of that part of the structure. Because the existing roof was fortuitously covered by fiberglass shingles, Wood contends, the contractor did not have to remove and replace those shingles in order to comply with the contract's instruction. The Government maintains that the note requires the contractor to install new shingles over the whole roof.

We agree with the Government that reading the contract as a whole, the only reasonable meaning of the statement "FIBERGLASS SHINGLES OVER EXISTING & NEW ROOF" is that the contractor must remove the existing roof coverings and install new ones. The drawings show that some architectural features are "existing" and should remain. Fiberglass shingles are not among them, however; thus, they are presumably to be new. This conclusion is strengthened by the fact that the drawings prescribe interconnections between existing and new architectural features in several places; by directing that fiberglass shingles be over the existing as well as new parts of the roof, the Government was asking for the installation of new shingles throughout. Indeed, the drawings in two places give specific directions for the installation of the shingles—first, over the roof generally, and second, where existing vent pipes protrude through the roof. The contractor could not ensure that the shingles (and associated felt and flashing) are installed in accordance with these directions unless it installs the items itself. Further, as experienced roofing contractors know, new shingles cannot be laid over existing ones without voiding the warranty which Wood was required to provide; thus, the direction to install new shingles necessitates the removal of the old ones. Finally, the contract contains no information about the composition of the shingles on the portions of the roof which are to remain on the building. Consequently, a prudent contractor bidding the job could not expect to find fiberglass shingles on the existing roof; the firm would have to base its price on the possibility that all old shingles would have to be removed and replaced.[1]

[1] The parties have submitted affidavits which conflict as to this conclusion. We find the statement made by the contractor referenced in the affidavit submitted by the Government to be more credible as a matter of common sense, notwith-

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Decision

The work for which Wood claims an equitable adjustment was required by the contract. The fixed price that the parties agreed on initially as fair compensation for the entire job encompasses the work in dispute. The appeal is therefore **DENIED.**

[¶ 26,396] Carl W. Poole v. General Services Administration

GSBCA No. 12320, September 21, 1993.

Sales of Government Property—Misdescription—Notice Requirement.—A contractor's notice to the government that surplus government property had been misdescribed was timely filed because it was submitted within 15 days of the date that the property was most probably removed from the delivery site. The contractor provided motel and rental car receipts to establish the likely date of removal of the property. The government offered no evidence to support its contention that the contractor removed the property 19 days prior to submitting the notice.

Sales of Government Property—Misdescription—Misdescription Discovered After Removal.—Although government property was misdescribed in a contract to sell surplus government pagers by lot, the remedies of contract rescission and refund of the purchase price were not available to the dissatisfied purchaser, because the misdescription was discovered after the pagers had been removed from the delivery site. The misdescription was obvious and could have been discovered in a reasonable prebid inspection of the pagers. Thus, unless there had been a change in the lot between the time of inspection and delivery, the purchaser was bound by its original inspection. Furthermore, the contract's description warranty clearly stated that when items were purchased by lot, no refund was permitted after removal of the lot.

For the appellant: Carl W. Poole. For the government: George U. Lane, Office of Regional Counsel, General Services Administration, Atlanta, Georgia.

Before WILLIAMS and NEILL, Administrative Judges.

WILLIAMS, Administrative Judge: In this appeal a purchaser of surplus pagers seeks rescission of his contract with the General Services Administration (GSA) and a full refund of the purchase price, $788.83. Appellant Carl W. Poole filed his notice of appeal on February 24, 1993, and elected the accelerated procedure on March 29, 1993. The parties have presented their cases on the record.

Findings of Fact

In early August 1992, respondent issued invitation for bids (IFB) number 4KFBPS92058 for the sale of 70 lots of miscellaneous property. At issue here is item 007 described as "ONE LOT CONSISTING OF 14 EA PAGERS, MOTOROLA PAGEBOY II, 4 EA PAGERS, MOTOROLA DEMENSION IV." Appeal File, Exhibit 2. Many of the other lots were described as "estimated to contain" the stated quantities. *Id.*

The IFB specified that lots 007 through 009 were located at Montgomery, Alabama, and could be inspected from August 10 until August 20, 1992. Appeal File, Exhibit 2. The IFB indicated the quantity of item 007 as "1 LT." *Id.*

The IFB contained the following relevant terms and conditions:

1. INSPECTION.

The Bidder is invited, urged, and cautioned to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation.

2. CONDITION AND LOCATION OF PROPERTY.

Unless otherwise provided in the Invitation, all property listed therein is offered for sale "as is" and "where is." Unless oth-

(Footnote Continued)

standing the fact that that statement is hearsay. *See* Affidavit of C.D. Smithson (Aug. 25, 1993).

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erwise provided in the Invitation, the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose. Except as provided in Conditions No. 12 and 14 or other special conditions of the Invitation, no request for adjustment in price or for rescission of the sale will be considered. *This is not a sale by sample.*

....

12. ADJUSTMENT FOR VARIATION IN QUANTITY OR WEIGHT.

Unless otherwise provided in the Invitation, when property is sold by a unit other than "weight," the Government reserves the right to vary the quantity tendered or delivered to the purchaser by 10 percent; .... The purchase price will be adjusted upward or downward in accordance with the unit price and on the basis of the quantity ... actually delivered. Unless otherwise specifically provided in the Invitation, no adjustment for such variation will be made where property is sold on a "price for the lot" basis.

....

14. RISK OF LOSS.

Unless otherwise provided in the Invitation, the Government will be responsible for the care and protection of the property subsequent to it being available for inspection and prior to its removal .... With respect to losses only, in the event the property is offered for sale by the "lot," no adjustment will be authorized under this provision unless the Government is notified of the loss prior to removal from the installation of any portion of the lot with respect to which the loss is claimed.

Appeal File, Exhibit 2A.

The Description Warranty stated:

The Government warrants to the original purchaser that the property listed in the invitation for bids will conform to its description. If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property at his or her expense to a location specified by the Contracting Officer. *NO REFUND WILL BE MADE UNLESS THE PURCHASER SUBMITS A WRITTEN NOTICE TO THE CONTRACTING OFFICER WITHIN 15 CALENDAR DAYS OF THE DATE OF REMOVAL THAT THE PROPERTY IS MISDESCRIBED AND MAINTAINS THE PROPERTY IN THE SAME CONDITION AS REMOVED.* After property has been removed, no refund will be made for shortages of property sold by the "LOT". This warranty is in place of all other guarantees and warranties, expressed or implied ....

Appeal File, Exhibit 2.

Appellant submitted a bid of $788.83 as his total bid price for item 007 on August 26, 1992. Appeal File, Exhibit 3. Appellant indicated on the bid that he had inspected the property. *Id.* On August 27, 1992, GSA awarded contract number GS04F92FBEE230 to appellant. Appeal File, Exhibit 5. The Notice of Award directed appellant to present payment by September 7, 1992, and to remove the property by September 17, 1992. *Id.* The notice indicated that this property was located at the VA center in Montgomery, Alabama. *Id.* Appellant was located in Charlotte, North Carolina.

On September 14, 1992, appellant appeared at the VA in Montgomery, Alabama, to accept delivery of the pagers. Appellant's Record Submission, Attachment. Upon inspection of the property at delivery, appellant found thirteen Pageboy II pagers and five Demension IV pagers instead of fourteen Pageboy II pagers and four Demension IV pagers as listed in the IFB. Appellant informed the VA's property custodian that the quantities did not conform to the description in the IFB, and the custodian replied: "It doesn't matter, you will have to take them anyway." Declaration of Diana D. Poole (June 1, 1993). GSA Form 27A, the Purchaser's Receipt and Authority to Release Property, was signed by appellant and annotated to correct the pager quantities as thirteen Pageboy II and five Demension IV. Appeal File, Exhibit 6.

By letter dated September 24, 1992, appellant requested that GSA's contracting officer refund the purchase price, due to the misdescription of the pagers. Appellant stated:

This will serve to notify you that the property listed as lot number 007 was misdescribed. The description reads, "One lot consisting of 14 ea pagers, Motorola Pageboy II, 4 ea pagers, Motorola Demension IV".

The lot consisted of 13 ea pagers, Motorola Pageboy II, 5 ea pagers, Motorola D[e]mension IV. I noted the discrepancy when the items were removed, but was

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told that the total quantity was 18 as was in the bid package.

I believe the item was misdescribed as a brief scan of other items in the bid package will show that other lots have "one lot *est to contain* . . . ." before the quantity. Lot number 007 did not have "estimated to contain" but instead read "one lot consisting of . . .".

I will agree that if the description had read "est to contain", I would have no reason for discussing this issue; however, the listing was very specific.

I am therefore requesting permission/approval to return the lot as directed by the Contracting Officer and obtain a refund for the purchase price.

Appeal File, Exhibit 7.

On November 25, 1992, the contracting officer issued his final decision denying appellant's request for rescission. Appeal File, Exhibit 12.

Discussion

Appellant seeks rescission of his contract on the ground that the pagers were misdescribed in the IFB. Respondent contends that appellant is not entitled to rescission because (1) notice of the alleged misdescription was untimely and (2) under the Description Warranty no refund would be made for shortage of property sold by lot.

Did Appellant Submit Timely Notice of the Misdescription?

The Description Warranty emphasized that no refund would be made unless the purchaser submitted written notice of the misdescription within fifteen calendar days of the date of removal. Appellant claims that he timely submitted a notice that the pagers were misdescribed on September 24, 1992, by letter to the contracting officer, within fifteen days of his removal of the pagers on September 14, 1992. Appeal File, Exhibit 7. Respondent contends that appellant removed the pagers on September 9, 1992, and that the contracting officer did not receive the notice required under the Description Warranty until September 28, 1992, thus making appellant's notice untimely. Respondent's Record Submission at 3-4.

Respondent's argument fails for lack of proof. Respondent contends without any evidentiary support that delivery occurred on September 9, 1992. Appellant has proffered motel and rental car receipts which indicate that delivery likely occurred in Montgomery, Alabama, on September 14. Appellant's Reply Record Submission, Attachment.

Is Appellant Entitled to a Rescission of the Contract Due to a Misdescription of the Pagers?

Appellant seeks rescission and a refund because the IFB described fourteen Pageboy II pagers and four Demension IV pagers, but appellant actually received thirteen Pageboy II pagers and five Demension IV pagers.

Appellant's claim fails. First, appellant should have detected that one Pageboy II pager was missing during the inspection.[1] Appellant does not claim that what he saw at the inspection is different than what he received at delivery. Complaint; Appellant's Record Submission. Nor is there any suggestion in the record that an intervening event altered the mix or quantities of the pagers in lot 007 between the time of inspection and delivery. Appellant's contention is rather that he first noticed that lot 007 was misdescribed at delivery. It is well established that purchasers cannot recover under a misdescription claim for deficiencies that could reasonably have been observed in a proper inspection of the property to be purchased. *Garrett J. Veenstra*, GSBCA 7251, 85-2 BCA ¶ 18,127, at 90,982 ("Appellant's claim of misdescription appears groundless in light of the general rule that, absent latent defects, a bidder is bound by its own inspection." (quoting *Richard A. Guthrie*, GSBCA 5721, 81-2 BCA ¶ 15,163, at 75,014)); *Doris A. Lahage*, GSBCA 7321, 84-2 BCA ¶ 17,498, at 87,155; *Mary E. Mullins*, GSBCA 6726, 83-2 BCA ¶ 16,589, at 82,493. Here, the identity and manufacturer of the pagers was readily ascertainable upon inspection, as is evidenced by appellant's observation at delivery.

Moreover, under the terms of the Description Warranty, appellant is not entitled to a refund once he removed the property, because the pagers were sold by lot. *Sheldon Aircraft Products Corp.*, ASBCA 12905, 68-2 BCA ¶ 7163, at 33,196. The Description Warranty explicitly stated that "After the property has been removed, no refund will be made for shortages of property sold by the 'LOT.'" Appeal File, Exhibit 2. Here, although appellant discovered the discrepancy at delivery, he took possession of the

[1] The only evidence to suggest that appellant actually travelled to Alabama and performed an inspection is the checkmark on appellant's bid indicating "bidder has inspected the property." Appeal File, Exhibit 3.

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lot and removed the pagers. Appeal File, Exhibit 6.

Appellant further claims that he was "forced to accept delivery against his better judgment" because the property custodian advised him he "had to take [the pagers] anyway" and appellant believed the property custodian was the GSA's contracting officer's representative. Appellant's Record Submission at 5. This misadvice, while unfortunate, does not entitle appellant to a refund. The VA property custodian's statement, as interpreted by appellant, was inconsistent with the clear, emphatic terms of the IFB, which were incorporated into the contract, that once property sold by lot was removed, no refund could be made. These terms of the IFB reflect the Government's legitimate concern that it would be problematic to ascertain the quantity in a given lot, once the lot was removed from the Government's possession.

Decision

For the foregoing reasons, appellant's appeal is DENIED.

[¶ 26,397] Federal Computer Corporation v. Department of the Navy

GSBCA No. 12221-C(12012-P), August 27, 1993.

Protests, GSBCA—Costs of Bid and Proposal Preparation—Stipulated Compensation.—Pursuant to stipulation, a protester was awarded a reasonable sum for wasted proposal preparation costs and attorney fees incurred in preparing the claim for those costs. In the underlying protest, the board had determined that a good portion of the protester's proposal preparation costs were wasted as a result of the government's violations of procurement law. The board was guided by the parties' agreement in fixing the precise amount of wasted costs. In light of that agreement, it would have been an inappropriate use of resources to secure expert testimony on the issue.

For the protester: Doyle & Bachman, Washington, D.C., by Gerard F. Doyle and Scott A. Ford. For the government: Ellen D. Washington, Information Technology Acquisition Center, Department of the Navy, Washington, D.C.

Before DANIELS, LABELLA, and PARKER, Administrative Judges.

DANIELS, Administrative Judge: Pursuant to 40 U.S.C. § 759(f)(5)(C) and Board Rule 35, Federal Computer Corporation (FCC) has moved us to declare it entitled to the costs of filing and pursuing a protest in which it was a prevailing party, *Centel Federal Systems, Inc. v. Department of the Navy,* GSBCA 12011-P, et al., 93-2 BCA ¶ 25,648, 1992 BPD ¶ 359, as well as costs the firm incurred in preparing its proposal in the subject procurement.

At the request of FCC and the respondent, the Department of the Navy, we bifurcated the case. On July 14, 1993, we granted FCC virtually all the costs it claimed as being associated with filing and pursuing the case—$257,930.71. *Federal Computer Corp. v. Department of the Navy,* GSBCA 12221-C(12012-P), 1993 BPD ¶ 192.

We now consider the firm's request for proposal preparation costs and associated attorney fees. The Board determined in *Centel,* 93-2 BCA ¶ 25,648, 1992 BPD ¶ 359, that in conducting the procurement in question, the Navy had violated requirements of statute and regulation in three specific ways which, taken together, were prejudicial to FCC and its fellow-protester. FCC has asked that we award it $2,694,608 in proposal costs that were allegedly wasted as a direct consequence of those violations. *See Centel Federal Systems, Inc. v. Department of the Army,* GSBCA 11315-C(11238-P), 92-2 BCA ¶ 25,000, 1992 BPD ¶ 102; *Recognition Equipment Inc.,* GSBCA 9408-C(9363-P), 89-1 BCA ¶ 21,281, 1988 BPD ¶ 228. FCC has also asked for reimbursement of attorney fees which relate to the preparation of the claim for proposal costs. Protester has identified such fees as being in the amount of $12,012.50. We also now consider whether FCC should be granted $1,687.50 in attorney fees that relate to proposal costs, but which FCC characterized as protest costs. In ruling on protest costs earlier, we deferred review of the last amount until writing this opinion.

With regard to the costs of proposal preparation itself, FCC used a two-step process to calculate the costs at issue. First, it documented the total costs it actually incurred in each of four stages of proposal development—solution formation and team forma-

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tion, live test demonstration preparation and performance, proposal development and negotiations, and best and final offer. Then FCC's president made estimates, based on his knowledge of the procurement, of the percentage of the costs at each stage which were wasted as a result of the Government's violations of law that were identified in the Board's decision in the underlying protest. The attorney fees sought are documented in appropriate detail.

The Navy agrees that FCC is an appropriate interested party for the purpose of entitlement to reimbursement of proposal preparation costs. The parties have agreed that FCC is entitled to an award of $2,014,100, inclusive of attorney fees, stemming from costs that protester incurred.

In the underlying protest case, FCC was one of two firms which challenged the Navy's contract award. We have already determined that FCC's fellow-protester, now known as Cordant, Inc., wasted a considerable part of its proposal preparation costs as a direct consequence of the Navy's improper procurement actions. We found that as a result of these violations of law and the Navy's decision to continue the procurement under revised terms, rather than award a contract to the lowest-priced offeror, each protester must make significant changes to its proposal and perform second live test demonstrations. In fixing the precise amount that Cordant wasted consequent to the violations, we were guided by the parties' agreement that the number they proposed represents reasonable compensation for Cordant's wasted efforts, irrespective of the outcome of the procurement. We explained that we would have no way to determine the correct percentage to apply to each of the categories of cost specified in the motion, apart from expert testimony, and because the parties had agreed on a total, we considered that securing such testimony would be an inappropriate use of resources. The amount specified for Cordant was virtually identical to the amount that FCC and the Navy now jointly request be awarded to FCC. *Cordant, Inc. v. Department of the Navy,* GSBCA 12226-C(12011-P), 94-1 BCA ¶ 26,275, 1993 BPD ¶ 210 (July 30, 1993).

For the reasons given in *Cordant,* we determine that FCC is entitled to an award, and that the sum stipulated by the parties as appropriate reimbursement for wasted proposal preparation costs and related attorney fees is reasonable.

Decision

FCC's application for reimbursement of costs incurred in preparing its proposal in the subject procurement, and associated attorney fees, is **GRANTED IN PART.** We award to FCC $2,014,100, to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988). 40 U.S.C. § 759(f)(5)(C) (1988).

[¶ 26,398] Centennial Leasing v. General Services Administration

GSBCA No. 12037, September 15, 1993. Contract No. GS-00F-9034A.

Default, Grounds—Delivery Failure—Causation.—The government met its burden of proving that grounds existed for a termination for default, because the contractor admitted that it failed to deliver the vehicles specified in the contract and further admitted that its failure to acquire the necessary financing resulted in its inability to fulfill the delivery orders. The government has the burden of proving the grounds for a termination for default, and it established the basis for the termination with the contractor's admissions.

Defaults, Excuses—Financial Problems—Credit.—A lender's failure to provide supplemental financing to the contractor to purchase vehicles necessary to fill contract delivery orders did not excuse the default, because it is the responsibility of the contractor to have the money to finance contract performance, even if a lender fails to advance funds through no fault of the contractor. The contractor had a stable line of credit sufficient to finance the initial two items awarded under the contract and gambled that it could obtain enough funds to purchase the remaining vehicles it was obligated to lease to the government. The death of the lender's chief operating officer was not an act of God and did not constitute an excuse justifying nonperformance. The contractor was responsible for securing financing, regardless of whether earlier credit had been withdrawn.

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For the appellant: Sam Zalman Gdanski, Montebello, New York. For the government: Michael D. Tully, Office of General Counsel, General Services Administration, Washington, D.C.

Before BORWICK, LABELLA, and HYATT, Administrative Judges.

BORWICK, Administrative Judge:

Background

This appeal involves an indefinite quantity requirements type contract for the lease of automobiles and light trucks. On December 6, 1991, the General Services Administration (GSA), respondent, awarded contract line items 5 and 7 (five passenger sedans and twelve passenger vans) of contract No. GS-00F-9034A to Centennial Leasing Corporation (Centennial). On December 9, 1991, the contract was modified to include contract line items 3, 13, and 16 (mid-size sedan, compact pickup, and delivery van, respectively). On August 14, 1992, the contracting officer required appellant to show cause as to why it should not be terminated for default for failure to deliver vehicles leased by numerous delivery orders. Appellant's excuse for failure to perform was its inability to secure financing to purchase the vehicles. The contracting officer terminated the contract for default on September 1, 1992. Centennial appealed.

Appellant argues that the contracting officer should not have terminated the contract for default; that any default was excused because of failure of performance of its creditors or due to an act of God. It also maintains that Centennial had the financing in place to perform the contract within two weeks of default. For the reasons stated below, we deny the appeal.

Findings of Fact

Precontractual Matters

In response to the solicitation for offers, Centennial submitted an offer with an estimated dollar value of $2,175,780. The contracting officer of respondent's Automotive Commodity Center had received an unsatisfactory pre-award financial report on Centennial from respondent's credit and finance branch. The contracting officer thus determined that Centennial was not responsible and, on October 30, 1991, sought a certificate of competency from the Small Business Administration (SBA). Appeal File, Exhibit 9. On December 6, 1991, after considering the matter, SBA granted a certificate of competency for $530,880 for items five and seven only. Appeal File, Exhibit 11. On December 6, respondent awarded a contract for those items to Centennial. Transcript at 9.

The Automotive Commodity Center desired to award additional items. Appeal File, Exhibit 12; Transcript at 10. On December 3, Centennial wrote the contracting officer that it had secured from Sparta Auto Leasing $3,800,000 in addition to its existing credit line of $2,176,000. Appeal File, Exhibit 16. Centennial stated that Sparta would "act only as a bank" and that Centennial would utilize the Sparta line of credit when it had exhausted the existing credit line of $2,176,000 from National Westminster Bank of New Jersey. *Id.*[1] Based on that letter, the Automotive Commodity Center awarded three additional line items, i.e. 3, 13, and 16—mid-size sedan, compact pickup, and delivery van, respectively—to Centennial without requesting a certificate of competency from SBA. Transcript at 22-23, 31. The estimated value of these line items was $855,360. Appeal File, Exhibit 5.

Contract Terms

The contract provided that the lease period for the vehicles was for a period of twelve months from the date of delivery of each vehicle, with an option to extend each lease separately for two additional twelve month periods. Appeal File, Exhibit 5 at 5. The contract required the delivery of the vehicles to be made "at the point(s) specified within 90 days after receipt of order." Appeal File, Exhibit 3 at 15.

The Default clause of the contract, as incorporated by reference through GSA Form 3507, states:

> (a)(1) The government may ... by written notice of default to the Contractor, terminate this contract ... if the contractor fails to—
>
> (i) Deliver the supplies or to perform the service within the time specified in this contract or any extension[.]
>
> ....

[1] The financing arrangement consisted of Sparta providing a line of credit by borrowing $3.8 million from a financial institution and turning the funds over to appellant as needed. Transcript at 68-69. In return for the line of credit, Sparta was to receive 50% of the profits from the lease of the vehicles to the Government. *Id.* at 84.

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(g) If, after termination, it is determined that the Contractor was not in default, or that default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

Appeal File, Exhibit 3 at 4; Supplemental Appeal File, GSA Form 3507 at 22.[2]

Loss of Supplemental Financing

On January 21, 1992, Sparta's chief operating officer died. Appeal File, Exhibit 16. Following that death, appellant's president testified that he received initial assurances that, "there would be no problem in . . . providing the line of credit." Transcript at 48. He testified that as a result of the death, the financial institutions from which Sparta was to borrow the $3.8 million eventually decided to withdraw from the arrangement. *Id.* Appellant's president testified that in April of 1992, it became apparent that Sparta would not provide the supplemental financing; consequently, appellant's president sought other sources of financing.

As of May of 1992, appellant had delivered and paid for $2,200,000 worth of cars, trucks, and vans, and it had outstanding orders for vehicles worth $1,800,000 more. Transcript at 50. Appellant's president attempted to secure financing from "every major financial institution" in San Francisco, Chicago, and Atlanta but was unable to secure financing. *Id.* at 54-55. The General Motors Acceptance Corporation was willing to provide financing, but not on terms that would provide appellant with a profit under the lease. *Id.* at 56-58.

Performance Resulting in Default

As early as March 24, 1992, complaints were filed with respondent concerning appellant's failure to perform under the contract. Appeal File, Exhibit 18. A total of 37 purchase orders for vehicles were placed by customer agencies and departments that appellant failed to timely fulfill. Appeal File, Exhibits 19-54; Transcript at 63. Appellant admitted that, by its own calculations, Centennial failed to deliver approximately 100 vehicles under the contract. Transcript at 80-81.

In June of 1992, appellant contacted the contracting officer and explained that it was having some financial problems and expected to have "cleared them up within a week or so." Transcript at 15. However, the complaints concerning appellant's performance continued through the summer of 1992. *See generally* Appeal File, Exhibit 18.

Termination for Default

On August 14, 1992, the contracting officer sent appellant a "show cause notice," advising appellant that the Government was considering terminating the contract for default. Appeal File, Exhibit 15. The notice gave appellant the opportunity to provide a written account justifying deficiencies in contract performance. *Id.*

On August 24, 1992, appellant, responding to the show cause letter, stated that "Sparta . . . has not been able to honor its funding commitment to Centennial." Appeal File, Exhibit 16. In addition, appellant stated that "I believe that we are close to having funding in place. However, I cannot guarantee that this additional funding will be secured by Centennial . . . ." *Id.* On August 26, 1992, appellant sent supplemental information to the contracting officer that stated, "the line of credit with Sparta could not be honored by the corporation." *Id.*

On September 1, 1992, the contracting officer terminated the contract for default, stating that:

> the explanation presented in your letter is not considered to be an excusable delay as defined in the Federal Acquisition Regulation . . . . Your right, therefore, to proceed with performance of the contract is hereby terminated for default pursuant to FAR 52.249-8(a)(1)(i), [for] failure to deliver the vehicles in the time specified.

Appeal File, Exhibit 17.

On September 15, 1992, appellant's president informed respondent that appellant had secured credit from Tilden Commercial Alliance of New Jersey (Tilden) in the amount of $3,000,000, and sought rescission of the termination. Appellant supplied no proof of a firm financial commitment from Tilden to appellant. Complaint, Exhibit dated September 16, 1992, Facsimile Attachment. The contracting officer decided that because of chronic delivery problems and the non-delivery of vehicles it was not in the best interests of the Government to rescind the termination for default. Transcript at 18. Appellant filed its timely notice of appeal on September 18, 1992.

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[2] GSA Form 3507 incorporates the standard Termination for Default clause found at FAR 52.249-8. Supplemental Appeal File, Second Exhibit.

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Discussion

The burden of proving the grounds for a termination for default is upon the Government. *M&T Construction Co.*, ASBCA 42750, 93-1 BCA ¶ 25,223, at 125,636. Appellant admitted that it failed to deliver approximately 100 vehicles specified in a total of thirty-seven purchase orders issued under the contract. Appellant admitted that its failure to acquire the necessary financing to fulfill the requirements of the contract resulted in its inability to fulfill the delivery orders. Respondent has established a basis for the default termination.

Sparta's failure to provide supplemental financing to purchase the vehicles required to fill the delivery orders does not excuse Centennial's default. As we have previously held:

> The law is generally, that it is the responsibility of contractors to have the cash to finance their contract performance .... This is as true of borrowed money as of cash in the bank and is true even when the lender fails to advance the funds through no fault of the contractor.

Yucca, a Joint Venture, GSBCA 6768, et al., 85-3 BCA ¶ 18,511, at 92,971 (citations omitted). Here, appellant had a stable line of credit sufficient to finance the initial two items awarded under the contract, but gambled it could obtain enough funds to purchase the remaining vehicles it was obligated to lease to the Government. When the gamble failed, appellant was financially overextended and found itself unable to perform.

Appellant claims its default is excused by an "act of God," *i.e.* the death of Sparta's chief operating officer. The illness or death of key contractor or subcontractor personnel is not a valid excuse justifying nonperformance, nor is it considered an act of God, as the contractor assumes the responsibility of employing and utilizing a competent work force. *Yankee Telecommunications Laboratory, Inc.*, ASBCA 25240 et al., 85-1 ¶ 17,786, at 88,873. Appellant is also responsible for securing financing, regardless of whether earlier credit has been withdrawn. *Yucca; Katzdorn Construction & Co.*, AGBCA 87-265-3, 87-2 BCA ¶ 19,929, at 100,838-39. The unfortunate passing of Sparta's chief operating officer was not the cause of appellant's default; appellant's inability to obtain secure financing caused the default.

Finally, appellant represented—without proof—that yet another source of financing had been secured. In light of the past unsuccessful history of the financing of this contract, the contracting officer did not act unreasonably in refusing to rescind the default termination based upon that representation.

Decision

The appeal is DENIED.

[¶ 26,399] Integrated Systems Group, Inc. v. Department of Commerce

GSBCA No. 11974-C(11921-P), August 25, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Corrective Action.—A protester was awarded the costs of pursuing a protest, as well as the costs of replying to the government's opposition to the protester's cost motion, even though the agency took only eight days to rectify the mistake that led to the protest, because the Competition in Contracting Act provides simply that the board may award costs when a protest is sustained. The board declined an invitation to follow the General Accounting Office's practice of awarding protest costs only when agencies unduly delay taking corrective action in the face of a clearly meritorious protest. The board has not adopted rules that parallel those adopted by GAO with respect to awards or protest costs. GAO's rules intend generally to restrict protest cost awards when an agency acts promptly, while preserving the discretion to make such awards when the facts and circumstances suggest that it took an inordinate amount of time for voluntary corrective action to occur. The board, however, routinely grants the costs of successful pursuit of a protest.

For the protester: Shelton H. Skolnick, Derwood, Maryland. For the government: Jerry A. Walz, Mark Langstein, and Kenneth A. Lechter, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C.

Before HYATT, BORWICK, and WILLIAMS, Administrative Judges.

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HYATT, Administrative Judge: Pursuant to Rule 35, protester, Integrated Systems Group, Inc. (ISG), filed a timely motion for the recovery of its costs of pursuing the underlying protest. Respondent, the Department of Commerce (DOC), argues that protester should not be awarded its protest costs because the agency promptly settled with protester once it realized that the agency procurement office had misread the protester's response to its Commerce Business Daily (CBD) synopsis. We disagree with respondent, and award ISG protest costs in the amount of $2,155.

Background

On July 7, 1992, ISG filed a protest at the Board challenging the award of a contract to Sylvest from the Sun Microsystems GSA Schedule. A pre-hearing conference was held on July 13, 1992. On July 14, 1992, protester's counsel visited respondent's offices in order to review the procurement file. At this time, it was discovered that the agency procurement office had misread protester's response to its CBD notice and that protester's was lower than the schedule price. Respondent promptly agreed to cancel the award and solicit competitively. Respondent's Response to Motion for Costs at 2; Protester's Reply to Respondent's Response at 1-2.

On July 16, 1992, the parties filed a joint stipulation with the Board asking that the protest be granted. In accordance with the stipulation, the Board granted the protest. *Integrated Systems Group, Inc. v. Department of Commerce*, GSBCA 11921-P, 1992 BPD ¶197 (July 24, 1992). As provided under the settlement agreement of the parties, the issue of protest costs was to be determined pursuant to the procedures provided by Board Rule 35.[1]

On August 17, 1992, protester filed a motion to recover $1,255 in costs related to this protest. On September 21, 1992, protester amended its claim to total $2,155, reflecting additional attorney fees of $900 expended in replying to respondent's opposition to protester's cost motion.

Discussion

Respondent, quite correctly, points out that it acted quickly and efficiently to correct its error and resolve this protest.[2] Accordingly, instead of awarding ISG its protest costs, respondent urges that the Board should take the opportunity to announce its intention to follow the practice of the General Accounting Office (GAO), which routinely holds that the award of protest costs is appropriate only where agencies unduly delay taking corrective action in the face of a clearly meritorious protest. Respondent points out that under GAO precedent, the eight days required to resolve this protest would not constitute "undue delay" and that the agency's quick actions should be deemed to obviate the payment of protest costs.[3]

At the outset, it should be noted that we do not regard this protest as an instance in which protester succeeded in showing nothing more than a minor technical violation of procurement regulations. Protester's complaint was valid and resulted in achieving the full measure of success sought by protester—the opportunity to compete for the award. The fees claimed are reasonable and are sufficiently documented.

We fully agree that the agency acted with commendable celerity in rectifying the mistake that led to the protest. The GAO cases respondent cites are based on regulations not applicable to our proceedings, however.[4] Although the Competition in Contracting Act

[1] 48 CFR 6101.35 (1992).

[2] Indeed, we have no doubt that respondent's quick action was largely contributory to the minimal amount of attorney fees that were incurred in the pursuit of this protest.

[3] Respondent also submits an affidavit of the contracting officer stating that had protester contacted her immediately after award she would have voluntarily taken corrective action without the need for the filing of a protest. We do not disbelieve the contracting officer; however, the pursuit of a voluntary resolution with the agency, although encouraged, is not, under our case law, a condition precedent to an award of fees for successful pursuit of a protest. There are many reasons, including the desire to obtain an immediate suspension of the procurement so as to preserve the opportunity for meaningful relief, which may motivate the protester to file a protest with the Board without first exploring resolution with the agency.

[4] Following the enactment of the Competition in Contracting Act of 1984 (CICA), GAO promulgated a regulation expressly providing that costs would not be awarded when an agency took corrective action prior to issuance of a ruling. Subsequently, GAO amended its regulation to provide that it "may" award costs, even if corrective action is taken by an agency prior to issuance of a ruling, if GAO finds that the agency delayed unduly. As the cases explain, GAO's cost regulation is intended generally to restrict protest cost awards when an agency acts promptly, while preserving the discretion to make such awards when the facts and circumstances suggest that it took an inordinate

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(CICA) addresses protests at both the Board and GAO, the Act creates significant distinctions in the protest processes in these two forums. *Compare* 31 U.S.C. §§ 3551-3556 (1988) *with* 40 U.S.C. § 759(f) (1988). These distinctions relate, inter alia, to such matters as the time frames in which protests must be processed, the availability of a suspension of the procurement and the effect of the tribunal's decision. Although the wording of the sections relating to an award of costs is similar, the legislative history of CICA reveals a distinction in the Congressional intent for administration of this aspect of the legislation as well. In alluding to the Board's authority to award costs, the conference committee report accompanying CICA indicates simply that the Board may award costs when a protest is sustained. It is more explicit in discussing the authority of the Comptroller General, stating that "the Comptroller General will declare monetary awards only in cases where the agencies have unfairly excluded vendors from procurements, and not in cases involving minor technicalities.[5] H.R. Rep. No. 861, 98th Cong., 2d Sess. 1431, 1437, *reprinted in* 1984 U.S.C.C.A.N. 2119, 2125.

The Board has not promulgated rules that parallel those adopted by GAO with respect to awards of protest costs, nor has it adopted such a practice in its cases. In contrast, the Board routinely grants the costs of successful pursuit of a protest in similar situations. For example, in *Communications Resource Group, Inc. v. General Services Administration,* GSBCA 11038-C(10998-P), 92-2 BCA ¶ 24,769, 1992 BPD ¶ 29, the Board granted reasonable protest costs where a protest was dismissed eight days after being filed as a result of the agency's prompt initiation of corrective action.

We are not persuaded by respondent's contention that an award of costs in this case would eviscerate the discretionary nature of the Board's authority to make cost awards to successful protesters. Because the Brooks Act provides that the Board "may" award protest costs, the Board has recognized that an award of attorney fees need not be automatic merely because protester has established a violation of regulation or statute. *See, e.g., Computervision Corp.,* GSBCA 8838-C(8709-P), 87-2 BCA ¶ 19,818, 1987 BPD ¶ 70 (protester's motion for costs denied when it prevailed only on a threshold issue that allowed it to be heard on a substantive issue which it ultimately lost). The Board has, furthermore, construed this language to require it to consider both entitlement and amount even where a protester has prevailed. In the case at hand we are persuaded that it is appropriate to make an award and that the amount requested is reasonable and properly supported.

Decision

Protester's motion for costs is **GRANTED.** Protester is awarded $2,155. This award may be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988). 40 U.S.C. § 759(f)(5)(C) (1988).

[¶ 26,400] Litton Systems, Inc., Intervenor v. Department of Transportation and Department of Defense

GSBCA No. 11915-C(11736-P/11745-P), September 17, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Timeliness of Motion for Costs.—An intervenor's motion for the recovery of proposal preparation costs in connection with protests against a procurement for voice band switching boxes was dismissed as untimely because the intervenor did not file its motion within the 30-day period following issuance of the board's decision sustaining the protests. The intervenor did not

(Footnote Continued)

amount of time for voluntary corrective action to occur. 4 CFR 21.6(e) (1992); *Marinette Marine Corp.,* B-245130.2, 92-1 CPD ¶ 298; *Oklahoma Indian Corp.,* B-243785.2, 91-1 CPD ¶ 558.

[5] Although the Board has not explicitly stated it will not award protest costs in "cases involving minor technicalities," as a practical matter the result is the same, since the Board will not grant a protest based on a showing of a de minimis error in the procurement or in the absence of a showing of prejudice to the complaining protester. *See, e.g., US Sprint Communications Co. v. Department of Defense,* GSBCA No. 11769-P, 93-1 BCA ¶ 25,255, 1992 BPD ¶ 165, *aff'd per curiam,* No. 92-1470 (Fed. Cir. July 15, 1993) (table); *Corporate Jets, Inc.,* GSBCA 11049-P, 91-2 BCA ¶ 23,998, 1991 BPD ¶ 111; *Andersen Consulting,* GSBCA 10833-P, 91-1 BCA ¶ 23,474, 1990 BPD ¶ 396, *aff'd,* 959 F.2d 929 (Fed. Cir. 1992).

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show that it had good cause to delay filing the motion. The obstacles cited by the intervenor as barriers to timely filing applied equally to protesters that filed timely cost applications.

For the intervenor: Pettit & Martin, Washington, D.C., by David V. Anthony, Michael W. Clancy, and Richard P. Rector. For the Department of Transportation: Richard J. McCarthy, John R. McCaw, Jr., and Anthony L. Washington, Office of the Chief Counsel, Federal Aviation Administration, Washington, D.C. For the Department of Defense: Roger B. Sabin and Capt. Richard B. Wingate, Office of General Counsel, Defense Information Systems Agency, Arlington, Virginia, and Clifton M. Hasegawa, Virginia Farrier, and Douglas G. White, Defense Commercial Communications Office, Defense Information Systems Agency, Scott Air Force Base, Illinois.

Before HYATT, NEILL, and WILLIAMS, Administrative Judges.

HYATT, Administrative Judge: Pursuant to Rule 35, Litton Systems, Inc., an intervenor in the protests of Denro, Inc. and Westinghouse Electric Corporation, has moved for the recovery of proposal preparation costs that it alleges were wasted as a result of agency actions that the Board overturned in deciding those protests. Respondent, the Federal Aviation Administration (FAA),[1] opposes Litton's application on two grounds: 1) the application was not timely filed under the Board's rules and 2) Litton, an intervenor supporting the FAA's position, is not a "prevailing party" under the Board's precedent. Because we find that the application was not timely filed, we do not address the substantive issue of whether an intervenor that supported the Government's position in the underlying protest is eligible to recover its wasted proposal preparation costs.

Background

On May 29, 1992, the Board granted the consolidated protests of Denro, Inc. and Westinghouse. These protests challenged the exclusion of these companies from the competitive range of an FAA procurement for voiceband switching boxes. As a result of the Government's initial determination that Denro and Westinghouse should be excluded from the competitive range of the procurement, the remaining competitor, Litton, had effectively been selected for award. Accordingly, Litton intervened in the protests in support of the Government's position.

In its decision on the merits of the protests, the Board held, inter alia, that the operational capability demonstrations (OCDs) involving Denro and Westinghouse were improperly conducted and that, thereafter, their proposals were unfairly evaluated as to the ability of their products to meet the Government's requirements. *Denro, Inc v. Department of Transportation,* GSBCA 11736-P, et al., 93-1 BCA ¶ 25,315, 1992 BPD ¶ 196. One of the options presented to the Government in the Board's decision was that of conducting another round of OCDs, which the Government ultimately elected to do.

The Board's decision in *Denro, Inc.* was issued on May 29, 1992. Litton filed its cost motion on July 2, some 34 days after the Board's decision was provided to the parties. The motion was limited to a request for the recovery of proposal preparation costs associated with the operational capability demonstrations (OCDs) and the post-OCD discussion process to the extent Litton's efforts were wasted as a result of the Government's violations of law. Litton characterized its motion as "premature," noting that the costs claimed are approximate and that the actual amount of wasted costs would not be determinable until such time as the Government had selected a course of further action in the procurement. Thus, the costs were not certified, and Litton reserved the right to supplement and update its motion as appropriate.

Discussion

The Board's Rule 35(b)[2] sets forth the following procedure for the filing of a motion seeking an award of protest costs:

> Within 30 days after a decision sustaining a protest, an interested party may submit a motion, with supporting documentation and certification of accuracy, requesting the Board to issue an order requiring respondent to pay the costs described in paragraph (a) of this rule.

[1] This procurement was conducted by the Defense Information Systems Agency, Defense Commercial Communications Office (DECCO), on behalf of the FAA, a component of the Department of Transportation. The FAA has conducted all proceedings pertinent to this cost case, however, and we thus refer to the FAA as the responding party throughout.

[2] 48 CFR 6101.35(b) (1992).

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Because Litton did not file its motion within the thirty-day period following issuance of the Board's decision sustaining the protests of Denro and Westinghouse, the FAA contends that its motion must be dismissed for lack of timeliness. Litton urges that the thirty-day time limit set forth in Rule 35 is not mandatory and should be waived by the Board in this case.

The Board has previously held, in similar circumstances, that a cost motion that was not timely filed should be dismissed for that reason. *Emulex Corp.*, GSBCA 9357-C(9259-P), 89-1 BCA ¶ 21,349, 1988 BPD ¶ 276. In *Emulex*, the successful protester filed a motion to recover costs several days after the expiration of the thirty-day period following issuance of the Board's decision. In that case, protester's counsel had misread the date of the decision and argued that the Government was not prejudiced by the error. The Board flatly rejected this contention, holding that the plain language of the rule sets a deadline and that that deadline must be strictly applied:

> We have in Rule 35(b), acting in accordance with statutory authority, set a time limit on the filing of motions for costs. This rule is clear; regardless of its caption or the intent of the drafters, the rule without doubt sets a limit of thirty days after a decision sustaining a protest in which to submit a motion for protest costs. Furthermore the rule is appropriate for and is specific to protest proceedings. In fairness to all parties in all actions before us, we adhere to the time limits which we have established. We will not enlarge the time for the filing of a motion for costs unless a party shows good cause for enlargement. Any other conclusion would foster disrespect for our rule regarding timeliness of cost motions.

89-1 BCA at 107,625, 1988 BPD ¶ 276 at 4.

Here, Litton merely states that in light of the Denro and Westinghouse filings, seeking proposal preparation costs, it filed essentially an "informational" motion intended to alert the Government that it has a claim.[3] What is not explained, however, is why this informational filing could not have been filed within thirty days of issuance of the Board's decision, so as to comply with the rule's purpose of notifying the Government within that time frame of its potential liability. Although Litton points out that it could not, with the limited information available, provide a certified claim in that period, it does not demonstrate that it could not have filed a protective application, which it did only a few days later anyway. *Cf. Trimble Navigation, Ltd. v. Department of Transportation*, GSBCA 11692-P, 93-1 BCA ¶ 25,341, 1992 BPD ¶ 62 (filing of "protective" preaward protest is preferable to awaiting a debriefing in order to obtain further details to support protest). The obstacles cited by Litton as barriers to filing sooner—that the Government had not yet selected a course of action, that the extent of costs incurred could not be calculated with certainty so as to permit their "certification," and that the decision, issued under protective order, was not yet available to the principals of Litton—applied equally to the protesters.[4] We note, however, that both protesters filed timely cost applications and neither of these parties was in any better posture to ascertain what costs had been wasted given that the Government had not yet chosen what course it would pursue to continue the procurement. Absent a more persuasive explanation from Litton as to why it had "good cause" to delay the filing of this motion, we have no reasonable basis

[3] Litton characterizes the request for wasted proposal preparation costs as premature, apparently relying on the Board's observation in its underlying decision that Westinghouse's request, made in its post-hearing brief, that the Board declare it entitled to recover proposal preparation costs, was possibly premature in light of the options available to the FAA. This issue was thus deferred for resolution in conjunction with any cost application that might be filed by Westinghouse. 93-1 BCA at 126,133 n.28, 1992 BPD ¶ 196 at 44 n.28. This statement was not intended to provide, nor could it reasonably be construed as, an extension of time to file such a motion beyond the thirty-day period established under our rule.

[4] The unavailability of complete cost information generally does not discourage successful protesters from filing within thirty days with a request for leave to supplement the motion with updated accurate information. Indeed, information on the cost of preparing the cost petition itself is rarely, if ever, available as of the original filing. Requests for leave to supplement the initial filing are thus customarily granted by the Board.

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for extending the deadline established in the rule.

Decision

This cost application is **DISMISSED AS UNTIMELY FILED.**

[¶ 26,401] LaSalle Bank Northbrook v. Department of the Treasury and General Services Administration

GSBCA No. 11896-TD, September 1, 1993.

Procedure, Boards—Parties—Real Party in Interest.—Under a lease of copiers, the board granted a contractor's petition requesting the contracting officer to issue a decision on the contractor's claim for convenience termination costs and denied the Internal Revenue Service's motion to dismiss, despite the IRS's contention that it was not a real party in interest, because the record showed that the terminated purchase order was an open market order for which the IRS was responsible, rather than an order under a GSA schedule contract. The schedule contractor was not involved in any phases of the leasing transaction. The IRS did not provide any documentation indicating the schedule contractor's involvement in the invoice and payment process.

Contract Disputes, Claims—Settlement Proposal—Failure to Agree.—Under a lease of copiers, the board granted a contractor's petition requesting that the contracting officer issue a decision on the contractor's claim for convenience termination costs and denied the Internal Revenue Service's motion to dismiss the case, because the IRS's extraordinary delay in responding to the petitioner's settlement proposal ripened into a claim. Under the Federal Acquisition Regulations, the petitioner's termination for convenience settlement proposal became a bona fide disputed claim for a sum certain.

For the petitioner: Altheimer & Gray, Chicago, Illinois, by Julie Swanson. For the Department of the Treasury: Christopher K. Bullard, Office of General Legal Services, Internal Revenue Service, Mid-Atlantic Region, Philadelphia, Pennsylvania. For the General Services Administration: John E. Cornell, Office of General Counsel, General Services Administration, Washington, D.C.

Before NEILL, PARKER, and BORWICK, Administrative Judges.

NEILL, Administrative Judge: This petition was filed by LaSalle Bank Northbrook on June 19, 1992. The petition is a request for the Board to issue an order directing a contracting officer at the Department of the Treasury to render a decision on a termination for convenience settlement proposal which the petitioner submitted to the Department of the Treasury, Internal Revenue Service (IRS) in August 1990. The transaction in question is for the lease of Toshiba copiers.

On June 25, 1992, the Board directed the IRS to issue a contracting officer's decision on the matter in question. On August 6, 1992, the IRS brought a motion asking the Board to dismiss this case.

The principal argument raised by IRS in support of its motion to dismiss is that the contract, in relation to which this claim arises, was a general schedule contract awarded by the General Services Administration (GSA). Respondent IRS claims to have been nothing more than an ordering agency under that contract. IRS maintains that the termination for convenience which occurred was the result of directions received from GSA directing ordering officers to terminate for convenience certain purchase orders issued under the contract.

The Board did not immediately rule on IRS' motion to dismiss. Based on representations made in that motion, however, it added GSA to these proceedings and requested GSA to issue a contracting officer's decision on the claim. GSA thereupon made a limited appearance for purposes of objecting to our jurisdiction. Counsel for GSA pointed out that no claim had been presented to the GSA contracting officer by the schedule contractor. Counsel for GSA did, however, take the useful and additional step of referring this matter to the GSA schedule contracting officer for review. This led to the issuance on September 18, 1992, of a letter from the contracting officer to counsel for the petitioner. In that letter, the contracting officer explains in detail why he has concluded that

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the purchase order which was terminated for convenience was not issued pursuant to a schedule contract but rather amounted to an open market order for which the IRS and not GSA is responsible.

On November 20, 1992, the Board issued an order to IRS and petitioner to show cause why, in light of the GSA contracting officer's determination, IRS rather than GSA is the real party at interest in the transaction to which the current dispute relates. During the following month of December, both petitioner and IRS filed replies. This prompted further inquiry from the Board to which both parties have also replied. Based on the information provided thus far for the record, the Board concludes that the GSA is not a proper party to this proceeding and that the IRS is. Accordingly, the IRS motion to dismiss is denied and the petition is granted.

Findings of Fact

1. The GSA Federal Supply Schedule (FSS) contract, number GS-00F-03105, with Toshiba American, Inc. (TAI) is for a contract period of October 13, 1987 to September 30, 1990. An FSS contract price list issued by TAI specifies the products which were available to ordering agencies under that contract. IRS Reply of December 10, 1992, Exhibit 1.

2. This TAI schedule contract price list includes the following instructions on placing orders:

> All orders placed under this Contract must be issued to Toshiba America, Inc., Copier Products Division—Attn: GSA, 9740 Irvine, [sic] Blvd., Irvine, California 92718.
>
> To place an order through one of the TOSHIBA DEALERS Listed on pages 49-58 the order must be forwarded to TAI (address listed above) but issued to TAI, c/o dealer's name and address, so it can be properly filled [sic] and invoiced under this Contract. Orders placed directly with a dealer are OPEN MARKET and, as such, this contract Number MAY NOT be used. No deviation from the terms (pricing, discount, warranty, etc.) specified in this schedule is authorized. Any prices or terms other than as stated herein are Open Market and this Contract Number MAY NOT be used. All contract items will be supplied by Toshiba Copier Products Division.
>
> OPEN MARKET ORDERS MUST COMPLY WITH GSA PROCUREMENT REGULATIONS.

IRS Reply of December 10, 1992, Exhibit 1 at 4.

3. The TAI schedule contract price list also contains the following provision regarding payment:

> Invoices will be submitted directly to all ordering agencies by TAI. All checks must be made payable to TAI and no other name shall appear for payment. Payment must be sent directly to TAI Copier Products Division, Attn. GSA, 9740 Irvine Blvd., Irvine, California 92718, or as indicated on the TAI invoice.

IRS Reply of December 10, 1992, Exhibit 1 at 4.

4. One of the dealers listed in TAI's schedule contract price list was: Executive Copy, Inc., P.O. Box 2380, One Allison Drive, Cherry Hill, NJ, 08034. IRS Reply of December 10, 1992, Exhibit 1 at 55.

5. On October 18, 1988, the IRS issued purchase order MA-89-0339-V. IRS Reply of December 10, 1992, Exhibit 2. The purchase order referenced contract number GS-00F-03105 and was signed by Ms. Gladys Wiggins. *Id.* The purchase order was for the lease of four copiers for a one-month period and the lease of eleven copiers for a twelve-month period. *Id.* These items are described under Special Item Numbers (SIN) 51-55 of the contract price list. *See Id.,* Exhibit 1. The order was issued to:

> TOSHIBA AMERICAN INC.
> C/O EXECUTIVE COPY
> ATTN: S. MURPHY
> MARLKRESS RD & ALLISON DRIVE
> CHERRY HILL, NJ 08034

Id., Exhibit 2.

6. Counsel for IRS, in response to an express inquiry from the Board, states:

> There is no evidence in the agency's file to suggest that its personnel ever forwarded a copy of the purchase order to Toshiba America, Inc. in California. The agency has no evidence to suggest that Executive Copy did either.

IRS Submission of June 9, 1993, at 2.

7. The record for this case contains a Fiscal Term Rental Agreement (FTRA) consisting of two parts. The first is a "Notice of Acceptance" signed by Ms. Cass Ryan, Facilities Manager for IRS' Philadelphia district office. The second part is a "Form GL51340." Both the first and second part of the FTRA show Executive Copy to be the

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"Vendor, Rentor [sic], Lessor or Supplier." IRS Reply of December 10, 1992, Exhibit 3.

8. The FTRA "Notice of Acceptance" is signed by Ms. Ryan but is undated. It references purchase order MA-89-0339-V (*see* Finding 5) and refers to that purchase order for a description of the equipment covered by the agreement. It states in part:

> As evidenced by this Notice of Acceptance, we acknowledge receipt, in good condition and satisfactory installation, of all the items as described in the above referenced Purchase Order or as described below and acknowledge the same to be in good working order and satisfactorily installed. We acknowledge and accept ther [sic] terms of form GL51340 (FISCAL TERM RENTAL AGREEMENT), and verify that "Vendor" has fully and satisfactorily performed each, every, and all covenants and conditions to be performed by it.

IRS Reply of December 10, 1992, Exhibit 3.

9. The form GL51340 shows a signature by Ms. Ryan which is dated November 14, 1988. It likewise references purchase order MA-89-0339-V.[1] It states in part:

> This agreement is effective as of the earlier of the date of the above referenced Purchase Order, (hereinafter the "Purchase Order") or, the date of issuance by Customer of a Notice of Acceptance. The execution of said Purchase Order constitutes acceptance by Customer of all terms and conditions of this Agreement and the collateral agreements incorporated by reference herein. Acceptance of the Purchase Order by Vendor constitutes acceptance of the price and term of agreement provisions of the Purchase Order which are incorporated by reference herein, and no other terms and conditions of said Purchase Order shall apply.

IRS Reply of December 10, 1992, Exhibit 3. The FTRA has an acceptance block bearing the signature of a David Fossler, Director of Government Accounts at Executive Copy, and dated November 14, 1988. *Id.*

10. Ms. Ryan, the IRS Facilities Manager, has subsequently stated in a recent memorandum to counsel that she signed the FTRA because the Government Account Representative for Executive Copy stated that the signed rental agreement would allow prompt delivery of the copiers to IRS. She also has stated in the same memorandum that she signed the form knowing that she was not a contracting officer and believing that the form was only to obtain delivery of the copiers. IRS Reply of December 10, 1992, Exhibit 11.

11. The GSA schedule contracting officer states that the terms set forth in the FTRA signed on November 14 by IRS and Executive Copy differ from schedule contract provisions. For example, the FTRA contains a liquidated damages clause which is not contained in the TAI contract price list. This clause states that:

> upon occurrence of any default ... vendor is entitled to recover immediately as liquidated damages and not as a penalty any unpaid rent which accrued on or before the occurance [sic] of the default, plus an amount equal to the difference between the present value (as of the date of default) of the total rents due for the unexpired terms.

Petitioner's Submission of October 2, Enclosure 2 at 3 (unnumbered). The GSA contracting officer writes: "No such agreement is present in the GSA contract." Contracting Officer's Determination of September 17, 1992, at 2. Furthermore, the FTRA has the following provision which effectively negates all different or conflicting provisions appearing in the TAI schedule contract:

> This Agreement and the collateral documents referred to herein set forth the entire Agreement and understanding of the parties in respect of the transactions contemplated hereby and relating to the subject matter hereof. No representation, promise, inducement or statement of intention has been made by Vendor which is not embodied in this Agreement or in the documents referred to herein and neither Vendor nor Customer shall be bound by or liable for any alleged representations, promise, inducement or statement of intention not so set forth.

Petitioner's Submission of October 2, Enclosure 2 at 4 (unnumbered).

12. On November 18, 1988, shortly after the FTRA was executed, David Fossler, the Director of Special Programs at Executive Copy, wrote a letter to the IRS Facility Manager, Cass Ryan, stating that the letter was to recap a discussion regarding the new program for the copiers. Among other things, the letter stated that the purchase order should be amended to read "Issue To:

[1] We note that it does, however, incorrectly state that the date of this purchase order is October 21, 1988, rather than October 18.

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Executive Copy for items #5 thru #15. Also add five year price protection per form GL51340." Petitioner's Submission of June 10, 1993, Exhibit A.

13. On November 23, 1988, Ms. Margaret Mannion, a contracting officer for the IRS, issued the first modification to purchase order MA-89-0339-V. This modification, which adds two Toshiba copiers, does not contain the changes requested by Executive Copy and described in the finding immediately above. Like the original purchase order, however, this modification references contract number GS-00F-03105 and is issued to:

TOSHIBA AMERICAN INC.
C/O EXECUTIVE COPY
ATTN: S. MURPHY
MARLKRESS RD & ALLISON DRIVE
CHERRY HILL, NJ 08034

IRS Reply of December 10, 1992, Exhibit 4.

14. Petitioner has submitted, for the record, a letter purportedly sent by Ms. Ryan at IRS to Executive Copy and dated November 29, 1988. The letter references purchase order MA-89-0339-V of contract number GS-00F-03105. It states that section 7, which identifies the contractor, is amended to read "Executive Copy." Toshiba America is to be referenced "as the manufacture [sic] only." The letter further states that "[p]ayments are to made only to Executive Copy, Inc." Petitioner's Submission of June 10, 1993, Exhibit C.

15. Both IRS and petitioner have submitted documentation indicating that during the first half of December 1988, the agreement between Executive Copy and IRS was assigned, at least in part, to Great Lakes Financial Services and subsequently to LaSalle Bank Northbrook. The documentation is incomplete and leaves many questions unanswered. What is significant, however, for purposes of this decision, is that there is no mention of TAI as a party to the assigned contract in any of the material provided by the parties regarding these assignments. *See* Petitioner's Submission of June 10, 1993, Exhibit B; IRS Submission of June 9, 1993, Exhibits 2, 3.

16. A typewritten note on the final page of the copy of the original purchase order MA-89-0339-V in the possession of petitioner reads: "Items No 5 thru 15 will be invoiced by Executive Copy Inc." Unnumbered Enclosure in Petitioner's Initial Submission of June 11, 1992. IRS has submitted a letter from its files which was purportedly sent to IRS from Executive Copy. It is dated December 12, 1988. It advises IRS that the assignment to LaSalle Bank was a partial assignment of only items five to fifteen and entitles LaSalle to no more than $3,786 per month per system. All other amounts due are to be sent to Executive Copy. IRS Submission of June 9, 1993, Exhibit 2 at 2 (unnumbered).

17. Petitioner has provided examples of invoices covering some of the leased copiers. They appear to have been issued after the partial assignment and are issued by "Executive Copy, Inc. C/O LaSalle Bank Northbrook." Petitioner has also submitted copies of two U.S. Treasury checks payable to Executive Copy, C/O LaSalle Bank Northbrook. However, because the amounts shown on the checks do not correspond to the amounts shown on the invoices submitted, it is unclear whether they represent payment for use of the equipment said to have been leased to IRS in this case. Petitioner's Submission of June 10, 1993, Exhibit E.

18. Petitioner has also submitted for the record a letter purportedly sent by Ms. Ryan of IRS to Executive Copy and dated December 13, 1988. Possibly this letter was provided in conjunction with the assignments which were being carried out at the time. The letter states that Ms. Ryan "has the right to negotiate and enter into Fiscal Term Rental Agreements with [Executive Copy], and that Gladys Wiggins is authorized to sign Purchase Orders on behalf of the Internal Revenue Service." This letter, however, is not written on IRS stationery, but rather on a piece of paper bearing Executive Copy's name. Petitioner's Submission of June 10, 1993, Exhibit F.

19. In December 1988, Congress imposed trade restrictions which prohibited United States governmental agencies from procuring products or services from Toshiba Corporations. Executive Order 12661, dated December 27, 1988, specifically prohibited contracts between agencies of the United States and Toshiba Machine Company (and its subsidiaries) and Toshiba Corporation (but not its subsidiaries). In response, GSA's Office of Acquisition Policy directed that any contract with the sanctioned organizations that was awarded after June 30, 1987, must be canceled.[2] IRS Reply of December 10, 1992, Exhibit 5.

[2] The IRS alleges that GSA may have acted improperly in terminating the contract with Toshiba America, Inc. because Congress mandated sanctions against Toshiba Corporation, not against

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20. On March 3, 1989, a GSA contracting officer unilaterally modified contract number GS-OOF-01305. IRS Reply of December 10, 1992, Exhibit 5 at 2 (unnumbered). The modification included a deletion of orders under SIN 51-55 which were the copier rental plans at issue. *Id.* at 3 (unnumbered). The effective date of the modification was thirty days from the date of issuance. *Id.*

21. On April 5, 1989, Ms. Gladys Wiggins, a contracting officer for the IRS, issued modification three to purchase order MA-89-0339-V. IRS Reply of December 10, 1992, Exhibit 6. This order was issued to the same address as shown on the original purchase order and modification one of that order.[3] This third modification canceled the remaining copier rentals "due to cancellation of GSA contract." *Id.* A fourth purchase order modification, dated April 18, 1989, provided that the leased copiers were to be removed by April 17, 1989. *Id.*, Exhibit 7. That modification of the purchase order also changed the "remit to" address to Executive Copy, c/o LaSalle Bank Northbrook. *Id.*

22. By letter dated August 13, 1990, counsel for petitioner submitted to IRS Procurement Officer, Ms. Gladys Wiggins, a termination settlement proposal in the amount of $245,851.26. The record also contains a letter dated October 22, 1990, transmitting a copy of the proposal to Ms. Cass Ryan at the IRS Consolidated Procurement Branch in Philadelphia. Correspondence submitted by petitioner indicates that during the course of 1991, inquiries were made by counsel for petitioner regarding the status of the proposal. A letter dated February 15, 1991, from counsel for petitioner to an IRS regional counsel mentions review of the proposal by the IRS Washington office. Unnumbered Enclosure in Petitioner's Initial Submission of June 11, 1992.

23. The chief of the small purchase section of the Philadelphia district of the IRS states in a declaration, which is neither sworn to nor provided under penalty of perjury, that in February 1991, she had a phone conversation with counsel for petitioner regarding a claim in the amount of $245,851.26, allegedly for wrongful cancellation of a purchase order issued under contract GS-OOF-03105. She further states that she forwarded copies of both the order and the modification canceling it to the GSA contracting officers responsible for the TAI schedule contract. They are said to have assured her "the IRS had acted exactly as GSA had advised," and that the IRS was "fully justified in canceling Toshiba America." This section chief states that she then passed this information on to counsel for petitioner. Shortly thereafter, she advised him that she was turning the matter over to the Office of General Legal Services. IRS Reply of December 10, 1992, Exhibit 10.

24. By letter dated June 11, 1992, counsel for petitioner requested this Board to direct the IRS contracting officer to render a decision on LaSalle's settlement proposal. Shortly thereafter, by letter dated June 30, 1992, counsel also provided the Board with a certification of its termination claim. The letter transmitting this certification to the Board shows a copy (with enclosures) was sent to IRS Procurement Officer, Gladys Wiggins, as well.

Discussion

The principal issue raised by this petition and IRS' motion to dismiss the case is whether we are dealing here with a transaction under TAI's schedule contract with GSA or with an open order transaction for which IRS would be responsible.

A good deal of time has been spent developing the record on this issue. Upon review of the information and documentation submitted by the parties, we conclude that the transaction in question was not one which occurred under the TAI's schedule contract with GSA.

We arrive at this conclusion first and foremost because the schedule contractor, TAI, is conspicuous by its absence from virtually all phases of the leasing transaction. The contract price list expressly requires that purchase orders—even those to be ultimately filled by local dealers—be sent to TAI's offices in Irvine, California. Users are advised that orders placed directly with a dealer will be considered open market orders and not orders issued under the schedule contract. Finding 2. In response to the Board's inquiry, IRS has been unable to

(Footnote Continued)

Toshiba America, Inc. IRS Reply of December 10, 1992, at 10.

[3] IRS counsel, in response to an inquiry from the Board, reports that the agency has no copy of modification 2 to purchase order MA-89-0339-V nor does it know whether there ever was one. He explains that there may have been an error in the numeration of the modifications. IRS Submission of June 9, 1993.

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demonstrate that purchase order MA-89-0339-V was ever placed with TAI's offices in Irvine. Finding 6.

We also note that TAI does not appear to have been involved in the invoicing or payments made in conjunction with the lease of the Toshiba copiers. The schedule contract price list states that all invoicing shall be done by TAI and all payments will be made to TAI or as indicated by TAI on its invoice. Finding 3. By order dated May 4, 1993, the Board asked IRS to provide documentation regarding the entity actually invoicing and seeking payment for the use of the leased equipment.

IRS initially indicated that the payment documentation was in storage but would be recalled. To date, however, no documentation has been provided by IRS indicating involvement of TAI in the invoice and payment process. Petitioner, on the other hand, has provided copies of invoices from Executive Copy C/O LaSalle Bank and copies of checks which possibly were sent in payment of invoices issued for use of the copiers leased to IRS. Finding 17. Although we find the Treasury checks inconclusive, the invoices are highly persuasive—as is the notation on petitioner's copy of the original purchase order indicating Executive Copy would invoice for items "5 thru 15." Finding 16. In the absence of any evidence to the contrary, we conclude that TAI was simply not involved in the invoicing and payment process associated with the leasing of the Toshiba copiers.

Our conclusion that the TAI schedule contract was not involved in the lease of the copiers, however, is based not only on the apparent absence of the schedule contractor from the leasing transaction but also on the conspicuous presence of Executive Copy as a would-be principal party to the leasing transaction. We have been provided with no evidence which convinces us that TAI either directly or indirectly through its agent accepted purchase order MA-89-0339-V. On the contrary, the record indicates that Executive Copy, TAI's "man" on location in Cherry Hill, effectively made off with what otherwise would have been TAI's business under the schedule contract. Executive Copy required the use of its own contract form, the FTRA. Findings 7, 8, 10, 12. This form substituted its terms and conditions for any other—including, therefore, those of any general schedule contract. It likewise nullified all terms and conditions of the purchase order except those relating to the price and the term of the agreement. Findings 9, 11. Not only was Executive Copy insistent on itself being one of the two principal parties to the leasing transaction, it would appear that IRS' Facility Manager had no objection and was willing to modify the original purchase order to reflect this.[4] *See* Findings 12, 14.

Finally, documentation provided by IRS and the petitioner indicates that the contract which is said to have been entered into by IRS and Executive Copy was assigned to Great Lakes Financial Services of America and subsequently to LaSalle Bank. Again, no mention is made of TAI in any of this documentation.[5]

We have no reason to doubt that the leasing agreement between IRS and Executive Copy was terminated because the IRS procurement official sincerely believed that it was a TAI schedule contract transaction. Furthermore, it may well be that the GSA schedule contracting officers, when consulted in 1991, reenforced this mistaken belief. *See* Findings 21, 23. Nevertheless, none of these individuals had the occasion to analyze the leasing transaction in the detail and to the degree which counsel and the Board have in this proceeding.

Given the record, as developed for this proceeding, we are now convinced, for the reasons set out above, that the leasing of the Toshiba copiers by IRS was not a schedule contract transaction. The original purchase order certainly pointed in that direction. Some IRS procurement clerks may well have continued to operate on the assumption that the leasing was being done under the TAI contract. It is obvious, however, that the purchase order quickly became derailed and led not to a transaction under the

[4] We draw no conclusion for purposes of this decision regarding the legal import of this letter or other documents allegedly signed by the IRS facility manager. We rely on this and similar documents solely to conclude that neither Executive Copy nor its customer contact considered that TAI had any interest whatsoever in the leasing transaction in question.

[5] The record for this proceeding does not provide us with sufficient information to determine whether these assignments have been carried out in accordance with applicable statute and regulation. Neither has that issue been put in controversy here by IRS. For purposes of this decision, therefore, we simply rely on the fact that there is no evidence that the schedule contractor, TAI, was actively involved in any way in either of the alleged assignments.

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schedule contract but to an arrangement involving only IRS and Executive Copy. Accordingly, we find IRS to be the real party in interest in this case. We, therefore, rescind our earlier action adding GSA to these proceedings. The motion previously brought by IRS to dismiss this case is denied.[6]

Before granting petitioner's request, however, there is the additional question of whether the matter concerning which petitioner seeks a contracting officer's decision is in fact a "claim" as that term is used in the Contract Disputes Act (CDA).

It is well established that a dispute is a necessary prerequisite to a valid claim under the CDA. *Dawco Construction, Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872 (Fed. Cir. 1991). In particular, it has been recognized that this applies to termination for convenience settlement proposals, which generally are nothing more than an initial step for opening negotiations and do not normally, at that early juncture, represent a final demand for a contractor's final decision on what is proposed. *Mayfair Construction Co. v. United States* [35 CCF ¶ 75,450], 841 F.2d 1576 (Fed. Cir. 1988).

This is not to say, however, that a settlement proposal cannot become a bona fide claim, as that term is used in the CDA, and become the basis of a dispute between the parties. To determine whether this has occurred, we must look to the facts of each case. In a section dealing expressly with disputes and appeals, the Federal Acquisition Regulation (FAR) provides a definition of "claim" for purposes of that section. It is said that any routine request for payment may be converted to a claim for dispute or appeal purposes by written notice to the contracting officer "if it is disputed either as to liability or amount or is not acted upon in a reasonable time." 48 CFR 33.201 (1992). We find that in this case, IRS' extraordinary delay in responding to petitioner's proposal is ample evidence that it has, by now, with the submission of the petition which is the subject of this proceeding, ripened into a claim for purposes of a dispute or appeal. *See* Findings 22-24.

Where a disputed claim is for money, as in this case, the demand must also be for a sum certain. *Essex Electro Engineers, Inc., v. United States* [37 CCF ¶ 76,304], 960 F.2d 1576, 1581 (Fed. Cir. 1992). Petitioner's proposal requesting the specific amount of $245,851.26 satisfies this requirement.[7] *See* Finding 22.

In conclusion, we are convinced that petitioner's termination for convenience settlement proposal has become a bonafide claim, as that term is defined in the FAR section relating to disputes and appeals. For the reasons set out above, we are also of the opinion that this claim arises in relation to a transaction for which IRS and not GSA is accountable.

Decision

IRS' motion to dismiss is **DENIED.** The petition of LaSalle Bank Northbrook asking that we direct the IRS contracting officer to issue a decision on LaSalle's claim for termination for convenience costs is **GRANTED.** It is **ORDERED** that an IRS contracting officer issue a decision on the claim by September 30, 1993. A failure to issue this decision within the period herein prescribed will be deemed to be a decision denying the claim, and will authorize the commencement of an appeal before this Board or a suit on the claim before the United States Court of Federal Claims pursuant to the Contract Disputes Act, 41 U.S.C. §§ 605(c)(5), 606, or 609, as appropriate.

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[6] An alternative argument raised by IRS for dismissal of this case is that petitioner's "appeal" has been "filed outside the 90 day limit prescribed by the Contract Disputes Act of 1978." Motion to Dismiss at 3. We reject this argument since this proceeding does not involve an appeal but rather a petition for a decision from which petitioner may or may not elect to appeal.

[7] We recognize that until the recent amendment of the CDA, it would also be necessary for a claim of this magnitude to be certified before we could direct a contracting officer to render a decision on it. In this case, a certification has been provided. Finding 24. If its adequacy were to be successfully challenged, however, this would still not deprive us of jurisdiction over the claim. Defects in certification no longer deprive a board of contract appeals of jurisdiction over a claim provided the claim has not been the subject of an appeal prior to October 29, 1992. 41 U.S.C. § 605(c) (1988), *amended by* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4518-19 (1992).

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[¶ 26,402] Grigor E. Atoian v. General Services Administration

GSBCA No. 11481, August 24, 1993.

Contract Disputes, Claims—Quantification—Lost Profits.—A lessor's claim under its lease of an office building to the government was dismissed for lack of jurisdiction because the lessor never submitted to the contracting officer a written demand for a specific amount of lost profits. Neither the lessor's letters to the government nor his complaint clearly stated the amount that the lessor sought. Although the lessor's board filing contained his first and only clear statement of the sum allegedly due from the government, a document filed with the board does not constitute a claim submitted to a contracting officer. Even if the complaint or the board filing could be deemed a claim, the board would not have jurisdiction over the uncertified claim in excess of $50,000.

For the appellant: Grigor E. Atoian. For the government: Michele M. Feher, Office of Regional Counsel, General Services Administration, San Francisco, California.

Before DEGRAFF, DEVINE, and HENDLEY, Administrative Judges.

DEGRAFF, Administrative Judge: Based upon a dispute between the parties concerning a lease, appellant claims that he is entitled to recover in excess of $500,000 from respondent. Although the contract between the parties is governed by the Contract Disputes Act, appellant never submitted a claim to the contracting officer. Because the submission of a claim is a statutory prerequisite to our review, count 2 of the appeal, which is the only count remaining, is dismissed for lack of jurisdiction.

Findings of Fact

On January 30, 1987, the General Services Administration (GSA) awarded a contract to Grigor Atoian for the lease of an office building in North Hollywood, California. Appeal File, Exhibit 1. The lease contract, which provides that it is subject to the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1982) (CDA), contains a Disputes clause which establishes how the parties intend to resolve all disputes arising under or related to the contract. The Disputes clause defines a "claim" as a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain ..." The Disputes clause provides that any claim made by Mr. Atoian must be submitted to the contracting officer for a written decision. The clause also requires that, if Mr. Atoian wishes to submit a claim exceeding $50,000, he must certify that the claim is made in good faith, that supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which he believes GSA is liable. Supplemental Appeal File, Exhibit 24.

GSA terminated the lease contract in January 1990. Appeal File, Exhibit 3. On March 20, 1990, Mr. Atoian submitted a claim letter to the contracting officer in the amount of $33,093.71, for necessary repairs to the office building. In his letter, Mr. Atoian notes, "I would appreciate your earliest attention to this matter, as you know the premises are vacant and can not be rented under the present condition." Supplemental Appeal File, Exhibit 17.

In an April 17, 1990 letter to a GSA employee other than the contracting officer, Mr. Atoian states, "I need to get the funds from GSA as soon as possible in order to repair the damages and be able to start marketing the property, meanwhile I am sustaining tremendous amount of losses due to unmarketable property." Supplemental Appeal File, Exhibit 18. Mr. Atoian wrote to the contracting officer on May 10, 1990, and asserts in his letter, "I need the funds immediately in order to repair all the damages on the building so that it is marketable. As it stands, the premises are vacant and I am sustaining great losses each day." Supplemental Appeal File, Exhibit 19.

Mr. Atoian again wrote to the contracting officer on June 20, 1990, and stated, "The bills are mounting and our reserve account is depleted as the property has had to remain empty for several months now. I have enclosed copies of utilities bills and shut-off notices. Each day we are delayed furthers our losses." Supplemental Appeal File, Exhibit 20. On October 8, 1990, Mr. Atoian wrote to a GSA employee other than the contracting officer, "The building cannot be rented without the itemized repairs and this loss of revenue for the last 10 months is causing acute financial problems." Supplemental Appeal File, Exhibit 21.

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In a February 5, 1991 letter to a GSA employee other than the contracting officer, Mr. Atoian maintains, "I need to repair all damages left behind by [the government tenant], in order to be able to market and lease the space. I had to come up with mortgage payments during the last 14 months to keep the property from going into foreclosure. . . ." Supplemental Appeal File, Exhibit 22. Finally, on May 22, 1991, Mr. Atoian wrote to a GSA employee other than the contracting officer, "I have been unable to lease the said premises because of the extensive damage caused by [the government tenant] to the building. I need funds to pay for the necessary repairs. I will also hold GSA responsible for all rent loss and mortgage payments from January 1990 till receipt of payment." Supplemental Appeal File, Exhibit 23.

GSA's contracting officer treated Mr. Atoian's March 20, 1990 letter which sought $33,093.71 in repair costs due to Government damage to the premises as a claim submitted pursuant to the contract's Disputes clause. In a letter dated June 27, 1991, the contracting officer denied Mr. Atoian's claim. Appeal File, Exhibit 13. On September 25, 1991, Mr. Atoian filed this appeal with the Board.

The complaint that Mr. Atoian filed here on November 22, 1991, contains four counts. Count 1 contains Mr. Atoian's challenge to the June 27, 1991 contracting officer's denial of Mr. Atoian's March 20, 1990 claim for repair costs. Count 2 is denominated by Mr. Atoian in his complaint as "Loss of Income." On March 22, 1993, the parties stipulated to the dismissal, with prejudice, of counts 1, 3, and 4, based upon a settlement agreement. Only count 2 remains before the Board for decision. In count 2 Mr. Atoian alleges that, because GSA failed to respond favorably to his March 20, 1990 claim within 60 days, he was unable to effect repairs to his office building and, thus, unable either to rent the building to another tenant or to sell the building. In his complaint, Mr. Atoian states, "I am claiming the amount of $5,000 per month, from January 10, 1990 until the date of the payment. . . . The actual loss of income, after mortgage, insurance, etc. would be between $8,000 to $10,000 per month, totaling $180,000 for a year and half. Therefore, my total negative on the property has run about $15,000 a month for the same period, amounting to $270,000." Complaint, at 6. In a July 8, 1993 filing with the Board, Mr. Atoian states that the amount of his claim is $12,533 per month, from January 1990 until the date that he receives payment. Appellant's Reply in Opposition to the Government's Motion for Summary Relief.

Discussion

The CDA, which governs the lease contract at issue here, requires that "[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). Consistent with the CDA, the contract between GSA and Mr. Atoian defines a claim as a written demand for a sum certain which is submitted to the contracting officer. In addition, if a contractor's claim exceeds $50,000, the CDA and the contract require that the contractor certify the claim in a particular manner. 41 U.S.C. § 605(c). Because Mr. Atoian never submitted a claim which meets these requirements to the contracting officer, the Board lacks jurisdiction to entertain this appeal.[1]

Although some of the letters that Mr. Atoian sent to GSA mention lost revenue, none contains a demand for a specific amount of lost profits or a demand for payment. Similarly, although the complaint that Mr. Atoian filed in this appeal requests payment for lost profits, the complaint does not clearly state the amount that Mr. Atoian seeks. Mr. Atoian's July 8, 1993 Board filing contains his first and only clear statement of the sum that he believes is due from GSA. But, a document filed with the Board does not constitute a claim submitted to the contracting officer. Because Mr. Atoian never submitted a claim to the contracting officer, we lack jurisdiction to entertain this appeal. In addition, even if either the complaint or the July 8, 1993 filing could be considered to be a claim, we would lack jurisdiction because Mr. Atoian seeks an amount in excess of $50,000 and he never fulfilled the certification requirements of the CDA and the contract.

[1] In its answer to Mr. Atoian's complaint, GSA asserts that count 2 is not properly before the Board because Mr. Atoian never submitted a claim for lost profits to the contracting officer for decision. Answer at 1, 5. Although GSA never filed a motion to dismiss count 2, we are obligated to

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Decision

For the reasons set forth above, count 2 of the appeal, which is the only count remaining, is **DISMISSED FOR LACK OF JURISDICTION.**

[¶ 26,403] Northern Virginia Service Corporation v. Department of the Treasury

GSBCA No. 10842-TD, September 10, 1993.

Contract Types—Fixed-Price—Indefinite Quantity Contracts.—Under a fixed-price janitorial services contract that estimated there would be a population of between 2,500 and 4,000 persons in the building being serviced, a contractor did not show that a population increase constituted either a breach of contract or a constructive change, because it did not demonstrate that the increase in population required it to expend efforts disproportionate to the risks it assumed under the fixed-price contract. Services were not described in terms of population; payment under the contract was not population dependent. The contractor did not demonstrate that the estimate was established improperly or that it was misled by the estimate. Moreover, the contractor grounded its calculation of quantum on its own conservative estimate of the number of hours required to perform the basic services rather than on the estimated range.

For the appellant: Dykema Gossett, Washington, D.C., by Katherine S. Nucci. For the government: Sherry L. Travers, Regional Counsel, Internal Revenue Service, Southwest Region, Dallas, Texas.

Before VERGILIO, LABELLA, and GOODMAN, Administrative Judges.

VERGILIO, Administrative Judge: On September 19, 1990, the Board received this appeal from Northern Virginia Service Corporation. Northern Virginia was a contractor with the respondent, the Department of Treasury, Internal Revenue Service (IRS), providing janitorial and related services. The contractor claims entitlement to $87,944.08 in increased costs incurred in providing basic services because of population increases in the building over the life of the contract. The contractor premises its claim on breach of contract, and, alternatively, constructive change. The contracting officer denied the claim in its entirety.

The contractor has failed to establish either a breach of contract or a constructive change. The underlying solicitation represented the building population as an estimate—a range of 2,500 to 4,000. The fixed-price contract required the contractor to provide basic—specified daily and periodic—services. Services were not described in terms of population; payment under the contract was not population dependent. The contractor has not demonstrated that the estimate was established improperly, or that it was misled by the estimate. Moreover, the contractor has not demonstrated that the increases in population required it to expend efforts disproportionate to the risks it assumed under the fixed-price contract. The contractor grounds its calculation of quantum on its own conservative estimate of the number of hours required to perform the basic services (as it takes the difference from actual expenditures of labor and estimates of material), and, in essence, inappropriately attempts to convert the fixed-price contract into a cost-reimbursement contract for its labor and supplies exceeding those in its bid estimate. Accordingly, the Board denies the appeal.

Findings of Fact

The solicitation

1. The General Services Administration (GSA) issued a sealed bid procurement to obtain a contract for an initial twelve-month period and two optional twelve-month periods. Appeal File, Exhibit 1. The contractor was to provide all management, supervision,

(Footnote Continued)

determine whether we possess jurisdiction to entertain this appeal.

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manpower, equipment and supplies necessary to perform described janitorial and related services at a specified Internal Revenue Service (IRS) building. *Id.* at 11 (¶ C.1).

2. The services were of two types: (1) basic—daily and periodic cleaning and activities, and (2) additional—those "used to satisfy the Government's short term nonrecurring needs for service." Appeal File, Exhibit 1 at 8 (¶ B.3). Basic services were to be priced as a single, dollar figure on a yearly basis; additional services were to be priced on a yearly basis as hourly rates for supervisory and productive labor. *Id.* at 7 (¶ B.2), 8 (¶ B.3).

3. The solicitation describes the "contract effort required":

> A. *General:* Bidders/offerors are cautioned that the daily productive man-hour guidelines set forth below may be less than that which they will require to perform all of the daily and periodic work requirements. The determination of the total daily productive man-hour requirements for the performance of all services herein specified as well as all other cost factors above those associated with the daily productive man-hours specified is the sole responsibility of the bidder/offeror. Nothing in this provision should be construed as being contrary to this bidder/offeror responsibility.
>
> B. *Daily Productive Man-Hour Guidelines:*
>
> (1) The Government *estimates* that approximately 153 daily man-hours of productive labor, exclusive of supervisory work, will be required to satisfactorily accomplish the work called for in this contract. This base guidelines figure of 153 daily hours of productive labor is included as a *guideline only,* to assist the contractor in planning and executing the work. It is of the utmost importance that the contractor utilize skilled and productive manpower in order to satisfactorily furnish the required level of ser[]vices.

Appeal File, Exhibit 1 at 11 (¶ C.2).

4. Regarding the "services required," the solicitation dictates that the "contractor shall provide the services outlined, at the frequencies specified in the Task and Frequency Chart ... in accordance with the Cleaning Work and Quality Requirements described[.]" Appeal File, Exhibit 1 at 11 (¶ C.3.A). Moreover,

> The building areas to be serviced are described [in Exhibit 1]. The figures contained in Exhibit 1 are approximate and are estimates of the building statistical data. The contractor is responsible for verifying dimensions and quantities. The data contained in Exhibit 1 in no way modifies the "Site Visit" clause on the GSA Form 3501[.]

Id. (¶ C.3.B). The referenced "Exhibit 1" is captioned "building information" and provides, among other items: *"Number of Occupants:* 2,500 to 4,000." "Note: Square feet and number of occupants are approximate figures." *Id.* at 68 (§ J, Exhibit 1).

5. The solicitation contains the Federal Acquisition Regulation (FAR) clause, FAR 52.214-6 (APR 1984), captioned "Explanation to Prospective Bidders":

> Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

Appeal File, Exhibit 1 at 119 (¶ 4).

6. The solicitation also contains the Changes clause, FAR 52.243-1, alternate I (APR 1984). Appeal File, Exhibit 1 at 51.

The contract

7. Northern Virginia was the incumbent contractor (under a 153 minimum daily productive hour contract) at the time of bid preparation and submission. Transcript at 39-40; Agency Answer (¶ 17). An employee of Northern Virginia claims to have made oral inquiry of GSA personnel prior to bid submission, and to have been told that the contract would stay the same. Transcript at 9-10, 30. The record does not support the conclusion that the inquiry focused on the building population over the life of the new contract. Moreover, the stated response fails to recognize a distinction between the existing contract (minimum hour) and that being competed (no minimum level of effort). Although the president of (and preparer of the bid for) Northern Virginia testified that population is relevant to pricing, *id.* at 45, Northern Virginia obtained no written verification of the alleged statements. *Id.* at 107-09; Respondent's Exhibit 2 at 4 (¶ 3.c).

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The solicitation was not amended to alter its terms or otherwise specify a more definite population of the building over the life of the new contract.[1]

8. Northern Virginia formulated its bid based upon performance utilizing 90 productive man-hours of effort daily. Transcript at 48; Appellant's Exhibit 5. It bid a constant rate for the three years. Appeal File, Exhibit 1; Transcript at 317. Although the solicitation nowhere made reference to historical populations (or their relevancy), Northern Virginia presumed that, on average, the population would be in the 2,400 to 2,550 range, thus at or below the very low end of the estimated range. Transcript at 42, 58, 104, 121. Northern Virginia submitted the lowest-priced bid. The price was below the GSA estimate; the closest-priced bid viewed by GSA to be responsive was more than twenty-five percent greater than Northern Virginia's. Appeal File, Exhibits 6, 2.

9. Given the price disparity, GSA sought a bid verification from Northern Virginia. Northern Virginia intentionally projected fewer productive hours than those estimated in the solicitation. Northern Virginia verified this and its bid in writing and through a conversation with GSA personnel. Appeal File, Exhibits 2-5.

10. GSA awarded a contract to Northern Virginia; the initial twelve-month period was December 1, 1984, through November 30, 1985. Appeal File, Exhibit 1.

Performance

11. Performance under the contract began December 1984. For the preceding twelve months, the average monthly population of the building was 2,790, with a monthly minimum of 2,248 and maximum of 3,219. Appellant's Exhibit 14.[2] For the initial twelve months of performance, the average monthly population of the building was 3,387, with a monthly minimum of 2,475 and maximum of 4,223 (the single instance of the population exceeding 4,000). *Id.* During the first month of performance, the population was 2,475, the contractor utilized, on average, at least 95 productive labor hours per day to perform the basic services. Appellant's Exhibits 14, 16.

12. GSA exercised the first option under the contract, extending the performance date through November 30, 1986. Appeal File, Exhibit 8. GSA exercised the second option under the contract, extending the performance date through November 30, 1987. *Id.*, Exhibit 12. With an effective date of December 1, 1986 (the start of option year two), GSA transferred the contract to the IRS. Appeal File, Exhibit 13.

13. A bilateral contract modification, with an effective date of August 1, 1987, reduced by 5,500 square feet the space to be cleaned and, under the contract terms, the associated contract amount for the basic services (from $29,302.91 to $28,875.56). Appeal File, Exhibit 30. The record does not suggest the number of daily productive man-hours the contractor had utilized for the deleted space.[3]

14. A bilateral contract modification was signed by the contractor and IRS on February 2 and 4, 1988, respectively, with an effective date of December 1, 1987. Appeal File, Exhibit 34. The modification extended the contract from December 1, 1987, through May 31, 1988, with the option to continue on a month-to-month basis as needed, subject to possible adjustment as a result of a collective bargaining agreement. The modification specified six months of basic services at $29,302.91 per month. *Id.* The modification contains some other alterations not here relevant and notes that "All other terms and conditions remain the same." While the modification makes no mention

[1] The president of Northern Virginia testified that at a post-award, pre-performance conference GSA provided verification of the anticipated constant population. Transcript at 116 ("I was told that the population was going to remain constant. I was told that mechanics in the boilerplate GSA spec was going to be the same, and I was told that there was no additional things that I should be concerned [with] or that would have a major cost impact on me."), 53.

[2] Although the contractor suggests in its post-hearing brief, at 36 n. 2, that these figures represent population totals in addition to the building cleaning, the record does not support the suggestion. Appellant's Exhibits 6, 7, 12; Transcript at 66-67, 73-74.

[3] Neither party has alluded to this modification—as affecting this claim or otherwise. The record does not enable the Board, with any degree of certainty, to extrapolate a number of hours to perform the deleted efforts. The record establishes no relationship between the level of effort on the deleted area and the average charge per square foot which was deleted; nor does it reasonably suggest the cost of supplies associated with the deleted efforts. The record suggests that the deduction was not taken in some months, and was taken based upon a miscalculation of space (6,500 square feet) in other months—in all, the contractor appears to have been overpaid by $815.85. Appeal File, Exhibits 38, 40, 43, 44, 46, 48, 50, 51, 54.

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of the contractor reserving a right to reprice the basic services for the period covered by the bilateral modification, it also fails to recognize the space deduction noted in Finding 13. *Id.* As anticipated in the modification, three subsequent contract modifications extended the period of the contract—two for two months and one for four months (through July 31, 1988, then September 30, 1988, and then January 31, 1989) at the stated monthly price. *Id.*, Exhibits 39, 45, 52. The last modification was signed as a bilateral agreement. *Id.*, Exhibit 52. Performance under the modified contract ceased on December 31, 1988. *Id.*, Exhibits 54, 55.

Claim to IRS

15. By letter dated March 21, 1989, after performance had ceased, the contractor informed the IRS that the contractor "has an existing claim against this contract." Appeal File, Exhibit 56.[4]

16. By letter dated June 25, 1990, the contractor submitted to IRS a "claim for an equitable adjustment in the amount of $87,944.08 for increased costs incurred under" the IRS contract. The contractor claims to have incurred increased costs in furnishing labor and supplies as a result of the increase in government personnel at the building. Appeal File, Exhibits 56, 57. The claim consists of four basic elements: (1) additional labor (burdened with, e.g., taxes, FICA, and benefits); (2) additional supplies; (3) general and administrative overhead (at 6%); and (4) profit (at 6%). *Id.*

17. The contractor calculates the labor hours to be reimbursed as follows:

(1)	actual payroll hours	77.070.56
(2)	additional services	−12,229.19
(3)	total hours	64,841.37
(4)	bid hours for 25 months	−57,240.00
(5)	total hours to be reimbursed	7,601.37

Appeal File, Exhibit 56 at 1882. The initial entry is the sum of hours in its payrolls (see Finding 21) paid during the months of the IRS contract; however, the initial payrolls utilized reflect work performed under the GSA contract. The figure includes supervisory, productive and non-productive (vacation/sick/holiday) hours incurred to perform basic and additional services. *Id.* at 1883; Appellant's Exhibit 16. From that figure, the contractor subtracts hours reimbursed separately as additional services. From the result, the contractor subtracts approximately (explained in the following finding) the number of productive and supervisory hours it projected in formulating its bid. The contractor concludes that it expended 7,601.37 total additional hours caused by the population changes.

18. In its calculations, to its advantage, the contractor makes no adjustment in lines (2) or (4) for non-productive hours attributable to performing the basic or additional services (non-productive hours are included in line (1)). To its disadvantage, the contractor represents its bid labor hours, line (4), by utilizing 260 productive days per year, not 252 as it utilized in formulating its bid. The following reflects parallel calculations after (a) burdening line (2) hours for additional services with the associated proportional non-productive hours, and (b) making the adjustments for line (4) non-supervisory labor such that on a payroll basis, twenty-three 90-hour days per month of non-supervisory labor are used (encompassing productive and non-productive hours), as bid:

(1)	actual payroll hours	77,070.56
(2)	additional services	−13,393.87
(3)	total hours	63,676.69
(4)	bid hours for 54 payrolls	−60,230.77
(5)	total hours to be reimbursed	3,445.92

This total, 3,445.92, represents productive and non-productive non-supervisory hours over 54 pay periods. This averages 58.26 productive hours per pay period, or 6.01 productive hours per day, which is 6.68 percent greater than the contractor's daily estimate of 90, a figure which reflects no allowance

[4] A settlement agreement entered into in early June 1990 between the contractor and GSA recites that by letter dated August 8, 1985, the contractor presented a claim to the GSA contracting officer for alleged additional work performed (for the period December 1984 through July 1985) due to an increase in the number of IRS employees in the building to be cleaned. The contracting officer denied that claim by decision dated March 14, 1986. By letter dated August 7, 1989, the contractor presented a claim to the GSA contracting officer for additional costs for extra labor and supplies for period December 1985 through November 1986. Although the contracting officer denied each claim, GSA reimbursed the contractor for essentially its requested amounts through the settlement agreement which, by its terms, relates only to that portion of the contract administered by GSA and effects "a full settlement and mutual release of all existing and/or potential claims, and causes of action relating to and/or arising under" the GSA contract. Appeal File, Exhibit 56, Settlement.

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for increased labor over the three-year life of the contract.

19. The record suggests that the contractor spent more money for supplies on average over successive years of the GSA/IRS contract, Appeal File, Exhibit 59, even when already reimbursed costs of supplies for additional services are subtracted. However, testimony and documentary evidence do not persuasively establish what portion, if any, of those increased costs may be directly attributable to population increases, and not, for example, attributable to increased prices (given that the contractor formulated its bid with a constant supply cost over the three-year contract life). Transcript at 67-68, 87, 317; Appeal File, Exhibit 59; Appellant's Exhibits 5, 11.

Additional information

20. During the 25 months here at issue, the average population of the building was 4,253. For the December 1986 through November 1987 period, the average monthly population of the building was 4,268, with a monthly minimum of 3,593 and maximum of 5,038 (for 2 consecutive months); 5 months were in the 3,000s, 5 months in the 4,000s, and 2 months at 5,038. For the December 1987 through November 1988 period, the average monthly population of the building was 4,279, with a monthly minimum of 3,467 and maximum of 5,050; 3 months were in the 3,000s, 8 months in the 4,000s, and 1 month at 5,050. Appeal File, Exhibit 65. The average monthly population of the building over the 49 months of performance (with the 5-month period of May through September 1986 not considered, because figures are not in the record) was 3,940. *Id.;* Appellant's Exhibit 14. Similarly calculated, 3,814 was the average monthly population for the 36 months of the original contract.

21. For each two-week pay period, the contractor's payroll summary reveals the total hours of productive and supervisory labor expended in performing the basic services of the contract, and the additional services (denoted as extra or overtime[5]), as well as hours attributable to vacation/sick/holiday. Appellant's Exhibit 16; Transcript at 92-95. Thus, to perform basic services, for each twelve-month period under the GSA/IRS contract, the contractor utilized the following average number of productive and supervisory hours per pay period (the numbers are approximate given that pay periods overlapped between each contract year):

Years	84/85	85/86	86/87	87/88
Average	1109.3	1115.5	1109.7	1115.3

Appellant's Exhibit 16. Subtracting 160 hours per pay period of supervisory labor, Appellant's Exhibit 5, yields the following averages for productive labor for basic services per pay period:

Years	84/85	85/86	86/87	87/88
Average	949.3	955.5	949.7	955.3

The contractor bid a constant of 872.3 productive labor hours per pay period over the three-year life of the contract. *Id.*

22. The record does not demonstrate that the GSA or IRS was or should have been aware at the time of issuing the solicitation or of entering into the GSA contract that the likely average monthly population would be at the high end of (or above) the estimate during many months of performance. E.g., Appellant's Exhibits 12, 14, 15, 18.

23. Throughout the life of the contract, the IRS did not explicitly add to or modify any of the daily or periodic tasks to be performed under the basic services. Although an increase in the population of a building may necessitate the expenditure of more labor hours and supplies to perform janitorial services, Transcript at 18, 31, 33-35, the contractor has not convincingly demonstrated that, when the population (monthly or yearly) exceeded the estimate range, it incurred additional costs which were not compensated under the additional services portion of the contract.

Discussion

The contractor maintains that it is entitled to compensation of $87,944.08 for furnishing allegedly extra labor and supplies during the twenty-five month IRS portion

[5] There are no overtime hours in any instance when "extra" hours are not indicated, Appellant's Exhibit 16; hence, the Board concludes that the overtime hours are attributable to the additional services.

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of the contract to perform the basic services. The contractor raises two alternative theories of recovery: breach of contract and constructive change. Under the first theory, it asserts that the extra custodial services generated by the larger population at the building exceeded the scope of the contract and the contractor's reasonable expectations. Under the second theory, it maintains the basic services to be performed with the population increase entailed efforts and expenses in addition to those encompassed in its contract.[6]

The claim focuses upon the provision of basic services under what the contractor characterizes as the changed condition of significantly increased building populations. Contending that the larger populations required it to expend more labor and supplies than it calculated in its bid, the contractor notes that its claim is discrete from any compensation it may have received for labor or supplies for the provision of "additional" services.

The claim of entitlement focuses on the population estimate contained in the solicitation and contract. The contractor contends that the estimate was inaccurate and established improperly. Further, the contractor asserts that the increased populations exceeded the terms of the contract, either so significantly as to constitute a breach or enough to constitute a constructive change.[7]

Breach

The record does not demonstrate that the estimate was knowingly or negligently determined. *Womack v. United States* [12 CCF ¶81,795], 182 Ct. Cl. 399, 389 F.2d 793 (1968); Finding 22. Nor does the record suggest that the contractor was misled by the estimate. In formulating its bid, the contractor intentionally departed from the population estimate found in the solicitation. The contractor chose to prepare its bid relying upon historical data (garnered as the incumbent contractor) not referenced in the solicitation, and presumed that the population would average at or below the lower-end of the estimate range. Contrary to the express notice in the solicitation that oral explanations would not be binding, Finding 5, and despite the solicitation's broad population range, Finding 4, the contractor maintains that it relied upon oral assurances (one prior to bid submission and the other after award) that the population would remain fairly constant over the contract life. Finding 7. The contractor did not seek an amendment specifying a more definite population, nor did it make provision for variations in the population within the estimated range. Therefore, it is not fully credible for this contractor to assert after award that population constituted a critical element in calculating cleaning rates and pricing the contract.

The contractor has not established that the population estimate contained in the solicitation and contract (2,500-4,000) was substantially inaccurate. Over the three-year life of the original contract, the monthly average was approximately 3,814; over the entire forty-nine month period, the average was approximately 3,940. Finding 20. Over the twenty-five months here at issue, the monthly average was 4,253. *Id.* As discussed below, the record does not demonstrate that the efforts and supplies required to perform the basic services to accommodate the population in excess of the estimate increased so as to be outside the scope of the fixed-price contract.

Constructive change

The contractor contends that the increased populations constructively changed the contract because it had to expend more labor and supplies in performing the services. The contractor has failed to demonstrate that it performed work in addition to the contract requirements or at a cost in addition to what the contract reasonably encompassed. *Mr. Klean's Janitor & Mainte-*

[6] The agency has not pursued theories of accord and satisfaction or estoppel. Transcript at 327. Accordingly, without a developed factual record, the Board does not reach the possible effect of the bilateral contract extensions being consummated when the building populations were known and a fixed, monthly price established without reservation for adjustment. Nor does the Board address how the assertion of breach squares with the contractor knowingly entering into bilateral contract extensions.

[7] If either of the contractor's theories for recovery is correct, any awardee under the solicitation would be entitled to relief given the population increase. The analysis would apply equally to the actual contractor and to any of the higher-priced bidders, even though the latter may well have formulated its bid in recognition of the population and man-hour estimates in the solicitation. The higher-priced bidders may have better provided for the risks inherent in the contract, while the contractor improperly attempts to shift those risks because of its lower price. Its bid price does not create the starting point for an analysis of the scope of the contract.

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nance Service, Inc., GSBCA 9010, 91-2 BCA ¶ 23,683.

The contractor entered into a firm, fixed-price contract for the provision of basic services. Once its bid was accepted, compensation was not to be dependent upon, or fluctuate with, the building population. The agency has not altered the basic services to be provided—in terms of the daily or periodic tasks to be performed. The solicitation represented the population range as an estimate, not as a "not to exceed" figure. The contractor assumed the risks of reasonable changes in the population of the building.

The contractor has not demonstrated that the increases in the population required it to provide labor or supplies in excess of what the contract required. The solicitation expressed the building population as an estimate of 2,500 to 4,000. Over the initial three-year contract period and over the entire contract period, the average monthly population was within that range. Finding 20. Over the twenty-five months here at issue, the monthly average was 4,253, or slightly greater than 6% over the upper end of the range for each month. The record does not suggest that such a variance in population in a fixed-price janitorial services contract is unreasonable or unusual.

The quantum portion of the claim also fails to evince a constructive change. The contractor expended relatively few hours in excess of its estimate, which was made for a constant population at or below the lower end of the estimate. Utilizing the numbers in the contractor's claim, as adjusted to conform to its bid, the contractor expended approximately 3,446 productive hours over its bid of 63,677. Finding 18. That is an additional 5.4% of productive effort. The contractor has not attempted to demonstrate what portion, if any, of those efforts may be attributable to population variances up to the upper end of the estimate range.

Viewed another way, the recovery sought appears excessive. Given the monthly average of 4,253 over the twenty-five month period here at issue, the contractor provided services to a population of 6,325 (253 × 25) in excess of the upper estimate figure. This represents less than the population for two months' performance within the estimate. The contractor has not asserted that overall there is a one-to-one correspondence between the increase in population and performance of basic services; the increases in population did not alter the frequency of daily or periodic cleaning. However, the contractor claims $87,944.08, or the equivalent of performance for three months under the contract. This comparison does not enhance the reliability or reasonableness of the contractor's claim. The actual productive hours expended, Finding 21, show no significant change in effort due to the population variations.

The contractor's claim does not fully recognize the risks inherent in the fixed-price contract, with estimates being represented as just that. In formulating its bid, the contractor chose to rely on information not contained in the solicitation, while downplaying the significance of the population and man-hour estimates contained therein. Although the contractor expended more labor and provided more supplies than it anticipated, the contract obligated the contractor to provide those services. The contractor has failed to demonstrate that the contract was constructively changed.

Decision

The Board **DENIES** the appeal.

[¶ 26,404] Centric/Jones Constructors

IBCA No. 3139, October 1, 1993. Contract No. 9-CC-32-00510.

Acceptance of Performance—Rejection of Nonconforming Items—Burden of Proof.—A contractor was entitled to an equitable adjustment for costs incurred in performing tests on an already installed cable, because the government failed to prove that the work it rejected was not in compliance with specifications. The government averred that it had properly rejected the cable because it had been damaged by oil that had leaked into it and that its rejection of the cable, despite the rejection's questionable basis, required the contractor to replace the cable in its entirety and then to file a claim for the cost of the entire replacement. However, the burden of proof in inspection and rejection cases is upon the government to demonstrate that the work is not in compliance with the specifications.

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Acceptance of Performance—Rejection of Nonconforming Items—Economic Waste.—A contractor was entitled to an equitable adjustment for costs incurred in performing tests on an already installed cable, because the government ignored the doctrine of economic waste in requiring the contractor to replace cable in its entirety. The government contended that it had properly rejected the cable because it had been damaged by oil that had leaked into it. However, it failed to consider the view of the manufacturer that the silicon oil involved was an inert insulating oil that could not have changed the cable's electrical characteristics.

Quality—Reasonableness of Standards—Burden of Proof.—The government was liable for the costs of tests it required on a fully installed, buried, high voltage electrical cable system because the tests were neither specified by the contract nor recognized by the industry. The government had the burden of proving that the contractor's work failed to meet specifications. In this case, the government feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil. The board held that the government's rejection of the work was simply to coerce the contractor into making the additional tests. The government could not require the contractor to perform additional tests, at its own expense, that were not consistent with industry standards. The government cannot insist upon performance of additional tests for the sake of its own satisfaction after a contractor has reasonably objected to their validity.

For the appellant: W. H. Hinton II, Vice President. For the government: Daniel L. Jackson, Department Counsel, Phoenix, Arizona.

Before PARRETTE and PACKWOOD, Administrative Judges.

PARRETTE, Administrative Judge: On January 21, 1993, the contractor, Centric/Jones Constructors, appealed from a final decision (unilateral modification No. 157, dated October 16, 1992), of the Bureau of Reclamation (BOR) Contracting Officer (CO), denying it an equitable adjustment in the amount of $39,744 for costs incurred in performing a.c. high potential and partial discharge tests on an already installed 115-Kilovolt (kV) a.c. cable serving the Snyder Hill/Black Mountain Pumping Plants and Switchyard, Tucson, Arizona, under Specification No. DC-7761, of the Central Arizona Project.

Appellant's Complaint was filed on February 17, and BOR's Answer on March 22, 1993. On June 16, appellant moved to supplement the appeal file with 169 pages of relevant materials that were inexplicably omitted from the appeal file prepared by the CO. That motion is granted. After an unsuccessful effort to resolve the dispute by Alternative Disputes Resolution (ADR) methods and some confusion over the need for a hearing (hereinafter discussed), the appeal was submitted to the Board for decision on the record.

The bases for the CO's denial were that BOR had properly rejected the cable inasmuch as insulating oil had leaked into it from the defective cable terminators before the contractor had replaced them, that the cable had been thereby damaged, and that the contractor had voluntarily agreed to the proposed additional electrical tests as a condition of BOR's acceptance of the damaged cable.

Appellant, however, argued that BOR had given no explanation or proof of its contention that the cable was functionally damaged by the oil, that the tests BOR then required were not recognized as valid for any purpose by the high voltage cable industry (a point which BOR's expert in effect conceded), and that, in any event, BOR had determined that the cable passed the tests. On the basis of the entire record, the Board concluded that appellant's contentions were accurate and consistent with applicable case law, and it finds for appellant in the full amount claimed.

Findings of Fact

1. In 1988, BOR contracted for the construction of a project known as the Snyder Hill/Black Mountain Pumping Plants and Switchyard, in Tucson, Arizona. Installation of a 115 kV power cable system, including the cable and cable terminators, was part of the constructing requirements.

2. The general contractor for the project was Centric/Jones Constructors ("Centric-Jones"). Centric-Jones contracted with an electrical subcontractor, Gardner Zemke Company ("Gardner Zemke"), to install the electrical work. Gardner Zemke in turn contracted with Brugg Cable ("Brugg") to furnish a 115 kV power cable system.

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3. In September 1990, the 115 kV power cable system was installed. It was satisfactorily tested and was accepted for permanent energization in early October of 1990.

4. The only test specified in the contract for this installed high voltage cable was a direct-current high potential (hi-pot) test (not an a.c. test), set forth in Specification Paragraph 14.4.1.d(3): "(3) After the above cable has been installed, it shall be given a direct-current, high-potential test per AEIC CS7-82, section J, and at test voltage in accordance with AEIC CS7-82, cable C1 for XLP cable."

5. In April 1991, silicon oil leaks from cable terminators ("potheads") were discovered. The leaking potheads were satisfactorily repaired.

6. BOR feared that the pothead leaks might have caused either damage to the cable because of incompatibility between the silicon oil and the cable, or impairment of the electrical performance of the cable, but it never offered evidence that the contract requirements for the cable had not been met or that the leaking potheads had damaged the cable.

7. On October 15, 1991, the Government rejected the cable. However, it said that it would accept the cable if further tests indicated that the cable would have "little probability of problems" from the oil in the cable. It specified an a.c. high potential and an a.c. partial discharge test.

8. The Contractor protested that the Government's failure to accept the cable was an improper rejection, that the proposed a.c. partial discharge test was outside the scope of the contract, and that the test was useless because it would not prove or disprove contract compliance and cable integrity.

9. On November 7, 1991, the Contractor requested compensation for performance of the required tests, but the Government denied the request.

10. On November 18 and 19, 1991, an a.c. hi-pot and partial discharge test was performed on the cable. BOR concluded that the cable had "passed" these tests.

11. The a.c. partial discharge test on the 115 kV installed cable was unreasonable because:

a. The test neither proved nor disproved damage to the cable caused by leaking silicon oil from the terminators.

b. The test was an unorthodox test not recognized in the high voltage cable industry for *installed* cable.

c. The test is not mentioned in the applicable high voltage cable standards of AEIC, IEEE, or NEMA, as an acceptable test for *installed* cable.

d. Before this test, the electrical subcontractor had never performed or been asked to performed an a.c. partial discharge test on its already installed high voltage cable. It did not include costs for this test in its bid.

e. For installed high voltage cable, the only test recognized by the cable industry, by the standards, or by the contract specifications was a d.c. (not an a.c.) test.

f. The partial discharge measurements were meaningless. The test report stated: "Hipotronics, Inc. [the test equipment supplier and a.c. tester] does not acknowledge the partial discharge values noted during the Snyder Hill-Black Mountain High Voltage test as accurate nor do they support any conclusions derived from it."

g. BOR did not specify the "pass/fail" criteria it intended to use in evaluating whether the cable passed the a.c. partial discharge test.

12. The test report documented the questionable test methods used. It stated that:

a. The test engineer said the test set was not clean enough or adjusted for partial discharge measurements.

b. Ambient PD readings fluctuated between 7 and 15 (max) pico coulombs.

c. Power was not properly filtered.

d. Testing was performed during working hours with welders and other high current electrical equipment in the area.

e. Difficult to find a frequency bank without a spike in it.

f. The base of terminations could have had corona.

g. No measurements of temperature, humidity, wind velocity or any other atmospheric phenom were taken. Dust was being blown on the terminations during the test.

It is unknown if these partial discharge readings indicate much about the cable system. Since the readings are all pretty much the same, you could infer that the installations are similar but still not know if the system is viable.... Trying to detect partial discharges in the cable or termination is impossible because of the changing ambient conditions. [Emphasis omitted.]

13. The a.c. partial discharge test was more stringent than the d.c. test specified in the contract.

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14. The cost to the contractor of performing the additional tests not required by the contract was $39,744.

Discussion

This appeal was one of several originally filed on January 15, 1993, under the Board's accelerated procedures. Had it then been submitted for a decision on the record, it might have been decided long ago. At the Board's urging, however, the parties initially attempted to settle the case by means of voluntary ADR methods, with commendable success as to the other appeals involved in the same contract. But when the ADR discussions relating to this appeal proved unsuccessful, and after appellant had properly supplemented the record with various essential documents that the CO had neglected to provide, procedures for the appeal's timely resolution began to bog down. We attribute much of the obfuscation to Department counsel. A few examples may suffice.

First, in Department counsel's first Affirmative Defense, as set forth in his March 16, 1993, answer to appellant's Complaint, at paragraph 35 on page 6, he states the following:

> 35. In proposing to accept proof through a test, *at the Contractor's expense*, of the serviceability of the nonconforming cable, the Contracting Officer applied the correct legal test to wit: "In the absence of a specified test method, any reasonable method may be applied so long as the test method reasonably determines compliance with specifications and does not impose a more stringent standard. * * * Appellant has the burden of proving the unreasonableness of the test method." *Appeal of Ball, Ball & Brosamer*, IBCA No. 2103-N, 93-IBCA [sic] 25,287 at p. 125,982 (citation omitted). [Emphasis added.]

This assertion by Department counsel is forcefully repeated in his May 26, 1993, Motion for Summary Judgment at paragraph 20 on page 5; in his Reply in Support of Appellee's Motion for Summary Judgment on page 10; and again in his Brief for Decision on the Record on page 4.

Unfortunately for the Government, the sentences before the quotation make clear that the reasonable test method referred to may be one that the *Government* undertakes and pays for, and not necessarily one at the contractor's expense as counsel alleges. The preceding sentences state: "In any case, *the contract* adds that, in addition to tests outlined in the specifications, *the Government can test* the materials at any time during contract performance for contract compliance. The manner of testing is not specified." (Emphasis added.) The case cited in (but omitted from) the quotation also makes clear that the decision is referring to testing at Government expense. *Ball, supra,* 93-1 BCA at 125,982.

The Government's Answer (at 42, page 7) asserts that the contract provides for the Government to charge the contractor any additional cost of inspection or test when prior rejection makes reinspection or retest necessary. The implication, of course, is that the cable was rejected for objective and valid reasons. In fact, however, the Government rejected the cable because the contractor would not agree to an additional test that it thought was both necessary and useless. As the contractor notes on page 16 of the Memorandum of Response to the CO's Final Decision, which accompanied its Notice of Appeal, "[i]n this case, the Government was not using the tests as a basis for rejection—it had already improperly rejected the cable. It was using the test as a basis for acceptance."

Department counsel, however, vigorously defended BOR's clearly improper rejection procedure, an action that presumably generated some of appellant's concern that an evidentiary hearing might ultimately be necessary. For example, in Department counsel's Motion for Summary Judgment, at paragraph 32 on page 7, he states that:

> The gravamen of Centric-Jones appeal is its allegation that "the Bureau directed the contractor to perform an 'alternating current' ('a.c.') partial discharge test on the already installed cable," Complaint at par. 7, and that this alleged direction constituted a change to the contract. *See* Complaint at par. 14. *The subject allegations are false and thus the instant appeal should be denied.* [Emphasis added.]

Counsel then spends 2½ pages arguing that BOR's rejection of the cable, despite the rejection's questionable basis, clearly required the contractor to replace the cable in its entirety and then to file a claim with BOR for the cost of the entire replacement—totally ignoring the doctrine of economic waste, for example, as well as the view of the manufacturer that the silicon oil involved was an inert insulating oil that could not have changed the cable's electrical characteristics.

What makes Department counsel's persistence particularly egregious is that by the time of his July 29 Brief for Decision on the Record, not only had appellant (in a July 2

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Memorandum in support of its Motion for Summary Judgment) cited a leading Court of Claims' decision in *Southwest Welding & Manufacturing Engineering Co. v. United States,* 188 Ct. Cl. 925, 413 F.2d 1167 (1969), but the contract press had also recently called the bar's attention to the Federal Circuit's (CAFC) reaffirmation of *Southwest* in a May 24, 1993, nonprecedential decision, *Merando v. Stone,* 93-1019. The CAFC specifically cited Note 7 of *Southwest,* which states:

> This concept of the burden of proof in these "inspection and rejection" cases [i.e., that the contractor is obliged to demonstrate acceptability after the Government routinely decides that something is not up to standard] *is not supported by the case law.* When the Government rejects work as being not in compliance with its specifications, the Boards of Contract Appeals have held that the burden is upon the Government to demonstrate that fact [citing example cases, including *Hardeman-Monier-Hutcherson,* ASBCA No. 11785, 67-1 BCA par. 6210, which was also relied on by appellant].

This footnote was also quoted in full on page 8 of appellant's July 2 Memorandum in Support of its Cross-Motion for Summary Judgment. Thus, Department counsel's subsequent assertions that BOR's unexplained rejection of the cable was proper leave much to be desired.

A second example of Department counsel's questionable advocacy was his continued representation that the Government was not liable for the cost of the test because it was the same test that the contractor had proposed before the Government's rejection of the cable, and BOR merely accepted the proposal as a solution to the problem of the allegedly damaged cable. Thus, he says, the test was reasonable, the contractor was bound by its proposal, and the Government was not liable for the cost of the test. But, in fact, the record makes clear that the contractor had merely suggested the test because it believed that it could be performed with some a.c. equipment already on the site.

Department counsel insisted that BOR merely gave the contractor the option of performing an a.c. test instead of replacing the "damaged" cable—an option which the contractor freely chose. Thus, in counsel's words, "[t]he Contractor elected to perform the a.c. Hi-Pot test in lieu of removing the nonconforming cable and replacing it with cable meeting the contract requirements and thus the Contractor is not entitled to payment for performing the test" (Answer, paragraph 43, at 7). *See also* paragraph 19, Government Motion for Summary Judgment, and pages 12-14 of the Government's Reply in Support of its Motion for Summary Judgment. The latter memorandum states, at page 13:

> The Bureau submits that the contractor cannot now make a credible claim of the inappropriateness of the test *that the contractor itself recommended and agreed to.* The "reasonableness" of the test performed in this case is *established by the fact that the contractor and the subcontractor suggested the very test that was performed.* [Emphasis added.]

Even in his final Appellee's Brief for Decision on the Record, Department counsel again asserts (paragraphs 12 and 13, pages 3 and 4) that:

> Appellant, through its subcontractor Gardner Zemke, suggested the A/C Hipot test, AF Vol. 2 at 21-21 [sic], to which Appellee agreed. Nokes Affidavit, *supra,* at par. 9. Subsequently, Appellant refused to perform the partial discharge portion of the A/C Hipot test to which Appellant had agreed and Appellee agreed to perform the partial discharge test. Nokes Affidavit, *supra,* at pars. 12-13.

Paragraph 9 of the Nokes affidavit merely states that Nokes wrote to the contractor on *August 20,* 1991, stating that the "AC hipot test as described in Gardner Zemke's letter dated July 24, 1991, would be acceptable." Paragraphs 12-13 state that in an *August 28* meeting, the contractor refused to perform the partial discharge portion of the a.c. Hipot test "originally suggested by" Gardner Zemke, and that BOR said it would do so if the contractor would perform the simultaneous a.c. withstand (*i.e.,* hi-pot) test.

In actuality, the cable manufacturer, knowing that BOR wanted the cable circuits retested after the necessary repairs had been made to the leaking terminators, suggested to Gardner Zemke on June 26, 1991, the possibility that the circuits could be tested *using the Southern California Edison (SCE) equipment already on the site.* That proposal was duly conveyed to BOR, which accepted it by the August 20 letter, in which it also prohibited the contractor from performing the d.c. test that was called for by the contract since any further d.c. testing might reduce the operating life of the cable.

By August 21, however, it was already clear that the SCE equipment was not capa-

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ble of performing the a.c. hi-pot test that BOR wanted, and the cable manufacturer promptly declined to pay for the rental of any other testing equipment because it did not believe that any further tests were reasonable or necessary. But as early as a September 5 meeting, BOR (Nokes) told representatives of the contractor, subcontractor, and the manufacturer unqualifiedly that the installed cable would not be accepted without an a.c. test.

On September 11, 1991, the Gardner Zemke notified the contractor that it considered BOR's refusal to accept the cable to be an improper rejection, and stated its position and that of the manufacturer that no further tests were necessary and that an a.c. partial discharge test was useless because it would not prove or disprove contract compliance or cable integrity, thus being unreasonable. The letter went on to state:

> Gardner Zemke will comply with the directions of the Bureau to proceed with tests not required by the contract. However, we request written directive to perform whatever tests should be performed, with expected measurements resulting from those tests.
>
> We expect USBR to pay for the costs of any tests unless they reveal that the cable is not in compliance with the contract documents. We will keep track of the costs and submit them for payment.

BOR responded with an October 15, 1991, letter rejecting the cable, stating: "Without further testing, the cable is unacceptable and must be replaced. Reclamation will, however, accept the cable if further tests indicate that there is little probability of problems resulting from the oil being in the cable." BOR failed, however, to state what criteria it would use to decide whether the cable system was satisfactory, which the subcontractor had requested. Accordingly, the subcontractor, in a November 7 letter to the contractor, stated that "[w]e are proceeding with these tests under protest, and our letter dated September 11, 1991, stands as written." As it turned out, there was only one firm in the United States that had equipment able to perform the newly required a.c. hi-pot test, and its report stated that it did not "acknowledge the partial discharge values noted * * * as accurate nor do they support any conclusion derived from it." BOR nevertheless somehow concluded that the cable system had passed the tests.

Under the circumstances, it can hardly be said that the contractor voluntarily agreed to perform any a.c. test of the installed cable system other than one using the SCE equipment already available on site; its position was abundantly clear to anyone reading the correspondence involved. Moreover, as appellant notes in its Final Brief at page 6, "[w]hen the cable passed the government's directed test, it eliminated the justification for rejection," and the costs of the test became the Government's to pay. Finally, if there were any further doubt about the unreasonableness of requiring an a.c. test on installed cable, it could have been resolved by a more careful perusal of the July 8, 1993, affidavit of the Government's own expert, Vernon Nokes, who concludes by saying:

> 21. An A.C. partial discharge test is a recognized test for testing high voltage cable in the factory by the contract provisions. *While the A.C. partial discharge is not a test normally performed in the field* (as distinguished from the factory) due in part to the difficulty of maintaining a stable testing environment, *there is no recognized test* to determine whether the characteristics of a cable has been adversely affected through the unexpected presence of a foreign fluid. [Emphasis added.]

Thus, the upshot of this case is simply that the Government was worried that the cable *might* have been damaged by whatever oil (*i.e.*, the same insulating oil in which the ends of the cable are immersed within the terminators to protect the cable!) leaked into the cable, and it therefore rejected the cable without specifying the nature of the damage it feared. It then solved the problem by requiring the contractor to perform a novel test, one not accepted by the industry, without specifying the criteria for acceptance. In any event, the cable somehow passed the test.

In our view, this is a case that never should have come before this Board. The Government should have settled it as best it could.

But there is more. In its May 26, 1993, Motion for Summary Judgment, the Government asserted that there were no genuine issues of material fact to be resolved. Appellant, however, was concerned that certain facts were still in dispute, so it requested an oral hearing. But on June 1, in submitting proposed alternative hearing dates to the Board, Department counsel again asserted that an evidentiary hearing was unnecessary.

After appellant on July 2 submitted its own Cross Motion for Summary Judgment,

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however, and after telephone conference calls by the Board on July 8 and 9 to the parties to ascertain whether an oral hearing was really necessary, Department counsel promptly submitted a reply brief arguing that the affidavits of appellant's experts were insufficient, as a matter of law, to support its motion, since the two experts who gave the affidavits were not on site at the time the tests took place and thus lacked personal knowledge of them. Further, Department counsel argued, there were now issues of fact as to whether the oil leaks had damaged the cable, whether the required tests were a change in the contract, and whether BOR had acted properly in requiring assurances from the contractor that its repairs were adequate. Thus, it appeared that Department counsel also now wanted a hearing.

It was not until the Board made another telephone conference call on July 22, 1993, that it was successful in getting both parties to agree that the appeal could be decided on the record after the submission of final legal briefs. In the Board's view, it was more than a little unorthodox for the Government first to allege in its motion that there were no issues of material fact to resolve, and then to decide that there were issues once appellant had submitted its own summary judgment motion. It is not clear to the Board why the Government should expect to have it both ways.

In summary, despite the somewhat overzealous defense of BOR by Department counsel, it is abundantly clear that BOR rejected the cable after it was installed and energized without giving any satisfactory reason for doing so, and that it then required the contractor to perform an arbitrary and expensive test not recognized by the high voltage cable industry in order to persuade the Government to rescind the rejection. Even after the cable system had allegedly "passed" the unrecognized field a.c. tests, however, the Government refused to compensate the contractor for their costs.

[1] We hold that the Government has the burden of proving that a contractor's work has failed to meet specifications. *Southwest, supra; Ball, supra; Sevcon,* IBCA No. 2862, 92-2 BCA ¶ 24,872; *Bruce Anderson Co.,* ASBCA 29411, 88-3 BCA ¶ 21,135. Where, after due repairs by the contractor to cable terminators that are found to have been leaking after their installation, the Government rejects a fully installed, buried, high voltage a.c. electrical cable system simply because it feared that the cable might have been damaged by the leakage into it of an unknown quantity of inert insulating oil from the faulty terminators, and where the purpose of the Government's rejection was simply to coerce the contractor into making additional tests that were neither specified by the contract nor recognized by the cable industry, the Government must pay the cost of the tests.

[2] Even if the Government had a sufficient basis for its concern that the cable had been damaged by the leakage of the insulating oil, it could not require the contractor at its own expense to perform additional tests that were not consistent with industry standards, tests that both the contractor and the Government subsequently agreed were ineffective, unless it paid for the tests. The Government cannot arbitrarily insist upon the performance of additional tests for the sake of its own satisfaction after the contractor had reasonably objected to their validity. *Ball, supra.*

Decision

Accordingly, the contractor is entitled to an equitable adjustment in the amount of $39,744, plus interest from April 15, 1992, in accordance with the provisions of the Contract Disputes Act of 1978.

[¶ 26,405] Jamco Constructors, Inc.

VABCA Nos. 3271, 3516T, October 5, 1993. Contract No. V501C-339.

Interpretation of Contracts—Ambiguities, Latent—Reliance on Own Interpretation.—A construction contractor that sought to excuse its delay by arguing that when it bid it reasonably believed it could proceed with demolition while it completed the necessary submittals for approval was not successful, because the contractor did not show that it relied on its interpretation at the time it bid the contract. The evidence as to how the contractor bid the contract was vague and indefinite.

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Interpretation of Contracts—Construction Contracts—Phasing.—A construction contractor's argument that it reasonably interpreted a contract to permit demolition work prior to submission of submittals for approval was denied because the contract provided that the submittal process must be completed prior to the start of construction. The original solicitation divided the work into three phases, with Phase I devoted solely to submittals. In response to a prospective bidder's specific question as to whether Phase I could be accomplished while Phase II and Phase III were in progress, the government responded, "No, Phase I must be completed before Phase II can start . . . ." The contractor's argument that its interpretation was supported by a provision stating that work done prior to submittal approval was done at the contractor's risk was not persuasive, because the provision created a patent ambiguity.

Defaults, Grounds—Failure to Progress—Discretion of Contracting Officer.—A default termination for failure to progress on a construction contract for operating room expansion work at a medical center was converted to a termination for the convenience of the government because the contracting officer abused his discretion in terminating the contract for default. The contracting officer, administering his first contract following completion of schooling for his position, terminated the contract because of the demand for surgical suites and because he felt that the take-over contract would last a very short period of time and that the take-over contractor would finish in a very timely manner. A fair and reasonable judgment, however, would have required some determination as to the amount of time it would have taken either the contractor or a take-over contractor to complete the work. Any estimate of the time it would have taken the contractor to finish the project was initially dependent on deciding how much had been completed to date.

For the appellant: Fairfield, Farrow, Hunt, Reecer & Strotz, Albuquerque, New Mexico, by Raymond R. Flowers. For the government: Charlma O. Jones, Trial Attorney, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas, Jr., Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

Before McMICHAEL, PULLARA, and ROBINSON, Administrative Judges.

McMICHAEL, Administrative Judge: In VABCA No. 3271, Jamco Constructors, Inc. (Jamco or Contractor) appeals the default termination of its contract with the Department of the Veterans Affairs (VA or Government) for an "OPERATING ROOM EXPANSION" at the VA Medical Center in Albuquerque, New Mexico. In a companion case, VABCA-3516T, the Contractor seeks convenience termination costs. Should the termination for default be converted to one of convenience, the parties have stipulated that the quantum is $60,004. (Tr. 3)

Appellant argues that any failure to complete the work by the adjusted Contract completion date should be excused, primarily because of the Government's refusal to permit construction to begin prior to completion of the submittal process. Irrespective of excusable delay, Jamco also argues that the termination for default was an "abuse of discretion" because the VA was "relying on erroneous information" when it made its decision.

The record in these appeals consists of the Appeal file in VABCA-3271 as supplemented (R4, tabs 1-49), the Appeal File in 3516T (3516T R4, tabs 1-18), and a transcript of a hearing held in Albuquerque (Tr. 1-408) together with exhibits introduced by the parties (Exhs. A-1 to A-13; G-1 to G-3; and B-1 to B-15). Both parties have filed post hearing briefs.

FINDINGS OF FACT

On June 30, 1989, the VA Medical Center in Albuquerque, New Mexico issued Solicitation No. IFB 501-50-89 requesting bids on or before August 1, for a project entitled "OPERATING ROOM EXPANSION," which was described in GENERAL REQUIREMENTS SECTION (01010)1.2 as follows:

> Work includes removal of flooring, ceilings, architectural specialties and selected other items. New Construction consists of new HVAC, plumbing and medical gas systems, including chiller and air cooled condenser, lights, surgical lights, surgical facility boom (big reach) units, new power outlets, flooring, ceilings, painting, and other items identified within the construction documents.

(R4, tab 23)

The contract was estimated by the VA to cost between $500,000 and $1,000,000. GENERAL REQUIREMENTS Section 1.4, Operations

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and Storage Areas, provided for phasing requirements in paragraph G as follows:

> Phasing: To insure such executions, Contractor shall furnish the Resident Engineer with a schedule of approximate phasing dates on which the Contractor intends to accomplish work in each specific area of the site, building or portion thereof. In addition, Contractor shall notify the Resident Engineer two weeks in advance of the proposed date of starting work in each specific area of site, building or portion thereof. *The submittal process must be completed prior to the start of construction.* Arrange such phasing dates to insure accomplishment of this work in successive phases mutually agreeable to Medical Center Director, Resident Engineer and Contractor as follows:
>
> PHASE I—SUBMITTALS
>
> PHASE II—PHASE I CONSTRUCTION
>
> PHASE III—PHASE II CONSTRUCTION

(emphasis added)

On July 26, 1989, the VA issued Amendment #1 to the IFB which extended the bid date to August 11, added certain new provisions, and provided copies of answers to questions posed by a prospective bidder. (3516T R4, tab 1) This amendment, which was received by the Contractor prior to bid, added provisions at the end of GENERAL REQUIREMENTS Section 1.4.G., quoted above, which defined Phase II construction as that shown on the drawings as "Area A" and Phase III construction as that listed on the drawings as "Areas B C & D." It further provided that the installation of the Chiller and Condenser "outside of the immediate area" of the above listed Areas, was to be "independent of all Phasing except ... 'Phase I—Submittals' shall be completed before any work on the following phases starts." The amendment further provided that all work in Phase II "shall be completed including final inspection and punch list items before the next phase [III] will be allowed to start."

Attached to the Amendment were the questions submitted by a prospective bidder and VA's responses thereto. Question 2.A. asked the VA to define the areas of work for the various phases which prompted the amendment outlined above. Question 2.B. asked if Phase I could "be accomplished while Phase II and III are in Progress?" The VA's written response was:

> No, Phase I must be completed before Phase II can start and Phase II must be completed before Phase III can start.

(3516T R4, tab 1)

The IFB provided that the contract was to be completed within 180 days of the Notice to Proceed. Amendment #1 also added a liquidated damages provision of "$700 for each day of delay" beyond the contract completion date, utilizing standard language found in Federal Acquisition Regulation (FAR) section 52.215-5.

At bid opening conducted on August 11, 1989, Jamco was determined to be the low bidder. On September 27, 1989, Bruce Johnson, who had just arrived at Albuquerque to begin his first assignment following completion of the contracting officer training program, notified Jamco that the VA had awarded the firm the Contract in the amount of $598,700. (R4, tab 3; tr. 353) At the time of Contract award, Jamco was performing two other contracts at the Albuquerque VAMC. One contract for approximately $500,000 involved the installation of a Magnetoencephalography (MEG) unit in the radiology area of the hospital. (Tr. 77) The other involved the installation of a new emergency generator exhaust. Neither contract involved working in areas where there were surgical procedures or critical patients. (Tr. 183-84; 238-40)

The Contract specifications for the Operating Room Expansion contained the usual provisions found in VA construction contracts, as provided by Federal Acquisition Regulation (FAR), 48 CFR Part 52, and as supplemented by VA Acquisition Regulation (VAAR) in Part 852. Included in the GENERAL CONDITIONS Section (01001) is clause 1.43, MATERIAL AND WORKMANSHIP (F[AR] 52.236-5) (APR 1984) which provides, in pertinent part:

> (b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work ... When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work ... *Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.* (emphasis added)

Also included in the GENERAL CONDITIONS is clause 1.51, SPECIFICATIONS AND DRAWINGS

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FOR CONSTRUCTION (FAR 52.236-21 (APR 1984)) which provides in paragraph (e), with respect to shop drawings that are required to be submitted by a Contractor, that:

> The Contracting Officer will indicate an approval of [sic, or] disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor. *Any work done before such approval shall be at the Contractor's risk.* (emphasis added)

A preconstruction conference was held on October 11, at which the Notice to Proceed was issued and received by the Contractor, thus establishing the Contract completion date as April 9, 1990. (R4, tab 6) VA representatives at the meeting included Contracting Officer (CO) Bruce Johnson, Michael McQuade, the Contracting Officer's Technical Representative (COTR), and Dr. Fred Bold, an anesthesiologist who attended as a representative of the VA surgical team. (3516T R4, tab 4; tr. 260) Jamco's Project Manager, Joe Mullins, attended for the Contractor, as did two representatives from Gardner-Zemke, the mechanical subcontractor. (3516T R4, tab 4)

Mullins had worked in construction since 1964, although the MEG contract and the Operating Room Expansion were his "first federal" government contract projects as a prime contractor. (Tr. 15) He testified that he had worked as a subcontractor on VA contracts on about 5 or 6 previous occasions. (Tr. 76) Asked if his experience was "consistent on those contracts with regard to phasing submittals and demolition," Mullins said it was, explaining:

> [D]ue to the Government's lengthy and very detailed submittals, it is not uncommon for us to *order* materials, and if we feel like those materials meet the specifications/requirements, to release them for shipment *prior to their approval* ... (emphasis added)

(Tr. 82)

The Contracting Officer conducted the preconstruction meeting by proceeding through items set forth in a standard form letter prepared several days prior to the conference. (Tr. 355,370-71) The letter which was then formally transmitted to Jamco by certified mail outlines the "items ... discussed at the preconstruction meeting." Under *"Responsibilities of the Contractor,"* paragraph 3.c. notes that a "cost breakdown was to be submitted ... within thirty (30) days of receipt of the Acceptance letter," while "detailed and realistic" progress charts were due "within ten (10) calendar days of the Notice to Proceed." Paragraph 3.g. further notes that submittals are to be furnished "timely and in a manner as to not delay timely completion of the project."

Although he made no notes of the meeting, CO Johnson testified that he recalled it was "stressed very strenuously that we need the submittals ... before the construction started." Johnson said he knew it "was a very tight schedule" and, that it would take an "extreme amount of coordination to accomplish disposition" of a contract involving an operating suite. He asked Project Manager Mullins at the preconstruction conference "if this was going to be a problem with the contract and his reply was 'no.' " (Tr. 360)

In advance of the preconstruction meeting, COTR Michael McQuade had also prepared a letter to Jamco which dealt with many of the areas covered by the Contracting Officer's letter. (Tr. 269) McQuade, who has a degree in fire protection and safety engineering, was originally employed by the VA in areas unrelated to construction. For only about two years immediately preceding this Contract he had been employed as a VA engineering technician. (Tr. 177-78, 234) During that time he served as a COTR on about 10 projects, although this Contract was the first in which he encountered any "performance problems." (Tr. 235) McQuade also served as COTR on Jamco's generator exhaust project but not on the MEG contract. (Tr. 183-84) During the administration of this Contract McQuade generally prepared Engineering Service's correspondence concerning this Contract for the signature of Ronald Richter, the Chief Engineer.

At the preconstruction conference the COTR went over the points set forth in the letter. Paragraph 6 of the letter concerning submittals "requested that all submittals be assembled into a single package and delivered within 30 days of the notice to proceed." (3516T R4, tab 8) McQuade testified that he informed the Contractor that the VA "would require submittals to be complete before construction could begin," and that Mullins voiced no objection at the meeting to furnishing the submittals within 30 days. (Tr. 181, 184)

McQuade also testified that Dr. Bold was concerned that the Contractor understood the necessity of working around medical gas bottles and wanted to "stress the importance of the dust barrier and what procedures would be used in changing out med gas bot-

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tles." (Tr. 261) Project Manager Mullins was apprised that because this was a "most sensitive project" in which the Contractor would be "invading the clean areas of a surgical complex ... [d]ust control was a paramount issue," as were "[n]oise, vibrations, anything that would affect an operation and the performance of surgery." (Tr. 182)

Finally, COTR McQuade's preconstruction conference letter to Jamco provided in paragraph 15 that:

> Request for final inspection shall be submitted at least 15 days in advance of the requested date. The 180 day period of construction will include time for correction of final inspection punch list items.

(R4, tab 8)

Jamco's proposed Contract Progress Schedule dated October 1, was received by the VA on October 16, 1989. (3516T R4, tab 16) It listed work activities in biweekly intervals. It showed work commencing on October 6, 1989, and completion on April 6, 1990. Under the proposed schedule submittals were to be completed in four weeks, half of them in the first biweekly period ending October 20, and the remainder in the next two week segment ending November 3, 1989. Under the proposed schedule about 20% of the demolition work was also planned to be accomplished in the second biweekly segment ending November 3.

This schedule was rejected by the VA on October 17, with directions to resubmit the plan in weekly rather than biweekly segments and to insert a "15 day time frame ... at the end of Phase II construction to allow for the punch list." (3516T R4, tab 17) The Contractor was informed that it could not commence work on Phase III until all Phase II construction "including the punch list is 100% complete." Additionally, McQuade directed that Jamco's Progress Schedule be adjusted to reflect another 15 days at the end of the Contract for the "final punch list" of Phase III, erroneously believing that the Contract provisions gave him authority to require such a reserved time period.

At some point a revised schedule was submitted which listed work progress in weekly segments. (3516T R4, tab 18) In dollar value terms, about 44% of the work was assigned to Phases I and II and 55% to Phase III. Phase I processing time for submittals still showed a four week period, the final 25% of which was scheduled to be completed in the fourth week (October 30-November 3). Week 4 was also shown as the commencement of Phase II (also known as "Phase I Construction"), for which completion was scheduled at the end of Week 14, (January 14, 1990). Weeks 15 and 16 were reserved for Phase II punch list work. Phase III work was shown as commencing in Week 17 with completion occurring in week 27 (January 29-April 13).

Approximately 10% of the scheduled demolition (a 6 week activity which represented 3.26% of the total project cost) was also shown being accomplished in the same week as the final 25% of the submittals were furnished. Mullins said he planned to begin demolition on Monday, October 30. (Tr. 17) But the VA did not permit him to begin the Phase II work on that date because the Phase I submittal process had not been completed. (Tr. 119) Jamco's *first* few submittals had been furnished only days before on October 25 and 26. (3516T R4, tab 5)

On November 14, CO Johnson wrote to Jamco that submittals were not being furnished in a "timely manner." He wrote that of "sixty-six (66) required submittals only eighteen (18) have been submitted with seven (7) of them being rejected." (R4, tab 9) Asserting that if the slow rate of submittals continued the Contractor would be "hard pressed to complete the project on time," he said "*no* work shall begin until *all* submittals are approved," and reminded Jamco that the Contract contained a $700 per day liquidated damages provision. The CO asked Jamco for a "schedule for finishing your submittals and when you plan to start construction." The Contractor made no written response and the Contracting Officer does not recall any verbal response. (Tr. 355-56)

COTR McQuade kept detailed, if not always accurate, records concerning when submittals were made and what actions were taken thereon. As of December 22, his records indicated that approximately half of the required submittals had not been furnished and approved. (3516T R4, tab 5) Notwithstanding that the Phase I submittal process had not been completed, the Contractor was allowed to begin demolition work on December 11, after McQuade, prompted by concerns that the completion date would not be met, recommended that the CO permit Phase II work to commence. (Tr. 22, 188) Demolition thus began 61 days after Notice to Proceed and 42 days after the planned starting date in the Contractor's Construction Schedule.

CO Johnson again wrote to Jamco on December 26, asserting that the Contractor was only 10% complete when it was scheduled to have completed 40.5% of the Contract. The source of these percentage figures is un-

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known and appears inaccurate. According to information inserted by COTR McQuade onto Jamco's Contract Progress Schedule, the Contractor had, on a dollar value basis, completed 4.2% of the Contract against a scheduled completion rate of 35% for the week ending December 29, 1989. (3516T R4, tab 18) By comparison, the Contract Progress Report for the period ending December 31, which is based on information supplied by Jamco, shows actual and scheduled completion rates of 6.3% and 35%, respectively. Whatever the correct percentages, the disparity between actual and planned was sufficient to cause the Contracting Officer to direct the Contractor to "accelerate your work force to assure completion as scheduled." (R4, tab 10)

Jamco made no written response to CO Johnson's direction to accelerate, although Project Manager Mullins recalled talking to the Contracting Officer and explaining that "we had all the people on the job that could safely work in that small area during demolition." The CO responded that he needed to "get a new schedule." Mullins, noting that Phase II work commenced on December 11, instead of October 30, asked if he could "revise our schedule and show this as lost time and push it out." (Tr. 26) When told no, he responded that without a time adjustment anything he prepared would be "an unrealistic schedule and I don't know how to do it." (Tr. 400-01) The actual time for demolition took 6 weeks which was what Jamco had scheduled in its Contract Progress Schedule. (3516T R4, tab 18)

In a January 10, 1980 memorandum to the Contracting Officer, Chief Engineer Ronald Richter expressed his concern that the Contract would not be completed on time. He said that a number of submittals had not been received and that of those 63 submittals that had been received, there was a "19% rejection ratio." Although observing that the Contractor had been permitted to begin Phase II demolition prior to completion of the Phase I submittal process, he said it did "not seem likely that the Contract will be completed on time." Instead of the originally scheduled April 9, 1990 completion date, he believed that the Contract would not be finished until September 12, 1990, 156 days late. The Board is unable to determine the method by which this estimate was made or its reasonableness. If such an estimate were correct, it would mean that Jamco would be facing liquidated damages in the amount of $109,200. (R4, tab 11)

On January 26, CO Johnson wrote to Jamco noting that there had been no response to his letter directing acceleration of work. He said he was "enclosing a list of submittals . . . that have not been submitted or need to be resubmitted." He concluded his letter by stating:

> Since you are about 26% behind schedule and the contract completion date is still April 9, 1990 please prepare a updated progress schedule on how you intend to meet this deadline and submit it to me for approval.

(R4, tab 12)

No revised progress schedule was furnished. (Tr. 382) However, Jamco did respond on February 6, the day actual new construction under Phase II began, concerning VA's list of items that had not yet been submitted for approval. The Contractor listed 12 of the Contract's boiler plate specification sections for which, contrary to the Contracting Officer's assertion, it claimed no submittals were required under the VA's construction plan. (R4, tab 13) This list was reviewed by the VA's Architect-Engineer who concurred with the Contractor's position with respect to 8 of those 12 items. (R4, tab 14)

As work progressed during January and February, a number of changes were ordered by the VA. Supplemental Agreement (SA) #1, resulting from a proposal submitted by Jamco on January 5, deleted the requirement for new fixed windows and allowed the reuse of existing windows. The Government accepted the Contractor's credit proposal of $2,810.31 with no change in time. (3516T R4, tab 6) SA #2, involving extra concrete work and the construction of a new stud wall increased the Contract price by $1,376.33 and granted a 7 day time extension as requested by the Contractor's January 24, 1990 proposal. The Supplemental Agreement was signed by both parties in early February and contains the following clause:

> RELEASE OF CLAIMS: This change [which] represents full and final compensation for money and time hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to such facts or circumstances giving rise to the "Proposal for Adjustment" for this change in work.

(3516T R4, tab 7)

Efforts to level the existing floor of the new anesthesia area encountered difficulties requiring "removal of the areas of concrete which are too high." (3516T R4, tab 8)

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Jamco, in a January 29 proposal, requested $6,116.36 to do the work and noted that "three (3) days time for this is probably the minimum required." The Contractor sought a Contract extension of 10 days "[d]ue to the time already passed to determine the method and cost to accomplish this change." The Chief Engineer recommended $4,633.50 which the Contracting Officer adopted together with a 10 day Contract extension. SA #3, which was executed by the parties on February 23, contained the RELEASE clause quoted above. Subsequently, SA #6 increased the compensation for the SA #3 change work by another $420.49. (3516T R4, tab 11)

The Contract called for the relocation of existing duct boxes which would have required shutting down the operating room. To avoid this shutdown, the VA requested on January 3, a proposal for installation of three new duct boxes in the Anesthesia Workroom. On January 30, Jamco requested $4,782.42 for this changed work which represented its mechanical subcontractor's proposal with general contractor markup. (3516T R4, tab 9) Gardner-Zemke's proposal showed only equipment cost and no additional labor costs or time required to accomplish the change. It did inform Jamco that delivery of the units would occur three weeks after the subcontractor was told to order the units. In its proposal to the VA, Jamco had said that the change would "require a 28 day time extension to accomplish the work." The Chief Engineer in a memorandum to the Contracting Officer recommended approval of the requested cost increase but advised that no additional days be given because "there is no additional work involved, only a rescheduling of work that would have to be performed." SA #4, signed by the parties on February 20 increased the Contract by the requested $4,782.42 and provided that "[t]here is no time extension warranted for this change." The standard RELEASE clause language was also included. Questioned at the hearing, COTR McQuade conceded that this change involved "more labor than what was originally planned." (Tr. 214) He was unable to recall why he had not recommended a time extension. (Tr. 306-07)

SA #5 covered additional valves and zone valves desired by the VA and contained the standard RELEASE clause language. On February 5, 1990, Jamco had forwarded the proposal of Gardner-Zemke, to which it had added a standard markup, requesting $2,989.44. The mechanical subcontractor had indicated in its proposal to Jamco that the work would require 5.3 man-hours for which it was seeking "zero days for performing the additional work." In submitting the proposal to the VA, however, Jamco stated that it would "require ten additional days to the contract time to accomplish this work." (3516T R4, tab 10) In a February 7 internal memorandum to the Contracting Officer recommending acceptance of the proposal, the Chief Engineer stated that "[t]en (10) additional days will be required for the completion of this work. This time will cover ALL TIME LOST TO DATE through the request of the VA." SA #5, itself, however, makes no reference to VA work stoppages, and simply states that there will be a "time extension of ten (10) days to accomplish this work."

COTR McQuade testified that he had requested the Contractor to include in its proposal the time lost to date due to various occasions when the VA would not permit Jamco to work. (Tr. 215) Early in the Contract he had asked Jamco to keep a daily log of when it "was shutdown at the request of the hospital" so that when there were "an appropriate number of days, we would make an adjustment by supplemental agreement or time extension, which we did." (Tr. 204) In this connection, the daily logs indicate that on December 18, 1989, demolition work was shut down at 2:30 p.m. because of excessive dust arising from the Contractor's trash chute. (3516T R4, tab 15) Shifting winds which operated in a "vortex fashion" led the VA to "shut him down until we could wet down this pile of dirt." (Tr. 203) Eight hours were lost on January 2, 1990, and 5 hours on January 5, due to heart surgery. Another 8 hours were lost on January 20, because of eye surgery. Surgery again resulted in approximately 6 hours lost on January 22, 8 hours on January 24, and approximately 2 hours on February 3. (3516T R4, tab 15)

Additional time was granted for "work stoppage" in SA #7 which was issued in early May. Previously, on March 27, the VA had requested a proposal from Jamco to substitute a gypsum wall board system for the specified lathing and plastering. Jamco's proposal was for a net credit of $295.40 with no reference to time. The Contracting Officer accepted Jamco's credit proposal and additionally granted an 8 day time extension "for work stoppage caused by Government requests . . . for delays from February 7, 1990 to May 2, 1990." (3516T R4, tab 12) How these delays were calculated is not known with precision, although the daily logs do show work stoppages of approximately 7

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hours on March 5, 2 hours on March 16, and nearly 7 hours on March 26, 1990. (3516T R4, tab 15) The time extension granted by SA #7 adjusted the Contract completion date to May 14, 1990.

SA #8, increasing the Contract by $945.96 and extending the Contract performance period by seven days to May 21, was proposed by the Government in mid-May but returned by Jamco unsigned on May 31. This change originated in a March 30 proposal from the Chief, Anesthesia Section, to remove counters and cabinets in the Anesthesia Workroom and replace them with shelving and C-lockers. Jamco responded on April 9, with a $568.79 proposal principally composed of material costs together with 6 hours of labor costs. In its proposal Jamco said that it would need an "additional 14 days to the Contract time to complete this change." (3516T R4, tab 13) In its recommendation to the Contracting Officer dated April 11, the Engineering Service approved the proposed costs but said that only 7 days would be required to complete the work. (Tr. 219) The daily logs indicate that work on the change order encompassed by SA #7 occurred on April 11, 12, 13, and 14. The change order was completed when the C rails were installed April 25.

In Jamco's May 31 letter refusing to sign the Supplemental Agreement, the Contractor claimed—apparently for the first time—that it was entitled to "extended overhead" in the daily amount of $266.95. It noted "[i]n addition ... our change proposal requested 14 additional days and the Modification has only 7 days." At the hearing, Guy Hankins, vice president of Jamco testified that he had requested 14 days because it was "going to take us ten days to get this rail locker and ... [i]t's going to take 14 days to get it all done." (Tr. 153) He claimed VA officials had verbally agreed to give him the 14 days he sought. (Tr. 90) Asked if it was his current position that Contract performance as a whole was extended by 14 days as a result of the change, Hankins was less positive, stating "I don't know without sitting down and doing a critical path." (Tr. 152) He added:

> [W]e don't have a job on critical path. If I could do a critical path I could see if it would fit in and it would push it out or wouldn't push it out. If it's not critical then it wouldn't push it out.

(Tr. 154)

As Contract performance proceeded, VA officials continued to be concerned about the lack of progress. Each VA Contract Progress Report for the months ending October 1989 through April 1990 listed the work progress as "Unsatisfactory." (Exh. A-3 through A-9) The Progress Report for the month of February 1990 which followed the Contracting Officer's January 26 direction to "accelerate," listed a completion rate of 36% against a scheduled rate of 60.3%. While the report noted that "[w]ork has picked up over the past month" it predicted that the Contract would not be completed prior to August 3. (Exh. A-7) The Progress Report for the month of March showed actual/scheduled completion rates of 51.4%/90% and estimated final completion in "mid-September." (Exh. A-8)

The Progress Report for the month of April showed an adjusted Contract completion date of May 1 and a September 15 estimated Contract completion date. (Exh. A-9) The VA report stated that the Contractor had earned $432,990 of an adjusted Contract price of $610,064. Jamco was thus 71% complete at a time when it should have finished the job. Notwithstanding the 71% figure listed under "Actual Percent Completion," the COTR under the remarks section asserted that the Contract was "only 51% complete." This figure was apparently arrived at by deleting costs for "Unused Materials Prev[iously] Paid For" from the calculations. It should be noted that a comparison of "Work in Place" ($333,800) with the "Current Contract Amount" ($610,065), which excludes material paid for but not installed, actually produces a 54.8% completion rate.

As part of the Progress Report, the Chief Engineer asserted that material was "slow in getting to the job site," that "labor is insufficient to perform this job," and that the job was "poorly organized and managed." McQuade testified that "he would inform Jamco's job superintendent on a regular basis" that there was insufficient manpower devoted to the project.

CO Bruce Johnson said he had "intensive extensive" discussions with VA attorneys and engineering personnel over what course of action to take. (Tr. 362) Among the options considered were "assessing liquidated damages ... terminating for convenience at the time the Contractor completed ... Phase I construction [Phase II] and/or termination for default." (Tr. 358) He said he was concerned that:

> if we assessed liquidated damages against the Contractor that by the time he ran out of money which would have been proba-

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bly, been half through the period of time into the project that he would simply walk off.

(Tr.358)

He informed Jamco's surety that he was considering default and that he had "written several letters ... that there had not been any response." (Tr. 362)

The FAR provisions found in 48 C.F.R. Part 49.402-3, PROCEDURE FOR DEFAULT provide in subsection (f) that:

The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

On May 2, CO Johnson issued a SHOW CAUSE NOTICE stating:

Since you have failed [sic] to perform ... within the time required (May 14, 1990), the Government is considering terminating the contract under the provisions for default to this contract.

Pending a final decision in this matter it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part.

Accordingly you are given the opportunity to present, in writing, any facts bearing on this question ... by May 4, 1990.

(R4, tab 15)

Jamco's president, Gwen Mullins, responded in a letter dated May 7, 1990, asserting:

We do not agree that May 14, 1990 is the completion date of this project. The start of construction was delayed from October 11, 1989, until December 11, 1989, by the VA, which amounts to sixty-one (61) calendar days for which we are entitled to an extension of time.

In addition ... we have experienced delays for stoppage of work by Hospital personnel, due to emergency surgeries, etc.

(R4, tab 16)

At the hearing Guy Hankins attempted to support this position by testifying that, notwithstanding the Contract provisions requiring that Phase I submittals be completed prior to commencement of Phase II Construction, he believed Jamco was authorized to proceed with construction absent submittals—subject only to the "risk of subsequent rejection"—based on GENERAL CONDITIONS SECTION clauses 1.43 and 1.51, cited *supra*, and "past practice." He testified that:

[E]ven though the specifications and the addendum says that the submittal process will be completed prior to the start of construction, in my opinion it did not mean we could not start demolition ... There's not one single piece of material in that demolition that requires approval ... there's nothing to stop a contractor from performing that six weeks of demolition while you're getting submittals and the other materials there.

(Tr. 84)

By requiring a 30 day period for submittals plus specific scheduled time for punch list review, the Government made it "totally 100% impossible to do that job in 180 days." (Tr. 84)

Mullins concluded her May 7, 1990 letter by asking the Contracting Officer to "consider this letter under the disputes clause of the contract for an extension to time and cost ... for sixty-one (61) calendar days making the completion date July 5, 1990."

Following receipt of Jamco's response to the SHOW CAUSE NOTICE, the Contracting Officer met with COTR McQuade and Chief Engineer Ronald Richter to discuss the matter. He did not find the letter to be an "adequate response" because the project was "not manned properly ... not given the attention that the other two projects were given." (Tr. 364) Nor did he accept Jamco's argument about submittal delays because contractors were "told up front and during the preconstruction conferences that the submittal processes needed to be completed before construction started." (Tr. 365)

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A meeting of the parties was held on May 18, 1990. Guy Hankins and Joe Mullins attended for Jamco. In addition to Contracting Officer Johnson and COTR McQuade, the local District Counsel for the VA was also present. (R4, tab 18) According to the memorandum of the meeting prepared by VA Project Supervisor Bill Lawrence, who was also in attendance, Hankins complained that the Contract completion time was "not reasonable" and that Jamco had been delayed in the completion of the Contract because of "unwarranted enforcement of the submittal clause of the specifications." CO Johnson responded that Jamco's problems stemmed from its "failure to supply submittals in a timely manner, failure to adequately man the project and failure to respond to government attempts to accelerate the work progress." He alluded to an April 5 meeting in which he said the Contractor had stated the project would be accelerated although in fact it was not. The CO also asked why Jamco had not responded to earlier letters requesting acceleration, and the memorandum asserts that Hankins replied that he didn't know.

Hankins then suggested that if the 61 day time extension was granted they "would drop the claim for monetary compensation due to the same." Asked if Jamco was "claiming any further delays for which they have not been compensated," the memorandum records that Hankins said no. (At the hearing, however, Hankins denied that the question was asked and further asserted that VA officials were aware that there were "other claims for time extensions at that point in time." (Tr. 104)) The memorandum further relates that CO Johnson stated that in light of Jamco's past performance he didn't believe that it would meet the new Contract completion date even if the 61 day extension was granted. It was pointed out that if a 61 day extension was granted the adjusted Contract completion date would be July 21, 1990. With the COTR estimating a September 15 completion date at the earliest, Jamco would be facing liquidated damages in excess of $40,000 and thus would "not have the incentive to perform the contract."

At the meeting, Jamco officials apparently made no direct response to this assertion, but in a letter dated May 21, the Contractor claimed that it could complete the Contract by July 21, because "major long-term lead items of materials are on the jobsite" and Phase III construction "does not require [the] extensive demolition work" encountered in Phase II. (R4, tab 19) A "final inspection" of Phase II had been conducted on May 11 and although some punch list items remained, Jamco noted that Phase III mechanical and electrical work had "already started" and that:

> As of May 20, 1990, the contract is 76% completed, of which 13% represents materials stored on the jobsite and 63% represents work complete to date. As you can see a majority of the actual work under Phase [III] expressed in dollars is materials. Therefore your hypothetical completion date of September is totally erroneous.

(R4, tab 19)

These percentage rates were consistent with the VA's Contract Progress Report for the period ending May 31, 1990, which listed the project as 77.7% complete and, after backing out materials paid for but not installed, showed a 64.7% rate for "Work in Place." (Exh. A-10)

In its May 21 letter, Jamco conceded that there were delays in completing Phase II construction but said there were "mitigating circumstances created due to the unavailability of materials and the fact that we lost almost one month due to stoppages of work created by the hospital."

CO Johnson, COTR McQuade, and other engineering personnel met once again, this time to discuss Jamco's response. McQuade did not believe the Contractor was entitled to a 61 day extension, nor that Jamco would come close to completing the Contract even if the additional time was granted. Nor did he believe that less "demolition time" would be required for Phase III than for Phase II, as asserted by Jamco. He said that the work required was not really demolition, but "disassembly" where:

> You had to take apart things without disturbing what was on the other side of the 5/8ths inch sheet rock with somebody on an operating table ... There wasn't a mass of material that had to be removed but there was a quantity of material that had to be removed ... in a very delicate fashion ... [which] in my opinion was more labor intensive.

(Tr. 225-26)

Under the Contract Progress Schedule submitted by Jamco, Phase II demolition was shown to occupy 4 weeks (20 working days) and cost $19,500. Phase III demolition also had a 4 week schedule and a cost of $8,400 assigned to it. (3516T R4, tab 18) The replacement contractor actually accom-

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plished demolition activities in under 3 weeks (13 work days). (3516T R4, tab 15 Daily Logs)

The COTR said it was his own "personal opinion" that it would take "upwards of 250 days at the present rate of construction" based on "[w]hat they had accomplished to date and how many men they had on the job and what their intentions appeared to be." (Tr. 223) He believed that Jamco's other contract work at the Medical Center was "conflicting with the work they were doing" in this Contract. (Tr. 223) He said work on this Contract was:

> so sporadic it was like stop and go. They had two other jobs on station and they were using the same crew for all three jobs. If you look at the certified pay [rolls] that will be borne out. It was a daily thing that I would talk to my counterpart, Ed Hoover, and we'd find out where the Jamco people were and who was working on what job today.

(Tr.346)

Asked what was the "principal factor" that lead him to conclude that termination of Jamco was in the best interest of the Government, COTR McQuade responded, "[n]onresponsiveness to official inquiries. Lack of man loading. Poor performance on the job." (Tr. 347) McQuade said he "figured another contractor could be more diligent, if he didn't have the other two jobs on the station." (Tr. 315)

CO Johnson said that there was a "consensus of opinion" to terminate for default after looking at the options of convenience termination and liquidated damages. (Tr. 366) He concluded that this would be in the best interest of the Government:

> [b]ecause of the seriousness and the demand for the surgical suites and we felt like that the take-over would be a *very short period of time* and it would . . . finish in a very timely manner. (emphasis added)

(Tr. 367)

On May 25, 1990, the Contracting Officer issued his final decision defaulting the Contractor and denying Jamco's request for a 61 day time extension due to the "government's action in requiring compliance with the submittal process clause of the contract." (R4, tab 20) After a lengthy recital of events which had occurred during Contract performance, CO Johnson asserted that although the "completion date with appropriate time extensions was May 21, 1990," the Contractor had "only completed 50% of the construction portion of the project." The 50% completion figure was apparently derived from Progress Report #6 for the period ending April 30, 1990. Comparing "Work in Place" and "Current Contract Price" the correct completion rate for April 30 was actually 54.8%. Asked about this discrepancy at the hearing, the Contracting Officer agreed with the suggestion that he "just sort of round[ed] off" the April figure to arrive at the 50% rate he used. (Tr. 370) Based on this information, the Contracting Officer concluded that:

> Even if sixty-one days were added to the contract, making the completion date about July 5, 1990, [sic, July 21, 1990] the Government does not believe that Jamco had adequately manned the job site to finish the contract. In failing to respond to my directive to accelerate the project, in an effort to get the job back on schedule, Jamco had indicated its unwillingness to prosecute the job.
>
> Therefore, the remaining portion of Phase I as it relates to submittals, Phase II, to the exten[t] it is incomplete and Phase III itself . . . is terminated for default based on Jamco's failure to make progress to insure timely completion and ultimate failure to meet contract completion date of May 21, 1990.

(R4, tab 20)

By letter dated May 25, the same day as the Termination for Default, Jamco made a request for $6,139.78 and 23 days for "increased costs and a performance time protraction" due to the VA's "failure to move cabinets" in the basement of a building where the new chiller was to be installed. (R4, tab 46) The Contractor's request, concerning an item scheduled for Phase III, was made on March 20, but the VA did not respond until April 12. COTR McQuade conceded that the biomedical staff was unwilling at the time to move the cabinets which occupied the space where the chiller was to be placed. (Tr. 349) But, he maintained that installation of piping and electrical work necessary to operate the system could have been completed during that period of time, and prior to placing the chiller. This sequence of work was challenged by Joe Mullins, however, as being as "hard to do" and less efficient. (Tr. 209-211; 401-02)

At the hearing, Guy Hankins testified that the chiller:

> involved a lot of money and a lot of work . . . and was going to [serve] the new operating rooms . . . it wasn't critical today, [but] since we only had 75 days . . . [on

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> Phase III], it could have very easily have become critical. So we always plan to install those as soon as they come in because later on down the road it gets to be the critical items of work.

(Tr. 100)

There was also considerable discussion at the hearing concerning how much work remained to be done when the Contract was terminated and the time it would take the Contractor to complete it. Jamco's Contract Progress Schedule showed Phase III work, which commenced with demolition work, as requiring 71 days to complete. While Phase III represented 55% of the original project costs, the Contract Progress Report for the period ending May 31 shows a 77.7% "Actual Percent Completion" leaving only a 22.3% non-completion rate. (Exh. A-10) Eliminating materials paid for but not installed, the same report shows 64.7% of the "Work in Place" thus leaving a balance of 35.3%. COTR McQuade, who inserted handwritten percentage completion figures on Jamco's Contract Progress Schedule as work progressed had written that the Contractor was only 56% complete as of May 31, 1990. McQuade was unable to explain the discrepancy between this figure and the 64.7% figure derived from the May 31 Contract Progress Report. Asked where he got the 56% completion rate he responded "I cannot remember how I came up with the number." (Tr. 294)

On May 18, COTR McQuade estimated that it would require the Contractor at least 120 days to complete Phase III as well as any remaining items from the previous phases. By May 25, his estimate inexplicably changed and he now thought that it would take upwards of 250 days for the Contractor to complete. Asked how it arrived at this estimate, McQuade responded that "I don't remember . . . I can't answer that." (Tr. 314) Pressed on the matter, he said he "had some numbers and some—it's kind of mathematical calculations but I have no idea where they are now . . . I never put them in the record." (Tr. 347) For his part, CO Johnson testified that he concluded that it would take Jamco "200 plus days" to complete the Contract which was "the opinion that was given to us by the engineering department." (Tr. 385)

Johnson acknowledged that he had no evidence at the time of termination that Jamco was "either unwilling or unable" to finish the Contract, but was convinced that a follow-on Contractor would complete the Contract more expeditiously. (Tr. 397) In this connection, COTR McQuade had estimated that it would take any follow-on Contractor 180 days to complete the Contract. (Tr. 316) But McQuade, who believed for some unexplained reason that it was inappropriate to convey such information prior to a default termination, did not volunteer this estimate to the Contracting Officer and can not recall any questions concerning the matter. (Tr. 344-45) CO Johnson testified that he was not aware of this estimate prior to his termination decision. Asked if this information "would have altered your view at all in terms of your course of action," CO Johnson replied: "Yes, it would have." (Tr. 399)

Following termination, Jamco's surety, Contractor's Bonding and Insurance Co. (CBIC) took over the Contract and, in turn, hired Mike Sims Building Construction (Sims), a "very small contractor" to finish the Contract. (Tr. 110) Although Sims was working for CBIC, he reported to Jamco's Guy Hankins. (Tr. 111) In the takeover agreement entered into with CBIC on June 18, 1990, the VA granted 160 days from June 19, 1990 within which to complete the Contract. (R4, tab 12; tr. 112). CO Johnson said that in determining how many days were to be given to Sims, they took into consideration that:

> He was going to be brand new, he was unfamiliar with the whole hospital . . . [and there was a need to] indoctrinate him into the . . . VA way, to the rules and regulations. We had to allow time for the mobilization. Time to get his materials together and do the actual construction and then the punch list items.

(Tr. 367-68)

Three days were allotted for punch list work on Phase II, leaving 157 days for Phase III work which Jamco had originally planned to do in 71 days. Sims was not permitted to start Phase III work until July 10 because the "anesthesiology people couldn't vacate their existing workrooms" due to a "tremendous" surgical workload. (Tr. 313)

During performance of Phase III some 13 change orders and 2 time extensions were issued, which increased the Contract price by $94,563 and extended Contract performance time by another 145 days. (Exhs. A-11; B-1 to B-15) The bulk of the costs and time awarded concerned the installation of additional special electrical power outlets in operating rooms known as isolated power units (IPU's). These February 1991 changes (SA #15-21) were ordered, according to COTR McQuade, because "heart operations are

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changing dramatically year to year and we're required to have more electrical equipment ... [which] in an operating room means an isolated power unit." (Tr. 229) While the need for most of the additional IPU's "wasn't discovered until we got into the operating rooms" following termination, McQuade acknowledged that he was aware of desired IPU additions with respect to Operating Room #5 in April 1990. (Tr. 228-29) McQuade had prepared a letter to Jamco dated April 20, 1990, requesting a cost proposal but this was never signed or presented to the Contractor because of funding constraints at the time. (Tr. 230) These changes were issued during the takeover and ultimately became SA #20, which was executed on February 22, 1991, in the amount of $21,164 plus 20 days. (Exhs. A-11;B-14)

The Contract work was completed under the takeover agreement on August 9, 1991, 441 days after the termination of Jamco's Contract. (Tr. 131)

DISCUSSION

I.

GENERAL CONDITIONS, Section 1.59, DEFAULT (FIXED-PRICED CONSTRUCTION) (FAR 52.249-10) (APR 1984) provides, in pertinent part, that:

> (a) If the Contractor refuses or fails to prosecute the work ... with the diligence that will insure its completion within the time specified ... or fails to complete the work within this time, the Government *may*... terminate the right to proceed.
>
> * * * * *
>
> (c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was *excusable,* the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government. (emphasis added)

In its Notice of Termination, the VA Contracting Officer, perhaps unsure of whether the adjusted Contract period had actually expired, informed the Contractor that it was terminated for default "based on Jamco's failure to make progress to insure timely completion and ultimate failure to meet contract completion date of May 21, 1990." Whether the completion date had been reached when the contract was terminated is not central to the dispute here. That is, there is no question that as of May 21, the Contract was not complete and could not have been completed even if the date had been extended for additional change order time which Jamco claims was warranted.

The Contractor's inability to complete was not a result of disputed time associated with change order work, but flowed from its delayed start of construction. Jamco claims that it was unable to complete the Contract in a timely manner, principally because the "contracting officer failed and refused, in violation of the contract and contrary to this agency's previous practices, to allow Appellant access to the site and to proceed with work thereby causing unavoidable delays." (App. Br. at 13) It argues that the "provisions of the contract as to submittals were contradictory," pointing to provisions "allowing the contractor to proceed at his own risk." Jamco cites *Vogt Brothers Mfg. Co. v. United States* [9 CCF ¶ 71,991], 160 Ct. Cl. 687 (1963) for the proposition that "[c]ontradictory provisions are generally construed against the party who drafted the provisions." In further support of its position, the Contractor argues that based on "previous experiences" with respect to the other two contracts it had at the Albuquerque Medical Center, it believed it could proceed with demolition while it "completed the necessary submittals." (App. Br. at 14) The Government responds that there is no evidence that Appellant relied in its bid on an interpretation which would permit construction prior to submittals, an interpretation which is, in any event, "totally unreasonable based on the language" of the specifications and Amendment No. 1 thereto. The Government further argues that Appellant "did not establish any prior course of dealing" with respect to VA submittal/construction practices. (Gov't Br. at 31-32)

We find the Government's arguments to be persuasive. The evidence as to how the Contractor bid the Contract is vague and indefinite at best. In order to recover under the rule of *contra proferentum,* a Contractor must show that he relied on that interpretation at the time it bid the contract. *Snack Time Foods, Inc.,* VABCA No. 3729, 93-2 BCA ¶ 25,825 *citing Fruin-Colnon Corporation v. United States* [36 CCF ¶ 75,923], 912 F. 2d 1426, 1430 (Fed. Cir. 1990). Jamco's passive and acquiescent conduct at the preconstruction meeting, where the Government reiterated and emphasized the "all submittals before construction" requirement, does nothing to bolster Jamco's contention that it had interpreted the Contract in a different manner at the time it bid the job. In addition, Jamco's own Contract Pro-

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gress Schedule shows the initial four weeks devoted to submittals, with demolition work beginning only in the fourth week on October 30. By its own plan 21 calendar days were exclusively devoted to submittals with no construction activity planned. (In its brief, Appellant has dismissed this 21 day period as simply "attempt[ing] to cooperate with the Contracting Officer by agreeing to a schedule delaying start." (App. Br. at 15))

Nor can we find that the interpretation now proffered by Appellant is a reasonable one. The original solicitation divides the work into three phases, with Phase I devoted solely to SUBMITTALS. The Contract provides that the "submittal process must be completed prior to the start of construction." In response to a prospective bidder's specific question as to whether Phase I could "be accomplished while Phase II and III are in progress," the VA responded in Amendment No 1, "*No, Phase I must be completed before Phase II can start ....*" (emphasis added)

This language is clear and unequivocal. *See Wiggins Plumbing & Heating Co., Inc.*, VABCA No. 2937, 90-1 BCA ¶ 22,461; *Gaffny Plumbing & Heating Corp.*, VABCA No. 1820, 86-2 BCA ¶ 18,987. At best, Appellant's construction of "boiler plate" language stating that work done prior to submittal approval is done "at the Contractor's risk" creates a patent ambiguity rather than the latent ambiguity present in the *Vogt Brothers* case. When a contractor is confronted with a "discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor." *Beacon Construction Co. v. United States* [9 CCF ¶ 72,018], 314 F.2d 501, 504 (Ct. Cl. 1963). The "existence of a patent ambiguity *in itself* raises the duty of inquiry, regardless of the reasonableness *vel non* of the contractor's interpretation." *J.F. O'Healy Construction Corp.* VABCA Nos. 2784, 2858, 91-1 BCA ¶ 23,320 at 116,995, *citing George E. Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647, 649 (Ct. Cl. 1982).

Although the Government eventually allowed the Contractor to begin work on December 11, 1989, prior to completion of the submittal process, Appellant's erroneous contract interpretation produced a 42 day delay in its Contract Progress Schedule. It was this 42 day delay in the original 180 day Contract (Jamco calculates the delay as 61 days measuring from the Notice to Proceed) that created the hole from which the Contractor was never able to extricate itself. Jamco concedes as much in its brief when it states that "there was no way to submit a revised progress schedule that was credible without some rational adjustment to performance time to reflect the initial delay in providing access to the work site." (App. Reply Br. at 27)

In addition to the initial construction delay, the Contractor has also pointed to certain changes and stop work orders by the Government which it claims extended the performance time and hence are an excuse to the default. Although it was granted 42 days under Supplemental Agreements for changes and stop work orders, it maintains that Contract performance was delayed even more, principally for 23 days due to the Government's failure to move cabinets promptly to permit the chiller installation. Another 15 days of delayed Contract performance is claimed with respect to plastering problems. An examination of the record, however, reveals that the Appellant has not persuasively shown that the Contract performance was in fact extended as claimed. Indeed, in the case of the chiller delay, Guy Hankins' testimony conceded that the "work wasn't critical" but only that it "could very easily have become critical." With respect to other claimed delays he was also unsure that the Contract performance period had been extended, saying he wouldn't know "without sitting down and doing a critical path."

The burden is on the Appellant to establish the existence of excusable delay. *Associated Refrigeration and Air Conditioning Inc.*, VABCA Nos. 1970, 2141, 86-2 BCA ¶ 18,932. General statements alleging delay "absent any showing through use of updated CPM schedules, Logs or credible and specific data or testimony, will not suffice to meet the burden." *Preston-Brady Co., Inc.*, VABCA Nos. 1892, *et al.*, 87-1 BCA ¶ 19,649 at 99,520. There must be more than a simple showing that some cause could have delayed the contract completion work." *Santa Fe, Inc.*, VABCA Nos. 1943-46, 84-2 BCA ¶ 17,341 at 86,411. In short, "[t]here must be evidence to show the objective impact of such cause on the work ... the Appellant has the burden of establishing by a preponderance of the evidence not only the existence of ... delay, but also the extent to which completion of the contract work as a whole was delayed thereby." *AB-Tech Construction, Inc.*, VABCA No. 1531, 82-2 BCA ¶ 15,897 at 78,823-11. We conclude that Appellant has not met that burden of establishing excusable delay sufficient to obviate its default status.

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II.

The more important and difficult question presented, however, is not the default status of the Contractor, but whether the VA properly exercised its discretion in deciding to terminate the Contract. Appellant argues vigorously that the default termination was an abuse of discretion founded on manifestly erroneous information. For its part, the Government argues that the Contracting Officer "considered alternatives to terminating for default," and "properly exercised his discretion by carefully evaluating the performance under the Contract and considering most of the factors set forth in FAR 49.402-3(f)." It maintains that the Board should not substitute its judgment for that of the Contracting Officer who acted reasonably in light of what was known "at the time the decision was made." (Govt Br. at 28-29)

We begin our analysis by noting that:

> The default clause does not say that the Government "shall" or "must" terminate the contract in the event of default, only that the Government "may" terminate it. Not only is the contracting officer to consider whether or not the default is excusable, but the regulations require him to consider at least seven factors in addition to the default in deciding whether or not to terminate the contract. "The existence of discretion is undeniable." *Schlesinger v. United States* [12 CCF ¶ 81,097], 182 Ct. Cl. 571, 581 390 F.2d 702, 707 (1968). If the contracting officer was improperly influenced by plaintiff's competitor or by anyone else to terminate the contract for default rather than to exercise his own independent judgment in light of the factors set out in the regulations, it would represent an abdication rather than an exercise of his discretion.

Fairfield Scientific Corporation v. United States [26 CCF ¶ 83,881], 611 F.2d 854, 862 (Ct. Cl. 1979).

In *Darwin Construction Company, Inc. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593, 596 (Fed. Cir. 1987), the court reversed a contract appeals board decision which had held that it "could not inquire into the motives or judgment of the contracting officer in electing to terminate the contract for default, once the Government determined that the contractor was in technical default." It quoted with approval lower court and earlier Court of Claims decisions that held "while the contracting officer had the discretionary authority to terminate the contract, 'the exercise of that discretion must be fair and reasonable, not arbitrary or capricious.'" *Darwin* 811 F. 2d at 597 (citations omitted).

As our Board said in *Executive Elevator Service, Inc.*, VABCA No. 2152R, 87-3 BCA ¶ 20,083:

> *Darwin* ... makes clear the authority of Boards of Contract Appeals under the Contract Disputes Act of 1978 to set aside terminations for default where they find that the contracting officer has not acted "fairly and reasonably," *i.e.*, where his action was "arbitrary and capricious."
>
> The Court specifically ruled that, in order to overturn a default termination, the Board need not require another layer of proof that the contracting officer acted in bad faith. In our opinion, this does not change the well established rule that Government officials are presumed to have acted properly in their official capacities (that has always been a rebuttable presumption); that the right of contracting officers to terminate for default is a discretionary authority; and that Boards of Contract Appeals will not substitute their discretion for that of the contracting officer (Boards had consistently ruled that, while they will not substitute their judgment or discretion for that of the contracting officer, they will examine the circumstances and determine whether there was an abuse of that discretion, *i.e.*, was it exercised fairly and reasonably).

The exercise of discretion involves more than a *pro forma* check off of factors drawn from FAR 49.402-3(f). It presupposes an active and reasoned consideration of available and sometimes contradictory information. Various factors must be evaluated and the totality of circumstances weighed by the Contracting Officer in arriving at a decision which "has the most serious consequences for a contractor." *Executive Elevator Service*, VABCA No. 2152, 87-2 BCA ¶ 19,849 at 100,438. While that decision ultimately reached may not be the one that the Board would have made, it will not be disturbed if it is the product of genuine consideration of the relevant information at hand.

In the exercise of this independent judgment, it is both permissible and natural for a contracting officer to seek the opinions of others concerning matters which ultimately help shape his decision. *Nuclear Research Corporation*, 814 F.2d 647 (Fed. Cir. 1987). But a contracting officer may not abdicate his responsibility by accepting any opinion offered without subjecting it to some analysis—particularly where he is, or should be,

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aware of information which calls that opinion into question.

The need for scrutiny is heightened in the case before us where the Contracting Officer, administering his first contract following completion of schooling for this position, relied heavily upon the advice and opinion of a Technical Representative who possessed limited contracting experience, and who was encountering his first "performance problems" in contract administration.

Finally, see *Monaco Enterprises v. United States,* 907 F.2d 159, 9 FPD ¶ 88, at 3, 1990 WL 86270 (Fed Cir. 1990) where the Federal Circuit in an unpublished decision overturned a default termination where there was "no showing that the contractor was unable or unwilling to perform, that the work was urgently needed, or even that a substitute contractor was likely to complete the system *more* expeditiously."

With these principles in mind, we now turn to the Contracting Officer's consideration of FAR 49.402-3(f)(4) which directs him to consider:

> The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

In this connection, the Contracting Officer testified that he concluded termination would be in the best interest of the Government:

> [b]ecause of the seriousness and the demand for the surgical suites and we felt like that the take-over would be a *very short period of time and it would* . . . finish in *a very timely manner.* (emphasis added)

The need for surgical suites appears self evident. To reach a fair and reasonable judgment, necessarily requires some determination as to the amount of time it would take either Jamco or a take-over Contractor to complete the work. Any estimate of the time it would take Jamco to finish the project was initially dependent on deciding how much had been completed to date. Relying on a 54.8% completion rate for the end of April, which he "just sort of round[ed] down" to 50%, the Contracting Officer made no attempt to ascertain what had been completed during May or to reconcile contradictory (and essentially accurate) information submitted by the Contractor four days prior to the termination action which showed a 63% completion rate.

Nor does there seem to have been any comparison by the CO of Jamco's Phase II progress once construction actually began with its own Progress Schedule for that phase. While it was somewhat behind its Phase II schedule, its actual progress tends to support Jamco's general thesis that it was the delayed start of construction rather than construction performance itself which was the root of its failure to complete.

VA Estimates of completion time for Jamco were equally suspect and unexamined. On May 18 the COTR was estimating it would take 120 days for Jamco to complete the remainder of the project for which the Contractor had scheduled 71 days. Seven days later the COTR's estimate had more than doubled to 250 days by some method that he was at an utter loss to explain. The record discloses no inquiry on the part of the Contracting Officer to examine the reasons for these wildly disparate estimates, but only an uncritical acceptance of the longer time period proffered by the COTR.

If the way in which the Contracting Officer reached his conclusion about how much time it would take Jamco to finish is suspect, the methodology by which he determined that another contractor would take a "very short period of time . . . to finish in a very timely manner," is completely unexplained, let alone justified. The COTR, who had concluded that it would take any follow-on contractor 180 days to complete, was never questioned about the matter. This is of critical importance here, where the Contracting Officer has testified that had he known of this estimate it would have altered his view about his "course of action."

Nor has the Government advanced any evidence of support for its other purported rationale for termination: that the Contractor would abandon the project because of pending liquidated damages. We observe, first, that the amount of potential liquidated damages was dependent on an estimate of how much Jamco had completed to date and how long it would take to finish. We need not reiterate the Contracting Officer's deficient inquiry into this subject. Second, the record itself is devoid of any evidence supporting abandonment by Jamco. Indeed, the Contracting Officer testified that, at the time of termination, he had no evidence that Jamco, which had two other ongoing and apparently successful projects at the hospital, was either "unable or unwilling" to finish the Contract.

We thus conclude that the Contracting Officer abused his discretion by failing to make

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an adequate inquiry prior to terminating the Contractor for default.

DECISION

For the foregoing reasons, the appeal of the termination for default in VABCA-3271 is granted and is converted into a termination for the convenience of the Government. In VABCA-3516T, the appeal of the claim for convenience termination costs, the Appellant is awarded $60,004 as stipulated by the parties, together with interest as authorized under the Contract Disputes Act.

[¶ 26,406] Allied Painting & Decorating Co.

ASBCA No. 43287, October 1, 1993. Contract No. F04666-85-C-0017.

Procedure, Boards—Reconsideration—Arguments Already Considered.—A housing and maintenance contractor's motion for reconsideration of a decision involving an issue of whether the contractor was entitled to reimbursement of state sales taxes paid on materials used in performance was denied, because the contractor merely reiterated arguments that were fully considered in the original decision. The contractor's motion simply recapitulated and cited selective findings of fact from the original decision while ignoring other findings.

For the appellant: Robert E. Losch, P.C., Washington, D.C., by Robert E. Losch. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Capt. Wayne D. Loosbrock, USAF, Trial Attorney.

Before ELMORE, RUBERRY, and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: Appellant has moved for reconsideration of the Boards's decision of 8 July 1993 in the above-captioned appeal. The Government has responded in opposition.

Appellant contends the Board erred in determining

> [T]he Appellant "bears the obligation to determine if a waiver of state . . . sales tax is available before it submits its bid"

and in concluding

> that by "[a]ccepting Allied's interpretation of paragraph 1.17 we would negate and make inexplicable and useless" subpart (b) of FAR Clause 59.229-3, Federal, state, and Local Taxes (APR 84), which states that "the contract price includes all applicable . . . State, and local taxes."

The Board has reviewed the appellant's arguments in support of its motion and finds no new matters which were not fully considered in reaching the original decision. Appellant's motion simply recapitulates and cites selective findings of fact from the original decision while ignoring other findings and is found not to be persuasive.

Appellant contends that the Board erred in a number of its findings of fact. The Board has reviewed these findings and finds the reported errors inconsequential to the decision. However, for clarity of the record we make the following changes:

Finding 11—the reference to "penalties" is deleted and substituted with "interest."

Footnote 2 is revised to read, "The attachments referred to at R4, tab 11 are attached to Mr. Losch's letter of 5 September 1991 and found in the Board's correspondence file." (Neither Mr. Losch nor the Government argues the attachments affect the Board's decision and the Board, upon reviewing them in light of appellant's reconsideration motion, has found them inconsequential).

Finding 19 is found to be accurate and no change is required. The claim letter states, in pertinent part, "The amount of the claim is revised from $117,353.27 to $127,847.26. The reason for the claim increase of $10,493.99 is that in submitting the original claim we failed to include 15% for overhead and profit on the California Sales Tax and interest assessed on materials purchased under Contract Item No. 1."

Appellant has further contended:

> The Board, in sustaining Appellant's claim for sales taxes assessed on the cost of reimbursable materials under Contract Item No. 2, stated that such reimbursement was "subject to compliance with the provisions of FAR 31.205-41(a)(2) and (b)(3)." The provisions cited by the Board appear to be inapplicable. Subpart (a)(2) relates to taxes "upon which a claim of

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illegality or erroneous assessment exists'. Subpart (b)(3) pertains to taxes "from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government". In the instant appeal, there was no claim of illegality or erroneous assessment, and no exemption from sales tax was available directly to the Appellant or to the Government. The Board also erred in not allowing interest on the sales tax assessed by the State of California on the reimbursable materials under Contract Item No .2.

The Board revises it original reference to FAR 31.205-41(a)(2) and (b)(3) by deleting the references to (a)(2) and (b)(3) and substituting "as applicable."

Addressing appellant's reference to interest, the Board notes the matter was remanded to the parties for settlement of quantum which includes interest, if applicable. Should the parties be unable to reach settlement on that portion of the appeal which the Board sustained, then appellant need only notify the Board of the impasse and file an appeal for quantum.

Except as amended above, the appellant's Motion for Reconsideration is denied and the Board's original decision is affirmed.

[¶ 26,407] JEM Development Corporation

ASBCA No. 45912, October 5, 1993. Contract No. N62467-88-C-2743.

Liquidated Damages—Amount—Penalties.—The assessment of liquidated damages against a contractor under a construction contract to repair identified transformers at a military facility was proper, despite the contractor's contention that the liquidated damages provision constituted an unenforceable penalty, because there was no indication that the liquidated damages bore no reasonable relation to potential damages for delay. The government selected the rate of liquidated damages from its contracting manual, which was a part of the government's procurement regulations. The government's use of the manual was presumed to be proper because the very purpose of the manual was to establish a reasonable estimate of the potential loss that the government was expected to incur as a result of any delay. The proper use of the manual provided a sufficient basis on which to infer that the liquidated damages rate was reasonable.

Liquidated Damages—Propriety of Assessment—Negotiated Amount.—A contractor's contention that liquidated damages were not intended in view of the fact that the amount of such damages was not negotiated by the parties was rejected, because the parties were not required to negotiate the clause. When the government issues an Invitation for Bids, it contains the terms the government is requesting offers on. When a contractor returns its bid, it is making an offer containing the terms of the Invitation for Bids. Negotiation on any particular clause is not required to make it effective.

For the appellant: Daniel T. Moore, Popular Bluff, Missouri. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Anthony M. Dowdle, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before STEMPLER and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: This is a timely appeal from a contracting officer's decision refusing to return $4,000 in liquidated damages assessed under the subject contract. Appellant has elected to proceed pursuant to Rule 12.3. A hearing was held and both parties have filed briefs. The Contract Disputes Act is applicable.

FINDINGS OF FACT

1. On 29 September 1989, as a result of sealed bidding, the Navy and JEM Development Corporation (JEM) entered into contract No. N62467-88-C-2743. The firm fixed-price construction contract in the amount of $82,000 called for JEM to repair and paint identified transformers and associated gear at the Naval Air Station Complex, Key West, FL. The contract called for performance to commence on 13 October 1989 and to be completed by 10 February 1990. The con-

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tract provided that for every calendar day JEM failed to complete the work within the time specified in the contract, JEM would be assessed $100 in liquidated damages. The $100/day figure was arrived at by using the NAVFAC Contract Manual, P-68, which sets $100/day as the liquidated damages to be charged for contracts of this size and type (R4, tabs 1, 2; exh. G-2; tr. 17, 23).

2. The contract work involved a four-step procedure: (1) cleaning the rust by brushing or sanding, (2) applying a rust inhibitor by brush or spray, (3) applying a primer by spray, and (4) applying a final paint coat by spray (tr. 12-13, 50-51).

3. On 4 February 1990, 6 days before the completion date of the contract, JEM started work (exh. G-1).

4. On 25 February 1990, JEM's superintendent reported to the Government inspector that it was unable to perform spraying on transformers 41, 43 and 44 (T-41, 43, 44) because a ship was docked at this location and he was concerned overspray would hit the ship. The report indicates wind speeds to have been 15-20 mph (exh. G-1; tr. 17-18).

5. On 26 February 1990, the Government inspector spoke to JEM's supervisor about the problem at T-41, 43 and 44. JEM was concerned that overspray would be carried to the ship and JEM would be held responsible. The inspector saw no problem, for if JEM considered it to be too windy, JEM could build windbreaks, as it was required to do by §09010, ¶3.9.3 of the specification if winds were in excess of 20 mph (tr. 18-20; R4, tab 1).

6. On 26 February 1990, the Government called JEM's president (Mr. Dilks) in Missouri to discuss the possibility of JEM's workers going home for a week. The Government said that was fine with it, but that liquidated damages would continue to accrue. Mr. Dilks said that he would fight that matter at a later date but that JEM's work was being held up by the presence of a ship near some of the transformers and JEM was concerned that the wind would blow overspray onto the ship (R4, tab 16).

7. On 26 February 1990, JEM performed step 3 on T-44, even though the ship was still at the same location. JEM's report describes the wind conditions as "windy 15 to 20 mph and gusty" (exh. G-1).

8. Sometime in this timeframe, JEM's superintendent spoke to JEM's president about the overspray problem. Mr. Dilks testified that putting up wind screens was discussed but it was decided not to because on another contract a windscreen had not been effective and JEM had to pay for some overspray damage. It was Mr. Dilks' testimony that the ship was not close enough to the transformers to be a problem unless the wind was blowing at a certain undetermined speed (tr. 38-39, 54-55).

9. On 27 February 1990, JEM's on-site superintendent (Mr. Minchew) informed the Government inspector that JEM's workers were going home for two weeks. The inspector testified that Mr. Minchew stated the reason for leaving was that he missed his family. Mr. Minchew did not testify (R4, tab 17; tr. 21-22; exh. G-2).

10. On 28 February 1990, the Government wrote JEM stating that liquidated damages were being accrued and requesting JEM advise the Government immediately as to when the workers would return (R4, tab 18).

11. Much of the work JEM performed when it returned could have been performed during the period its workers had returned home (tr. 23, 64; exh. G-1).

12. On 14 March 1990, JEM returned to work. On this date, JEM's report to the inspector indicates that JEM could not spray at T-43 and T-44 because the ship was located there and would not be moved until 21 March. The wind conditions were described by JEM as "wind" (tr. 22-23; exh. G-1).

13. On 15 March, JEM performed steps 3 and 4 on T-41. The wind conditions were described as "wind" by JEM's report (exh. G-1).

14. JEM's report of 16 March 1990 states that it was unable to work on T-43 and T-44 because of the presence of the ship. JEM reported wind conditions as "windy" (exh. G-1).

15. No wind was reported by JEM on 18 or 19 March, but JEM still reported on 19 March that it was unable to work on T-43 and T-44 because of the presence of the ship (exh. G-1).

16. The ship left on 21 March 1990 and JEM performed the work on T-43 and T-44. JEM's report described the wind conditions as "wind" (tr. 63; exh. G-1).

17. On 22 March 1990, work under the contract was accepted (R4, tab 21; tr. 17).

18. JEM performed work on other transformers on each date that it reported it could not work on T-43 and T-44 (exh. G-1).

19. JEM never painted under this contract using windscreens (tr. 59).

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20. The Government inspector inspected the site twice a day during the period contract performance was open and filled out daily reports (tr. 24).

21. On 23 July 1990, the Government wrote JEM, stating that liquidated damages would be assessed for 40 days at the contract rate of $100/day unless JEM could provide evidence that a time extension was justified (R4, tab 28).

22. On 30 July 1990, JEM responded, stating:

> I have contended, and still do so, that the major reason for delay on this contract was caused by the Navy. The case in point being that the contract required sandblasting material of which I was unable to find a source. Since you continued to require that I furnish the material you wanted, I made numerous requests to Ens. Green for a source and he continually refused to do so. This delay, caused by you, in itself resulted in not only additional contract time extension requirement in excess of 40 days but increased costs.

(R4, tab 29)

23. The issue of responsibility for the sandblasting material delay was decided against JEM in *JEM Development Corporation,* ASBCA No. 42644, 92-1 BCA ¶ 24,451.

24. On 9 March 1992, JEM requested a contracting officer's decision on the liquidated damages issue, stating:

> Please be advised that the contractor requests the Contracting Officer's final decision on the following matters:
>
> 1. $4,000.00 Liquidated damages imposed. The imposition of liquidated damages was both arbitrarily [sic] unreasonable, liquidated damages constitute a penalty and have no reasonable relationship to any damages actually suffered by the government.

(R4, tab 46)

25. On 29 February 1993, the contracting officer issued his decision, denying the claim for the return of liquidated damages (R4, tab 49).

26. On 29 March 1993, JEM filed a timely notice of appeal (R4, tab 50).

CONTENTIONS OF THE PARTIES

JEM's position is that the liquidated damages should be returned, principally because these liquidated damages are a penalty and are unenforceable. JEM contends that the $100/day was not reasonable in the context of the contract and does not bear a reasonable relationship to the anticipated damages to the Government from a failure to complete the contract in a timely manner. Additionally, JEM argues that the parties did not intend to provide for liquidated damages because the amount was not negotiated. JEM also contends that the liquidated damages should be returned because the Government allegedly did not suffer any actual damages. Finally, JEM contends that an unspecified portion of the 40 days of delay is attributable to the presence of the ship near T-41, T-43 and T-44.

The Government denies that the liquidated damages are a penalty, contending that they were a reasonable forecast of the potential delay damages. The Government denies that actual damages are relevant but contends that nonetheless, it has demonstrated damage. The Government argues that the presence of the ship did not prevent progress on the contract and that the 40 day delay was due to JEM's actions.

DECISION

We will uphold liquidated damages provisions when they are fair and reasonable attempts to fix compensation for anticipated loss caused by delay in completion, if at the time of contracting actual damages are uncertain in nature and amount and if the amount bears a reasonable relationship to the anticipated loss. *Rivera-Cotty Corporation,* ASBCA No. 32291, 86-3 BCA ¶ 19,148. JEM has the burden of coming forward with evidence that the amount of the liquidated damages was an unreasonable forecast of the potential damages and that it bore no reasonable relation to potential damages for delay. *Jennie-O Foods, Inc. v. U.S.* [24 CCF ¶ 81,814], 580 F.2d 400 (Ct. Cl. 1978); *Rivera-Cotty, supra.* In the appeal before us, the Government selected the rate of liquidated damages from its contracting manual, P-68, for the nature and size of the contract. We have had experience with manuals from which a liquidated damage rate is selected for use in the contract and in particular, P-68. It is not necessary that the Government tailor-make the liquidated damages rate for each contract. *Young Associates, Inc. v. U.S.* [18 CCF ¶ 81,980], 471 F.2d 618 (Ct. Cl. 1973); *Brooks Lumber Company,* ASBCA No. 40743, 91-2 BCA ¶ 23,984. P-68 has been held to be a part of the Government's procurement regulations and we presume that resort to it is reasonable since its very purpose is to establish a reasonable estimate of the potential loss the Government is

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expected to incur as a result of delay. Independent proof is not necessary to establish the reasonableness of the liquidated damages rate. The proper use of P-68 is *prima facia* evidence that the liquidated damage rate was reasonable. *Brooks, supra; Orbas & Associates,* ASBCA Nos. 32922, *et al.,* 87-3 BCA ¶ 20,051. In the appeal before us, P-68 was properly applied and JEM has not persuaded us that the $100/day was an unreasonable forecast at the time of contracting. The actual damages shown by the Government (inspection and record keeping by the inspector) are administrative in nature. Administrative costs can be the basis for liquidated damages because it is a readily foreseeable cost if delay occurs but the amount is difficult to estimate accurately. *Rivera-Cotty, supra.*

JEM's contention that the Government did not incur actual damages is both factually incorrect and legally irrelevant. Actual damages need not be proven. *Rivera-Cotty, supra.*

JEM's contention that the parties did not intend to provide for liquidated damages because the amount was not negotiated between the parties is also without merit. There is no allegation that the liquidated damages clause was not properly included in the contract or that JEM was unaware of it. When the Government issues an Invitation For Bid, it contains the terms it is requesting offers on. When a contractor returns its bid, it is making an offer containing the terms therein. Negotiation on any particular clause is not required to make it effective. Indeed, we are unaware of any negotiation over any of the clauses of the contract, as is proper since the contract was awarded pursuant to sealed bidding.

While JEM's complaint and its position at the hearing were that the presence of the Government ship was responsible for an unspecified portion of the 40 days of delay, this position is all but abandoned in its brief. JEM's total argument on the point consists of:

> Although Appellant may be able to make a case that the delay in completing the job was not the fault of the Appellant, or at least not entirely Appellant's fault and thus there was an excusable or justifiable delay.
>
> Appellant does not see the need to pursue this course of action because the imposition of liquidated damages in this case cannot be sustained on behalf of the Government under any theory.

(App. br. at 2)

Even if this theory was not abandoned, it would fail. JEM started work only 6 days before completion was due. It failed to make any attempt to screen the ship from the painting and, indeed the painting continued at times even with the ship present. We are unconvinced that there was a causal connection between the delay and the presence of the ship.

CONCLUSION

The appeal is denied.

[¶ 26,408] Jorgensen Forge Corporation

ASBCA Nos. 45846, 45847, 45848, 45967, 45968, October 5, 1993. Contract Nos. N00024-86-C-4226, N00024-87-C-4322, N00024-89-C-4004.

Modifications—Bar to Claims—Summary Judgment.—A government motion for summary judgment regarding a contractor's claims for additional manufacturing costs was denied, despite the government's contention that the claims were the subject of a release, because there remained factual issues as to whether the release covered the additional manufacturing costs. In support of its position that the release was understood by both parties not to cover any claim for additional manufacturing costs, the contractor presented four affidavits.

For the appellant: Perkins Coie, Seattle, Washington, by Richard W. Oehler. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Robert Lieblich, Trial Attorney, Naval Sea Systems Command, Arlington, Virginia.

Before LUSSIER, RUBERRY, and SPECTOR, Administrative Judges.

LUSSIER, Administrative Judge: The Government has moved for summary judgment in these appeals contending that the claims for additional manufacturing costs underly-

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ing all five of these appeals are the subject of binding, unqualified releases executed by appellant. Its motion contends that there are no material facts in dispute, and that the only question before the Board is one of interpretation of the language of the releases in the contract modifications, a question of law upon which it is entitled to judgment in its favor. Appellant has filed an opposition to the Government's motion for summary judgment. The appellant's opposition is supported by four affidavits in support of its position that the releases which appellant was asked to execute were understood by both parties not to cover any claim by appellant for additional manufacturing costs. Thereafter, by letter to the Board, the Government recognized that appellant "appears to have raised an issue of material fact." The letter expresses the Government's disagreement with the "version of history" set forth in the appellant's opposition and requests that a hearing be held on, and discovery be limited to, the release issue, and that proceeding with the merits of the claims await the Board's decision on the release issue.

DECISION

The Government's letter appears to be an implicit withdrawal of its motion for summary judgment, although it has not explicitly withdrawn that motion. In any event, we cannot grant the motion for summary judgment as it is evident there are genuine issues of material fact in dispute. The Board will grant summary judgment only if there is no genuine dispute as to a material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States* [33 CCF ¶75,126], 812 F.2d 1387, 1391 (Fed. Cir. 1987); *Willa Brokenbough Parties, Inc.*, ASBCA No. 26457, 82-2 BCA ¶15,929. All inferences drawn from the relevant facts must be resolved in favor of the non-moving party. *Dry Roof Corporation*, ASBCA No. 29061, 86-2 BCA ¶18,972.

The Government's motion to bifurcate the hearing and limit discovery, as well as an outstanding motion by appellant to compel discovery, will be dealt with by a separate Board order. The Government's motion for summary judgment is denied.

[¶ 26,409] Healy Tibbits Builders, Inc.

ASBCA No. 45269, October 4, 1993. Contract No. N62477-89-C-0053.

Payments—Anti-Assignment Statutes—Bankruptcy Proceeding.—An assignment of a government contract that resulted from an order of the bankruptcy court was excepted from the effects of the anti-assignment statutes as an assignment by operation of law, because the assignment did not create the risk that the government would be subject to multiple lawsuits. The purpose of the prohibition against unauthorized assignments of government contracts is to protect the government from fraud and multiple litigation. In making a determination of whether the anti-assignment statutes are applicable to a given assignment, the threshold question is whether the assignment is susceptible to the evils against which those statutes were enacted.

Payments—Anti-Assignment Statutes—Waiver by Course of Dealing.—The government waived its right to demand the protection of the anti-assignment statutes with respect to an assignment authorized by an order of a bankruptcy court, because the government acknowledged the assignment by virtue of its conduct. Prior to awarding the instant contract, the government knew that the contractor was in bankruptcy proceedings. The government was also aware that the contractor had entered into a sale agreement whereby another firm, the assignee, had agreed to purchase all its contracts. The contractor agreed to continue to perform the contract until the assignee obtained the necessary licenses. After the purchase of the contractor and the approval by the bankruptcy court, the contractor's personnel, equipment, and principal office remained essentially intact for the performance of the instant contract. Given the government's knowledge of the contractor's bankruptcy and the sale agreement, coupled with its acknowledgment of the working relation of the assignee and contractor during performance of the contract, the board determined that the government had waived compliance with the anti-assignment statutes.

For the appellant: Watt, Tieder, Killian & Hoffar, McLean, Virginia, by Robert G. Watt. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John Dietrich, Trial Attorney.

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Before YANNELLO, RUBERRY, and SPECTOR, Administrative Judges.

Introduction; Background

YANNELLO, Administrative Judge: Following the filing of the complaint, the Government, in lieu of an answer, filed a motion to dismiss this appeal for lack of jurisdiction. Essentially, the Government contends that the party contracting with the Government was Healy Tibbits Construction Company (hereinafter "HTC"), which continued to be the entity represented throughout contract performance as the contractor. Thus, the Government at no time had a contract with appellant Healy Tibbits Builders, Inc. (hereinafter "HTB"), no privity exists, and appellant has no standing to bring the appeal. Morever, if, at some time during performance, the contract was assigned to HTB, the Government was not informed and any purported assignment is asserted to be contrary to the anti-assignment statutes, 31 U.S.C. § 3721 (formerly § 203) and 41 U.S.C. § 15. In support of its motion, the Government cites, *inter alia, CBI Services, Inc.,* ASBCA No. 34983, 88-1 BCA ¶ 20,430.

Appellant has responded in opposition; the Government has not filed any reply.

SUMMARY FINDINGS

1.a. On 5 June 1989 the Government issued a solicitation for the construction of a Magnetic Silencing Facility Type III Degaussing Range at the Norfolk, Virginia, Naval Air Station.

b. On 7 August 1989, the Government informed HTC that, at a bid price of $2,533,000, it was the low bidder on the solicitation. The Government requested financial and other data demonstrating that HTC was responsible.

2.a. On 14 August, as a consequence of the insolvency of its parent company, Raymond International Builders, Inc. (hereinafter "Raymond"), HTC filed a petition for Chapter 11 relief in the U.S. Bankruptcy Court for the Southern District of Texas.

b. In response to the Government inquiry, HTC, on 31 August, provided lists of current and completed contracts, references, and a written notice that HTC's financing would be funded, bonded, and backed by Weeks Marine, Inc. (hereinafter "Weeks").

3. On 12 September, Weeks, Federal Insurance Company, Raymond and HTC as debtor-in-possession, entered into a Purchase and Sale Agreement whereby Weeks agreed to acquire all of the existing contracts of HTC, as well as those which had been bid but not yet started, and to complete these jobs. The attached list included the bid on the subject contract; likewise, HTC agreed to assign all such contracts. The Agreement further provided that, between the date of its execution and until approval by the Bankruptcy Court (or until Weeks could obtain all necessary licenses, whichever came later), HTC would continue to perform all active contracts. The effective date of the Agreement, subject to Bankruptcy Court approval, was 31 August.

4.a. On 13 September 1989, HTC, and its parent, Raymond, filed motions with the Bankruptcy Court to, *inter alia,* transfer HTC's executory contracts.

b. Thereafter further issues of responsibility were discussed between the Government, HTC, and Weeks. On 14 September, Weeks responded to Government inquiry and furnished the Purchase and Sale Agreement of 12 September, under which Weeks would acquire HTC, and its contracts, as of 31 August, subject to approval of the Bankruptcy Court. (Exh. A-7) The Government requested from Weeks additional financial information, and assurance of contract funding, which were furnished.

5. Having determined responsibility, the Government awarded the contract to HTC on 26 September 1989.

6. The Purchase and Sale Agreement of 12 September (retroactive to 31 August) was amended on 11 October. (This amendment presumably addressed the previously-inactive affiliate of Weeks, then known as Deepwater Construction Co., Inc. or "Deepwater." See also para. 7 below.)

7. On 11 October, the Bankruptcy Court issued its Order authorizing the sale of HTC's assets and assignment of its executory contracts to Weeks and Deepwater pursuant to the parties' Purchase and Sale Agreement dated (retroactively) 31 August as amended on 11 October. (Exh. A-11) The court's Order stated, in part:

> 4. Healy Tibbitts [Construction] be, and it hereby is, authorized, in accordance with the terms of the Sales Agreement, to assume and assign all of its rights and obligations under its executory contracts ... to Weeks or Deepwater, as the case may be, pursuant to § 365 of the Bankruptcy Code; *provided, however,* that
>
> (a) in the event Deepwater is the assignee of [HTC] executory contracts ..., Weeks and Deepwater shall be jointly and sever-

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ally liable for ... satisfying future obligations thereunder and

(b) in the event that Weeks is the assignee of [HTC] executory contracts ..., Weeks shall be responsible ....

8. On 13 October, pursuant to the Bankruptcy Court order, HTC and Deepwater entered into an agreement whereby HTC was to be owned and operated by Deepwater, and HTC would continue to perform the contracts until Deepwater could obtain necessary licenses, at which time the contracts would be assigned to and performed by Deepwater (then, with a name change in which HTC would cooperate, doing business as HTB). (Exh. A-12, para. 6)

9. On 19 October, Deepwater amended its certificate of incorporation and changed its name to Healy Tibbits Builders, Inc. (Exh. A-13)

10. Following the purchase of HTC, its personnel, equipment, and principal office remained essentially intact for performance of the contract, with, however, different shareholders and board of directors of the entity doing business as (d/b/a) HTB.

11.a. From November 1989 to March 1991, invoices for payment were submitted by the contractor to, and approved by, the Government in the name of "HTC" by the former HTC project manager, and current HTB manager, Alan England.

b. During contract performance (for example, in exchanges between mid-1990 to mid-1991), the Government addressed various correspondence to, and received various correspondence from "HTB," including Alan England.

12. Beneficial occupancy of the contract facility occurred on or about 10 August 1990.

13. On 3 March 1991, a Government Contract Specialist, Iris Jenkins, furnished HTB with copies of regulations regarding novation agreements. Subsequently, counsel for HTB called the Specialist and suggested that such an agreement would be costly to his client. No Novation Agreement has been executed. (Exh. G-5)

14. a. On 12 March 1991, appellant submitted its claim for equitable adjustments, in the amount of over $2 million. The parties discussed the issuance of a final decision by the contracting officer.

b. In April 1991, the Government issued a unilateral modification assessing liquidated damages for 115 calendar days (citing a scheduled completion date of 17 April 1990 and beneficial occupancy on 10 August 1990) at $1,050 per day.

15. During the latter part of 1991, an audit was conducted by the Defense Contract Audit Agency (DCAA).

16. The parties continued to correspond while awaiting issuance of a final decision. The contractor requested a copy of the DCAA audit report but was advised this would not be released pending issuance of the final decision. The Government raised, for the first time, the issue of contractor identity in early April 1992. Appellant, through counsel, responded on 10 April 1992, summarizing the corporate transactions and providing copies of relevant documents, and offering any additional information or documentation which the Government may request, including any form of Novation Agreement if necessary.

17. A decision denying all but one portion of appellant's claim was issued on 24 September 1992, addressed to HTB.

18. In late October and mid-November 1992, the Government suggested that, pursuant to the DCAA audit, it would investigate whether there was any improper pricing in the subject claims, as well as in another unrelated contract ("Oceanside").

19. On 30 October 1992, HTB filed its notice of appeal to the Board; the complaint was filed on 7 December and, on 10 December, appellant served its first discovery request upon the Government.

DECISION

It is now well established that assignments which occur by operation of law are excepted from the provisions of the anti-assignment statutes, and that assignments incident to court-ordered bankruptcy proceedings constitute such assignments by operation of law. *See, e.g., Goodman v. Niblack,* 102 U.S. 556, 26 L.Ed. 229 (1880); *Keydata Corp. v. United States,* 205 Ct. Cl. 467 (1974); *Broadlake Partners,* GSBCA 10713, 92-1 BCA ¶ 24,699. As these cases illustrate, in determining whether the anti-assignment statutes apply the threshhold question is whether the assignment is susceptible to the evils against which the anti-assignment statutes were enacted; here, it is not. Since the assignment of the subject contract to appellant [1] was pursuant to Order of the bank-

[1] The assignment was to Weeks' affiliate, Deepwater which then, also as part of the same agreement which underlay the assignment, changed its name to, and is now doing business as, HTB. This

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ruptcy court, the Government will not likely be subject to suit by multiple claimants. Moreover, appellant did not merely seek to acquire a claim, or even potential claim, by virtue of the assignment; rather, it is the party directly interested inasmuch as it in fact performed much (indeed almost all) of the contract (and the Government was well aware at the time of award to HTC that the contract would be assigned to and largely performed by another).

Accordingly, we find the assignment here in issue, being one by operation of law, to be excepted from the anti-assignment statutes.[2]

The facts in this appeal are clearly distinguishable from those in *CBI, supra,* relied upon by the Government. That appeal involved an alleged assignment between the initial contractor, a subidiary company, and the assignee, another affiliate of the same parent company which was undergoing a restructuring. No copy of the alleged assignment was furnished to the Board and the appellant/assignee acknowledged that it did not have a document either authorizing or prohibiting the assignment of the contract. The assignment apparently occurred by virtue of a voluntary transfer of assets (unrelated to insolvency and/or the satisfaction of creditors and without cover of formal bankruptcy proceedings). As such, the Board there found that the assignment was not one by operation of law but rather fell squarely within the parameters of the anti-assignment statutes.

Moreover, it is also well established that the Government can waive the protection and procedures of the anti-assignment act by virtue of its overall course of conduct including knowledge and recognition of, and assent, to the assignment. *See, e.g. Tuftco Corp. v. United States* [27 CCF ¶ 80,097], 222 Ct. Cl. 277 (1980); *Patterson v. United States* [11 CCF ¶ 80,178], 173 Ct. Cl. 819 (1965); *Vertical Aviation Transport Systems, Inc.,* ASBCA No. 18266, 74-1 BCA ¶ 10,617; *Radiatronics, Inc.,* ASBCA No. 15133, 75-2 BCA ¶ 11,349; *Rodgers Construction, Inc. and Federal Insurance Company,* IBCA 2777 *et al.,* 92-1 BCA ¶ 24,503; and *CBI Services Inc., supra.*

In *CBI,* the Board addressed the question of whether the Government had waived compliance with the anti-assignment statutes by treating appellant as the contractor. In this respect *CBI,* and the cases cited above, establish that it is not any one event but rather a course of dealing which will determine whether Government conduct constitutes such a waiver, whether intentional or not. Among the events which may be examined are contract payments and modifications, delivery to and acceptance by the Government of completed work, and general course of dealing.

Here, we consider the Government's knowledge of HTC's bankruptcy and agreements for its purchase, subject to approval in bankruptcy proceedings, in evaluating HTC's bid prior to entering into the contract, as well as the Government's frequent acknowledgment of HTB as the contractor during performance, together with HTB's performance and completion of the contract, and acceptance by the Government, as establishing a course of conduct which constituted a waiver of the provisions of the anti-assignment statutes.

Thus, we conclude that HTB is the proper appellant here and the Board has jurisdiction to proceed.

(Footnote Continued)

mere change of name does not affect appellant's rights under the assignment. *See, e.g., Mancon Liquidating Corporation,* ASBCA No. 18304, 74-1 BCA ¶ 10,470. As an administrative matter, the Board chooses to retain the above caption of this appeal, rather than expanding to a fuller description of Deepwater Construction Co., Inc., *sub nom* Healy Tibbits Builders, Inc. *See, e.g., Bermite Division of Tasker Industries,* ASBCA No. 18280, 74-1 BCA ¶ 10,625 at 50,412.

[2] We note the Government's contention in its moving brief that:

> There is no evidence in the record, nor allegation in the complaint, that the apparent assignment of the contract to Healy Tibbits Builders, Inc. was the result of a bankruptcy decree, ... or any other transfer by operation of law. Thus the appellant has failed to allege a necessary basis for jurisdiction, and the Board should dismiss this appeal. [Br. at 6]

This argument is somewhat curious in view of the materials, including a proposed Purchase Agreement, furnished to the Government before award of the contract (see findings 2.b. and 4.b), and relied upon by the Government in determining financial responsibility of the bidder, not to mention the information furnished to the Government when the issue of contractor-identity was first raised (after contract completion, see finding 16). In any event, appellant's response to the Government's motion (to which the Government has not replied), and the attachments thereto, clearly provide such evidence and raise such contentions.

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CONCLUSION

The Government's motion to dismiss for lack of jurisdiction is denied.

[¶ 26,410] Mindeco Corporation

ASBCA No. 45207, September 28, 1993. Contract No. DLA700-90-C-1924.

Defaults, Government Acts Excusing—Bad Faith—Proof of Intent.—A default termination was not set aside for bad faith, because there was no proof that the contracting officer's decision was motivated by bad faith. In order to rebut the presumption that public officials act conscientiously in the discharge of their duties, there must be "well-nigh irrefragable" proof of bad faith. "Well-nigh irrefragable" proof has been equated with evidence of some specific intent to injure. The record of the termination of a contract to deliver valves showed no evidence of any personal animosity on the part of the contracting officer toward the contractor or its owners, officers, or employees.

Defaults, Procedure—Government Decision—Best Interests of the Government.—A contracting officer reasonably concluded that it was in the best interests of the government to default-terminate a contract for the delivery of valves because the contractor's performance of the contract was poor. The contractor alleged that the termination was not in the best interests of the government, because the contracting officer put her subjective beliefs ahead of the objective interests. However, the contractor failed to meet the original delivery date and received four extensions, extending the delivery schedule from five months to 22 months, and had not completed the contract by the final delivery date.

Defaults, Procedure—Government Decision—FAR Factors.—The termination for default of a contract for the delivery of valves was not an abuse of discretion, because the contracting officer adequately considered all the factors in Federal Acquisition Regulation 49.402-3(f), either explicitly or implicitly. The contractor cited a 1992 ASBCA decision in which a termination for default had been overturned because the government had waived the delivery date. Moreover, in the cited case, the contractor had demonstrated a willingness and ability to perform. In this case, however, the delivery date had not been waived, and the contractor had not shown that it was willing and able to perform.

Defaults—Decision to Terminate—Administrative Discretion.—Although a contractor contended that the termination of its contract for default was improper because the contracting officer did not believe that she had other options, the termination was upheld because the record showed that the contracting officer knew that the contract could be extended but chose to terminate it instead. The record showed that the delivery date had been extended once by the contracting officer after she took over responsibility for the contract. The contractor had a long history of nonperformance, and the contracting officer's precipitance in issuing the termination did not prove that she did not exercise discretion.

For the appellant: Jerry M. Kaplan, General Counsel. For the government: Philip L. Brady, Trial Attorney, Defense Construction Supply Center (DLA), Columbus, Ohio.

Before TUNKS, RIISMANDEL, and RUBERRY, Administrative Judges.

TUNKS, Administrative Judge: This is an appeal from a contracting officer's decision partially terminating a contract for default for failure to deliver a quantity of valves. The parties have requested that this appeal be processed pursuant to Rule 11.

FINDINGS OF FACT

1. On 17 July 1990, the Government awarded a fixed-price supply contract for 223 valves to appellant. At award, the contract price was $89,133 and the delivery date was 14 December 1990. (R4, tab 1)

2. The contract incorporated FAR 52.249-8, entitled Default (Fixed Price Supply and Service) (APR 1984), by reference.

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That clause provides, in pertinent part, as follows:

(a)(1) The Government may, subject to paragraphs ... (d) below ... terminate this contract in whole or in part if the Contractor fails to—

(i) Deliver the supplies ... within the time specified ...;

* * *

(d) If the failure to perform is caused by the default of a subcontractor ... and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform ....

(R4, tab 1)

3. The contract did not contain a Progress Payments clause or an Advance Payment clause (R4, tab 1).

4. FAR 49.102(d) provides as follows:

(d) *Reinstatement of terminated contracts.* Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract ... if it has been determined in writing that—

(1) Circumstances clearly indicate a requirement for the terminated items; and

(2) Reinstatement is advantageous to the Government.

5. FAR 49.402-3, entitled "Procedure for default," provides, in pertinent part, as follows:

(c) Subdivision (a)(1)(i) [of the Default clause] ... covers situations when the contractor has defaulted by failure to make delivery of the supplies ... within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) below).

* * *

(e)(1) If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination....

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies ... and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

6. On 9 January 1991, appellant requested an extension of the delivery date from 14 December 1990 to 28 June 1991 in exchange for a $250 reduction of the contract price (R4, tab 7). Appellant did not allege any excusable causes for its default. The Government issued Modification P00001 granting the extension on 14 January 1991 (R4, tab 2).

7. On 26 August 1991, appellant requested an extension of the delivery date from 28 June 1991 to 31 October 1991 in exchange for a no-cost cancellation of an open purchase order (R4, tab 8). No excusable causes were offered in support of the request. The Government issued Modification P00002 granting that extension on 27 August 1991 (R4, tab 3).

8. On 28 January 1992, appellant requested an extension of the delivery date from 31 October 1991 to 24 April 1992 in exchange for a $250 reduction of the contract price (R4, tab 9). Appellant did not allege any excusable causes for its failure to meet the 31 October 1991 delivery date. The Government issued Modification A00001 extending the delivery date as requested on 17 March 1992 (R4, tab 10).

9. By 21 February 1992, appellant had delivered 150 of the 223 valves required by the contract (Complaint, tab 2).

10. After determining that the Government no longer needed the valves, the contracting officer asked appellant if it would agree to a no-cost cancellation (R4, tab 13). Appellant refused (R4, tab 14).

11. On 2 June 1992, Ms. Spradlin, a newly assigned contracting officer, issued a show

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cause notice to appellant in connection with the 24 April 1992 delivery date (R4, tab 15).

12. In reply, appellant requested an extension of the delivery date from 24 April 1992 to 31 July 1992 in exchange for a $250 reduction of the contract price (R4, tab 17). Appellant did not assert any excusable causes for its default. In her affidavit, Ms. Spradlin indicated that she extended the contract instead of terminating it out of concern that the Government might have waived the delivery date. (Spradlin Affidavit)

13. Ms. Spradlin issued Modification P00003 on 22 July 1992 extending the delivery date to 31 July 1992 (R4, tab 5).

14. Appellant did not deliver the 73 remaining valves by 31 July 1992 (R4, tab 6).

15. Ms. Spradlin's Memorandum of 10 August 1992 set forth the facts surrounding the default. Among other things, she indicated that there were 29 valves in stock, that there were no open purchase requests for the item and that the supplies were still required. The re-order point for the valves was -66. (R4, tab 22)

16. Ms. Spradlin terminated appellant's contract for default on 12 August 1992 without issuing a show cause notice (R4, tab 6).

17. On 12 August 1992, appellant forwarded a letter from its subcontractor to the Government which stated that the failure to deliver was "... due to incorrect machining with our outside vendor."

18. During a telephone conversation on 14 August 1992, appellant requested Ms. Spradlin to reinstate the contract on the basis that it could ship the valves within the week. Ms. Spradlin declined. (R4, tabs 26, 27)

19. Appellant timely appealed the termination and this appeal followed.

20. As of the filing of this appeal, the contracting officer has not issued a decision assessing reprocurement costs against appellant.

DECISION

Appellant argues that the default should be set aside because the contracting officer acted in bad faith, abused her discretion and failed to follow proper procedures in terminating the contract. In particular, appellant alleges that:

(1) the termination was not in the best interests of the Government;

(2) the contracting officer was not sufficiently familiar with the prior dealings between the parties to make the termination decision;

(3) the contracting officer did not follow the procedures set forth in FAR 49.402-3(f)(1)—(6);

(4) the contracting officer did not follow the proper procedures for reprocuring the valves;

(5) the contracting officer did not exercise discretion in making her decision as required by *Schlesinger v. United States* [12 CCF ¶ 81,097], 390 F.2d 702, 182 Ct.Cl. 571 (1968);

(6) The contracting officer abused her discretion by not reinstating the contract after the termination.

We uphold the termination for default. Each of appellant's arguments will be discussed below.

BAD FAITH

There is a well-established legal presumption that public officials act "conscientiously in the discharge of their duties." *Liebrach v. United States,* 147 Ct.Cl. 605, 612 (1959). In order to rebut that presumption, a contractor must present "well-nigh irrefragable proof" of bad faith. *Knotts v. United States,* 128 Ct.Cl. 489, 492, 121 F.Supp. 630, 631 (1954). Irrefragable proof has been equated with evidence of some specific intent to injure. For example, in *Knotts, supra,* evidence that a Government employee had been discharged so that her job could be given to a personal friend of the chief of the section was sufficient to render the discharge unlawful.

In this case, there is no evidence indicating that Ms. Spradlin's decision to terminate the contract was motivated by bad faith. Nothing in the record suggests that she terminated the contract to get rid of appellant, to give the contract to another contractor or to harm appellant financially, to name a few possibilities. There is no evidence of any personal animosity on the part of Ms. Spradlin towards appellant or any of its owners, officers or employees. *Cf. Darwin Construction Company, Inc. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593 (Fed. Cir. 1987). This argument is without merit.

BEST INTERESTS OF THE GOVERNMENT

Appellant argues that the termination was not in the best interests of the Government because Ms. Spradlin "put her own subjective beliefs ahead of the objective" in termi-

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nating the contract. Given appellant's poor performance on this contract, Ms. Spradlin reasonably concluded that termination was in the best interests of the Government. The contract required delivery of 223 valves five months after award. After failing to deliver by the original delivery date, appellant requested and received four extensions, extending the delivery schedule from five months to 22 months. At no time did appellant assert that its failure to deliver was excusable. As of 21 February 1992, appellant had delivered 150 of the 223 valves. Between 21 February 1992 and 31 July 1992, the final delivery date, appellant did not deliver any valves. Following termination, appellant indicated that it could deliver the remaining 73 valves by 24 August 1992. On balance, we conclude that appellant's ability to deliver the remaining valves by 24 August 1992 was highly questionable. In addition, the Government had some valves in stock, its need for the valves fluctuated and there were no pending purchase requests for the item at termination.

Appellant further alleges that Ms. Spradlin was not sufficiently knowledgeable about the prior dealings between the parties, particularly issuance of Modifications P00001, P00002 and A00001, to make the termination decision. At the outset, we note that even if she had had no prior involvement with the contract, she could have properly terminated the contract based upon her review of the files and the advice of her staff. However, the termination decision was not Ms. Spradlin's only involvement with this contract. She issued the 2 June 1992 show cause notice relating to appellant's failure to meet the 24 April 1992 delivery date, made the decision to extend the 24 April 1992 delivery date rather than terminate the contract and issued Modification P00003 extending the delivery date to 31 July 1992. We conclude that Ms. Spradlin was sufficiently knowledgeable to make the termination decision.

FAR 49.402-3(f)

Appellant alleges that Ms. Spradlin either failed to consider or inadequately considered the factors listed in FAR 49.402-3(f)(1)-(6). Contracting officers have considerable discretion in making the termination decision and the failure to consider one or more of these factors does not necessarily invalidate a default termination. *Ruffin's A-1 Contracting, Inc.*, ASBCA No. 38343, 90-3 BCA ¶ 23,243; *Lafayette Coal Company*, ASBCA No. 32174, 89-3 BCA ¶ 21,963. Ms. Spradlin considered all the factors either explicitly or implicitly with the exception of a portion of factor number six. We conclude that she adequately considered the factors listed in FAR 49.402-3. Each factor will be discussed individually below.

(1) *Contract, Applicable Laws and Regulations.* Appellant criticizes Ms. Spradlin's decision because she "considered only the Contract Delivery Date of July 31, 1992." Under paragraph (a)(1)(i) of the Default clause, the Government acquired the right to terminate the contract immediately upon appellant's failure to deliver on 31 July 1992. No other delivery date was relevant to her determination.

(2) *Contractor's Specific Failure and Excuses.* Appellant argues that the termination was improper because the Government failed to determine if there were excusable causes before terminating the contract. Under paragraph (a)(1)(i) of the Default clause, the Government is not required to issue a show cause notice before terminating a contract for failure to deliver. *Sermor, Inc.*, ASBCA 29046, 87-1 BCA ¶ 19,568. Although FAR 49.402-3(d)(1) recommends that the contracting officer contact the contractor before issuing an (a)(1)(i) termination where practicable, it is not required. In this case, Ms. Spradlin knew that the delivery schedule had been extended four times at appellant's request and that appellant had not made any deliveries between 21 February 1992 and 31 July 1992. She also knew that appellant had not asserted any excusable causes for its failure to meet the 31 July 1992 delivery date or any of the prior delivery dates in its response to the earlier show cause notice. In its brief, appellant does not argue that the default was excusable. We conclude that Ms. Spradlin acted appropriately in terminating the contract without issuing a show cause notice.

(3) *Availability from Other Sources.* Appellant finds fault with the termination because Ms. Spradlin did not check to see if the valves were available from other sources before terminating the contract. In her Memorandum, she indicated that the Government had some valves in stock and that there were no open purchase requests. The Rule 4 documents also reflect that the need for the item fluctuated. The contracting officer adequately considered this factor in making her decision.

(4) *Urgency of Need and Time Required to Obtain.* Appellant argues that the contracting officer did not consider this factor. Ms. Spradlin's Memorandum indicated that the Government had 29 valves in stock, that

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there were no open purchase requests and that the re-order point level was −66 valves. We conclude that the Government did not have an urgent need for the valves and could have obtained them from stock if necessary.

(5) *Essentiality of Contractor.* This was an $89,133 contract for 223 valves. Appellant was not essential to the Government acquisition program and the contracting officer's failure to include a statement to that effect in her Memorandum is without significance.

(6) *Guaranteed Loans, Progress Payments or Advance Payments.* The contract did not provide for advance payments or progress payments. Ms. Spradlin did not discuss guaranteed loans in her Memorandum.

Appellant cited *S.T. Research Corp.*, ASBCA No. 39600, 92-2 BCA ¶ 24,838, for the proposition that failure to consider the factors listed in FAR 49.402-3(f) constitutes an abuse of discretion. *S.T. Research* is not applicable here. The termination in *S.T. Research* was overturned because the Government had waived the delivery date. Here, the Government did not waive the delivery date. In *S.T. Research*, the contractor maintained "intensive efforts" to complete the work after the delivery date had passed from which the board concluded that the contractor was willing and able to perform. Appellant did not make "intensive efforts" to complete the contract either before or after the delivery date passed. The board criticized the contracting officer for not considering certain of the factors in terminating the *S.T. Research* contract, but the criticism was generated by the unique facts of that case, namely the contractor's demonstrated willingness and ability to perform. Those facts were not present here.

REPROCUREMENT

Appellant argues that the contracting officer failed to follow the proper procedures for reprocuring the valves. No contracting officer's decision has yet been issued assessing excess reprocurement costs against appellant. We do not have jurisdiction over this matter until such a decision is issued and appealed to the board.

EXERCISE OF DISCRETION

Citing *Schlesinger v. United States* [12 CCF ¶ 81,097], 390 F.2d 702, 182 Ct.Cl. 571 (1968), appellant argues that the termination was improper because the contracting officer "believed that her only option was to issue an immediate default termination." The record does not support this assertion. Ms. Spradlin issued a show cause notice in connection with appellant's failure to meet the 24 April 1992 delivery date and extended the delivery date to 31 July 1992. In her affidavit, she indicated that she extended the contract rather than terminate it because she was concerned that the Government might have waived the delivery date. The fact that there were only two days between Ms. Spradlin's termination Memorandum and the termination does not prove that she did not exercise discretion in terminating the contract. It more likely reflects appellant's long history of nonperformance Ms. Spradlin had no more reason to rely on the promised 24 August 1992 delivery date than on the earlier delivery dates appellant had predicted and failed to meet. We conclude that Ms. Spradlin knew that the contract could be extended, but chose to terminate it instead.

REINSTATEMENT

Citing the fact that it offered to deliver the valves by 24 August 1992, appellant argues that Ms. Spradlin abused her discretion by refusing to reinstate the contract pursuant to FAR 49.102(d)(2). As stated above, appellant's performance was so poor that it is difficult to see how reinstatement would have been advantageous to the Government. The length of time it took Ms. Spradlin to reach this decision is irrelevant.

The appeal is denied.

[¶ 26,411] Kimmins Contracting Corporation

ASBCA No. 44513, October 6, 1993. Contract No. F09650-89-C-0081.

Interpretation of Contracts—Electrical Work—Additional Wiring.—A building renovation contractor was not entitled to additional compensation for having to provide extra wiring to accommodate a relocated deionizer, even though it argued that government-furnished deionizer wiring was spliced and was not long enough for the relocation use, because the contract required the contractor to provide adequate electrical wiring for the government-furnished equipment. The contract did not positively represent that electrical

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wiring was sufficient for the entire deionizer relocation. The contract required the contractor to verify and site-check all dimensions and to provide wire, cable, and conduit for all government-furnished equipment. The contractor had the pre-bid opportunity to ascertain the spliced condition and length of the existing deionizer wiring and thus to determine the extent to which it would need to provide additional electrical wiring.

For the appellant: George R. Robinson, Vice President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Maria S. Kavouras and Michael F. Copley, Trial Attorneys.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: This appeal arises from the contracting officer's denial of appellant's claim for an alleged Government change in deionizer electrical connections. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. § § 601 *et seq.* Pursuant to Board Rule 11, the parties agreed to submit this appeal for decision on the record, consisting of the Rule 4(a) file, tabs 1-25; appellant's exhibits A-A through A-E; respondent's exhibits G-1 to G-65; and the affidavits of 29 April 1993 (respondent) and 7 May 1993 (appellant). Both parties submitted briefs. We decide entitlement only.

FINDINGS OF FACT

1. On 16 August 1989 the parties entered into firm fixed price contract F09650-89-C-0081 ("contract 81") for the repair and renovation of the Robins Air Force Base, GA, plating shop, building 142 (R4, tab 1).

2. Contract 81 incorporated by reference, *inter alia,* the FAR clauses 52.233-1 "Disputes" (APR 1984), 52.243-4 "Changes" (AUG 1987), and 52.245-2 "Government Property (Fixed Price Contracts)" (APR 1984), the last of which required the Government to deliver to the contractor:

> Government furnished property described in the ... specifications together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property

and which required the contractor, if the Government-furnished property (GFP) is received in a condition not suitable for its intended use, to notify the contracting officer and

> as directed by the Contracting Officer and at Government expense, either [to] repair, modify, or return or otherwise dispose [of such property].

(R4, tab 1)

3. Contract 81's specification Section 01652, ¶ 2.3.4, required "Re-Installation of Deionized Water Unit complete and operational." Section 01005, ¶ 7, GOVERNMENT-FURNISHED PROPERTY, stated:

> Existing equipment in service shall be removed and relocated. The following is a list of Government furnished property and approximate amount: *ITEM* Deionized Water Unit *QUANTITY* One Package—Existing

(R4, tab 1).

4. Specification Section 17X, "Deionized Water System Installation Water Refining Company, Inc. DIH-18 High Flow Deionizer" in pertinent part provided:

> ¶ 1.2 Separation of these Specifications into Divisions and Sections is for convenience only and is not intended to establish limits of work.
>
> ¶ 1.3 ... The Contractor shall furnish all appurtenances necessary to properly install the equipment and place it in operation.
>
> * * *
>
> ¶ 2.1 The contractor shall install the Deionized Water System provided by the Government in accordance with the attached installation, operation and maintenance manual. The Contractor shall install all parts of the system including all tanks, valves, piping and controls. The system shall be installed such that, after the utility connections are made, the system shall operate in accordance with the operation and maintenance manual.
>
> * * *
>
> ¶ 4.3 Electrical Work: Electrical equipment and wiring shall be in accordance with SECTION [16B]: ELECTRICAL WORK. Electrical characteristics shall be as indicated in the operation and maintenance manual ... any controls wiring required for controls and devices, but not shown on the electrical plans, shall be provided under this section.

(R4, tab 1, spec. § 17X).

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5. Specification Section 13, "INSTRUMENTATION TECHNICAL REQUIREMENTS," provided:

¶ 1.5 Examination of the site: The Contractor shall make a thorough examination of the site .... All dimensions shall be checked and verified by the Contractor at the site.

* * *

¶ 4.4 .... Before installing any wire or conduit, the Contractor shall obtain the exact equipment requirements and shall install wire, conduit, tubing, piping, valves, fittings, controls and other items of the correct size for the equipment actually installed.

* * *

¶ 7.5.1.2 Wiring shall be from terminal to terminal with no splices.

(R4, tab 1)

6. Specifications Section 16A, "GENERAL REQUIREMENTS, ELECTRICAL," provided:

¶ 10.2 Except as otherwise specifically noted, automatic-control wiring ... are not included in this Division [16, including Sections 16A-16E] of the specifications, but shall be furnished and installed under other sections of the specifications. Control wiring not shown on the Contract Drawings shall be furnished under the other sections of the specifications.

(R4, tab 1).

7. Specification Section 16B, "ELECTRICAL WORK," provided:

¶ 7.3 Conduit installation: ... Install conduit parallel with or at right angles to ceilings, walls, and structural members.

* * *

¶ 9.1 The contractor shall make connections to all Government-furnished equipment as indicated in the Contract Documents to make it operate as intended, including providing miscellaneous items such as plugs, receptacles, wire, cable, conduit, flexible conduit, and outlet boxes or fittings.

(R4, tab 1).

8. The deionizer operation and maintenance manual depicted by diagrams and described in written instructions the existing electrical wiring harnesses and plugs connecting the deionizer control panel, receptacles, valves, sensors and connectors. Neither that manual nor any contract 81 plan or drawing was an electrical elementary diagram or schematic; none specified deionizer wire lengths. (R4, tab 1, spec. § 17X, pp. 31, 33-35, 37, 39-42, 47 and 54; complaint & answer, ¶ ¶ 11, 12)

9. Respondent originally received the deionizer "as separate, unassembled component parts with the electrical cables unattached ... the electrical cables were in bundles." Respondent assembled and connected those parts, replacing some over the years, which resulted "in some splices in the existing cable." (Exh. G-62, ¶ ¶ 2-3)

10. Contract 81 drawings depicted (a) the existing GFP deionizer occupying a 6′ by 8 1/2′ space, with its neutralizing tank 20 feet, and the balance of parts 15 feet, from building 142's south wall (R4, tab 1, dwg. D-8) and (b) the relocated GFP deionizer occupying a 25.5′ by 7 1/2′ space with its neutralizing tank three feet, and the anion and cation tanks 25 to 28.5 feet, from building 142's south wall (R4, tab 1, dwgs. PR-3, PR-15).

11. At pre-bid site visits (a) on 19 April 1989, appellant's George Robinson saw the deionizer control wiring unplugged and coiled, with no evidence of splices; he brought no photographic equipment to the site (exh. A-E, ¶ ¶ 7, 9; exh. G-60 at 27; Robinson aff. of 7 May 1993, ¶ 2) and (b) on 18 May 1989, appellant's Robert Moody probably photographed the deionizer control wiring installed in "panduits" at right angles and parallel to the ceiling. (Keene aff. of 29 April 1993, ¶ 4, photo. 3; Robinson aff. of 7 May 1993, ¶ 5). The record contains no evidence that appellant on 19 April 1993 asked respondent to uncoil the electrical wiring to permit measuring its length, or on 18 May 1993 measured the length of that uncoiled and installed wiring.

12. Appellant's 19 September 1990 submittal, "Proposed Disconnect and Reconnect of Deionized Water System," to respondent sketched the relocated deionizer components "in the vicinity shown on Drawing PR-15" approximately at the inter-component dimensions shown on that drawing (exh. G-64).

13. Prior to 17 October 1990 appellant's electrical subcontractor W.H. Howell & Associates (WHH) requested as-built drawings of the deionizer electric control wiring from appellant and appellant requested such drawings from respondent. Respondent provided no such drawings and told appellant that such drawings did not exist. (Exh. A-A, ¶ 9-10; exh. A-D, ¶ 7)

14. On 15 or 16 October 1990 Dennis Keene, respondent's construction manager,

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inspected the deionizer with Robin Sauer, appellant's quality control manager. Keene's notes stated: "Showed him where units were in operation." On the next day Keene met with Sauer, Dean Carter, appellant's project engineer, and appellant's subcontractors Blue Ridge Mechanical (BRM) and WHH. William H. Howell saw many splices in the deionizer control wiring. According to appellant, Keene instructed appellant:

> to relocate the electrical wiring leaving it in tact [sic] as much as practical. The consensus ... was the system should be moved in as large of pieces as possible as there were no as-built drawings available for interconnection and/or elementary wiring diagrams .... WHH ... was instructed to disassemble only the minimum required.

(R4, tab 21; exh. A-A, ¶ 12; exh. A-B, ¶ 3; exh. A-D, ¶ ¶ 9-10; exh. G-60 at 27). According to Keene:

> [A]n agreement was reached between me, Kimmins, BRM, and WHH to relocate the [deionizer] system ... keeping the electrical wiring intact as much as practicable, provided the Contract specification were met. I stressed that even if the wire ... was reused, it had to be installed in accordance with Contract specifications.

(Exh. G-1, ¶ 5; R4, tabs 3, 4) Appellant's affiants do not deny Keene's statement, "provided the Contract specifications were met."

15. Appellant's 17 October 1990 letter proposed a deionizer relocation procedure to respondent. Its steps 3 and 9 were to disconnect the control and/or instrumentation wiring, to identify each wire prior to disconnection to assure proper reconnection, and to "relocate (if necessary) and reconnect all previously disconnected electrical connections including ... control/instrumentation wire restoring it to its previously wired configuration" (R4, tab 5).

16. Respondent's 19 October 1990 letter to appellant concurred with all 12 steps in appellant's 17 October letter except step 1, which is immaterial to this dispute (R4, tab 6).

17. Respondent turned over the deionizer to appellant on 19 or 22 October 1990 (R4, tabs 4, 6).

18. Appellant relocated the deionizer, including electrical wiring, between 22 and 25 October 1990 and successfully tested it in accordance with the operation and maintenance manual on 25 October 1990, after which it was available for Government use (exh. A-A, ¶ 13; exh. A-B, ¶ 5; exh. G-14 to G-24; R4, tabs 4, 12, 16).

19. On 25 October 1990 Dennis Keene observed deionizer wiring not in accordance with the specifications. On 27 October 1990 Keene told Robin Sauer that the deionizer wiring was not acceptable because the wires were not long enough for the relocated deionizer, had splices, and the panduit trays were lying on top of other components unsupported, and not at right angles. Keene's post-relocation photographs showed deionizer panduits installed at random angles. (R4, tabs 2, 4, 7; exh. G-1, ¶ ¶ 9-11; Keene aff. of 29 April 1993, ¶ ¶ 6-7, photos 14-15).

20. On 30 October 1990 the contracting officer directed appellant to replace existing deionizer electric wiring containing splices and to install all wires with panduit trays, firmly attached, rigidly supported, and routed using 90 degree angles. Appellant considered this to be a change order, as stated orally at the 30 October meeting and on 13 November 1990 in writing. (Exh. G-35, ¶ 45.10; R4, tab 8)

21. Government contract administrator Gene Lee's 28 November 1990 letter to appellant stated that the electrical portion of the relocated deionizer did not comply with specification § § 16A, ¶ ¶ 2.1, 5.2, 5.4 and 17X, ¶ 2.1 and directed appellant to correct noted deficiencies (R4, tab 10).

22. Appellant replaced the deionizer wiring between 3 and 5 December 1990 with Government-furnished special cable (exh. G-42 to G-47).

23. Appellant's 18 December 1990 letter to Gene Lee asserted that the deionizer "was relocated and wired in exactly the same state as it was turned over to KCC. This was agreed to in writing by the Government" (R4, tab 11).

24. Keene's internal memorandum stated that as relocated, the distance from the control box to each control system was increased by several feet; appellant reused existing wiring to connect the control box to each valve or sensor; and the wiring was too short to be installed properly (R4, tab 12).

25. Appellant's 22 January 1991 letter to respondent requested $1,444.34 for installing the deionizer "electrical work a second time," which it said was a constructive change (R4, tab 18).

26. The contracting officer's 25 January 1991 letter to appellant stated that (a) the Government interpreted appellant's 17 October 1990 proposal to restore the deionizer "to its previously wired configuration" to "mean arrangement of connections, not physical condition of the wire"; (b) appel-

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lant's "reconnection of control wiring was not identical with that existing prior to the" deionizer's transfer to appellant; (c) respondent's 19 October 1990 concurrence in appellant's 17 October 1990 procedures "does not alter Kimmins [sic] requirement to comply with the specifications" and (d) appellant's claim was without merit (R4, tab 16).

27. Appellant's 9 January 1992 letter to respondent sought $1,959.68 for replacing "the existing panduit and existing wiring" (R4, tab 18).

28. The contracting officer's 24 February 1992 final decision denied appellant's deionizer rewiring claim (R4, tab 25; complaint & answer, ¶ 23).

29. On 8 May 1992 appellant timely filed its notice of appeal of the foregoing contracting officer's final decision (complaint & answer, ¶ 24).

DECISION

Appellant argues that the deionizer wiring was Government-furnished property which was spliced and not long enough for the relocated use, except when installed at odd angles over deionizer components, and that its only duty was to install GFP wiring "as is," not to provide and install the specified unspliced wiring, supported, and parallel with or at right angles to the structure. Appellant tacitly abandoned its original "changed conditions" claim and now asserts four grounds for entitlement: (1) the GFP wiring was unsuitable for its intended use, of which appellant gave prompt notice to the Government; (2) respondent did not furnish reasonably required "related data," *viz.*, as-built electrical wiring drawings; (3) the specification was defective because the GFP deionizer electrical wires were too short; and (4) respondent's order to replace spliced electrical wiring installed at random angles was a constructive change.

Appellant has the burden of proving unsuitable GFP, *Dayron Corporation,* ASBCA No. 24919, 84-1 BCA ¶ 17,213 at 85,710, or defective specifications, *Celesco Industries, Inc.,* ASBCA No. 21928, 81-2 BCA ¶ 15,260 at 75,547, or constructive change by Government order to replace wires, *Jack Austin & Associates,* ASBCA Nos. 20574 *et al.,* 78-2 BCA ¶ 13,500 at 66,106.

Appellant's contention that the deionizer electrical wiring was GFP is correct (finding 9). However, it does not follow that appellant had no duty to provide electrical wiring. Contract 81 did not positively represent that GFP electrical wiring was sufficient for the entire deionizer relocation. Contract 81 required appellant to verify and site-check all dimensions and to provide "wire, cable, conduit" for "all Government-furnished equipment" (findings 5, 7). To the extent that unspliced GFP electrical wiring was insufficient to relocate the deionizer, contract 81 required appellant to provide electrical wiring conforming to the specifications.

Appellant argues that to relocate the deionizer it needed to have as-built wiring drawings. Appellant requested as-built electrical wiring drawings from respondent, but was told that none existed (finding 13).

Appellant knew that the relocated deionizer space was larger than its former space and the deionizer components were considerably farther apart (findings 10, 12) and contract 81 required it to provide and install wire, cable and conduit for Government-furnished equipment (findings 5, 7). From these facts one can deduce that the GFP electrical wiring was not sufficient for the relocated deionizer. On its 19 April 1989 pre-bid site visit appellant did not see the length of, and splices in, the "coiled" GFP wiring (finding 11(a)). At the 18 May 1989 pre-bid site visit appellant photographed the uncoiled, deionizer wiring installed in panduits at right angles and parallel to the ceiling (finding 11(b)). Appellant did not seek to uncoil the wiring to permit its measurement on 19 April 1989 or to measure it as uncoiled and installed on 18 May 1989. Appellant needed no as-built electrical wiring drawings to determine the spliced condition and lengths of GFP wiring, and suffered no harm by not obtaining them. Appellant had the pre-bid opportunity to ascertain the spliced condition and length of the existing deionizer wiring and thus to determine the extent to which it would need to provide additional electrical wiring. Appellant's arguments that the GFP deionizer wiring was defectively specified and unsuitable for its intended use are unsound.

Appellant argues that on 16 or 17 October 1990 Dennis Keene instructed appellant to leave the electrical wiring intact as much as possible (finding 14), and respondent concurred in writing with its 17 October 1990 procedure to "relocate (if necessary) and reconnect all previously disconnected electrical connections including ... control ... wiring restoring it to its previously wired configuration" (findings 15, 16). Thus, appellant tacitly argues, respondent nullified the contract 81 duty to provide and install wiring without splices and parallel with or at right angles to the building structure.

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Keene's statement "to relocate the system ... keeping the electrical wiring intact as much as practicable" did not represent that all GFP electrical wiring could be relocated intact, that splices were acceptable and that no additional wiring would be needed. His statement that "if the wire ... was reused, it had to be installed in accordance with Contract specifications" was unrebutted. (Finding 14) Appellant's procedure to restore the electrical wiring "to its previously wired configuration" respondent reasonably interpreted to "mean arrangement of connections, not physical condition of the wire" (findings 15, 26(a)). The record contains no special definition of configuration. "Configuration" means the "relative disposition or arrangement of parts." (Websters's Third International Dictionary Unabridged, 1971 Ed.) Respondent reasonably understood "previously wired configuration" to mean previously wired connections parallel with or at right angles to the building structure, as appellant had seen the wiring on 18 May 1989. Neither "keeping the electrical wiring intact as much as practicable" nor "to its previously wired configuration" could reasonably have meant that the GFP electrical wiring alone, installed at random angles without proper support, would satisfy contract 81's wiring requirements.

We hold that respondent did not waive the specification requirements for conforming electrical wiring, and that appellant failed to sustain its burden of proof on its claim.

We deny the appeal.

[¶ 26,412] Compania Petrolera Nacional

ASBCA Nos. 43041, 43839, 43887, September 30, 1993. Contract No. DLA600-90-D-1003.

Foreign Acquisitions—Currency Used for Payment—Exchange Rate.—The Honduran Central Bank's issuance of a new currency exchange rate triggered a Price Adjustment clause that was correlated to changes in the Bank's officially published rate, although the new rate did not entirely supersede the existing official rate, because the new rate was issued in the Bank's official capacity and was applicable to the transactions contemplated by the contract. During the term of a contract with a Honduran fuel supplier, a new Honduran government came to power and authorized the Central Bank to establish a new interbank currency exchange rate that would coexist with the official exchange rate. The new rate was intended to terminate a longstanding government policy of unofficially subsidizing petroleum prices. The interbank rate was consistent with the real value of the Honduran currency used for virtually all commercial transactions. The preexisting official rate was retained only for the purpose of paying the Honduran national debt.

For the appellant: Pillsbury, Madison & Sutro, Washington, D.C., by Dale Church, Howard Lipper, and Julia A. Soyars-Berman. For the government: Howard M. Kaufer and Cynthia E. Segal, Defense Fuel Supply Center (DLA), Alexandria, Virginia.

Before DICUS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: These appeals arise from a contract for the supply of fuel in Honduras. The disputes center on whether certain actions by the government of Honduras changed the currency exchange rate. The parties have elected to proceed under Rule 11.

FINDINGS OF FACT—GENERAL

The Contract

1. Contract No. DLA600-90-D-1003 was awarded to Compania Petrolera Nacional (hereinafter sometimes "COPENA") on 28 December 1989. The contract incorporated the RFP and called for delivery of fuel through January 1991. The estimated dollar value of the contract was $13,748,106 (R4, tabs 1, 3).

2. Prices in the contract were in dollars for each of 29 line items which called for an estimated quantity of fuel at specific locations with numbered zones. The contract included the clauses Economic Price Adjustment (DFSC 1986 May) and Upward Ceilings on Economic Price Adjustment (DFSC 1984 APR), which limited increases to 40 percent of the base price. Part C of the former clause provides as follows:

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PART C

(a) The prices payable under this contract for listed items shall be the base price for the listed item, increased or decreased by the same number of cents, or fraction thereof, as measured in U.S. dollars as the increase or decrease in the price reported in the most recent official publication of the Acuerdo/Decredo up to and including the dates of delivery. In order to calculate the price escalation/deescalation authorized under this clause the Official Publication will be adjusted to reflect the currency rate between the U.S. dollars and the applicable countries' currency rate in effect on the date of the change.

(b) If any of the reference price tabulations requires quantity conversions for economic price adjustment provisions, then the conversion factors specified in the clause entitled EVALUATION OF BUNKER AND BULK OFFERS, shall apply, unless otherwise specified in the schedule.

(c) For administrative purposes only, the award price will be the base price as adjusted to reflect reference price changes to the date of award.

REFERENCE PRICE TABULATION

Item No. (listed items)	Name of publication	Heading under which reference price is published and name of product	Location where reference price is applicable	Method of delivery applicable to the reference price	Reference price as of _____ (date) (exclude all taxes)
Jet Fuel	Acuerdo No. 519-86 dated 15 Jul 86				
Diesel Fuel	Acuerdo No. 198-86 dated 12 Mar 86				
Gasoline	Acuerdo No. 198-86 dated 12 Mar 86				

All fuel items in Honduras have their prices controlled by government decree (Acuerdo) issued by the Office of the Department of Economy and Commerce of the Republic of Honduras. The following "Acuerdos" are in effect:

Acuerdo No. 198-86 dated 12 Mar 86 effective 15 Mar 86 established the maximum sales prices for all fuel items by product, by zone of the country, and by type of seller. This Acuerdo was amended by Acuerdo No. 519-86 dated 15 July 86 effective on 1 Aug 86 which changed the price of the Av-Jet fuel only.

(d) When there is a change in the Acuerdo/Decredo the equation to escalate/deescalate the reference price is as follows:

Subtract the old Acuerdo/Decredo from the new Acuerdo/Decredo to find the change in the Acuerdo/Decredo prices. The change in the Acuerdo/Decredo divided by the applicable exchange rate in effect at the time of the change in the Acuerdo/Decredo equals adjustment in the Acuerdo/Decredo. The adjustment plus the current unit price equals the new unit price. In the event a simultaneous change occurs in both the Acuerdo/Decredo and exchange rate the adjustment affecting the exchange rate shall be computed first and then the resultant new unit price shall be used as the current unit price in calculating (the) new reference price.

(R4, tab 1)

3. The zones in the contract corresponded with zones in the referenced Acuerdos. The Acuerdos established maximum prices for various fuels in each of seven zones (R4, tabs 3, 65).

4. The price of fuel stated in the contract was based on an exchange rate of 2.00 Honduran Lempiras ("L.2.00") to 1.00 United States dollar ("$1.00") pursuant to clause I162.02, which provides:

I162.02 PAYMENTS—REVALUATION (DFSC 1986 MAY)

(a) The unit price in this contract is expressed in United States currency based on a rate of exchange of dlrs. 1.00 US dollar to *2.00 HONDURAN LEMPIRA*. Unless otherwise specified in the contract schedule, payment is in U.S. currency.

(b) However, with respect to payments in U.S. currency, in the event there is a fluctuation in the rate of exchange, a contract modification will be issued to adjust the unit price expressed in U.S. currency, by the full amount of the change, effective as to deliveries made on and after the date of such change in the exchange rate.

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(c) The modification will adjust the unit price expressed in U.S. currency to reflect the changed cost expressed in U.S. Dollars to equal the changed *HONDURAN LEMPIRA* based on the official publication of the exchange rate as published *by the BANCO CENTRAL DE HONDURAS.*

(d) When there is escalation/deescalation in the exchange rate the equation to escalate/deescalate the prices is as follows:

Convert the current unit price to desired currency by multiplying by the current exchange rate. Divide the converted currency by the new exchange rate, which will then equal the new unit price in U.S. dollars. In the event a simultaneous change occurs in both the Acuerdo and Exchange Rate the adjustment affecting the exchange rate shall be computed first and then the resultant new unit price shall be used as the current unit price in calculating the new reference price.

(R4, tab 1)

5. In addition to incorporating the RFP provisions, the contract contains *NOTES* in which specific mention is made of certain provisions. The following is included with respect to clause I162.02:

Clause I162.02: PAYMENTS—REVALUATION:

Payments will be made in U.S. currency. Any change in the exchange rate of two (2) Honduran Lempira to one (1) U.S. Dollar as published by the Banco Central de Honduras will be used to revaluate payments following the provisions of this clause.

(R4, tab 3)

Honduran Reform

6. On 3 March 1990 the government of Honduras issued Legislative Decree No. 18-90 (hereinafter "the Decree"). The Decree provides in relevant part:

LEGISLATIVE ACTION

"DECRETO" NUMBER 18-90

The National Congress

* * *

CONSIDERING: That it is of national convenience to introduce policies adjusting the structure of Public Finances, with the purpose of vitalizing the national economy, increasing the production and productivity of the agricultural, craft, and industrial sectors and consequently be able to attend effectively the areas of governmental action priority such as health, education and employment.

CONSIDERING: That it is equally in the national interest to reorganize the financial affairs of the State with the purpose of reducing the fiscal deficit which is currently impacting the Honduran economy negatively through a sharp inflationary pressure and a deterioration of the purchasing power of the Lempira. At the same time, it is pertinent to obtain a better administration and grasp of the fiscal resources of the State.

* * *

THEREFORE,

DECREES:

The following:

* * *

SECTION II

CUSTOMS VALUATION OF MERCHANDISE

ARTICLE 3.—For the application of the tariff duties contained in the Tariffs on Importation and Exportation and Other Taxes, the customs value will be that which results from converting into Lempiras the value expressed in foreign currency applying a valuation factor, based on the rate of interbank exchange, which the Banco Central de Honduras will periodically establish. The rate of the interbank exchange for currency, which will be valid for the period of time which the Banco Central de Honduras deems necessary, will be determined as a function of offer and demand, within the standards which the Directorate of the Banco Central de Honduras establishes, to the Banco will also correspond the determination of the sources and uses of the currency which will be eligible to operate in this interbank market.

(R4, tab 65)

7. Although an international market and other unofficial markets existed in which lempiras were exchanged at a rate of about L. 4.00 to $1.00, prior to the Decree the only exchange rate published by the Banco Central de Honduras ("the Central Bank") was L. 2.00 to $1.00 (R4, tabs 47, 66; Robinson deposition (Rob. dep.), at 11, 16). The Central Bank issued two resolutions to be effective 3 March 1990, the same date as the Decree. The first, Resolution No. 128-3/90, authorized the interbank market of foreign currency as follows:

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Secretariat of the Directorate
March 5, 1990
NATIONAL BANKING SYSTEM
ALL THE REPUBLIC

Circular D-06/90

The Directorate of the Banco Central of Honduras, based on the Articles 342, third paragraph of the Constitution of the Republic; 2, 6, 16, 29, 30, 33 and 36 of the Law of the Banco Central of Honduras and Article 3 of Decreto No. 18-90 dated March 3, 1990, during its meeting of March 3, 1990, by means of Resolution No. 128-3/90, resolves:

1. To authorize the Banks of the National System, so that they may, at their own risk, operate in an interbank market of foreign currency, which will be subject to the following conditions:

a) The purchase price of the foreign currency in this market, will be determined by the banks depending on offer and demand, within a range which will not be superior nor inferior to 2.5% with respect to the Customs Valuation Factor, established by the Directorate of the Banco Central of Honduras.

Each Bank will exhibit for public viewing in their establishments, the purchase and selling prices of the day and these will apply to all.

The Banco Central of Honduras will publish on a weekly basis the averages of purchases and sales of each bank corresponding to the previous week.

b) Through the interbank market will be funneled:

i) Currency received by the Private Sector originating from exports of goods and services, including tourism, effective as of the date of the present Resolution. In the case of exports of goods, the Banks will require presentation of the corresponding export policy, which specifies the amount to be paid for the Temporary Tax on the Extraordinary Profit From Exports. The Banks will act as collectors of this tax according to a special regulation.

ii) Foreign currency originating from direct foreign investment and other capital income to the Private Sector.

iii) Foreign currency received by the Private Sector from external debt or from overseas transfers.

iv) Remittances from relatives or foreign currency which for any other reason individuals or private entities established in this country may receive.

c) The interbank market will handle:

i) Foreign currency for payment of imports of goods, after presentation of import permits issued by the Banco Central de Honduras.

ii) Foreign currency needed for travel expenses, education, health and other personal expenses in sums no greater than US $3,000.00.

iii) Foreign currency in amounts greater than US $3,000.00, which may be required by the Private Sector for repatriating investments, remitting profits, servicing the external debt not eligible for conversion and other overseas transfers; as long as the interested party presents an authorizing voucher from the Banco Central de Honduras.

2. Revoke all resolutions related to exchange matters which this directorate may have issued which may be opposed to the measures adopted by means of the present Resolution.

3. This Resolution will become effective starting at the time in which Decree 18-90 of the date of March 3 of one thousand nine hundred and ninety becomes effective.

(R4, tab 65)

8. Resolution No. 129-3-90 provides:

The Directorate of the Central Bank of Honduras, based on Article 342, paragraph three of the Constitution of the Republic; 2, 6, 16, 29, 30, 33 and 36 of the law of the Central Bank of Honduras and based on section a) of number 1) of the resolution No. 128-3/90 dated March 3, 1990, in session of March 3, 1990, by resolution No. 129-3/90, resolves:

1. To establish at Four Lempiras (L4.00) for One United States Dollar (US$1.00), the Customs Valuation Factor.

2. This value will be revised periodically by this directorate to adjust it to the price of currency in the inter-bank market and the evolution of the principal macroeconomic indicators of the country.

3. This resolution will enter into effect starting with the effective date of decree No. 18-90, dated March 3, 1990.

(R4, tab 15)

9. Thereafter, the Customs Valuation Factor relative to $1.00 was revised several times by the Central Bank in the amounts and with the effective dates as follows: 25

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May 1990, L. 4.20; 15 October 1990, L. 5.50; 19 November 1990, L. 5.40; 24 December 1990, L. 5.30 (R4, tabs 15, 27, 65, 67, 68).

10. The Honduran government published a document titled "Economic Reform Program Summary" which provides under "Exchange Rate Reform:"

EXCHANGE RATE REFORM

The GOH has enacted a sweeping reform of the exchange rate regime, the centerpiece of which is the clear decision to recognize the realities of the exchange rate situation. The Central Bank of Honduras (BCH) has adopted a sliding peg system of currency valuation, initially setting the domestic value of the US Dollar at 4 Lempiras (referred to as the custom valuation rate). This parity will be reviewed by the Board of Directors of the Central Bank of Honduras from time to time, in the light of the evolution of current economic conditions. Under the new system, commercial banks will be allowed to conduct foreign exchange transactions, except those related to official foreign indebtedness, within a two and a half percent band around the custom valuation rate.

The actual exchange rate will be a weighted average of the rates of all foreign exchange transactions carried out within the commercial banking system, although as already mentioned, the BCH will retain the right to vary the custom valuation rate in accordance with changing macroeconomic conditions. This basically means that the BCH will increase the rate if the current value proves too low to attract a large proportion of the export earnings currently being held outside the commercial banking system.

Each week the commercial banks will sell a given proportion of their dollar balances to the Central Bank at the free interbank exchange rate. The Foreign Exchange Option Certificates (CETRA) and the self-financing system for imports have been abrogated. Henceforth, all types of imports will be financed through foreign exchange transactions conducted in the interbank foreign exchange network, signifying an end to the long-standing policy of implicit and hidden subsidization of petroleum, basic grains, industrial inputs, and other key imports. Once properly functioning, the revamped foreign exchange regime should serve as: (1) an important stimulus for export production, and (2) an effective mechanism for rationalizing import demand.

(R4, tab 61)

11. Although the L. 2.00 to $1.00 exchange rate was never abolished, the record establishes, and we find, only two uses for that rate. It was used for purchase of dollars to pay the Honduran national debt and, until November 1990, in the pricing of international airline tickets (R4, tab 17; resp. exh. 1; 43887 R4, tab 7). According to the Central Bank's vice president, the interbank foreign currency exchange authorized by Central Bank Resolution No. 128-3/90 was "used to liquidate transactions for goods, services, and movement of foreign capital in general" (R4, tab 32; *see also* finding 26, *infra*).

Fuel Prices

12. On 28 March 1990 Acuerdo No. 120-90 was issued revising maximum fuel prices upward with an effective date of 10 April 1990. It provides in part:

SECRETARY OF THE ECONOMY AND COMMERCE

REPUBLIC OF HONDURAS

ACUERDO NO. 120-90

Tegucigalpa, County Seat of the Central District, 28 March of 1990.

THE PRESIDENT OF THE REPUBLIC

* * *

CONSIDERING: That by means of Legislative Decree No. 18-90 of 3 March 1990, published in the official newspaper "La Gaceta" on 12 March 1990, taxes were amended for the import of petroleum and its by-products, its form of customs valuation, and the tax on production and consumption.

CONSIDERING: That the Directorate of the Central Bank of Honduras by means of Resolution Nos. 128 and 129 dated 03 March 1990, published in the official newspaper "La Gaceta" on 13 March 1990, determined to approve the operations of the foreign exchange Interbank Market and established at four lempiras (Lps 4.00) for one dollar of the United States of America (US$1.00), the Customs Valuation Factor.

CONSIDERING: That the Customs Valuation Factor will be revised periodically by the Directorate of the Central Bank of Honduras in order to adjust it to the price

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of currency in the Interbank Exchange Market.

CONSIDERING: That in accordance with the Legislative Decree No. 94 of 18 May 1983; Decree No. 41 of 29 May 1989 and its Regulations and Agreement No. 472-89 of 26 December 1989, the Executive Power is authorized to regulate the internal marketing of the products derived from petroleum.

THEREFORE:

* * *

FIRST:

* * *

SECOND: The prices established in the previous Article will be adjusted periodically when the price of the Currency in the Interbank Market, the Customs Valuation Factor, and the International Prices of Imported Petroleum and Fuel products change from the initial levels they are established at, which served as the basis for fixing the sales price of the fuel products of the fuels during the same period. The Petroleum Administrative Commission through the Offices of Economy and Commerce, will proceed through Executive "Acuerdo" to make an adjustment to the domestic sales prices, which will permit a compensation of the differences in the course of the following period.

(R4, tab 65)

13. Subsequent Acuerdos changed the price of fuel in 1990. Acuerdo No. 557-90 cited the Persian Gulf conflict as the cause of price increases (R4, tab 18). Acuerdo No. 626-90 increased prices due to freight rates (R4, tab 25). Acuerdo No. 666-90 decreased prices due to a reduction of petroleum prices in the international market (R4, tab 28). Both Acuerdo No. 557-90 and No. 666-90 contained Article 2 as in No. 120-90 (R4, tabs 18, 28, 65). By letter of 11 September 1992 the Secretary of the Honduran Secretariat of Economy and Commerce explained the foregoing price changes:

Responding to your fax received on the 11th of September of the current year regarding wanting to know the factors which affected the modifications to the prices of the Products Derived from Petroleum, on the dates of the 10th of April/90 (Acuerdo No. 120-90) and the 4th of October/90 (Acuerdo No. 557-90), 25th of November 1990 (Acuerdo No. 666-90) respectively. In relation to the preceding, I notify you as follows:

1. The first increase in prices of the Products Derived from Petroleum occurred on the 10th of April of 1990 (Acuerdo No. 129-90), as a consequence of the application by the Government of the Republic of the "Law of Structural Order of the Economy," as stated in Decreto No. 18-90 of the 12th of March of 1990, which consequently modified the Interbank Rate and the Customs Valuation Factor from Lps. 2.00 to Lps. 4.00 per dollar.

2. The second increase as stated in Acuerdo No. 557-90 occurred on the 4th of October of 1990 as a result of the crisis which developed in the Persian Gulf which consequently affected the price of petroleum in the International Market.

3. Through Acuerdo No. 666-90 of the 25th of November of 1990, the Government of the Republic reduced the price of products derived from petroleum due to a decrease in the price of Petroleum in the International Market.

(R4, tab 62)

ASBCA No. 43041

14. By letter of 16 April 1990 appellant advised respondent of Acuerdo No. 120-90. The letter, which enclosed a copy of the Acuerdo, pointed out that jet and diesel fuel had increased more than the 40% permitted by the contract. The letter concluded:

Legislative decree No. 18-90 dated March 3, 1990, and the Honduran Central Bank's resolutions Nos. 128 and 129 of March 3, 1990, effective March 13, 1990, mentioned on paragraphs 2 and 3 of "Acuerdo No. 120-90" revised, on all petroleum products, the airport duties, consumption and production taxes and, for purposes of assessing customs duties only, established a rate of exchange of four Honduran Lempiras to one U.S. Dollar, this does not however, in any way, alter the official exchange rate of two lempiras to one U.S. Dollar on which subject Contract is based.

(R4, tab 5) By separate letter of 16 April 1990 appellant provided the line item price changes (R4, tab 6).

15. Appellant learned of additional charges for the Petroleum Adjustment Fund and Consumption Tax not addressed in Acuerdo No. 120-90 and sent a letter dated 18 April 1990 to respondent advising that the prices previously provided were not accurate (R4, tab 7). By separate letter of 18 April 1990 appellant provided a copy of the Decree to respondent (R4, tab 8). Two letters dated 19 April 1990 followed outlining the

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new prices (R4, tabs 9, 10). This exchange culminated in appellant's request for an increase in the ceiling to 107 percent which was granted effective 10 April 1990, along with the increase in prices, by Modification P00008 (R4, tabs 11, 12).

16. Exxon Company, another fuel contractor operating in Honduras, sent the following letter dated 25 June 1990 to respondent:

> The purpose of this letter is to formally advise DFSC of several changes in Honduras that affect the prices payable under the subject contract. The first change, covered by Acuerdo 18/90 and effective March 12, 1990 affected the official exchange rate—from 2 Lemperas to 1 USD to 4 Lemperas [sic] to 1 USD, and the taxes, duties and fees payable under the contract.
>
> Effective April 10, Acuerdos 519/86 and 198/86 were replaced by Acuerdo 120/90. At the same time, the Honduran Government issued Resolutions 197/90 and 207/90 affecting fees payable to the Government. Lastly, by Resolution 291-5/90, effective June 1, 1990, the exchange rate changed again to 4.2 Lemperas [sic] to 1 USD.

(R4, tab 14) Thereafter, Exxon advised respondent of further changes in the exchange rate and the resulting changes in Exxon's fuel prices (R4, tab 14).

17. In September 1990 respondent obtained from the United States Department of State copies of Honduran Central Bank Resolutions 128-3/90 and 129-3/90 (R4, tab 15; *see* findings 7, 8). In a 19 September 1990 telephone conversation with appellant the contracting officer raised the issue of the applicability of the Resolutions to the contract. Appellant agreed to obtain from the Central Bank a statement confirming that the official rate of L. 2.00 to $1.00 had not changed, while asserting that, if the exchange rate had been changed, refunds would be forthcoming (R4, tab 16). However, in a 26 September 1990 telephone conversation appellant stated the Central Bank would not provide a document on the exchange rate. Another bank provided a statement that the 2 to 1 rate continued to be the official rate, but was used only for "the purchase of U.S. Dollars destined to pay capital and interest of the Honduran public external debt." (R4, tabs 16, 17)

18. Modification No. P00013, issued 2 November 1990, revised the contract prices retroactive to 10 April 1990 to reflect the rate of exchange between Honduran and U.S. currency effected by Central Bank resolutions 129-3/90 (10 April 1990 to 25 May 1990), 291-5/90 (25 May 1990 to 4 October 1990), and 604-10/90 (post 15 October 1990), and Acuerdos 557-90 and 560-90. The contract amount was reduced by $2,873,465 effective 15 October 1990 (R4, tab 21).

19. By letter of 15 November 1990 appellant refused to accept Modification No. P00013, "except for those based on an exchange rate of 5.50 to one according to which, we have been invoicing since the implementation of the Honduran Central Bank's Resolution 604-10/90 of October 11, 1990, which pairs the Bank's rate of currency exchange to the customs' value of Imports and Exports ... (and) is the only Official Publication which has modified the currency exchange rate ...." (R4, tab 23).

20. The contracting officer replied in a 28 November 1990 letter in which he explained that none of the Central Bank Resolutions state an official rate of exchange for Honduras, and that the "confusion of exact terminology" has led respondent to interpret the Resolutions as "in fact a change in the exchange rate, although the resolution does not specifically use that terminology." He also noted that other contractors and Government officials use the new rates (R4, tab 24).

21. After Modification No. P00014 revised prices further in accordance with Resolution No. 694-11/90 and Acuerdo Nos. 626-90 and 666-90, the contracting officer sent a letter dated 4 December 1990 to appellant demanding payment of $5,482,425.33 for overpayments made between 10 April 1990 and 15 October 1990. The overpayments were attributed to payments made during the referenced period under the L. 2.00 to $1.00 exchange rate (R4, tabs 29, 30).

22. By letter of 10 December 1990 appellant transmitted a statement of the Central Bank confirming that the "official exchange rate is TWO LEMPIRAS FOR EACH U.S. DOLLAR (L 2.00 × US $1.00), inasmuch as the same has not been modified according to the procedure established in Article 32 of the Law of the Central Bank of Honduras." The statement also confirmed that the then current L. 5.40 to $1.00) interbank exchange rate "is used to liquidate transactions for goods, services, and movement of foreign capital in general." (R4, tab 31) Thereafter, in a letter of 27 December 1990 appellant asserted that its practice of invoicing in accordance with Modification Nos. P00013 and P00015 does not imply acceptance of the prices as the exchange rate had not changed (R4, tab 33). This signalled a retreat from appellant's position in its 15 November 1990 letter (*see* finding 19).

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23. The contracting officer notified appellant that he would consider the Central Bank statement (R4, tab 35). An affidavit from the Central Bank affirming the content of the 10 December 1990 statement (finding 22) was forwarded by appellant on 8 January 1991 (R4, tab 36). Thereafter the contracting officer contacted the State Department for advice and, after receiving support for his position that the L. 2.00 to $1.00 rate was only applicable to Honduran external debt, issued a final decision demanding $5,471,425.35 on 22 March 1991 (R4, tabs 38—40). COMPENA filed an appeal on 11 June 1991 (R4, tab 41).

ASBCA No. 43839

24. Appellant submitted a certified claim on 4 September 1991 in which $3,277,292.21 was claimed for underpayments based on an allegedly incorrect interpretation of the exchange rate, $1,578,499.64 for improper withholding of payments, $311.17 for underpayment on invoices 1454 and 1472, $2,141.17 for deductions on invoices 1428 ($1.309.27) and 1446 ($831.90), and $1,750.00 for damage to a vehicle. The total claim was $4,859,994.19 (R4, tab 43). The contracting officer denied the claims for $3,277,292.21 and $1,578,499.64. He granted the claims under invoices 1428, 1446, and 1454 after adjustments for the exchange rate, and denied the claim under 1472. The claim for vehicle damage, which was also denied by the contracting officer, has been withdrawn (R4, tabs 44, 80).

25. COMPENA filed its appeal on 2 December 1991. The appeal does not include the denial under invoice 1472 (R4, tab 45).

ASBCA No. 43887

26. In a 5 April 1991 letter the contracting officer demanded payment of appellant in the amount of $1,372,075.77 for tax exoneration credits (43887 R4, tab 5). Appellant responded on 9 July 1991, pointing out that certain tax credits had been taken (43887 R4, tab 6). Appellant followed up with a letter of 17 July 1991 forwarding a letter from the Central Bank asserting that the L. 2.00 to $1.00 exchange rate is the official rate since it has not been modified under Article 32 of the Honduran Central Bank's Law. However, the Central Bank conceded the rate is used only for "the payment of conversion operations of the external debt" and that the interbank rate is used for "liquidating transactions of goods, services, and movements of external capital in general." (43887 R4, tab 7)

27. After further explanation a final decision was issued demanding $1,529,310.50 for uncollected tax exoneration credits (43887 R4, tabs 8, 9). COMPENA filed an appeal on 13 December 1991 (43887 R4, tab 11). Appellant does not dispute respondent's entitlement to tax credits. It does, however, contest the amounts, which are dependent on the applicable exchange rate (app. br. at 18).

DECISION

The parties are in agreement that the only remaining issue under the claims in ASBCA Nos. 43041 and 43887 is whether the exchange rate between Honduran and United States currency applicable to the contract changed during performance. As the exchange rate issue is at the heart of ASBCA No. 43041, only that appeal will be addressed specifically.

In simplest terms, appellant argues that the L. 2.00 to $1.00 exchange rate never changed and, under the applicable contract terms, must be used to establish contract prices. Respondent argues that the issuance of the Central Bank resolutions constitutes a change under clause I162.02 notwithstanding the continued existence of the L. 2.00 to $1.00 rate. Although the parties interpret events differently, the essential facts are not in dispute.

Briefly stated, in 1990 the new government of Honduras by means of the Decree gave the Central Bank authority to establish an interbank currency exchange rate based on the Customs Valuation Factor without abolishing or directly changing the L. 2.00 to $1.00 rate (findings 7—9). The interbank rate/Customs Valuation Factor established by the Central Bank (initially L. 4.00 to $1.00) was consistent with the real value of Honduran lempiras, and was used for virtually all commercial transactions (findings 7, 10, 11). However, the L. 2.00 to $1.00 rate was retained for paying the Honduran national debt (findings 11, 26).

The contract states prices and provides for payment in dollars, but recognizes that price adjustments will be tied to Acuerdos which state the new prices in lempiras (finding 2). Thus, a means of converting the price from lempiras to dollars is established which contemplates changes in the exchange rate as an element of the conversion process (*id.*). The contract also recognizes that instability in the exchange rate between lempiras and dollars will affect payments, and stipulates that a modification will be issued in the event of such fluctuation (finding 4). The specific language of the contract is important to our

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resolution of the dispute, because it ties such contract modifications to changes "based on the official publication of the exchange rate as published by the Banco Central de Honduras." (Finding 4) Similarly, the NOTE paraphrasing clause I162.02 calls for revaluation based on "Any change in the exchange rate of two (2) Honduran Lempira to one (1) U.S. Dollar as published by the Banco Central de Honduras ...." (Finding 5) We believe the contract language is important because we think the record establishes beyond question that changes occurred in the exchange rate. The issue is whether the contract makes those changes applicable to payments made by respondent to appellant.

The change that occurred effectively established several rates. The Central Bank has responded to questions about whether the exchange rate changed by stating that the "official rate" has not been changed, but that it applies only to the retirement of Honduran external debt (finding 11, 26). For other purposes, the interbank rate applies (*id.*). The Honduran government in a publication summarizing reforms states unequivocally it "has adopted a sliding peg system of currency valuation, initially setting the domestic value of the US Dollar at 4 Lempiras (referred to as the custom valuation rate) ..." and that the interbank foreign exchange system signified "an end to the long-standing policy of implicit and hidden subsidization of petroleum ...." (Finding 10) The Honduran Secretariat of Economy and Commerce states the price changes in Acuerdo No. 129-90 were the result of the Decree, "which consequently modified the Interbank Rate and the Customs Valuation Factor from Lps.2.00 to Lps.4.00 per dollar." (Finding 13) The preponderance of the evidence in this record clearly establishes that the interbank rate/Customs Evaluation Factor applied to fuel prices. It even establishes petroleum subsidies as a specific target of exchange system reform.

The contract only recognizes changes to the exchange rate officially published by the Central Bank. The several resolutions issued by the Central Bank (findings 7—9) were under the authority given the Bank by the Decree (finding 6). We conclude, therefore, they were issued by the Bank in an official capacity, and were official publications as set out in clause I162.02. Moreover, while L. 2.00 to $1.00 continued to be an official rate of exchange in Honduras, its applicability was changed. As it no longer applied to fuel prices in Honduras, evidenced not only by statements of the Honduran government and the Central Bank but by contracts with another supplier (findings 10, 11, 13, 16. 26), we hold that a change in the exchange rate had occurred as contemplated by clause I162.02.

We believe this appeal is distinguished from the cases relied on by appellant. In *Truong Xuan Truc, et al. v. United States,* 212 Ct. Cl. 51 (1976), the contract was priced in dollars based on the contractors' proposals, but payment was made in piasters. Although the contract did not specifically establish a rate of exchange, proposals were submitted based on an exchange rate of 80 piasters to one dollar. The contract provided for payment at the legal rate of exchange in effect on the date approved invoices were presented. At the date of contract execution the Court found there were two legal rates of exchange consisting of a basic rate of 80 piasters to one dollar, which applied to the U.S. Government, and a consolidated premium rate of 118 piasters to one dollar, which did not. The latter rate was comprised of the 80 to 1 rate and a Vietnamese government subsidy of 38 piasters. During the course of contract performance, the U.S. Government was permitted to purchase piasters at the consolidated premium rate of 118 to 1. The plaintiffs sought to apply the premium to their payments under the contract, asserting that the legal rate of exchange had changed to 118 piasters to one dollar. The Court found that both the official rate of 80 to 1 and the consolidated premium rate of 118 to 1 existed at the time of contract award, but the parties had priced the contract based on the 80 to 1 rate. Thus, they had selected that as the rate of exchange applicable to payment under the contract. Moreover, as both rates existed at the time of contract award, there was no change in the exchange rate.

In contrast to *Truong Xuan,* the contract here explicitly provided for the 2 to 1 rate until that rate was changed and the change published by the Central Bank. That rate was the only official or legal rate in effect at the time of contract award. The record here persuades us that the exchange rate system was changed and the change published by the Central Bank so the 2 to 1 rate no longer applied to commercial transactions, including petroleum products, and the interbank rate/Customs Valuation Factor was made applicable. Moreover, appellant's argument that better rates than 2 to 1 were available in parallel markets at the time of contract award is not convincing as both prices and payment in the contract were in dollars. While respondent could arguably have writ-

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ten the contract to provide for payment in lempiras and purchased lempiras outside of official Honduran channels, it is too speculative to be an appropriate consideration here.

Appellant also cites *Marubeni-Iida Co. Ltd. and Ohki Construction Co., Ltd., a Joint Venture,* ASBCA No. 16937, 72-1 BCA ¶ 9408. In that case a contract performed in Japan was priced in dollars but provided for payment in Yen "based upon the official rate current at time of payment." At the time of contracting the official exchange rate was 360 Yen to one dollar. A treaty existed which provided for payment by the United States armed forces at the "basic rate of exchange." *Id.* at 43,699. Subsequently, Japan allowed the Yen to float. A U.S.—Japanese Joint Committee agreed that through the Bank of Japan Yen would be made available to U.S. disbursing officers at the "majority rate," which was the rate at which the largest volume of dollars was transacted the day before. Payment was made by the United States at the majority rate of 337 Yen to one dollar and an appeal taken.

Appellant argued there had been no change in the exchange rate. The Board, in agreeing with appellant, considered several factors not in evidence here. First, it found that appellant was not on notice of the Joint Committee's authority to fix the rate of exchange. Second, it found that the Joint Committee's actions were in conflict with the treaty providing for payment at the "basic rate of exchange," which it found synonymous with "official rate," and that the Joint Committee had no authority to change the official or basic rate of exchange. Here, appellant was on notice of the Central Bank's authority to change the value of the lempira, and the authority under the Decree is not disputed.

The Board noted in *Marubeni-Iida* that "Japan retained the 'basic rate of exchange' ... Japan did not purport to take or in fact take, any direct action by legislation or otherwise, on existing public or private obligations expressing payment in terms of the 'basic rate of exchange' or the 'official rate of exchange.'" *Id.* at 43,707. Here, however, Honduras purported to and did in fact take action affecting private obligations expressing the L. 2.00 to $1.00 exchange rate. The Honduran government described its action as "a sweeping reform of the exchange rate regime ... initially setting the domestic value of the US Dollar at 4 Lempiras (referred to as the custom valuation rate)." (Finding 10) In summary, the Court in *Truong Xuan* and the Board in *Marubeni-Iida* found facts that persuaded them a change in the exchange rate had not occurred. Here we have found facts that persuade us there was a change in the Honduran exchange rate. Accordingly, the appeal in ASBCA No. 43041 is denied.

Since the outcome of the exchange rate issue determines the amounts at issue in the appeals in ASBCA Nos. 43839 and 43887, they are denied in accordance with the above discussion.

The determination of quantum in all three appeals is remanded to the parties.

[¶ 26,413] Progressive Tool Corp.

ASBCA No. 42809, October 4, 1993. Contract No. F34601-90-C-0020.

Defaults, Excuses—Subcontractor and Supply Problems—Alternative Sources.—A contractor's failure to meet a contract schedule for delivering jet engine shields was not excused by the manufacturing difficulties experienced by its supplier, because the contractor neglected to show that it made all reasonable attempts to locate an alternate supplier. Supply problems do not automatically excuse a contract default. A contractor must establish the unavailability of alternative sources of supply that would have permitted it to meet the contract's delivery schedule.

Defaults, Government Act Excusing—Schedule of Work—Oral Extension.—The government's alleged oral agreement to extend a delivery date that a contractor had missed did not preclude the government from subsequently issuing a default termination, because any reliance that the contractor may have placed in the alleged agreement was unreasonable. Just three days after the alleged agreement, the contracting officer issued a show-cause notice that made no reference to the agreement and clearly indicated that a default termination was still under consideration.

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Defaults, Waiver—Delay in Terminating—Reliance.—A five-week interval between a notice to show cause and a default termination did not constitute a waiver of a contract's delivery schedule, because there was no indication that the contractor had relied on the delay to its detriment. No evidence was offered to show that the government encouraged the contractor to continue working past the delivery date or that it performed any substantial amount of work after that date. Moreover, although the time between the notice to show cause and the default termination was somewhat long, it was not shown to be unreasonable in the circumstances.

Defaults, Grounds—Delivery Failure—Best Interest of Government.—It was in the government's best interest to terminate a jet engine shield contract for default, although the contractor maintained that it would be able to deliver the urgently needed shields within three and one-half months of the contract's delivery date, because the government had made a reasonable determination that the contractor was unreliable. The contracting officer had offered the contractor an opportunity to explain its failure to meet the contract schedule and had rejected the contractor's explanation; this decision was upheld by the board. In view of the government's urgent need for the shields, the contracting officer was correct in concluding that a default termination would serve the government's best interests.

For the appellant: Robert Friss, Vice President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Col. Billy Smith, Jr., USAF, Trial Attorney.

Before TUNKS, RUBERRY, and RIISMANDEL, Administrative Judges.

TUNKS, Administrative Judge: This is an appeal from a contracting officer's decision terminating a supply contract for default for failure to timely deliver a quantity of jet engine shields.

FINDINGS OF FACT

1. The Government awarded Contract No. F34601-90-C-0020 for 219 jet engine shields to appellant on 5 October 1989. At award, the contract price was $13,468.50 and the delivery date was 10 February 1990 (R4, tabs 1, 2).

2. The contract incorporated FAR 52.249-8, Default (Fixed-Price Supply and Services) (APR 1984), by reference. That clause provided, in pertinent part, as follows:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below ... terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Perform the work under the contract within the time specified in this contract or any extension;
>
> * * *
>
> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor....
>
> (d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and the subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(R4, tab 1)

3. Appellant did not deliver the shields by 10 February 1990, but delivered 22 shields shortly thereafter (R4, tab 2).

4. At appellant's request, the Government extended the delivery date for the remaining 197 shields to 31 August 1990 in exchange for a reduction of $350 in the contract price (R4, tab 2).

5. Appellant did not deliver the 197 shields by 31 August 1990, but subsequently delivered 128 shields, leaving a balance of 69 (R4, tab 3).

6. At appellant's request, the Government extended the delivery date to 31 January 1991 in exchange for a reduction of $380 in the contract price (R4, tab 3).

7. Appellant did not deliver the remaining 69 shields by 31 January 1991 (R4, tabs 4, 5; Supp R4).

8. On 22 February 1991, the contracting officer called appellant and asked about the remaining 69 shields. Appellant indicated that the shields would be shipped by 31 March 1991 (Supp R4, Memo dtd 21 Feb 91).

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As a result of that conversation, appellant allegedly concluded that the contracting officer had agreed to a new delivery date of 31 March 1991 (App. Final Br.). The contracting officer denies he agreed to such extension.

9. On 21 February 1991, the Item Manager expressed to the contracting officer "the urgency of finding a reliable contractor to furnish the needed parts" (DeYong Affidavit).

10. On 25 February 1991, the contracting officer issued a show cause notice which indicated that the Government was considering terminating appellant's contract for default and requested appellant to submit any excuses it had for nondelivery by 11 March 1991 (R4, tab 5).

11. Appellant answered the show cause notice as follows:

> 1) The balance of contract (69)Pcs.) being late was a result of material cracking and thinning during forming operations. New material was ordered and received on 17 Jan 91. During forming, 21 Pcs. were scrapped. As a result we again ordered new material in which we have received it [sic]. All material is now in production.
>
> 2) Delivery of 69 Pcs. is now in full production and is scheduled for 12 April 91.

(R4, tab 6)

12. Since the contractor had failed to meet two earlier delivery dates, the contracting officer concluded that appellant was not reliable. In addition, appellant's repeated delinquencies had a negative impact on the repair of the jet engines. After considering the foregoing facts, the contracting officer terminated the contract for default for failure to deliver on 8 April 1991. (DeYong Affidavit; R4, tab 4)

13. Appellant timely appealed the contracting officer's decision.

DECISION

It is undisputed that appellant did not deliver the 69 remaining shields by 31 January 1991. As a result, the burden of proof is on appellant to prove that its default was excusable. Appellant has failed to carry this burden.

Appellant's response to the show cause notice indicated that it did not deliver the shields because its supplier had experienced "material cracking and thinning during forming operations." Manufacturing problems do not automatically excuse a default. Under paragraph (d) of the Default clause, appellant was required to make all reasonable efforts to locate alternate sources of supply. *C&M Machine Products, Inc.*, ASBCA No. 43348, 93-2 BCA ¶ 25,748; *Free Flow Packaging Corporation*, GSBCA Nos. 3992, 4040, 75-1 BCA ¶ 11,105. Appellant has neither alleged nor proven that it attempted to locate an alternate supplier. Since appellant has not proven that the shields were unavailable, the default is not excusable.

Alternatively, appellant asserts that the default should be overturned because the contracting officer entered into an oral agreement with appellant on 22 February 1991 to extend the delivery date. The contracting officer denies that he agreed to an extension. Moreover, the Government issued a show cause notice to appellant on 25 February 1991, just three days after appellant's conversation with the contracting officer. The show cause notice clearly indicated that the contracting officer was considering terminating appellant's contract for default and made no reference to any agreement to extend the delivery date. Under these circumstances, any reliance appellant may have placed upon the alleged agreement of 22 February 1991 was unreasonable.

The contracting officer has a reasonable amount of time in which to decide whether or not to terminate a contract which is in default. What constitutes a reasonable length of time is determined on a case by case basis. In this case, the show cause notice was issued on 25 February 1991. Appellant replied to the show cause notice on 1 March 1991 and the contracting officer terminated the contract on 8 April 1991. Although the time between the show cause notice and the termination was somewhat long, there is no evidence that the Government encouraged appellant to continue working after the delivery date and there is no evidence that appellant performed any substantial work on the contract during that period. We conclude that the Government did not waive the delivery date.

Appellant lastly argues that the termination was not in the best interests of the Government because appellant could have delivered the remaining shields by 12 April 1991. This argument is without merit. The Government acquired the right to terminate the contract on 31 January 1991 when appellant failed to deliver. Although the Default clause did not require it, the contracting officer sent appellant a show cause notice soliciting excuses for nondelivery. The con-

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tracting officer rejected the excuses proffered by appellant, namely the manufacturing problems experienced by its subcontractor, and we have sustained that determination. In view of appellant's unreliability and the Government's urgent need for the shields, we hold that the contracting officer was correct in concluding that termination was in the best interests of the Government.

The appeal is denied.

[¶ 26,414] Sears Petroleum & Transport Corp.

ASBCA No. 41401, September 30, 1993. Contract No. DLA600-85-D-4744.

Contract Types—Economic Price Adjustment—Date of Delivery.—A contractor was to be paid at the rate in effect when it began pumping oil from its vessel, not when it gave notice that it was ready to pump, even though the contractor provided convincing evidence that in trade usage "delivery" of petroleum products occurs on the date and at the time of readiness, because the express terms of the contract provided otherwise. The contractor's barge was hooked up to the receiving line and gave notice of readiness 16 minutes before a price decrease became effective; the government did not give permission to discharge, and the actual movement of the oil from the vessel did not start until four minutes after the price decrease became effective. The unit price under the contract was to be adjusted weekly and was to be that in effect on the "date of delivery," under the Economic Price Adjustment clause. Regardless of the definition of "date of delivery" for any other purpose, for the purpose of pricing, which was controlled by the EPA clause, the date of delivery was the date and time the vessel began to discharge, which was undisputedly 12:05 a.m. the day after the downward price adjustment became effective.

For the appellant: Manes, Rifken, Frankel & Greenman, P.C., Syracuse, New York, by Sidney Manes. For the government: Howard M. Kaufer, Counsel, Defense Fuel Supply Center, DLA, Alexandria, Virginia.

Before LANE, RUBERRY, and FREEMAN, Administrative Judges.

LANE, Administrative Judge: This case involves an issue of contract interpretation.

Appellant had a firm fixed-price contract to deliver fuel oil f.o.b. destination. Pursuant to the Economic Price Adjustment clause, contract unit prices were to be adjusted weekly upward or downward based on certain published reference prices. Appellant gave notice of readiness to pump the shipment in issue at the prescribed destination sixteen minutes before a price decrease became effective, but discharge, or the actual movement of oil from the vessel, did not start until four minutes after the price decrease became effective.

The dispute over which unit price applies turns on which day was the "date of delivery." Appellant says that under trade practice, "delivery" occurs upon notice of readiness to pump. The Government says that "delivery" for the purpose of price adjustment under the EPA clause is conclusively defined by that clause as occurring on "the date and time the vessel begins to discharge."

The Government has moved for summary judgment. Appellant opposes the motion, asserting that there are material issues of fact in dispute.

We have concluded that all the material facts are undisputed; that the issue is purely one of contract interpretation that can be decided solely as a matter of law; and that the Government is entitled to summary judgment because the express definition of "date of delivery" in the EPA clause made the start of discharge the controlling event and rendered inapplicable any contrary understanding of "delivery" for other purposes under trade practice.

FINDINGS OF FACT

The following facts are undisputed.

I. *The Contract*

1. On 14 August 1985, the Defense Fuel Supply Center (DFSC) awarded appellant contract No. DLA600-85-D-4744. It was an indefinite quantity contract for delivery f.o.b. destination of various fuels to be ordered between 1 October 1985 and 30 September 1986, at firm fixed unit prices, subject to adjustment under the Economic

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Price Adjustment (EPA) clause. (R4, tabs 1,2)

2. Included in the award was Item No. 0656-55 for delivery of an estimated 6,000,000 gallons of Burner Oil No. 6 by barge to the United States Military Academy, West Point, New York, at a unit price of $.54300. The specified destination was "INTO 8 INCH RECEIVING LINE." (R4, tab 1, at 6, 120, 198 clause F26; R4, tab 2, Award Sheet, at 01)

3. The standard F.O.B. Destination clause in the contract stated:

F(18)F F.O.B. DESTINATION (APR 1984)

(a) The term "f.o.b. destination," as used in this clause, means—

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies shall be delivered to truck tailgate at the unloading platform of the consignee. If the Contractor uses rail carrier or freight forwarder for less than carload shipments, the Contractor shall assure that the carrier will furnish tailgate delivery if transfer to truck is required to complete delivery to consignee.

(b) The Contractor shall—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

(R4, tab 1, clause F(18)F, FAR 52.247-34)

4. The Economic Price Adjustment clause in the contract stated:

B.19.19 ECONOMIC PRICE ADJUSTMENT (DFSC 1984 JUL)

The prices payable under this contract shall be adjusted upward and downward, in accordance with changes in published reference prices pre-selected by the Government for this purpose, and shown hereinafter, and in accordance with all other provisions of this Economic Price Adjustment clause. The Contractor warrants that the unit prices set forth in this contract do not include any contingency allowance to cover the possibility of increase(s) in the reference price(s) set forth below.

PART A

As used throughout this provision:

(a) The term "item" or "items" means the numbered line items of supply which are listed in section B of the solicitation Schedule and included in Section B of the contract award Schedule. These are the only items subject to price adjustment unless otherwise expressly provided for in the contract award.

(b) The term "base unit price" means the unit price offered for an item and included in the contract Schedule.

(c) The term "reference price" means that published reference price or combination of published reference prices pre-selected by the Government for price adjustment for individual items by product, market area and publication as specified in Part D below.

(d) The term "base reference price" means the pre-selected reference price for an item as published on *20 May 1985*. In the event one or more applicable reference prices are not (or were not) published on the date shown, then the term "base reference price" means the pre-selected reference price for an item as published on the

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date nearest in time prior to the date shown.

(e) The terms "published" and "publication" include the electronic pricing and information network of *Oil Price Information Service (OPIS)* provided through *PetroScan* for the two weeks that *OPIS* is not published.

(f) The term "date of delivery" means:

(i) the date and the time vessel begins to load where the contract calls for delivery at origin into tanker or barge;

(ii) the date and the time vessel begins to discharge where the contract calls for delivery at destination by tanker or barge;

(iii) the date and the time product commences to move past the specified f.o.b. point where the contract calls for delivery by pipeline;

(iv) the date product is received for all methods of delivery other than (i), (ii), or (iii) above.

PART B

Price adjustments under this contract shall be cent for cent with any increase or decrease occurring in the reference price applicable to a particular item (subsequent to the date on which the base reference price is established), with or without prior notice thereof from the Contractor.

(a) The determination of the price payable for each delivery of a particular item of supply shall be accomplished by adding to, or by subtracting from the base unit price, the difference between the base reference price and the published reference price applicable on the date of delivery.

(b) The reference price applicable on the date of delivery shall be the pre-selected reference price for the item as first published during the calendar week in which the delivery is made, or in the event there is no publication in that week, it shall be the pre-selected reference price for the item as last previously published.

(c) No upward price adjustment shall be due or apply to items of supply which were required in accordance with contract terms to be delivered prior to the effective date of such upward price adjustment, but delivered subsequent to such effective date, unless the Contractor's failure to make earlier delivery results from causes which are beyond the control of and without the fault or negligence of the Contractor, within the meaning of the Default clause of this contract, or is the result of an allocation made in accordance with the terms of the Allocation clause of this contract.

PART C

(a) The Contractor warrants that the prices to be invoiced hereunder for listed items shall be computed in accordance with these economic price adjustment provisions.

(b) In the event any applicable published reference price is discontinued or its method of derivation is altered substantially, or it otherwise consistently fails to reflect market conditions, this contract may be amended effective on the date such reference price is discontinued, altered, or began to consistently fail to reflect market conditions, to substitute a comparable reference price.

(c) Price changes issued pursuant to this clause are subject to the clause entitled UPWARD CEILING ON ECONOMIC PRICE ADJUSTMENT.

(d) The Contracting Officer shall issue a modification to the contract to reflect any price change pursuant to this provision.

PART D

REFERENCE PRICE LISTING

* * *

(R4, tab 1, clause B19.19)

5. The Barge Unloading Conditions clause in the contract stated in pertinent part:

F16 BARGE UNLOADING CONDITIONS (DPSC 1984 APR)

On items calling for delivery f.o.b. destination by means of barge:

(a) The supplies ordered hereunder shall be delivered, all transportation charges paid, to the destination specified in the Schedule....

(R4, tab 1, clause F16)

II. *Contract Performance*

6. On 28 January 1986, in accordance with contract clause F38(F), Ordering, West Point issued Delivery Order No. G8L2 to appellant for 1,176,000 gallons of Item No. 656-55, Burner Oil No. 6, to be delivered during week of 3 February 1986, at the contract unit price of $.54300 (R4, tab 5).

7. Pursuant to the order, appellant delivered 972,251 gallons to West Point. The specific timetable of events surrounding the delivery was as follows:

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Sunday, 9 February 1986:

10:10 p.m. — Appellant's barge arrived at West Point.
10:30 p.m. — Appellant's barge was moored alongside the dock.
11:15 p.m. — Cargo hoses between the barge and the West Point receiving line were connected.
11:45 p.m. — The cargo was inspected and ready to discharge, and notice of readiness to discharge given to the Government.

Monday, 10 February 1986:

12:05 a.m. — Barge received permission to discharge and discharge of the oil commenced.
3:00 a.m. — Discharge of the oil finished.
3:10 a.m. — The cargo hoses were removed.
3:20 a.m. — The barge was released by the inspector.
5:00 a.m. — The barge left its berth.

(R4, tabs 6, 21; Taskasap Affid.)

8. As a result of unit price adjustments made pursuant to the EPA clause, the price for Item No. 656-55, Burner Oil No. 6, was $.492404 per gallon for the period 12:01 a.m. on 3 February to 12:01 a.m. on 10 February 1986 (R4, tab 3, Modification PA0017), and $.460857 per gallon effective at 12:01 a.m. on 10 February 1986 (R4, tab 4, Modification PA0018). Thus the unit price under the contract dropped $.031547 per gallon at 12:01 a.m. on 10 February, which would make the total price for the 972,251 gallons nearly $30,700 less if the 10 February unit price applied instead of the 9 February price.

9. On 21 February 1986, appellant invoiced DFSC for Delivery Order No. G8L2 at a unit price of $.49240 per gallon, which was the unit price in effect on Sunday, 9 February (rounded from six to five decimal places), for a total of $478,736.39 (R4, tab 7). On 26 March 1986 DFSC paid the full amount invoiced (R4, tab 8).

10. By letter to appellant of 3 November 1987, the DLA Accounting and Finance Center asserted that appellant owed the Government $30,667.71 on account of an overpayment on the 21 February 1986 invoice. The letter stated that (1) under the EPA clause, the date of delivery was determined by "the date and time the vessel begins to discharge where the contract calls for delivery at destination by tanker or barge"; (2) the barge commenced discharge on 10 February 1986; and (3) the price applicable to Item No. 656-55 on 10 February 1986 was $.460857 per gallon pursuant to Modification No. PA0018. The claimed amount of $30,667.71 was evidently arrived at by multiplying the difference between the unit price billed and paid ($.49240) and the unit price effective 10 February 1986 ($.460857), or $.031543, times the total quantity of 972,251 gallons. (R4, tab 9)

11. By letters of 13 November, 17 November, and 22 December 1987, appellant disputed the Government's demand, asserting that it had not been overpaid because its barge was ready and able to start discharging her cargo at 11:45 p.m. on 9 February 1986 but actual pumping did not start until orders to do so were received from West Point personnel at 12:05 a.m. on 10 February 1986 (R4, tabs 10-12).

12. By letter of 30 March 1990, the contracting officer disagreed with appellant's view on the basis that the twenty minutes the shore crew took to give permission to start discharge was irrelevant to the "date of delivery" as defined in the EPA clause. The letter asked if appellant intended to repay the Government. The letter reflected a slight miscalculation of the asserted overpayment by using the contract unit price of $.492404 in effect on 9 February 1986 (six decimal places) instead of the unit price of $.49240 (five decimal places) which appellant actually used to bill the Government. This resulted in an alleged overpayment of $30,671.60 instead of the previously calculated overpayment of $30,667.71. (R4, tab 13)

13. By letter of 2 April 1990, appellant reiterated its position, recited the absence of agreement, and asked that "the matter go to arbitration and be decided by an impartial party." (R4, tab 14) At that point if not before, a dispute existed between the parties over the Government's claim.

14. On 20 June 1990, the contracting officer issued a final decision claiming $30,671.60 from appellant (R4, tab 15). By letter of 23 July 1990 appellant filed a timely appeal with this Board (R4, tab 19).

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III. *Delay Not in Issue*

15. It is undisputed that the twenty-minute delay between appellant's readiness to discharge and the Government's giving of permission to discharge was not unusual and that the delay involved no malice or bad faith or calculated attempt to take advantage of the price change. Indeed, there is no evidence that either party knew there would be a price change or whether the price would increase or decrease at 12:01 a.m. on 10 February 1986.

IV. *Trade Practice*

16. Appellant has provided ample evidence, uncontradicted by the Government, that under the usage of the trade concerning the sale of petroleum products, the date of the notice of readiness is the controlling date of delivery with respect to questions of performance under an f.o.b. destination contract. (Tso Affid.; Taskasap Affid.; Eklof Affid.; Hurlin Affid.) We so find.

DECISION

I. *The Issue*

This case involves a question of contract interpretation. It presents a dispute over the proper unit price applicable to a shipment of oil delivered by barge f.o.b. destination to West Point. The unit price under the contract was to be that in effect on the "date of delivery," as adjusted weekly under the Economic Price Adjustment (EPA) clause. The problem is that the appellant's barge was hooked up to the receiving line and gave notice of readiness to discharge sixteen minutes before 12:01 a.m. when a price decrease (it later turned out) went into effect, while the Government gave permission to discharge and the pumping actually started at 12:05 a.m., four minutes after the price decrease became effective. Appellant asserts that the "date of delivery" under the contract, as interpreted in light of trade practice, was the date of notice of readiness. The Government asserts that the date of delivery was the date of start of discharge.

Appellant invoiced and the Government paid at the higher unit price, and the Government now claims a refund of the asserted overpayment.

The Government has moved for summary judgment.

II. *Criteria for Summary Judgment*

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. All matters in the record, and all reasonable inferences to be drawn therefrom, must be construed liberally in favor of the party opposing the motion for summary judgment. *Engineering Metals Co.*, ASBCA No. 37525, 92-3 BCA ¶ 25,164, at 125,422 (and authorities cited). Questions of contract interpretation are appropriate for summary judgment where there is no genuine issue of material fact bearing on the interpretation. *Crawford Technical Services, Inc.*, ASBCA No. 36732, 89-2 BCA ¶ 21,783, at 109,607 (and authorities cited). Here, as in the *Crawford* case, mere allegations that the contract does not evidence the intent of the parties, without an offer of specific facts to show a genuine issue for trial, will not defeat summary judgment.

Appellant asserts that the contract is ambiguous and so requires inquiry into usage of trade. However, we have accepted appellant's affidavit evidence of trade practice, and more importantly, as discussed below, trade practice is not pertinent because the contract is unambiguous.

III. *The Merits*

The unit prices under this contract were adjusted weekly under the EPA clause.

Under Part B, paragraph (a) of the clause:

> The determination of the price payable for each delivery of a particular item of supply shall be accomplished by adding to, or by subtracting from the base unit price, the difference between the base reference price and the published reference price applicable on the date of delivery.

The "date of delivery" in turn was defined in Part A of the clause. It stated:

> As used throughout this provision:
>
> * * *
>
> (f) The term "date of delivery" means
>
> * * *
>
> (ii) the date and the time vessel begins to discharge where the contract calls for delivery at destination by tanker or barge;
>
> ....

In this case the contract called for delivery at destination by barge, and it is undisputed that the vessel began to discharge at 12:05 a.m. on 10 February 1986. Therefore, for purposes of the EPA clause, the "date of delivery" of the shipment in issue was 12:05 a.m. on 10 February 1986.

Under Part B, paragraph (a) of the clause, the price payable for the shipment was to be calculated at the original contract unit price, adjusted on the basis of the "published reference price applicable on the date of deliv-

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ery." Under Part B, paragraph (b) of the clause:

> The reference price applicable on the date of delivery shall be the pre-selected reference price for the item *as first published during the calendar week in which the delivery is made* . . . .

(Emphasis added.) Thus the appropriate reference price published at any time during a given week was, for purposes of the EPA clause, applicable retroactively to deliveries earlier that week. The Government has agreed for purposes of this case, in light of its consistent prior practice, that each week started on Monday, not on Sunday. (Memorandum of Telephone Conference Call) Thus the lower reference price published during the week of Monday, 10 February 1986 applied retroactively to 12:01 a.m. on that date, not to 12:01 a.m. on Sunday, 9 February 1986.

According to contract modifications implementing the EPA clause, the unit price for the item in question was $.492404 for the week 3 February through 9 February 1986, and was adjusted downward to $.460857 effective at 12:01 a.m. on 10 February 1986.

We consider the foregoing provisions of the EPA clause clear and unambiguous on their face and uncontradicted by any other provision of the contract. Regardless of the definition of "date of delivery" for any other purposes, for the purpose of pricing, which is controlled by the EPA clause, the date of delivery was the date and time the vessel began to discharge, which was undisputedly 12:05 a.m. on 10 February 1986, after the downward price adjustment became effective.

Appellant has provided convincing evidence, which we have accepted for purposes of this motion, that according to the usage of trade, f.o.b. destination delivery of petroleum products occurs on the date and at the time of notice of readiness, which in this case was on 9 February 1986 when the higher unit price was in effect. However, Uniform Commercial Code section 1-205(4) provides:

> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Restatement of Contracts (Second), § 203(b), is to the same effect. In this case the date of delivery as expressly defined in the EPA clause and the date of delivery according to trade practice are flatly inconsistent with each other. Under these circumstances, the express terms of the contract control.

Appellant in its argument emphasizes the f.o.b. destination term of the contract, asserting that f.o.b. destination merely required delivery to the wharf and that therefore delivery for all purposes was complete upon placement of the fuel oil at the wharf and the giving of notice of readiness in accordance with trade practice. The Government argues that while the F.O.B. Destination clause of the contract merely required delivery on board the carrier's conveyance to the destination consignee's wharf, the destination specified for the particular line item in issue was "INTO 8 INCH RECEIVING LINE." Thus the Government argues that the fuel oil was not "delivered" for any purpose until it passed into the receiving line. Under this interpretation, the fuel oil would actually be delivered only incrementally as it was pumped into the receiving line.

We need not and do not decide when delivery occurred for other purposes, such as timeliness under the Default clause or risk of loss under the Responsibility for Supplies clauses. For the purpose of pricing under the EPA clause, we hold that the "date of delivery" of the entire shipment of fuel oil took place upon the start of discharge, *i.e.*, 12:05 a.m. on 10 February 1986.

Appellant also suggests that this interpretation could not have been intended because it could create difficulty in determining exactly when delivery occurred, such as if the hose were clogged. Appellant has provided no evidence or offer of proof that that is a realistic possibility, and in any event it is beside the point. The contract clearly says what it says, and if that might create difficulty in some unusual circumstances in factually determining when discharge started and delivery thereby occurred, so be it.

Therefore appellant's billing and the Government's payment for the shipment in question at the 9 February 1986 unit price of $.49240 (rounded to five decimal places) instead of at the 10 February 1986 unit price of $.460857 were erroneous. Appellant was thereby overpaid by the difference between the total billed and paid amount of $478,736.39 and the total of $448,068.67 which should have been billed and paid, or $30,667.72.

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As a matter of law, the Government is entitled to recover payments erroneously made under a contract where the payment provisions of the contract are unambiguous, as distinguished from a discretionary or judgmental determination by the contracting officer. *Mercury Construction Corp.*, ASBCA No. 21534, 77-2 BCA ¶ 12,753, at 61,967 (and authorities cited); *Silverman v. United States* [24 CCF ¶ 82,330], 230 Ct.Cl. 701, 712, 679 F.2d 865, 871 (1982). Government acceptance of erroneous invoices does not entitle the contractor to retain payment erroneously billed at the wrong unit price any more than payment for performance not rendered. *See Government of the Virgin Islands of the United States*, ASBCA No. 30648, 88-1 BCA ¶ 20,265, at 102,572; *Coral Petroleum, Inc.*, ASBCA No. 27888, 86-1 BCA ¶ 18,533.

Therefore the Government is entitled to recover $30,667.72 on its claim against appellant in this case.

CONCLUSION

The contract is clear on its face as a matter of law that the "date of delivery" for pricing purposes under the EPA clause was the date and time of the start of discharge of the fuel oil from the barge. There are no material factual issues in dispute. The Government is entitled to summary judgment in its favor for $30,667.72 on its claim against appellant (which is $3.88 less than the amount claimed because of appellant's rounding from six to five decimal places in its billing).

The appeal is denied.

[¶ 26,415] Harris Manufacturing, Inc.

ASBCA No. 40434, September 30, 1993. Contract No. DLA100-87-C-0783.

Delays—Causation—Prior Contract.—A manufacturer of toxilogical agents protective aprons was not entitled to an equitable adjustment under the instant contract by reason of government-caused test delays on a prior contract, which allegedly delayed performance under the instant contract, because it was the contractor that delayed performance on the instant contract. Despite the test delays on the prior contract, the government did not direct or notify the contractor to change its performance on the instant contract. The contractor itself elected to delay proceeding with obtaining cloth samples, speculating that they could not be tested in sufficient time for delivery of end items in accordance with the delivery schedule. As a result, the contractor did not have sufficient quantities of material ordered to meet the first delivery dates if there had been no problem with testing. These intervening events precluded a finding that the testing delays for which the government was responsible caused the contractor's delay in the performance of the instant contract.

Delays—Causation—Cross-Contractual Relief.—A manufacturer of toxilogical agents protective aprons was not entitled to an equitable adjustment under its instant contract by reason of government-caused test delays on a prior contract, which allegedly delayed performance under the instant contract, because the effect of government actions that delayed performance on the first contract was generally not reasonably foreseeable on the second contract. Where there is a sufficiently close relationship between two contracts, the government may be found responsible in rare cases where both government culpability and proximate cause can be found. The contractor here argued that exceptional circumstances existed for granting cross-contractual relief because under the first contract the government knew of significant testing delays at the testing site and chose not to advise the contractor or other offerors. However, the contractor was also aware of testing delays occurring at the testing site at the time of entering into the second contract.

For the appellant: Saul, Ewing, Remick & Saul, Philadelphia, Pennsylvania, by Robert G. Fryling and Elizabeth A. Kaiser. For the government: Wayne J. Bober, Trial Attorney, Defense Contract Management District Mid-Atlantic (DLA), Philadelphia, Pennsylvania.

Before TODD, REITER, RUBERRY, and RIISMANDEL, Administrative Judges.

TODD, Administrative Judge: This appeal involves an equitable adjustment claim for Government delays in testing at the laboratory at the U.S. Army Armament Munitions and Chemical Command (Aberdeen) that occurred under one contract and allegedly

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caused additional costs of performance of a second contract. A hearing was held before Administrative Judge Reiter who has participated in this decision. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 24 July 1987, the Defense Personnel Support Center (DPSC) awarded Contract No. DLA100-87-C-0664 (contract 0664) to appellant Harris Manufacturing, Inc. (Harris) for the manufacture and delivery of 15,900 Toxilogical Agents Protective Aprons (TAP aprons). The last quantities of completed satisfactory end items were due 22 January 1988. (Board exh. 1, Stipulated Facts [Stip.] ¶ ¶ 1, 2, 8)

2. On 24 September 1987, DPSC awarded Contract No. DLA100-87-C-0783 (contract 0783) to Harris for manufacture and delivery of 23,050 TAP aprons for $777,937.50. The contract was a fixed-price, negotiated contract. The first quantities of completed satisfactory end items were due 22 January 1988, and completion of all deliveries was scheduled for 22 May 1988. (Stip. ¶ ¶ 3, 4, 9; R4, tab 3)

3. Both contracts incorporated Military Specification MIL-C-12189G, dated 29 December 1986, governing butyl coated, toxicological agents protective, cloth (stip. ¶ 10; R4, tab 11).

4. Both contracts contained DPSC Clause E21, GOVERNMENT LABORATORY TESTING OF COMPONENTS AND END ITEMS FOR ACCEPTANCE PURPOSES (October 1983), which provides in pertinent part:

> [T]he contract delivery requirements are based on the assumption that, from the day of receipt of the samples at the Government laboratory to the date the completed test results are mailed to the contractor, the Government will require a total of . . . 30 working days . . . for toxicological tests. If these time frames are exceeded, the contract delivery schedule will be extended by the number of additional days taken to complete the testing, provided the contractor can establish that the delay in its delivery was caused by the Government exceeding the prescribed times. The foregoing provision for extension of the delivery schedules is exclusive and the Government shall not be held liable to suit for breach of contract by reason of any delay by the Government in providing these test results.

(Stip. ¶ 11) Both contracts also incorporated by reference the standard clauses, GOVERNMENT DELAY OF WORK (APR 1984) (FAR 52.212-15), and DISPUTES (APR 1984) (FAR 52.233-1) (R4, tab 8; stip. ¶ 13).

5. The two contracts were issued under separate solicitations and awarded as separate and distinct contracts (stip. ¶ 6). The Government considered the contracts separate, individual contracts for administration (tr. 2/16, 3/39-40). At the time of bidding for contract 0783, S. David Harris, appellant's president, who was responsible for the preparation of appellant's proposals, intended to perform the second contract after completion of the first contract based on the contract delivery schedules (tr. 1/29, 33, 77, 78, 96). Mr. Harris never intended to perform the two contracts simultaneously (tr. 1/97). In his best and final offer Mr. Harris did not indicate that he considered performance of contract 0783 related to contract 0664, and he did not tell the Government prior to award that the contracts were related (tr. 1/93).

6. Under both contracts the principal material used for the production of the TAP aprons was butyl coated, toxicological agent protective cloth that was required to be tested at the Government facilities at Aberdeen for permeability (stip. ¶ 10). The cloth samples were subjected to one test against permeation from G.B., which is a nerve gas, and another test against permeation from H.D., which is a blister agent (tr. 2/27).

7. Beginning in August 1987, and lasting until early 1988, Aberdeen had a backlog of testing to be performed (tr. 2/47-49). The first delays occurred in early 1987 (tr. 2/41). They were caused by large numbers of failures that required retesting, a shortage of personnel, and changes necessitated by environmental concerns (tr. 2/41-42, 3/16-17). Ms. Patricia Panzera, the contracting officer, knew about these problems from a trip to the facility on 14 August 1987 to discuss testing delays (exh. A-12; tr. 2/46-47, 3/20-26). The backlog at that time was 58 manweeks (exh. A-12; tr. 2/47-48). Aberdeen was taking measures to reduce the backlog with use of a service contractor and overtime and hiring of additional personnel (exh. A-12; tr. 2/69, 3/50).

8. During July or August of 1987, after receipt of contract 0664 and prior to the completion of negotiations for award of contract 0783, Mr. Harris became aware of problems with testing at Aberdeen (tr. 1/37-38, 47-48, 94). Archer Rubber Com-

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pany (Archer), a cloth supplier for contract 0664, gave information to appellant that testing at Aberdeen was backed up for months (tr. 1/38).

9. Appellant's first samples of butyl cloth submitted under contract 0664 were received for testing at Aberdeen on 6 October 1987 (stip. ¶ 17). There were delays exceeding the contractually allowed time for testing on the first two of four submissions made (tr. 1/168). There were no Government-caused delays prior to 6 October 1987 (tr. 1/81-82). Appellant incurred additional costs in performing contract 0664 because of the Government testing delays. All testing was complete on contract 0664 with results reported to Harris by 23 February 1988. (Stip. ¶ 17) Appellant received a day for day extension in the contract 0664 delivery schedule (tr. 1/130). Deliveries of acceptable end item TAP aprons under contract 0664 were completed 7 April 1989 (stip. ¶ 25). Appellant filed a claim for delay under contract 0664 that was settled by payment to the appellant of $30,063.13 (R4, tabs 9, 43; stip. ¶ ¶ 19-20).

10. Prior to award of contract 0783, appellant did not have a contract with any supplier to provide butyl cloth for contract 0783 (tr. 1/104-05). Appellant had obtained a quotation and identified a source of supply, but did not issue a purchase order to or obtain a binding offer from the supplier before award (tr. 1/102, 105, 177).

11. To meet delivery schedules in contract 0783, appellant was required to submit samples of butyl cloth for testing by mid-October 1987 (tr. 1/106-08). Harris had problems obtaining a material supplier to provide the butyl cloth in a timely manner (R4, tab 30). On 22 October 1987, Harris placed its first order for material with Gladwynne Textile Company (R4, tab 35; tr. 1/111). The material was to be shipped to Aldan Rubber for coating (R4, tab 36; tr. 1/112, 115, 117). Appellant did not expect that the material purchased would be shipped immediately to Aberdeen (tr. 1/109). Mr. Harris acknowledged that if these shipments of material had been made, he would not have had sufficient quantities to meet the first two delivery dates under contract 0783 (tr. 1/121).

12. By letter dated 11 January 1988, to the contracting officer, appellant stated its concern with the effect the testing delays were having on costing and scheduling both contracts 0664 and 0783 and requested a meeting (R4, tab 19; tr. 1/40, 3/41). Appellant had also alerted the Government to the delay problems before that date in telephone conversations (tr. 1/39, 41, 87, 89, 174). A meeting was held with the contracting officer at DPSC on 21 January 1988, to discuss the delays and obtain assistance in expediting the testing (R4, tab 20; tr. 1/42, 165, 174, 175, 3/30-31). DPSC contacted Aberdeen and was given priority for testing contract 0664 samples (R4, tab 20; tr. 2/44-45, 58, 72, 94, 3/41-42). Testing was expedited on contract 0664, and it was the opinion of the contracting officer that testing could also have been expedited on contract 0783 if samples were submitted (tr. 3/57).

13. In correspondence and discussions with the Government, Mr. Harris generally referred to both contracts 0664 and 0783 (R4, tabs 19, 21, 23, 25, 27, 34; exh. A-4; tr. 1/43, 54, 78, 2/15).

14. In early 1988, Ms. Cheryl Keitt, Government contract specialist, told Mr. Harris that he had to begin submitting samples for testing even though the testing was delayed on contract 0664 in order to meet the delivery schedule on contract 0783 (tr. 2/15-18). The Government did not direct appellant not to ship samples on contract 0783 (tr. 1/141, 2/16).

15. Mr. Harris had told Aldan Rubber to hold up production of butyl cloth for contract 0783 because the samples would not be tested before contract 0664 samples that were then at Aberdeen for testing and delayed (tr. 1/49-50, 176). Mr. Harris did not think it was sensible to pay for more material to be tested that could not be used while shipments were still being made under contract 0664 and there was a backlog of testing at Aberdeen (tr. 1/78, 142, 144). In a letter, dated 11 November 1988, submitted to the Contracting Officer in support of its claim, appellant explained:

> [W]e gave the order for cloth on 0783 to Aldan Rubber Co. in October 1987. It seemed prudent on our behalf not to push Aldan for deliveries since the whole testing system was backed up and any materials delivered by Aldan would have to be paid for, and since we would not be using this material until we completed 0664, we did not request any shipments.

(R4, tab 27) Appellant decided not to ship any cloth samples under contract 0783 to Aberdeen for testing until deliveries under contract 0664 were completed (tr. 1/141). These were independent business decisions made by Mr. Harris (tr. 1/142-45).

16. Aldan Rubber had production problems and, with the exception of one small lot, never supplied any coated cloth

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(R4, tab 41; tr. 1/77). By letter, dated 12 August 1988, Aldan Rubber informed appellant that it would not perform its purchase order (R4, tab 24; tr. 1/122-23). Harris entered into a purchase order with Cotswald Industries on 14 December 1988 (R4, tab 38; tr. 1/133). Cotswald did not perform, and Harris then selected Archer as the supplier (tr. 1/136, 139).

17. Appellant's first samples of butyl cloth submitted under contract 0783 were received for testing at Aberdeen on 13 April 1989 (R4, tab 37; stip. ¶ 18; tr. 1/139-40, 148). Almost all the shipments under contract 0783 were tested within the time limits allowed by the contract (exh. A-7; stip. ¶ 18; tr. 1/57-58, 140). After performance of contract 0783 began, Harris did not experience any significant Government-caused delays or problems that were reason to file claims (tr. 1/87). Appellant's first deliveries of acceptable end item TAP aprons under contract 0783 were on 11 May 1989 (stip. ¶ 26).

18. Appellant experienced problems in the performance of contract 0783 that were not anticipated at the time of award. There was a labor shortage in the area where its plant was located, and adhesion problems on the cementability of the butyl cloth were encountered. (R4, tab 23) The adhesion problems were resolved on contract 0664 and did not have a significant impact on contract 0783 (tr. 1/157-58). Appellant was producing approximately 400 units per week at the time of award of contract 0783, and the delivery schedule in that contract called for production of more than double that number (tr. 1/152-54, 156). Appellant's actual production thereafter was approximately 600 units per week, which was not sufficient to comply with the delivery schedule in contract 0783 (stip. ¶ 25; tr. 1/153).

19. By letter dated 18 April 1989, Mr. Harris requested clarification of shipping instructions from the Contracting officer stating that contract 0783 was essentially a continuation of contract 0664 which had just been completed and the same procedures for shipping should be continued "as if it was essentially a single contract" (R4, tab 29).

20. By letter dated 5 June 1989, the contracting officer required submission of a revised delivery schedule with an offer of monetary consideration because the delays were not considered to have been Government-caused. The letter noted that the Government was then meeting the 30 working day time allowed by the contract for testing. (R4, tab 33; tr. 2/23, 3/44)

21. Deliveries of acceptable end item TAP aprons under contract 0783 were completed 16 August 1990 (stip. ¶ 26).

22. By letter dated 11 July 1988, appellant's certified claim for an equitable adjustment under the Delay clause in both contracts 0664 and 0783 was submitted. Appellant claimed the amount of $63,225 under contract 0783 for labor costs, unabsorbed overhead, and professional fees. (R4, tab 9; stip. ¶ 19) The period of delay claimed began 45 days after the 6 October 1987 submission of material under contract 0664 for testing and ended no later than 6 February 1988 (tr. 1/85-86). By letter dated 7 June 1989, appellant amended its claim under contract 0783 to include material costs and make adjustments based on actual costs incurred that increased the amount of equitable adjustment requested to $129,450 (R4, tab 34; stip. ¶ 21).

23. The contracting officer denied the claim by letter, dated 16 January 1990 (R4, tab 10; stip. ¶ 23). On 15 February 1990, appellant filed this timely appeal.

DECISION

Appellant claims an equitable adjustment in Contract 0783 for the additional costs incurred for work under Contract 0783 on the basis that the Government-caused delay which first affected contract 0664 in turn delayed the contract at issue, contract 0783. Appellant has stated that the question of cross-contractual liability is not at issue in this appeal, and the claim is "a typical delay claim" (App. Br. at 8, n. 1). Appellant has not, however, identified actions or inactions of the contracting officer in the administration of contract 0783 as the basis for such a claim under the Delay clause.

Appellant maintains its entitlement citing as authority the analysis of the Claims Court in *Neal & Co., Inc. v. United States* [34 CCF ¶ 75,366], 13 Cl. Ct. 282 (1987). In that case the contracts were for housing renovation in Kodiak, Alaska on a three-phased project. The contractor was notified that work on the Phase III contract could not begin until some or all of the Phase II buildings were completed. A claim for delay in completion of the Phase II contract was denied because the same contractor, Neal, was fully responsible for the delays that occurred. The claim under the follow-on Phase III contract was for increased costs allegedly resulting from the Government's failure to

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grant time extensions under the Phase II contract which forced an acceleration and performance of the renovation work in winter weather. Neal's fault in failing to complete the Phase II contract in a timely fashion was found to have caused the delay in beginning the Phase III contract. The Court denied recovery of damages for delay under the follow-on contract where the contractor was responsible for delay on the preceding contract. *Accord, Triax-Pacific, A Joint Venture,* ASBCA No. 36353, 91-2 BCA ¶ 23,724.

The Court's analysis in *Neal,* on which appellant relies here, was stated as follows:

> If the Phase II contractor had not been the plaintiff Neal, then the outcome would be different. The Phase III contractor would be compensated for its damages by the government and then the government would sue the Phase II contractor for its damages. Here, it is unnecessary to take those steps since the plaintiff is the cause of its own loss.

13 Cl. Ct. at 286-87. Appellant was not responsible for the delay under contract 0664, but appellant must establish that the Government-caused delay in completion of contract 0664 was the actual cause of the claimed delay costs under contract 0783. The burden is on appellant to establish the facts of liability, causation and resultant injury for proof of a compensable claim. *San Carlos Irr. and Drainage Dist. v. United States,* 877 F.2d 957, 959 (Fed. Cir. 1989); *G & H Machinery Co. v. United States* [35 CCF ¶ 75,638], 16 Cl. Ct. 568 (1989). In its administration of contract 0783, the Government did not direct or notify appellant to change its performance because of the testing delays on contract 0664 (finding 14). Appellant elected to delay proceeding with obtaining cloth samples for contract 0783 speculating that they could not be tested in sufficient time for delivery of end items in accordance with the delivery schedule in contract 0783. Appellant did not have sufficient quantities of material ordered to meet the first delivery dates if there had been no problems with the testing. These intervening events preclude our finding that the testing delays the Government was responsible for caused appellant's delay in the performance of contract 0783.

Appellant's second argument relates to whether cross-contractual relief should be granted here. The Government maintains that there was no linkage between the contracts, which were separate and legally distinct, and the Government cannot be held to have been the proximate cause of appellant's increased costs of performing the second contract. But even if contract 0783 can be considered a follow-on contract to contract 0664, each required compliance with its specific terms and conditions, including the calendar dates in the delivery schedules which were separately and independently stated.

The effect of Government actions delaying performance of one contract is generally not reasonably foreseeable on a second contract, but where there is a sufficiently close relationship between two contracts, the Government may be found responsible in rare cases where both Government culpability and proximate cause can be found. *General Dynamics Corp. v. United States* [25 CCF ¶ 82,730], 218 Ct. Cl. 227, 585 F.2d 457 (1979); *Sermor, Inc.,* ASBCA No. 30576, 33176, 33179, 94-1 BCA ¶ 26,302 (16 August 1993). Appellant argues in response to the Government's position that exceptional circumstances exist here for granting cross-contractual relief because the Government knew of significant testing delays at Aberdeen and chose not to advise Harris or other offerors (App. Reply Br. at 3). In this case, however, appellant was also aware of testing delays occurring at Aberdeen at the time of entering into contract 0783 (finding 8). Since appellant had information about the problems, we cannot find the Government's failure to disclose additional information that it had about the testing backlog to be exceptional circumstances for granting relief. *R.E.D.M. Corp. v. United States* [15 CCF ¶ 83,775], 192 Ct. Cl. 891, 428 F.2d 1304 (1970).

Even if the Government were responsible for delays on contract 0783, the remedy of a monetary adjustment, according to the Government, is not available. Appellant must show that the delays were not concurrent with other delays for which it was responsible, or there can be no recovery of monetary compensation. *Commerce International Co. v. United States* [9 CCF ¶ 72,781], 167 Ct. Cl. 529, 338 F.2d 81 (1964); *Cline Construction Company,* ASBCA No. 28600, 84-3 BCA ¶ 17,594. The contractor is responsible to determine the sources of supply prior to bidding and obtain assurance that the material needed to complete performance will be furnished. *Conquest Industries, Inc.,* ASBCA No. 38738, 90-3 BCA ¶ 23,090. Deliveries of end items were first due under contract 0783 in January 1988. There were no Government-caused delays after February 1988. Appellant was unable to obtain butyl cloth from any of its material suppliers until April 1989, and did not make deliveries until May

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1989. We do not consider that appellant's efforts to minimize its costs by not purchasing cloth samples for contract 0783 were reasonable or prudent measures to mitigate the costs of delay. The supplier problems which occurred were the contractor's problem and responsibility and should not be attributed to the Government. *H.C. Machine Company*, ASBCA No. 32932, 89-1 BCA ¶ 21,247. The contractor is also responsible for having an adequate production capability to meet the contract delivery schedule which we have found was not sufficient (finding 18).

Appellant made a business decision not to buy materials and begin performance of contract 0783 and was unable to meet the delivery schedule without cloth from its suppliers. Appellant also decided to delay its deliveries on contract 0783 until completion of deliveries on contract 0664 without regard to the delivery dates provided in contract 0783. These delays cannot be attributed to the Government. Concurrent causes of delay preclude granting an equitable adjustment. Where both parties contribute to the delay, neither can recover damages unless there is a clear apportionment of the delay and expense attributable to each party. *William F. Klingensmith, Inc. v. United States* [32 CCF ¶ 72,527], 731 F.2d 805, 809 (Fed. Cir. 1984).

For the reasons stated above, the appeal is denied.

[¶ 26,416] Sauer, Inc.

ASBCA Nos. 39605, 39372, 39898, 43680, October 1, 1993. Contract No. N68248-84-C-4113.

Contract Disputes, Certification—Authority—Presence at Location.—Under a construction contract, a claim certified by a senior vice president who had unlimited authority for all construction bids and contracts in the area of the construction, was responsible for the contractor's bid on the contract, maintained close contact with and control of the work, and signed 60 out of 69 contract modifications was properly certified under the Contract Disputes Act, even though the government asserted that the vice president was at best an off-site representative, because at the time the claim was certified, there was no contract activity at the original construction site. The area of activity at the time of certification was where the project records were maintained. It was from this location that the final contract administration and closeout efforts took place. There was no question that the vice president was the senior official in charge at that site. Moreover, during the contract activity at the construction site, the vice president clearly had primary responsibility for the performance of the contract; he did not need to be in charge of the construction site.

For the appellant: Smith & Fleming, Atlanta, Georgia, by Kent P. Smith. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Brad L. Johnson, Trial Attorney.

Before WATKINS, RIISMANDEL, and RUBERRY, Administrative Judges.

WATKINS, Administrative Judge: The Government moves to dismiss these appeals for lack of jurisdiction asserting that the individual who certified appellant's claims does not appear to meet the requirements of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c). Since these appeals were filed prior to 29 October 1992, the modified certification requirements as enacted in the Federal Courts Administration Act of 1992, P.L. No. 102-572, 29 Oct 1992, do not apply. The Government alleges that appellant's Vice President and Division Manager of Sauer's Southeast Region, who signed the certification, was not a "senior company official in charge at the contractor's plant or location involved" as required by FAR § 33.207(c)(2)(i). A ruling on this motion was deferred pending the taking of oral testimony.

STATEMENT OF FACTS

The Government awarded this contract to appellant on 28 February 1986 under terms of which appellant was, among other things, to complete the interior of the Refit Industrial Facility building at the Naval Submarine Base, Kings Bay, Georgia, for a price of $7,399,000. Eleven claims have been filed as a result of various disputes arising under this contract. In ASBCA No. 39605, appel-

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lant submitted a claim on 18 December 1987 in the amount of $937,765.26 for alleged "work beyond contract scope, impact, acceleration, and extended overhead among others." This claim was certified by Mr. H. John Rowland, Jr., Branch Manager. By letter of 5 December 1988, appellant revised the total amount of the claim to $1,081,998.35. This certification was signed by Mr. Neil J. Wickersty, Vice President. Similarly, the certifications for the claims in ASBCA Nos. 39372, 39898 and 43650 were signed by Mr. Wickersty. Since the Government ordered Sauer off the site at Kings Bay, GA, in October 1987, all claims and certifications were submitted from the Jacksonville, Florida, office.

Mr. Wickersty has been employed by Sauer since 1974 and has been a vice president since 1 September 1978 (tr. 1/10). He has been a division manager of Sauer's Southeast Region since 1978 and, in that capacity, has continuously had unlimited authority for all construction bids and contracts in the Southeast Region (tr. 1/22). The Southeast Region encompasses both Kings Bay, Georgia, and Jacksonville, Florida. Mr. Wickersty's principal location was at the Jacksonville office. He was responsible for Sauer's bid on this contract and maintained close contact with and control of the work (tr. 1/10, 14). He signed the contract as well as 60 out of the 69 modifications to the contract (tr. 1/14). The remaining 9 were signed by Mr. Rowland, after he obtained the concurrence of Mr. Wickersty (tr. 1/14). Mr. Wickersty also signed, on behalf of Sauer as Principal, both the performance and payment bonds submitted on the contract.

Mr. Peter North was Sauer's first contract manager with his office at the Kings Bay, Georgia, site. He resigned from Sauer on 31 July 1987 and left the area. In short, Mr. North was no longer an employee of Sauer at the time the claims and the certifications were submitted in 1988 and later.

DECISION

Proper claim certification is jurisdictional (*Universal Canvas, Inc. v. Stone* [38 CCF ¶76,370], 975 F.2d 847 (Fed. Cir. 1992)) and the contractor bears the burden of proving that a proper individual has certified under FAR 33.207(c)(2)(i). *Fidelity and Deposit Company of Maryland,* ASBCA No. 40327, 91-1 BCA ¶23,312. In deciding whether an individual is a senior company official, we look to a person's rank and managerial responsibilities with the organization at the time of certification. *J.A. Jones Construction Company,* ASBCA No. 40625, 92-3 BCA ¶25,212. Mr. Wickersty clearly meets the test to be a senior company official. *M.A. Mortenson Co.,* ASBCA No. 39978, 91-1 BCA ¶23,558.

The Government contends that "Appellant's on-site representative, Mr. North, clearly held responsibility over the project." The Government argues that Mr. Wickersty was, at best, an "off-site" representative. However, at the time the certification was made in 1988 and later, there was no contract activity at the Kings Bay, Georgia, location. The remaining contract activity was at Jacksonville, Florida, where the project records were maintained. It was from this location that the final contract administration and closeout efforts took place. There is no question that Mr. Wickersty was the senior official in charge at that site. Moreover, during the contract activity at Kings Bay, Mr. Wickersty clearly "had primary responsibility for the performance of the contract;" he did not need to be in charge of the construction site. See *George Hyman Construction Co.,* ASBCA Nos. 44155 *et al.,* 93-2 BCA ¶25,870. *Cf., Robert E. McKee, Inc.,* ASBCA No. 42917, 92-2 BCA ¶24,976.

The Government's Motion is denied.

[¶ 26,417] M. Bianchi of California

ASBCA Nos. 37395, 37798, 42243, 42244, 42416, September 30, 1993. Contract Nos. DLA100-80-C-2290, DLA100-80-C-2972, DLA100-79-C-2894.

Value Engineering—Acceptance—Constructive Acceptance.—A contractor was not entitled to compensation for three of the four value engineering change proposals it submitted, despite its contention that the government constructively accepted the VECPs, because there can be no compensable constructive acceptance of a VECP under future contracts if a VECP was rejected without bad faith for the contract under which it was submitted. Consequently, since the VECPs were rejected under the contract without bad

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faith on the part of the government, the contractor could not, as a matter of law, recover future contract royalties for those VECPs, even if they were implemented on future contracts. Moreover, the record did not show that any military specifications for which the contractor sought future contract royalties were changed because of the contractor's VECPs.

Value Engineering—Acceptance—Implementation.—A contractor was not entitled to compensation for a value engineering change proposal, even though it was accepted under the contract as an alternative provision, because it was not implemented by the contractor. There could be no future contract royalties under the terms of the contract because the basis for future contract royalties was clearly stated to be the unit cost reduction under the instant contract. There was no legal basis for the contractor to recover future contract royalties, even though the VECP had been accepted. Moreover, none of the future contracts for which it sought royalties was for the same items as those purchased in the contractor's contracts.

For the appellant: Petrillo & Hordell, Washington, D.C., by Michael A. Hordell and Laurel A. Heneghan. For the government: Thomas Hornak, Chief Trial Attorney, and John M. Logue and Patricia A. Papas, Trial Attorneys, Defense Personnel Support Center (DLA), Philadelphia, Pennsylvania.

Before AXELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

AXELMAN, Administrative Judge: After being awarded three contracts for the production of articles of clothing for the military services, appellant submitted five value engineering change proposals (VECP's) thereunder which it contends the Government accepted directly or constructively and for which it now seeks royalties of approximately $180 million, as follows:

ASBCA No.	*VECP No.*	*Contract*	*Description of VECP*
37395	1380	DLA100-80-C-2290	Change thread for buttonhole gimp on women's pantsuit coats from silk to polyester*
37798	1280	DLA100-80-C-2290	Change interlining of women's pantsuit coats from hairwool, rayon, or cotton to Pellon non-woven material
42243	2181	DLA100-80-C-2972	Change interlining of men's all weather coats from fusible woven material to Pellon fusible non-woven material
42244	3380	DLA100-79-C-2894	Change interlining of enlisted men's raincoats from fusible woven material to Pellon fusible non-woven material
42416	2880	DLA100-80-C-2290	Change from separate size and identification labels for women's pantsuit coats to one combined label

Quantum, as well as entitlement, is at issue in each of the appeals.

FINDINGS OF FACT

I. *The Contracts*

A. *Contract No. DLA100-79-C-2894*

1. On 13 July 1979, the Defense Personnel Support Center (DPSC) of Philadelphia, Pennsylvania, Defense Logistics Agency (DLA), awarded appellant Contract No. DLA100-79-C-2894 for the manufacture and delivery of 43,000 Navy men's single-breasted polyester/cotton, poplin blue shade 3346 raincoats in accordance with military specification MIL-R-82290B(SA) for a unit price of $19.20 and a total contract price of $825,600 (R4, ASBCA No. 42244, tabs 1-4).

2. The contract also provided for an optional quantity of 21,500 units, which the Government ordered by Modification P00007 on 22 February 1980, at a unit price of $21.64, raising the contract quantity to 64,500 and increasing the contract price to $1,290,860 (*ibid.*, tab 5).

* VECP 1380 also contained a proposed change to use Oncore or cotton thread for all body construction of the coats instead of polyester and silk thread (finding 23, *infra*). However, appellant declared at the hearing of these appeals and thereafter that it was no longer pursuing its claim with regard to that proposed change (tr. 1/17-18; app. posthearing br. at 79, 312).

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3. Appellant delivered 43,952 units, but the remaining quantity of 20,548 units was terminated for default by Modification P00011 dated 29 October 1981 (*ibid.*).

B. *Contract No. DLA100-80-C-2290*

4. On 7 November 1979, DPSC awarded appellant Contract No. DLA100-80-C-2290 for the manufacture and delivery of 26,250 polyester/wool, tropical 10-ounce, blue shade 1578 Air Force women's pantsuit coats in accordance with Purchase Description ENEU 78-7 (subsequently superseded by MIL-C-87160) for a unit price of $34.37 and a total contract price of $902,212.50 (R4, ASBCA No. 37395, tab 1). The contract stated that it was a production test procurement for the purpose of determining whether the item described in ENEU 78-7 "can be manufactured in quantity production in accordance with accepted production practices" (*ibid.*, tab 3 at 63; tr. 1/89).

5. Appellant delivered 25,903 units which the Government paid for and regarded as contract completion on 9 December 1980 (tr. 9/62-63; exh. G-193).

C. *Contract No. DLA100-80-C-2972*

6. On 23 June 1980, DPSC awarded appellant Contract No. DLA100-80-C-2972 for the manufacture and delivery of 125,240 Army men's black cotton and polyester poplin cloth all weather coats with removable liners at a unit price of $31.92 and a total contract price of $3,997,366.40. The coats were to be manufactured in accordance with Limited Purchase Description 12-77A (DES 12-77A) dated 1 November 1978 (subsequently replaced by MIL-C-44030, dated 24 July 1980) using patterns dated 21 September 1979 issued by the United States Army Natick Research and Development Laboratory (Natick) and were to be delivered between 4 January and 3 June 1981 (R4, ASBCA No. 42243, tabs 3, 5; tr. 1/156).

7. Appellant delivered 38,146 coats under the contract, and the remaining 87,094 were terminated for default in late 1981 (R4, ASBCA No. 42243, tab 6).

D. *Value Engineering Incentive Clause*

8. All three of appellant's contracts contained the following value engineering incentive clause (R4, ASBCA No. 37395, tab 4; R4, ASBCA No. 42243, tab 1; R4, ASBCA No. 42244, tab 2):

J09 VALUE ENGINEERING INCENTIVE (DPSC 1978 Jan)

(a) **Application.** This clause applies to a Contractor developed and documented Value Engineering Change Proposal (VECP) which:

(i) requires a change to this contract to implement the VECP, and

(ii) reduces the overall costs to the cognizant Military Department without impairing essential functions or characteristics, provided that it is not based:

(A) solely on a change in deliverable end item quantities, or

(B) a change in R&D end item or test quantities due solely to results of previous testing under this contract, or

(C) solely on a change to the contract type.

(b) **Documentation.** As a minimum, the following information shall be submitted by the Contractor with each VECP.

(i) a description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each, justification when a function or characteristic of an item is being altered, and the effect of the change on the performance of the end item;

(ii) an analysis and itemization of the requirements of the contract which must be changed if the VECP is accepted and a recommendation as to how to make each change (*e.g., a suggested specification revision*):

(iii) a separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs, if any, that will result from acceptance of the VECP, taking into account the costs of development and implementation by the Contractor (*including any amount attributable to subcontracts in accordance with paragraph (h) below*);

(iv) a prediction of any effects the proposed change would have on collateral costs to the Military Department such as Government-furnished property costs, costs of related items, and costs of maintenance and operation.

(v) a statement of the time by which a contract modification accepting the VECP must be issued so as to obtain the maximum cost reduction, noting any effect on the contract completion time or delivery schedule, and

(vi) identification of any previous submission of the VECP, including the dates submitted, the agencies involved, the

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numbers of the Government contracts involved, and the previous actions by the Government, if known.

(c) **Submission.** VECPs shall be submitted to the Procuring Contracting Officer (PCO). When the contract is administered by other than the purchasing office, a copy of the VECP shall be submitted simultaneously to the Administrative Contracting Officer (ACO). VECPs shall be processed expeditiously, however, the Government shall not be liable for any delay in acting upon any VECP submitted pursuant to this clause. The Contractor has the right to withdraw, in whole or in part, any VECP not accepted by the Government within the period specified in the VECP.

(d) **Acceptance.** The Contracting Officer may accept, in whole or in part, by contract modification either before or within a reasonable time after performance has been completed under this contract any VECP submitted pursuant to this clause. Until a contract modification applies a VECP to this contract, the Contractor shall remain obligated to perform in accordance with the terms of the existing contract. Contract modifications made pursuant to this clause will so state. The decision of the Contracting Officer as to the acceptance of any VECP under this contract (*including the decision as to which clause is applicable to the proposal if this contract contains both a "Value Engineering Incentive" and a "Value Engineering Program Requirement" clause*) shall be final and shall not be subject to the "Disputes" clause of this contract.

(e) **Sharing.** If a VECP submitted by the Contractor pursuant to this clause is accepted, the Contractor shall share in savings realized by the Government in accordance with the following provisions:

(1) Instant Contract.

(i) Definitions:

(A) Instant contract savings to the Contractor (ICS) is the unit cost reduction times the number of units affected in the instant contract. The proposed unit cost reduction includes estimated allowable Contractor development and implementation costs (CC). The Contractor's development and implementation costs include any subcontractor development and implementation costs and subcontractor incentive payments (*see (h) below*). For purposes of this clause, Contractor development costs are those costs incurred after the Contractor has identified a specific VE project and prior to acceptance by the Government.

(B) Government Costs (GC) are those DOD costs which directly result from development and implementation of the VECP, such as test and evaluation of the VECP, and any increased cost in DOD operations, maintenance, and logistics support.

* * *

(2) Concurrent Contracts.

(i) If the VECP accepted under this contract is also used on concurrent contracts of the purchasing office for essentially the same items, the Contractor shall be paid a share of any savings as calculated in (ii) below.

(ii) Calculations

(A) Determine the reduction in the price of each concurrent contract(s) as a result of incorporating the VECP.

(B) Subtract from the total amount in (A) any Government costs (GC) not yet offset (*if GC was greater than ICS*) in (e)(1)(ii)(C) or (D) above, and any increase in the instant contract price, i.e., if ICS was negative in (e)(1)(ii)(D), if the resulting number is positive, multiply it by 50% (*25% if this is a VEPRC*). Add this amount to the instant contract price.

(3) Future Contracts.

(i) Definition. The term unit cost reduction for future contract sharing shall be the unit cost reduction under this instant contract without deducting any cost of development or impletion [sic].

(ii) If the VECP accepted under this contract is used on future purchases of essentially the same item by the purchasing office, or its successor, the Contractor shall share in the savings on all affected end items scheduled for delivery not later than 3 years after acceptance of the first item incorporating the VECP, or until the originally scheduled delivery date of the last affected end item under the instant contract, whichever is later. When sharing on future contracts is expected, the Contractor shall be responsible for the following:

(A) Maintaining records adequate to support identification of the first delivered unit to which the VECP applies. These records are considered an integral part of contract documentation and shall be maintained for a period of three years after final payment on the contract under which the VECP was accepted.

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(B) Annotating the DD-250, Material Inspection and Receiving Report, which applies to the initial unit covered by the VECP with the following statement:

"This is the initial unit delivered which incorporates VECP NO. _____ _____, Contract Modification No. _____, dated _____ _____."

(iii) Calculations. At the time each eligible future contract is awarded:

(A) Determine the number of units scheduled to be delivered prior to expiration of the Contractor sharing period determined in (ii) above. Multiply this by the unit cost reduction as defined in (e)(3)(i).

(B) Subtract from the total amount in (A) any Government costs or instant contract increases not yet offset in (e)(1)(ii)(C) or (D), or in (e)(2)(ii)(B), or in other contracts awarded since acceptance of the VECP. If the resulting number is positive multiply it by 50% (*25% if this is a VEPRC*) and add the result to the instant contract price.

(f) Payment. The Contractor's concurrent and future contract shares should be paid upon modification of concurrent contracts or future contract award, or within six (6) months thereafter. However, any such payments are subject to the condition that to the extent the Government does not receive delivery of and accept all items on which the share is paid, the Contractor shall reimburse the Government the proportionate share of the payments. If this clause is modified to provide for lump sum payments, such payments shall be made upon modification of the instant contract.

II. *Appellant's Value Engineering Proposals (VECP's)*

A. *VECP 1280 (ASBCA No. 37798)*

9. In a letter to DPSC dated 3 December 1979 (R4, ASBCA No. 37798, tab 6), appellant submitted several VECP's under Contract 2290, including the following proposal which the Government subsequently designated as VECP 1280 (*ibid.*, tab 10):

1. *Change From:*
MIL-C-297F Cloth Interlining, Cotton Wrap and Spun Hairwool or Rayon Filling 12-1-79; $4.50 per yard 72" wide for Coat Fronts.

Change To:
Pellon Corp. fusable [sic] #3633, Color White, 45" wide at $.60 per yard.

Hair-Wool	.286 yards per garment 72 × 36 equals 2592 square inches Cost per square inch = .001736 658 square inch × .001736 = $1.14 per coat
Pellon	45" × 36" long = 1620 square inches. Cost per square inch = .000373 658 square inch × .000373 = $.25 per coat.
	Savings of $.89 per coat

10. An interlining is a piece of fabric that is sewn or fused between two other layers of fabric in parts of a garment, such as collars, cuffs, and pocket flaps, to give them body and stiffen them (tr. 5/187-88, 8/52).

11. Garment interlining material is either woven—that is, resulting from the weaving of yarns vertically and horizontally on a loom like the hairwool prescribed in Contract 2290—or non-woven—that is, resulting from the pressing together of fibers with some sort of resin or by heat to cause them to bond into a papery type configuration like the Pellon Corp. #3633 material proposed by appellant (tr. 1/23, 82, 131-32, 141-43, 156-57, 5/188, 6/83-84).

12. Both woven and non-woven interlinings can be sewn or fused into a garment (tr. 1/134, 5/188). A fabric like Pellon #3633, is fusible when an adhesive is applied to it and is joined to other material by a process of time, temperature, and pressure which melts the adhesive (tr. 3/17, 5/189-90, 8/28-29).

13. Non-woven fusibles were developed by Freudenberg, the parent company of Pellon Corp., in Germany in or before the 1960's and became generally accepted in the garment industry by the mid-1980's (tr. 3/64). DPSC began testing fusibles in the late 1960's to determine how they could be used in military clothing (tr. 6/133); and the Army Research and Development Center at Natick, Massachusetts, engaged in a continuous research, development, and experimentation program concerning the use of fusible fabrics for components of garments, including interlinings, from 1971 to 1983 and thereafter (tr. 5/170, 175-76, 193-94, 6/5-6, 16-17, 93-96, 136, 138, 192-200, 7/49, 9/115-21; exh. G-139, -143). All of the military services participated in the Natick program, including the Marine Corps (tr. 2/58, 6/13, 16-18, 133-34, 7/49, 116) which wrote the MIL-C-29365 (MC) specification, entitled "CLOTH, NONWOVEN: INTERLINING, FUSIBLE, NYLON AND POLYESTER, POLYAMID," around a Pellon product in February 1978 (exh. G-116,

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-139; tr. 6/19, 35); and the military departments were fusing interlinings on approximately 15 items such as dress shirts, raincoats, service caps, and optional PX-type uniform coats in the mid to late 1970's (tr. 5/199-200; exh. G-125). Although the Government had tested 250 uniform coats in 1975-76 to determine the feasibility of fusible interlinings therein (tr. 6/5-6, 21, 133-34; exh. G-128) and had met with Pellon personnel at its factory in New England in the mid-1970's (tr. 6/17), it was not convinced in late 1979 that the desired quality of dress coats could be maintained with fusible interlinings (tr. 5/198-99, 6/57, 94-95). As stated by Mr. Bruce Snigger of the Fabric and Fabric Technology Division of Natick, in a 14 January 1980 memorandum to the chief of that division (exh. G-128):

> 2. A meeting was held on 7 December 1979 with Mr. D. Cerow, AUPO, to review the present status of the use of fusible interlinings and discuss where new uses can be introduced as presented in reference 1. Present from F&FT Branch, TR&ED were B. Snigger, E. Frederick, and R. Roth.
>
> 3. From the items identified in reference 1 as potential candidates for fusibles, it was agreed that the items listed in the attached table should be investigated and priorities were assigned as indicated.
>
> 4. The following comments are made concerning the categories selected for investigation:
>
> a. Coats (items 1-3)—A wear test was performed in 1975/1976 with 250 fused polyester/wool coats. Although 68 percent of the test subjects reporting to NARADCOM indicated preference of the fused coats, some of the test items exhibited delamination of fused areas. The number of faulty coats generated a reluctance to introduce fusibles into dress items at that time. However, with the growing popularity of fusibles in commercial items, and with the experience gained in-house and by outside contractors, a program has been initiated to evaluate improved fusibles in 25 men's coats in a small scale, closely monitored wear test which could include Army Uniform Board personnel. The coats will be made under "ideal" conditions (temperature, pressure and dwell time) with the fusing being done in the fusible supplier's laboratory. Crown Textile Co. has offered to furnish the fusibles and to assist in the fabrication of the coats.
>
> b. Shirts and Overblouses (items 4-7)—The question was raised as to whether fusing of the flaps would magnify the puckering of the pocket stitching because of the flaps' relative smoothness. Approximately six (6) shirts will be made with fused collars, cuffs, flaps and shoulder loops to determine what aesthetic differences result before and after laundering.
>
> c. Raincoats (items 8-10)—A document modification will be sent through AUPO to EPMO which will implement the fusing of raincoat collar stands as an alternate to the sewn-in marquisette. Fusing of the raincoat front with a suitable nonwoven fabric was also determined to be worthy of investigation. Sample coats will tentatively be made up at the Pellon Corporation Studio in New York and evaluated.
>
> d. Women's Uniforms (items 11 & 12)—These items are scheduled to be phased out. AUPO has indicated that changes to these items would not be feasible since they could be out of the system before any modifications were implemented.
>
> e. Coat, Men's, Woven Twill, Textured Polyester, AG 434—UQC S-2-75 (item 13)—Since this item already utilizes fusible interlinings, a document change is being prepared for the UQC Office through AUPO to include fusing of the cuff wigans. This will be completed in January 1980.
>
> 5. Total funding over a two year period should be approximately $60,000. Action is being taken to transfer funds from AUPO to establish a TR&ED task.

14. Delamination is the separation of a fusible interlining from the fabric to which it is fused (tr. 1/131, 3/17, 43-44, 8/27).

15. At the time appellant submitted VECP 1280, it was aware that the Marine Corps had prescribed fusible, non-woven interlinings in MIL-C-29365 (MC) in 1978 (tr. 2/58). Appellant itself had had no prior experience with Pellon non-woven fabrics (tr. 2/114, 126).

16. By letter dated 28 February 1980, while the Government was evaluating VECP 1280 (R4, ASBCA No. 37798, tabs 8-11), appellant proposed the following Pellon products for the Government's consideration as "additional alternate" products to be used for interlinings on the Air Force women's pantsuit coats "for this procurement and all like procurements" (*ibid.*, tab 12):

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Pellon #SG413 36" Non-woven Fusible $1.09½ per yard White
Pellon #SG413 36" Non-woven Fusible $1.16½ per yard Black

(or, a lighter version)

Pellon #SG313 36" Non-woven Fusible $0.85 per yard White
Pellon #SG313 36" Non-woven Fusible $0.91 per yard Grey

17. In a letter dated 12 March 1980 (*ibid.*, tab 14), appellant informed DPSC:

> Cost estimated for the difference between hairwool and fusible interlining, as referenced in letter to DPSC dated 03 Dec 79, is incorrect. Depending on the type fusible interlining used, the savings is not $.89 but, from $1.36 for SG413 to $1.62 with Pellon #3633, SG313 savings would be $1.49.
>
> Estimated labor savings by fusing are as follows:

Labor cost deleted

Hand Operations

A. Operation 4 (E)	Press undercollar	.046
B. Operation 4 (T)3	Baste collar 1/4" from edge to edge	.092
C. Operation 12(A)	Baste interlining to front	.092
D. Operation 14(A)	Press fronts	.092
E. Operation 14(B)	Trim front interlining	.092
F. Operation 21(C)	Baste diagonal rows across lapel	.198

Sewing Operations

A. Operation 4 (A)	Blindstitch collar lining	.055
B. Operation 4 (H)	Stitch top and side edges of collar	.055
C. Operation 13(A)	Blindstitch 6 rows on lapel	.11
D. Operation 14(DD)	Stitch interlining from armhole to shoulder seam	.11
E. Operation 21(F)	Blindstitch back of front facing to interlining	.22
F. Operation 27(C)	Sew shoulder loop interlining to edge	.11

Labor cost added

Fusing of parts .20

Total labor savings are:	Deleted operations	$1.272
	Minus added cost	.22
	Savings	$1.052

18. After evaluation by DPSC and the Air Force specification preparing activity and in accordance with their recommendation (*ibid.*, tabs 13, 16-18), the contracting officer, by letter dated 18 April 1980, disapproved VECP 1280, stating (*ibid.*, tab 19):

> VECP 1280—Proposal to use Pellon fusible in lieu of cotton warp and spun haircloth or rayon filling interlining material is not approved. We concur in the concept of using fusible interlining materials wherever applicable. However, one of the problems to be resolved before any action can be taken is to have test methods that yield reproducible data on which requirements can be based. Also, compatibility of the Pellon material and the base cloth to which it will be fused must first be determined. Detailed manufacturing procedures to insure control of time, temperature, and pressure during the fusing operation is of primary importance.

19. On 13 and 16 June 1980, appellant resubmitted VECP 1280, proposing respectively that Pellon #3633 and Pellon #SG413 be used in the manufacture of the pantsuit coats instead of hairwool or hair-rayon, and further stating that the proposal contemplated a reduction in cost on all like garments as well as the contract item (*ibid.*, tabs 20, 21; tr. 1/126-27).

20. The Government took no action on the resubmitted VECP, and appellant, through counsel, submitted a claim concerning VECP 1280, in the amount of $1,023,999.86, on 4 August 1988 (exh. A-1165).

21. On 17 October 1988, the appeal in ASBCA No. 37798 was initiated by appellant after failure of the contracting officer to issue a final decision on its claim.

B. *VECP 1380 (ASBCA No. 37395)*

22. Appellant's 3 December 1979 letter to DPSC (finding 9) also contained the following proposal under Contract 2290 which the Government subsequently designated as VECP 1380 (R4, ASBCA No. 37395, tabs 6, 7):

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2. *Change From:*

V-T-301D Thread Silk 4/22/71 AM,2—4-19-73—$50.60 1750 yards per pound/Omit Completely.

Change To:

V-T-285 D Polyester—1750 yards $.65

Savings: $49.95 per pound

23. On 25 January 1980, appellant amended its proposal in the following letter to DPSC (*ibid.*, tab 8):

> Please refer to our Valued [sic] Engineering Recommendations dated 03 December 1979, Change #2.
>
> The information given to us by Gudebrod, Inc. regarding 1750 yards per pound, silk thread, is incorrect. We recommend the following change which will reflect the pounds as being accurate according to the management of Gudebrod, Inc.:
>
> *Change From:*
>
> V-T-301D Thread Silk 4/22/71 AM 2, 4-19-73 — $50.60 per pound
>
> Yield as follows: Type A 15,200 per pound
> Type B 12,480 per pound
> Type C 9,920 yards per pound (Gimp)
>
> *Change To:*
>
> *Threads, Inc.*
>
> | | | |
> |---|---|---|
> | Oncore 50 | MIL-T-43548 (To be used for all body construction including topstitching) | 7.02 per pound |
> | | Yield as follows: | 11,000 yards per pound |
> | Cotton A-3 | V-T-276 (To be used for button hole sewing) | 6.30 per pound |
> | | Yield as follows: | 9,600 yards per pound |
> | Cotton #8 | V-T-280 (Gimp to be used for button holes) | 5.86 per pound |
> | | Yield as follows: | 11,000 yards per pound |
>
> Omit V-T-295D Thread Nylon 2-33-77 $28.50 per pound. This can be utilized with Threads, Inc., as listed above.
>
> | | | | |
> |---|---|---|---|
> | Silk: A | $50.60 | Threads, Inc. | $ 7.02 |
> | B | 50.60 | Threads, Inc. | 6.30 |
> | C | 50.60 | Threads, Inc. | 5.86 |
> | | $151.80 | | $19.18 |
>
> Savings: $132.62 per three (3) pounds

24. After evaluation, the Government disapproved VECP 1380, except the proposal to use V-T 280 cotton thread for button hole gimps (reinforcements) which it accepted, in Modification P00006, dated 20 May 1980, as an alternative to the ENEU 78-7 requirement for silk thread for gimps (tr. 1/98, 9/54-55; R4, ASBCA No. 37395, tabs 9, 10).

25. The allowance of V-T cotton thread as an alternative material for gimps was confirmed in Modification P00010 which was executed by appellant on 30 October 1980 and by the contracting officer on 3 November 1980 and contained the following provisions (*ibid.*, tab 11):

1. Pursuant to Clause J 09 entitled Value Engineering Incentive Clause the following changes are made to the specification requirements:

VECP #1380—para. 3.1.15 Gimp—At the end of the paragraph add "or the Gimp may be cotton type II, size 8 of V-T-280."

2. The contractor and the Government hereby agree that savings as a result of VECP #1380 will be $.0395 per unit for future contracts utilizing this change.

3. It is agreed that the contractor is entitled to 50% of the unit savings or $.01975 per unit for all items utilizing this change during the royalty period.

26. Appellant did not use the alternative V-T-280 cotton thread for gimps on the 25,903 units which it delivered under Contract 2290 between 24 September and 9 De-

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cember 1980 (exh. A-1074, G-194; finding 5; app. posthearing br. at 78).

27. There were no concurrent contracts for the item which was the subject of Contract 2290, and no other contractors which manufactured women's Air Force pantsuit coats for the Government after appellant's submission of VECP 1380 elected to utilize the alternative V-T-280 cotton thread for gimps (tr. 4/26-27, 35, 9/57-58).

28. Appellant received no royalties or other compensation for VECP 1380 (tr. 1/120).

29. In a letter dated 27 May 1988, appellant filed a claim in this matter, through counsel, in the amount of $1,036.88 for instant contract savings and indicated that the claim would be supplemented as it obtained further information concerning the implementation of VECP 1380 by the Government (exh. A-1166).

30. Appellant subsequently appealed from a failure of the contracting officer to issue a final decision on VECP 1380.

C. *VECP 2181 (ASBCA No. 42243)*

31. By letter dated 31 October 1980 (R4, ASBCA No. 42243, tab 7), appellant submitted to DPSC the following VECP under Contract 2972, which was subsequently designated as VECP 2181 (*ibid.*, tabs 8, 9):

> Regarding Clause J 09 Value Engineering, MBOC recommends the following change:
>
> *Change From*
>
> 100 percent cotton plain weave cloth which has a uniformly distributed dot system of a polyvinyl chloride/polyvinyl acetate type fusible adhesive applied to one side. (Per paragraph 3.2.9.1 of LP/P DES 12-77A)
>
> *Change To*
>
> Pellon product SG413 (#8325) non-woven fusible interlining.
>
> Note: Pellon Corporation has notified MBOC that #SG413 and #8325 applies to the same product. A decision is being finalized by Pellon Corporation management as to which number will pertain to the product.
>
> Please refer to DLA100-79-C-2894 correspondence on VECP #3380 and DLA100-80-C-2290 correspondence on VECP #1380 from DLA which contains all current data and testing accomplished by the Department of Defense.
>
> Cost savings can only be determined upon future evaluating by audit. MBOC will supply this information upon request in complience [sic] with Clause J 09.

32. After technical review and evaluation of appellant's proposal, the Army Natick Research and Development Laboratories determined that the interlining material proposed in VECP 2181 was acceptable as an alternative to the interlining material prescribed in the contract, and it recommended the approval of that VECP (*ibid.*, tab 8; tr. 6/24, 43, 51).

33. Natick's recommendation was adopted by the Government in unilateral Modification P00005 to the contract dated 31 March 1981, which provided (R4, ASBCA No. 42243, tab 6):

> 5. In addition, VECP #2181 has also been approved. The following changes are incorporated into the contract as changes to MIL-C-44030:
>
> CHANGES TO MIL-C-44030, 24 July 1980
>
> a. Page 1, paragraph 2.1, under Military Specifications, add: "MIL-C-29365—Cloth, Nonwoven, Interlining, Fusible, Nylon and Polyester, Polyamid."
>
> b. Page 4, paragraph 3.2.9.1, at the end of the paragraph add: "As an alternative a nonwoven fusible fabric conforming to class 3 material of MIL-C-29365 may be used as a fusible interlining. Testing for the nonwoven fusible shall be as specified in MIL-C-29365 (The woven fusible requirements contained herein for colorfastness, 3.2.9.3; fusing conditions, 3.2.9.4; bond strength, 3.2.9.5, and shrinkage, 3.2.9.6, shall not apply).
>
> 6. The contractor shall be entitled to 50% of the unit savings or [sic] any unit incorporating VECP #2181. Unit savings has not yet been determined for this VECP; modification will be issued to definitize the savings at a later date.
>
> 7. Contractor is obligated to annotate the DD Form 250 which applies to the initial unit covered by the VECP #2181.

34. A cost analysis of the proposed change, conducted by DPSC's Directorate of Manufacturing in late March 1981 disclosed that the change in interlining material proposed in VECP 2181 would effect neither an increase nor a decrease in production costs (tr. 5/81, 6/152-56; exh. G-140).

35. VECP 2181 was not implemented under Contract 2972, and appellant received no payments for VECP 2181 (tr. 1/162; exh. A-1042; app. posthearing br. at 289-90, 384, 443-44).

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36. Appellant submitted its present claim in this matter, for an unspecified amount, on 3 August 1990 (R4, ASBCA No. 42243, tab 12) and subsequently appealed from a failure of the contracting officer to issue a final decision thereon (*ibid.*, tab 14).

D. *VECP 2880 (ASBCA No. 42416)*

37. On 22 January 1980, appellant submitted to DPSC a VECP, subsequently designated as VECP 2880, under Contract 2290, proposing that two labels prescribed in the contract for attachment to the pantsuit coats, one for size and one for contractor and personnel identification (tr. 1/165, 199, 5/114-15), be combined as suggested in a 10 December 1979 letter from its subcontractor, Star Printing Company, which stated (R4, ASBCA No. 42416, tabs 6, 7, 10):

> We enclose herewith 100 each of the labels required for your contract 2290 and can quote as follows for the labels as submitted:
>
> | | | | |
> |---|---|---|---|
> | 1. | 27,000 | 3" × 3" Type I Classes 1 & 10 labels | @$16.50 M |
> | 2. | 27,000 | Asst. $1\frac{1}{2} \times 1\frac{1}{4}$ Type I Class 2 labels plus 31 size changes | @ $5.25 M
@ $1.50 each |
> | | 27,000 | Asst. $3\frac{1}{2} \times 1\frac{5}{8}$" paper "bag insert" labels plus 31 size changes | @ $4.50 M
@ $1.50 each |
>
> Maury, if it is possible for you to combine label #1 and label #2 with $\frac{1}{4}$" sew in on four sides only, combination Type I Classes 1, 2 and 10 label, the price for 27,000 assorted $2\frac{5}{8}$" × $2\frac{3}{8}$" labels would be at $12.50 per thousand plus 31 size changes at $1.50 each. These labels would take the place of both 3" × 3" and the $1\frac{1}{2}$" × $1\frac{1}{4}$" label if you are able to convince the inspector that there is a cost saving by combining the two labels.
>
> We will hold up processing the balance of your order and would appreciate hearing from you at your earliest convenience how you want to handle the balance of this order.

38. After consideration and evaluation of VECP 2880, the Air Force Clothing and Textile Office, of Philadelphia, Pennsylvania, the specification preparing activity, reported that it did not concur in the proposal because the "size label is required to be placed so that it will be visible for both storage & issue purposes" (*ibid.*, tab 11).

39. By letter dated 2 April 1980 (*ibid.*, tab 12), the contracting officer informed appellant that VECP 2880 was not adopted for the reason stated by the specification preparing activity in its report.

40. VECP 2880 was not implemented on the subject contract, and appellant received no payment therefor (tr. 1/168, 171).

41. Appellant submitted its present claim, in an unspecified amount, for alleged constructive acceptance of VECP 2880 on 30 October 1990 and revised the claim on 26 November 1990 to an amount less than $50,000; and it has appealed from the failure of the contracting officer to issue a final decision thereon.

E. *VECP 3380 (ASBCA No. 42244)*

42. On 28 February 1980, appellant sent the following VECP to DPSC under Contract 2894, which was subsequently designated as VECP 3880 (R4, ASBCA No. 42244, tabs 6, 7):

> MBOC recommends the following change:
>
> *Change from:*
>
> Samuel Habers, QST, style #961/Facemate style #2320
> Fusible Interlining Woven. $1.05
>
> *Change to:*
>
> Pellon Corp., 36 inch SG413 Fusible Non-Woven 1.09\frac{1}{2}$ White
1.16$\frac{1}{2}$ Black
>
> This product has been proven to be highly successful in raincoats and all like garments for all outer-wear use.
>
> This product is especially good for garments that are exposed to rain or heavy water use. We have found that when the outer-shell becomes saturated, the SG413 does not defuse itself from the base fabric as easily as woven fusible facings. Its porus [sic] construction factors and its fusible properties are of a higher quality than woven products we have experienced in the past.

43. By letter to DPSC dated 7 April 1980, appellant amended VECP 3380 after learning that the Government intended to revise the provisions of MIL-R-82290B to replace the woven fusible interlinings with sewn-in hairwool woven cloth interlinings meeting the requirements of MIL-C-297, as follows (*ibid.*, tabs 8, 9, 15):

> . . . it has been brought to MBOC's attention that Woven Fusibles would be changed to a loose coat front, flap, collar and stand interlining.

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MBOC received a bid (DLA100-80-B-0542) that indicates MIL-C-297F Cloth, Interlining Cotton Warp and Hairwool. This product is $4.50 per yard (72 inches wide). The Hairwool will require hand trimming; added cost as follows:

1 Collar		.025
1 Stand		.025
2 Flaps	@ .02 each	.04
2 Coat Fronts	@ .06 each	.12

A total cost for hand trimming of .21c.

Machine setting time cost will increase as follows:

1 Collar		.015
1 Stand		.015
2 Flaps	@ .015 each	.03
2 Coat Fronts	@ .03 each	.06

A total increase cost of .12c per coat.

The above does not reflect arm flaps or epaulets. A cost increase can not be evaluated.

The percentage of shrinkage is flexable [sic] in the MIL-C-297F Cloth Interlining Cotton Warp and Hairwool. Patterns must be graded with an over-allowance to accommodate. This over-allowance can only be determined by the Pattern Maker and Engineering Department in the Government. Additional material of course will be necessary for the Hairwool Interlining.

The fabric cost difference is as follows:

a) Facemate Woven Style #2320	45 inches wide	$1.06	per yard
b) MIL-C-291F Cloth Hairwool/Cotton Warp	72 inches wide	4.50	per yard
c) MBOC recommends:			
Pellon Corp SC 413 Non-woven,	White	1.095	per yard
Pellon Corp SC 413 Non-woven,	Black	1.16½	per yard
(or) Pellon Corp SG 313	White	.85	per yard
Pellon Corp SG 313 Grey	36 inches wide	.91	per yard

The selection between SG 413 and SG 313 will determine the savings in this cost area.

Pellon SG 413 is heavier than SG 313. It is MBOC's opinion that SG 313 will accomplish an end product of quality finish and desired stiffness. It is also MBOC's position that bubbling will not occur because of the open weave construction of either SG 413 or SG 313. MBOC strongly suggests an indepth laboratory test on this product for all weather garments.

MBOC has made contact with the Pellon Corp to assume proper fusing. All fusing can be arranged if contractors do not have the proper fusing equipment.

This Valued Engineering Recommendation is for all like garments.

44. VECP 3380 was considered by the Navy Clothing and Textile Research Facility at Natick, Massachusetts, whose evaluation and recommendation (*ibid.*, tab 9) were adopted by the contracting officer and reflected in the latter's 14 October 1980 letter to appellant, as follows (*ibid.*, tab 10):

> Your Value Engineering Change Proposal 3380, recommending a nonwoven fusible interlining for man's raincoat under MIL-R-82290(SA) has been evaluated and final approval is still pending.
>
> Currently, the Navy, with the other military services, DCAS and DPSC are conducting a Fusible Interlining Development Program. The intent of this program is to develop a Government wide fool proof method of specifying fusibles, their requirements, application and testing in specifications.
>
> Since problems occurred with fusibles in raincoats in the past and since a program is currently underway, the Navy is withholding any adoption of fusible into the subject specification until the fusible interlining committee can agree on the adoption of specification verbage [sic] that is considered to be the best method of selecting, applying and testing the fusible.
>
> In view of the above, your VECP cannot be adopted at this time. We will inform you periodically regarding the progress of the fusible program.

45. By letter dated 15 October 1980 (*ibid.*, tab 11), appellant informed the contracting officer, with reference to VECP's 3380 and 1280:

> We have been advised by the Pellon Company that the progress for all branches of service has been verbally accepted and it is a matter of the time of processing the proper paper work to formalize the governments [sic] acceptance of the changes in the above reference [sic] VECP numbers.
>
> I would also like to advise you that for bookkeeping purposes, the numbers only are being changed by the Pellon Company to an 8,000 number series. SG313 is now

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8313 and SG413 is now 8325. The fabric itself has not changed.

The Value Engineering, as previously stated, is to cover all branches of service and all applicable garments.

Cost calculation of savings can only be determined upon audit and evaluation in accordance with Value Engineering Claus [sic] J09 DPSC Jan.

46. The specification for the Navy enlisted man's raincoat, which was the subject of Contract 2894, was never changed to include non-woven fusible interlinings or other components, and the raincoat was "phased out" as an authorized item starting in May 1985, and replaced by an all weather coat (*ibid.*, tabs 13, 15, 17; tr. 7/160).

47. VECP 3380 was not implemented on the subject contract, and appellant received no payment therefor (tr. 1/149-50, 153).

48. Appellant submitted its present claim, in an unspecified amount, concerning VECP 3380 on 3 August 1990 (R4, ASBCA No. 42244, tab 12) and has appealed from a failure of the contracting officer to render a final decision thereon (*ibid.*, tab 14).

III. *Appellant's Claims*

A. *VECP's 1280, 2181, and 3380*

49. Appellant contends that its suggested changes to non-woven fusible interlinings in VECP's 1280, 2181, and 3380 were constructively accepted by the Government when the latter implemented the concepts in those proposed changes on subsequent specifications; that the Government confirmed the constructive acceptance of VECP's 1280 and 3380 when it accepted VECP 2181; that it had introduced the Government, through DPSC, to the non-woven fusible manufactured by Pellon Corp. or its functional equivalent; that it is entitled to royalties for future contracts of the Government for "essentially the same" items, which it defines, as it applies to VECP's 1280, 2181, and 3380, as "any item which contains (or would contain 'but for' MBOC's VECPs) an unsatisfactory interlining requirement that can be replaced with a nonwoven fusible, resulting in lower production or life-cycle costs, without a diminution of the changed item's essential functions or characteristics"; that it is also entitled to royalties for collateral savings which the Government realized as a consequence of its constructive acceptance of those VECP's; and that the Government acted in bad faith in denying that its VECP's, particularly VECP 2181, resulted in contractor savings (app. posthearing br. at 63-65, 310-12, 316-458).

50. Since the changes recommended in appellant's VECP's were not implemented under its contracts, appellant is claiming no instant contract savings therefor (*ibid.* at 289-90, 384, 443-44).

51. Nor is appellant claiming any royalties for concurrent contracts since it could find no information to show that its VECP's were used on any such contracts (tr. 4/44; exh. B of exh. A-1040, -1041, -1042).

52. In accordance with its definition of "essentially the same item," appellant seeks royalties for alleged Government savings on many contracts awarded by the Government embracing the following military specifications (exh. A-1, -1000 through -1042, -1094; tr. 1/136-37, 149-50, 159, 3/41; app. posthearing br., vol III):

MIL-SPEC	*DESCRIPTION*
B-29407	Belt for Man's All Weather Coat
B-29408	Belt for Woman's All Weather Coat
C-15507	Woman's Garrison Cap
C-24921	Woman's All Weather Coat With Removable Liner
C-43972	Woman's All Weather Coat, Black, With Removable Liner
C-44030	Man's All Weather Coat, Black, With Removable Liner
C-87110	Man's All Weather Coat, Black, With Convertible Collar and Removable Liner
C-87170	Woman's All Weather Coat, Black, With Removable Liner
C-87230	Flyer's Coveralls
J-88382	Man's Flyer Jacket, Summer
J-82189	Man's Full Dress Coat, Summer and Winter
J-83388	Flyer's Jacket, Cold Weather
J-29451	Man's Marine Corps Jacket, Intermediate Weight
R-24918	Man's Double-Breasted Raincoat, Coast Guard, With Removal Liner
R-24919	Woman's Raincoat, Coast Guard, With Removal Liner
R-43518	Man's Quarpel-Treated Double-Breasted Raincoat
S-21087	Woman's Skirt, Wool, Polyester Wool
S-29122	Woman's Dress Skirt
S-87053	Woman's Belted Skirt
S-87054	Woman's Belted Slacks
S-87055	Woman's Dress Shirt, White

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C-24920	Man's All Weather Coat, With Epaulets, and Removable Liner
C-27438	Man's Service Coat
C-44048	Combat Coat, Camouflage Pattern
C-44211	Man's Coat, Tropical and Serge, Polyester Wool
C-44379	Woman's Combat Coat, Polyester Wool
C-87215	Woman's Air Force Garrison Cap
J-87250	Man's Light Weight Jacket, With Removable Liner
J-87251	Woman's Light Weight Jacket, With Removable Liner
J-29396/7	Woman's Dress Jacket, Scarlet
S-24948	Woman's Slacks
S-29394	Woman's Marine Corps Band Evening Dress Skirt
S-29429	Woman's Skirt
S-44039	Man's Long Sleeve Shirt, Polyester/Cotton, Army Green
S-44041	Man's Short Sleeve Shirt, Army Green
S-44090	Woman's Short Sleeve Shirt, Polyester/Cotton, Army Green
S-44093	Woman's Long Sleeve Shirt, Polyester/Cotton, Army Green
S-44290	Man's Hospital Duty Uniform Smock
S-83234	Woman's Blue Skirt
S-82126	Woman's Marine Corps Dress Skirt
T-44047	Combat Trousers, Camouflage Pattern

53. Appellant selected the foregoing military specifications and the Government contracts referring to them after examination of the histories and specifications of several thousand contracts (tr. 1/99-100, 104-13). Employing consultants with expertise in engineering, computers, apparel manufacturing, methods-time-measurement with regard to clothing manufacture, and cost and pricing data (tr. 2/149-54, 3/9-15, 4/11-19, 23), appellant completed the formulation and quantification of its claims in late March 1992 in reports prepared by the Peter Elliott Accountancy Corporation (exh. A-1040, -1041, -1042; tr. 3/18-58, 105-61, 4/23-120) which contained cost figures for the following:

a. Appellant's estimate of labor and material savings by the Government on future contracts.

b. Indirect expense savings.

c. Profit.

d. Extended life savings—i.e., estimated savings on quantities that would have been scheduled for delivery but for implementation of the VECP's.

e. Maintenance savings.

f. Interest, both before and after the filing of appellant's claims.

g. Collateral savings and interest thereon.

h. Escalation—i.e., the adjustment of material costs to the midpoint period of performance (tr. 4/31-33).

i. Re-engineered costs for VECP 1280 reflecting an alternate royalty period of the highest three years of planned production because Contract 2290 was a production test contract (tr. 4/38-41).

54. The total amounts of appellant's claims for its three non-woven fusible interlining VECP's, as constructed by the Elliott Corporation, were (exh. A-1040, -1041, -1042):

VECP 1280		$68,629,052
VECP 2181		91,182,891
VECP 3380		17,013,187
	Total	$176,825,130

B. *VECP 1380*

55. Appellant contends that its suggestion in VECP 1380 that cotton gimp be used for button hole sewing was implemented by the Government in future contracts for approximately 32 "essentially the same" items as that purchased under Contract 2290, defining "essentially the same item" as "any item which contained (or would have contained) buttonholes prior to MBOC's VECP" (app. posthearing br. at 76, 287, 415; exh. A-1049 through -1074; tr. 1/99, 118).

56. Appellant seeks no collateral or concurrent savings in its claim for this VECP (tr. 1/18; exh. A-1074).

57. Appellant does not seek any instant contract savings since "Contract DLA100-80-C-2290 was modified to incorporate VECP 1380, however, the change was not implemented on that contract" (exh. A-1074 at A2, p. 1; finding 26; tr. 3/74; app. posthearing br. at 78).

58. The future contracts for which appellant seeks royalties for VECP 1380 embraced the following military specifications (exh. A-1, -1049 through -1074; tr. 1/107-12):

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MIL-SPEC	*DESCRIPTION*
T-44094	Trousers, Night Camouflage, Desert
C-24920	Man's All Weather Coat with Removable Liner
C-24921	Woman's All Weather Coat with Removal Liner
C-27438	Man's Service Coat
C-44101	Woman's Classic Design Coat, Polyester/Wool
C-44107	Ground Troops Parachutist's Helmet Cover
C-44111	Woman's Maternity Work Uniform Coat
C-44211	Man's Tropical Serge Coat, Army Green
C-44379	Woman's Classic Design Coat, Army Green
J-24949	Woman's White Jumper
J-87250	Man's Light Weight Jacket with Removable Liner
J-87251	Woman's Light Weight Jacket with Removable Liner
O-24905	Man's Coast Guard Reefer Overcoat
O-24906	Woman's Coast Guard Reefer Overcoat
O-24926	Enlisted Woman's Overcoat
R-24918	Man's Coast Guard Raincoat
R-24919	Woman's Coast Guard Raincoat with Removable Liner
S-29429	Woman's Skirt
S-44110	Woman's Maternity Work Uniform Skirt
S-87005	Woman's Coast Guard Dress Skirt
S-87169	Woman's Utility Durable Press Shirt
S-87171	Woman's Durable Press Utility Slacks
T-29452	Man's Polyester Wool Trousers
C-29391	Woman's Wool Gabardine Dress Ceremony Coat
C-29393	Woman's Marine Full Dress Coat
J-29396	Woman's Marine Band Full Dress Jacket
J-29397	Woman's Marine Band Full Dress Jacket
J-29451	Man's Intermediate Weight Jacket, Polyester Wool
O-29390	Woman's Wool Gabardine Overcoat
S-29392	Woman's Wool Gabardine Skirt
S-29394	Woman's Marine Band Evening Dress Skirt
S-29395	Woman's Musician Slacks
S-24902	Woman's Polyester and Cotton Slacks
T-44291	Man's Hospital Duty Uniform Trousers
V-29389	Man's Scarlet Dress Vest

59. Appellant selected the foregoing military specifications and the Government contracts referring to them and prepared its claim for VECP 1380 in the same manner and with the same elements as for VECP's 1280, 2181 and 3380 (finding 53; tr. 1/99-100, 104-15, 4/23-42, 45; exh. A-1074), except that the Peter Elliott report for VECP 1380 contained no collateral savings or re-engineered costs (tr. 4/39; exh. A-1074).

C. *VECP 2880*

60. Appellant contends that VECP 2880, which suggested the combining of labels for pantsuit coats, was denied by the contracting officer "in bad faith and without a rational basis" (app. posthearing br. at 88) and that it was constructively accepted by the Government's utilizing the change in contracts involving the following 13 specifications for essentially the same item, which appellant defines as "any place that the Government is going to use the combination label" without restriction to any particular garment (*ibid.;* tr. 1/32, 168-71; exh. A-1, -1080 through -1092):

MIL-SPEC	*DESCRIPTION*
C-85700	Flyer's Summer Coveralls
T-44213	Physical Fitness Trunks
C-87230	Flyer's Cold Weather Coveralls
O-24905	Man's Coast Guard Reefer Overcoat
O-24906	Woman's Coast Guard Reefer Overcoat
P-44087	Night Camouflage Desert Parka
P-44188	Extended Cold Weather Camouflage Parka
S-29415	Wool Service Sweater
S-37951	Man's Medical Assistant Polyester/Cotton Smock
S-44092	Woman's Classic Design Polyester/Wool Slacks
S-44212	Hooded Physical Fitness Uniform Sweat Shirt
T-44094	Night Camouflage Desert Trousers
T-44189	Extended Cold Weather Camouflage Trousers

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61. Appellant further contends that the first unit which incorporated VECP 2880 was delivered to the Government on 28 February 1984 and that therefore the royalty period for the VECP is from February 1984 to February 1987 (exh. G-308; app. posthearing br. at 89); that since Contract 2290 was a production test contract, with a low rate of production, a second, alternative royalty period, based on the highest 36 months of actual production, from April 1989 to April 1992, is applicable (*ibid.*); and that it is entitled to royalties for future contract savings totalling $250,575 (*ibid.* at vol III, attachment 1).

62. Appellant seeks no instant contract savings royalties since its proposed change was not implemented under Contract 2290 (exh. A-1093; tr. 1/168).

63. Nor does appellant seek any concurrent contract savings royalties or collateral savings costs (exh. A-1093).

64. Appellant prepared its claim for VECP 2880 in the same manner and with the same elements as for its other VECP's (findings 53, 59; exh. A-1093; tr. 4/63-67).

IV. *Pertinent Regulations*

A. *Collateral Savings*

65. Armed Services Procurement Regulation (ASPR) 1-1703.2 (1 July 1976), in effect at the time of award of the subject contracts, provided that the paragraph in the standard J09 Value Engineering Incentive clause entitling a contractor to share in collateral savings "may be excluded from a contract or class of contracts when the HPA [Head of the Procuring Activity] determines that the cost of computing and tracking collateral savings will exceed benefits to be derived."

66. Pursuant to that regulation, the paragraph in the standard J09 clause entitling a contractor to share in collateral savings was excluded from all of the contracts involved in these appeals (finding 8) as well as for subsequent DPSC contracts for the acquisition of clothing and textiles (tr. 9/103-07; exh. G-165, -166, -167, -171).

B. *Profit*

67. ASPR 1-1703.1(d), in effect at the time of award of the subject contracts, provided:

> On instant and future contracts the contractor's profit or fee shall be excluded when calculating the net savings.

C. *Alternative Royalty Period*

68. Appellant contends that because Contracts 2290 and 2874 were production tests contracts, it is entitled to future contract royalties for the time period prescribed in Defense Acquisition Circular (DAC) #76-26, dated 15 December 1980, which was in effect prior to the actual acceptance of VECP's 1380 and 2181 and the constructive acceptance of VECP's 1280, 2880, and 3380, as an alternative to the royalty period specified in the J09 clause of the contract (app. posthearing br. at 18). DAC #76-26 provided (exh. A-1146):

> (4) *Concurrent and Future Contract Savings.*
>
> *a.* .... If the instant contract is for low rate initial production or an earlier life-cycle phase, the future sharing period shall encompass scheduled deliveries, equal in number to the quantity required by the highest 36 consecutive months of planned production, based on the Five Year Defense Program (FYDP) or other planning documentation at the time the VECP is accepted.

V. *Additional Findings and Conclusions*

A. *VECP's 1280, 2181, and 3380*

69. In VECP 1280, appellant had proposed to change only the fronts of pantsuit coats and not other coat parts for which it seeks royalties (finding 9; tr. 6/140, 7/13, 9/22-23).

70. The fronts of women's pantsuit coats were never changed in military specifications to include non-woven fusible interlinings (tr. 6/139-40, 143-44, 147-48).

71. The change proposed in VECP 3380, from woven fusible interlining to Pellon non-woven fusible interlining, would not have produced any savings, but rather it would have increased the cost of the Navy enlisted man's polyester cotton raincoat since the proposed Pellon material cost ($1.095 per yard for white and $1.165 per yard for black) was greater than the cost of the woven material prescribed in the contract ($1.05 per yard) (finding 42; tr. 1/141, 146, 6/84-85, 156-58).

72. The raincoat which was the subject of Contract 2894 and VECP 3380 was phased out of the Government procurement system in 1985 (tr. 7/160).

73. The change in material proposed in VECP 2181, from woven to Pellon non-woven interlining in the Army man's polyester cotton all weather coat, which the Government accepted as an alternative (findings 32, 33), would have produced no cost savings since the cost of the Pellon material was the same as that for the interlining material pre-

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scribed in the contract (tr. 1/162, 5/81, 6/83, 86, 152, 155-56; exhs. G-140, -141).

74. Contrary to appellant's contention (finding 49), it did not introduce the Government to the non-woven fusible manufactured by appellant. Before appellant had submitted its VECP's concerning Pellon products or otherwise suggested their use by the Government, the Government had met with Pellon personnel at the latter's factory, had written a specification, MIL-C-29365, around a Pellon product, and fully considered Pellon's non-woven fusible interlinings as part of its continuous research, development, and experimentation program concerning the use of fusible fabrics for garment components for all of the military services (findings 13, 15).

75. Non-woven fusibles had not been sufficiently developed by late 1979 to eliminate the likelihood of delamination and shrinkage during manufacture, particularly during fusing, and subsequently during laundering and dry cleaning processes (tr. 5/198-201, 6/57, 94-95, 135-36, 7/99, 122, 8/35-37; finding 13).

76. In the 1980's, improvements in technology, particularly with regard to fusion machines and resin-based adhesives developed for the fusion process, led the Government, as well as the textile industry, to make more extensive use of non-woven fusibles in the fabrication of wearing apparel and other textile products (tr. 3/63-64, 71, 161, 5/198-202, 6/81-82, 145, 8/16-17, 43-46).

77. Four days before appellant had submitted VECP 2181, the Government had completed a study of a Pellon non-woven fusible and had begun to draft changes to military specifications for all weather coats, as indicated in the following memorandum for the record dated 27 October 1980 by Natick's fusing program project officer (tr. 6/23, 38; exh. G-151):

> 1. A study of Pellon Corporation Style 8325 has been completed by the Seams Engineering Laboratory. The nonwoven style is compatible with the water repellent treated fabric used in the men's, women's and Jr. ROTC all-weather coats. No delamination of any samples was found, and the fused fabrics look outstanding, in my opinion, after laundering or dry cleaning.
>
> 2. In view of the above, I am drafting the necessary changes to the all-weather coat specifications (MIL-R-87110, MIL-R-43972 and MIL-R-43962A) to allow the nonwoven as an alternate to the present (woven) fusible. This decision was based on our testing, Pellon test results and acceptance by the Marine Corps and commercial manufacturers. In addition, a minimal cost savings should result when the nonwoven is used.

78. On the record before us, we are convinced that none of the military specifications for which appellant seeks future contract royalties (finding 52) was changed because of appellant's VECP's 1280, 2181, and 3380 (tr. 6/158-71, 177-78, 183-84, 7/9-43, 8/24-30, 43-47, 50). In fact, those working on the fusible program and garment specifications at Natick in the 1980's had never even heard of appellant (tr. 8/46).

79. Nor are we persuaded that the Government realized any cost savings on any future contracts involving those military specifications because non-woven fusibles, as opposed to other materials, were prescribed therein (tr. 6/151-53, 155-58, 169-71, 194). In this regard, we deem it highly significant that appellant produced no cost records of any contractor under any of those contracts to disclose how its manufacturing costs were affected by its use of non-woven fusibles.

80. We further conclude, after examination of the military specifications upon which appellant bases its claims for future contract royalties (finding 52), that none of those specifications dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions; that none of those specifications dealt with an item which was essentially the same as the man's cotton and polyester poplin cloth all weather coat prescribed in Contract 2972 with regard to design, construction, purposes and functions, with the exception of MIL-C-44030; and that none of those specifications dealt with an item which was essentially the same as the Navy enlisted man's single-breasted raincoat prescribed in Contract 2894 with regard to design, construction, purposes, and functions (exh. A-1000 through -1042; tr. 2/101-03, 3/23, 5/196, 8/31-34). Most of those specifications, such as those for belts, caps, coveralls, skirts, slacks, shirts, and combat wear, were not even for remotely similar items (tr. 5/196, 8/32-34; exh. A-1000 through -1042).

81. The revision to MIL-C-44030, which appellant alleges constituted implementation of its VECP 2181, only affected items delivered after 18 September 1984 (exh. A-1, -1029), more than three years after 14 May 1981 when appellant ceased operations on

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all Government contracts (exh. A-1042, attachment 5 at 2, 21).

82. We find in the record before us no evidence to persuade us that any future contractors for the production of garments in accordance with MIL-C-44030 elected to use the alternative non-woven fusible fabric for interlinings in accordance with the July 1980 amendment to that specification (finding 33) or, if they did, thereby effected any cost savings for themselves or the Government.

B. *VECP 1380*

83. None of the military specifications upon which appellant bases its claim for future contract royalties (finding 58) dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions; and most of them, such as those for trousers, helmet covers, jumpers, raincoats, skirts, shirts, slacks, and vests, were for items which were not even remotely similar to the pantsuit coat (exh. A-1049 through -1074; tr. 2/101-03, 3/23, 5/196, 8/31-34, 61-62).

C. *VECP 2880*

84. None of the military specifications upon which appellant bases its claim for future contract royalties (finding 60) dealt with an item which was essentially the same as the Air Force woman's pantsuit coat prescribed in Contract 2290 with regard to design, construction, purposes, and functions; and most of them, such as those for coveralls, trunks, parkas, sweaters, smocks, shirts, slacks, and trousers, were for items which were not even remotely similar to the pantsuit coat (exh. A-1080 through -1092; tr. 2/101-03, 3/23, 5/196, 8/31-34, 61-62).

D. *All of the VECP's*

85. The Clothing and Textile Directorate of DPSC has never awarded a *low rate* initial production contract, and all of its contracts have always been firm fixed price contracts (tr. 9/63-64).

86. We find no evidence in the record of these appeals to establish that any of the subject contracts was, or was intended to be, a low rate initial production contract within the meaning of DAC #76-26 (finding 68) or that the items procured in any of the subject contracts were involved in any Five Year Defense Program or other planning documentation at the time any of appellant's VECP's were accepted.

87. Although appellant alleges in its post-hearing brief that the Government acted in bad faith and without a rational basis in actions which it took concerning the VECP's which are the subjects of these appeals (findings 49, 60), we find no evidence in the record before us which supports that allegation, and we conclude that the Government's representatives acted in good faith and with good and rational cause in all of their actions with regard to those VECP's.

DECISION

Although appellant has expended years of effort, culminating in the many volumes of documentary evidence and the extensive testimony which it has presented to us in support of its claims in these appeals totalling approximately $180 million, we find those claims to be wholly without merit.

It is appellant's position that it is entitled to royalties because four of its five VECP's, 1280, 2181, 2880, and 3380, were constructively accepted by the Government when the latter implemented the concepts in those proposed changes on subsequent, or future, contracts (findings 49, 60).

That position, however, is invalid as to three of those VECP's since there can be no compensable constructive acceptance of a VECP under future contracts if a VECP was rejected without bad faith for the contract under which it was submitted. *John J. Kirlin v. United States* [34 CCF ¶ 75,354], 827 F.2d 1538, 1541 (1987); *M. Bianchi of California,* ASBCA Nos. 37029 and 37071, 93-1 BCA ¶ 25,309, at 126,089; *appeal docketed, M. Bianchi of California v. Cheney,* No. 93-1087 (Fed. Cir. 2 Dec. 1992).

Since VECP's 1280, 2880, and 3380 were rejected under appellant's contracts without bad faith on the part of the Government (findings 18, 39, 44, 47, 87), appellant could therefore, as a matter of law, not recover future contract royalties for those VECP's even if they had been implemented on future contracts.

Although VECP 2181 was accepted under Contract 2972 as an alternative provision, it was not implemented thereunder by appellant (findings 32, 35). Consequently, there was no unit cost reduction for that VECP under Contract 2972; and without such instant contract unit cost reduction, there can be no future contract royalties under the terms of the J09 clause of the contract (finding 8), since the basis of future contract royalties is clearly stated in that clause, at (e)(3)(i) and (iii)(A), to be "the unit cost reduction under this instant contract."

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Thus, there is no legal basis for appellant to recover future contract royalties for VECP 2181 even though it had been accepted.

All of these appeals must be denied as to collateral savings since neither the J09 clause nor any other clauses in the subject contracts allow the contractor any compensation therefor (findings 8, 65, 66).

Furthermore, none of appellant's claims are supported by the facts surrounding them.

Three of these appeals, ASBCA Nos. 37798, 42243, and 42244, deal with VECP's (1280, 2181, and 3380) proposing contract changes to permit the use of Pellon fusible non-woven interlinings in various types of coats. However, it has been clearly established that at the time appellant submitted those VECP's, the Government was engaged—and had been for many years—in a research, development, and experimentation program concerning the use of fusible fabrics, including Pellon non-woven fusibles, for interlinings and other garment components; that appellant was aware of that program; that the Government had already used fusible non-woven interlinings in some garments; and that the Government had even written a specification for non-woven fusible interlinings around a Pellon product (findings 13, 15, 74, 77).

The record before us compels the conclusion that not a single military specification for which appellant seeks future contract royalties was changed because of any of appellant's interlining VECP's (finding 78).

Furthermore, we have found no evidence to persuade us that the use of non-woven fusible interlinings in any contracts involving the military specifications cited by appellant resulted in any cost savings to the Government (finding 79).

Appellant's claims for VECP's 1280, 2181, and 3380 are also unallowable because none of the future contracts for which it seeks royalties were for essentially the same items as those purchased in appellant's contracts, except those embracing MIL-C-44030 (finding 80), and we find no evidence to establish that any contractors who produced garments in accordance with MIL-C-44030 elected to use non-woven fusible fabric as an alternative material for interlinings or delivered any items to the Government within the three-year royalty period prescribed in the J09 clause of the contracts (findings 81, 82).

Likewise, ASBCA Nos. 37395 and 42416, dealing respectively with VECP's 1380 and 2880, cannot be sustained because none of the future contracts for which appellant seeks royalties in those appeals was for essentially the same item as that purchased in Contract 2290 (findings 83, 84).

The claim for VECP 1380 in ASBCA No. 37395 must also be rejected because no contractors which manufactured women's Air Force pantsuit coats after the submission of that VECP elected to utilize the V-T-280 cotton thread for gimps which was allowed as an alternative pursuant to the VECP (findings 24, 25, 27).

For the foregoing reasons, all of the subject appeals are denied.

[¶ 26,418] R&R Enterprises

IBCA Nos. 2833, 2860, 2897, October 1, 1993. Contract No. CC-9029-82-002.

Modifications—Novations and Change of Name Agreements—Approval of Corporate Status.—A contractor, a partnership, was not entitled to damages for alleged breach of contract for the government's failure to allow the transfer of a concession contract from the contractor to a proposed corporation, because the contractor did not have an absolute right to transfer the concession contract to the new corporate entity. The contractor acquired possession of the assets of the prior holder of a resort concession, on which the Small Business Administration held a lien as security for debt. The contractor did not assume the debt, but it took possession of the assets of the resort subject to the lien. The contractor decided to incorporate for business reasons before assuming the debt but failed to submit the details of the proposed corporation to the government. Although the government declined to take action on the incorporation request, the contractor was not harmed, because the SBA was willing to have the debt assumed by the contractor as a partnership.

Attorney Fees and Costs Under Equal Access to Justice Act—Board's Authority Under EAJA—District Court Litigation.—A claim for attorney fees and expenses incurred by a contractor in a federal district court was denied because the board does

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not have jurisdiction to decide a claim for costs incurred in another forum. The contractor incurred the expenses defending against the Small Business Administration's attempt to use federal offset procedures with regard to a judgment obtained by the contractor; however, the contractor presented no reasonable rationale as to why the board should be entitled to exercise such jurisdiction.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Statutory Claim v. Contract.—The government's motion to dismiss a claim for lack of jurisdiction on the basis that the ground for the claim was a statutory and not a contractual right was denied because the actions of government officials in applying the law are subject to the board's review. The contractor alleged that the government denied its right of preference as an incumbent concessionaire. However, the fact that the officials interpreted a statute relating to the preferential status of an incumbent did not allow them to avoid review by the board or courts. Most actions taken by contract administrators are for the purpose of applying various statutory and regulatory requirements to particular contracts.

Selection of Contractor—Competitive Advantage—Incumbent's Preference.—The government's alleged failure to give the preference to an incumbent contractor for a follow-on concession contract was not a ground for damages, because the incumbent contractor did not submit a responsive proposal and its right of preference was therefore extinguished. The government required that an applicant submitting an offer in response to the statement of requirements had to demonstrate the ability to resolve an existing debt issue with the Small Business Administration, and the incumbent contractor did not address the problem of the SBA lien on the resort property in its response.

For the appellant: Joseph J. Connolly, Lynwood, Washington. For the government: William D. Back, Department Counsel, Portland, Oregon.

Before PACKWOOD and PARRETTE, Administrative Judges.

PACKWOOD, Administrative Judge: These claims arose out of National Park Service (NPS) Concession Contract 9029-82-002 for the operation of the Diablo Lake Resort located in the Ross Lake National Recreation Area of the North Cascades National Park Complex. The appellant, R&R Enterprises, a State of Washington limited partnership, operated the Diablo Lake Resort with privately owned assets on ground space provided and assigned by the concession contract. The Diablo Lake resort consisted of 20 rental cabins, a resort store and utility building, a restaurant, and a marina. Thomas M. and Nancy J. Roberts purchased the resort assets from LMH Investments, Inc. (LMH), paying $45,000 in cash and executing a note to LMH for $325,000, on March 26, 1982. On March 31, 1982, the Roberts sold their interest in the resort to R&R Enterprises for two notes, one for $45,000 and the other for $328,000. On April 8, 1982, NPS cancelled the LMH concession contract and superseded it with a new concession contract with R&R Enterprises, CC-9029-82-002, effective through December 31, 1988.

The appeals, docketed as IBCA-2833, 2860, and 2897, all relate to contract number CC-9029-82-002. The first appeal involves a claim for $88,000 for an alleged breach of contract when NPS did not allow transfer of the concession contract from the R&R partnership to a proposed corporation. The second appeal, IBCA-2860, is for damages in the amount of $95,500 for expenses incurred in a court action involving an attempt by the Small Business Administration (SBA) to offset a judgment by this Board in R&R's favor for $50,000 in IBCA-2417 against an SBA lien on the assets of the Diablo Lake Resort. The third claim is for a total of $612,198 in damages alleged to have resulted from the failure of NPS to give preference to R&R and to award a follow-on concession contract after CC-9029-82-002 expired on December 31, 1988.

The three appeals were consolidated for the purpose of hearing, briefing, and decision. A 2-day hearing was held in Seattle, Washington. At the conclusion of the testimony offered by appellant, the Government rested without offering any testimony. Appellant requested and was granted permission to supplement the record with information regarding a pending Government motion to dismiss the third appeal, IBCA-2897, for lack of jurisdiction.

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IBCA-2833

At the time R&R acquired possession of the assets of the Diablo Lake Resort in 1982, the previous holder of the concession, LMH, owed approximately $325,000 to SBA, which held a lien on the assets of the resort as security for the debt. R&R did not assume the debt, but took possession of the assets of the resort subject to the lien, and agreed to make payments of $4,100 per month to LMH, which in turn was supposed to use the money for payments to SBA. However, Melvin Heidi, owner of LMH, filed a petition in bankruptcy in December 1984 and R&R stopped making payments to LMH for fear that the payments would not be passed on to SBA for credit against the outstanding balanced owed by LMH. During the remainder of the concession contract (until December 31, 1988), R&R made no monthly payments nor did it deposit any payments in escrow for the payment of the loan.

During the summer of 1988, R&R held discussions with SBA regarding assumption of the debt which, with accrued interest, had now grown to more than $400,000. R&R agreed in principle to the assumption of the debt, but for business reasons decided it would not be wise to expose the partners in R&R to further personal liability in the event R&R did not obtain the new contract for the concession to operate the resort. SBA agreed to allow R&R to incorporate before assuming the debt and on September 5, 1988, R&R requested permission from the National Park Service to incorporate and transfer the concession contract to the new corporation to preserve for the corporation the benefits of incumbency when the time came to award the new contract to operate the concession. R&R failed to submit to NPS the details of the proposed corporation, such as the corporate charter and the proposed capitalization of the corporation. On September 26, 1988, NPS declined to take immediate action on the incorporation request from R&R and assumed that the request would be renewed with more detailed information in response to the soon-to-be-issued Statement of Requirements for the new concession contract.

Appellant has made no showing that it had an absolute right to transfer the concession contract to a new corporate entity without disclosure of adequate details regarding the new entity. NPS, on the other hand, had the responsibility to consider the public interest in any such transfer, where, as here, the amount of the lien against the assets of the resort greatly exceeded the value of the assets, and the only security NPS had that the resort would be operated was the personal liability of the partners of R&R. It was prudent of NPS officials to defer approval of the request for incorporation of R&R in order to obtain more details of the proposed corporation. There was no abuse of discretion on the part of the NPS officials.

Since SBA was willing to have the debt assumed by R&R as a partnership, the Board finds that the decision by NPS not to give immediate approval of the incorporation caused no harm to R&R. The claim for damages resulting from such action must therefore be denied.

IBCA-2860

In this claim, R&R asks the Board to assume jurisdiction over events which occured in a Federal District Court and to approve a claim for $95,500 for attorney's fees and expenses incurred by R&R to fight an attempt by SBA to use Federal Offset Procedure with regard to a $50,000 judgment obtained by R&R in IBCA-2417.

Appellant has offered no reasonable rationale as to why the Board should be entitled to exercise such jurisdiction. The claim is therefore dismissed for lack of jurisdiction.

IBCA-2897

The claims docketed under this appeal are based on appellant's allegation that it was denied its right of preference as an incumbent concessioner when the successor contract was entered into. The Government has moved the Board to dismiss this appeal for lack of jurisdiction, on the grounds that the right of preference is a statutory, not a contractual, right and that the actions of NPS officials in applying the law are not subject to the Board's review.

At the conclusion of the hearing, appellant requested and was granted permission to supplement its response to the Government's motion. However, when appellant offered its supplement, the Government fought vigorously to oppose allowing the submission into the record. Since the evidentiary record was closed at the conclusion of the hearing, appellant's supplement to its response to the Government's motion is received as argument, not as evidence.

The Government's argument with respect to its motion is not persuasive. The mere fact that NPS officials apply a statute relating to the preferential status of an incumbent does not grant them any special cachet.

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Most of the actions taken by contract administrators throughout the Government are for the purpose of applying various statutory and regulatory requirements to particular contracts. Such actions are routinely reviewed by agency boards of contract appeals. There is no safe harbor for NPS to avoid review of its actions by this Board or the courts merely because it is interpreting a statute in relation to a contract. The Government's motion to dismiss this appeal for lack of jurisdiction is therefore denied.

Appellant's claims under this docket number, IBCA-2897, are based on the allegation that NPS failed to grant a right of preference to R&R in awarding a new contract for operation of the Diablo Lake Resort.

Thomas Roberts, a principal partner in R&R, was aware of NPS' concern about achieving a resolution of the debt to SBA, having been advised by the Deputy Regional Director in his letter of September 22, 1988, as follows: "The Park Service has been concerned for sometime about the increasing debt of the resort and its ability to meet future obligations. *Any applicant submitting an offer in response to the Statement of Requirements must demonstrate the ability to resolve this debt issue with the Small Business Administration.*" (Emphasis added.) And, in the Statement of Requirements (SOR), A.F. 18, NPS restated this requirement:

> Before the concession contract is to be negotiated with anyone, the proposed successor must be able to satisfy with the U.S. Small Business Administration, their first lien of any possessory interest described herein or other assets, including merchandise and inventory used or held for use in connection with the operations. Negotiations may be conducted directly with the U.S. Small Business Administration.

A.F. 18, p. 221.

Prior to March 13, 1989, when proposals for the new concession contract were due, appellant's counsel was advised (on March 10, 1989) by SBA Regional Counsel Marsha Beck as follows:

> As of February 22, 1989, the outstanding balance on this loan was $407,800.54. Our records indicate that your clients have not made a payment on this debt since December 27, 1984.
>
> In the past, SBA has agreed to an assumption of this loan by your clients, subject to various conditions. SBA further agreed to various modifications at the request of your clients. For one reason or another your clients failed to proceed with the assumption. The Seattle District Office has decided that further lack of payments on this loan cannot be tolerated and has chosen to initiate foreclosure proceedings.

A.F. 23, p. 332.

Also on March 10, 1989, the SBA advised appellant's counsel of the following by letter:

> As you will recall, you have advised Mr. Lovegren and myself in numerous telephone conversations that your clients have no desire to make any commitment to SBA unless they are first assured that they can obtain the necessary contract to operate the resort. My letter to you of January 5, 1989 confirmed that SBA ceased processing the Roberts' proposal when the Agency was advised that this was not an acceptable solution to the Park Service. Apparently, Mr. Roberts also believed that the Park Service decision rendered his proposal moot, as he stated in his letter of October 3, 1988 to the NPS that as a result of their decision his "agreement" with SBA was "useless and cannot be completed."
>
> Thereafter, since despite the foregoing and our numerous telephone conversations, you continued to insist on a formal response to the Roberts' proposal, I wrote you my letter of February 3, 1989. I am amazed that despite my letter of February 3, 1989 (which you neglected to send to [Regional Counsel] Ms. Beck), and our numerous telephone conversations, you still claim that you do not know whether SBA is willing to allow a corporation controlled by Nancy and Tom Roberts, the only assets of which would be the resort property SBA already has a lien on, to assume the SBA debt. I believe that I have responded straight forwardly verbally and in writing that the answer is "no". As I stated in my letter of February 3, 1989, "... We are not interested in pursuing any further workouts with the Roberts or any entity which they control." While this may not be the answer you wish to hear, nevertheless it is the Agency's official decision.

A.F. 24, p. 335.

In the response to the Statement of Requirements, R&R did not address the problem of the SBA lien on the resort property. The response contains the following statements:

> Concessioners should ... never question the reason for NPS directives, regulations,

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or policies. When a concessioner follows guidelines they interface better with the NPS...

Recognize capabilities of NPS employees. NPS employees are better qualified, trained, and experienced at operating business enterprises than concessioners. NPS employees have sacrificed their opportunity to operate businesses in order to provide concessioners with the benefit of their experience, training, and expertise. Concessioners and the visiting public are incapable of recognizing what is best for them.

A.F. 25, p. 357.

After their decision that they would not assume the SBA debt as a partnership, the partners in R&R knew full well that a foreclosure of the SBA lien was imminent and that their days as concessioners at the Diablo Lake Resort were numbered. The heavy-handed irony in their response may be overlooked as a partial venting of their frustrations. The unfortunate fact, however, is that they were in a predicament of their own making. Their slide down the slippery slope of insolvency began when they purchased a failing operation at a high price and were able to operate it as long as they did only by neglecting to reduce the SBA debt and allowing it to increase to more than $400,000. The cautionary information from NPS in the SOR that "investors should be aware that the financial history together with a comparison with industry guidelines has revealed this resort will probably not be able to support a debt level exceeding $150,000" was a warning that would have been given to them at the time of the original purchase had they adequately consulted NPS about the sale. When the time came to submit a response to the SOR, R&R was not in a position to submit a responsive proposal, and they could do nothing to prevent the SBA foreclosure on the assets of the Diablo Lake Resort. These two circumstances extinguished any right of preference that R&R may have had as an incumbent concessioner under Concession Contract No. 9029-82-002.

The facts presented by R&R do not establish any basis for liability on the part of the National Park Service for the financial misfortunes resulting from the business decisions of R&R. Accordingly, the claims for damages are denied in their entirety.

[¶ 26,419] Patricia J. Stevens

PSBCA No. 3272, October 4, 1993. Contract No. HCR 84077.

Defaults, Excuses—Subcontractor and Supply Problems—Replacement Carrier.—A contractor's default under a highway transportation contract was not excused, despite the contractor's contention that the government interfered with a replacement carrier hired by the contractor to fill in while the contractor took a vacation, because the contractor failed to adequately monitor the replacement carrier's operation during the vacation period. The contractor could have ascertained any problems on the route through telephone contact with the replacement carrier. Even though the contractor alleged road construction and equipment problems, excusable grounds for performance deficiencies, it did not demonstrate excusable reasons for the carrier's departing the post office two to six hours late and the substantial missed deliveries, which were not shown to have resulted from a jeep breakdown or road construction.

For the appellant: Patricia J. Stevens. For the government: Harold E. Durham, United States Postal Service, San Bruno, California.

Before MENEGAT, COHEN, and FINN, Administrative Judges.

MENEGAT, Administrative Judge: Appellant, Patricia J. Stevens, has appealed the default termination of her highway transportation contract with the United States Postal Service, Respondent. This appeal is being decided on the record pursuant to 39 C.F.R. § 955.12.

FINDINGS OF FACT

1. On June 12, 1991, the Postal Service awarded contract HCR 84077 to Appellant for delivery and collection of mail on a highway contract route in Park City, Utah. The term of the contract was to run from July 1, 1991, to June 30, 1993 (Appeal File Tab ("AF") 8).

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2. The contract specified that Appellant would serve 290 delivery boxes and receive annual compensation of $12,977 (AF 8). By amendments to the contract, the number of boxes served was increased to 458 and the annual compensation to $17,370 (AF 1, 7). There were actually 481 boxes served by the route at the time the contract was terminated in June of 1992 (Appellant's supplemental evidence filed February 8, 1993, Exhibits ("Supp. Exhs.") 11, 12).

3. The contractor was required to deliver mail into customers' mail boxes (AF 8, "Basic Surface Transportation Services Contract General Provisions," PS Form 7407T, November 1988, paragraph ("GP") 4(b)(1)(i), Contract Section 13 E, Contract Attachment B) and collect outgoing mail (AF 8, GP 4(b)(1)(iii), Contract Attachment B) and "carry all mail tendered for transportation under this contract, whatever may be its size and weight, with certainty, celerity, and security." (AF 8, GP 4(a)).

4. The contract required that Appellant "give either personal or representative supervision over the operation of the route and must be easily contacted in the event of emergencies, to give personal or representative attention to the problem at hand" (AF 8, GP 8(a), Contract Section 19 A). The contractor remained responsible "for the faithful performance of the obligations assumed by him under this contract, whether or not he has entrusted the care and transportation of the mail to another." (AF 8, GP 8 (b)).

5. The contract was subject to termination for default by the contracting officer "[f]or Contractor's failure to perform service according to the terms of the contract." (AF 8, GP 16 (a)(1)).

6. The termination for default provision of the contract provided:

> "If, after notice of termination of this contract under the provisions of this Clause, it is determined for any reason that the Contractor was not in default under the provisions of this Clause, or that the default was excusable, the rights and obligations of the parties shall be the same as if the notice of termination has been issued pursuant to Clause 17." (AF 8, GP 12 (c)).

7. The contractor's sole remedy in the event of a termination for convenience during the first two years of performance was an indemnity payment equal to one-third of the annual rate under the contract (AF 8, GP 17, GP 12 (d)(1)).

8. The schedule for the route, as set forth in the original contract, required Appellant to depart the Park City Post Office by 10:00 a.m. and return to the post office at 1:00 p.m. (AF 8, Contract Attachment B). Through amendments recognizing the additional boxes on the route, the return time was adjusted to 1:50 p.m. before June, 1992 (AF 1, 7 p. 9).

9. To perform the route, Appellant customarily arrived at the post office at 7:30 a.m. to case the mail. Her husband arrived between 10:15 and 10:30 a.m., at which time they would load and depart in two vehicles to deliver the route. Appellant returned to the post office between 12:00 and 12:30 p.m. to case the third class mail for the next day, and her husband returned between 1:30 and 2:00 p.m. (Supp. Exh. 1 ¶ I(1)).

10. On June 13, 1992, a replacement carrier hired by Appellant performed the route. The carrier did not leave the post office until 2:00 p.m. and was unable to finish the route (AF 5 pp. 4, 5; Supp. Exh. 1 ¶ I(4)). On two previous occasions, this employee had failed to deliver the entire route, and Appellant's husband had completed delivery (Supp. Exh. 1 ¶ I(4)).

11. The Park City Postmaster and Superintendent of Postal Operations ("SPO") met with Appellant the following week to discuss the deficiencies that had occurred on June 13 (AF 5, p. 1; Supp. Exh. 1 ¶ ¶ I(4), II(2); Declaration of Michael M. Thurber, SPO, dated March 9, 1993 ("Thurber Decl.") ¶ 5). The postmaster specifically addressed the replacement contractor's failure to adhere to the contract schedule and failure to deliver all mail as required under the contract (Thurber Decl. ¶ 6; AF 5 p. 1). Appellant acknowledged the deficiencies and advised that she had fired the employee (Supp. Exh. 1 ¶ I(4)) and had available another substitute carrier to work for her (AF 5 p. 1). The postmaster asked that Appellant verify that any replacement would be fully trained and competent to meet all contractual obligations before being allowed to "solo" on the route (Thurber Decl. ¶ 6; AF 5 p. 1).

12. Appellant planned to be out of town on vacation beginning June 19, 1992, and arranged for the new replacement carrier to deliver the route (Supp. Exhs. 1 ¶ I(5), 14). This carrier had substituted for Appellant on the route a number of times in the past, and, during the week of June 15, Appellant and her husband conducted further training with her (Supp. Exhs. 1 ¶ I(5), 3 ¶ ¶ (2), (9)). They told the replacement to call them if there were any questions of an unusual nature or problems on the route (Supp. Exhs. 1

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¶ II(9), 3 ¶ (9)). The record does not reflect how long Appellant intended to be away.

13. On Friday, June 19, Appellant's employee arrived at the post office at about 6:00 a.m., cased and loaded her mail and left the post office after 3:00 p.m. (Thurber Decl. ¶ 7; but see Supp. Exh. 3 ¶ (3)). During the time the replacement carrier was in the post office, the SPO spoke to her on a number of occasions, totalling about 15 minutes (Supp. Exh. 3 ¶ (2); Thurber Decl. ¶ 7). Some of the SPO's conversation was critical of Appellant's performance of the contract (Supp. Exh. 3 ¶ (2)). Appellant's employee finished delivering mail after 6:00 p.m. and returned to the post office before dark (Thurber Decl. ¶ 7; Supp. Exh. 3 ¶ (3)). On June 19 and on the other days she delivered the route she encountered delays resulting from construction on one of the roads she was required to travel (Supp. Exh. 3 ¶ (3)).

14. On Saturday, June 20, the replacement carrier cased mail until noon (Supp. Exh. 3 ¶ (4)). She was using Appellant's jeep, which broke down while she was on the route. As a result, she lost one-and-one-half hours getting it repaired, and completed delivery at about 7:00 p.m (Supp. Exh. 3 ¶ (4)) When the SPO discussed the route with Appellant's employee on Monday, June 22, she did not mention the mechanical problems with the jeep (Thurber Decl. ¶ 9). Appellant had had the jeep serviced within two weeks before she left for vacation (Supp. Exh. 6).

15. On Monday, June 22, the replacement carrier did not depart the post office until 4:00 p.m. (AF 5 p. 10). Appellant's jeep again broke down, and there were delays in getting it fixed (Supp. Exh. 3 ¶ (5)). She delivered mail until after dark, but did not complete the route (AF 5 pp. 2, 10; Supp. Exhs. 1 ¶ II(5), 3 ¶ (5); Thurber Decl. ¶ 13 and Exhibit D thereto). Also on June 22, the SPO received more than 20 calls from customers on Appellant's route complaining that they had not received mail delivery on Friday or Saturday, June 19 and 20, and on June 23, the post office received many calls from customers on Appellant's route complaining of missed delivery on June 22 (Thurber Decl. ¶ ¶ 10, 13 and Exhibit A thereto).

16. On June 23, two postal employees spent four-and-one-half hours assisting Appellant's employee in casing the mail (AF 5 p. 2; Supp. Exh. 3 ¶ (6); Thurber Decl. ¶ 12). As the postal employees were not familiar with the route and the casing area was not big enough to accommodate three people efficiently, their help was of questionable value (Supp. Exhs. 3 ¶ (6), 5; AF 5 p. 10). The carrier did not leave the post office until 2:00 p.m. The post office also provided at least an hour of delivery assistance on the route, and the route was finished at 6:00 p.m. (AF 5 p. 2; Supp. Exh. 3 ¶ (6)).

17. Before Appellant's employee left the post office to deliver the mail on June 23, the postmaster told her not to return the next day. The postmaster declined the employee's offer to use her own car instead of Appellant's jeep on the route the next day and declined her offer to give him the telephone number where Appellant could be reached (Supp. Exh. 3 ¶ (6)). When she returned to the post office that evening, the case for Appellant's route had been broken down and reconfigured to permit the route to be split in two so that it could be delivered by two highway contractors (*id.*).

18. On the evening of June 23, Appellant's employee called Appellant, who was still on vacation, and told her of the problems she had been encountering on the route and the postmaster's direction that she not return to deliver the route the next day (Supp. Exhs. 1 ¶ I (6), 3 ¶ (6)).

19. At Appellant's direction, her employee returned to the post office on June 24 and asked the postmaster to put his dismissal in writing, but he refused to do so and told her to leave (Supp. Exh. 3 ¶ (6)).

20. The postmaster described the deficiencies on the route in a letter addressed to Appellant dated June 23, 1993 (AF 5 p. 1-2). In that letter, he asserted that Appellant's actions constituted abandonment of the route. Appellant did not receive the letter before the contract was terminated. A copy of the letter was provided to the Salt Lake City Transportation Management Service Center.

21. The post office prepared a total of five "Contract Route Irregularity Reports," PS Form 5500, for June 19 through 23 (AF 5 pp. 6-12), but they were not given to Appellant or her employee before the termination, and Appellant was not given a formal opportunity to respond regarding the irregularities before the contract was terminated.

22. By a final decision dated June 24, 1993 (and received by Appellant June 27), the contracting officer terminated the contract for default effective the close of business June 24, 1993, "for failure to perform service according to the terms of the contract." (AF 4). In deciding to terminate the contract, the contracting officer did not characterize the contractor's failure to perform on June 24 as an abandonment of the contract or rely on

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an abandonment theory. *See* Declaration of Gordon W. Kirkham, December 14, 1992. Appellant appealed the final decision.

23. Before and after her termination, Appellant noted, and on many occasions, pointed out to Park City postal officials what she considered to be violations of contract requirements by other Park City highway contractors (Supp. Exhs. 1 ¶¶ I(1) & (2), III(2), (4)-(7), 2 ¶ (9), 13). Other contractors working from the Park City Post Office also received Forms 5500 showing performance deficiencies on their routes (Supp. Exh. 9).

DECISION

Appellant admits that the replacement contractor failed to meet all of the requirements of the contract but argues that, for the most part, the performance deficiencies were excusable and that those that were not excusable were insufficient to justify termination of the contract for default.

Respondent argues that the termination was proper as the delays in delivery and missed deliveries were serious violations of contract requirements and were not excusable. Respondent argues that Appellant was not entitled to an opportunity to respond to the route deficiencies as the deficiencies constituted "major irregularities" for which the contracting officer may terminate without affording a contractor an opportunity to respond.

The Postal Service has the burden of proving that the termination was justified, but once Respondent shows that Appellant failed to perform in accordance with the contract, the burden shifts to Appellant to present evidence of excusable causes, *Pamela J. Sutton,* PSBCA No. 1622, 88-3 BCA ¶ 21,031 at 106,237, or to show the termination was an abuse of the contracting officer's discretion, *Jesse A. Farmer,* PSBCA No. 2702, 91-3 BCA ¶ 24,181 at 120,941; *Quality Environment Systems, Inc.,* ASBCA No. 22178, 87-3 BCA ¶ 20,060 at 101,569.

Thus, the serious performance deficiencies, unless excusable, following by less than a week the specific warning to Appellant of Respondent's concern about service deficiencies stemming from Appellant's use of a replacement carrier, plus the absence of any assurance that service could be restored to the contract standard without application of additional postal resources justified the default termination.[1] *See John Michael Hall,* PSBCA No. 1311, 1985 WL 16596 (P.S.B.C.A.), May 15, 1985.

As excuses for the performance deficiencies, Appellant raises (1) road construction on the line of travel, (2) mechanical problems with her delivery vehicle, (3) interference with the replacement carrier by postal employees and other highway contractors working out of the Park City Post Office and (4) Respondent's failure to adjust the route time to recognize the actual number of boxes on the route. However, even accepting road construction, *see Brooks E. Cook,* PSBCA No. 1350, 86-3 BCA ¶ 19,073 at 96,361, and equipment problems, *see William Cimpi,* PSBCA No. 2695, 91-1 BCA ¶ 23,390 at 117,379, as excusable grounds for performance deficiencies, Appellant has not demonstrated excusable reasons for the carrier's departing the post office two to six hours late, (Findings 8, 13, 14, 16, 17) and the substantial missed deliveries on June 19, 20 and 22, which were not shown to result from the jeep breakdown or road construction (Findings 15, 16).

Appellant has not shown that Respondent interfered with the replacement carrier's performance of the route. Appellant claims that the SPO delayed the replacement carrier on her first day on the job by talking to her at length and criticizing Appellant's performance of the contract. That the SPO talked to the replacement on her first day would be expected, and his discussions could have caused no more than a minor delay, if any, and do not constitute interference. Appellant's argument that providing casing assistance on June 23 interfered with the replacement carrier is also rejected. Although the casing assistance may have been ineffective, in the face of the serious delays on the route over the previous three delivery days (regardless of cause), providing assistance on casing and delivery was reasonable. The postmaster's action in doing so does not show an effort to interfere with the replacement carrier, and there is no evidence the carrier was delayed by the casing assistance. Other than these two instances, Appellant has presented only conclusory and generalized allegations of interference, unsupported by specific proof and probative evidence, and these are not sufficient to

[1] The Postal Service was not obliged to take the replacement's inexperience into account by accepting performance that did not comply with the contract requirements or by continuing the additional supervision of and assistance to Appellant's employee to obtain performance that met the requirements of the contract. *See Arnette B. Fleming Hauling, Inc.,* PSBCA No. 2872, 91-2 BCA ¶ 23,868 at 119,567.

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show Respondent interfered with Appellant's employee's performance. *See Fred A. Arnold, Inc.*, ASBCA Nos. 20150, 22154, 84-3 BCA ¶ 17,624 at 87,843.

Appellant has not shown that the replacement carrier's performance deficiencies resulted from there being more boxes on the route than reflected in the contract delivery time. Appellant had not requested a route adjustment, and there is no evidence Respondent would have refused one if requested. Moreover, Appellant has not shown that an adjustment in time to account for 23 additional boxes would have been sufficient to make an appreciable dent in the late departures and route completions or to affect the missed deliveries. Appellant has thus failed to demonstrate that the performance deficiencies of her replacement carrier were excusable.

Appellant argues that Respondent discriminated against her in that the deficiencies for which her contract was terminated were no more serious than those occurring on other highway contract routes out of the Park City Post Office. She contends that other highway contractors conspired to deprive her of the route and that they exerted undue influence over the postmaster which caused Park City postal officials to overlook performance deficiencies of the other contractors. Whether other contractors were also guilty of violations of their contracts has no bearing, in and of itself, on whether Appellant's contract was properly terminated. *See Pascal Redfern*, PSBCA No. 1512, 87-1 BCA ¶ 19,646 at 99,461 *aff'd on recon.* 87-3 BCA ¶ 19,983. Appellant's unsubstantiated suspicions and allegations of a conspiracy between postal officials and other contractors and of undue influence over the postmaster exerted by the other contractors do not establish that the termination of her contract stemmed from bad faith or bias on the part of postal officials. *See Spezzaferro v. F.A.A.*, 807 F.2d 169, 173 (Fed. Cir. 1986).

Appellant contends that the failure to give her an opportunity to respond to the allegations of deficient performance by the replacement carrier violated her due process rights afforded by the Constitution and that the termination of the contract before she was allowed ten days to respond to the allegations as provided in the Forms 5500 requires that the termination for default be overturned. After the failure of the previous replacement carrier to complete the route on June 13 and the subsequent meeting with the postmaster and SPO (Findings 10, 11), Appellant was on notice that Respondent would not tolerate serious service deficiencies resulting from use of a replacement carrier unable to perform the route in accordance with the terms of the contract. Appellant's contract does not guarantee her notice of deficiencies and an opportunity to respond in advance of a termination, and, as the 5500s were not given to Appellant before the termination, she did not receive a commitment from Respondent that she would have ten days to respond. *See Douglas Cremer*, PSBCA No. 3108, 93-2 BCA ¶ 25,965; *Harvey L. Monk*, PSBCA No. 995, 82-2 BCA ¶ 15,797. Therefore, termination based on the recurrence of such deficiencies and lack of assurance that acceptable performance would be restored is not invalidated by the Postal Service's failure to give the contractor advance formal notice of the termination. *See Homer J. Sappington*, PSBCA No. 3162, 93-3 BCA ¶ 26,042, 1993 WL 130171 (P.S.B.C.A.), April 13, 1993; *Marlena R. Antrim*, PSBCA No. 2149, 88-3 BCA ¶ 21,108 at 106,563. Additionally, Appellant was required by her contract to supervise the contract which included establishing adequate monitoring of the operation of the route whether or not she was performing it personally. Appellant could have ascertained the problems on the route through telephone contact with the replacement carrier.[2] That Appellant did not know of the problems on the route stemmed from her delegation of performance of the route to the replacement carrier, and did not result from any action of Respondent.

Respondent's termination of the contract without advance notice and an opportunity to respond does not violate Appellant's constitutional due process rights. Although Respondent failed to provide Appellant a formal opportunity to respond to the deficiencies before termination, Appellant has not been denied her rights under the Constitution as she has had an opportunity in this proceeding to raise, and we have considered, her explanations and arguments regarding the service deficiencies. *See Melvin R. Kessler*, PSBCA Nos. 2820, 2972, 92-2 BCA

[2] Notwithstanding Appellant's instructions to her employee that the employee call Appellant if she encountered any problems or questions of an unusual nature on the route (Finding 12), the employee inexplicably did not do so despite encountering what Appellant now contends were significant road construction delays, major mechanical problems with the delivery jeep and substantial interference from postal employees and other contractors.

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¶ 24,857 at 123,997; *Shorthaul Trucking Co.*, PSBCA No. 1046, 1985 WL 16706 (P.S.B.C.A.), June 18, 1985.

Appellant argues but has not established that the termination of her contract violated other provisions of the Constitution. There is no evidence in the record to support her contention that her contract was terminated to stop complaints she had made about the Park City Post Office or in retaliation for her complaints, and thus there would be no basis for concluding she was denied any First Amendment protection that might be applicable to government contractors. Likewise, Appellant has made no showing that the termination of her contract violated any rights she might possess under the Fourth Amendment or the Equal Protection clause of the Fourteenth Amendment.[3]

Finally, Appellant challenges the postmaster's characterization of her actions as abandonment of the contract because the replacement carrier's failure to deliver on June 24 resulted from the postmaster's direction not to return to the post office even though the contract had not been terminated. However, in deciding to terminate the contract, the contracting officer did not rely on Appellant's failure to perform the contract on June 24 or the postmaster's characterization of Appellant's performance as an abandonment of the contract. Rather, the contracting officer terminated the contract for failure to perform service according to the terms of the contract. Based on the evidence presented, the contracting officer properly terminated for default Appellant's contract.

The appeal is denied.

[¶ 26,420] Jake Sweeney Auto Leasing, Inc.

PSBCA Nos. 3164, 3166, 3177-3179, September 1, 1993. Contract No. 381793-86-V-A172.

Contract Types—Vehicle Rentals—Bailment Principles.—A contractor's contention that its leased-vehicle contracts were mutual benefit bailment contracts under which the government, as bailee, was presumed to have negligently caused damage to the bailed property was rejected because the presumption urged by the contractor was inconsistent with contract language. The contract specifically stated that the contractor had the burden of proving that any damage to the leased vehicles was the result of negligence on the part of the government.

Contract Types—Vehicle Rentals—Proof of Negligence.—Although a contracting officer conceded that damage necessitating the repair of a leased vehicle was beyond ordinary wear and tear, a contractor was not entitled to recover on any portion of its claim for damage to vehicles leased to the government, because the contractor provided no evidence to show that the damage was caused by the negligence of the government's personnel.

For the appellant: Teri Geraci. For the government: John T. Farrell, Jr., Philadelphia Field Office, United States Postal Service, Philadelphia, Pennsylvania.

Before BROCHSTEIN, COHEN, and FINN, Administrative Judges.

BROCHSTEIN, Administrative Judge: Appellant, Jake Sweeney Auto Leasing, Inc., has appealed from contracting officer's decisions denying its claims for damage to vehicles leased by Respondent, United States Postal Service. These appeals are being decided on the record in accordance with 39 C.F.R. § 955.12.

FINDINGS OF FACT

1. Contract No. 381793-86-V-A172 was awarded to Appellant on August 7, 1986, and covered the lease of eight passenger vehicles for use in "Park & Loop" service at two stations in Cincinnati, Ohio. The term of the contract was from September 27, 1986, through October 25, 1991. (Appeal File Tab (AF) A).

[3] As Appellant has not shown that her Constitutional rights were violated, we need not address what, if any, relief the Board could grant based on violations of the Constitution. *See Paul A. Mason*, PSBCA No. 1357, 85-2 BCA ¶ 17,998, 1985 WL 16447, March 26, 1985; *M&M Services, Inc.*, ASBCA No. 28712, 84-2 BCA ¶ 17,405 at 86,688.

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2. The contract contained the July 1980 version of PS Form 7476, "U.S. Postal Service, General Provisions for Vehicle Hire Contracts." Clause GP-6 of the General Provisions contained the following relevant language:

"LIABILITY PROVISIONS

(a) *Contractor's Vehicles.* The Postal Service shall be responsible for loss of, or damage to, the Contractor's vehicles while in its custody only when caused by the act or negligence of any officer or employee of the Postal Service acting in the scope of his employment .... In no event shall the Postal Service be responsible for ordinary wear and tear." (*Id.*)

3. Through a series of claims dated December 2, 1991, Appellant sought the cost of repairing damage to five of the vehicles which damage was alleged to have occurred during the contract term. As the basis for each claim, Appellant stated substantially the following:

"USPS had physical possession of vehicle. Damage was not present when vehicle was delivered. No reports have been submitted by USPS to explain damages."

Each of the claims was accompanied by two repair estimates, the lower of which reflected the amount of the claim. (AF B).

PSBCA No. 3164—Vehicle No. 11665

4. The PS Form 4577, "U.S. Postal Service Hired/Borrowed Vehicle Condition Report," related to this appeal showed dents on the right side and a broken front spoiler [valance] at the time the vehicle was returned to Appellant. Appellant's claim was in the amount of $243.00 and covered the repair of corresponding damage. In a decision dated February 3, 1992, the Contracting Officer denied the claim in its entirety. With respect to the damage to the right side, he concluded that there was no evidence of negligence on the part of the Postal Service and that the damage had not been shown to be outside ordinary wear and tear. With respect to spoiler damage, he concluded that the damage was outside ordinary wear and tear but that there was no evidence that the damage had been caused by an act or negligence of Postal Service employees. (AF B, D, E).

PSBCA No. 3166—Vehicle No. 11183

5. In this appeal, the Form 4577 reflected damage to the right front bumper and right front fender as well as small scratches on the left side door. The amount claimed was $162.00, covering repairs to the bumper and fender only. In a decision dated February 3, 1992, the Contracting Officer denied the claim on the basis that the damage covered by the claim had not been shown to be outside ordinary wear and tear or to have been caused by an act or negligence of a Postal Service employee. (AF B, D, E).

PSBCA No. 3177—Vehicle No. 11760

6. In this appeal, the Form 4577 showed a broken spoiler and dents and scratches on the rear of the vehicle. The claim requested $217.60 in payment for replacing the spoiler and repairing the rear hatch. In a decision dated February 4, 1992, the Contracting Officer approved the payment of $81.00 for damage to the hatch. As to damage to the spoiler, the Contracting Officer conceded that such damage was outside ordinary wear and tear but denied recovery based on the absence of a showing that the damage had been caused by an act or negligence of a Postal Service employee. (AF B, D, E).

PSBCA No. 3178—Vehicle No. 11671

7. The Form 4577 in this appeal noted dents and scratches on the front, rear, and right side of the vehicle. The claim, in the amount of $292.60, sought the cost of repairing the right rear quarter panel and rear body panel as well as the cost of replacing the front valance. In a decision dated February 3, 1992, the Contracting Officer concluded that the damage to the right rear quarter panel and rear body panel and the dent in the valance had not been shown to be outside ordinary wear and tear. Accordingly, he denied the claim in its entirety. (AF B, D, E).

PSBCA No. 3179—Vehicle No. 11668

8. In this appeal the Form 4577 showed dents on the left side, right front, left rear, the rear of the right side. Appellant's claim, in the amount of $226.00, sought the cost of repairs to the left door, right rear quarter panel, and right front bumper. In a February 3, 1992, decision, the Contracting Officer denied the claim in its entirety, concluding that Appellant had not shown the damage to be outside ordinary wear and tear or to be the product of Postal Service negligence. (AF B, D, E).

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DECISION

In its Complaints,[1] Appellant argues that these contracts are mutual benefit bailment contracts under which Respondent, as bailee, is subject to a presumption that any damage to the bailed property was caused by Respondent's negligence. Appellant also argues that terms of the "Liability Provisions" [Finding 2] which limit Respondent's liability with respect to ordinary wear and tear are unenforceable. These arguments have been considered and rejected by this Board in *Jake Sweeney Auto Leasing, Inc.,* PSBCA Nos. 3091-3094, 3096, 3098, 3122, 3125, 93-1 BCA ¶ 25,363, where we concluded that the presumption urged by Appellant was inconsistent with the contract language and that the limitation on liability for ordinary wear and tear was enforceable. Those conclusions apply equally to the appeals here.

As the party seeking recovery, Appellant has the burden of proving that an act or negligence on the part of Respondent's personnel was the proximate cause of the damage to each vehicle and that the damage exceeded ordinary wear and tear. *E.g., Jake Sweeney Auto Leasing, Inc.,* PSBCA Nos. 2784-2788, 2791-2798, 91-3 BCA ¶ 24,278. Respondent argues that Appellant has failed to meet that burden.

In PSBCA Nos. 3164 and 3177 the Contracting Officer conceded that damage necessitating the replacement of a valance was beyond damage which could be considered ordinary wear and tear. However, Appellant has provided no evidence to show that such damage was caused by an act or negligence of Respondent's personnel. As to other damage in dispute in these appeals, Appellant has provided no evidence to show that any damage was beyond ordinary wear and tear or was caused by an act or negligence of Respondent's personnel. Thus, Appellant has failed to satisfy its burden of proof in these appeals.

The appeals are denied.

[¶ 26,421] N.J. Hastetter, Trustee for Thomas and Judith Hastetter

PSBCA No. 3064, September 1, 1993.

Procedure, Boards—Reconsideration—Letter as Motion.—In characterizing a contractor's letter relating to an earlier decision as a motion for reconsideration, the board denied the motion because the letter stated no grounds and furnished no information that would provide a basis for modifying the earlier decision.

For the appellant: N.J. Hastetter. For the government: Robert E. O'Connell, United States Postal Service, San Bruno Field Office, San Bruno, California.

Before BROCHSTEIN, COHEN, and FINN, Administrative Judges.

Reconsideration of 93-2 BCA ¶ 25,809 denied.

BROCHSTEIN, Administrative Judge: Appellant, N.J. Hastetter, has filed a letter dated July 20, 1993, with the Board, generally expressing dissatisfaction with the Board's June 15, 1993, Opinion (*Appeal of N.J. Hastetter, Trustee for Thomas and Judith Hastetter,* PSBCA No. 3064, 93-2 BCA ¶ 25,809). Although not specifically denominated a motion for reconsideration, we have treated the letter as such, since it was filed within the time allowed for such motions (39 C.F.R. § 955.30).

Appellant's letter states no grounds and provides no information which would cause us to modify our earlier Opinion. Accordingly, to the extent Appellant's letter may be considered a motion for reconsideration, the motion is denied and the Opinion is affirmed.

Appellant's letter also states that he wishes to file "two new Complaints," related to repairs demanded by the Postal Service on facilities in Brunswick, Missouri, and Archer City, Texas, apparently owned by his wife, Erica Hastetter. Appellant asks how to proceed with these complaints.

Under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613), Appellant must first file any claims related to these facilities with the appropriate contracting officers. Under the Act, the contracting officer must issue final decisions, which may then be ap-

[1] Appellant did not file a brief.

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pealed to this Board or to the Court of Federal Claims. At this time the Board lacks jurisdiction to consider Appellant's additional complaints.

[¶ 26,422] Buster Smith

AGBCA No. 93-152-1, October 25, 1993. Contract No. 0810-04-007641.

Sale of Government Property—Timber Sales—Resale of Uncut Timber.—Although a contractor alleged that the government intended to resell timber that the contractor failed to cut under its timber sales contract, thus reducing its damages, and to allow the contractor to bid on the resale, the board refused to order a resale of the uncut timber because the contractor failed to prove that the government intended to resell. The contractor asserted that the government's letter requesting the contractor to extend its letter of credit under the contract established the government's intent to resell. However, the government sought the extension to ensure that sufficient funds would be available to cover damages resulting from the contractor's failure to cut the timber. The contractor further alleged that it relied on oral representations by the contracting officer that it would be allowed to bid on the resale. Even if the timber had been resold, the contractor, having failed to complete the original contract, would have been prohibited by regulations from bidding. Consequently, the government was entitled to collect damages calculated in accordance with the contract provision applicable if the timber was not resold.

For the appellant: Hixson, Cleveland & Rush, Forth Smith, Arkansas, by Craig L. Cook. For the government: Marilyn J. Brown, Office of the General Counsel, U.S. Department of Agriculture, Little Rock, Arkansas.

Before EATON, HOURY, and GISH, Administrative Judges.

EATON, Administrative Judge: This appeal arises under the Spy Rock Timber Sale in the Pleasant Hill Ranger District of the Ozark-St. Francis National Forests, Arkansas. The Forest Service, U.S. Department of Agriculture, awarded contract No. 0810-04-007641 to Buster Smith of Vendor, Arkansas (Appellant), on September 22, 1989. The sale's original termination date, December 15, 1991, was extended to May 16, 1992.

Appellant constructed roads but did not cut any timber before the extended termination date. The Contracting Officer (CO) initially advised Appellant that the timber would be resold and allegedly told Appellant he would be permitted to bid on the resale. The Forest Service subsequently determined that due to an outdated environmental analysis, the timber would not be resold. The agency offset potential damages of $142,416.83 by the estimated resale value of the timber, $107,224.57, resulting in total damages of $35,192.26. Appellant had $48,648.08 in unused purchaser credit and unobligated cash in the timber sale account, so the Forest Service refunded $13,455.82 to Appellant. In a final decision dated January 14, 1993, the CO found that an additional $13,514.55 should be returned to Appellant, reducing damages to $21,677.71.[1]

On appeal, Appellant alleges that he relied on Government advice that the timber would be resold. Appellant seeks a Board order for resale, as well as remission of the remaining damages, alleging that the Forest Service appraisal on which they were based undervalued the timber and that purchaser credit earned for road construction was too low.

On August 11, 1993, the Government filed a Motion for Summary Judgment, citing the decision of the U.S. Court of Appeals for the Federal Circuit in *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401 (Fed. Cir. 1993) (hereafter *Hobin*). Appellant opposes the Motion.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. § § 601-613.

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[1] In a brief in support of an amended Complaint, Appellant states the amount of damages as $21,633.16. This discrepancy apparently is because Appellant substituted the amount of unused purchaser credit, $13,559.10, for the amount of interest on stumpage payments, $13,314.55, which the CO's final decision stated could be refunded to Appellant. (Correspondence File.)

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FINDINGS OF FACT

1. The Forest Service, U.S. Department of Agriculture, awarded contract No. 0810-04-007641, the Spy Rock Timber Sale, to Appellant on September 22, 1989. The original termination date for the sale was December 15, 1991. (Appeal File (AF) Tab 51 page (p.) 67.)

2. The sale area covered approximately 3,000 acres in the Pleasant Hill Ranger District of the Ozark-St. Francis National Forests, Arkansas. It included an estimated 624 thousand board feet (MBF) of miscellaneous hardwood, ash, mixed oak, white oak, and northern red oak, for which Appellant bid $205 per MBF, or $127,920, and 284 hundred cubic feet (CCF) of miscellaneous hardwood and small roundwood for which Appellant bid $10 per CCF, or $2,840. (AF Tab 51 pp. 68, 69.)

3. Appellant twice requested extensions of the sale termination date: on September 5, 1991, he sought an unspecified number of additional days due to a depressed market (AF Tab 79 p. 31), and on September 18, 1991, he requested a 120-day adjustment due to wet weather the previous spring (AF Tab 81 p. 28). The CO granted Appellant a 61-day extension, finding that although Appellant had planned to begin operations on March 16, weather had prevented work until May 16, 1991. Time outside the normal operating season was not counted, so contract termination date, as extended, was May 16, 1992. (AF Tab 81 p. 26.)

4. The contract required construction or reconstruction of 2.61 miles of specified roads: No. 1003P, Mountain Creek, .52 miles of reconstruction; No. 94469A, Well Cave Hollow, .71 miles of construction; and No. 94669B (unnamed), 1.38 miles of reconstruction (AF Tab 51 p. 73). The Forest Service inspected and accepted these on June 25, 1992 (AF Tab 87 p. 20). Under contract Provision BT4.21, **Purchaser Credit,** Appellant earned $15,501 in purchaser credit for road construction and used $1,942 to pay for right-of-way timber (AF Tab 51 p. 81, Tab 90 p. 17, Tab 95 p. 2).

5. Contract provision WO-CT9.4—**Failure to Cut,** stated in pertinent part:

> In event of ... Purchaser's failure to cut designated timber on portions of Sale Area by Termination Date, Forest Service shall appraise remaining Included Timber ... Such appraisal shall be made with the standard Forest Service method in use at time of termination.
>
> Damages due the United States for Purchaser's failure to cut and remove Included Timber meeting Utilization Standards shall be the amount by which Current Contract Value, plus costs described below, less any Effective Purchaser Credit remaining at time of termination, exceeds the resale value at new Bid Rates. *If there is no resale, damages due shall be determined by subtracting the value established by said appraisal from the difference between Current Contract Value and unused Effective Purchaser credit* ...

(AF Tab 51 p. 111.) (Emphasis added.)

6. Except for clearing incidental to road construction, Appellant did not cut any timber before the contract expired (AF Tab 95 p. 1).

7. By letter dated June 3, 1992, the CO advised Appellant that he was no longer authorized to cut or remove timber from the sale area. The letter further stated:

> Refer to Contract Provision CT9.4 [sic] in your contract. The Forest Service will appraise and offer for sale the timber remaining on this sale. After the sale of the timber, damages will be computed. All cash and unobligated purchaser credit will be held until damages are paid.
>
> The letter of credit that serves as a performance bond [2] on this sale expires on June 15, 1992. Please have this letter of credit extended until December 15, 1992.

The letter did not state that Appellant would be permitted to bid on the resale. (AF Tab 85 p. 22.)

8. Appellant did not provide a new performance bond. The record includes a memorandum from the CO stating that sufficient cash remained in the sale account to cover any damages due to Appellant's default, so the CO had decided not to pursue the matter. (AF Tab 86 p. 21.)

9. The environmental assessment for the Spy Rock Sale had been approved on December 15, 1986 (AF Tab 54 p. 61). On September 21, 1992, the Forest Service Representative advised the Forest Supervisor that new documentation and a new decision to sell would be required before any resale (AF Tab 89 p. 18).

[2] The contract required a performance bond in the amount of $14,000 (AF Tab 51 p. 75).

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10. By letter dated October 16, 1992, the CO advised Appellant that the sale would not be reoffered. The CO stated that the resale value of the timber had been determined by appraisal, using base period prices and costs in effect at the time of sale termination. The average overbid [3] for that quarter was added to the appraised price to determine estimated resale value. Damage calculations, in which volume and contract value of remaining timber were listed by individual species, resulted in the following:

Value of Remaining Timber	$ 128,710.00
Cost of resale	192.28
Interest on Stumpage Payments Not Received	13,514.55
Maximum Potential Damage	$ 142,416.83
Appraised Value at Termination	63,934.19
Estimated Overbid	43,290.38
Resale Value	$ 107,224.57
Maximum Potential Damages	$ 142,416.83
Less Resale Value	107,224.57
Total Damages	$ 35,192.26

Unused Purchaser Credit	13,559.10
Unobligated Cash on Hand	35,088.98
Refund Due Purchaser	$ 13,455.82

(AF Tab 91 pp. 14-16.)

11. The CO's October 16, 1992, letter was not identified as a final decision. *Id.* Appellant nevertheless appealed the damage assessment to the Board. The appeal was dismissed for lack of jurisdiction, since Appellant had neither refused to pay the damages nor paid and filed a claim with the CO. *Buster Smith,* AGBCA No. 93-115-1, 93-1 BCA ¶ 25,762. On October 30, 1992, counsel for Appellant wrote the CO, objecting to the calculation of damages; the CO treated this as a Contract Disputes Act claim (AF Tabs 96, 101).

12. In a final decision dated January 14, 1993, the CO advised Appellant that in view of the fact that the sale was not being reoffered, it had been improper to include in damages interest on stumpage payments not received. The CO stated that an additional $13,514.55 would therefore be refunded to Appellant. The CO otherwise found the damage assessment proper and denied the claim. (AF Tab 104.)

13. Appellant timely appealed. In an affidavit attached to an amended Complaint, Appellant declared that "on numerous occasions" he had been notified by the CO and other "agents of the Appellee" that he would be allowed to rebid and harvest the timber. With regard to damages, Appellant stated that in his opinion, based on 30 years of experience, timber prices were escalating and the value of the contract at the time in question would have been at least $142,416.83; that he had improved the sale area by building "two different paths for ingress and egress," costing more than $20,000; that the Government's cost of resale, and any loss due to delay and receipt of stumpage payments, was minimal; and consequently, that the Government had not in any way been damaged. (Affidavit of Buster Smith, July 3, 1993, Correspondence File.)

14. As indicated above, on August 11, 1993, the Government filed a Motion for Summary Judgment, arguing that no material facts are in dispute and that, as a matter of law, the Government properly calculated damages pursuant to contract provision WO-CT9.4—**Failure to Cut.** In support of its Motion, the Government cites the decision of the U.S. Court of Appeals for the Federal Circuit in *Hobin.*

15. In opposing the Motion, Appellant alleges that the Forest Service arbitrarily and capriciously used figures from an appraisal dated September 21, 1992, that are inconsistent with those used to compute damages. The Government points out that the Forest Service voided the appraisal referred to by Appellant (AF Tab 37 p. 161) and instead based damage calculations on an appraisal dated September 22, 1992 (AF Tab 39 p. 149). Appellant has not commented on the second appraisal.

DISCUSSION

Summary judgment is appropriate when no material facts are in dispute, so that the moving party is entitled to judgment as a matter of law. The moving party has the initial burden of demonstrating the absence of disputed material facts. In opposing the motion, the non-moving party must present more than "some" evidence to the contrary. If the evidence is not sufficiently probative, or is merely colorable, summary judgment is appropriate. *Cannon Structures, Inc.,* AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059; *Borderland Spraying Serv.,* AGBCA No. 90-180-1, 92-3 BCA ¶ 25,129.

[3] The average overbid would be the average of the amount bid above minimum rates set by the Forest Service appraisal.

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For the reasons set out below, we find this case appropriate for partial summary judgment in favor of the Government with regard to entitlement to damages. The only material facts in dispute relate to quantum.

In *Hobin,* the Federal Circuit, construing a contract provision virtually identical to that in Appellant's contract *(see* Finding of Fact (FF) 5), held that even when the Forest Service had no present intent to resell timber, the contract entitled the Government to recover damages for failure to cut. The court reviewed an opinion of this Board, *Hobin Lumber Co.,* AGBCA No. 87-170-1, 91-3 BCA ¶ 24,213, in which we held that since the Forest Service intended to preserve a sale area as habitat for the Northern spotted owl, and the timber would therefore not be resold, no damages had been incurred. The court stated:

> Because the contract specifically provides that the government is entitled to recover in the event that the contractor does not cut the timber and the government does not resell it, and also provides the method by which the amount of recovery is to be determined, we reverse the Board's decision and direct it to grant summary judgment for the government . . .

Hobin, 986 F.2d at 1402.

In its Motion, the Government argues that the instant case is controlled by the Federal Circuit's conclusion that contracting parties must be held to their agreements, and that the Forest Service therefore need not reoffer the Spy Rock Timber Sale or prove actual damages in order to recover.

Although the Board requested both parties to address the applicability of *Hobin* to the instant appeal, Appellant has not done so. Instead, Appellant advances legal theories including promissory and/or equitable estoppel, denial of due process, denial of a property right, *i.e.,* the right to contract, and an arbitrary and capricious appraisal by the Forest Service.

Appellant first alleges that the CO's letter of June 3, 1992, regarding extension of the letter of credit, shows that the Forest Service intended to resell and to allow Appellant to bid. Although the letter pre-dated the Forest Service decision not to resell, Appellant merely infers that he would be permitted to bid; the letter did not so state (FF 7). The CO's request that Appellant extend the letter of credit, which would have expired before damages could have been calculated, is unrelated to and does not support such an inference. Rather, the CO sought the extension to ensure that sufficient funds would be available to cover damages due to Appellant's failure to cut, but did not pursue the matter because sufficent funds remained in the timber sale account. (FF 8.)

We find the request for extension of the letter of credit distinguishable from Government actions in *Louisiana-Pac. Corp. v. United States* [29 CCF ¶ 81,737], 227 Ct. Cl. 756 (1981). The Federal Circuit narrowly construed the holding of that case, finding that the only evident, and plausible, justification for creating an exception to the general rule that agreed-upon contract terms must be enforced was a Government attempt, during performance, to modify a timber sale contract. The Federal Circuit held that *Louisiana-Pac.* should only apply in the following limited circumstances:

> [W]here the government decides during the period of contract performance that it does not want all of the contract timber cut, where the government attempts to modify the contract . . . to limit the timber the contractor is otherwise required to cut, but the contractor refuses, and where the Government subsequently seeks to recover damages on that precise timber.

Hobin, 986 F.2d at 1405. In a footnote, the Federal Circuit noted that the holding in *Louisiana-Pac.* suggested that the court had applied some form of estoppel against the Government due to the Government's attempted modification of the timber sale contract. Finding no similar facts in *Hobin,* the Federal Circuit held that a similar estoppel theory did not apply in that case.

Nor does a similar theory apply in Appellant's case: there was neither a Government attempt to limit the amount of timber available to be cut nor a refusal by the contractor. Rather, Appellant's sale expired by its own terms with only right-of-way timber cut (FF 6). Appellant did not renew the letter of credit, so cannot claim detrimental reliance in having done so (FF 8). If, as Appellant argues, he relied on the CO's initial statement that the timber would be resold, and elected not to pursue other sales, that was a business judgment for which the Forest Service is not responsible. *See Robert O'Hair and O'Hair Constr. Co., JV,* AGBCA No. 82-115-1, 89-1 BCA ¶ 21,384.

Appellant next alleges that he relied on oral representations by the CO and other unidentified Forest Service officials that he would be allowed to bid. Appellant asserts that this also estops the Government from deciding not to resell. The argument is un-

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availing. Even if the timber had been resold, applicable regulations would have prohibited Appellant's bidding. 36 CFR § 223.86, **Bid restriction on resale of non-completed contract,** states in pertinent part:

> (a) Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract:
>
> (1) Because of termination for purchaser's branch;[4] or
>
> (2) Through failure to cut designated timber on portions of the sale area by the termination date, unless acceptance of such bid is determined to be in the public interest.

Appellant has neither alleged nor proved that the CO would have found a bid by Appellant in the public interest.

Even if we assume, *arguendo,* that Appellant was told he could bid on a resale, estoppel generally is not available to individuals who rely on incorrect legal advice from Government employees. *Walker Equip. v. Int'l Boundary and Water Comm'n,* GSBCA No. 11527-IBWC, 93-3 BCA ¶ 25,954; *Turner Constr. Co. v. General Services Administration,* GSBCA No. 11361, 92-3 BCA ¶ 25,115 and cases cited therein. Given the regulatory prohibition, any advice that Appellant would be allowed to bid was legally incorrect. Accordingly, we find the Government entitled to collect damages calculated in accordance with contract provision WO-CT9.4—**Failure to Cut.**

The only material fact in dispute is the amount of such damages. Appellant's affidavit, while lacking in specificity, raises a question as to the validity of the Forest Service appraisal. Appellant avers that timber prices were escalating; that the contract value would have been equal to or greater than the maximum potential damages calculated by the Forest Service; and that road construction has benefited the Forest Service to an extent greater than the amount of purchaser credit allowed. These disputed facts preclude summary judgment for the Government so far as quantum. We question, however, whether Appellant should be given credit for an estimated overbid (FF 10) when there is no resale in which such an overbid will be added to the appraised value of the timber.

With regard to Appellant's remaining assertions, consideration by this Board under the Contract Disputes Act is intended to provide contractors with due process and, at the same time, "informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e). *See also Shelby Crop Ins. Corp.,* AGBCA No. 91-192-1, 92-3 BCA ¶ 25,069; *Summit Contractors,* AGBCA Nos. 81-252-1, 83-312-1, 84-1 BCA ¶ 17,227. Appellant in this case was afforded both notice of the Government's position and an opportunity to be heard. Appellant specifically declined a hearing and elected a decision on the written record.

As for the alleged denial of a property right, while there is arguably such a right once a contract has been awarded, there is no right to award of a Government contract. Except for specific restrictions imposed by statute, as part of its general authority to make contracts, the Government has the right, as do private individuals, to decide with whom and on what terms it will contract. *Old Hickory Serv.,* GSBCA No. 6259, 82-2 BCA ¶ 15,972 quoting *Perkins v. Lukens Steel Co.,* 310 U.S. 869 (1940).

Finally, remedies available to parties before the Board are the same as those available to litigants in the U.S. Court of Federal Claims, 41 U.S.C. § 607(d), and thus are generally limited to money damages and/or reformation or rescission of a contract. Regardless of environmental considerations, ordering the Forest Service to resell the timber is a form of equitable relief which the Board has no jurisdiction to grant. *Taeu Somsai,* AGBCA No. 92-181-1, 93-1 BCA ¶ 25,233.

By letter of today we are providing the parties with a schedule for supplementing the record with regard to the amount of damages. If the parties are able to settle this matter in the interim, so much the better.

RULING

The Government's Motion for Summary Judgment is granted with regard to entitlement. Following further submissions by the parties, the Board will rule on quantum.

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[4] This appears to be a typographical error that should read "purchaser's breach." The term "branch," however, appears in the regulation as originally promulgated and numbered. 42 Fed. Reg. 28,257(1977), codified as 36 CFR 233.5(h)(1).

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[¶ 26,423] Schmalz Construction Ltd.

AGBCA No. 92-177-1, October 25, 1993. Contract No. 50-82X9-3-041.

Reprocurement—Variations from Defaulted Contract—Changes in Requirements.—Excess reprocurement costs were properly assessed against a defaulted road construction contractor because the government met its burden of showing that the terms and conditions of the reprocurement contract were substantially the same as those in the defaulted contract. The default contractor did not show that reprocurement bidders increased their prices as a result of any alleged confusion resulting from the use of identical drawings for both contracts that perhaps caused bidders to think that all work shown on the drawings remained to be performed. The default contractor also failed to show that bidders increased their prices to cover the costs of clearing and grubbing. Although a resurvey of the remaining excavation would have been more precise than pay estimates as a method of calculating reprocurement excavation, the absence of a contractually mandated method of calculating remaining work entitled the government to use any reasonable method. Moreover, different circumstances, rather than different contract terms, justified the reprocurement contractor's allegedly more favorable treatment regarding road closures and its use of alternative gravel sources.

For the appellant: Fred Schmalz, President. For the government: Daniel B. Rosenbluth, Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado.

Before EATON, HOURY, and GISH, Administrative Judges.

EATON, Administrative Judge: This is an appeal from a Government claim for the excess costs of reprocurement for the Grand Mesa Roads Project, requiring approximately 9 miles of road construction in the Grand Mesa, Uncompahgre, and Gunnison National Forests, Colorado. The Forest Service, U.S. Department of Agriculture, awarded the contract, No. 50-82X9-3-041, to Schmalz Construction Ltd., of Gunnison, Colorado (Appellant) on May 25, 1983, in the amount of $675,044.20, but terminated it for default on January 30, 1986.

Appellant challenged the termination and itself claimed $12,289.51. In a decision dated July 17, 1991, *Schmalz Constr., Ltd.*, AGBCA Nos. 86-207-1, 86-229-1, and 86-255-1, 91-3 BCA ¶ 24,183 (hereafter *Schmalz*), the Board upheld the termination, granted Appellant 1 1/2 days and $616, and denied all other claims.

The reprocurement contract, awarded to G.R. Construction, Inc., of Grand Junction, Colorado (hereafter G.R. or the reprocurement contractor), had not been completed at the time of a hearing on the above appeals, so excess costs were not at issue. When G.R.'s contract also was terminated for default in June 1987, its surety agreed to take over, subcontracting the balance of the contract to Norm Gould and Sons, Inc., of Glenwood Springs, Colorado (hereafter Gould or the takeover contractor). Gould completed the project in September 1988.

On January 16, 1992, the Contracting Officer (CO) issued a final decision finding Appellant liable for $195,292.28 in excess costs and liquidated damages. Appellant timely appealed, arguing that the reprocurement contract did not accurately reflect work remaining at the time of the termination for default. Appellant alleged that the Forest Service had treated the reprocurement and takeover contractors more favorably than Appellant, and further alleged that Forest Service actions, including modifications to the reprocurement contract, had increased excess costs.

During pendency of the appeal, the Government reduced its claim to $118,733.53. A 2-day hearing was held in Denver, Colorado, on November 12 and 13, 1992. In post-hearing briefs, the Government moves to increase its claim by $92,250.49, the amount by which modifications increased the reprocurement contract price, and Appellant moves for reconsideration of the Board's decision on the termination for default.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. § § 601-613.

FINDINGS OF FACT

Background: The Termination for Default

1. The Forest Service awarded contract No. 50-82X9-3-041 to Appellant on May 25, 1983. The contract, known as the Grand Mesa Roads Project, required construction or reconstruction of approximately 9 miles of roads in the Grand Mesa, Uncompahgre, and Gunnison National Forests in Colorado.

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Four different roads were involved: Trickle Park Road, 1.77 miles of reconstruction; Old Grand Mesa Road, 3.47 miles of reconstruction; Hay Park Road, 3.6 miles of new construction; and Young's Creek Reservoir Road, .24 miles of new construction. *See Schmalz*, 91-3 BCA at 120,949.

2. The original contract price was $675,044.20, and the original time for performance was 200 days. Modifications issued to Appellant increased the price to $701,439.80 and performance time to 228 days. The CO's final decision further increased the time by 34 days for unusually severe weather in 1983 and 1984. On appeal, the Board granted Appellant an additional 1 1/2 days, for a total of 264 1/2 days for performance. *Id.*

3. Work consisted of clearing and grubbing, excavation, installation of culverts and drainage ditches, crushing and placing gravel, and minor additional items such as installation of cattleguards, construction of a retaining wall, and seeding. *Id.*

4. The Forest Service terminated Appellant's contract for default on January 30, 1986. The CO found that Appellant had not made satisfactory progress in clearing and grubbing, and that except for a small amount of crushing done by another contractor from whom Appellant had purchased gravel, this work had not begun. *Id.* at 120,950. Pay Estimate No. 9, the final estimate issued to Appellant, showed that by the end of the 1985 season, Appellant had completed approximately 51 percent of the work in 108 percent of contract time. With 10 percent of earnings retained, Appellant had been paid $320,178.28. (Appeal File (AF) I, Tab 3 at 2, 3; Transcript (Tr.) II 96.) [1]

5. Appellant timely appealed the termination, alleging that excusable delays entitled it to extensions that would have allowed it to complete the project in a timely manner. Appellant additionally claimed $12,289.51 on the basis of alleged differing site conditions, unusually severe weather, and improper governmental acts. *Schmalz*, 91-3 BCA at 120,950.

6. In its decision of July 17, 1991, the Board found the default termination proper. As indicated above, it granted Appellant 1 1/2 days and sustained one claim for $616, but denied all other claims. *Id.* at 120,965.

The Reprocurement

7. For the reprocurement, the Forest Service did not survey or otherwise measure work completed by Appellant that had been paid for by designated quantities, for example, clearing and grubbing and excavation. Instead, quantities for the reprocurement contract were based on percentages shown in Pay Estimate No. 9. The estimate was in turn based on a Forest Service inspection on September 20, 1985, after work had been suspended for the season. (Tr. II 57, 103, 253, 254.)

8. The Forest Service solicited bids for the reprocurement contract under invitation No. R2-86-24, issued June 7, with opening on July 7, 1986 (AF II 26). Resolicitation had been put off from January until June to allow snow to melt before the Forest Service conducted a pre-bid meeting and "show me" tour on June 23, 1986 (AF II 51; Tr. II 145, 146, 261). A representative of G.R., the subsequent awardee, attended the pre-bid meeting (Tr. II 39; Government Exhibit (Gov't Ex.) 3).

9. The Forest Service received five bids and, on August 6, 1986, awarded reprocurement contract No. 50-82X9-6-039, in the amount of $553,152.80, to G.R. (AF II 47, 277-280). Performance was to be completed within 100 days of a Notice to Proceed, effective September 8, 1986 (AF II 47, 125).

10. During the 1986 season the Forest Service issued three modifications to G.R., increasing the contract price by $41,007.75, to a total of $594,160.55. Performance time was increased by 15 days to a total of 115. *See* Finding of Fact (FF) 54.

11. A pay estimate issued to G.R. for the period November 26, 1986, to January 5, 1987, showed that the reprocurement contractor had completed 16 percent of the work in 32 percent of available time (AF II 150). G.R. subsequently filed for bankruptcy and left the Grand Junction area without a forwarding address. On June 17, 1987, the Forest Service also terminated its contract for default. (AF II 24.)

The Takeover

12. In August 1987, Transamerica Premier Insurance Company (hereafter the surety), which had furnished G.R.'s payment and performance bonds, agreed to take over the contract. The takeover agreement stated,

[1] AF I refers to that covering the appeals of the default termination and Appellant's claims; AF II refers to that covering the appeal of excess costs. Transcripts are similarly distinguished. At the hearing on excess costs, the presiding judge advised the parties that they might rely on relevant evidence from the first hearing without reintroducing it during the second (Tr. II 9).

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among other things, that the surety would not be required to spend more than $553,000, the limit of the performance bond; that 78 days for performance remained; and that materials including a culvert, cattleguard grates, and pipe for a french drain would be furnished by the Government. (AF II 19-23.)

13. On August 4, 1987, the surety subcontracted with Gould to perform the balance of the work for $458,890 (Gov't Ex. 9). The Forest Service issued four additional modifications to the surety for work to be performed by Gould. These increased the contract price by $51,242.74 and time by an additional 20 days. *See* FF 55.

14. Gould completed work on September 10, 1988, and the CO approved final payment in the amount of $645,403.29 [2] on January 25, 1989. (AF II 157, 159.)

The Government's Claim: Excess Costs and Liquidated Damages

15. In calculating excess costs, the CO did not consider the effect of any modifications, which had increased the contract price by a total of $92,250.49 and time for performance by 35 days. Rather, the CO compared Appellant's contract price and performance time with the original reprocurement contract awarded to G.R. (Tr. II 93-98.)

16. In a final decision dated January 16, 1992, the CO notified Appellant that it was liable for $195,292.28 in excess costs of reprocurement (AF II 1).

17. The Government subsequently reduced its claim to $118,733.53, conceding that Appellant was not liable for the costs associated with an item covering gravel crushing and stockpiling from another defaulted contract that had been added to the reprocurement contract. G.R. had bid $75,491.75 for this item. (AF II 9; Tr. II 94; *see* FF 40.) The Government calculated its claim as follows:

Appellant's Contract, as Modified	$701,439.80
Payments to Appellant	320,178.28
Available for Reprocurement	$381,261.52
G.R. Constr. Contract	$553,152.80
	381,261.52
Excess Costs	$171,891.28
Costs Attributable to Defaulted Crushing Contract	75,491.75
Revised Excess Costs	$ 96,399.53
Liquidated Damages	$ 22,950.00[3]
	$119,349.53
AGBCA Award to Appellant	616.00
Government Claim	$118,733.53

(Gov't Ex. 5.)

18. Appellant timely appealed the final decision on excess costs, alleging that (1) the reprocurement contract did not accurately reflect the amount or type of work remaining at the time of the termination for default, so that the reprocurement and takeover contractors were paid for work Appellant already had completed; (2) the Forest Service treated these contractors more favorably than Appellant, for example, with regard to gravel sources, road closures, and contract time; and (3) Forest Service actions, including modifications to the reprocurement contract, increased excess costs. (Correspondence File.)

19. In its post-hearing brief, the Government moved to increase its claim by $92,250.49, the amount by which modifications increased the reprocurement contract price (Gov't Brief at 52).

20. In its post-hearing brief, Appellant moved for reconsideration of the Board's decision on the termination for default, arguing that new evidence demonstrates that the action was improper (Appellant's Brief at 42).

Similarities and Differences: Appellant's and the Reprocurement Contract and Treatment Thereunder

Scope of Work, Contract Drawings

21. Contract provisions covering scope of work (length of roads to be constructed or reconstructed) and type of work required (clearing and grubbing, excavation, installation of culverts and drainage ditches, crushing and placing gravel, installation of cattleguards, construction of a retaining wall, and seeding) were identical in both Ap-

[2] The final pay estimate was not based on the price of the contract between the surety and Gould. Rather, the estimate showed G.R.'s contract price, as modified, $594,160.55, plus $51,242.74, in modifications issued to the surety, for a total of $645,403.29. (AF II 157.)

[3] Appellant's contract specified liquidated damages of $300 a day (AF I, Tab 2 at 47). Appellant had been allowed 264 1/2 days for performance (FF 2). Of these, Appellant had used 241, so that 23 1/2 days remained. The Forest Service subtracted the 23 1/2 days from the 100 days originally allowed under the reprocurement contract to determine that Appellant owed liquidated damages for 76 1/2 days. (Tr. II 98; Gov't Ex. 5.)

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pellant's and the reprocurement contract. (AF I, Tab 2 at 20; AF II 51.)

22. In both contracts, General Provisions for Public Work Contracts, § 30.3, Drawings, stated that drawings showed the "location, details, and dimensions of the work *to be performed*" (AF I, Tab 2 at 53; AF II 92) (emphasis added). Drawings also were identical. The CO's Representative (COR) testified that for the reprocurement, they were intended to show the desired end product; that revising them would have delayed the project for at least another year;[4] that the Schedule of Items showed work actually remaining; and that this also had been discussed at the pre-bid meeting and "show me" tour (Tr. II 34-36, 107; Gov't Ex. 7).

Standard Specifications

23. Forest Service Standard Specifications for Construction of Roads and Bridges, 1979 edition, were incorporated by reference in both contracts (AF I, Tab 2 at 12; AF II 46). However, Forest Service Standard Specifications for Construction of Roads and Minor Drainage Structures, issued in 1985, were effective by the time of the reprocurement and were also referenced in the reprocurement contract (AF II 51). Inclusion of the 1985 specifications was a mistake, and in case of questions during performance of the reprocurement contract, the parties consulted the 1979 version (Tr. II 32, 33).

Clearing and Grubbing; Merchantable Timber

24. Clearing and grubbing was paid on a per-acre basis under both contracts. The Schedule of Items in Appellant's contract listed an estimated 27.71 acres of clearing and grubbing for which Appellant bid $650 an acre, or $18,011.50. The reprocurement contract listed 2.74 acres, for which G.R. bid $1,000 an acre, or $2,740. (AF I, Tab 2 at 31; AF II 49.)

25. A Special Project Specification in both contracts showed the volume of merchantable timber designated to be cut as 232 thousand board feet (MBF). Appellant's contract required it to purchase all merchantable timber in the right-of-way for $1,392. (AF I, Tab 2 at 62; AF II 52.) About 50 MBF of merchantable timber, plus unmerchantable timber suitable only for firewood, remained at the time of the termination of Appellant's contract (Tr. II 52). The reprocurement contract merely required the contractor to dispose of all timber, either by removing it from Forest Service land or decking it at locations shown on contract drawings (AF I, Tab 2 at 62). Bidders attending the pre-bid meeting and "show me" tour were aware of the amount of timber remaining on the project site (Tr. II 23, 61-64).

Excavation

26. Both contracts included an item for Excavation, Placement Method 3. Appellant's contract called for an estimated 77,921 cubic yards for which Appellant bid $3.50 a yard. Modifications increased this quantity to 82,534 cubic yards. *Schmalz*, 91-3 BCA at 120,962. Pay Estimate No. 9 showed that Appellant was paid for 61,651 cubic yards of excavation (AF I, Tab 3 at 2).

27. The reprocurement contract called for an estimated 20,883 cubic yards (82,534 – 61,651) of excavation for which G.R. bid $4.50 a yard (AF II 49).

28. Forest Service Standard Specifications for Construction of Roads and Bridges, 1979 edition, at § 106.04—Payment, stated:

> One of the following methods of measurement for determining final payment is DESIGNATED on the SCHEDULE OF ITEMS for each pay item:
>
> (a) *Designed Quantities (DQ).* These quantities denote the final number of units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project . . . .

The Schedule of Items in both Appellant's and the reprocurement contracts indicated that excavation would be measured and paid for by designed quantities. The Standard Specifications, at § 203.17—Method of Measurement, further stated:

> When designed quantities are DESIGNATED in the SCHEDULE OF ITEMS as the method of measurement, the original design data has been established on the basis of the undisturbed ground surface elevations . . . .
>
> When actual quantities are DESIGNATED in the SCHEDULE OF ITEMS as the method of measurement, preliminary cross sections or comparable measurements will be taken of the undisturbed ground surface and quantities

[4] The year or more delay was unacceptable to the Forest Service because pending timber sales depended upon completion of the roads (Tr. II 110).

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finally measured in accordance with the following:

(a) When excavation is DESIGNATED as a pay item in the SCHEDULE OF ITEMS, final cross sections or comparable measurements will be taken of completed and accepted work.

29. Contract drawings showed that 35,796 cubic yards of excavation would be required for Hay Park Road (Gov't Ex. 7, Sheet 2). An expert engaged by Appellant surveyed this road in July 1986, spending approximately 4 weeks in the field with a crew of three. Using existing Forest Service benchmarks and slope stakes to establish the centerline and elevations of the road, the expert determined that Appellant had completed 9,797 cubic yards, or approximately 27 percent, more excavation than Appellant had been paid for on Hay Park Road: (*Schmalz*, 91-3 BCA at 120,962.)

30. Forest Service witnesses consistently testified that Appellant had been paid only for excavation correctly placed (Tr. I Vol. 2 318-320, Vol. 3 1-6, Vol. 4 116-122; Tr. II 40-42). Appellant's expert acknowledged that he had not determined whether the roads were underbuilt or overbuilt. Rather, he calculated the square footage for each cross section and the cubic yards between sections in order to measure total volume of earth moved by Appellant. The expert was not aware of contract requirements for finished road width or ditch depth. (Tr. I, Vol. 2 at 165-168, 170-173.)

31. At the 1992 hearing, the Government introduced an exhibit showing the original ground line, the road template as required by the contract, and the road as constructed by Appellant (Gov't Ex. 4). Appellant's expert had plotted some 200 cross sections. The Forest Service, using the expert's survey notes, randomly plotted 30 points between Stations 123+36 and 167+62 on Hay Park Road. (Tr. II 138, 139.) The Government's exhibit covered nine of these cross sections where Appellant had begun cuts up to 10 feet further from the centerline than required; had undercut by 2 or 3 feet; and had placed fill as much as 7 feet wider than required. Appellant objected to the exhibit on grounds that it lacked vertical and horizontal controls and because, at the hearing, the Government did not introduce evidence establishing that the expert's notes had been correctly extrapolated.[5] (Tr. II 41-43, 46, 48-55.)

32. Following the hearing, the Government engaged an independent engineering firm which verified the exhibit and made some corrections to it. The firm added a scale to the exhibit and provided an explanation of numbers, letters, and lines thereon. It found a mathematical error in the field notes for Station 149+59 which it stated would have resulted in Appellant's expert's computing more excavation than actually moved. (Ex. A to Gov't Post-hearing Brief).

33. Appellant's expert responded, among other things, that the final elevations required by the contract typically would include 8 inches of surfacing which had not been placed at the time of the survey, so that it was not unusual that the "Constructed by Schmalz" lines on the exhibit would be below finished grade. After reviewing field notes and cross sections, the expert could find no mistake in his figures for Station 149+59, and concluded that there might be a Forest Service survey error at this station. (Appellant's Response to Gov't Ex. A.)

34. There is conflicting evidence as to the time required to complete excavation. Appellant had alleged that on Hay Park Road, earthwork was 96 percent complete. Gould worked 10-hour days for 6 days a week, yet required 6 more weeks to complete excavation on Hay Park Road and an additional 4 weeks on Old Grand Mesa Road. (Tr. II 173, 174.)

35. In its decision of July 17, 1991, the Board did not address alleged differences in the amount of excavation completed and paid for, since it had not been a factor in the CO's decision to terminate Appellant's contract for default and had not been the subject of a claim by Appellant. *Schmalz*, 91-3 BCA at 120,962.

Government-Furnished Materials

36. In the reprocurement contract, the Forest Service indicated by use of reduced quantities in the Schedule of Items that materials for items to be paid on an actual-quantity or lump-sum basis, including culverts, cattleguards, a retaining wall, guard rails, and the arch culvert, had been purchased by Appellant and left on site (Tr. II 64, 106, 209, 210). For example, Appellant's contract called for furnishing and installing

[5] With the agreement of the parties, the presiding judge ruled that the Government might attach additional evidence to its Post-hearing brief, and that Appellant would have an opportunity to rebut such evidence (Tr. II 294).

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two cattleguards; the reprocurement quantity was .62. G.R. bid a unit price of $5,000 and a total of $3,100 for this item. Appellant's contract similarly called for furnishing and installing a retaining wall; the reprocurement contract quantity was .5. G.R. bid a unit price of $5,000 and a total of $2,500 for this item. (AF I, Tab 2 at 31; AF II 49.) The Schedule of Items in the reprocurement contract did not include the notation GFM (Government-furnished material); however, the COR advised prospective bidders at the pre-bid meeting and "show me" tour that the Government would furnish the items (Tr. II 64, 67-70). As indicated below, Modifications No. 2 and 3 also clarified requirements regarding GFM. *See* FF 54.

Gravel Crushing and Stockpiling; Designated Sources

37. The Schedule of Items in Appellant's contract included an estimated 37,849 cubic yards of crushed aggregate under items for base course and surfacing (AF I, Tab 2 at 31). Young's Creek Pit, located at approximately the mid-point of Hay Park Road, was shown on contract drawings as the designated source (Gov't Ex. 7, Sheet 9).

38. In July 1985, Appellant notified the Forest Service of moisture problems encountered by another contractor in Military Park Pit. Appellant had been unable to move its crusher into Young's Creek Pit because of wet spots on Hay Park Road and because it had not yet installed a retaining wall and guardrail across Young's Creek Reservoir. On August 6, 1985, the Forest Service denied Appellant's request to use an alternate source because Military Park Pit was being used by the other contractor and Surface Creek Pit, the only other possibility, was in an area of heavy recreational use, carrying up to 200 vehicles a day. *Schmalz*, 91-3 BCA at 120,953, 954.

39. In its decision of July 17, 1991, the Board denied Appellant's claim for a 30-day extension based on an alleged inadequate gravel source. Although Appellant had purchased approximately 4,000 cubic yards of gravel, Appellant itself had done no crushing before the termination for default. The Board found that Appellant's performance had not proceeded to the point where it had encountered excess moisture or run out of rock in Young's Creek Pit. *Id.* at 120,952.

40. The Schedule of Items in the reprocurement contract included an estimated 33,967 cubic yards of crushed aggregate under items for base course and surfacing. It also included an item for crushing and stockpiling an additional 13,129 cubic yards that had not been in Appellant's contract. G.R. bid $5.75 a cubic yard, or $75,491.75, for the additional item. (AF II 49.) It covered work in the same general area under another contract that also had been terminated for default. Adding the item to the reprocurement contract was intended to lower excess costs because of reduced mobilization costs and economies of scale. (Tr. II 24, 26.)

41. In 1986, G.R.'s subcontractor determined that Young's Creek Pit did not contain enough suitable gravel (AF II 165, 282). G.R. was allowed to use Surface Creek Pit between September and December, which the Forest Service regarded as after the recreation season (AF II 171, 175; Tr. II 87-90).

42. The Forest Service and the surety agreed that Military Park Pit would be the source of remaining gravel to be crushed by the takeover contractor (AF II 288). This pit was subsequently determined to be inadequate (Tr. II 85, 86) and, as indicated below (FF 55), Gould was allowed to purchase gravel from a commercial source, receiving an additional $10.45 a cubic yard for this purpose.

Road Closures

43. Forest Service Standard Specifications for Construction of Roads and Bridges, 1979 edition, at § 104—Maintenance for Traffic, required existing roads that were undergoing improvement to be kept open to all traffic. During suspensions all roads were to be left in condition suitable for traffic, with the Forest Service responsible for maintenance due to permitted (public) use.

44. Appellant did not install gates on Hay Park Road during winter shutdowns because construction had not progressed to the point where the public could drive on it, except possibly with four-wheel drive vehicles. During the winter shutdown of G.R.'s contract, vandals pulled out a gate that G.R. had installed, and the Forest Service reinstalled it to prevent damage to the road. In 1988, Hay Park Road was easily passable, and public traffic posed safety problems for Gould's gravel trucks; the Forest Service therefore issued a total road closure. (Tr. II 80-82.)

45. A Special Project Specification in both Appellant's and the reprocurement contract stated that Old Grand Mesa Road might be closed to public traffic during reconstruction; however, it was to be kept open on weekends and holidays if the contractor was not working (AF I, Tab 2 at 60; AF II 102).

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Appellant did not work on weekends, so was required to keep the road open at such times. In 1986, G.R. installed and locked a gate near the beginning of Old Grand Mesa Road, and also installed and locked a cable with barricade at its junction with Hay Park Road. The Forest Service advised G.R. that the road would have to be kept open except when actually being worked on. Gould worked on weekends and was then allowed to close Old Grand Mesa Road. (AF II 163; Tr. II 75-79.)

Contract Time

46. The 100 days originally allowed for performance of the reprocurement contract were based on the fact that Appellant had been paid approximately half the contract price, and the Forest Service estimated that half the original time would be needed to complete the project (Tr. II 104).

47. Section 30.1, Contract Time and Suspension of Work, in both contracts, stated that time was to be charged beginning on the calendar day established by the CO's written Notice to Proceed or Resume Work Order. During periods of total suspension, the section stated, the CO might permit emergency work or minor operations not affected by or connected with the cause of the suspension. (AF I, Tab 2 at 52; AF II 91.)

48. In 1983, 1986, and 1987, Notices to Proceed were issued on dates mutually agreed to by the COR and the contractor; the COR's practice was to allow extra time for gearing up and moving in equipment during a contractor's first year (Tr. II 83).

49. In the appeal of the default termination, Appellant alleged that in 1985, the Forest Service had unilaterally ordered it to resume work when ground conditions, particularly at higher elevations, were too wet. The Board found that Appellant could have begun work at lower elevations and that a financial dispute with its excavation subcontractor was also a factor in preventing Appellant from resuming work as ordered on July 1, 1985. *Schmalz*, 91-3 BCA at 120,958.

50. In 1986, the Forest Service partially suspended G.R.'s performance on September 22, but permitted G.R. to continue crushing and stockpiling gravel and removing right-of-way logs until total suspension on December 8, 1986 (AF II 126, 127). The COR based the time counted during the suspension on the dollar value of items being worked on as a percentage of contract price (Tr. II 72, 73).

51. In 1987, the Forest Service issued a Notice to Proceed to Gould on August 5 (AF II 128), and suspended all work except crushing as of October 13 (AF II 129). On November 17, the Forest Service issued a total suspension, effective retroactively to October 13, 1987, on grounds of inclement weather (AF II 130). Gould continued work in the interim: the Forest Service daily diary for October 21, 1987, showed 16 men and equipment including a water truck, roller, grader, backhoe, and loader, on the project (AF II 254.)

52. In 1988, Gould was permitted to work beginning July 14, blading roads in order to dry them out and moving several loads of gravel in order to determine whether conditions were suitable for use of heavy equipment. Gould attempted to start crushing, found Military Park Pit too wet, and took approximately a week to find another gravel source (*see* FF 55). Performance was not formally resumed until August 17, 1988, so that Gould worked 35 days without charge to contract time. (AF II 256-265; Tr. II 84, 85, 113-115, 183, 184.) The COR did not believe ground conditions permitted Gould to resume work earlier because placing gravel requires a drier subgrade than clearing and excavating (Tr. II 116).

53. Appellant was granted extensions totaling 34 days for unusually severe weather. Neither G.R. nor Gould was granted any weather days. (Tr. II 72.)

Reprocurement Contract Modifications

54. The Forest Service issued three modifications to G.R.'s contract, as follows:

Modification No. 1, effective September 24, 1986, increased the quantity of aggregate to be crushed and stockpiled under the bid item from the other defaulted contract. It increased the contract price by $24,299.50 and performance time by 5 days. (AF II 27.)

Modification No. 2, effective December 5, 1986, among other things clarified the item covering cattleguards by requiring the contractor to install a concrete foundation for two Government-furnished cattleguard grates. The price for this item was increased from $3,100 to $4,246. Due to deletion of the last 836 feet of Young's Creek Reservoir Road (no longer needed after Young's Creek Pit was found inadequate), the modification reduced items covering excavation, crushed aggregate base, and reconditioning of the roadbed. Overall, the modification increased the contract price by $18,558.25 and performance time by 10 days. (AF II 28-31.)

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Modification No. 3, effective December 11, 1986, deleted the retaining wall on Young's Creek Reservoir Road, also due to the change in gravel source. The contractor was to be paid for removal of a section of the wall that had been installed and approved, as well as for reshaping the reservoir. The modification reduced the contract price by $1,850, but did not change performance time. (AF II 32-34.)

Overall, modifications increased G.R.'s contract price by $41,007.75, or to $594,160.55, and performance time to 115 days (AF II 33).

55. The Forest Service issued four additional modifications to the surety, to be performed by Gould, as follows:

Modification No. 4, effective September 9, 1987, added a parking area and boat ramp on Young's Creek Reservoir Road, removal of five slides on Old Grand Mesa Road, and installation of an underdrain on the same road. It increased the contract price by $23,311.54 and performance time by 10 days. (AF II 35, 36.)

Modification No. 5, effective September 17, 1987, covered installation of prefabricated drainage structures on Hay Park Road. It increased the contract price by $26,013 and performance time by 5 days. (AF II 37, 38.)

Modification No. 6, effective August 17, 1988, covered construction of a leadout ditch, removal of five slides, and placement of riprap on Old Grand Mesa Road. It stated that "high moisture content has made the gravel sources on the Grand Mesa inadequate to crush." The contractor had located a commercial source, and due to additional hauling and watering costs, its unit price was increased by $10.45 a cubic yard, to be paid by actual instead of designed quantities. The surety was to contribute $10,000 of the additional cost. Overall, the modification reduced the contract price by $32,950.25 and increased performance time by 5 days. (AF II 41-43.)

Modification No. 7, effective September 2, 1988, showed the final quantity of crushed aggregate surfacing as 3,241 cubic yards. It increased the contract price by $33,868.45. (AF II 44.)

Modifications covering work by Gould totaled $51,242.74. They resulted in a final contract price of $645,403.29 and performance time of 135 days. (AF II 43, 44.)

DISCUSSION

Excess costs of reprocurement constitute a Government claim, requiring the Government to prove the following:

1. The reprocured supplies or services, and the terms and conditions of the reprocurement contract, were substantially the same as those in the original contract.

2. The Government acted to minimize costs by reprocuring within a reasonable time, using the most efficient method, and obtained a reasonable price (frequently discussed in terms of the Government's duty to mitigate damages).

3. The Government actually incurred excess costs, and the defaulted contractor's liability is a sum certain (requiring proof that the reprocurement contract has been completed and final payment made).

B&M Constr., Inc., AGBCA No. 90-165-1, 93-1 BCA ¶ 25,431. In this case there is no dispute that the reprocurement contract has been fully performed and payment made (FF 14).

The Government goes to great lengths to establish that, as completed, the Grand Mesa Roads Project was substantially the same as would have been constructed had Appellant completed it to specifications. "An eagle, soaring overhead," allegedly would have seen no difference. Appellant does not really contest this, but rather looks to alleged differences in the terms and conditions of the reprocurement contract. The issue, in our opinion, is most accurately stated as whether the differences—in either the completed project or the terms and conditions of the two contracts—were material.

Drawings and Specifications

Certainly the use of identical drawings for both contracts could have been confusing if bidders for the reprocurement thought that all work shown on the drawings remained to be performed. The Schedule of Items, however, showed actual quantities of work required, and a representative of G.R., the reprocurement contractor, was at the prebid meeting and "show me" tour, where remaining work also was discussed (FF 8, 22). The Government argues that revision of the drawings would have taken up to a year, delayed pending timber sales, and been inconsistent with its duty to mitigate damages by reprocuring within a reasonable time. Appellant's argument that bidders were confused by inclusion of identical drawings for both contracts, and consequently may have increased their prices, is not supported by

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testimony as to the understanding of any competitor for the reprocurement contract.[6]

As for differences between the 1979 and 1985 editions of Forest Service Standard Specifications, the Government asserts that the 1979 edition, applicable to Appellant's contract, was also used in case of questions during performance of the reprocurement contract (FF 23). Appellant has provided no evidence to the contrary.

Clearing and Grubbing; Merchantable Timber

The parties also disagree as to whether bidders for the reprocurement contract were misled by the fact that 232 MBF of timber were designated for cutting (FF 25). Appellant contends that bidders also may have increased their prices to cover disposal of such timber. The Government responds that the reduction in acreage from 27.72 to 2.74 was sufficient to alert bidders to the fact that there was less merchantable timber than stated, and that bidders also would have observed this during the "show me" tour.

We find that G.R.'s bid of $2,740 for clearing and grubbing, compared with Appellant's bid of more than $18,000 for the same work (FF 24), confirms that G.R. did not expect to have to cut 232 MBF of merchantable timber.

The requirement that the road construction contractor purchase right-of-way timber for $1,392, however, appeared only in Appellant's contract. The reprocurement and takeover contractors were allowed to take or leave approximately 50 MBF of merchantable timber, plus an unspecified additional quantity of unmerchantable timber suitable for firewood. (FF 25.) While this difference is not material enough to relieve Appellant entirely of liability for excess costs, it warrants a reduction in such costs. Appellant was charged $6 per MBF ($1,392 divided by 232 MBF) for merchantable timber. Excess costs should therefore be reduced by $300 ($6 × 50 MBF).

Excavation

Appellant argues that the Forest Service's use of Pay Estimate No. 9, and its failure to survey excavation remaining to be completed, resulted in the reprocurement and takeover contractors being paid for excavation Appellant already had done.

The Government responds that use of pay estimates to determine the amount of work completed is an accepted Forest Service practice, and that on eight prior occasions, Appellant or its representative accepted such estimates for progress payments. The Government also contends, as it did in the appeal of the default termination, that Appellant over- and under-excavated and has been paid for all excavation correctly placed. In addition, the Government argues that survey and redesign would have delayed reprocurement and increased costs, pointing out that Appellant's expert, with a crew of three, took a month to survey Hay Park Road alone. A similar survey of the entire project, the Government concludes, would have placed an undue burden on the Forest Service and, again, would have constituted a failure to mitigate damages.

The Government cites *Mark Smith Constr. Co.*, ASBCA Nos. 25058 and 25328, 81-2 BCA ¶ 15,306, for the proposition that value of work in place at the time of a termination for default may be determined by Government estimates of the percentage of completion. The decision is not directly on point. It deals only with payments to the contractor, and does not stand for the proposition that estimates for progress or final payments are equally valid for determining the amount of work remaining for a reprocurement. Appellant's acceptance of eight prior estimates for purposes of progress payments is, in our opinion, irrelevant, since quantity estimates used for partial payments are necessarily inexact and subject to subsequent adjustment and correction. *Guy F. Atkinson, Co.*, ENG BCA No. 4891, 87-3 BCA ¶ 20,063.

The Government also cites *Max D. Schenk, Inc.*, AGBCA No. 84-246-3, 85-1 BCA ¶ 17,802, in which a contractor's rough survey of excavation quantities, based on an aerial topographic map with built-in errors, is compared with more accurate Government measurements of staked cross sections. The decision is distinguishable and in fact supports Appellant, whose expert plotted 200 cross sections using Forest Service stakes and benchmarks (FF 29, 31).

We are not particularly impressed with Government Exhibit 4, which shows over-

[6] Neither party produced G.R., a reprocurement of the reprocurement contractor, or any other bidder as witness at the hearing on excess costs. Norm Gould appeared for the Government and was qualified as an expert in construction. This witness, however, bid only for the takeover contract and had no personal knowledge of events leading up to award to G.R or during performance in 1986. (Tr. II 155, 158, 178, 279.)

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building or underbuilding on only nine cross sections. We find an admission against Appellant's interest, however, in its expert's acknowledgment that he surveyed all earth moved, with no knowledge of specifications for Hay Park Road (FF 31). In addition, if Appellant in fact placed 27 percent more excavation than it was paid for on Hay Park Road alone, we question why Appellant did not assert a claim for this work in the first appeals, litigated after the survey had been completed (FF 35).

Appellant's argument that Forest Service Standard Specifications for Construction of Roads and Bridges, 1979 edition, required the Forest Service to take "final cross sections or comparable measurements ... of completed and accepted work" is inapposite. The quoted section applies only when a Schedule of Items indicates that the method of measurement will be actual quantities. In Appellant's contract, the Schedule of Items clearly indicated that excavation would be measured and paid for by designed quantities. (FF 28.)

Undoubtedly resurvey and recalculation would have been more precise than use of the final pay estimate to determine reprocurement quantities. In *J.F. Whalen & Co.*, AGBCA Nos. 83-160-1 and 83-281-1, 88-3 BCA ¶ 21,066, this Board upheld a Government claim for the cost of such a resurvey, deemed "reasonably and necessarily undertaken" not only to determine payments due a defaulted contractor, but also to provide information to a surety and the reprocurement contractor. The instant case, where Appellant was given credit for most, if not all, completed work, is also distinguishable from *William A. Hulett*, AGBCA Nos. 91-230-3 *et al.*, 93-1 BCA ¶ 25,389, *reconsideration denied*, AGBCA Nos. 92-237-R *et al.*, 93-2 BCA ¶ 25,888, in which the Board recomputed a Government claim for excess costs because the Forest Service attributed no value whatsoever to partially completed work that was of benefit to the reprocurement contractor, and therefore refused to resurvey.

Nevertheless, we find that in the absence of a specific, contractually mandated method of calculating work remaining in the event of a default, the Forest Service was entitled to use any reasonable method. The method chosen by the Forest Service in this case was reasonable, particularly in view of the Government's countervailing duty to mitigate damages.

Government-Furnished Materials

Appellant asserts that bidders for the reprocurement contract also were misled by the Schedule of Items, which used percentages for cattleguards, a retaining wall, and the like, without specifically stating that materials for these items had been purchased by Appellant and were available on site. The Government responds that during the pre-bid meeting and "show me" tour, bidders were advised that these items would be Government-furnished.

As with clearing and grubbing, we find that G.R.'s bid prices indicate that G.R. understood it would not be required to furnish and install two cattleguards and a retaining wall (FF 36). As discussed below, subsequent changes in the contract price for Government-furnished materials, accomplished by modification, were not a factor in calculation of excess costs.

Gravel Crushing and Stockpiling; Designated Sources

Appellant to some extent attempts to relitigate its claim that Young's Creek Pit, the designated gravel source, was inadequate and constituted a differing site condition. The Forest Service denied Appellant's request to use alternate sources because in August 1985, recreational traffic was heavy in the area of Surface Creek Pit and another contractor was operating in Military Park Pit.

The Board initially found that Appellant had not attempted to crush gravel from the designated source, and therefore had not progressed to the point where it encountered a differing site condition. We stated, however, that different treatment of the reprocurement contractor might provide a defense to Appellant's liability for excess costs. *Schmalz*, 91-3 BCA at 120,954.

Now that the issue has been presented, we find the defense unavailing. G.R.'s subcontractor actually opened up Young's Creek Pit and established that it was inadequate. The Forest Service allowed G.R. to use Surface Creek Pit only between September and December, after the recreation season. (FF 41.) Gould subsequently determined that neither Surface Creek nor Military Park Pits were adequate (Military Park had become available because of the termination for default of the contractor operating there), and was allowed to purchase gravel from a commercial source (FF 50, 55). Different treatment was, therefore, due to different circumstances when the reprocurement and takeover contractors

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were permitted to use alternate sources for gravel.

Despite the fact that the Government deleted the cost of the additional crushing and stockpiling of gravel from the other defaulted contract from its claim (FF 17), Appellant continues to argue that it should not be charged for this item. Clearly Appellant is *not* being charged for this item, and its argument that the addition of this item to the reprocurement contract it may have impacted prices for other items is speculative at best. *See* footnote 6, *supra*.

Finally, the modification allowing Gould an increase in price for purchase of gravel from a commercial source also was not a factor in calculation of the Government's claim, and the increase in price was in any event absorbed at least in part by the surety (FF 15, 55).

Road Closures

Appellant alleges that the reprocurement and takeover contractors were treated more favorably with regard to road closures. In Appellant's case, however, construction on Hay Park Road had not progressed sufficiently to allow public traffic to pass; installation of gates during the winter shutdown was therefore unnecessary. By contrast, G.R. and Gould had progressed to a point where potential damage to the road and safety considerations made closures necessary. Appellant did not work weekends and was therefore required to keep Old Grand Mesa Road open. The Forest Service also required G.R. to keep this road open, despite two attempts to close it during 1986. Gould did work weekends, and therefore was allowed to close Old Grand Mesa Road at such times. (FF 44, 45.)

There is no evidence that if Appellant's construction had been further along, or if Appellant had worked weekends, it would not have been allowed to close the same roads. Road closures, therefore, were also the result of different circumstances and not due to material differences in contract terms and conditions.

Contract Time

Appellant to some extent also attempts to relitigate its claims regarding unusually severe weather and an alleged premature Resume Work Order for 1985. We will not reconsider these claims, which were asserted and decided against Appellant in our initial decision (FF 49). *See Dan F. Harrison Constr., Inc.*, ASBCA No. 42546, 93-2 BCA ¶ 25,914. We will, however, look at alleged disparate treatment of the reprocurement and takeover contractors with regard to contract time.

With regard to starting dates, G.R.'s Notice to Proceed was not effective until September 8, 1986, an ostensibly overlong delay from termination of Appellant's contract the previous January. The Government, however, explains the delay as due to the need to wait until late June to conduct a tour for prospective bidders, then allow sufficient time for preparation and evaluation of bids prior to award of the reprocurement contract on August 6, 1986. (FF 4, 9.) As for the takeover contractor, Gould's contract with the surety is dated August 4, 1987, and its Notice to Proceed was effective the following day (FF 13, 51). In 1988, however, from July 14 to August 17, a period of 35 days, Gould was permitted to blade roads, move gravel, and locate an alternate source before work was formally resumed. In addition, there is evidence that during suspensions, both G.R. and Gould were allowed to perform other than minor work without charge to contract time. (FF 50-52.)

If Appellant had similarly been allowed to resume work in mid-August 1985, instead of being ordered to resume work on July 1, or to work during suspensions without charge to contract time, Appellant would have had additional time remaining when its contract was terminated for default. We therefore find that liquidated damages should be reduced. Using the most objective figure available on the present record, we reduce liquidated damages by $10,500 ($300 × 35) to account for the 35 days Gould was allowed to work in 1988 before formal resumption of performance.

Reprocurement Contract Modifications

In calculating excess costs, the Government did not consider modifications issued to either the reprocurement contractor or the surety. Rather, it compared Appellant's contract price and performance time, as modified, with the original reprocurement price and time. (FF 15.) Because in this case the project as completed was substantially the same as that required by Appellant's contract, we assume that changes to the reprocurement contract were within the scope of Appellant's contract and, but for the termination for default, would also have been made to it. *Compare* the instant case with *B&M Constr., Inc., supra*, wherein modifications to the reprocurement contract, frequently made in the field and reduced to writing only after contract (cont'd)

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completion, resulted in a substantially different project.

The deletion of the last 836 feet of Young's Creek Reservoir Road, for example, was not a material change in a project involving more than 9 miles of road construction. The retaining wall, required for access to Young's Creek Pit, presumably would also have been deleted from Appellant's contract had Appellant demonstrated that this gravel source was inadequate. When the Forest Service subsequently decided it wanted a parking area and boat ramp on Young's Creek Reservoir, these could have been added to Appellant's contract by modification.

Other modifications, covering removal of slides, correction of drainage problems, and Gould's purchase of gravel from a commercial source, were in response to differing site conditions encountered by Gould and confirmed by the Forest Service. (FF 54, 55.) In the previous appeals Appellant alleged that it had encountered differing site conditions, for example, wet spots on Hay Park Road; however, the Board found that surface water and Appellant's own construction methods, not subsurface water that constituted a differing site condition, had caused the problems. *Schmalz*, 91-3 BCA at 120,956.

The net result of modifications to the reprocurement contract was to increase the price by $92,250.49 (FF 54, 55). Appellant argues that excess costs should be decreased to reflect reductions in price accomplished by modification, but not increased to reflect corresponding increases. This argument is unreasonable and illogical.

Post-Hearing Motions

The Government's post-hearing Motion to increase its claim by $92,250.49 appears to be in response to Appellant's argument regarding reductions due to modifications. Since neither increases nor decreases in the contract price were considered, however, the Government's Motion fails.

Appellant's Motion for reconsideration of the Board's decision on the termination for default also fails. Some new evidence has been presented: as Appellant points out, we now know that a project originally planned for completion in three seasons in fact required six; that the reprocurement contractor also was terminated for default; and that there were some differences in terms and conditions of the reprocurement. Except as previously indicated, however, we do not find these differences material. We affirm our decision that the termination for default was proper.

Both Motions are denied.

Summary

We conclude that the Government has met its burden of proof that the terms and conditions of the reprocurement contract were substantially the same as those in Appellant's contract, and that the Government has adequately mitigated damages.

DECISION

Excess costs are reduced by $300 because the reprocurement and takeover contractors were not required to purchase right-of-way timber. Liquidated damages are reduced by $10,500 because Gould was allowed to work 35 days at the beginning of the 1988 season without charge to contract time. Appellant's total liability is therefore reduced to $107,933.53 ($118,733.53 – [$300 + $10,500]). The appeal is otherwise denied.

[¶ 26,424] Prairie Wood Products, Inc.

AGBCA No. 91-197-1, October 25, 1993. Contract No. 070185.

Procedure Boards—Parties—Merger.—A board of contract appeals had jurisdiction to hear a road construction contractor's claim, despite the fact that the contractor who brought the appeal had a different name than the contractor who signed the contract, because the two companies were functionally the same. The president of the company that signed the contract owned both companies, which were merged.

Subcontracting—Prime Contractor on Behalf of Subcontractor—Severin Doctrine.—The *Severin* doctrine did not bar a prime construction contractor's recovery on behalf of its road construction subcontractor, despite the government's contention that the government was not liable for any costs incurred by the subcontractor for which the prime contractor was not liable, because the government did not show that the subcontract contained a clause that specifically relieved the prime contractor of liability. Moreover, the

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evidence showed that the prime contractor was going to pay the subcontractor if it recovered under the appeal.

Sales of Government Property—Timber Sales—Road Construction and Purchaser Credit.—Under a timber sale contract that provided a contractor with purchaser credit for road construction to pay for the harvested timber, the contractor was not entitled to an adjustment in purchaser credit for changes in the road work in connection with inadequate designated aggregate sources, because the increased delay costs resulting from government action were outside the scope of the contract. Moreover, the parties stipulated that the contractor's delay claim was outside the scope of the clauses providing for adjustments to purchaser credits. The Designated Source clause provided for an adjustment in the contract price, rather than in purchaser credit, for an inadequate designated source.

Sales of Government Property—Timber Sales—Road Construction Specifications.—Under the Designated Source clause of a timber sale contract that included road construction for purchaser credit toward the harvested timber, a contractor was entitled to recover for delay caused by inadequate designated sources of aggregate, despite the drill hole log indications that much of the source material was not usable as road aggregate, because the government included a specification that guaranteed that the source would produce satisfactory material without requiring the removal of more than 10 percent of objectionable material. The road construction subcontractor could not meet the specified gradation and the required minimum sand equivalent without removing 30 to 50 percent of the objectionable material. The government failed to show that the specifications could be met by simply scalping away the objectionable material.

Sales of Government Property—Timber Sales—Damages.—Under a timber sale contract that included road construction for purchaser credit toward the harvested timber, a contractor was entitled to a portion of its claimed damages, including administrative costs, the costs of the subcontractor's consultants, and the subcontractor's downtime, plus profit, because the contractor showed that these damages were incurred in connection with delay caused by the contractor's inability to meet specifications using aggregate from a government-designated source. The portion of the appeal relating to the cost of the laydown crew that placed the crushed aggregate on the road was denied. The contractor did not show that the laydown crew was delayed by any government actions.

For the appellant: Cegavske, Johnston & Associates, P.C., Roseburg, Oregon, by Ronald S. Yockim. For the government: Owen L. Schmidt, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before HOURY, EATON, and GISH, Administrative Judges.

HOURY, Administrative Judge: This appeal arises from contract No. 070185 between the Forest Service, U.S. Department of Agriculture and Prairie Wood Products, Inc.[1] (Appellant). The contract was for the sale of timber known as the Steamboat Sale from the Malheur National Forest in Oregon.

The contract contemplated that Appellant would construct and reconstruct specified roads and receive purchaser credit therefor. The purchaser credit could then be used in lieu of cash to pay for harvested timber.

The Forest Service designated a rock source for the road aggregate. Appellant subcontracted for the rock crushing and aggregate application on the roads. The subcontractor was unable to obtain aggregate meeting the specifications from the designated source.

After the subcontractor gave the Forest Service notice of its problems with the designated source, Appellant certified and filed a $173,914.83 claim for delay on behalf of its subcontractor. After the Contracting Officer (CO) denied the claim, Appellant filed a timely appeal.

A 2-day hearing was conducted October 27-28, 1992. The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

[1] The contract was signed by Don R. Johnson as president of D. R. Johnson Lumber Company. Prairie Wood Products is a wholly-owned subsidiary of D. R. Johnson Lumber Company. *See* Finding of Fact (FF) 1, *infra*.

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FINDINGS OF FACT

1. Contract No. 070185, the Steamboat Timber Sale, was awarded to the D. R. Johnson Lumber Company (Appeal File (AF) 110). Prairie Wood Products is a wholly-owned subsidiary of D. R. Johnson Lumber Company. Don R. Johnson was the owner of both companies and merged them. Prairie Wood Products, Inc., was an assumed business name. The Forest Service stipulated that Johnson Lumber Company and Prairie Wood Products, Inc., were functionally the same company. (Transcript (Tr.) 329-331.) Payments to the Forest Service were made by Prairie Wood Products, Inc. (Tr. 334).

2. The contract was awarded December 19, 1989, and has an expiration date of March 31, 1995 (AF 110).

3. The contract was for the sale of 8,600 MBF (thousand board feet) of timber from the Malheur National Forest in Oregon. To remove the timber, the contract required construction or reconstruction of 24 specified roads or road segments (AF 115; Contract clause B5.2 *Specified Roads*). When the roads were constructed or reconstructed, Appellant would earn purchaser credit that could be used in lieu of cash to pay for timber harvested from the sale (Contract clause B4.21 *Purchaser Credit*).

4. For road 2640, contract pay item 304(10) specified crushed aggregate, Grading D,[2] with a designed quantity of 16,620 cubic yards. The maximum purchaser credit for constructing this road, including the crushed aggregate, was $239,340.92. (AF 195-197.)

For road 2600877, contract pay item 304(10) specified crushed aggregate, Grading T, with a designed quantity of 175 cubic yards. The maximum purchaser credit for constructing this road, including the crushed aggregate, was $11,250.31. (AF 192-193.)

The contract specified the rock source for the aggregate as the Dry Fork Material Site. This source was designated on the project Vicinity Map—Steamboat Timber Sale (AF 116, 286, 290) and on the project drawings (AF 185, 342-343).

5. Forest Service Specifications for Construction of Roads and Bridges, as amended by special project specification 105.062, provide in pertinent part:

> *Designated Sources.* Sources of local materials SHOWN ON THE DRAWINGS are guaranteed to contain adequate materials meeting quality requirements. The Contractor shall determine the equipment, selection of material and processes required to produce the specified product. Unless otherwise SHOWN ON THE DRAWINGS, sources will not require removal of more than ten percent by volume of objectionable material [*see* FF 8] to meet contract requirements. When the quantity of material requiring removal exceeds the stated amounts, the Contractor shall immediately notify the Contracting Officer before proceeding further.
>
> * * * * *
>
> Should the designated source, due to causes beyond the control of the Contractor, contain insufficient suitable material, the Government will provide another source with an adjustment in contract price.

(AF 266.)

6. The Dry Fork Material Site is located in a geological area known as the Strawberry Mountain Volcanic. The materials were deposited by volcanic action beginning 15 million years ago. There were numerous eruptions and deposits over a 10-million-year period. The thickness of the deposited material ranged from 5 to 3,000 feet. (Tr. 285-286.) The Dry Fork Material Site had been used as a material source 20 to 25 years before the present contract, and a part of the site was exposed (Tr. 287, Appellant's Exhibit (App. Ex.) 93). There were $2\frac{1}{2}$ acres where the overburden had been removed and the rock was visible. Road 2640 was within 200 to 300 feet of the site. Another rock pit was 400 to 500 feet downslope where the rock was also visible (Tr. 476).

7. Prior to the contract, the Forest Service conducted an investigation of the Dry Fork Material Site. Five test holes were drilled 150 to 180 feet apart. A log of the borings was available to bidders. Photographs of the recovered material also were available (AF 342-343; Tr. 299; Government (Gov't) Ex.).

8. "Objectionable Material" was Variable Volcanic Interflow Material (VVIM). VVIM is the volcanic breccia—a mixture of volcanic ash, some hard and soft rock, and a lot of fines. This material is typical between lava flows, which are much harder, darker in color and more consistent in texture. The VVIM would not be suitable for crushing. The VVIM was generally at deeper levels

[2] The Grading specification should have been "T" instead of "D." Appellant voluntarily agreed to the correction at the outset of the contract, and none of the present claim pertains to the error (AF 171; Tr. 38-39). *See* FF 13.

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and the Forest Service plan was to use the material above the VVIM. (Tr. 477-478.)

9. The drill hole #1 log showed 53 percent recovery down to a depth of 18 feet 6 inches and VVIM below that depth. The drill hole #2 log showed 100 percent recovery to a depth of 18 feet and VVIM below that depth. The drill hole #3 log showed 100 percent recovery down to a depth of 9 feet 6 inches and VVIM below that depth. The drill hole #4 and #5 logs showed VVIM with no recovery. (AF 343.)

10. Appellant's expert witness conceded that the drill hole logs were representative of actual conditions because the logs showed a lot of variability (Tr. 311). It was, therefore, difficult to tell if the pit were useable, and a contractor would have to be very cautious (Tr. 299-300).

11. As stated in FF 2, Appellant was awarded the contract on December 19, 1989. Appellant visited the site, saw the pit, but did not look at or evaluate the core samples prior to bidding. The pit appeared to be what was represented. (App. Ex. 10-P-1 through 10-P-18 (minus 10-P-9); Tr. 366-368.) Appellant was familiar with road building only to a limited degree (Tr. 368).

12. On January 12, 1990, Appellant subcontracted the road work for roads 2640 and 2600877 to Judy M. Hilts for $211,024.69, "plus or minus add ons or deletions." Judy M. Hilts signed the contract. (App. Ex. 1-A.) Judy M. Hilts was the owner of H & L Construction and was authorized to sign contracts (Tr. 182-183, 201-202). H & L Construction was an assumed business name (Tr. 15-16, 202). Appellant assumed the subcontract was with H & L Construction (Tr. 358-359).

There were many other roads and road segments that were required to be constructed or reconstructed. These were not included in the subcontract and are not at issue in the appeal (AF 116).

13. The Grading T specification was a measure of the percentage of material passing through a series of different-size screens, as set forth below:

Screen Size	Road 2640 Percentage Passing	Road 2600877 Percentage Passing
1½		
1	100	100
¾		
½	64–86	71–91
⅜		
No. 4	40–60	43–60
No. 8	28–46	30–46
No. 30	16–28	16–28
No. 200	10–15	8–15

(AF 173-174, 283; Tr. 191.)

14. In addition to gradation requirements, the aggregate was required to meet a Sand Equivalent (SE) value of at least 35 (App. Ex. 5A Table 703-3). The SE is a test on that portion of the aggregate passing the No. 4 screen for materials 3/16 inch or less. A measured quantity of this material is placed in a plastic tube 15 inches long. An SE solution consisting of calcium chloride, formaldehyde and glycerin is added to the test material and the solution and material are agitated and then allowed to settle. Generally, the coarse material settles at the bottom of the tube with the finer gradations and fines remaining near the top. A weighted foot, consisting of a dish connected to a rod with a weight on top, is then placed in the tube. The weighted foot settles in the tube remaining a certain number of inches from the bottom of the tube. The distance from the bottom is converted to the SE number by empirical data. Generally, the lower in the tube the weighted foot settles, the lower the SE number. A road material with too low an SE would tend to become muddy quickly. (Tr. 227-232.)

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15. Appellant's subcontractor had been in the rock crushing business for 24 years and had crushed rock for at least 70 to 80 jobs. Many of the jobs were in Baker, Willowa, John Day, and Grant counties in Oregon. The Dry Fork Material Site was in Grant County. (Tr. 17-19.) On March 15, 1990, Appellant's subcontractor began clearing operations to prepare the pit for the crusher plant (AF 366). On March 21, 1990, the crusher had been set up and the crushing operation was in progress. The subcontractor immediately began having problems meeting the SE requirement while at the same time meeting the gradation requirement for material passing the No. 200 screen. The Forest Service inspector told the subcontractor that the Forest Service engineering representative and "geo-tech" persons would be advised about these problems (AF 368).

16. On March 23, 1990, Appellant was authorized by the Forest Service engineering representatives to haul material from the Squaw Pit for purposes of blending with the material being produced from the Dry Fork Pit (AF 369). Appellant's subcontractor continued to have problems meeting the SE and gradation even with the blended material.

17. Pockets of material coating the rocks and embedded into the rock fractures and seams were causing the problem. When the impact crusher pulverized the rock, the objectionable material was incorporated in the end product. The objectionable material could not be scalped off. (Tr. 250-251, 571-572; App. Exs. 10-P-1, 10-P-2, 10-P-7, 97, 101-103.)

18. In attempts to solve the problem, the subcontractor made screen changes, scalped, excavated more selectively, and mixed material from another source.[3] Out of 20 samples, only one met both gradation and SE requirements (AF 420-437; Tr. 540-549).

19. The subcontractor concluded that if a satisfactory gradation were achieved, the SE would be unsatisfactory, and that if a satisfactory SE were achieved, the gradation would be unsatisfactory (Tr. 549-550). The subcontractor advised the Forest Service almost daily of the problems (Tr. 115).

20. On March 27, 1990, the Forest Service prepared a contract modification formalizing the agreement authorizing Appellant to utilize approximately 2,000 cubic yards of material in the Squaw Pit to blend with the material being produced at the Dry Fork Material Site. The contract modification increased the unit cost of the crushed aggregate from $11.63 per cubic yard to $11.92, an increase of $4,819.80 for the estimated quantity of 16,620 cubic yards. The modification was delivered to Appellant March 28, 1990, and signed by Appellant (not Appellant's subcontractor) April 3, 1990. The $4,819.80 increase was not paid in cash, but was an adjustment to purchaser credit as provided by clause C5.254 *Design Change* (AF 173). It is not apparent what if any payment adjustments were made between Appellant and the subcontractor.

21. On April 3, 1990, the Forest Service notified the subcontractor the specifications required daily SE test results to be delivered to the Forest Service, that the Forest Service had not been receiving these tests, and SE tests run by the Forest Service indicated that Appellant was not meeting the SE requirement (AF 353). The subcontractor considered the notice by the Forest Service as a shutdown of the crushing operations because of its inability to meet gradation and SE at the same time. The crusher and loader were down for repairs on April 3, 1990. (App. Ex. 6.)

22. It was possible to process the material from the Dry Fork Pit to meet the gradation and SE specifications if 50 percent of the excavated material were wasted (Tr. 262-269). The Government's expert did not know how "reasonable" it would have been to do so (Tr. 492-493).

23. On Wednesday, April 4, 1990, the crusher and loader remained out of service (AF 378-379). Inspection of the material stockpiles by Forest Service geotechnical personnel indicated that there were inconsistent sizes in the piles, but that the stockpiles could be used with proper rescreening. It was also noted that VVIM had been mixed with the rock to be processed. (AF 378.) On at least three occasions, the subcontractor's dozer was observed removing VVIM for blending purposes. One area was outside the designated development. (Tr. 479-481.)

24. On Monday, April 9, 1990, the loader remained broken down and out of operation. Although the crusher had been reassembled, the generator had broken down and the subcontractor was waiting for an electrician to arrive. The parties met at the site and continued to disagree about whether the pit material could be processed to meet the specifications. (AF 379-380.)

[3] The other source was apparently the Squaw Pit. *See* FF 16, *supra*.

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25. As of Thursday, April 12, 1990, neither the loader nor the generator had been repaired but the loader was almost ready (AF 382). In an attempt to determine if the specifications could be met, the subcontractor hired outside consultants. They concluded that it was possible to meet the specifications if 30 to 50 percent of the material were wasted. The wasted material would not be acceptable as aggregate under the specifications. (Tr. 238-239, 308.) The subcontractor had attempted to process material from all areas of the pit but could not meet the SE and gradation specification. It considered further attempts as futile. (AF 383; Tr. 562-563.)

26. As of April 18, 1990, the subcontractor's generator had not been repaired. A generator had been rented and the subcontractor was in the process of hooking it up. (AF 384.)

27. Appellant's subcontractor could have corrected the equipment problems in a more timely manner, and could have immediately leased a generator and a loader if the equipment breakdowns had been the only cause of the delay. The subcontractor did not expedite correction of the equipment problems because crushing would have been futile until an agreement was reached with the Forest Service to reduce the specification requirements. (Tr. 167-171, 352-354.)

28. On April 19, 1990, a limited crushing operation was commenced. Test samples met the SE specification but the gradation failed. (AF 387-388.) Operational adjustments resulted in a lower, but satisfactory, SE and a higher, but failing, gradation (AF 388).

29. On April 23, 1990, the parties reached an oral agreement to reduce the SE requirement from a minimum of 35 to a minimum of 25. The subcontractor began crushing at full production on April 24, 1990 (AF 389). A contract modification was prepared the same date and signed by Appellant and the CO. In addition to reducing the SE, the Forest Service agreed to accept 7,850 cubic yards of material already crushed at $.27 per cubic yard. The Forest Service authorized use of this material for the roads. Purchaser credit was increased by $2,119.50. (AF 178; Tr. 355-358.) The parties discussed including the subcontractor's other costs and the consultants' expense but there was no agreement on these items (Tr. 355-358).

30. The Government cites testimony that while the subcontractor used a scalping screen, the scalped material was not removed and went into the end product (Tr. 56-57); however, this was only a selective portion of the testimony. The subcontractor did not remove the scalped material because the subcontractor could not meet the gradation requirements unless the fine material was used (Tr. 57-58). When Appellant did remove the scalped material, the SE requirement was met but gradation failed because there were too few fines (Tr. 544-545).

31. The Government cites testimony that Appellant did not waste *more than 10 percent* of what was crushed (Tr. 373-374). Again, this is very selective on the part of the Government. Only 10 percent was placed in the waste site because the Government accepted 7,850 cubic yards of unacceptable material for use on the roads (Tr. 374-376). Moreover, 2,000 yards were hauled in from another pit for purposes of blending because of the problems with the material at the Dry Fork Site.

32. The Government notes that the subcontractor testified that it did not take samples and make tests daily as required by the contract. The testimony referred to indicates the subcontractor took daily samples but did not run SE tests every day because gradation was not being met and, therefore, there was no need to run the SE test (Tr. 188-189).

33. As of April 24, 1990, the subcontractor was constructing road turnouts and blading the new road (AF 389). On April 25, 1990, the subgrade was approved for the placement of gravel from stations 492+00 to 532+90, a distance of 4,090 feet on road 2640 which was 10.07 miles long (AF 115, 390). This was the first indication that any of the subgrade had been approved for the placement of gravel. The contract required approval of the subgrade prior to the placement of gravel (Tr. 410-411). The subcontractor testified that although it had a laydown crew on site by April 4, 1990, it had to check its records as to whether any roadbeds had been approved for the placement of gravel (Tr. 198-199). Before April 9, 1990, ground conditions were too wet to even begin roadbed preparation. Preparation of the road for aggregate began April 12, 1990. (Tr. 408-409.)

34. By letter dated July 19, 1990, Appellant filed a certified claim in the amount of $108,618.83, comprised of the following elements:

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Materials testing services	$ 4,150.83
Delay from April 4, 1990 to April 30, 1990	
14 days at 1,100 cubic yards per day for crushing at $6.76 per yard	104,104.00
The subcontractor asserted that:	
This matter has also lost us 14 days' time in laying and processing the rock on the road, in which we are not claiming	
	$108,254.83
Prime Contractor's Costs	364.00
	$108,618.83

(AF 517-525.)

The 1,100 average yards per day were derived from an analysis of the production under the present contract, other recent jobs, and what the subcontractor used in preparing its bid for Appellant's contract (Tr. 153-155). The production on the present contract was between 185 and 981 yards per day (Tr. 88-89). The $364 in prime contract costs are for 14 hours of administrative expenses (AF 535; Tr. 335, 339).

35. The $6.76 per cubic yard is derived as set forth below:

Crusher & Test Lab:	$300 per hour @ 10 hours=	$3,000.00
CAT D-8 W/Rippers:	$130 per hour @ 10 hours=	1,300.00
Loader 988-B 8 Yard Loader:	$130 per hour @ 10 hours=	1,300.00
Excavator 4300 Linkbelt:	$110 per hour @ 10 hours=	1,100.00
Total		6,700.00
11% profit		737.00
		7,437.00
$7,437 ÷ 1,100 yards per day		$ 6.76

(AF 534.)

36. By letter dated October 12, 1990, Appellant transmitted an increase in the subcontractor's claim for the laydown crew intentionally omitted by the subcontractor from the original claim. The laydown crew was charged at $4.24 per cubic yard for a total claim of $11 per cubic yard. The revised claim amount, including Appellant's add-on of $364, was $173,914.83. The payroll component of the subcontractor's claim was $15,827.16. (AF 533-542.) It is Appellant's intention to pay the subcontractor any amounts recovered in excess of the $364, but Appellant has no liability to pay the subcontractor if there is no recovery (Tr. 334-335).

37. The $6.76 per cubic yard rate claimed by the subcontractor for the crushing operation was the same cost used to arrive at the bid price for securing the subcontract. The equipment rates were Associated General Contractor (AGC) rates. (Tr. 153-155.) The $4.24 per cubic yard rate for the laydown crew was based upon the haul distance, the number of trucks, and the haul per load. The subcontractor did not charge for fire trucks, pickup trucks and lowboys, even though these were also in use. (Tr. 155-163.)

38. The subcontractor claims to have been effectively shut down by the Forest Service's April 3, 1990 Notice of Noncompliance (see FF 21) until April 24, 1990, the day after the parties agreed that subcontractor could place aggregate with a minimum SE of 25 instead of 35 (see FF 29). This is a period of 21 calendar days. The subcontractor claimed only 14 days because of weekends (Tr. 164-167).

39. Ground conditions were snowy and wet during the time of the asserted shutdown (Tr. 144-145). The subcontractor could not have moved its equipment to another job because it was too early in the year (Tr. 144).

40. The CO's position was that objectionable material could simply have been scalped away (AF 568). In denying the claim, the CO concluded:

> The pit cannot fail to meet gradation specifications for a crushed aggregate product unless it had no materials coarse enough to provide for the coarser screen sizes.
>
> * * * * *
>
> The Forest Service was not slow in its rendering a decision ... The Contractor never remedied noncompliance ... did not test samples as required ... was broken

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down for most of the 14 days being claimed as lost time....

(AF 560-570.)

41. Contract clauses C5.21 *Material Sources,* C5.251 *Variation in Quantities,* C5.253 *Physical Change,* and C5.254 *Design Changes* provide for increases or decreases in purchaser credit for events within the scope of these clauses.

The *Material Sources* clause provides for adjustments in purchaser credit when the weight/volume relationship between the designated source material and purchaser furnished material is prejudicial to the Forest Service. The *Variation in Quantities* clause provides for adjustments to purchaser credit based upon quantities furnished outside a 15 percent tolerance from the estimated quantities. The *Physical Change* clause provides for adjustments to purchaser credit based upon the cost of repairing such physical changes as landslides, washouts, fire damage, etc. The *Design Changes* clause provides for adjustments in purchaser credit when changes in design are necessary due to unexpected field conditions or revisions to the design are otherwise necessary to meet design standards or road stability requirements. (AF 131-133.)

The parties stipulate that the Appellant's claim is outside the scope of these clauses and that if the Board holds that Appellant is entitled to recover, the Forest Service must pay the Board's judgment, rather than adjusting purchaser credit. (Stipulation finalized Aug. 23, 1993.)

DISCUSSION

Jurisdiction

Although neither party has raised a question regarding jurisdiction, the Board must assure itself that jurisdiction does in fact exist. Section 7 of the Contract Disputes Act, 41 U.S.C. § 606, provides that "the contractor" may appeal the CO's decision to an agency board of contract appeals. The Act defines the "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4).

The present contract was signed by Don R. Johnson as president of D. R. Johnson Lumber Company. The contract set forth D. R. Johnson Lumber Company as the name of the purchaser. The appeal was brought by Prairie Wood Products, Inc. Consequently, there is a question as to whether Prairie Wood is "the contractor" within the meaning of 41 U.S.C. § 606. The presiding judge raised this issue prior to the hearing and requested the parties to stipulate to the matter or treat it in their briefs (Tr. 8).

It has been held that "the contractor" may not be a subcontractor with whom there is no privity of contract. *Erikson Air Crane Co v. United States* [32 CCF ¶ 72,392], 731 F.2d 810 (Fed. Cir. 1984); *United States v. Johnson Controls, Inc.* [31 CCF ¶ 71,374], 713 F.2d 1541 (Fed. Cir. 1983). Nor may "the contractor" be an assignee. *Produce Factors Corp. v. United States* [18 CCF ¶ 81,750], 199 Ct. Cl. 572 (1972); *United California Discount Corp. v. United States* [36 CCF ¶ 75,804], 19 Cl. Ct. 504 (1990); *Twin City Shipyard and Packer River Corp. v. United States* [36 CCF ¶ 75,952], 21 Cl. Ct. 582 (1990). However, "the contractor" may be a Miller Act surety to the extent the Government improperly disbursed funds to the prime contractor. *Balboa Ins. Co. v. United States* [33 CCF ¶ 74,051], 775 F.2d 1158 (Fed. Cir. 1985). In *Swan Wooster Eng'g, Inc.,* AGBCA No. 89-203-1, 94-1 BCA ¶ 26,287, 1993 WL 308740 (Aug. 13, 1993), we recently held that a dissolved corporation was "the contractor."

The Government stipulated that the two companies, D. R. Johnson Lumber Company and Prairie Wood Products, Inc., were functionally the same company. The evidence shows that Mr. Johnson is the owner of both companies and that they were merged (FF 1). We conclude that Prairie Wood Products, Inc., is "the contractor" and that the Board has jurisdiction over the present appeal.

Severin Doctrine

The Government asserts that except for the $364 incurred by Appellant (*see* FF 34) the Government is not liable for the alleged damages in the amount of $173,914.83, because these are costs incurred by the subcontractor for which Appellant is not liable, citing *Severin v. United States,* 99 Ct. Cl. 435 (1943), *cert. denied* 322 U.S. 733 (1944). Generally, the doctrine requires proof that the prime contractor has been damaged, not simply that the subcontractor has incurred additional costs.

The doctrine has been scaled back by decision and now generally allows recovery unless the subcontract contains a clause specifically relieving the prime contractor of liability. Moreover, it is the Government's burden to prove the subcontract contains such a clause. *Southern Constr. v. United States* [11 CCF ¶ 80,552], 176 Ct. Cl. 1339, 364 F.2d 439 (1966). See also *JAL Constr., Inc.,* AGBCA No. 80-185-3, 81-1 BCA ¶ 14,912.

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We note that although the subcontract was signed by Judy M. Hilts, she represents H & L Construction. Appellant assumed that he was contracting with H & L Construction. (FF 12.) We conclude the subcontract was with H & L Construction. The Government has not shown that the subcontract contains an exculpatory clause. Our review indicates such a clause was not included. Moreover, the evidence indicates that Appellant will pay the subcontractor if Appellant recovers (FF 36). We conclude that the Severin doctrine does not bar recovery under the present facts.

Purchaser Credit

The contract required the construction or reconstruction of roads for the removal of timber. By performing this work, Appellant could earn purchaser credit as set forth in the contract. As long as purchaser credit was effective it could be used in lieu of cash to pay for the harvested timber (FF 3).

Certain contract clauses provide for adjustments to purchaser credit, as opposed to increases or decreases in the contract price for changes to the road work. Two contract modifications pertaining to the aggregate resulted in increases to purchaser credit. (FF 20, 29, 41.) However, increased cost for delay as a consequence of Government action or inaction appears to be outside the scope of these clauses. The parties, moreover, stipulated that Appellant's claim for delay is outside the scope of the clauses providing for adjustments to purchaser credits (FF 41). Finally, the *Designated Source* clause (FF 5) provides for an adjustment in the contract price (not purchaser credit) for an inadequate designated source.

Consequently, we concur with the Government's position that "if the Board orders payment to the purchaser under this appeal, ... the Government will locate funds to make the ordered payment" as opposed to adjusting purchaser credit (Gov't Brief, page (p.) 3).

Liability

Appellant was to earn $250,591.23 in purchaser credit for constructing roads 2640 and 2600877 (FF 4). Appellant subcontracted this task for $211,024.69 (FF 12).

The aggregate for the roads was required to meet certain gradation requirements and minimal SE requirements (FF 13, 14). A road with too low an SE will tend to become muddy quickly when wet (FF 14).

The contract specified the material source for the aggregate on the project vicinity map and on the project drawings (FF 4). This source was therefore a "Designated Source" within the meaning of specification section 105.062 in that the source was shown on the drawings (FF 5).

Section 105.062 provided that a designated source would not require removal of more than 10 percent by volume of objectionable material to meet contract requirements. If the quantity of material requiring removal exceeded 10 percent, Appellant was immediately to notify the CO. If in fact the inability of the designated source to produce suitable material was beyond the control of Appellant, the Government was obligated to provide another source and adjust the contract price (FF 5).

Appellant devoted considerable effort in attempting to prove that the Forest Service did an inadequate job of evaluating the Dry Fork Material Site for purposes of determining whether it could be made to produce aggregate meeting specifications. The evidence produced by Appellant was unpersuasive. (App. Brief, pp. 4-9.)

The Forest Service's evaluation of the designated source is largely irrelevant. The Forest Service has no legal obligation to evaluate a material source, even one that it designates. Where the Forest Service fails to evaluate a material source or where the evaluation is only cursory, however, the Forest Service can expect lower bid prices because of the greater risks imposed on a timber purchaser.[4]

A site visit and an evaluation of the drill hole logs produced by the Forest Service in this case indicated that much of the material was in fact not suitable for the road aggregate. Several drill hole logs showed no useable material recovery below certain levels and others showed no useable recovery whatever. Even Appellant's expert conceded that the logs were representative of the actual yield and that a bidder would have had to proceed very cautiously because the logs showed a lot of variability, and it was difficult to tell if the source were useable (FF 6-10). *See Gilchrist Timber Co.*, AGBCA No. 82-235-1, 85-2 BCA ¶ 18,106.

Notwithstanding the indications that much of the source material was not useable as road aggregate (or perhaps because of these indications), the Forest Service in-

[4] In a procurement contract, the Forest Service could expect higher bid prices.

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cluded specification section 105.062, which essentially guaranteed that the source would produce satisfactory material without Appellant having to remove more than 10 percent of objectionable material (FF 5).

Appellant's subcontractor was experienced, having performed 70 to 80 road jobs over a 24-year period, many in the same county as the Dry Fork Material Site (FF 15). From the outset, the subcontractor had problems achieving gradation within specification while at the same time meeting the required minimum SE. The subcontractor advised the Forest Service of these problems on March 21, 1990. (FF 15-19.)

On March 27, 1990, the Forest Service orally authorized use of aggregate from another pit to blend with that from the Dry Fork Material Site. The parties memorialized their agreement a few days later (FF 20). Appellant continued to have problems meeting the specifications and on April 3, 1990, the Forest Service notified the subcontractor that it was not delivering required daily SE test results and that tests conducted by the Forest Service on aggregate produced by the subcontractor indicated that the SE requirement was not being met. The subcontractor considered this notice a shutdown on the work because it was impossible to meet the gradation and SE requirements at the same time using aggregate from the Dry Fork Material Site (FF 21).

It is clear from the evidence that it was possible to meet the gradation and SE requirements if more than 10 percent of the objectionable material from the pit were wasted. However, even the Government's expert did not know how reasonable it would have been to do so (FF 18, 22, 25).

On April 23, 1990, the parties orally agreed to reduce the minimum SE requirement from 35 to 25. The parties' agreement was not an accord and satisfaction of Appellant's claims because the claims were discussed but no agreement was reached. Appellant began full production the next day, April 24, 1990 (FF 29).

Appellant filed a claim in the amount of $173,914.83, claiming delay for the 21-day period between April 3 and April 24, 1990. Appellant claimed only 14 days of delay instead of 21 days because of weekends included during this period (FF 36, 38).

For the reasons indicated in the Findings, we reject the Forest Service's assertions that the subcontractor failed to meet specifications because the subcontractor did not properly scalp (FF 30), that the subcontractor wasted less than 10 percent of objectionable material (FF 31), and that the subcontractor did not provide daily samples (FF 32). While there were occasions when the subcontractor mixed objectionable material with rock that was to be processed (FF 23), the subcontractor appeared to exhaust all possibilities for screening adjustments (FF 18) and use of material from selected areas of the pit (FF 25, 28).

The problem in meeting both gradation and SE was that the objectionable material coated and was embedded into the rock fractures and seams. This material could not be scalped and when the impact crusher pulverized the rock, the objectionable material was incorporated into the end product (FF 17). While screening could remove this material, the subcontractor would then fail either gradation or SE (FF 18, 19, 28). Although gradation and SE could both be achieved on rare occasions (FF 18), it was necessary to remove 30 to 50 percent objectionable material (FF 22, 25). The Forest Service position that the objectionable material could simply be scalped away and specifications met (FF 40) has not been supported. Therefore, to the extent Appellant proves damages, Appellant may recover pursuant to the *Designated Source* clause.

Damages

Appellant's claim of $173,914.83 is comprised almost totally of subcontractor expenses. Appellant claims $364 for 14 hours of administrative expenses for itself.

The subcontract portion of the claim includes $4,150.83 for consultants hired by the subcontractor to assist in determining how or whether it could meet the specifications (FF 25, 34). These expenses were incurred in April 1990, *i.e.,* during contract performance and 3 months prior to Appellant's initial claim submission in July. These expenses arose directly from Appellant's inability to meet specifications using material from the Government's designated source. Accordingly, we conclude they are not the unallowable cost of prosecuting claims against the Government. *See,* for example, *Owen L. Schwam Constr. Co.,* ASBCA No. 22407, 79-2 BCA ¶ 13,919, citing *Singer-Gen. Precision, Inc.,* 215 Ct. Cl. 281, 568 F.2d 695 (1977); *Bill Strong Enter., Inc.,* ASBCA No. 42946, *et al.,* 93-3 BCA ¶ 25,961, 1993 WL 243140 (June 28, 1993); Federal Acquisition

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Regulation (FAR) 48 CFR § 31.205.47.[5] Accordingly, the appeal for these expenses is sustained.

The subcontractor claims $65,296 for the cost of the laydown crew that placed the crushed aggregate on the road ($173,914.83 – ($364 + $4,150.83 + $104,104); *see* FF 33-34). However, the evidence indicates that the contract required approval of the subgrade prior to the placement of the aggregate (FF 33). Ground conditions were snowy and wet during the shutdown (FF 39). Preparation of the road for aggregate did not begin until April 12, 1990. The first segment of the road was not approved for the placement of aggregate until April 25, 1990. This was after the subcontractor asserted it was shut down. We conclude that the laydown crew was not delayed by the actions of the Forest Service. This portion of the appeal is denied.

The balance of the subcontractor's claim is in the amount of $104,104. The subcontractor has selected a 14-working-day period between April 3 and April 24, 1990, when no aggregate production occurred. Appellant asserted its alleged lost revenues during this period as damages based upon a production rate of 1,100 cubic yards per day (FF 34-38). The subcontractor has not set forth extra time, effort and associated costs proximately resulting from its futile efforts to meet the Government's specifications beginning on March 21, 1990 (FF 21).

The Government complains that the subcontractor never achieved a production rate of 1,100 cubic yards a day and that the claim is therefore inflated (Gov't Brief, p. 9). The Government is partly correct in that job records under the present contract indicate a daily production of between 185 and 981 cubic yards (FF 34). However, it is hardly surprising that less than 1,100 cubic yards per day were produced because of the difficulties experienced by Appellant achieving gradation and SE. The 1,100 cubic yard amount was also derived from experience with prior contracts and was the amount upon which the subcontractor based its bid (FF 34).

The Government also complains that the subcontractor might have moved to a different job, but that it could not do so because of wet weather conditions, and that the subcontractor has therefore not proven that revenues were in fact lost (Gov't Brief, p. 10). There is evidence supporting the Government's position that the subcontractor might not have lost revenues[6] (FF 39). The Board, however, is not constrained to consider the claim for delay and lost revenues as presented.

Although the subcontractor characterized its claim as one for delay and lost revenues, the claim is based upon unproductive equipment and labor, plus profit, in the amount of $7,437 per day (FF 35). We, therefore, consider the subcontractor's claim on this basis.

The Government asserts that the subcontractor was not prepared to operate during the 14-day period because of equipment failure problems (Gov't Brief, p. 9). The evidence indicates considerable equipment downtime during the period of the alleged delay (FF 21, 23-26). Appellant and the subcontractor, however, testified that the equipment was not repaired in a more timely manner because it was futile to attempt to crush aggregate at the time. In addition, replacement equipment could have been leased immediately. (FF 27.)

While there is merit in Appellant's and the subcontractor's testimony, it is nevertheless clear that some unproductive time would have been experienced due to the documented equipment problems. Since we are unable to determine precisely how quickly the broken equipment could have been repaired or leased, we determine the damages based upon a jury verdict.

The crusher and loader were out of operation Wednesday, April 4 through Friday, April 6, 1990, or 3 work days. The generator and loader were out of operation from Monday, April 9 through Thursday, April 12, 1990, or 4 additional work days. While the loader was almost ready on April 12, 1990, the generator remained out of operation. If producing aggregate meeting the specifications had been feasible, we will assume that repair of the loader could have been expedited so that it would have been ready by the close of business on April 12, 1990. We will also assume that lease of the generator could have been expedited so that a generator could also have been available by close of business the same day. Therefore, the subcontractor is entitled to 7 days of equipment and labor downtime, plus profit, of $7,437 per day, or $52,059.

[5] It is recognized that the FAR is not applicable to the present contract because it is a sale.

[6] Mobilization to return to the present site after demobilization could be recovered in any event.

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DECISION

The following portions of the appeal are sustained: Appellant's costs, $364; the subcontractor's consultants, $4,150.83; and the subcontractor's equipment and labor downtime, plus profit, $52,059. The balance of the appeal is denied.

[¶ 26,425] Sun Eagle Corporation

ASBCA Nos. 45985, 45986, October 15, 1993. Contract Nos. DACA09-90-C-0053, DACA09-91-C-0041.

Payments, Prompt—Interest—Penalty.—A contractor was entitled to Prompt Payment Act penalty interest on the combined total of two progress payment checks that were dated, signed, placed in an envelope for timely mailing, and then stolen by an independent courier service's employee before being mailed, because the government assumed the risk of nondelivery of the checks to the contractor. By issuing substitute checks, the government acknowledged that the statutory provision deeming that payment be made on the date that the checks were dated did not relieve it of the duty to tender the checks to the contractor. The government failed to prove its contention that holding the government liable for a third party's criminal acts would be too broad a construction of the Act's waiver of sovereign immunity.

For the appellant: Jennings & Haug, Phoenix, Arizona, by Carolyn M. Kaluzniacki. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Stephen E. Temmel, Engineer Trial Attorney, U.S. Army Engineer District, Los Angeles.

Before RIISMANDEL and RUBERRY, Administrative Judges.

RIISMANDEL, Administrative Judge: These appeals arise from the contractor's claims for interest penalty pursuant to the Prompt Payment Act, 31 U.S.C. §§ 3901-3907, as amended in 1988 (P. Law 100-496, 102 Stat. 2455) (PPA).

At issue is the application of the PPA where Government checks for progress payments were dated, signed, correctly addressed, and placed in an envelope for mailing in a timely manner, but were stolen by an employee of an independent contract courier service before delivery to the Government's mail room in another building where the placement of postage and mailing was to occur that same day. Payments were made several months later by replacement checks.

There are no material facts in dispute and the cases have been submitted for decision on the parties' cross-motions for summary judgments. An oral argument was held in a transcribed telephone conference call. Appellant elected to proceed under the Board's Rule 12.3 accelerated procedure.

ASBCA No. 45985 involves Contract No. DACA09-90-C-0053 for the construction of an Air Cargo Test Facility at Yuma Proving Grounds, Yuma, Arizona. ASBCA No. 45986 involves Contract No. DACA09-91-C-0041 for the construction of an Aircraft Engine Shop at Davis Monthan Air Force Base, Arizona. The contracts were awarded in 1990 and 1991 and were administered by the Army's Corps of Engineers.

The PPA provides that on construction contracts payment is due either 14 days after the date a request for a progress payment (proper invoice) is received by the Government agency, or on the date provided in the contract.

It provides further that interest "shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made" (§ 3902(b)). The date the check is signed by the Government is deemed to be the date of payment, with the understanding that the check will be mailed or delivered immediately. Under the definition section at ¶ 5, the Act states:

> A payment is deemed to be made on the date a check for the payment is dated.

The same provision is included in OMB Circular A-125, as revised 21 December 1989 (54 Fed. Reg. 52706), which implements the PPA. It provides further in ¶ 4.n, *Making the payment,* that "[c]hecks will be mailed or transmitted on the same day for which the check is dated."

The Federal Acquisition Regulation (FAR) implementation in Part 32.9 prescribes the use of the clause at 52.232-27

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but otherwise does not add to Cir. A-125 provisions.

Both contracts contain FAR Clause 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 89) (R4, tab 7). In accordance with FAC 84-55, the clauses were modified to establish the payment due date as 25 days after receipt of the payment estimate instead of the standard 14 days. (R4, tab 8) Section 10 of OMB Circular No. A-125, 54 Fed. Reg. 52700, December 21, 1989, and 31 U.S.C. 3903(a)(6)(A).

The arrangement under these contracts was for payments by check. We conclude from the contract terms in general (stating in Block 16 of the award that remittance be made to the address shown in Block 14—offeror's name and address) and the conduct of the parties that remittance/payment was to be made by mailing the check to the contractor's address as shown in Block 14, 461 North Dean Avenue, Chandler, Arizona 85226.

Under the Yuma Proving Grounds contract appellant submitted Payment Estimate No. 16 (a proper invoice) for $254,515 and under the Davis-Monthan contract Payment Estimate No. 7 (a proper invoice) for $77,484. The two invoices were received by the Government on 19 June 1992, and payment in full was authorized. Payment was due to be paid to Sun Eagle within 25 days, which would have been 14 July 1992. The two checks were signed and dated on July 14th, correctly addressed, and sealed in an envelope. Then they were given to an independent courier service for delivery to the Corps mail room in another building several blocks away, as was the usual procedure. The mail room employees of the Corps would place the appropriate postage on the envelopes and deliver them to the U.S. Postal Service.

The parties stipulated that the checks in question were stolen by an employee of the independent contract courier. They were never placed in the mail and were never delivered to Sun Eagle.

When payment was not received within 25 days and a few days for mailing, Sun Eagle immediately notified the Corps, first by telephone and then in writing. The Corps requested stop payment on the checks and the issuance of new checks. However, it was not until 15 December 1992, that the substitute checks were issued. The substitute checks contained no interest payment.

Thereafter, Sun Eagle filed a claim for interest under the Prompt Payment Act on the combined total of the two checks, *i.e.*, $331,999, and requested a final decision of the contracting officer in a letter of 7 January 1993 which was received at the Corps' resident office on 11 January. The Corps declined to rule on Sun Eagle's claim for payment of interest under the Prompt Payment Act, stating there was no precedent for making payment where the checks were stolen by an independent courier. The appeals followed from that refusal to issue a decision on the claim stated in the complaint to be $8,310.16.

Parties' Contentions.

Appellant argues that (1) the mere dating and issuance of a check does not constitute payment nor relieve the Government from liability for interest penalty pursuant to the PPA, and (2) the Government's duty to pay PPA interest penalty is not excused by the failure of its independent courier service to deliver the checks to the mail room.

In appellant's opinion actual delivery of a check is a conditional payment and the debt is not discharged until the check is presented for payment. It cites UCC § 3-802(1)(a) as well as legislative history of the PPA in support of this position. It argues further that the Government is responsible or liable for its subcontractor/courier service and appellant did not assume the risk of theft of the checks by the subcontractor.

The Government relies on the statutory language that the payment is "deemed to be made on the date" the check is dated. It interprets this to mean that the Congress intended the agencies to establish procedures to pay their bills on time and not ensure against theft after a check was dated. Having dated the checks in question within the contractually allowed 25-day period, no interest penalty commenced to accrue, notwithstanding the theft of the checks before their being mailed and non-receipt by appellant.

As a further argument Government contends that since the PPA is a waiver of sovereign immunity, it must be strictly construed in favor of the sovereign. In counsel's opinion to hold the Government responsible for the criminal acts of a third party after the check has been dated and thus preventing the envelope from receiving postage and placement in the U.S. mails would amount to an enlargement of the waiver of sovereign immunity beyond that which the statute requires.

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Discussion.

Counsel submit that on these facts this is a case of first impression and that the Board's guidance is needed for the Government to pay interest in the subject cases.

We address first the Government's sovereign immunity argument. That the PPA waived sovereign immunity with respect to the "interest penalty" on late payments is not at issue. We are unable, however, to adopt the Government's narrow view that "the statute [PPA] only requires that Government agencies establish procedures to pay their bills on time." Although the Act was intended to provide agencies incentive to make timely payments, an underlying purpose of the procedures established to that effect was to reduce business concerns' reliance on borrowings to finance their performance on Government contracts. The cited case of *U.S. Department of Energy v. Ohio, et al.,* 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992), is inapposite to the instant cases and does not mandate a different conclusion.

Both parties have cited the ruling of the U.S. Comptroller General in *Matter of Four Square Construction Company,* 64 Comp. Gen. 32 (1984), in support of their respective positions. In that case the check was issued within the allowable time period but, for unspecified reason, was not received by the addressee, and the replacement check was issued approximately 3-1/2 months later. In denying interest penalty under the PPA, the Comptroller General held that payment was made once the check was issued and the agency was not liable for payment of interest on the time it took to reissue the check since "the fact that Foursquare did not receive the original payment was not the fault of the contracting agency." No mention was made of the check having been mailed.

The Government suggests that since in the instant case the theft of the checks was outside the control of the Corps, the interest should be denied.

In appellant's opinion, the *Four Square* opinion should be limited to those cases "where payment is actually made, not merely dated because it was assumed in that case that the check was timely mailed." Therefore, it should not be followed here where the checks were NOT mailed but were stolen before they were placed in the U.S. mails. In support of this view appellant cites a later unpublished opinion of the Comptroller General (B-223857, dated 27 February 1987), 1987 West Law 010593 (C.G.). It was held therein that the Commodity Credit Corporation (CCC) was obligated to pay interest to contractors under the PPA on late payments even though the CCC was unable to make payments when due because of the temporary depletion of its borrowing authority. See also H. Rep. No. 784, 100th Cong., 2d Sess. 2021, reprinted in 1988 *U.S. Code Cong. & Admin. News* 3036, 3048-49.

Appellant interprets this ruling to establish that the PPA requires payment of interest even when non-payment is not due to Government's fault, as seems to be the case here.

We do not have to interpret the Comptroller General's rulings as these are not binding on the Board. Suffice to state that we are free to adopt his reasoning if found persuasive. We note, however, that the *Four Square* case did not involve theft of check before it was placed in the mail system.

The real issue in this case is which of the parties, the agency or the contractor, assumed the risk of the non-delivery of the checks to the contractor due to theft before they were placed in the U.S. mails.

The general rule in federal courts is that in the absence of an agreement otherwise, delivery of a check is a conditional payment and the discharge of the debt does not occur until the check has been presented to the drawee bank. *United States v. Forcellati,* 610 F.2d 25 (1st Cir.), *cert. denied,* 445 U.S. 944, 63 L. Ed. 2d 778 (1979). This is in conformance with UCC #3-802.

We have reviewed the legislative history of the PPA but have found no indication that Congress may have intended to change this judicially developed rule or establish a different rule for payments by check when interest penalty would be applicable against the Government or intended to insure contractors against all eventualities.

Legislative history of the PPA and its 1988 Amendments reflects the Congressional concern for Government contractors to receive payments in a timely manner. This was the main objective for establishing the elaborate procedure to assure this result.

Since the checks did not reach the U.S. mail because of their intervening theft by the Government's courier service, it would be inconsistent with the legislative objectives to transfer upon an innocent contractor the risk of non-delivery of payment checks in these circumstances. If there are equities to be considered, these clearly are on the side of Sun Eagle. The risk of non-delivery of the checks to the U.S. Postal Service re-

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mained with the Government who trusted the courier service with the checks.

This conclusion is not inconsistent with the statutory provision that the payment is deemed to be made on the date the check is dated. We agree with appellant that this definition was included in the statute to provide an easily ascertainable date for the assessment of the interest penalty, for the purpose of calculating the interest. The dating of the check does not relieve the Government of the duty to tender the check to the contractor. See Renner, *Prompt Payment Act: An Interest(ing) Remedy For Government Late Payment,* 21 Pub. Cont. L.J. 177, 221-22 (1992), and authorities cited. Here the Government acknowledged this by issuing the substitute checks.

In view thereof we do not reach appellant's further contention that by analogy to the *respondeat superior* doctrine the Government is liable for the default of its courier service as its agent, even if this is not a tort case, and remained liable for these payments.

Conclusion.

We conclude accordingly that Sun Eagle did not receive the two payments on the dates when the original checks were issued by the Corps. The payment was made on 15 December 1992, the date when the replacement checks were issued. Under the terms of Sun Eagle's contracts payments were due on the 25th day after the receipt of the invoice which we established as 14 July 1992. Interest penalty started to accrue on the unpaid amounts of $331,999 on 15 July for 154 days until 15 December 1992. From that date until 11 January 1993 (the date the Government received appellant's CDA claim) interest penalty accrues on the accumulated interest. Pursuant to 41 U.S.C. §611, from that date until payment appellant is entitled to simple interest on the accumulated interest penalty amount.

The computation of the amount due appellant is remanded to the contracting officer.

The appeals are sustained in accordance with the foregoing discussion.

[¶ 26,426] Brown Marine Service, Inc.

ASBCA No. 45861, October 7, 1993. Contract No. N68860-91-C-0112.

Labor—Service Contract Act—Jurisdiction of Boards.—The board could not consider a contractor's assertion that the Walsh Healey Act, and not the Service Contract Act, applied to a contract, because board jurisdiction in Service Contract Act cases is limited. The government contended that the contractor had twice agreed to the inclusion of Service Contract Act wage determinations and was not entitled to additional compensation. However, determinations of coverage are left to the Department of Labor, which has the primary and final authority and responsibility for administering and interpreting the Act.

Labor—Price Adjustments for Changes in Wage Determinations—Contractor's Knowledge.—A contractor was not entitled to reimbursement for payment of Service Contract Act wages, because Department of Labor wage rate determinations are binding on a contractor whether or not it had actual notification. The government advised offerors that their offers could be amended by letter or telegram, and although it did not give them much time, at least one offeror raised its price. The contractor was afforded another opportunity to increase its prices during contract performance, but instead it executed a modification incorporating a current wage determination into the contract at no cost to the government. Although the contractor may not have understood the consequences of the amendments, relief cannot be granted on that basis, particularly where a statutory requirement such as the Service Contract Act is at issue.

For the appellant: S.J. Brown, Chairman/CEO. For the government: Arthur H. Hildebrandt, Chief Trial Attorney, and Kenneth J. Densmore, Trial Attorney, Chief of Naval Education and Training, Pensacola, Florida.

Before DICUS and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: This appeal arises under a contract between appellant Brown Marine Service, Inc. and respondent Naval Air Station, Pensacola, Florida, for overhaul of two barges. The dispute has to do with inclusion of a Service Contract Act

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Wage Determination by Amendment 0004 to the solicitation and contract Modification P0002. The parties have elected to proceed under Rule 11 and appellant has elected to proceed under Rule 12.3.

FINDINGS OF FACT

1. Solicitation No. N88660-91-R-0100 was issued 21 August 1991 with a date for receipt of proposals of 1:00 p.m., 23 September 1991. The solicitation was for overhaul of two barges (R4, tab 1).

2. Three amendments were issued advising of the procurement's status as a 100 percent Small Business Set Aside and revising specifications. Amendment 0004 dated 27 September 1991 was issued to incorporate a Department of Labor Wage Determination under the Service Contract Act and relevant contract provisions, and a Certification of Procurement Integrity. The date for receipt of offers was extended to 1:00 p.m., 30 September 1991. Page one of the amendment advised offerors "If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified." It also cautioned that offers could be rejected if the amendment was not acknowledged by the extended date (R4, tab 7).

3. Although dated 21 September 1991, Amendment 0004 was transmitted by FAX to appellant 29 September 1991, a Sunday. Appellant acknowledged receipt of the amendment by FAX dated 30 September 1991, and included an executed page one of the amendment. No changes to appellant's offer of $53,760.00 per barge dated 23 September 1991 were indicated (R4, tabs 8, 9, 14). Of the other offerors, the record establishes that one declined to sign the amendment and another raised its price (R4, tabs 6, 10, 11).

4. The contract was awarded to appellant at the price of $107,520.00, $53,760.00 per barge. Included by reference were the Disputes (1984 APR) and Service Contract Act, As Amended (1989 MAY) clauses. The latter clause makes the contract subject to the Service Contract Act of 1965, 41 U.S.C. 351, *et seq.*, and 29 C.F.R. part 4). The letter notifying appellant of award was dated 30 September 1991 and was acknowledged by appellant in a letter dated 4 October 1991. The contract was executed by the contracting officer and forwarded to appellant on 4 October 1991 (R4, tabs 12—14).

5. Modification P00002, executed by the parties 10 January 1992, amended the contract by incorporating a Department of Labor Wage Determination dated 18 September 1991 at no change in price (R4, tab 17). Appellant invoiced for the work at the contract price of $53,760.00 for the first barge on 5 February 1992 and 1 May 1992 for the second barge (R4, tabs 18—21). Checks representing payment of the full contract price were issued by respondent on 18 February 1992, 26 March 1992, and 26 May 1992 (R4, tab 22). There is no evidence that appellant reserved any claim prior to issuance by respondent of checks constituting the full contract price.

6. At a conference with the Department of Labor on 26 March 1992 appellant was advised that Service Contract Act wages had not been paid to certain employees. Thereafter, in November 1992, appellant paid those employees a total of $11,327.55 in back wages in compliance with the Service Contract Act (R4, tab 27; Affidavit of Reid S. Byers (Byers aff.), exh. 1).

7. Alleging that no wage determination had been received, and citing 48 C.F.R. § 22.404-9, appellant by letter of 11 November 1992 requested a price increase of $11,327.55 (R4, tab 23). The claim was denied in a final decision dated 26 January 1993. By letter of 15 February 1993 appellant requested reconsideration of its claim (R4, tab 25). When no answer was received a notice of appeal was filed on 17 March 1993.

DECISION

Appellant alleges it has been treated unfairly and that the Walsh Healey Act, and not the Service Contract Act, applies to the contract. Respondent argues that appellant twice agreed to the inclusion of Service Contract Act Wage Determinations in the contract and is not entitled to additional compensation.

Board jurisdiction in Service Contract Act cases is limited. We cannot, for example, consider appellant's assertion that the Walsh Healey Act, and not the Service Contract Act, applies to this contract. Such determinations are left to the Department of Labor under 4 C.F.R. § 4.101(b), which provides:

> The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility for administering and interpreting the Act, including making determinations of coverage.

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Similarly, 29 C.F.R. § 4.187(f) specifically excepts disputes on violations of the Service Contract Act from the disputes clause of agency contracts. We may, however, determine whether payments made by appellant to comply with the Service Contract Act are reimbursable as a contract change. *Miller's Moving Co.*, ASBCA No. 43114, 92-1 BCA ¶ 24,707.

In this regard, we find appellant is not entitled to reimbursement. Amendment 0004 advised offerors that their offers could be amended by letter or telegram (finding 2). While it did not give much time to do so, at least one offeror raised its price (finding 3). Appellant was afforded another opportunity to increase its price during contract performance but chose to execute Modification P00002, which incorporated a current Wage Determination into the contract, at no cost to respondent. Although appellant may not have understood the consequences of Amendment 0004 and Modification P00002, it cannot be granted relief on that basis, particularly where a statutory requirement such as the Service Contract Act is at issue. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

Finally, as to appellant's contention that respondent did not give it adequate time to amend its offer, we have held that "DOL wage rate determinations under the Service Contract Act were binding on appellant whether it had actual notification thereof or not." *Miller's Moving Co., supra*, at 123,326. Accordingly, the appeal is denied.

[¶ 26,427] Bay Harbor Company, Inc.

ASBCA Nos. 45452, 45453, October 14, 1993. Contract No. N00604-87-D-A065.

Procedure, Boards—Prior Decisions—Amount v. Entitlement.—A contractor was permitted to adduce evidence on which delivery orders were to be reformed, even though the board had already issued a decision on entitlement, because there were no findings regarding which delivery orders were in question in the prior decision. Facts found, determinations made, and issues decided during entitlement litigation are *res judicata* and the law of the case during the quantum litigation. The government contended that the contractor could not relitigate which delivery orders were reformed in an appeal of quantum, because the government's right to reform the contract to correct a mistaken line-item prices sheet had been upheld in the board's earlier decision. However, the issue of which orders to include in the reduction arose during the quantum phase of the litigation, and the parties adduced new evidence.

Pricing of Adjustments—Proof—Burden of Proof.—The government was not entitled to reimbursement for overpayment for delivery orders that were pending when the government discovered a mistake on the contract award sheet, because there was unrebutted evidence that the contracting officer agreed to exclude the pending orders from the price reduction. The government had the burden of proving its claim that the amounts of principal and interest it demanded from the contractor were consistent with the contract provisions and were lawful.

Payments—Interest—Suspension of Interest.—A government employee's statement did not bind the government to suspend interest pending the outcome of litigation, because the statement was not a promise and the employee lacked authority to contract. Moreover, the Federal Acquisition Regulation prohibits contracts and arrangements for the deferment of collection of debts that provide that a government claim will not become due and payable pending decision on a dispute. There is also no regulatory provision permitting suspension of interest on contract debts by reason of post-appeal delays in calculating the indebtedness. The government had the burden of proving that the interest it demanded from the contractor was consistent with the contract provisions and was lawful; the government sustained its burden with respect to the suspension of interest and was therefore entitled to interest on the principal amount owed to it from an overpayment.

For the appellant: Marcia L. Anderson, Vice President. For the government: Arthur H. Hildebrandt, Chief Trial Attorney, and Elizabeth Bagwell, Trial Attorney, Naval Supply Center, Pearl Harbor, Hawaii.

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Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: In our decision on entitlement in *Bay Harbor Company Inc.*, ASBCA Nos. 41589, 41809, 92-3 BCA ¶ 25,210 ("Bay Harbor I"), we upheld respondent's right to reform the contract due to mistaken line item prices entered on the contract award sheet and denied both appeals. Familiarity with Bay Harbor I is assumed. In these quantum appeals the parties dispute whether (1) the prices of five delivery orders were to be reformed and (2) interest was suspended on the amount of the adjustment for any portion of the time before appellant paid the principal and interest amounts respondent demanded. The parties agreed to submit quantum for decision on the record pursuant to Board Rule II. The record in these appeals consists of the Bay Harbor I record; the ASBCA Nos. 45452 & 45453 Rule 4 file; the parties' affidavits; and respondent's brief. Appellant elected not to submit a brief.

FINDINGS OF FACT

1. Contract N00604-87-D-A065 contained (a) the FAR 52.232-17 INTEREST (April 1984) clause providing that

> (a) ... all amounts that become payable by the Contractor to the Government under this contract ... shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 ... which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.
>
> (b) Amounts shall be due at the earliest of the following dates: ... (2) The date of the first written demand for payment consistent with this contract ....

and (b) clause 110 requiring appellant to reject delivery orders exceeding stated limitations within three days after their issuance (R4, tab II; Bay Harbor I, R4, tab 4).[1]

2. Respondent issued (a) contract A065 delivery order ZZAV on 22 March 1990 for performance by 30 April 1990 and (b) delivery orders ZZBA, ZZBB, ZZBC and ZZBD on 4 April 1990 for performance by 28 May to 1 June 1990 (ASBCA Nos. 41589, 41809, App. Supp. R4, tab 3). In Bay Harbor I we found that "Appellant rejected no contract A065 orders for work" (finding 22).

3. Respondent's 16 April 1990 letter to appellant said that respondent had discovered an "administrative error" in contract A065 prices for items 0008AA and 0015AA due to entering the initial rather than BAFO rates for the two option periods, included delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD among 18 item 0015AA delivery order prices it adjusted, requested appellant to repay $189,656.75 to respondent, and advised appellant, if it had any questions, to contact Richard Harr, who was not a contracting officer (R4, tab 18; Harr affid. ¶ 2).

4. In a 27 April 1990 meeting with Richard Harr and appellant's James Horst and Marcia Anderson, contracting officer Robert S. Kay said that respondent would pay $4.25 per square foot for delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD (Horst affid. ¶ 10; Anderson affid. ¶ 3). Harr did not deny the foregoing, but stated that he does not remember Horst saying that appellant "would exercise its contract right to reject" those delivery orders (Harr affid. ¶ 9). Mr. Kay submitted no affidavit.

5. On 14 May 1990 Horst telephoned Harr and asked what appellant would be paid for delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD. Harr replied $4.25 for item 0015AA. (Harr affid. ¶ 10; Horst affid. ¶ 10)

6. Appellant's 24 May 1990 letter to Richard Harr stated:

> As per our discussion on ... May 14, 1990, we are proceeding with PRC removal work issued to us under delivery orders ZZAY, BB, BC and BD with the understanding that we will be paid the contract price of $4.25 per square foot.
>
> After receiving your ... letter of April 16, 1990, we notified you by phone that we felt the $4.25 figure was correct and we continued with removal work that had already begun. As previously explained in our meeting of Friday, April 27, 1990, Bay Harbor accepted work orders in reliance upon the then stated contract price of $4.25 per square foot. If we had known that the government would subsequently issue a unilateral modification reducing ... line item 0015AA to $1.50 per square foot, we would have rejected the majority

[1] Unless otherwise stated, Rule 4 citations are to ASBCA Nos. 45452 and 45453 Rule 4 tabs.

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of this work to the extent our contract would allow.

(R4, tab 21)

7. On 8 June 1990 Horst asked Harr about interest on appellant's claim. Harr replied that he "thought interest would stop until the appeal was resolved." (Harr affid. ¶ 13; Anderson affid. ¶ 9)

8. The contracting officer's 8 June 1990 final decision demanded reductions of $67,172.49 for item 0008AA and $63,268.18 for item 0015AA, totalling $130,448.67 and included delivery orders ZZAV, ZZBA, ZZBC and ZZBD among 13 item 0015AA delivery order prices reduced, with interest from the date of that demand and notified appellant that it might submit a proposal for deferment of collection within ten days after receipt of the demand for payment if the amount was disputed (R4, tab 1).

9. Appellant's attorneys' 19 June 1990 letter requested respondent to defer collection of the $130,448.67 allegedly due pending the outcome of the appeal process (Bay Harbor I, R4, tab 10). By awaiting our decision on Bay Harbor I before pressing for payment, respondent tacitly deferred collection of the debt.

10. Robert Kay's 8 August 1990 letter recalculated reductions of $63,274.37 for item 0008AA and $70,455.58 for item 0015AA, for a "total refund" of $133,729.95, and included delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD among 14 item 0015AA delivery order prices reduced (R4, tab 2).

11. Respondent's (a) 8 August 1990 letter to appellant stated that at a 31 July 1990 meeting respondent proposed to appellant a settlement offer in which respondent would agree to $4.25/SF instead of $1.50 for delivery orders ZZBA, ZZBB, ZZBC and ZZBD, reducing the adjustment by $19,651.50 (without subtraction of the 1% discount respondent took)[2] to $114,078.42, and (b) 14 August 1990 letter revised its foregoing offer to appellant to include delivery order ZZAV, further reducing the adjustment by $9,779.22 (subtracting the 1% discount respondent took) to $104,299.20.[3] Neither letter mentioned payment of interest. (R4, tabs 22, 23)

12. Appellant noticed its appeal of the 8 June 1990 final decision on 31 August 1990. At the Bay Harbor I hearing on 5 November 1991, contracting officer Robert Kay testified as follows:

> Q: But the $130,000.00 that ultimately was determined to be the number that the government felt it was entitled to included money ... for work that was in progress at the time that this mistake was discovered, is that correct?
>
> A: That's correct. There were five work orders ... that were in progress at that time for line item 15AA.
>
> Q: And did the government make any attempt before issuing its final decision to determine what work orders Bay Harbor could have rejected under the contract and to give some consideration to Bay Harbor Company because of the lost opportunity to reject work?
>
> A: I believe that we indicated to Bay Harbor that they would be authorized to go ahead and complete those work orders at $4.25. And the main reason for this was because we were still in the fact-finding phase ... and more importantly we didn't want the ship sitting out there being delayed from completing their repairs while we were trying to figure out the exact dollar amount of the claim. So based on really our customer's need and to get the ships back out in the fleet, we authorized them to proceed.
>
> Q: But ... as part of the government's claim against Bay Harbor, you're now trying to change that $4.25 to $1.50 for the work that they did that was in progress at that time?
>
> A: I believe that's in our final claim. It's around $133,000.00.

(tr. 2/115-16; R4, tab 19)

13. On 29 June 1992 we denied the appeals in ASBCA Nos. 41589 and 41809.

14. Appellant's 27 July 1992 letter offered to repay $104,299.20 to respondent (R4, tab 4).

15. Respondent's 6 October 1992 letter rejected appellant's 27 July 1992 offer and stated that (a) $104,299.20 was respondent's settlement offer, which appellant's attorneys declined by a 22 August 1990 letter (not in the record) and (b) it offered to pay $4.25 for five item 0015AA orders in process when the error was discovered only if the dispute could be settled without litigation, which had not happened. Respondent demanded

[2] If the 1% discount is subtracted, the reduction is $19,454.98.

[3] That amount is $104,495.75 if the 1% discount is subtracted consistently from the adjusted item 0008AA and 0015AA prices.

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$133,729.95 plus $26,416.45 interest as of 18 September 1992. (R4, tab 5)

16. Appellant's 30 October 1992 letter sent respondent a check for $104,299.20 and asserted that (a) James Horst told Robert Harr that he would reject delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD if not priced at $4.25 per foot and Harr had agreed to price those orders at $4.25 long before respondent proposed any settlement amount; (b) in June 1990 Harr had told Horst that "interest stopped once the appeal was filed by us" and (c) interest should not accrue during respondent's delay from 29 June to 6 October 1992 to calculate the price adjustment, citing FAR 32.615 (R4, tab 7).

17. The only provision in FAR Subpart 32.6 which suspends or extends interest on contract debts is § 32.615, which provides:

> If delivery of the demands or notices required by the clause at 52.232-17, Interest, is delayed by the Government (e.g., undue delay after dating at the originating office or delays in the mail), the date of the debt and accrual of interest shall be extended to a time that is fair and reasonable under the particular circumstances.

Appellant submitted a detailed, substantive response to respondent's 8 June 1990 demand letter on 19 June 1990 (finding 9). We find no undue delay in receipt of respondent's demand letter.

18. Respondent's 10 December 1992 reply letter cited testimony showing that the parties knew that delivery orders for work in progress were included in the $133,000 price reduction respondent had calculated, stated that the FAR 52.232-17 INTEREST clause did not waive interest for any action of Government employees and acknowledged receipt on 2 November 1992 of appellant's $104,299.20 payment, of which respondent applied $78,489.55 to principal and $25,809.65 to interest, leaving a balance due of $55,240.40, with interest accruing at 7% (R4, tab 8).

19. Appellant's 14 December 1992 letter requested the Board to determine quantum on ASBCA Nos. 41589 and 41809 (R4, tab 9). On 23 December 1992 we docketed the quantum appeals as ASBCA Nos. 45452 and 45453.

20. Respondent's 3 [sic] January 1993 letter to appellant refers to a 4 January 1993 meeting and respondent's offer to waive additional interest if appellant repaid $55,907.83 by 8 January 1993 (R4, tab 10).

21. Appellant's 6 January 1993 letter to respondent sent $55,907.83 under protest to stop accrual of further interest and stated its disagreement with the final amount due to settle these appeals (R4, tab 14).

22. The Secretary of the Treasury established Section 12 Contract Disputes Act of 1978 (CDA) interest rates as follows:

Period	Rate	Fed. Reg. Cite	No. Cal. Days
Jan-June 1990	8.5%	54 F.R. 53798	23
July-Dec 1990	9.0%	55 F.R. 27743	184
Jan-June 1991	8.375%	56 F.R. 101	181
July-Dec 1991	8.5%	56 F.R. 30413	184
Jan-June 1992	6.875%	57 F.R. 428	182
July-2 Nov 1992	7.0%	57 F.R. 29559	124
3 Nov-Dec 1992	7.0%	57 F.R. 29559	59
1-4 Jan 1993	6.5%	57 F.R. 62418	4

23. Appellant's 24 March 1993 pleading for the first time sought interest on appellant's alleged "overpayment" to respondent. Appellant submitted no prior certified claim for such overpayment.

DECISION

Respondent has the burden of proving its claim that the amounts of principal and interest it demanded from appellant were consistent with the contract provisions and lawful. *International Gunnery Range Services, Inc.*, ASBCA Nos. 43134, 43135, 93-1 BCA ¶ 25,304 at 126,056.

Respondent argues that since in Bay Harbor I we found that appellant had not rejected any delivery order (finding 22 therein), appellant cannot relitigate which delivery orders were to be reformed in these quantum appeals, citing *International Gunnery Range, supra,* and *Maitland Brothers Co.*, ASBCA No. 29825, 85-3 BCA ¶ 18,234. Those decisions hold that in quantum litigation, facts found, determinations made and issues decided during entitlement litigation are *res judicata* or law of the case. In *International Gunnery* we rejected further evidence on the condition of trucks coming off the tactical and manned ranges. In *Maitland* we refused to relitigate the recovery of costs

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beyond 22 December 1977, consistent with the entitlement finding setting that end date for cost recovery.

In Bay Harbor I we decided that respondent was entitled to reform the item 0008AA and 0015AA prices to the intended $2.50 and $1.50 unit prices (ASBCA 41589) and denied appellant's claim for the alleged constructive change from hydroblasting to mechanical PRC removal (ASBCA 41809). We made no findings about, and did not decide whether: (a) appellant had the right to reject delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD, (b) the principal and interest amounts respondent demanded in June-August 1990 were consistent with the contract provisions, (c) the contracting officer agreed to exclude five pending delivery orders from the item 0015AA price adjustment, and (d) respondent agreed to suspend interest on the amount of the price reduction demanded. (See Bay Harbor I findings 25-29.) Those issues have arisen now and the parties have adduced new evidence thereon.

There is unrebutted evidence that contracting officer Robert Kay agreed to exclude the pending delivery orders ZZAV, ZZBA, ZZBB, ZZBC and ZZBD from the price reduction he sought after discovery of the mistake in preparing the contract award sheet (findings 4, 12). Excluding those five orders, the correct principal amount was $104,495.75 (finding 11). We need not decide whether appellant, three to five weeks after expiration of the three-day delivery order rejection period (finding 1(b)), had the right to reject the five orders. Respondent did not sustain its burden with respect to the principal amount. We hold that on 27 April 1990 the contracting officer unconditionally agreed to exclude those five orders (findings 4, 12). The condition that the parties settle rather than litigate the price reduction appears as an afterthought (findings 11, 15).

Regarding suspension of interest, Richard Harr's 8 June 1990 statement to James Horst was not a promise to suspend interest pending the outcome of Bay Harbor I litigation and Harr lacked authority so to contract (findings 3, 7). Moreover, FAR 32.613(g) prohibits contracts and arrangements for deferment of collection of debts which provide that a Government claim will not become due and payable pending decision on a dispute. Appellant received respondent's 8 June 1990 demand letter with no undue delay (finding 17). There is no regulatory provision permitting suspension of interest on contract debts due to post-appeal delays in calculating the indebtedness of the sort appellant alleged (findings 16, 17). Respondent sustained its burden with respect to the issue of suspension of interest.

When appellant paid $104,299.20 to respondent on 30 October 1992, it disputed whether it had to pay interest thereon (finding 16). The FAR "Interest" clause in contract A065 requires payment of "simple interest" (finding 1), so interest did not accrue on unpaid interest. Accordingly, we apply appellant's $104,299.20 payment first to principal and compute interest on the principal amount due as follows:

Period	Rate	Days	Prin. Amount	Interest
Jan-June 1990	8.5%	23	$ 104,495.75	$ 559.70
July-Dec 1990	9.0%	184	$ 104,495.75	$ 4,740.96
Jan-June 1991	8.375%	181	$ 104,495.75	$ 4,339.79
July-Dec 1991	8.5%	184	$ 104,495.75	$ 4,477.57
Jan-June 1992	6.875%	182	$ 104,495.75	$ 3,572.41
July-2 Nov 1992	7.0%	124	$ 104,495.75	$ 2,478.21
3 Nov-Dec 1992	7.0%	59	$ 196.55	$ 2.22
1-4 Jan 1993	6.5%	4	$ 196.55	$ .14
Total interest due:				$20,171.00

The total of principal ($104,495.75) plus interest ($20,171.00) owed to respondent was $124,666.75. Appellant paid respondent $160,207.03 (findings 14, 18), which was $35,540.28 in excess of the amount owed. We sustain the appeals to the extent of $35,540.28, on which amount no interest is recoverable, which appellant overpaid to respondent, and deny the balance of the appeals.

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[¶ 26,428] Louisiana Lamps and Shades

ASBCA No. 45294, October 18, 1993. Contract No. DLA400-90-C-1904.

Modifications—Changes—Written Order Prerequisite.—The government was not entitled to a summary judgment stating that there was a bilateral amendment reestablishing a contract delivery date, because there was no written modification in the file, either attested to by affidavit or appended to the motion as an exhibit. The government alleged that there was a bilateral amendment and that the contractor failed to comply with the delivery date. However, until both the contractor and the contracting officer agree in writing, a binding modification does not occur. Thus, there was a genuine issue with respect to the existence of a written agreement reestablishing the contract delivery date.

Defaults, Grounds—Delivery Failure—Absence of Contract Schedule.—The government failed to show that it unilaterally reestablished a delivery date that the contractor failed to comply with, because there was no evidence that the government conveyed an appropriate notice of a reasonable, specific time for performance on pain of a default termination. Although the government stated that a unilateral modification had occurred, the evidence showed instead that negotiations were being conducted for a bilateral contract modification reestablishing the delivery date. The government failed to show the absence of a genuine issue with respect to unilateral reestablishment of the delivery date.

Defaults, Waiver—Delivery Date—Failure to Reestablish.—The issue of whether a contract was properly default terminated on the basis of the contractor's delivery failure could not be summarily resolved, because issues remained as to the existence of a valid delivery schedule. The contractor contended that its contract was improperly terminated because the government waived the original delivery date and never reestablished another, and it asked the board to infer that fact from the documents contained in the file. However, the opposite could also be inferred from the file.

For the appellant: Alan J. Gould, Emeryville, California. For the government: Donald S. Tracy, Chief Trial Attorney, Defense General Supply Center (DLA), Richmond, Virginia.

Before HARTMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

HARTMAN, Administrative Judge: This is an appeal from a termination of a contract for default based on a failure to deliver. Both parties have filed motions for summary judgment.

UNDISPUTED MATERIAL FACTS

In September 1990, the Defense General Supply Center ("DGSC") awarded to appellant, Louisiana Lamps and Shades ("LA Lamps"), fixed-price contract No. DLA400-90-C-1904 in the amount of $96,957 for the supply of 3,402 floor lights on or before 27 January 1991. The contract provided that the floor lights were to contain a German-manufactured lampholder or socket to ensure compatibility with European-manufactured light bulbs. (R4, tabs, 1a, 1j, 1k; compl. ¶¶ 1 through 5; ans. ¶¶ 1 through 5; see R4, tab 27)

On 14 March 1991, approximately six weeks after LA Lamps was to have delivered the floor lights, DGSC sent the company a show cause letter stating the company had "failed to perform on contract DLA400-90-C-1904 within the time required" and DGSC was considering termination of the contract for default (R4, tab 2). LA Lamps submitted a response to the show cause letter and, through bilateral modification effective 18 April 1991, the parties amended their contract to establish 31 May 1991 as the delivery date and decrease the contract price by $350 (R4, tabs 11, 3, 4).

By letter dated 25 June 1991, LA Lamps requested that DGSC modify the parties' contract to change the FOB point, manufacturing location, and delivery date (R4, tab 5). DGSC's contracting officer declined to make the first change, but agreed to make the other two changes. On 8 August 1991, the contracting officer amended the contract to re-establish the delivery date as 31 December 1991. (R4, tabs 1m, 6, 7)

By letter dated 22 November 1991, LA Lamps indicated it was unable to obtain inspection of a floor light shipment because the quality assurance representative had not received a copy of a modification authorizing change of the manufacturing location (R4, tab 8). On 29 November 1992, the contracting officer amended the contract to

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change the manufacturing (and inspection) site from Louisiana to California (R4, tab 1n).

During December 1991, LA Lamps notified DGSC that it was not going to meet the contract delivery date and requested an extension to 31 March 1992 (R4, tab 9). Shortly thereafter, on 7 January 1992, LA Lamps requested by telephone that the palletization requirement in its contract be changed. A DGSC contract administrator advised LA Lamps by telephone the same day that the change would not be made and it "should proceed with the performance of the contract as is." (R4, tab 10) By bilateral modification effective 30 January 1992, the parties amended their contract to re-establish the delivery date as 31 March 1992 and further decrease the contract price by $450 (R4, tab 1o).

In February of 1992, LA Lamps again raised the issue of changing the palletization requirement (R4, tabs 11, 12). Within two weeks of receipt of this request, a DGSC contracting officer advised LA Lamps by letter that: its requested change was once again denied; "a [r]eview of the contract revealed that of the 3402 items required only 204 have been delivered;" and "the remaining 3198 items must be delivered FOB Destination (New Cumberland Army Depot) by 31 March 1992" (R4, tab 14).

During late February and early March 1992, LA Lamps delivered 450 additional floor lights (R4, tab 25 at 8-9). By letter dated 27 March 1992, however, LA Lamps requested "approximately 60 days" to "complete[ ] the full order" and set forth the following as a basis for its delayed performance:

> We tried to get the government to accept an American socket that we feel was far superior than the German sockets. Our request was denied, we travelled to Crystal City to the Technical Division to see if we could get the division to allow us to use the American socket with a warranty.

(R4, tab 15)

During April 1992, the contracting officer issued another show cause letter indicating that DGSC was considering termination of the contract for default and seeking information concerning whether LA Lamps' failure to perform arose out of causes beyond its control and without its fault or negligence (R4, tab 16). On 29 April 1992, LA Lamps responded by stating that: "from the time issuance of the contract was made, we tried to clarify the socket issue by going to the Engineering Division in Crystal City"; "we have been working with the [socket] manufacturer from Germany and have now set up a line of fast delivery of these sockets"; and "we can finalize this contract within the next 60 days" (R4, tab 17). After reviewing LA Lamps' response, the contract specialist and contracting officer recommended that the contract be terminated for default (R4, tab 18). DGSC's termination contracting officer, however, declined to terminate the contract because she apparently believed that the delivery schedule had been waived as a result of the contractor "continuing to perform," *i.e.,* delivering another 246 floor lights during late May or early June 1992, and stated DGSC should "renegotiate a revised delivery schedule with consideration" (R4, tab 19).

In June 1992, the contract specialist, Elizabeth Brown, spoke by telephone with Bill Kaye of LA Lamps concerning a delivery date for the remaining floor lights and a reduction in the contract price. Mr. Kaye advised Ms. Brown "he would deliver the contract complete by 3 August 1992." Ms. Brown thereafter prepared a hand-written memorandum "of the [telephone] conversation" and a contract modification, No. P00004, which was executed by the contracting officer and forwarded by Ms. Brown to LA Lamps through "normal mail distribution." (Affidavit of E. Brown)

In a "Request for Deviation/Waiver" which was dated 28 August 1992 and addressed to Ms. Brown, Mr. Kaye stated that LA Lamps was not able to afford the German-manufactured sockets, which had increased in price to "3.30," and had "purchased from Leviton Electrics a socket that has the same voltage and wattage required for Europeon [sic] and German lighting ... made in the USA" for 82 cents per socket which it desired to use (R4, tab 21).

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On 3 September 1992, however, the termination contracting officer, Deborah Arrington, notified LA Lamps that its contract was being terminated for default based upon "failure to deliver the supplies in accordance with the established delivery schedule" (R4, tab 22), and issued modification No. P00005 terminating the contract for default (R4, tab 1q). By mailgram dated 4 September 1992, LA Lamps requested reconsideration of the termination, and stated 900 lamps were ready for immediate delivery upon granting of the waiver requested and filed "August 25 1992" (R4, tab 23).

On 9 September 1992, the contracting officer, Marie Payne, advised LA Lamps by letter that its waiver "request has been received and is under evaluation," but the "submission of your request in no way relieves you of the obligation to meet the specified delivery schedule" and an "offer of equitable price reduction or other offer of consideration" must be furnished prior to DGSC's final acceptance or rejection (R4, tab 24). By letter dated 16 September 1992, Mr. Kaye advised Ms. Payne he felt $1,050 was "fair and equitable" consideration (R4, tab 26). On 9 October 1992, Ms. Arrington notified Mr. Kaye that LA Lamps' waiver request had been reviewed and denied, and the "review of your request should not be construed as affecting in any way, the partial termination of Contract DLA400-90-C-1904" (R4, tab 28).

On 6 November 1992, LA Lamps appealed the contract's default termination to this Board. In December 1992, DGSC transmitted to the Board a Rule 4 file containing as tab 1p a standard form contract modification, which was numbered P00004, was executed by Ms. Payne, was not executed by any representative of LA Lamps, and provided that a signature of the contractor was required, the contract price was decreased by $500, and the delivery date was re-established as 3 August 1992. By letter dated 8 January 1993, LA Lamps objected to the inclusion of tab 1p because "this purported bilateral modification does not contain the signature of the contractor" and "is, therefore, not a contract document." Shortly thereafter, pursuant to Rule 4(e), the Board removed tab 1p from the Rule 4 file.

On 29 January 1993, LA Lamps filed a motion for summary judgment contending that DGSC had waived the contract delivery schedule, never re-established the delivery schedule, and thus improperly terminated the contract for failure to deliver. According to LA Lamps, modification No. P00004 "was established as a bilateral document," but "was never signed by the Contractor," and is therefore not a valid contractual document (app. br. at 6).

DGSC thereafter submitted a four-tab supplement to the Rule 4 file. Tab 32 of the supplement was a copy of the document previously submitted as tab 1p, except it appeared to contain in blue ink the signature of Mr. Kaye and the number "2" inserted immediately before the number "3" in the revised delivery date of "3 August 1992." According to a motion filed by DGSC to amend its answer, this "executed modification" apparently was "misfiled" and only belatedly discovered by counsel. At the same time it submitted the Rule 4 supplement, DGSC filed a cross-motion for summary judgment, which contended among other things that it properly terminated the contract for default because LA lamps had failed to deliver in accordance with the schedule established by "bilateral" contract modification No. P00004.

LA Lamps objected to DGSC's submission of tab 32 as part of the Rule 4 file and filed an opposition to DGSC's cross-motion, which contended there was no bilateral modification re-establishing a delivery date because the standard form modification P00004 bearing the signature of Mr. Kaye was a counteroffer to deliver on "23" August 1992 that DGSC never notified LA Lamps it was accepting. Thereafter, pursuant to Rule 4(e), the Board also removed tab 32 from the Rule 4 file.

DECISION

Summary judgment is granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *E.g., Mingus Constructors, Inc. v. United States* [33 CCF ¶ 75,126], 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Patten Co.*, ASBCA No. 35319, 89-3 BCA ¶ 21,957 at 110,449. The moving party bears the burden of showing the absence of any genuine issue of material fact and any doubt as to the existence of such an issue is resolved against that party. *E.g., Balboa Insurance Co. v. United States* [33 CCF ¶ 74,051], 775 F.2d 1158, 1163 (Fed. Cir. 1985); *Military Industrial Supply Co.*, ASBCA No. 43872, 93-1 BCA ¶ 25,312 at 126,099. The fact that both parties have moved for summary judgment does not mean that judgment as a matter of law must be granted for one side or the other. Each party's motion is evaluated on its own merits and properly denied if there

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is a dispute regarding a material fact. *E.g., Mingus Constructors,* 812 F.2d at 1391.

In its summary judgment motion, DGSC argues that a bilateral amendment re-established the contract delivery date as 3 August 1992 and LA Lamps failed to comply with that delivery date (Gov't br. at 9-10). However, where a Government contract modification is required to be in writing, until both the contractor and the contracting officer agree in writing, a binding modification of the contract does not occur. *Mil-Spec Contractors, Inc. v. United States* [34 CCF ¶ 75,412], 835 F.2d 865, 867 (Fed. Cir. 1987); *SCM Corp. v. United States* [26 CCF ¶ 83,166], 595 F.2d 595, 598, 219 Ct. Cl. 459, 464 (1979); *Woodington Corp.,* ASBCA No. 37885, 91-1 BCA ¶ 23,579 at 118, 218-19. No written modification re-establishing an August 1992 delivery date currently is part of the Rule 4 file, attested to by affidavit, or appended to DGSC's motion as an exhibit. DGSC, therefore, has failed to show the absence of a genuine issue with respect to existence of a written agreement re-establishing the contract delivery date.

DGSC argues alternatively in its motion that, even if the Board cannot conclude there was a bilateral agreement reestablishing the delivery date, DGSC unilaterally re-established the delivery date as 3 August 1992 and LA Lamps failed to comply with that delivery date. According to DGSC, the actions of its contract specialist in speaking with Mr. Kaye and preparing a contract modification put LA Lamps on notice it was required to deliver the remaining floor lights by 3 August 1992. (Gov't br. at 11-13) However, in order to establish a new delivery date unilaterally, the Government must convey to a contractor appropriate notice of a reasonable, specific time for performance on pain of default termination. *ITT Corp. v. United States* [21 CCF ¶ 84,288], 509 F.2d 541, 547-49, 206 Ct. Cl. 37, 50-52 (1975); *DeVito v. United States* [13 CCF ¶ 82,319], 413 F.2d 1147, 1154-55, 188 Ct. Cl. 979, 991-92 (1969). Based upon the fact that the termination contracting officer stated DGSC should "renegotiate a revised delivery schedule with consideration," and the fact that both the contract specialist's affidavit and memorandum "of conversation" suggest she was seeking agreement by LA Lamps to a reduction in contract price, one could infer that negotiations simply were being conducted for a bilateral contract modification re-establishing the delivery date, rather than action being taken unilaterally to set a reasonable specific delivery date. *See, e.g.,* Sidney G. and Florence Kornegay, ASBCA No. 18454, 76-1 BCA ¶ 11,744 at 56,037. DGSC, therefore, also has failed to show the absence of a genuine issue with respect to unilateral re-establishment of the delivery date.

In its summary judgment motion, which was filed prior to DGSC's submission to the Board of a document appearing to be modification No. P00004 executed by Mr. Kaye, LA Lamps argues its contract was terminated improperly because DGSC waived the 31 March 1992 delivery date and never re-established another delivery date, *i.e.,* the converse of the arguments raised by DGSC. LA Lamps cites no sworn testimony or document in its motion purporting to establish that DGSC did not reestablish a delivery schedule. Rather, LA Lamps asks the Board to infer that fact from the documents contained in the Rule 4 file. However, based upon the affidavit of DGSC's contract specialist that, after being advised by Mr. Kaye in June 1992 LA Lamps "would deliver the contract complete by August 3," she prepared a contract modification, had it executed by the contracting officer, and sent it to LA Lamps, one could infer the opposite. Further, in its opposition to DGSC's summary judgment motion (app. reply br. at 2-3), which notes LA Lamps' objection to inclusion of the document executed by Mr. Kaye as part of the Rule 4 file, LA Lamps acknowledges the existence of a modification numbered P00004, but characterizes it as a counteroffer by Mr. Kaye to deliver on 23 August. Accordingly, LA Lamps also has failed to show the absence of a genuine issue with respect to the existence of a material fact, *i.e.,* the lack of existence of a modification reestablishing the delivery date. *See, generally, Military Industrial Supply, supra,* at 126,100; *Leadermar, Inc.,* ASBCA Nos. 40575, 42408, 92-2 BCA ¶ 24,919 at 124,248-49; *Greenstreet, Inc.,* ASBCA No. 3137, 59-1 BCA ¶ 2089 at 8932.

CONCLUSION

The parties' motions for summary judgment are denied. On or before 10 November 1993, each party is to file with the Board a proposed schedule for further proceedings.

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[¶ 26,429] Bodell Construction Company

ASBCA No. 44474, October 18, 1993. Contract No. DACA83-89-C-0126.

Interpretation of Contracts—Drawings—Scaled Drawing Detail.—Under a contract calling for the construction of several concrete masonry buildings, a contractor's interpretation that wall footings for the buildings be placed no more than three feet below finished grade was unreasonable because this interpretation ignored a relevant drawing note. The drawing detail for the wall footings depicted four eight-inch blocks from the finished floor level to the top of the footing. In scaling this detail, the contractor assumed that the footings would be placed no more than three feet below grade. The drawings did not contain a break line on the footing detail that would have alerted the contractor to the fact that the drawings were not scaled. Nevertheless, the drawings did contain a note beneath the detail that highlighted the footing depth requirements. The note required that the wall footings be at a minimum of three feet and rest on firm, undisturbed ground. This note was obvious and was inconsistent with the reading that all footings be at the scaled depth of the detail. The contractor's oversight was further evinced by the repetition of this same note in the column footing schedule.

For the appellant: Suzuki & Goo, Honolulu, Hawaii, by William L. Goo and Aaron A. Lee. For the government: Col. Riggs L. Wilks, Jr., JAGC., Chief Trial Attorney, and Gayle B. Chestnut and Robyn U. Au, Trial Attorneys, U.S. Army Engineer Division, Pacific Ocean, Fort Shafter, Hawaii.

Before LUSSIER, RUBERRY, and SPECTOR, Administrative Judges.

LUSSIER, Administrative Judge: This appeal is from a January 1992 decision of the Corps of Engineers Contracting Officer denying a claim by Bodell Construction Company for $244,349.00 plus interest, as additional compensation for work performed under the contract. Because of a question regarding the adequacy of the certification accompanying appellant's claim it was recertified on 22 October 1992. The Government has stipulated that the contracting officer has informally considered the recertified claim and would deny the claim on the same basis as did the January 1992 decision.

FINDINGS OF FACT

1. On 29 September 1989, Contract DACA83-89-C-0126 was awarded by the U.S. Army Engineer District, Honolulu (HED) to Bodell Construction Company (Bodell) for the firm, fixed price of $9,102,000. The contract required, among other things, the construction of three multi-story concrete and concrete masonry unit (CMU) buildings (Buildings A, B and C) at a site on the East Range at Schofield Barracks. The contract work also included parking areas, utilities, sidewalks, storm drainage, and landscaping at the East Range site. (Stip. 1)

2. The contract contained the following pertinent clauses: "FAR 52.233-1 Disputes (APR 1984)" (R4, tab C-3); "FAR 52.236-3 Site Investigation and Conditions Affecting the Work (APR 1984)" (R4, tab C-4); "Specifications and Drawings for Construction (APR 1984)" (R4, tab C-5); and "Contract Drawings, Maps and Specifications (SEP 1987)" (R4, tab C-6). The latter clause provided in pertinent part that:

* * *

> (c) The Contractor shall check all drawings furnished him immediately upon their receipt and shall promptly notify the Contracting Officer of any discrepancies. Figures marked on drawings shall in general be followed in preference to scale measurements. Large scale drawings shall in general govern small scale drawings. The Contractor shall compare all drawings and verify the figures before laying out the work and will be responsible for any errors which might have been avoided thereby. [DFARS 52.236-7002]

3. The project site was a eucalyptus forest located on the north side of East Range Road at Schofield Barracks which sloped away from East Range Road to the north. The "Site Development Plan," (R4, tab E-4), indicated existing and final elevation contours for the project site. The greatest differences between existing and final elevation contours were indicated at the north end of Building A, where the existing contour was shown at an elevation of approximately 943 feet and the finished floor elevation was shown at 951.5 feet—a difference of approximately 8.5 feet.

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4. The contract drawing for "Building A Foundation and Ground Floor Sections" (R4, tab E-19) contained details of five wall footings. Each detail showed that the scale was $1/2'' = 1'0''$. The walls shown were identified as "Typical 8″ CMU wall." The depiction for each detail reflected four 8″ CMU blocks from the finished floor level to the top of the footing. The details also show the finished grade to be a few inches below the finished floor level. The dimensions of each footing were shown, with each footing being 1′ deep, but no dimension, as such, was shown for the distance between the floor level and the footing. However, the fact that four 8″ CMU blocks were shown with no break line would indicate the distance to be 32," as would scaling the drawing. Underneath these details the drawing contained a box within which the following appeared: "*Note*, all bearing wall & column ftg's shall extend a minimum of 3′0″ below grade, free of any tree roots & shall rest on firm undisturbed ground."

5. The contract drawing for "CMU & Concrete Column Details & Footing Schedule & Typical Details" (R4, tab E-20), contains a column footing schedule showing the size of each column footing. At the bottom of the column footing schedule the following appears: "*Note!* All column footings shall extend a minimum of 3′-0″ below grade free of any tree roots and shall rest on firm, undisturbed ground. . . ."

6. The design for the contract was prepared for HED by a private Architect-Engineers (A-E) firm, Okita, Kunimitsu and Associates, Inc. (Okita) under a separate A-E contract. Okita subcontracted various aspects of the design to several other firms. The structural design work was subcontracted to SSFM Engineer (SSFM), and cost estimating for the structural and architectural portions of the design was subcontracted to Cost Engineering, Inc. (Cost Engineering). The approving engineer for SSFM was Mr. Lee Takushi, and the estimator who prepared the cost estimate for the architectural and structural portions of the design for Cost Engineering was Mr. Victor Tsuha. (Stip. 2)

7. Mr. Takushi approved the structural design based, in part, on data provided in a soil report dated July 1987, which had been provided to Okita by HED. Among the data was a finding that undisturbed natural ground at the East Range site had an allowable soil bearing capacity of 3,000 pounds per square foot (PSF), compared to an allowable soil bearing capacity of 2,000 PSF for insitu soil recompacted to 90% of maximum density. SSFM designed the structures of Buildings A, B and C based on the assumed 3,000 PSF soil bearing capacity for undisturbed natural ground. (Stip. 3)

8. In Mr. Takushi's opinion, the above quoted drawing notes were adequate to indicate what material the footings had to bear on when they were being constructed, although not the exact depths at which the footings were required to be placed, and were adequate to indicate that if the undisturbed natural ground varied, then the footing depths would also vary. Mr. Takushi also acknowledges that there are other methods by which the draftsman could have indicated that the footing depths might vary. These other methods include indicating break lines on the individual footing details, showing a dimension line with the word, "varies," calling out specific top-of-footing or bottom-of-footing elevations, and giving specific dimensions between finished grade and the top or bottom of the footing. (Stip. 5)

9. Mr. Tsuha prepared the portion of Okita's cost estimate relating to the architectural and structural design for this project. He does not believe that the civil drawings for the project were available to him at the time he prepared his estimate. In his estimate, Mr. Tsuha assumed that all of the footings for all three buildings would require excavation three and one-half feet below the bottom of the base course under the floor slab. He believes he either scaled the details of the footings on the contract drawings to arrive at that number, or he was given that number by someone else, but he does not recall which. He calculated the materials and labor required to construct the walls and columns on top of the footings based on the same assumption—i.e., that the bottom of the footings would extend no more than three and one-half feet below the base course under the floor slab. He is not sure whether he saw the two notes on the contract drawings which required that the footings rest on firm, undisturbed natural ground while he was preparing his estimate, and he is not sure whether or not either of those two notes was on the drawings at the time he made his estimate. (Stip. 6)

10. Mr. Tsuha's calculations of the quantities of materials and labor required to excavate for the footings, place the footings, and construct the walls and columns atop the footings were accepted by the Government's cost estimator, Mr. Thomas Taam, who prepared the final government estimate which

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is used to determine if bids are reasonable (tr. 3/112). Mr. Taam spot-checked the quantities indicated in Okita's estimate and assigned his own unit prices to the quantities indicated there (tr. 3/114, 119, 121). The final government estimate was approximately 8% below Bodell's bid on the contract (tr. 3/131).

11. Bodell subcontracted various items of the construction contract work to a number of subcontractors and planned to perform some of the contract work with its own employees. On 17 October 1989, Bodell executed subcontract agreements with a number of subcontractors for the contract work. Three of these subcontractors were Bateman Construction, Inc. (Bateman), Quality General, Inc. (Quality General), and Hawaiian Reinforcing Steel Company, Ltd. (Hawaiian Steel). This appeal is being prosecuted by Bodell at the request of these three subcontractors. (Stip. 8)

12. Bateman's subcontract with Bodell included, for the East Range site, all mass excavation and fill, finish subgrade, structural excavation and backfill, interior plumbing excavation, under slab cushion, base course, concrete curbs and wheelstops, wood edging, topsoil in place, underground fuel tank earthwork, exterior drain lines, sewer lines, and water lines, including concrete structures, soil and compaction tests, contractor quality control for Bateman's scope of work, clearing and grubbing, demolition, and landscaping. (Stip. 9)

13. Quality General's subcontract with Bodell included all masonry work, including, but not limited to, hoisting, cleanup of Quality General's debris, CMU sills, enlarging window openings, and placing of rebar furnished by others. (Stip. 10)

14. Hawaiian Steel's subcontract with Bodell included furnishing and installing all concrete rebar and furnishing, F.O.B. job site, all masonry rebar. (Stip 11)

15. The cost of the work performed by each of the three construction subcontractors listed above was affected by the elevations at which the concrete footings for Buildings A, B and C were placed. In general, the lower the elevations at which the concrete footings were placed, the greater the cost to each of these three subcontractors to perform its portion of the work. (Stip 12)

16. Each of these three construction subcontractors, independently, in preparing its subcontract bid for Bodell, interpreted the contract drawings as requiring the footings for Buildings A, B and C to be placed approximately three feet below finished grade, based upon either scaling the relevant details on the structural and architectural drawings and/or counting CMU blocks indicated on those details and based upon their interpretation that the contract drawings did not inform them that certain footings would be placed more than three feet below finished grade. (Stip 13)

17. Mr. Stanley Wada, the president of Quality General, assumed that the footings throughout the project would be essentially the same as the section details depicting specified wall footings (tr. 1/143). He admittedly saw the notes but considered them wrong because they were inconsistent with the detail depiction (tr. 1/148). He did not inquire about this inconsistency to Bodell or the Government before giving Bodell his bid. Mr. Brent Bateman, the owner of Bateman Construction, did not see the notes at the time he bid (tr. 2/105-106). Mr. Edson Hoo, the president of Hawaiian Reinforcing, testified that his estimator saw the notes but didn't think they applied and used only the details to estimate the amount of reinforcing steel (rebar) to bid to Bodell. Mark Bodell, the construction manager for Bodell Construction, could not recall whether he or his assistant saw the notes when they did a take off for concrete work but concluded that the footings would be approximately 3′ below grade based upon the details (tr. 3/21). He concedes there is an inconsistency between the notes and the drawings but dismisses it because the note is not "quantifiable" (tr. 3/39). He relied upon his subcontractor's bids in his bid to the Government (tr. 2/204).

18. By Memorandum dated 4 January 1990 (R4, tab D-1), while the clearing and grubbing operation was ongoing and before the footings had been placed (tr. 2-171, 2-172), Bodell's project supervisor, Mr. Richard Francisco, informed the Government's Construction Representative, Mr. Fabian Ladao, that:

> Due to the existing terrain, it will be necessary to step the footings initially on Bldg "A" and Bldg "B". At this time, the steps will be in increments of 8″ to interface with the CMU's. The locations for Bldg "A" will be at gridlines 4.5, 9.8, 12.4, and 13.5.
>
> These steps will be at no additional cost to the U.S. Army Corps of Engineers.
>
> Unless we hear otherwise, we will proceed assuming this is acceptable by the U.S.

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Army Corps of Engineers and start forming by 08-January-90.

(R4, tab D-1)

19. Mr. Ladao first became aware of the stepped footings issue when he received Mr. Francisco's 4 January 1990 Memorandum (R4, tab D-1). Mr. Ladao felt that Mr. Francisco's Memorandum was "correct" (tr. 2-166) and that stepping the footings was in compliance with the contract, because the contours on the civil drawings did indicate that the property sloped toward the back (tr. 2-196). On a slope, the bottom of a footing must be stepped because a level bearing surface is needed on the bottom of the footing. Otherwise, the building would tend to slide downhill (tr. 1-152). The footing depth issue did not arise (tr. 2-189). Mr. Ladao did not become aware of any issue about the depth of footings until early April when Bodell wrote to the contracting officer (see finding 21 below) (tr. 2/177).

20. The concrete for the bearing wall footings and column footings for Buildings A and B was placed by early April 1990 (tr. 2-173). The elevations of the completed footings varied, and after the backfill was completed, their depths ranged from two feet, eight inches to fourteen feet below finished ground elevation (tr. 1-66). In particular, the footings along the north end of Building A where there was a large difference between the finished grade and the original contour of the land, ended up approximately eleven to fourteen feet below the finished grade (tr. 1-159, 1-160).

21. By letter dated 4 April 1990, after the footings had already been placed and construction was already 50% complete (tr. 2-172, 2-173), Bodell requested "additional compensation to extend the foundations of the buildings ... to a greater depth than anticipated due to incomplete, unclear and defective contract documents" (R4, tab D-3). Bodell's claim attached copies of correspondence from Bateman (dated 8 February 1990), Hawaiian Reinforcing (dated 28 February 1990), Quality General (dated 5 March 1990) and Shore Form, Inc., appellant's form subcontractor (dated 8 March 1990), setting forth their estimates for additional work involved in placing footing more than 3′ from the finished floor level. The letter attached a summary sheet requesting $211,798 which included the claims of the four named subcontractors, plus approximately $11,000 in Bodell direct costs, plus Bodell's mark-ups. The difference between this total of $211,798 and the $244,049 referred to in the contracting officer's final decision appears to be due to an increase in the estimate of damages for Quality General.

22. There was no testimony that Bodell ever expressed any dissatisfaction with respect to the contract's footing requirements prior to or during placement of the footings. There is no evidence that, either before or during the time the footings were placed, Bodell ever put the Government on notice that Bodell believed the contract specifications regarding footings were defective or that any differing site condition existed.

23. During construction and at all subsequent times relevant to this appeal, the Government has contended that the contract drawings required that all bearing wall and column footings be placed a minimum of three feet below existing grade and that they rest on firm, undisturbed natural ground. Bodell and its construction subcontractors assert that the contract drawings required the bearing wall and column footings to be placed at a depth of approximately three feet below finished grade, as indicated either by scaling the relevant details on the structural and architectural drawings and/or counting the CMU blocks indicated on them and that the contract drawings did not inform them that certain footings would be placed more than three feet below finished grade. (Stip 15)

24. It was Bodell's practice to obtain releases from its subcontractors prior to making final payments and to use a standard form supplied by its surety (tr. 2/217). Such a release is in evidence for both Quality General and Hawaiian Reinforcing (Govt. exh. 4, 5). It is likely that Bateman Construction signed a similar release (tr. 2/129, 218; 3/8) although it is not in evidence. However, there is reason to believe that Bodell and its subcontractors understood that the release did not apply to pass through equitable adjustments claimed due under the contract for the alleged drawing deficiency (app. exh. 2; tr. 2/44, 218-220). Since the issue of the releases was raised by the Government not in the pleadings, but rather at the hearing (to show Bodell suffered no damages,[1]) the record was not completely developed. Even

[1] While the Board has only the issue of entitlement, and not quantum, before it at this time, the Government's purpose in introducing the release issue was to estabish a bar to entitlement under the *Severin* doctrine, *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944). Because of our disposition of this appeal on other grounds, no useful purpose is to be served by a

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apart from the open question of whether the written releases fully integrated the agreement of the parties, the record does not permit us to conclude that Bodell has suffered no damages. Bodell has a direct cost claim which was included in the claim denied by the contracting officer and subsequently appealed. While the complaint filed in the appeal sought a lesser equitable adjustment totaling only the claims of Quality General, Hawaiian Reinforcing and Bateman Construction[2], the Government concedes Bodell's claim for mark ups is also before us although not mentioned in the complaint (tr. 1/20). It does not concede that Bodell's direct cost claim is still alive. However, there has been no withdrawal of that claim, even though Mr. Bodell testified that it would not have pursued its direct cost claim because of the small dollar amount, had not the subcontractor claims also been involved (tr. 2/210-212). No prejudice to the Government has been shown by the failure to include Bodell's direct cost claim specifically in the complaint.

DECISION

This appeal presents yet another example of the dangers of risk taking in Government contracts. The applicable legal principles where the parties disagree as to what the terms of a particular contract require are fairly straightforward. It is a basic tenet of contract interpretation that every portion of a contract must be considered and given effect, if possible. *Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶ 72,885], 169 Ct. Cl. 384 (1965). However, a bidder on a Government contract is not expected to be clairvoyant, nor inquire concerning subtle, latent or minor discrepancies in the solicitation. *Blount Brothers Construction Company v. United States* [10 CCF ¶ 73,058], 171 Ct. Cl 478, 346 F.2d 962 (1965); *WPC Enterprises v. United States* [9 CCF ¶ 72,289], 323 F.2d 874 (Ct. Cl. 1963). Nevertheless, it is clear that if the ambiguity is patent a duty arises for the bidder to inquire concerning the ambiguity prior to award. *Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647 (Ct. Cl. 1982); *Monarch Painting Corporation v. United States*, 16 Ct. Cl. 280 (1980). This doctrine protects the integrity of the bidding process by ensuring that all bidders bid to the same requirements. *Chris Berg, Inc. v. United States* [17 CCF ¶ 81,143], 455 F.2d 1037 (Ct. Cl. 1972).

In the case before us the problem might have been avoided had the Government drawings shown break lines on the individual footing details or given specific elevations or dimensions on the details to reflect the footing depth. The drawing did not do that but it did highlight the footing depth requirement by a box directly under the details relied upon by Bodell and its subcontractors. This note required that the depth be a "minimum" of 3′ below grade, free of tree roots, and that the footing "rest on firm undisturbed ground." The note was obvious and the testimony given by appellant's witnesses makes it clear the note was inconsistent with the drawing details (see finding 17). We agree that it is inconsistent with the drawing details if one were to read them as requiring only that all footings be at the scaled depth of the details. The discrepancy is highlighted again by the repetition of the note in the column footing schedule (see finding 5). Further, the "Site Development Plan" drawing made it quite clear that there was a significant slope to the existing grade at the project site requiring substantial fill at the north end of Building A (see finding 3).

We recognize that the Government cost estimate was based upon a 3 1/2′ footing depth. However, the estimator was not called to testify and the parties have stipulated that he is not sure that the notes were on the drawings he used (see finding 9). The later review by the HED engineer, who prepared the final government estimate, was only a spot check as to quantities. We do not think this background rises to the level of establishing that there was no patent ambiguity, especially in light of testimony that the inconsistency created by the notes was in fact noticed at time of bidding. Appellant's interpretation of the contract requirements left the note with no meaning, a result not favored by the law. *See Hol-Gar Manufacturing, supra.*

Even if it is customary to scale the drawings in the absence of an indication on the drawing that the column or wall shown was broken, this would not reasonably excuse ignoring the note staring the viewer in the face. Where there is a patent inconsistency, as here, a bidder is obliged to seek clarifica-

(Footnote Continued)

discussion of the *Severin* doctrine and later cases restricting its application.

[2] Counsel for appellant represented at the hearing that Shore Form had "decided not to prosecute the appeal" (tr. 1/25).

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tion before unilaterally relying upon his own view of the meaning intended. *Metric Construction Company,* ASBCA No. 31750, 86-3 BCA ¶ 19,034; *Newsom v. United States, supra; Monarch Painting Corporation v. United States, supra.* We are troubled by the fact that, as in all patent ambiguity cases, there exists some Government fault. If there were not, there would be no ambiguity to begin with. However, once it is shown that the ambiguity is glaring, the law places the risk on the bidder to inquire or proceed at its risk. The appellant did not make that inquiry and we are compelled to hold against it.

The appeal is denied.

[¶ 26,430] Quality Granite Construction Co., Inc.

ASBCA No. 43846, October 12, 1993. Contract No. DMA700-91-C-0023.

Defaults, Procedure—Show Cause Notices—Reconsideration.—Upon reconsideration of an earlier decision involving the propriety of a default termination, the board affirmed its earlier decision because it had already considered and rejected the contractor's contention concerning the discretion of the contracting officer. The contractor asserted that the failure of the contracting officer to give the contractor notice of breaches of labor standards precluded upholding the default termination. The issue, however, was not whether the contracting officer's failure to give notice of the labor violations precluded default termination, but whether there were existing labor violations that constituted an independent and valid basis for the default termination.

For the appellant: Bernard & Davidson, Granite City, Illinois, by Kevin J. Davidson. For the government: Larry J. Olson, Assistant General Counsel, Defense Mapping Agency, St. Louis, Missouri.

Before PARK-CONROY, RUBERRY, and SPECTOR, Administrative Judges.

Affirming 93-3 BCA ¶ 26,073 on reconsideration.

PARK-CONROY, Administrative Judge: Appellant has moved for reconsideration of our 7 May 1993 decision. Although the appeal had been taken from the default termination of appellant's construction contract for failure to timely complete performance, we held that existing violations of the applicable labor standards provisions of the contract constituted a valid and independent ground for the default termination and granted the Government's motion for summary judgment.

Appellant makes two arguments in its motion for reconsideration. First, it contends that we discounted its argument concerning the contracting officer's discretion and departed from precedent, apparently because we found *Hellas Painting Contractor,* ASBCA No. 31656, 87-1 BCA ¶ 19,427, to be more analogous to the facts of this appeal than the cases appellant relied upon, *Corban Industries, Inc.,* VABCA Nos. 2181, 2559T, 88-3 BCA ¶ 20,843 and *La Madera Services,* ASBCA Nos. 29518, 30597—30603, 87-1 BCA ¶ 19,621. The Government responds, and we agree, that *La Madera* and *Corban* were fully discussed in the context of this appeal and correctly distinguished. We did not depart from precedent; we considered appellant's argument carefully and rejected it. Indeed, after explaining why *Corban* and *La Madera* were not applicable, we stated: "The issue here is not whether it would have been an abuse of discretion for the contracting officer to terminate the contract for alleged violations of the labor standards without giving appellant notice, but whether there were existing violations which constitute a valid and independent ground for the termination." Slip op. at 4. Appellant's motion for reconsideration does not raise any new argument in this regard.

Appellant's second contention is that, in the absence of an affidavit or other documents bearing indicia of veracity, we improperly considered the contracting officer's lack of knowledge of the alleged labor violations. The Government responds that the contention is untimely because appellant did not dispute this fact when it opposed the Government's motion for summary judgment although the knowledge issue was discussed in that motion. We again agree with the Government. *See RGI, Inc.,* ASBCA No. 38772, 93-2 BCA ¶ 25,581. Our reconsideration of this issue, however, revealed that,

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instead of making a separate finding of fact concerning the contracting officer's knowledge, we included our finding in the decision portion of our appeal. Therefore, we supplement our original Statement of Facts with the additional finding that the contracting officer did not have knowledge of the labor violations at the time she terminated the contract for default. Our finding was not, and is not, based upon an affidavit by the contracting officer; however, it was, and is, fully supported by the record evidence (*see* Gov't App. to Motion for Summary Judgment at 40, 42-45; R4, tabs 133, 134).

Having reconsidered our decision, we affirm it for the reasons stated.

[¶ 26,431] Choe-Kelly, Inc.

ASBCA No. 43481, October 18, 1993.

Contract Disputes—Implied-In-Fact Contracts—Intent to Contract.—There was no implied-in-fact contract between the government and a firm beyond the scope of a task order calling for the development and implementation of a software system for management functions, despite the firm's contention that the actions of the parties established an intent to contract for enhancements to the software program, because services performed to enhance the software programs were merely corrections of the system required to satisfy the task order. There was no indication that government personnel gave the firm any directions to perform out-of-scope work or promised compensation for any enhancements to the management system. After the change management system was implemented, a number of deficiencies still needed to be corrected. Those corrections were accomplished and reflected in what the firm submitted as version 1.1 of the change management system. For the most part, the firm's version 1.1 was simply a corrected version of the management system that was within the scope of the original task order.

Contract Disputes—Implied-In-Fact Contracts—Government Action.—Although a government official took steps to help a firm obtain contractual coverage for follow-on efforts to enhance a software program implemented under a task order for the development of a change management system, these actions did not establish an implied-in-fact contract to enhance the software program, because the government official did not have authority to bind the government. The firm knew that the government official was not a contracting officer and was without authority to obligate the government. The firm's assertion that the unauthorized promises made by the government official were ratified by the government was contradicted by the record. The contracting officer directly vetoed one of the attempts by the government official to obtain sole-source contractual coverage.

For the appellant: Thompson, Hine and Flory, Dayton, Ohio, by Richard A. Ciambrone. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Mark E. Landers and Maj. William M. Lackerman, Jr., USAF, Trial Attorneys.

Before GROSSBAUM, RUBERRY, and SPECTOR, Administrative Judges.

GROSSBAUM, Administrative Judge: This dispute arises under an allegedly implied-in-fact contract between the Government and appellant, Choe-Kelly, Inc. (Choe-Kelly, sometimes CKI), for services involving the design and implemention of a management software system for the propulsion program office within the Aeronautical Systems Division (identified by the symbol: ASD/YZ, sometimes simply YZ) of the United States Air Force Systems Command at Wright Patterson Air Force Base (WPAFB). Choe-Kelly submitted a certified claim in the amount of $209,792, representing the value of the work performed, and the appeal was taken from the contracting officer's failure to render a decision on the claim

By decision dated 10 March 1992, the Board denied a Government motion to dismiss this appeal for lack of jurisdiction, holding that "we clearly have jurisdiction to entertain the appeal, at least up to the point of establishing the existence of an implied contract." *Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910 at 124,221. Accordingly, a hearing on the merits was held in Dayton, Ohio, after which both parties filed briefs. Only liability is before us for decision.

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FINDINGS OF FACT

1. As noted in our March 1992 decision on the Government's motion to dismiss, "Choe-Kelly had been a subcontractor under Contract No. F33657-87-D-0097 between the Government and Frontier Engineering, Inc. (Frontier)." *Choe-Kelly, Inc.*, 92-2 BCA at 124,220. The record establishes that, in February 1988, contract F33657-87-D-0097 (contract 0097) had been entered into between the United States Air Force and the Small Business Administration (SBA) pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), and that, concurrently, the SBA entered into an 8(a) contract with Frontier to perform the services required by contract 0097. The effective date of contract 0097 was 12 November 1987, however, events predating that effective date are also relevant.

2. In late 1986 the ASD propulsion program office's acquisition support directorate (symbol: ASD/YZW, sometimes YZW) prepared a statement of work for computer support services. A specific requirement to define, design and implement a configuration change management system (CMS, sometimes CCMS) to support ASD/YZ's change management functions and to install the system in YZ computers was identified and described in a document designated "Task Order 87-02," dated 17 December 1986. YZW is a technical management activity, and its personnel do not have any contracting authority. (AR4, tab 2; tr. 3/64-65)

3. Sometime in late 1986 or early 1987 Choe-Kelly and Frontier (sometimes FEI) arranged to seek contracts at WPAFB involving, *inter alia*, providing computer support services. To this end, Choe-Kelly and Frontier entered into a "Teaming Agreement" in March 1987. (Tr. 1/36-37, 2/126; exh. G-1)

4. During the first half of 1987 Choe-Kelly assisted Frontier in preparing a technical proposal to the Government. In June 1987 Frontier submitted a Task Implementation Plan, under which the Task Order 87-02 work was to be performed by Choe-Kelly as Frontier's subcontractor. Under its agreement with Frontier, Choe-Kelly would be paid for developing the change management system for ASD/YZ (sometimes referred to as the YZ CMS) only after a contract was awarded to Frontier. (R4, tabs 17, 18; tr. 1/62-64, 2/124)

5. Choe-Kelly had begun working on the CMS software described in Task Order 87-02 in April 1987. In this effort, Choe-Kelly worked directly with personnel from the Configuration, Data Management and Service Reporting branch (symbol: YZWC) within the ASD/YZW directorate. The principal YZWC representatives with whom Choe-Kelly dealt were Mr. Susano ("Sal") Mascorro, chief of the branch, and Mr. Thomas Gatchel, a configuration management engineer. (Tr. 1/41-45, 72, 131, 234, 3/114, 213)

6. Negotiations that eventually led to formation of contract 0097 were conducted directly between Frontier and the Government during 1987. These negotiations were completed on 12 November 1987 and the parties understood that the resulting award, which was not expected to be issued for more than thirty days, would reflect an effective date of "12 Nov 87." (R4, tabs 19, 20)

7. Meanwhile, a critical design review (CDR), intended to establish the baseline for the emerging configuration change management system, was held at Choe-Kelly's facility in September 1987. Choe-Kelly's principal management officials, Messrs. Michael Kelly and Neil Southerly, participated in the review. User activity representatives attending the CDR included Mr. Mascorro and Mr. Gatchel from YZWC. (R4, tab 18; tr. 1/44-45, 236)

8. During the CDR, government personnel identified several corrections needed to make the CMS acceptable and Choe-Kelly agreed with YZWC personnel on a list of the corrections to be made. Choe-Kelly has designated the version of the YZ CMS incorporating the agreed upon corrections as "Version 1.0." In addition to the foregoing corrections, Choe-Kelly and YZWC personnel discussed possible improvements or "enhancements" to the contemplated software, beyond the scope of Task Order 87-02. However, we are not persuaded that any agreement was reached as to whether or when Choe-Kelly would undertake an effort to make "enhancements" to the CMS. (Tr. 1/49-52, 236)

9. All of the documentation relating to "Version 1.0" of the YZ CMS that Choe-Kelly prepared was submitted to the Government under an FEI cover page that specifically referenced contract 0097. In late September or early October 1987 Choe-Kelly prepared and submitted to YZWC a typewritten report purportedly "cover[ing] those system improvements and corrections to be incorporated in the YZ Change Management System as a result of the Critical Design Review." However, this report listed only

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some, but not all, of the corrections to the CMS software that had been identified and agreed upon during the CDR. YZWC personnel made handwritten comments to the Choe-Kelly report, informing Choe-Kelly, *inter alia*, that:

> We feel that the base[line] product should be reworked to operate in a way that is functionally correct at no cost increase. How this is achieved is the contractor's decision.

(R4, tabs 25, 26; tr. 3/121, 200-202, 217-222)

10. Sometime in late November 1987 Choe-Kelly installed software for "Version 1.0" of the CMS on three YZ computers for an "initial operating capability (IOC)" period, intended to "obtain user feedback on system performance." On or about 30 November 1987 Choe-Kelly prepared and submitted to YZWC a Version Description Document (VDD) and a preliminary User's Manual for "Version 1.0" of the change management system required by Task Order 87-02. (R4, tabs 18, 27, 28; tr. 1/46, 3/229-230, 233-234).

11. According to Mr. Kelly, "Version 1.0" of the YZ change management system was "totally complete" by early December 1987 (tr. 1/46). In a memorandum to the ASD computer center dated 10 December 1987, the YZWC branch chief, Susano Mascorro, stated that Choe-Kelly had completed the requirements of Task Order 87-02 and that the "Change Management System has been delivered, tested, accepted and installed." The memorandum also noted that Mr. Mascorro's office was "in the process of determining system enhancements for [a] follow-on effort" and that a task order request for this effort would be submitted "in the near future." (AR4, tab 5)

12. Under letter dated 7 January 1988 Choe-Kelly transmitted to Frontier what it characterized as the "deliverable items" under Task Order 87-02, including three copies of the CMS software on floppy disks. The letter also enclosed a copy of Mr. Mascorro's 10 December 1987 memorandum, to show that the task order requirements were completed and had been accepted. (Exh. G-1)

13. However, despite Mr. Mascorro's 10 December 1987 memorandum, a number of deficiencies in the system, problems with the CMS software and inconsistencies between the "Version 1.0" software and the draft User's Manual had not yet been corrected. These problems were documented by YZWC personnel on "CMS System Problem Report" forms, and we find that these problems were not resolved completely until at least February 1988, when Choe-Kelly submitted a corrected revised software package (referred to as "Version 1.1"). (R4, tab 48; tr. 3/123, 227-234, 243)

14. Between December 1987 and February 1988, Choe-Kelly continued to make corrections to the change management system. According to Choe-Kelly's principal management officials, this work included developing "Version 1.1" of the YZ CMS, allegedly constituting "enhancements" to "Version 1.0" of the system. However, Choe-Kelly did not inform either Frontier or any government contracting officials that it was performing any changes or "enhancements" beyond the scope of Task Order 87-02. Moreover, we find that Frontier, for whom Choe-Kelly was acting as a prospective subcontractor, neither requested nor authorized Choe-Kelly to perform any work beyond Task Order 87-02. (R4, tab 45; tr. 1/79, 155, 178, 236-237, 2/35-36, 44, 3/21)

15. By February 1988 Choe-Kelly's relationship with Frontier had deteriorated for reasons not disclosed fully in the record. Among other things, Frontier informed Choe-Kelly's officials that it did not expect to give Choe-Kelly any more work under contract 0097. By this time Choe-Kelly recognized that it did not have a formal subcontract with Frontier for Task Order 87-02, that it had not yet been paid for any of the work already performed under that task order, and that it was undertaking what it regarded as a "follow-on effort" for the YZ CMS without contractual coverage. (Tr. 2/18, 24-25)

16. On or about 11 February 1988 Choe-Kelly entered into a consulting agreeement with a former Air Force employee, Mr. Eric Van Hoose, for marketing assistance services. In particular, the agreement contemplated the consultant's help in perfecting Choe-Kelly's rights under Task Order 87-02 and in obtaining "a contract vehicle" for "a follow-on to the YZ CMS which was delivered to YZ by CKI in December 1987." The value of this follow-on project was estimated to be $395,300 and Choe-Kelly was anxious to have this project "under contract no later than 15 April 1988." (R4, tab 50)

17. Indefinite quantity contract 0097 between the Air Force and the SBA was executed formally on 26 February 1988, with an effective date of 12 November 1987. Concurrently, the SBA entered into a corresponding subcontract with Frontier. Delivery Order 0001 under the then unexecuted contract 0097, showing an order date of 12 Nov-

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ember 1987 and covering, *inter alia,* Task Order 87-02, had been signed by an ASD contracting officer on 9 February 1988. Both contract 0097 and Delivery Order 0001 showed a "Mailing Date" of 14 March 1988. (R4, tab 1)

18. SubCLIN 0002AB under Delivery Order 0001 was priced at $253,406 and incorporated the requirement specified in Task Order 87-02. The following labor effort was indicated at the end of the description of this item:

"HOURS: Frontier—420 Choe-Kelly—4,936" (R4, tab 1)

19. Sometime in February 1988, Choe-Kelly completed what it called "Version 1.1" of the CMS software and installed it in three ASD/YZ computers. Choe-Kelly prepared a VDD for "Version 1.1" dated 11 February 1988, the cover page of which indicates that it was prepared by Choe-Kelly and submitted to ASD by "Frontier Engineering Inc." under contract 0097. In addition, Choe-Kelly submitted to the Air Force a User's Manual for "Version 1.1" of the YZ Change Management System, dated 12 February 1988, which also referenced contract 0097 specifically. (Tr. 1/79, 2/44; R4, tabs 31, 32)

20. We find that most of what Choe-Kelly called "Version 1.1" of the YZ CMS represented the correction of deficiencies in "Version 1.0" that were within the scope of Task Order 87-02, many of which had been identified at the critical design review. Moreover, many of the functions listed by Choe-Kelly as "changes" or "enhancements" to the "Version 1.0" software and documentation simply represented necessary minor adjustments, corrections, or "fixes." (R4, tabs 31, 48; exh. A-1; tr. 3/131-132, 145, 223-225, 237-239)

21. However, a few of the "enhancements" listed with "Version 1.1" included changes that were beyond the scope of Task Order 87-02. These changes were discovered by YZWC personnel (including Mr. Gatchel and Mr. Mascorro), when reviewing Choe-Kelly's "Version 1.1" software and accompanying documentation in February and March 1988. (R4, tab 31; exh. A-1; tr. 3/251-255)

22. Mr. Gatchel and Mr. Mascorro questioned Choe-Kelly management about the out-of-scope changes being made to the CMS software and were told that the additional changes were being made for convenience, since Choe-Kelly's programmers were "in the area" and the company had no other work and needed to keep its people busy. Mr. Gatchel cautioned Mr. Southerly not to undertake work in advance of contractual authorization. He also made comments on various CMS System Problem Reports advising Choe-Kelly, among other things, to await written "[o]fficial direction to begin work" on any "enhancements" to the CMS, notify the program office of the nature of problems encountered "prior to implementing a fix," and await "official direction to proceed" from the contracting office before undertaking "a fix [that] would require further funding." Mr. Mascorro also claims to have warned Choe-Kelly about the risk of working without contractual coverage and did not promise Choe-Kelly that it would be paid for any "enhancements." (R4, tab 48; tr. 3/132-134, 151, 252-257)

23. Despite the foregoing warnings from YZWC personnel, Choe-Kelly started to design and develop additional "enhancements" to the CMS software as soon as it completed "Version 1.1." Choe-Kelly referred to these additional "enhancements" as "Version 1.2." (Tr. 1/97, 98, 250)

24. It is undisputed that Mr. Mascorro had discussed and expressed interest in Choe-Kelly's pursuit of a "follow-on effort" to develop "enhancements" to the change management system software required by Task Order 87-02. Mr. Mascorro actually took steps to assist Choe-Kelly in obtaining contractual coverage for this follow-on effort and, among other things, helped prepare a purchase request for "enhancements" to the CMS described as "Version 1.2." Choe-Kelly was listed as the prospective source for this effort, under a proposed SBA 8(a) contract, at an estimated cost of $192,000. That purchase request was never processed through ASD procurement channels because Choe-Kelly was unable to get designated as an 8(a) contractor. (Findings 8, 11; AR4, tab 3; tr. 3/124, 133)

25. Neither Mr. Mascorro, Mr. Gatchel, nor any other personnel within the YZWC organization were contracting officers or had any contracting experience. Both Mr. Kelly and Mr. Southerly understood that only a contracting officer could obligate the Government contractually. Mr. Southerly admitted that he knew that Mr. Mascorro was not a contracting officer and had no authority to obligate the Government. Mr. Southerly also acknowledged that he had been aware that a purchase request was not a contract and did not obligate the Government.

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For his part, Mr. Kelly admitted that he did nothing to ascertain the contracting authority of Mr. Mascorro, Mr. Gatchel or anyone else in the ASD/YZW organization with whom he dealt. (Tr. 1/185, 2/10-11, 13-14, 3/64-69, 134, 213)

26. We find, as admitted by Mr. Southerly, that Mr. Mascorro never "directed" Choe-Kelly to do anything in connection with developing "enhancements" to the YZ change management system. Moreover, Mr. Mascorro denies having promised to pay Choe-Kelly for any such "enhancements." (Tr. 2/15-16; 3/132-133) There is not the slightest suggestion in the record that any other ASD personnel ever gave Choe-Kelly any directions to perform out-of-scope work or ever promised Choe-Kelly compensation for any "enhancements" to the CMS.

27. By mid-March 1988 Choe-Kelly had not been paid by Frontier for the work it had done on the YZ change management system. Around that time Choe-Kelly's consultant, Mr. Van Hoose, contacted an ASD contracting officer, Mr. Donald Trenner, seeking assistance in getting Frontier to pay Choe-Kelly. To confirm Mr. Van Hoose's agency status, on or about 25 March 1988 Choe-Kelly sent a letter to the ASD contracting directorate designating Mr. Van Hoose as Choe-Kelly's "Contract Representative." (R4, tab 49; tr. 3/24-26)

28. As of 1 April 1988 Frontier still did not want to issue a formal subcontract covering the work on the YZ CMS that Choe-Kelly had performed at its own risk. After further prodding from Choe-Kelly, including a demand for return of its software and documentation, on 19 April 1988 Frontier's president executed a fixed-price subcontract agreement with Choe-Kelly in the amount of $206,315 covering the work performed on Task Order 87-02 under contract 0097. (Exh. A-2, G-1; AR4, tab 1).

29. In June 1988, Choe-Kelly was directed by the Air Force to remove the "Version 1.1" software from YZ's computers and to reinstall "Version 1.0" for testing and acceptance purposes. Around that time, Choe-Kelly was paid in full, by Frontier, for the work it had performed on the YZ CMS under Task Order 87-02. (Tr. 1/198, 247, 3/178-179)

30. The Air Force formally accepted the reinstalled "Version 1.0," even though it was not useful. On 7 June 1988 Mr. Mascorro signed a "Certificate of Completion," certifying that "all effort and deliverables have been received from Frontier" under contract "... -0097-0001, Task Order 87-02." (On 23 March 1988 Choe-Kelly had presented to Mr. Mascorro, and he had signed, a "Certificate of Completion," certifying that the contractor and/or subcontractor had satisfactorily completed all requirements under Task Order 87-02 of contract 0097.) (R4, tab 35; AR4, tab 4; tr. 3/127, 178-179) We are unable to determine with any certainty the reasons why the Air Force accepted a product that was not useful or why Mr. Mascorro signed, at different times, different certificates signifying completion of what was presumably the same requirement.

31. Shortly after the Air Force accepted "Version 1.0" of the CMS, "Version 1.1" was reinstalled in some YZ computers and remained there until May 1989. By this time Choe-Kelly's work on "Version 1.2" was substantially complete and Mr. Southerly was still attempting to secure contractual coverage for this effort. (Tr. 1/247, 250, 2/49, 3/177-79)

32. On or about 3 August 1988 Mr. Mascorro requested the ASD/YZ program control office to write an advanced purchase request "to enhance the current YZW Configuration Change Management System," as a task order under an existing Air Force contract "for an estimated value of $226,560." Choe-Kelly was identified as the "source for this effort." A "Call Order" entitled "YZ CMS VERSION 1.2," which had been prepared by Mr. Southerly, was attached to Mr. Mascorro's request. (AR4, tab 3; tr. 2/49, 3/124, 184-186)

33. The ASD contracting officer, Mr. Trenner, summarily rejected the request and accompanying "Call Order" as being "clearly not in the scope" of the existing Air Force contract under which it was sought to be placed. That contract was for computer hardware, not computer software. (Tr. 2/154, 3/36, 126)

34. On 27 October 1988 Mr. Southerly provided Choe-Kelly's "Version 1.2" of the CMS software and related documentation to YZWC for testing in YZ computers. These materials consisted of: 15 disks comprising 3 copies of "Version 1.2" software, a copy of a software test plan for "Version 1.2" of the YZ CMS, and 5 copies each of a User's Manual, a VDD, and data base documentation for "Version 1.2." All the "Version 1.2" documentation was dated 10 June 1988. (R4, tab 36)

35. These "Version 1.2" materials were "received [by YZWC] for the purpose of acceptance testing to determine their applica-

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bility to the YZ change management process and for [the] possibility of future procurement" and Mr. Southerly was informed that any testing of these materials would be performed on a "non-interference basis with regular work" of ASD/YZ. One copy of the "Version 1.2" software was installed on a YZWC computer. When he provided the "Version 1.2" materials to YZWC, Mr. Southerly was aware that Choe-Kelly did not have a contract with the Air Force. Choe-Kelly kept a full copy of the "Version 1.2" software and documentation. (R4, tab 36; tr. 2/42, 95; 3/79, 137)

36. A "To Whom It May Concern" letter dated "19 Dec 88," signed by YZWC section chief Albert Pritchett "for" branch chief Mascorro, declared that:

> The Government intends to award a contract in the amount of $192,000 to Choe-Kelly, Inc. (CKI) for the delivery of Version 1.2 of the YZ Change Management System developed by CKI. A fully funded Purchase Request has been delivered to the YZ Contracts Department (YZK) as the initial step in the award process.

This letter was prepared at Choe-Kelly's request, to assist it in dealings with its bank. Mr. Mascorro was suspended for one day without pay because he permitted this letter to be released. (R4, tab 2; tr. 3/127-129)

37. In the late fall of 1988 Mr. Mascorro initiated a purchase request seeking to award a sole source contract to Choe-Kelly for its work on Versions 1.1 and 1.2. This sole source purchase request was routed to a contracting officer within the ASD/YZW contracting directorate (YZK), Ms. Marilyn Smith, who had not previously heard of Choe-Kelly. (Tr. 2/233, 234)

38. Ms. Smith questioned Mr. Mascorro about the justification for a sole source award to Choe-Kelly and Mr. Mascorro conceded that a sole source procurement could not be justified. However, Mr. Mascorro did not inform Ms. Smith that Choe-Kelly had already worked on "Version 1.2" or that YZWC possessed a "test version" of the "Version 1.2" software. (Tr. 2/245-246, 270)

39. On or about 17 January 1989 Ms. Smith issued a "sources sought" synopsis in the Commerce Business Daily (CBD) for "Version 1.2 of ORACLE based Configuration Change Management System." Choe-Kelly responded to the CBD synopsis on 1 February 1989 and responses were also received from other prospective contractors. All responses to the CBD synopsis were referred to YZWC for evaluation. (R4, tabs 3, 4; tr. 2/251; 3/126-127, 137)

40. After receipt of the CBD responses, Ms. Smith learned that Choe-Kelly had already done work on the solicited requirement. When this situation was reported to her supervisor within YZK, Ms. Smith was directed to stop all efforts to procure "Version 1.2" until the matter could be investigated. (Tr. 2/236-237)

41. By May 1989 ASD/YZW had completed evaluating the "Version 1.2" materials Choe-Kelly had provided in October 1988. The "Version 1.2" software was removed from YZ computers and "Version 1.0" software was reinstalled. By letter to Mr. Southerly dated 31 May 1989, the director of YZW indicated that the Government was returning the materials to Choe-Kelly. The materials were physically given to Mr. Van Hoose on 1 June 1988. (R4, tabs 5, 38; tr. 3/178, 180, 291)

42. Choe-Kelly's consultant, Mr. Van Hoose, was busy "doing his marketing" for various clients during the period relevant to this appeal. Choe-Kelly's consulting agreement with Mr. Van Hoose was discontinued by mid-1989, but was never terminated in writing as expressly provided in the agreement. Moreover, Choe-Kelly never rescinded the 25 March 1988 letter to the ASD contracting directorate designating Mr. Van Hoose as its "Contract Representative" and never notified the Government that Mr. Van Hoose's agency relationship had ended. (Tr. 1/134, 2/106-107, 3/24-25; R4, tab 49)

43. Choe-Kelly filed its certified claim with the contracting officer on 25 May 1990 and took this appeal from the contracting officer's failure to render a decision on that claim, as directed by the Board pursuant to Rule 1(e) (R4, tabs 6, 12-14).

DECISION

Appellant claims entitlement to compensation under an "implied in fact" contract allegedly entered into with the Government. An implied in fact contract is an agreement

> founded on a meeting of minds, which, although not embodied in an express contract, is inferred as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.

Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923)

According to appellant, the following conduct of the parties gave rise to an implied in fact contract in this case:

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> Once Version 1.0 had reached the critical design review, CKI was encouraged by Air Force personnel to enhance the program. The understanding was that if CKI did enhance Version 1.0, it would be paid for the follow on effort. This understanding is evidenced by the efforts of Mr. Sal Mascorro to get Versions 1.1 and 1.2 under contract. Both parties intended to contract for the enhancement to Version 1.0. The Air Force offered to pay CKI approximately $192,000 for its software design and development of Versions 1.1 and 1.2 which CKI accepted. In fact, Version 1.0 was never installed in any YZ computer, but rather the Air Force waited until Version 1.1 was completed and then installed that software. A meeting of the minds with respect to Versions 1.1 and 1.2 existed between CKI and [the Government] which is evident from the conduct of both parties between December 1987 and October 1988. The conduct of both appellant and [the Government] clearly establishes a mutuality of intent to contract.

(App. br. at 8)

The record before us does not support appellant's version of events. When the critical design review was conducted in September 1987, to establish the baseline for the change management system, the details of the CMS still needed corrections. What appellant has designated as "Version 1.0" of the CMS was required to incorporate the corrections agreed upon at the CDR in order to satisfy the requirements of Task Order 87-02. There is no credible evidence of any agreement that Choe-Kelly would make and the Government would pay for "enhancements" to a system whose details had not yet been approved and we conclude that any encouragement Air Force personnel may have given Choe-Kelly, prior to February 1988, would have related to the scope of Task Order 87-02, which Choe-Kelly was performing without the benefit of formal contractual coverage. (Findings 7, 8, 15)

Moreover, when Choe-Kelly submitted a version description document and preliminary user's manual for "Version 1.0" of the CMS at the end of November 1987 a number of deficiencies still remained in the system and needed to be corrected. Those corrections were accomplished and reflected in what appellant submitted in February 1988 as "Version 1.1" of the CMS, the documentation for which expressly referenced contract 0097. For the most part, Choe-Kelly's "Version 1.1" was simply a corrected version of the CMS that was within the scope of Task Order 87-02. However, "Version 1.1" did include a few out-of-scope changes. (Findings 10, 13, 19-21).

Appellant focuses on the actions and "efforts of Mr. Sal Mascorro to get Versions 1.1 and 1.2 under contract" to prove the existence of the alleged implied agreement and to establish its terms. However, the behavior of Mr. Mascorro is still not enough to establish an implied in fact contract. For purposes of our decision we assume that Choe-Kelly did not intend the out-of-scope changes reflected in "Version 1.2" to be voluntary or gratuitous, even though we might draw a contrary inference from the record (see finding 22). We also assume, although it has not been proven, that Mr. Mascorro's conduct went so far as to amount to a promise on which Choe-Kelly actually relied.

The elements of an implied in fact contract include:

> 1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance [and, w]hen the United States is a party, ... [4)] the Government representative "whose conduct is relied upon must have actual authority to bind the Government in contract."

City of El Centro v. United States [37 CCF ¶ 76,044], 922 F.2d 816, 820 (Fed Cir. 1990) (citations omitted), *cert. denied*, — U.S. —, 111 S. Ct. 2851 (1991).

Appellant "admits that Mr. Mascorro did not have the actual authority to bind the Government" and the record establishes that appellant knew that Mr. Mascorro was not a contracting officer and had no authority to obligate the Government. (App. br. at 9; finding 25) However, appellant argues that Mr. Mascorro's actions (and whatever unauthorized promises he may have made) were "ratified by the Government," specifically by "the inactions of Donald Trenner, a[n ASD] contracting officer." (App. br. at 9) This argument is without merit. To the contrary, the record shows that Mr. Trenner directly vetoed one of Mr. Mascorro's several attempts to obtain sole source contractual coverage for Choe-Kelly and there is no evidence that any ASD contracting officials had reason to know about Choe-Kelly's performance of a so-called "follow-on effort." (Findings 11, 14, 32-33, 39-40).

Similarly without merit is appellant's alternative argument that whatever understanding was reached between Choe-Kelly and Mr. Mascorro was "institutionally ratified," in the sense that "the agency received

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a direct benefit from the [claimant] based upon a promise of payment," despite the promising official's lack of authority to bind the Government. (App. br. at 9). The record does not establish the Government's receipt of any benefit from Choe-Kelly's extra-contractual efforts or, specifically, that the "Version 1.2" materials left with the YZWC for evaluation (and eventually returned to an individual cloaked with inherent agency authority by Choe-Kelly) were used for any other beneficial purpose. (Findings 34-35, 41-42). Nor do we consider authoritative the decision on which appellant mainly relies to support its "institutional ratification" theory. *See City of El Centro v. United States* [37 CCF ¶ 76,044], 17 Cl. Ct. 794 (1989), *rev'd* 922 F.2d 816 (Fed. Cir. 1990).

This appeal is based on an alleged implied in fact contract for the procurement of property or services entered into between an executive agency (the Air Force) and Choe-Kelly sometime after 1987, to which the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*, would apply automatically. 41 U.S.C. § 602(a). Appellant has failed to prove the elements of an implied in fact contract in this case. Therefore, we hold that no contract for the performance of work beyond the scope of Task Order 87-02 ever came into existence.

This Board's jurisdiction under the Contract Disputes Act is quite broad and extends to "decid[ing] any appeal from a decision [including a "deemed" decision] of a contracting officer ... *relative to a contract made by its agency.*" 41 U.S.C. § 607(d)(1) (emphasis added). Since no contract ever came into existence, we lack jurisdiction to grant any relief under this appeal.

Accordingly, the appeal is dismissed with prejudice for lack of subject matter jurisdiction.

[¶ 26,432] Precision Dynamics, Inc.

ASBCA Nos. 41360, 41361, 41362, 41363, 41364, 42955, October 13, 1993. Contract Nos. N00102-88-C-0116, N00102-88-C-0115, N00102-88-C-0102, N00102-87-D-0013, N00102-86-D-3220, N00102-88-C-0105.

Procedure, Boards—Discovery—Motions to Compel.—A government motion to compel discovery or, alternatively, to dismiss the appeal was denied, despite its contention that the contractor's default was not traceable to any government-caused delays, because the board determined that there was nothing further to compel. The contractor made a reasonable search in response to the subpoena and cooperated with the government's investigation of the matter. Moreover, the government had not pursued other available means of gaining access to much of the information sought from the contractor.

For the appellant: Shain, Schaffer & Rafanello, P.C., Bernardsville, New Jersey, by Jeffrey A. Donner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Dennis G. LaPointe, Trial Attorney, Portsmouth Naval Shipyard, Portsmouth, New Hampshire.

Before REITER, RUBERRY, and SPECTOR, Administrative Judges.

REITER, Administrative Judge: The Government's Motion to Compel or Dismiss was docketed on 28 September 1993. Discovery on this appeal commenced in September 1990. On 20 July 1993, the Government caused a discovery subpoena, returnable 20 August 1993, to be issued to appellant's President and the Custodian of the Records for certain records the Government feels appellant has in its possession, or under its control.

The subpoena in essence requested copies of:

1. Deposit slips covering deposited government checks which checks would evidence that the Government was paying twice for the same work.

2. The contents of a folder maintained for appellant by a Patricia Halosz containing information relating to the above duplicate payments.

3. Bank statements of an unregistered company, Greengate Development Company, for the 5 year period 1986-91. Appellant's president and members of his family allegedly have had an interest in this company during that 5 year period of time.

4. The work papers of appellant's accountants generated during the 5 year period, 1986-91.

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The thinking behind these discovery requests by the Government is that appellant's default was not traceable to any Government caused or excusable delays as appellant alleges, but that appellant's president was syphoning off appellant's assets which in turn resulted in appellant's inability to properly conduct its business.

Appellant's timely response to the discovery request was to the following effect:

1. That it had delivered, and was in its response delivering, all of the copies of deposit slips it could find and possessed.

2. It had no awareness of any folder as described in the subpoena and kept by Ms. Halosz.

3. It was not in possession or control of any bank statements relating to Greengate Development Company for the period 1986-91.

4. It had through its accountants provided all existing work papers for the period 1986-91 which its accountant could locate.

After a review of the Government's Motion and after a telephone conference with the Government's and appellant's attorneys on 6 October 1993 on this matter, the Board is unconvinced that there is anything further to compel.

Appellant has made a reasonable search in response to the subpoena and has cooperated with the U.S. Attorney's Office in that office's investigation of one of appellant's employees allegedly involved in the double payments. Although the Government has articulated suspicions that this may not be the case, we are unconvinced based on what has been presented that those suspicions are anything more than suspicions.

Obviously, if those suspicions were true, Federal felonies were committed; but in this connection, the Government has acknowledged that the matter has been brought to the attention of the U.S. Attorney, and that no active investigation is being pursued by that office into this matter.

Also, we note that the Government has alternate means of gaining access to much of the information and documents sought from appellant, but to our knowledge has not pursued them.

In light of all of the above, the Government's Motion to Compel or in the alternative to Dismiss is denied.

[¶ 26,433] Davey Compressor Company

ASBCA Nos. 38671, 38672, October 18, 1993. Contract Nos. F09603-85-C-1482, F09603-85-C-0536.

Delays—Causation—Concurrent Causes.—Under contracts for portable air compressors, a contractor was not entitled to an equitable adjustment for a delay allegedly caused by the government's rejection of impregnated oil sump castings, because any delay was concurrent with the much larger delay experienced by the contractor in connection with its suppliers.

Acceptance of Performance—Rejection of Nonconforming Items—Responsibility for Nonconformance.—Under contracts for portable air compressors, a contractor was not entitled to an equitable adjustment for the government's allegedly improper rejection of the contractor's cylinders, because the cylinders, which contained rust and oil in violation of the specifications, were properly rejected. The cylinder supplier conceded that the problem resulted from inadequate neutralization and improper plating, rather than from any government cause. The contractor failed to show that it was impossible to provide rust-free cylinders or to show that government-prescribed testing procedures damaged the cylinders or the compressor unit or contributed to the rust.

Quality—Compliance with Specifications—Testing.—Under contracts for portable air compressors that specified noise emission testing but remained silent as to how to read and interpret the sound meter, a contractor was not entitled to an equitable adjustment for allegedly improper testing, because the government's interpretation reasonably ensured that contract requirements were met. The contractor failed to show that the consistent use of low readings would ensure that the contract's not-to-exceed noise standard would be met, whereas the government's interpretation reasonably fulfilled the specifications' purpose

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regarding the noise standard. Moreover, the government's interpretation was supported by an Environmental Protection Agency circular that required use of high readings in testing compressors. The contractor failed to prove its contention that the circular applied only to nonsteady noise compressors, rather than to the contractor's steady noise compressors or to show that its standard practice was to use low meter readings in testing.

Acceptance of Performance—Rejection of Nonconforming Items—Basis of Rejection.—Under contracts for portable air compressors, a contractor was not entitled to an equitable adjustment for the government's allegedly improper rejection of reworked mufflers, because it did not show that the rejected reworked mufflers were conforming. The contractor's receiving inspection report indicated that the mufflers had exposed edges and that corrective action was required. The contractor's inspection staff, rather than the government, required the contractor to use trim rings to correct the mufflers.

Delays—Causation—Concurrent Delays.—Under a contract for portable air compressors, a contractor was not entitled to recover for the government's improper reliance on a nonmandatory painting standard in rejecting castings, despite the fact that this government action affected production for one month, because the contractor was precluded from shipping during this period as a result of its inability to meet the painting specifications. The government contended that the defectively painted units did not affect overall function. However, the government was entitled to receive what it paid for and to reject the oversprayed units. The contractor did not show that compliance was impossible.

For the appellant: Thompson, Hine & Flory, Dayton, Ohio, by Donald J. Kinlin. For the government: Donald J. Srail, Trial Attorney, Defense Contract Management Area Office, Cleveland (DLA).

Before DELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

DELMAN, Administrative Judge: Appellant, Davey Compressor Company, seeks damages for delay allegedly caused by the Government under the above captioned contracts. Jurisdiction lies under the Contract Disputes Act (CDA), 41 U.S.C. § § 601 *et seq.* A hearing was held on entitlement and quantum. We deny the appeals.

ASBCA No. 38671

FINDINGS OF FACT

Contract No. F09603-85-C-1482 ("1482")

1. Contract 1482, a multi-year contract, was awarded to appellant on 11 July 1985. Appellant was to deliver portable air compressors, type MC-1A, on a monthly basis in accordance with a prescribed contract schedule. The Government also reserved the right to exercise option quantities of compressors. It appears that appellant was obligated to deliver over 1,100 compressors over the life of this contract, including those exercised under option (R4, tabs 50, 65).

2. The contract contained the standard FAR clause entitled *Government Delay of Work* (Apr 1984), FAR 52.212-15, which states in part as follows:

(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. *However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.* [Emphasis added]

3. The contract required that appellant provide a certain number of compressors commencing December 1985, and monthly thereafter. Appellant failed to deliver the prescribed monthly quantities. By letter to the Government dated 30 April 1986, appellant acknowledged that it was delinquent and asked for a revised delivery schedule.

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Appellant stated that several factors contributed to shipment delay. The first involved a post-award survey which was not accomplished until 15 November 1985. The second involved a claimed delay in the Government's approval of an engineering change proposal (ECP), telexed on 10 December 1985, but not reduced to a contract modification until 6 January 1986. This seems to refer to ECP Nos. 1482-1 through 1482-5 under contract Modification P00002. These ECPs updated the drawing and data package, ostensibly at appellant's request. Appellant failed to adduce any credible evidence linking these events to Government fault and to production delay.

4. Appellant's 30 April letter also acknowledged that its oil sump casting supplier went out of business, and that appellant's new supplier provided inferior product. According to appellant, this problem halted production about four weeks. We find that this was the problem which materially contributed to production delay during this period.

5. As far as we can tell, the Government neither granted nor denied appellant's request for a modification of schedule at this time.

6. By letter to the Government dated 23 June 1986, appellant reported further schedule slippage, and sought a further delivery schedule revision from that requested in April. Appellant cited the "major problem" as a receipt of a bad lot (500 units) of compressor oil sump castings. Appellant offered a total contract price reduction of $10,465 in return for the new delivery schedule. Appellant did not assert any Government responsibility for these delays.

7. The Government accepted appellant's offer. The parties executed Modification A00002 in late Summer 1986, which extended the delivery schedule in consideration for a contract price reduction of $10,465. The contract modification contained the following (R4, tab 4):

> This modification represents the final agreement of the parties. Both the contractor and the Government waive all claims against the other, either expressed or implied, which may be attributed to the adjustments made by this modification.

Impregnation of Oil Sump Castings

8. When appellant received oil sump castings from suppliers that contained major leaks or other defects, it rejected them. This was consistent with the contract requirement that porosity in castings was a cause for rejection. See Note on Drawing No. 50651 (R4, tab 20). However if the castings were found to have only minute leaks, appellant sought to repair them by impregnation. Impregnation is a process whereby polyester resin is forced into the molecular structure of a casting, thereby effectively sealing the casting. Appellant had used the impregnation technique since 1974 on Government contracts without Government objection (tr. 155, 162). As far as the record shows, use of impregnation, if performed properly, does not affect the form, fit or function of castings or the parts so derived. The Government's quality assurance representative (QAR) characterized a properly impregnated casting as a "minor" nonconformity (tr. 665). The contract neither prohibited nor permitted impregnation of oil sump castings.

9. Based on this record, we find that impregnation is a legitimate repair technique for the sealing of minute casting leaks and was allowable under this contract, assuming, of course, that the castings so impregnated were effectively sealed and otherwise met contract requirements.

10. It was appellant's practice to impregnate only a small percentage of the castings it received—those which evidenced minute leaks. Mr. Lang, appellant's quality control manager, estimated that approximately one percent of appellant's castings were impregnated (tr. 162). The record does not provide us with the total number of castings appellant had on hand in the summer of 1986. We do know, however, that appellant obtained castings from suppliers in lots as large as 500 (finding 6).

11. On 14 July 1986, the QAR issued a Quality Deficiency Record (QDR) upon learning that a group of 52 castings were impregnated and were to be placed in appellant's inventory. The QAR determined, *inter alia,* that the contract did not permit the impregnation of oil sump castings. It does not appear that the Government permitted the appellant to use any impregnated oil sump castings for the compressors under this contract.

12. Appellant disagreed with the Government's position, but returned the impregnated castings to the vendor. It received a credit from the vendor in the amount of $1,631 (R4, tab 5).

13. Appellant did not adduce any evidence as to how the Government's rejection of impregnated castings impacted upon its production line or shipment schedule. Appellant's vice president was unable to ascribe any particular delay to this dispute

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(tr. 65-66). Appellant's quality control manager stated there was "some" delay, but was unable to describe it or quantify it (tr. 162-63).

Rust in Cylinders

14. An air purifier cylinder, also known as a dehydrator cylinder, was a component of the portable compressor under this contract. Insofar as pertinent, Drawing No. 65353, "Assembly Dehydrator Cylinder," stated as follows:

> Dehydrator Cylinder Aero Dri 82990/82991 Conforms to MIL-C-83959.

"Aero-Dri," a division of appellant, supplied this cylinder to appellant for this contract. Insofar as pertinent, MIL-C-83959, "Cylinder, Air Purifier," provided that cylinder components, during and after assembly, shall be free from corrosion products, oil, grease or other contamination or foreign matter. MIL-C-83959, para. 4.7.6.1.

15. On 30 September 1987, the QAR issued QDR 87-27, which documented a rejection of portable compressors. This report indicated that "Inspection showed rust in the air purifier cylinders and oil (P-10) applied by Davey personnel following 'rework' of the rust." According to the QDR, this was a violation of MIL-C-83959, para. 4.7.6.1 and other provisions. Appellant conceded the presence of rust in the cylinders (tr. 165). It did not contend that MIL-C-83959 did not apply to the contract. However, appellant did not acknowledge that the presence of rust was its responsibility.

16. By letter to appellant dated 9 October 1987, the president of Aero-Dri stated as follows regarding QDR 87-27 (R4, tab 48):

> The remaining 91 ea 82992 cylinders at Aero-Dri which were plated in July of 1987 *(the same batch as your cylinders)* have been inspected, *29 of these cylinders have rust present in the bottom or on the side.*
>
> *The cause of this rust is, inadequate neutralization and rinsing of the acid bath process or improper plating itself.*
>
> Our incoming inspection would not discover or suspect any problem at this time since the gold chromate conversion and the time frame would not be long enough for rust to appear.
>
> The 29 rusty cylinders were returned to the plater and corrective action has been implemented to insure that there is not a reoccurrence of this problem.
>
> Request you return all of your rusty 82992 cylinders (only) to Aero-Dri for corrective action .... [Emphasis added]

Based upon the above, it is clear that not all cylinders contained rust. Those that did were the product of faulty workmanship. These cylinders were plated to retard rust (tr. 80). Improper plating did not adequately serve that purpose.

17. On 23 October 1987, appellant sought the Government's approval of a rework procedure for cylinders "where plating is very thin" and "indications of rust or corrosion may appear" (R4, tab 15). This rework procedure included cleaning the rusted area with a wire brush, washing the affected area, and coating it with a two-part epoxy.

18. On 10 November 1987, the Government approved appellant's rework proposal (R4, tab 17). The parties executed Modification P00010 in late 1987 to incorporate the rework procedure. The parties agreed that "there will be no change in contract price or delivery as a result of this supplemental agreement" (R4, tab 49).

19. On or about 24 August 1988, appellant submitted a claim to the contracting officer in the amount of $436,301 for delays in compressor shipments due to the wrongful actions of the QAR, specifically the QDRs referenced herein. A claim for scrapped impregnated castings was also included. Appellant's claim was certified by Mr. Carl J. Wurtz, appellant's vice president for finance. By contracting officer's decision dated 1 March 1989, the Government denied the claim, and appellant took a timely appeal to this Board.

20. On the eve of trial, the Government filed a motion to "dismiss the appeal, or in the alternative, a motion in limine." The Government sought dismissal on the grounds that Mr. Wurtz was not an appropriate certifying official; alternatively, it sought to prohibit appellant from seeking more money than previously claimed. The Board deferred ruling on the Government's motion and the parties proceeded to hearing.[1]

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[1] After hearing evidence on the Government's motion and on the merits, and after briefing, the Board held that Mr. Wurtz was not an appropriate certifying official and dismissed the appeal without prejudice. *Davey Compressor Company*, ASBCA Nos. 38671, 38672, 92-1 BCA 24,460. The Federal Circuit reversed, *Davey Compressor Company v. Cheney*, 985 F.2d 584 (Archer, dissenting) (table), and remanded to the Board for consideration of the merits.

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DECISION

Impregnation of Oil Sump Castings

While we have held that appellant had the right to cure minute leaks in castings by impregnation, appellant has failed to establish any nexus between the Government's prohibition of impregnation and compressor shipment delay.

Plainly, not all of appellant's castings were impregnated or needed impregnation. Appellant's quality manager testified that it was his experience that approximately one percent of castings were impregnated (finding 10). The QAR questioned 52 impregnated castings (finding 11). However appellant purchased hundreds of castings (finding 6). Appellant's own witnesses were equivocal about the nature and magnitude of any delay due to the impregnation issue (finding 13).

On the other hand, the record reflects that appellant's original sump casting supplier went out of business and that the new supplier was not providing satisfactory product (findings 4, 6). It was this fact that caused appellant delay. Appellant requested a delivery extension because of delay and offered the Government a reduction in contract price in return—the parties executed a contract modification to embody the Government's acceptance of these terms. The aforementioned problem occurred in the same general time frame as the Government's rejection of the impregnated castings. Hence, even assuming, *arguendo,* that some undefined amount of delay resulted from the Government's rejection of the impregnated castings, the delay was concurrent with the much larger delay that appellant was experiencing with its suppliers. These "concurrent delays" preclude appellant from recovering delay damages under the contract. See *Government Delay of Work* clause (finding 2). *Perma-Cal Corporation,* ASBCA No. 42155, 91-2 BCA ¶ 24,034 at 120,320.

As for appellant's claimed cost to scrap impregnated castings, appellant failed to provide any credible evidence supporting this cost. To the contrary, the record reflects that appellant returned the castings for a credit (finding 12).

For reasons stated, appellant's claim is denied.

The Rusty Cylinders

We hear appellant to argue that the Government improperly rejected appellant's cylinders. We find no merit to this contention. When presented to the Government's inspector for acceptance, the cylinders contained rust and oil, in violation of the specifications. The supplier of the cylinder, a division of Davey, conceded the problem and attributed it to inadequate neutralization and improper plating, neither of which was shown to be attributable to the Government. We are unpersuaded that it was impossible to provide a rust-free cylinder—not all of appellant's cylinders were in this condition (finding 16).

Appellant contends that it should be held blameless for the rusty cylinders because, it is argued, the cylinders became rusty only after being tested on the compressor by appellant and hence became "used" components that were no longer appellant's responsibility (brief at 57). This novel argument is belied by the facts. Rust was found in cylinders while still in the supplier's hands—the ones that were inspected by the Government were from that same batch (finding 16). Assuming, for argument's sake, that rust first became evident only through the testing of the unit, we fail to see how this would be a boon to appellant's cause. Appellant does not suggest, let alone prove, that Government-prescribed testing procedures damaged the cylinder or the compressor unit. It appears that the compressor unit, along with its cylinders, was simply operated in the manner intended. We have not been persuaded that the mere testing of the unit will automatically generate visible rust in the cylinders. The presence of such rust at this early juncture speaks volumes about the overall poor quality of the workmanship of these parts.

Moreover, appellant proposed to the Government a rework procedure for those cylinders with thin plating and indications of rust, and signed a contract modification which incorporated these procedures. No mention was made of design error or Government responsibility at the time. No mention was made of the inapplicability of MIL-C-83959. Appellant characterized the need for these additional steps as "rework." In view of the foregoing, we must conclude that appellant's problem with rusty cylinders was not of the Government's making.

Appellant's claim is denied.

ASBCA No. 38672

FINDINGS OF FACT

Contract No. F09603-85-C-0536 ("0536")

21. The Government awarded multi-year Contract 0536 to appellant on 8 March 1985. Appellant was to provide a certain number

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of portable air compressors, diesel engine driven, type MC-7, in accordance with a contractually prescribed schedule. The contract required appellant to provide and test a first article, with delivery of production units to begin after the Government's approval of first article testing.

22. Insofar as pertinent, the contract contained Clause F-29, *Government Delay of Work* (Apr 1984), FAR 52.212-15, *supra.*

23. The Government approved the first article, and shipment of units was to begin in February 1986. Appellant began shipment in April 1986 (supp. R4, tab 14). This delay was attributable, in material part, to the dispute between the parties regarding the testing of compressors for noise emission, addressed below.

Compressor Noise Emission Test

24. Amendment No. 0003 to the solicitation provided, *inter alia,* that "[a] noise emission test shall be conducted on the compressor unit in accordance with paragraph 204.54 of Environmental Protection Agency (EPA) Title 40, CFR, Part 204 Subpart B." Amendment No. 0003 further provided that "[t]he exterior sound level produced by the compressor unit *shall not exceed* the noise limits established by the EPA in effect on the date of manufacture." [Emphasis added)

25. The "noise limit" established by the EPA for portable air compressors, effective on the date of the manufacture of the units in question, was contained in 40 C.F.R. § 204.52(a), which specified that "[e]ffective January 1, 1978, portable air compressors with maximum rated capacity of less than or equal to 250 cubic feet per minute (cfm) shall not produce an average sound level in excess of 76 dBA when measured and evaluated according to the methodology provided by this regulation." (R4, tab 54) The air compressor at issue here was a 125 cfm rated compressor. (R4, tab 1, at purchase description paragraph 1.1) We find that appellant's compressors were obligated to meet this EPA noise emission standard under this contract.

26. Section 204.54 of the regulations, to which Amendment A00003 referred, contained the noise emission testing procedures for the unit, including information on test site description, measurement equipment, compressor operation, test conditions, microphone locations, and the calculation of average sound level. A sound level meter conforming to prescribed industry standards was to measure noise emission from each of five microphone locations around the unit. The unit was to be tested in an open area (outdoors). To assure test accuracy, background sound level had to be materially less than that of the unit, 40 C.F.R. § 204.54(e)(4). Such background noise would then become a nonfactor in the test result.

27. The sound level meter used by appellant for this contract had a digital readout. When appellant tested an air compressor, the readout flashed or fluctuated constantly from one decibel figure to the next within a given range, but never came to rest upon any particular number (tr. 602).

28. When the QAR witnessed noise emission testing of units in March 1986, he noticed that at each microphone location, the Davey test technician was consistently recording the low decibel reading from the range of numbers which flashed on the digital readout. The QAR disagreed with this technique; he believed that Davey should have recorded the high decibel reading at each location (tr. 627-28). The QAR called this to appellant's attention, but appellant maintained that its use of the low reading was appropriate. As far as we can tell, the QAR did not accept any compressors for shipment that were tested by appellant in this manner.

29. Neither the contract, nor the EPA regulation expressly states whether sound meter measurements were to be based upon the highest or lowest reading shown on the meter at each microphone location.

30. On 6 March 1986, Davey requested removal of EPA noise emission requirements from contract 0536. Davey had estimated a savings of $254.25 per unit (approximately $205,000.00 total contract savings) if its request was granted. The request was forwarded to the buying activity and was disapproved. (R4, tabs 34 through 37; tr. 200-01)

31. The QAR contacted EPA regarding sound meter readings. By letter dated 2 April 1986, the EPA confirmed the Government's interpretation, that is, that the high reading should be taken during the test, with care to exclude significant extraneous background noise. The EPA stated that to use the lowest reading "is inconsistent with any reasonable interpretation of the regulatory standard, which specifies a not-to-exceed sound level." (R4, tab 13).

32. The EPA also enclosed EPA Noise Advisory Circular No. 3, "Portable Air Compressors," for the Government's information. EPA circulars provide interested parties with EPA's interpretation of

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its regulations (see EPA Circular No. 1, R4, tab 14). These circulars were not published in the Federal Register. However, EPA Circular No. 3, issued in 1978, had been distributed to the industry; appellant had a copy of this circular in its files at the time that these units were tested (tr. 198). Circular No. 3 clearly stated that high decibel readings should be recorded for purposes of determining compliance of the units with noise emission standards, and that care should be taken to void the test if impacted by identifiable extraneous noise sources, such as trains, airplanes or noisy equipment such as chain saws (R4, tab 16).

33. After obtaining this input from EPA, the QAR reiterated the Government's position that compliance with EPA noise emission standards required that appellant test the compressors using the high readings measured at each microphone location. The QAR refused to accept units unless tested in this manner (tr. 187).

34. Appellant continued to dispute the Government's interpretation (tr. 598). However in order to keep the contract going, appellant began testing the units using the high readings, as required by the Government, and added noise-dampening insulation where necessary to meet the decibel standard. The QAR began accepting units so tested on or about 17 April 1986.

35. At the hearing, appellant's test technician testified that it was his practice to use the low readings on the sound meter to determine acceptable noise levels. He used the low readings because of the intermittent background noise at the testing site (tr. 122). However, Circular No. 3 provided that a particular test should be voided if variations were caused by identifiable extraneous noise sources; it did not authorize use of low readings under those circumstances (R4, tab 16). Appellant's test technician had never seen Circular No. 3 (tr. 124).

36. Appellant's test technician also stated that his test method was used to test and pass the first article under this contract. The QAR was present at first article testing. However, the QAR stated, and we find, that he did not observe the meter-reading method employed by appellant at that time (tr. 595).

37. There are letters of record from appellant's vice president of engineering to EPA in 1989 which take the position that Circular No. 3 does not apply to appellant's compressors, since the circular applies only to "nonsteady state" noise compressors, but appellant's compressors are of the axial vane type that produce only "steady noise." This person did not testify, nor did appellant proffer any other witness who was qualified at trial to give expert opinion in this area. Moreover it is interesting to note that in appellant's letter to EPA dated 26 May 1989, it did not seek to support its practice of using low readings to measure noise emission compliance, but rather proposed that "data at each test point be recorded to the nearest whole number, and averaged to the nearest 0.5 dba" (supp. 84, tab 6). As far as this record shows, EPA did not accept appellant's proposal, nor did it accept appellant's argument that its compressors were not subject to Circular No. 3.

38. The record also contains evidence which contradicts appellant's position that appellant's compressors generated "steady noise." The QAR observed, and we find, that the readout did not remain routinely flat or steady—rather, "the entire time it's going up and down, and when [the Davey test technician] would stop to record the number it's still going up and down and I had seen numbers that were higher than that" (tr. 661). The fluctuation was constant, even in the absence of extraneous noise (tr. 602).

Muffler Workmanship

39. Insofar as pertinent, the purchase description for the portable compressor set out the following workmanship standard (R4, tab 1):

> 3.20.2 Metal Fabrication.... External surfaces and edges of sheet, plate and structural members shall be free from burrs, slivers, and sharp projections.

40. A muffler was a component of the compressor unit. Appellant obtained mufflers from Nelson Muffler Corporation. When appellant received mufflers from Nelson, they were inspected and found not to conform to contract requirements. On 11 February 1986, appellant rejected the mufflers and returned them to Nelson (R4, tab 67).

41. Representatives from appellant and Nelson met at Nelson's plant to discuss muffler construction problems. Nelson redesigned and reworked the mufflers. The evidence does not indicate that this effort was due to the fault of the Government.

42. It appears that the QAR reviewed the reworked mufflers in late March 1986. He determined, and we find, that they still contained jagged edges (tr. 642). The QAR advised appellant that the mufflers failed to meet workmanship standards and suggested that appellant apply for a waiver of the con-

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tract's workmanship provision above (R4, tab 17). Appellant did not contest the QAR's findings in writing at this time.

43. Appellant requested that the Government waive the above workmanship standards in the contract (R4, tab 30). The Government declined to do so.

44. On 8 April 1986, appellant received an additional delivery of mufflers from Nelson. Appellant's receiving report indicated that "All pieces has [sic] exposed welded edges." Appellant's proposed corrective action was indicated as follows (R4, tab 75):

> Davey to tack weld trim rings to all mufflers in house prior to use. Vendor to supply all future mufflers with trim rings.

The trim rings provided the mufflers with a smooth finish. This fix was acceptable to the QAR (R4, tab 32).

Paint Overspray

45. The contract required that each compressor, along with its attached frame, be painted. The purchase description at paragraph 3.15(d) specified that, "The total thickness of the primer and top coat shall be between 2.7 and 3.5 mills [sic]" (R4, tab 1).

46. On or about 28 September 1987, appellant presented 12 compressors to the Government for inspection and acceptance. The QAR found that "paint thickness on frames checked 5.0 or 1.5 mils over max." This exceeded contract requirements by over 40 percent. The QAR rejected the lot, and issued QDR 87-25 to document these findings (R4, tab 8).

47. On or about 30 September 1987, appellant proffered another 10 compressors. Again, the paint on the compressor frames was significantly thicker than prescribed by the contract—1.5 to 2.5 mils over the maximum allowed levels. The QAR rejected this lot as well, issuing QDR 87-26 for purposes of documentation. (R4, tab 9)

48. Appellant replied to these QDRs in writing. Appellant did not contest the Government's findings. By memorandum dated 9 October 1987, appellant indicated that the paint deficiency was caused by overspray from the painting of various assemblies, that this occurrence was an "isolated incident particular to this type of unit," and that "all future units will be masked in affected areas." Appellant also stated that it had submitted a request for the waiver of this contract requirement. (R4, tab 10)

49. By memorandum to the QAR dated 21 October 1987, appellant provided additional information regarding paint overspray (R4, tab 50):

> Some frames required touch-up at Davey due to damage during shipment. This also resulted in heavy paint on frames.

Appellant concluded with the commitment that:

> All future shipments received will be 100% inspected for proper Mil thickness. Any frames on future shipments which do not meet the paint thickness requirements will be returned to the Vendor.

We find that appellant's failure to meet contract paint requirements was within its control or within the control of its vendors, and was appellant's responsibility under this contract.

50. On or about 1 October 1987, appellant submitted Request for Deviation No. D0536-1 to eliminate or modify the contract's paint thickness requirement. Appellant indicated that production was currently stopped pending action on this request. The Government, through the buying activity, approved appellant's request for deviation on or about 21 October 1987, so long as it involved no cost to the Government (R4, tab 49). This deviation was eventually incorporated into a bilateral contract modification, P00012. The contract modification stated that "[t]here will be no change in price or delivery as a result of this modification."

51. In late October 1987, the QAR resumed acceptance of compressor units (see DD250's, R4, tab 61).

ASTM-A159

52. In late September 1987, the QAR conducted a "procedures review" under the contract, in which he reviewed certifications of the chemical content of certain gray iron castings which appellant had received from its vendors. The QAR noted that certain castings were represented as being over the maximum "carbon content" permitted by ASTM-A159, which was incorporated into the contract. The QAR also noted that a report which detailed this information was not initialed by Davey's quality engineer. Davey's internal inspection system, per MIL-I-45208, required initialing of the report by a quality engineer to assure acceptability of the item in conformity with contract requirements. In lieu of the report being signed by a quality engineer, the report was signed or initialed by appellant's quality control receiving inspector supervisor (tr. 142). The QAR issued QDR 87-24 dated 21 September 1987 specifying these nonconformities. (R4, tab 20)

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53. Appellant did not contest the fact that the wrong person signed the certification report. As far as this record shows, this appears to have been an isolated occurrence which was not shown to have had any impact upon appellant's compressor shipments.

54. In reply to the QDR, appellant stated, and we find, that chemical composition requirements were not mandatorily prescribed in the specifications for these castings. There is a section in ASTM-A159 which talks to "chemical composition," but that is located in the appendix of the specification, entitled "Nonmandatory Information" (R4, tab 19). Appellant asked the QAR to retract the QDR.

55. The QAR did not retract the QDB, and advised appellant to seek clarification from higher authority on the ASTM-A159 issue (R4, tab 21). The QAR stated that he would not accept any units until the matter had been resolved. On or about 28 September 1987, appellant submitted Waiver No. W0536-2 for the castings in issue. The Government approved the waiver on or about 15 October 1987 (R4, tab 51). We understand the import of this waiver as the Government's acknowledgement that any so-called carbon content "deviations" from ASTM-A159 would not be grounds for rejection. Shipments of compressor units resumed in late October 1987.

56. Appellant's executive vice president testified, and we find that appellant was delayed approximately one month due to the ASTM-A159 dispute (tr. 195). Appellant's shipping figures show that shipments went down significantly in September 1987, but rebounded by the end of October 1987 (supp. R4, tab 14).

57. We also find that in the period in which appellant experienced shipping delay due to the ASTM-A159 dispute, it was also unable to ship any units due to their rejection for defective paint work (tr. 654).

58. On or about 24 August 1988, appellant submitted a claim to the contracting officer in the amount of $698,984 for delays in compressor shipments due to the wrongful actions of the QAR. This claim was certified by Mr. Carl J. Wurtz, appellant's vice president for finance. (R4, tab 6) By contracting officer's decision dated 1 March 1989, the Government denied appellant's claim, and appellant took a timely appeal to this Board.

59. On the eve of trial, the Government filed a motion to "dismiss this appeal, or in the alternative, a motion in limine." As was the case with ASBCA No. 38671, the Government sought dismissal on the grounds that Mr. Wurtz was not an appropriate certifying official; alternatively, it sought to prohibit appellant from seeking more money than previously claimed. The Board deferred ruling on the Government's motion and the parties proceeded to hearing.[1]

DECISION

Noise Emission Testing Standard

When the contracting parties dispute the use of a test that is unspecified in the contract, we typically seek to determine whether the unspecified test serves to reasonably measure contract compliance. If so, the test is a proper one. *Allegany Technology, Inc.*, ASBCA No. 18395, 74-1 BCA ¶ 10,487. See generally, Nash & Cibinic, *Federal Procurement Law*, Volume II (3rd Ed. 1980), at 1565 and cases cited. We would think that this principle should equally apply here. Where noise emission testing is specified, but the contract and regulations are silent as to how the sound meter is to be read or interpreted, we must determine which of the party's interpretations serves to reasonably insure that contract requirements are met.

Appellant's interpretation is not reasonable. Appellant has not shown that the consistent use of low readings, and concomitantly, the consistent disregard of all high readings (including those above the 76 decibel level), will serve to insure that the contract's not-to-exceed noise standard of 76 decibels will be met. On the other hand, this standard will be met through the recordation of high readings, in accordance with the Government's view, so long as extraneous noise factors are eliminated. The Government's interpretation reasonably fulfills the purpose of the specifications—to obtain units which, when operated, do not emit noise in excess of 76 decibels. Appellant's interpretation does not.

The reasonableness of the Government's position is supported by EPA Circular No. 3. The circular expressly required use of high

[1] After hearing evidence on the Government's motion and on the merits, and after briefing, the Board held that Mr. Wurtz was not an appropriate certifying official and dismissed the appeal without prejudice. *Davey Compressor Company*, ASBCA Nos. 38671, 38672, 92-1 BCA 24,460. The Federal Circuit reversed, *Davev Compressor Company v. Cheney*, 985 F.2d 584 (Archer, dissenting) (table), and remanded to the Board for consideration of the merits.

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readings in the test of portable air compressors. Appellant had a copy of the circular in its files, but for some unexplained reason, appellant's testing engineer had never seen it and did not follow it (finding 35).

We understand appellant to argue that Circular No. 3 does not apply to appellant's compressors, since appellant's compressors are of the type that produce only "steady noise" but the circular applies to only "nonsteady state" noise compressors. However, the circular does not state that it applies to nonsteady state noise compressors only. Appellant points to no pertinent technical exclusion in the EPA regulations, and we have found none. Appellant tried to get EPA to accept its position, but EPA did not do so (finding 37). Appellant failed to prove on this record that appellant's portable compressors were not subject to Circular No. 3.

Moreover, appellant's "steady state" noise thesis is belied by the record. The QAR observed that the readout did not remain relatively steady as appellant would have us believe—rather, it was going up and down "the entire time," and when appellant's testing engineer "would stop to record the number it's still going up and down" (finding 38).

We also hear appellant to argue that it should be allowed to use low meter readings because that was its standard practice. However, appellant failed to establish any course of dealing with the Government on the issue. Nor did it establish that the Government waived its interpretation through acceptance of the first article (finding 36).

We have reviewed appellant's other arguments, but find none of them persuasive. Appellant's claim is denied.

Muffler Workmanship

There is no question that the mufflers supplied to appellant in February 1986 did not conform to the workmanship standards of the contract—appellant rejected them and returned them to the supplier (finding 40). Appellant sought a waiver of the workmanship standard from the Government but it was denied.

We now hear appellant to argue that the reworked mufflers later submitted were conforming. However, appellant's own contemporaneous contract records are to the contrary. Appellant's receiving inspection report of 8 April 1986 makes clear that the mufflers received from Nelson had exposed welded edges and that corrective action—trim rings—was required (finding 44). It thus appears that the Government did not impose upon appellant the use of trim rings; appellant's own inspection staff did. In any event, it is clear that the mufflers required correction, even after rework. Appellant's claim related to muffler workmanship is denied.

ASTM-A159 and Paint Work Delays

While we agree that the QAR improperly relied upon a nonmandatory section of ASTM-A159 to reject certain castings, we have not been persuaded that this particular Government action caused appellant any recoverable delay damage under the contract. While this Government action impacted production and shipment during a one month period in September-October 1987 (finding 56), absent this delay, appellant was still precluded from shipping in this period due to its inability to meet the painting specifications. We have found that these painting defects were appellant's responsibility (findings 46 through 49). When two actions, one Government-caused and one contractor-caused, operate concurrently to produce delay, neither party may recover its delay damages. *Government Delay of Work* clause. *Perma-Cal Corporation, supra.*

We hear appellant to argue that it was wrongful for the QAR to reject the defectively painted units because the overspray did not encompass a substantial portion of the unit, and it did not affect its overall function. This is the time-worn refrain of Government contractors in defense of nonconforming work; it has been consistently rejected. Appellant signed this contract which contained this painting requirement. Appellant did not prove that compliance was impossible. Indeed, it appears that a watchful eye and some masking would have obviated the problem. It is well settled beyond the need for citation that the Government is entitled to receive what it pays for. If the Government was required to bicker with a contractor over the materiality or relevance of every instance of defective performance, rarely, if ever, would the Government—and the taxpayers—receive the benefit of their contractual bargain. The QAR had every right to insist that appellant comply with the painting specification. That the Government later agreed to waive future compliance was a gratuitous benefit to appellant; the waiver may not be used retroactively as a sword to attack the propriety of the specification, or the QAR's earlier enforcement thereof.

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CONCLUSION

As appellant has failed to establish entitlement to delay damages under either appeal, we need not address the quantum portion of the evidence. The Government's motion in limine, insofar as it sought to limit appellant's quantum recovery, is denied as moot. The appeals are denied.[2]

[¶ 26,434] King Construction Company

ASBCA Nos. 38303, 39170, 40096, September 30, 1993. Contract No. N62467-83-C-0224.

Value Engineering—Savings to Be Shared—Disposable End Items.—Under a runway repair contract, a contractor was entitled to share in the savings resulting from a value engineering change proposal that it initiated and paid for, despite the contracting officer's determination that the VECP merely reduced the quantities of the deliverable end items, which were the reconstructed runways, because the contractor's VECP developed an improved and cheaper method of reconstructing the runways without changing the deliverable end items. The VECP changed the cost and the base material rather than the deliverable end item quantities. The board also determined that the waiver language in the modifications related only to the amount of the savings, rather than to whether the contractor released its share of the amount.

Acceleration Claims—Measurement of Acceleration Period—Government Delay.—Under a runway reconstruction contract, a contractor was entitled to an equitable adjustment for part of its delay/acceleration dispute in connection with defective specifications and government indecision that prevented it from finishing the contract as early as it had contemplated when bidding; although a contract modification compensated the contractor for that delay, the contractor was entitled to compensation for the acceleration necessary to overcome the 10 days of prepumping delay caused by the government's indecision regarding its defective specifications.

Performance—Voluntary Work—Government Directions.—Under a runway reconstruction contract, a contractor was entitled to an equitable adjustment for installing ground rods and clamps and for rewiring defective lighting systems, despite the government's contention that the contractor voluntarily made the electrical repairs, because the record indicated that the government directed the rod and wiring work. The government failed to show that a site visit would have revealed that the underground wiring needed to be rewired or that the contractor had already been paid for the corrective work.

For the appellant: Mattox & Associates, P.C., Colorado Springs, Colorado, by Judith Ward Mattox and Chris M. Darby. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Richard A. Gallivan, Trial Attorney.

Before REITER, RUBERRY, and FREEMAN, Administrative Judges.

REITER, Administrative Judge: These appeals from a contracting officer's final decision dated 30 November 1989 concern three separate disputes. ASBCA No. 38303 involves a value engineering change proposal wherein the appellant claims it did not receive its full share of the savings. ASBCA No. 40096 is a delay/acceleration dispute wherein the appellant claims defective specifications and Government indecision cost appellant its ability to finish the contract as early as it had contemplated when it bid. At the core of both ASBCA No. 38303 and ASBCA No. 40096 is a differing site condition. ASBCA No. 39170 is essentially a pass

[2] In its reply brief, appellant objected to the Government's inclusion of a time line chart with its brief, characterizing the Government's use of the chart as an attempt to introduce evidence after the close of the evidentiary record. The Board does not consider the chart as evidence and will not strike it from the Government's brief. Appellant also objected to the the fact that the Government's brief contained argument related to an exhibit which appellant proffered but was not admitted into evidence. This proposed exhibit related to appellant's quantum claim. We have ignored the Government's argument, at appellant's request, but the issue is essentially moot, since the Board has not found it necessary to reach the quantum issue in the disposition of these appeals.

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through claim which appellant is sponsoring for its one-time electrical subcontractor.

The Government defends on the merits and raises the issue of accord and satisfaction. Only entitlement is at issue.

FINDINGS OF FACT

1. The appellant was low bidder under Contract N62467-83-C-0224 and received the notice of award on April 1985. The contract called for repair of two runways at Orange Grove Naval Air Station in Texas, *i.e.*, Runway 1-19 and Runway 13-31. The contract price was $4,700,000 which ultimately, through eleven (11) modifications, was raised to $5,407,832.27. The contract contained the standard clause for construction, including the Value Engineering-Construction clauses (APR 1984).

2. The repair work was to be completed by 19 November 1985 (within one hundred sixty-five (165) days of the starting date, 7 June 1985). Because the runways were critical to the Navy's training mission, no sooner starting date was possible. The appellant was told (orally) that time was of the essence, and no extensions could be granted. "Come hell or high water it had to be done on time." (Tr. 1/63) When appellant submitted its bid on 18 March 1985, it was convinced it could finish the contract in 52 to 37 days less than the 165 days allowed by the contract.

3. Although the contract was administered by a Resident Officer in Charge of Construction (ROICC) at Corpus Christi, Texas, change order authority rested with Naval Facilities Engineering Command (NAVFAC), Southern Division, Charleston, S.C. which was responsible for creating the contract specifications.

4. Section 01011 (GENERAL PARAGRAPHS) of the specifications described the work in general terms as follows:

> 3. The work includes reconstructing a portion of existing runways by removal of existing materials and the provision of new base and asphaltic concrete courses; repairing a portion of existing runways by sealing cracks and resurfacing with new asphaltic concrete binder and wearing courses; marking of pavement; rubber removal; provision of new Portland cement concrete and asphaltic concrete blast pavement around existing parking apron and ends of runways and taxiways; and replacing runway edge light circuits and modifying runway edge lights to provide circuit access . . . .

ASBCA NOS. 38303 AND 40096

5. The Government design required, among other things, tearing up portions of the runways, getting into the subgrade which had a high plasticity index (PI) and treating the mucky subgrade with lime to stabilize it before putting in the new runways.

6. The original (pre-1975) design to which the runways had been built bridged the subgrade with a base that would not sink. The runways were then put on top of that stable bridge-base. (Tr. 1/73-74) Additionally, runway 13-31 had its original design improved upon when it was repaired in 1975. This repair further strengthened its base.

7. Prior to bidding, appellant with the Navy's permission took 3 or 4 foot borings. (The Navy had taken no borings after 1971, and even these pre-1971 boring results were not provided the bidders by the Navy). The purpose in the appellant taking borings, as Mr. Alexander, the person who prepared appellant's bid stated, was not to challenge the Government's specifications but to see how much lime would be needed to control the subgrade plasticity. (Tr. 1/204; 2/14) Mr. Alexander testified as follows:

> I really wasn't looking for any conditions at the time; I just wanted to check the soil subgrades and find out what type of material was out there and what needed to be done . . . .
>
> (Tr. 1/44)
>
> [The borings] represent how much asphalt, how much base, how much clay, . . . was on the runways . . . and what type of material it was, and what type and what quantity of either lime or cement we would have to use to get what was required, . . .
>
> (Tr. 1/131)

8. Appellant hired as its independent Contract Quality Control (C.Q.C.) for this contract, W.P. Wills. Mr. Wills had been the original designer of the two Orange Grove runways and had done work on them in 1975 subsequent to designing them. Further, he had built runways all over the world. According to one of appellant's witnesses, Mr. Wills (also known as Sally) is noted for his talent, "He is the best there is"; and for his egocentricity, ". . . to Sally, nobody can design a runway except him . . . there is only one design that is any good; it is his."

9. Appellant in preparing for performance also hired the Brent Raubut Company to do nondestructive dynaflex testing to deter-

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mine the plasticity of the subgrade. When the results of the dynaflex testing became available in May of 1985 (tr. 1/53; R4, ASBCA 40096, tab 4 chronology), appellant grew apprehensive about the Navy's specifications. It was the considered opinion of W.P. Wills, and Mr. Alexander, the appellant's then construction superintendent, that the Navy specification was fatally flawed and doomed to fail because of the high plasticity of the secondary subgrade. On 9 May 1985 appellant presented a variance request to the Navy (tr. 1/49, 50) to obviate the subgrade plasticity problem. The essence of the variance was: (1) to use the existing bridge base, rather than piercing it and trying to lime stabilize the subgrade beneath the bridge; and, (2) not to disturb portions of the base that were further strengthened by the 1975 repairs to runway under Mr. Wills' direction. The variance represented a cure for a defective Southern Division specification which had negligently failed to take current soil conditions into consideration. The request for variance was signed by W.P. Wills, the C.Q.C.

10. What appellant feared if the Navy's design were followed was that "pumping" would occur in the unstable subgrade during construction. In "pumping", the subgrade when pressure is applied to it at one point simply pops up at another. The end result is the creation of a wave-like phenomenon throughout the subgrade which at worst can be destructive of all above it and at best make compaction impossible. Appellant was able to predict the strong possibility of a pumping action in the subgrade only after the dynaflex testing results were known. This was after the contract was awarded. (Tr. 1/204)

11. The variance request was apparently not initially fully considered by Southern Division because it had been signed by the C.Q.C., an independent contractor who although paid by appellant was not its employee and could not bind appellant; however, appellant was asked by Southern Division to, and did, resubmit the request on 29 May 1985 properly signed.

12. The variance had the support of the ROICC's office which shared appellant's "pumping" apprehension. As a matter of fact the ROICC's office on reviewing the specifications prior to issuing the solicitation had recommended not getting into the subgrade. They felt there was no reason to fix what was not broken. Visually there was no evidence of any base failures; ergo, no reason existed to further stabilize the base. (Tr. 2/89) Additionally, runway 13-31 because of 1975 repairs was so stable that it would prove difficult to get through the base to the subgrade as the proposed specification required.

13. Southern Division, the organization which had authority to change the specifications, also felt as early as 13 May 1985 that the variance request had merit but did not tell this to the appellant directly. Instead Southern Division on or about 11 June 1985, directed appellant to submit the variance as a value engineering change proposal (VECP). The rationale behind having the request for a variance resubmitted as a VECP is not clear. The Government stated that its reason was that a VECP would be more beneficial to the appellant. The assistant ROICC however opined that the real reason had something to do with the total dollars involved and Southern Division's lack of authority to modify the monetary value of the contract to that extent.

14. The appellant did as instructed without any feel for the rationale behind it and resubmitted its request for a variance first proposed on 9 May 1985 as a VECP on 28 June 1985. The appellant's motivation in complying with what appeared to it to be nothing more substantial than an internal bureaucratic maneuver, was to get some action, any action, out of Southern Division.

15. Appellant had previously, on 21 June 1985, written the Government wanting to know, yes or no, on its proposed variance from the contract. The appellant never did get a written response to this inquiry or many others. This failure to respond in writing promptly, or even just respond in writing, was endemic to the Government under this contract. (Tr. 1/52) Some eighty letters to the Government went unanswered. Changes to the contract during the performance period, 7 June 1985-22 November 1985, were made orally. The rationale for this deviation from normal contract procedure was the "urgency of the timeframe". (Tr. 2/278)

16. The appellant was pressing for a definite answer in writing because by 21 June 1985 appellant was rapidly approaching the critical area in the keelway on runway 1-19 where it would either have to break through the underlying bridge as per specification, the operation it justifiably feared because of the foreboding dynaflex tests, or use the existing bridge as the base as per its request for variance.

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17. Appellant had mobilized its workforce on 7 June 1985, the designated starting date on which both runways were shut down. By 21 June 1985 appellant had done all the work it could do without getting further directions. Without attacking the subbase/keelway issue one way or the other other promptly, appellant could not finish 37 to 52 days early as was its game plan. Both the ROICC and Southern Division were aware of this potential delay. The ROICC testified "... the contractor did come to us a number of times and say: If you don't do this or if you don't tell me that, then we will be delayed...." (Tr. 4/174)

18. Confusing matters further for appellant (and the ROICC's office) was the fact that appellant had been previously led to believe that the essence of its variance had been approved. This occurred as a result of a site visit on or about 11 June 1985 when the design engineer and the construction representative, both from Southern Division, reviewed the site. Later on 26 June 1985 through the ROICC's office, again orally, appellant was told that the variance had been technically approved but to resubmit it as a VECP.

19. The appellant, as previously found, immediately (28 June 1985) submitted the variance as a VECP as requested. During this entire period Southern Division was continuously made aware of appellant's and ROICC's trepidations regarding pumping if the appellant were to proceed according to the contract rather than the variance/VECP.

20. On 2 July 1985 Southern Division informed the ROICC (orally) they had not approved the VECP and wanted appellant to come to Charleston to "sell" its VECP. The ROICC felt the matter had been settled on 26 June 1985 and told this to Southern Division. The ROICC nevertheless immediately contacted the appellant concerning the proposed trip to "sell" the VECP. The appellant was ready to go to Charleston that same day, 2 July 1985, but Southern Division declined, and set the meeting for 8 July 1985 instead.

21. Having prudently waited (tr. 4/258) for definite direction as long as it possibly could without compromising its ability to meet the schedule, appellant on 4 July 1985 opened up 1,000 feet of the keelway of the 4,000 ft. runway 1-19 in accordance with the contract specification but against its better judgment.

22. When appellant got to the subgrade and tried to compact it as required by the contract, the feared pumping action occurred making compaction impossible and enveloping some of appellant's equipment in the subgrade "like quicksand". (Tr. 1/74-75) The appellant was directed, orally, to stop work immediately on the keelway by the ROICC. Southern Division was contacted the next day for direction.

23. The appellant's people, the ROICC's people, and a team from Southern Division did confer telephonically on 8 July 1985 on what to do now that the cat (the pumping) was out of the bag. It immediately became apparent that Southern Division was wholly unprepared for the conference. According to the Assistant ROICC one of the Southern Division members inanely asked "What air pressure was in your tires?" trying to suggest the pumping was caused by excessive air pressure in appellant's vehicles in and about the runway. This inanity along with feigned ignorance of "Why are we here?" on the part of Southern Division embarrassed and infuriated the ROICC's office and worsened an already strained relationship between them which had already impacted adversely on prompt problem resolution to the appellant's detriment.

24. It was not until 24 July 1985 that appellant was notified to proceed. In the area where the appellant had proceeded as per contract and the pumping occurred the contractor was directed to:

> [E]xcavate 32 inches in the area; then take that bottom 12 inches, aerate it, compact it back in place, bring in caliche, a six-inch layer, lime stabilize it; bring in another layer, lime stabilize it; then put in an eight-inch stabilized base; and then lay your asphalt over it.

25. As far as the rest of the work on the runways was concerned the appellant's variance/VECP was incorporated into the contract. Although there were technical revisions to the VECP directed by Southern Division, those technical revisions did not affect the essence of the appellant's initial VECP, *i.e.*, to utilize the existing bridge base and not disturb those base areas that had been repaired in 1975.

26. The appellant now was able to proceed with vigor and utilizing the VECP completed the contract by 19 November 1985 within the allotted 165 days

27. The Government treated the pumping problem as a differing site condition and modified the contract accordingly by increasing the contract price by $704,620 through P00001 dated 3 September 1985

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and P00008 dated 26 February 1986. Additionally, P00008 issued well after the contract was completed extended the time of performance by 10 days. In negotiating the bilateral modification in November of 1985 the negotiators made it clear through a provision in the negotiation memorandum that they were not settling any delay claim encompassing pre-4 July 1985 (pre-pumping) delay. The provision reads as follows:

> (d) Any final agreement made would not "close the door" to the other items included in the 16 July 1985 proposal i.e. the contractor could still claim delay costs for the period prior to 4 July 1985, the cost of engineering and the additional work around the duct banks.

28. The final agreement P00008, as formalized however contained the following clause:

> Acceptance of this modification by the Contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect, and/or delays arising out of, or incidental to, the work as herein revised and extension of the contract completion time.

29. Both appellant's president and superintendent testified that there were no negotiations on the differing site conditions beyond the November 1985 date of the negotiation memorandum, and they simply read the formalized agreement as not covering any pre-pumping delay. The waiver language in this agreement and the others was meant to be applied only to those items specifically and clearly set forth as having been disputed, negotiated, and settled.

30. We find this pre-pumping delay which occurred between 21 June 1985 and 4 July attributable to Southern Division indecision. We find that delay to be 10 days. (The appellant could have opened the keelway, a critical part of the Government's design, at least 10 days before 4 July 1985. In this connection we note a Government representative, Carter, estimated the total delay (pre and post pumping) attributable to indecision to be twenty days (20).) As far as the post-pumping delay is concerned, we find that the appellant has been compensated for that delay as evidenced by P00008.

31. The suggestions in appellant's VECP were dealt with in modifications P00002 and P00003 both dated 5 November 1985. P00003 reduced the contract price by $342,982 and the time for performance by 10 days while P00002 reduced the contract price by $116,564. Modification P00002 acknowledges that it was effected under the VECP clause while P00003 does not. P00002 dealt with eliminating lime stabilization. P00003 dealt with eliminating the destruction of those areas in runway 13-31 which had been further strengthened by the 1975 repairs. Appellant was permitted to share in the savings accomplished by P00002, but not in the savings (money and time) accomplished by P00003. Both P00002 and P00003 contained an Accord and Satisfaction clause identical to the one in P00008 set out in Finding of Fact 28.

32. P00003, although it does not specifically refer to appellant's VECP, adopts a portion of it. The portion it adopts is the part where appellant suggests utilizing the base previously reconstructed in 1975 under runway 13-31. It was appellant's up-to-date scientific dynaflex testing, superior analysis and knowledge of local terrain which led to that suggestion in the VECP. By adopting that portion alone, the cost of performance was reduced by $342,982.

33. The Government however, did not treat this as a savings under the VECP clause. It treated it as a deductive $342,982 change in which the appellant could not share.

34. The Government's rationale in not permitting the contractor to share the $342,982 saving achieved under P00003 is that sharing in the Government's view was not called for under the following clause defining VECP.

35. (4) "Value Engineering Change Proposal (VECP)" means a proposal that:

> (i) requires a change to this, the instant contract, to implement; and
>
> (ii) results in reducing the contract price or estimated cost without impairing essential functions or characteristics, *provided that it does not involve a change in deliverable end-item quantities only*. [emphasis added]

36. a. The Southern Division's construction area manager and member of the paving team, under cross-examination, testified to the Government's thinking on this as follows:

> Q. So you really deducted 116- plus 342- and you only gave the contractor about $130,000 for saving the Government $600,000. Isn't that approximately correct?
>
> A. Correct, but under the VECP the contractor proposed to upgrade the base

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course to increase the CBR, assumed liability for the subgrade pumping on the base course as a better way to do it than what was specified. *Under the straight deduct on the 13-31, he proposed not something to do better: he proposed deleting—don't do anything to that work which, in my opinion and apparently the PECP manager, it did not meet the definition of VECP).*

(Tr. 4/78, emphasis added)

b. The same witness did however agree there was no reduction in runway size to be repaired when he testified as follows:

Q. Well, the contractor did do something on runway 13-31. Didn't he—what did he do: seal those cracks and do some other?

A. Well, that is part of the contract.

Q. All right. But there was work done on 13-31. Is that true?

A. There was work done on 13-31; that is true.

* * *

Q. Were there quantities of materials specified in the contract? There weren't were there?

A. No.

Q. It was just the contractor was supposed to deliver this end product which is the finished or completed rehabilitated surface runways, and that didn't change in the value engineering change proposal, did it?

A. The surface area didn't change; I agree.

* * *

Q. Well, i [sic] guess what I am trying to get at is: What did you look at as being the end item quantities? Was it the surface of runway that was being delivered or was the quantities of materials that were involved in the various areas that were being repaired?

A. When you delete what is called for in the contract.

Q. Well, what? Was the amount of surface runways that was going to be eventually delivered to the Government for use, was that reduced by the value engineering change proposal?

A. Not to my knowledge, but it did not reflect—the surface didn't reflect—the final surfacing doesn't reflect the total picture that is required on the contract

Q. Well, were there—

A. —because that called for reconstruction.

(Tr. 4/78-83)

37. What the VECP accomplished was not a simple reduction "in deliverable end-item quantities." Rather we find that the VECP eliminated to a large extent the need for lime stabilization in the subgrade by proper utilization (rather than destruction) of existing site conditions. The VECP represented a novel engineering alternative which became reality only after the appellant enterprisingly availed itself of: (1) the latest scientific testing techniques; and, (2) a recognized runway expert familiar with local soil conditions. The result of this estimated $80,000 investment in research and development by the appellant was a better, simpler and cheaper design accomplishing the contract's objective, a reconstruction of the two runways. The appellant's 55% share of the savings should be taken against the $342,982 savings effected by P00003 as well as the savings effected by P00002.

38. a. Although the Government expected appellant, contrary to the written terms of the contract, to react to its oral directives in order to meet the critical completion date, the Government did nothing to expedite payments. The Government would not pay the appellant for any increased costs until there was a formal change to the contract (as per contract). These changes were not effected until November of 1985 or later when contract performance by the appellant was complete. Payment itself on these changes was not completed until April of 1986. (Interestingly there was no delay by the Government in collecting the savings under modifications P00002 and P00003 which reduced the contract price.) In April 1986 the appellant finally was paid, but as appellant's president testified:

> And the third time I went to Charleston is to plead for mercy for my check. They owed me about a million dollars, and I was just about to go down the drain. I went up there to see if there was any way in the world I could get my money. (Tr. 1/225)

b. The million dollars referred to by the appellant's president represents a little less than 20% of the adjusted ($5,407,832.27) contract price.

ADDITIONAL FINDINGS SPECIFICALLY RELATED TO ASBCA NO. 39170

39. The appellant's electrical subcontractor was initially Zeller Electric Company (Zeller). Zeller's president, Charles Zeller,

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was a registered professional electrician but with limited "airfield" experience. During the course of the contract Zeller's services were terminated, and Pecan Valley Electric which completed the electrical work was hired by appellant instead. Zeller's dismissal and its limited "airfield" experience, however, we find (contrary to the Government's contentions) to be irrelevant to the two pass-through claims endorsed and presented by appellant.

40. According to appellant, there were eleven changes affecting the electrical specifications during the contract. The adjustments or lack thereof are disputed as to two of those changes only *i.e.*,:

A. the installation of copper clad ground rods and clamps, and

B. the rewiring of the windtee and taxiway light systems.

(Tr. 1/6; appellant's opening Brief at 52-62, and Reply Brief at 33)

THE WINDTEE AND TAXIWAY LIGHT SYSTEMS

41. During the course of its work Zeller, appellant's original electrical subcontractor, noted that the tetrahedron (windtee) wiring was in a deteriorated condition causing the tetrahedron not to work. (The Tetrahedron performs the functions of a wind sock or tee and permits landing aircraft to gauge wind direction.) Also Mr. Zeller noted that the wires feeding the taxiway lighting system, most of which were underground, were corroded and their ability to conduct 5,000 volts safely was in question.

42. Rewiring the tetrahedron and taxiway lighting systems was not part of the contract as awarded.

43. Nevertheless, when these matters were brought to the attention of the Government, Zeller was directed (orally) to replace the suspect wiring. The source of the direction was the Government inspector and the assistant ROICC. Although the inspector disputes giving such a directive, his recollection of many of these events was obviously blurred by time and subsequent events. Further one of his reports implies otherwise, *i.e.*, that he was involved in these changes and their negotiation. This work was performed at additional expense to appellant, but no payment for it has been made.

44. The Government's basis for refusal to pay is that the defective wiring was apparent when appellant bid and that the Government did not direct appellant to make the repairs. The Government does not deny that the inspector and/or assistant ROICC had authority to issue such directives.

GROUND RODS AND CLAMPS

45. Under the contract the appellant was to install a continuous counterpoise ground wire "for the entire length of all circuits supplying airfield lighting." The system was to be grounded with a rod every 1,000 feet. (R4, tab H and subtab 1, ex. E, ¶ 15.3 and 3.6) Either the appellant, or the Government, or both together discovered that this approach as specified was inappropriate because of the condition of portions of the conduit that the counterpoise wire was to be run through and the danger of running the counterpoise wire through the same conduit as the electrified wire. (Tr. 4/121-122)

46. Again it was mutually decided that to correct this, the counterpoise wiring need not be continuous around each runway. Rather the wiring was to be interrupted, and where interrupted, a 10 ft. ground rod was to be installed. The corrective procedure was again done under the auspices of the Government and, because of the need for the installation of additional ground rods, at an additional cost to the appellant. The Government however refused to adjust the contract price.

47. The Government's reasoning for refusing to adjust the contract in this regard is as follows: (1) the idea was wholly appellant's who volunteered the change; (2) the change actually resulted in a saving to appellant; and, (3) the appellant in any event was already paid for this work under P00005. Modification P00005 provided for (i) rewiring distance markers, (ii) a change in concrete joint detail, and (iii) installing direct burial cable in a 12-inch sandbed. The back-up documentation for this modification does not indicate any allowance for grounding rods and clamps for interruptions of the counterpoise cable.

DECISION

I

We address the VECP problem as raised in appeal ASBCA No. 38303 first. The contracting officer had precluded appellant from sharing in a $342,982 saving effected by P00003 because in his view the appellant's VECP as incorporated in P00003 merely reduced the deliverable end-item only.

At the outset it should be noted that the Government's goal as reflected by the testimony and the contract itself was the recon-

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struction of two runways. The reconstruction of these two runways was the deliverable end-item quantity within the fair meaning of the VECP clause defining what a VECP is.

In evaluating and characterising appellant's VECP we must also look to the Government's design. The Government's proposed method of accomplishing this reconstruction was only superficially feasible. To build to the Government's design, although probably technically possible, was wasteful to the point of being economically impractical. The appellant on its initiative and at its own expense, (estimated by appellant to be about $80,000) remedied the Government's design by developing an improved and cheaper method of reconstructing the runways. The mere fact that this improved alternate design ultimately, but reluctantly, adopted by the Government eliminated certain costly and unneeded operations does not excise the savings for eliminating those operations from the definition of VECP as the Government contends.

The proper use of the existing base (rather than destroying it and then rebuilding it) does not involve "a change in the deliverable end-item quantities only" as the Government contends. The deliverable end-item quantities—two satisfactorily reconstructed runways—remain the same. What was changed was the cost ($342,982 less) and the material used as the base.

This being so, there remains the question as to whether the appellant waived its right to share in this saving because of modifications P00002 and P00003, both of which contained a boilerplate accord and satisfaction/waiver of all claims clause.

The appellant contends, among other things, that the waiver language in modifications P00002 and P00003 (and also P00008) should be vitiated because those modifications were signed under duress. Although there may be some elements of duress here, we cannot set aside these agreements on that rather nebulous facet of contract law. *Fruhauf S.W. Garment Co. v. U.S.*, 126 Ct. Cl. 51 at p 62 (1953). Especially significant on the issue of duress is the fact that although payment representing a little less than 20% of the adjusted contract price was made 5 months after the work was completed, the agreements themselves were negotiated in November 1985 *before* all work was completed. Thus, the subsequent withholding of payment could not have influenced the prior agreements.

Rather than dwell on "duress", we look to the agreement, its words, and the context in which they were written to see just what effect the parties intended the rather broad and boilerplate release clause used by the Government under this contract should be given. In this regard, it should be noted that releases are not necessarily a favorite of the Courts or this Board. They are to be scrutinized with a high degree of care to determine the true intent of the parties. *Green Builders, Inc.*, ASBCA No. 35518, 88-2 BCA ¶ 20,734, reconsideration denied, 88-3 BCA ¶ 20,981.

Looking to modification P00003, we note that all the appellant was agreeing to was that by the elimination of the stated operations, there would be a $342,982 saving. The agreement did not deal with whether appellant would share in these savings. Consequently, the waiver language relates only to the amount of the savings, not whether appellant released its share of that amount. As far as P00002 is concerned, there is nothing in P00002 which disturbs this reasoning. Even though it was executed under the VECP clause it relates only to those operations listed within it making no mention of the work eliminated by P00003; and therefore, the waiver language in P00002 has no effect on whether the appellant should share in the savings effected by the elimination of the operations listed in modification P00003.

In line with the above, we sustain the appeal in ASBCA No. 38303 to the extent that appellant shares in the savings effected by P00003.

II

Next we address the delay/acceleration claim as raised in ASBCA No. 40096.

Initially we note that under the law the mere fact that appellant finished the contract on time is no impediment to this claim. Logically, and in the eyes of the law, the extra effort which a contractor puts forth to overcome Government caused delay in order to meet the performance schedule wherein time was agreed to have been of the essence, is fully compensable.

Here, however, the appellant has been compensated for that delay, as witnessed by P00008, with the sole exception of the prepumping delay caused by Southern Division's dawdle over what to do with its defective specifications.

The remainder of the delay/acceleration claim is settled in P00008 which was negoti-

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ated and agreed to in November of 1985 although not formally executed and issued until February 1986.

Again, since those negotiations were conducted in November of 1985, just as the work was being completed, and the resultant memoranda of the negotiations was signed by appellant at that time, the subsequent delay in payment to April of 1986 could have had no effect on appellant's acquiescence in November of 1985, nor been the duress the appellant alleges.

In line with the above, we sustain the appeal in ASBCA No. 40096 to the extent that the appellant is entitled to compensation for the acceleration necessary to overcome the 10 days "pre-pumping" delay.

III

ELECTRICAL CLAIM ASBCA NO. 39170

The whole thrust of the Government's defense to the appellant's electrical claim consistently has been that what the appellant's subcontractor did regarding the rods and wiring was done as a volunteer. There was testimony to the contrary at trial which we obviously credited in our findings. Further, it seems inherently improbable that the Government would not want, and upon discovery did not direct, essential safety devices such as the Windtee and Runway lights fixed when the existence of the defective wiring became apparent.

Since most of the wiring was underground and rewiring was not part of the contract as advertised, we see no merit, none whatsoever, to the Government's other contention that this is something that should have been seen on a site visit and taken into consideration when bidding.

Further, we found no convincing evidence that appellant saved money by doing what the Government directed it to, nor did we find any convincing evidence that appellant had already been paid for this work.

The appeal in ASBCA No. 39170 is sustained.

IV

In conclusion, we sustain appellant's three appeals on the issue of entitlement only to the extent stated.

[¶ 26,435] KRW, Incorporated

DOT BCA No. 2572, October 13, 1993. Contract No. DTFH61-88-Z-00038.

Contract Disputes, Interest—Claim—Existence of Dispute.—Interest did not start running from the date a contractor submitted a request for adjustment and the request was not a claim, because there was no dispute between the parties on that date. The contractor did not consider the request to be a claim, inasmuch as it made no protest in response to the contracting officer's denial of the request in correspondence that fell short of being a final decision under the Contract Disputes Act.

Attorney Fees and Costs Under Equal Access to Justice Act—Application Timeliness—Premature Claims.—A claim, set out in the amended complaint, for the costs of prosecuting a claim under the Contract Disputes Act was not a valid claim under the Act, because an application for relief under the Act must be submitted after the adjudication. The time limits of the Equal Access to Justice Act for filing a claim are limited and must be strictly construed. The date of the adjudication is the date of the opinion; hence, the claim for the costs of prosecuting the underlying claim was premature.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Officer of the Contractor.—The costs of prosecuting a claim were not recoverable, because under rules in effect on the date of the contract, the costs of professional and consultant services could not be recovered if the services were provided by an officer of the contractor.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Unauthorized Practice of Law.—A contingent fee for preparing and presenting a claim was not reimbursable, because the individual and the company representing the contractor improperly practiced law before the board, and the government should not bear any of the contractor's costs of those improper acts. The contractor was represented by one of its corporate officers in his capacity as an officer of a separate company that he had

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formed solely to collect debts for the contractor. A corporation may be represented by an officer of that corporation or by a member of the bar of any state, territory, or the District of Columbia. Had the contractor been forthright in revealing that it was being represented by a company that was not a professional corporation organized under state law for the practice of law, the board would have barred the company and the individual from conducting the representation. The board will not allow consultants and others who are not members of the bar to practice law through the subterfuge of a corporate officer's title.

Delays—Approval Delays—Oral Approval.—The oral advice of the contracting officer's technical representative did not constitute approval of a bibliography, glossary, and outline for a manual on stream stability at highway structures, because the contract required formal written action. The contract obligated the government to provide written comments on, or approval of, drafts of the sections within 30 days after the contractor submitted the drafts for review. The record showed that the government never satisfied its response obligations within the 30-day period. The contractor was not entitled to compensation, however, because it did not show that the government's failure to provide written approvals delayed its performance or increased its performance costs.

Delays—Extension of Time—Approval Delay.—Under a contract to develop a design manual, a contractor was entitled to an extension of the contract completion date because the government's failure to comply with the contract's requirements to provide comments by a certain date delayed the contractor's performance. The contract required the contractor to submit drafts of various chapters of the manual at two-week intervals and obligated the government to provide comments on a chapter-by-chapter basis within 30 days after their respective submissions. The absence of comments precluded any work from being performed for two months.

Modifications—Authority of Government Agents—Ratification.—Although a contract to develop a design manual clearly indicated that a contracting officer's technical representative was not authorized to make changes that would obligate the government to pay an increased price, a contractor was entitled to an equitable adjustment for making revisions to the manual because the contracting officer acquiesced in the alteration of the required work product. The technical representative directed the contractor to furnish an abbreviated manual. The contractor did not notify the contracting officer of that direction, but it submitted a progress report that contained a clear statement that it considered the directive to be a change of the contract terms. The progress report was addressed to the contract administrator, who had a duty to communicate the information to the contracting officer. Therefore, knowledge of the notice was imputed to the contracting officer. The contracting officer accepted the manual without the coverage originally requested and did not object to its omission.

Pricing of Adjustments—Proof—Records in Support.—Although the government's failure to provide comments on chapters delayed performance of a contract, a contractor was not entitled to an equitable adjustment, because it failed to provide proof of the amount of its alleged losses. Under a contract to develop a design manual, the contractor was not required to prove its damages with precise, mathematical exactitude. However, a reasonable, albeit approximate, basis for computation was necessary. In this case, the contractor attempted to discredit its own records, the most convincing evidence, by stating that the records did not include all the work performed. There was no evidence in the record of any labor costs incurred during the delay period, much less labor costs resulting from government-caused delay.

Pricing of Adjustments—Proof—Changes.—A contractor was not entitled to all the costs it claimed it incurred as the result of government-ordered changes, because the presumption that the time and monies expended by a contractor after a modification are reasonable was rebutted in this case. Under a contract to develop a design manual, the government changed the requirements after a draft of the manual had been written. Not all the effort performed after the change order resulted from the change; however, there was no evidence to distinguish the work required to rectify deficiencies from the work required to implement the change. The contractor did not call any persons who had the technical capability to explain why the hours of effort were actually required. The board grounded its

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decision on the only evidence presented, the testimony of a government expert, regarding the effort that reasonably resulted from the government-directed change to delete the material.

For the appellant: Russell E. Machol[1]. For the government: Eric A. Kuwana and Vivian A. Philbin, Federal Highway Administration, Washington, District of Columbia.

Before ROBERTORY, WARE, and FENNESSY, Administrative Judges.

ROBERTORY, Administrative Judge: KRW, Incorporated ("KRW" or "appellant") has appealed from a decision by the Contracting Officer, Federal Highway Administration ("FHWA" or "respondent"). That decision denied KRW's claim for $70,096.78 in its entirety. Appellant's final Amended Complaint[2] at the Board seeks $173,848.45.

The appeal was taken to the Board on November 23, 1992 and the trial was held in June-July, 1993. However, the trial was almost six years after many of the key events transpired. KRW made a decision to present its case through the testimony of only one of the persons who had been in its employ. This was Mr. Russell Machol, who during the events out of which this dispute arose was KRW's Contract Administrator. In lieu of calling other present and former KRW employees who had been personally involved in performance under this contract to testify, KRW elected to call involved FHWA and Defense Contract Audit Agency personnel as its witnesses[3] and to attempt to make out its case through their testimony. Out of deference to appellant's presentation of its case without the services of a member of the Bar, the Board permitted the appellant to question these persons as if hostile witnesses[4] under the Federal Rules of Evidence and thereafter to present evidence intended to impeach the testimony they gave.[5] However, to the extent that this selection of its witnesses may have impaired appellant's presentation, or to the extent that their testimony adversely affected the strength of its case, KRW must bear the result of such deficiencies. This matter is addressed in some detail in Discussion section VII.B, *infra*.

As an example: KRW's burden of proof includes proving the costs incurred as a result of an FHWA-directed change to the scope of work that appellant alleges as the basis of its claim. Rather than present testimony by KRW accounting personnel as to those costs as reflected in KRW's records, KRW chose to present its quantum case entirely through the testimony of the Defense Contract Audit Agency auditor, his notes, and the Audit Report he authored. In part due to a KRW misreading of the Audit Report, the auditor's testimony did not support the result KRW seeks, especially in the area of overhead rates.[6]

FINDINGS OF FACT

The Contract

1. On November 3, 1986, Contract DTFH61-88-Z-00038 was awarded to KRW through the Small Business Administration, acting on behalf of the FHWA, under section 8(a) of the Small Business Act. (RAF[7] Tab 6). The firm fixed price of the contract as awarded was $107,724.00. The contract called for KRW to review and evaluate available information on stream stability and stream scour at bridges, and to develop a design manual entitled *Stream Stability At Highway Structures*. The manual was to classify stability problems, provide assessment criteria, and categorize each by possi-

[1] Mr. Machol on some occasions (when seeking to establish his standing to represent KRW) stated that this representation was being effected by him as an officer of KRW, and on other occasions (when seeking to justify recovery of a contingent fee to be paid E.A. James Company) stated that it was being conducted as an employee of E.A. James Company. The matter of representation is a major issue in this case, and is addressed below in this Opinion. See *KRW Incorporated*, DOTBCA No. 2572, 94-1 BCA ¶ 26,268 (1993) for a Board decision on a respondent Motion to Dismiss that addressed Mr. Machol's status, before the name of the E.A. James Company was mentioned to the Board.

[2] Filed June 7, 1993.

[3] For examples, see Findings 27, 63, 84, and 85.

[4] The Board notes for the record that the demeanor of these witnesses during the trial was not hostile to KRW. There was no hostility exhibited.

[5] See Rule 611(c) of the Federal Rules of Evidence..

[6] See Findings 76, 78, and 81.

[7] There are two appeal files in the instant case, the original and a revised version, prepared by the Contracting Officer due to certain perceived inadequacies in the organization of the first. The Board ruled that either party could cite to either version. (Tr. 25). These are cited as "AF" for the original appeal file and "RAF" for the revised appeal file.

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ble solutions which designers might utilize.[8] Among the areas to be addressed were stream instability, scour and erosion, and stream aggradation and degradation, with respect to their effects on highway bridges.[9] The work was to be a compilation of existing materials rather than a project to study the subjects of stream stability and scour directly. Thus, the research to be performed by KRW was the ferreting out of existing documents on the subject. As awarded, the contract called for full completion in 18 months from award, *i.e.*, by May 3, 1988. As modified by bilateral Modification #1,[10] the work was to be completed by September 30, 1988. Unilaterally-issued Modification #2 further extended the completion date to October 31, 1988.

2. In its final proposal that led to the award, KRW proposed the use of 2,130 hours of labor to produce the manual. (App. Exs. 3, 4). This included 454 hours for Dr. Everett Richardson (Principal Investigator[11]), 406 hours for Mr. Frank Johnson (Hydraulic Specialist), 196 hours for Mr. Fred Chang (Hydraulic Specialist), 654 hours for Mr. Pierre Julien (Assistant to Principal Investigator), 40 hours for Mr. Stan Schumm (Technical Advisor), 58 hours for Mr. Russell Machol (Project Coordinator), 224 hours for a secretary and 98 hours for a draftsman. Messrs. Johnson, Chang, and Julien, in addition to Dr. Richardson, were deemed professional staffers; Mr. Machol and the others were not.[12] The proposal included overhead at 85% of estimated direct labor costs, general and administrative overhead at 18% of the total of labor plus overhead, and profit at 10% of the aggregate of general and administrative overhead, overhead, and labor costs.[13] By entering into a fixed-price contract at the price proposed, the FHWA impliedly accepted these proposed hours and rates as reasonable.

3. The contract incorporated the clause entitled "Termination for Convenience of the Government (Services) (Short Form) (April 1984)" set out in Federal Acquisition Regulation section 52.249-4. The contract incorporated the clause entitled "Default (Fixed-Price Supply and Service)(April 1984)" from Federal Acquisition Regulation § 52.249-8. Also incorporated was the Changes clause[14] of Federal Acquisition Regulation § 52.243-1, which provides *inter alia*, "(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. . . ."

4. The contract included a clause[15] entitled "Contracting Officer's Technical Representative," providing that the Contracting Officer could designate a Contracting Officer's Technical Representative who would be responsible for technical administration of the contract and technical liaison with KRW. The clause included the following caveats:

> "The COTR IS NOT authorized to change the scope of work or specifications as stated in the contract, to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, delivery schedule, period of performance or other terms and conditions.
>
> "The Contracting Officer is the only individual who can legally commit or obligate the Government for the expenditure of public funds. The technical administration of this contract shall not be construed to authorize the revision of the terms and conditions of this contract. Any such revision shall be authorized in writing by the Contracting Officer." (Upper case in original.)

5. The contract set six tasks. The respective periods for performance were set out in the individual task descriptions and were also summarized in a graphical Work Schedule in the contract.[16]:

a. The first (Task A) was data gathering (reviewing existing technical information and evaluating present practices) and the preparation of two documents, a bibliogra-

[8] Contract, page 2 of 17.

[9] Contract, page 4 of 17.

[10] AF Tab 6.

[11] See Finding 7.a.

[12] See Finding 7.b.

[13] As we look at the record of negotiation (RAF Tab 3), it appears that the rates allowed in negotiating this fixed-price contract were actually 82% (84,984 ÷ 103,250) and 14% (33,881 ÷ 244,596), respectively.

[14] Although the instant contract would appear to be more in the nature of a services contract than a supply contract, none of the alternative versions for services contracts were incorporated.

[15] Contract section G, page 11 of 17.

[16] Contract page 8 of 17. The graph, altered by replacing the columns headed with the number of months since award with the actual months, is also in the record as the topmost portion of Appellant's Exhibit 2.

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phy and a glossary.[17] These latter two documents were to be delivered to the Contracting Officer's Technical Representative within two months after contract award, by January 3, 1987 according to the Board's calculations, based on the November 3 award date and the tabular Work Schedule, *infra*.[18] Thereafter, the FHWA was to provide comments to KRW within 30 days, which comments were to be included in the final bibliography and glossary to be delivered within 30 days after receipt of comments.

b. The second task (Task B) was for KRW to develop an outline for the manual.[19] A draft of this outline was to be delivered to the FHWA within two months after the effective date of the contract, January 3, 1987 by the Board's calculations.[20] The contract obligated the FHWA [21] to furnish KRW with comments on that draft outline within 30 days thereafter, which comments KRW were to incorporate into the final manual outline. The task as laid out in the contract provided that the approval of the final design manual outline would be given "in writing by the Contracting Officer." In bold-face type, the task went on to state that KRW was not to proceed to Task C prior to receipt of that written approval from the Contracting Officer.

c. The third (Task C) as set forth in the contract also cast performance obligations upon both parties. KRW was to develop the manual itself, submitting the chapters as developed to the Contracting Officer's Technical Representative for review at two-week intervals. The FHWA was obligated to review these chapter-by-chapter submissions and provide comments within thirty days after receipt of each. The manual was to cover five areas, which apparently equate to chapters.[22] These were: Introduction, Problem Identification, Selection of Countermeasures and Solutions, Construction Methods, Appendices. The Work Schedule called for the Introduction to be submitted to the Contracting Officer's Technical Representative by June 3, 1988,[23] the Problem Identification by June 18, Selection of Countermeasures and Solutions by July 3, Construction Methods by July 18, and Appendices by August 3. The Schedule also showed Contracting Officer's Technical Representative approval/comments were to be given KRW within 30 days after each such submission. In its pretrial claim submissions (see Finding 64), KRW has contended that $61,134.70 of the initial contract price was attributable to the Task C work. The FHWA has not denied this, and we therefore find this to be factual.

d. The fourth task (Task D) was to revise the manual to reflect the FHWA's comments.

e. The fifth (Task E) was to prepare a two to four page technical summary of the manual. This draft was to be submitted 60 days prior to the completion of Task C, with the FHWA to review the draft and provide comments within 30 days of receipt and KRW to incorporate those comments into the final summary.

f. The sixth task (Task F) was for KRW to conduct two one-day briefings for FHWA personnel.

6. The contract [24] required KRW to submit monthly progress reports, each to include descriptions of (i) significant progress made during the reporting period; (ii) interim results or trends that KRW might feel would be of interest to the FHWA; (iii) any problems encountered that would affect timely completion or completion within fiscal constraints, and proposed solutions; (iv) work planned for the next reporting period; (v) a bar chart showing work performed (by task) versus scheduled work; and (vi) current and cumulative expenditures (by task) versus planned expenditures.

7. The Contract contained two provisions relating to KRW's personnel assignments:

a. A clause entitled "Key Personnel" provided that Dr. Everett V. Richardson would be "Principal Investigator." If he should be terminated by KRW or unable to perform, his replacement would be subject to Contracting Officer approval. Mr. Richardson was to contribute at least 16% of normal

[17] Contract pages 2-3 of 17.

[18] The appellant gave the due date as January 1, 1987. (App. Ex. 2).

[19] Contract page 3 of 17.

[20] See subparagraph a. above.

[21] "The Government will review the draft design manual outline and furnish comments to the Contractor within 30 days after receipt."

[22] See Finding 9.

[23] These dates are based on the Board's calculation from the November 3 award date and do not take into account holidays or weekends coinciding with due dates.

[24] Section C, page 10 of 17.

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working time to performance of this contract work.[25]

b. A clause entitled "Professional Staffing" stated that KRW agreed to assign four professional staff members to work on this contract: Dr. Richardson, Dr. Pierre Julien, Mr. Fred Chang, Mr. Frank Johnson. If KRW were to find it necessary to replace "any of the assigned personnel" during contract performance, the Contracting Officer was to be notified.[26]

Performance

8. By letter, the Contracting Officer appointed Mr. Robert Martin to be Contract Administrator and Mr. Thomas Krylowski to be Contracting Officer's Technical Representative. (RAF Tab 10). The letter directed KRW to submit all reports and administrative documents to Mr. Martin. It directed KRW to contact Mr. Krylowski on all technical matters, referencing the limitations on his authority reflected in the clause set out in Finding 4. The letter also contained a reminder that only the Contracting Officer had authority to modify the contract.

9. KRW delivered the Task A bibliography and glossary and the Task B draft outline to the Contracting Officer on Monday, January 5, 1987. (RAF Tabs 12-14). We take judicial notice of the fact that January 3, 1987 (the due date—Findings 5.a and 5.b) fell on a Saturday. Therefore, this was a timely submission. Following the areas called out in Task C (Finding 5.c), the draft outline (RAF Tab 12) provided for a manual composed of an Introduction and four chapters, summarized [27] as follows:

I. INTRODUCTION

A. Discussion of purpose of manual

B. Background of the problem at highway structures at river crossings

C. Description of Manual Organization

D. Instructions on use of the manual

II. CHAPTER 1—FACTORS TO CONSIDER IN STREAM AND BRIDGE STABILITY

A. Geomorphic considerations in stream and bridge stability

B. Hydraulic and flow consideration in stream and bridge stability

III. CHAPTER 2—PROBLEM IDENTIFICATION

A. Description of stream and bridge stability problems

B. What to consider in stream and bridge stability analysis

C. How to identify actual or potential stream and bridge stability problems

IV. CHAPTER 3—COUNTERMEASURES

A. Description of countermeasures

B. Selection of countermeasures

C. Design of countermeasures

V. CHAPTER 4—CONSTRUCTION OF COUNTERMEASURES

A. Construction factors to consider

B. Construction methods

VI. GLOSSARY

VII. REFERENCES

VIII. APPENDICES

10. On January 27, KRW submitted a revised outline to reflect comments received from Mr. Krylowski at a meeting on January 14. (App. Ex. 6; RAF Tab 17).

11. At some time during January, Mr. Krylowski had orally advised KRW that the outline was acceptable. (Tr. 313). On February 2, Mr. Krylowski advised the Contract Administrator that the bibliography, the glossary, and the draft outline were all acceptable and requested that KRW be provided with the appropriate written approval to proceed with Task C. (RAF Tab 16). Notwithstanding the clear, bold-faced prohibition of Task B (Finding 5.b), KRW proceeded with the Task C work on the basis of the oral advice.[28] KRW's Progress Report #4 (RAF Tab 18) for February 1987, dated March 12, 1987, stated that during February KRW had commenced work on Tab C, and recited that KRW was "advised by telephone call from CO that approval" of the Tasks A and B work (*i.e.*, the bibliography, glossary, and outline) was being prepared. The Progress Report also stated that "KRW was given verbal approval to start Task C." The appellant argues in its post-trial Reply Brief [29] that it did not commence work on Task C until some time in March. However, KRW's own Progress Report #4 for February not only states that it had commenced

[25] Contract, page 11 of 17.

[26] Contract, page 12 of 17.

[27] Only major outline headings are shown here.

[28] Neither party is contending that KRW's entitlement to compensation is precluded by this action in proceeding notwithstanding the absence of the written approval.

[29] Pages 10-11.

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work on Task C, but also states that a total of 88 labor-hours of effort were expended on this Task during February. We therefore find that work on Task C began during February, right on schedule.

12. On March 19, 1987, the Contracting Officer issued his formal, written approval of the design manual outline produced under Task B, some 44 days late. (RAF Tab 20; Tr. 28, 43).

13. KRW's Progress Report for March (RAF Tab 21), dated April 15, 1987, stated that work on Task C was proceeding. While it complained that KRW was still awaiting FHWA approval of the bibliography and glossary, the Progress Report made no mention of awaiting action on the outline.

14. On April 20, 1987, the Contracting Officer issued the formal, written approval of the bibliography and the glossary, some 76 days late. (RAF Tab 22; Tr. 25, 43). Although KRW later alleged progress was delayed by the FHWA's haphazard compliance with its contractual commitment to furnish, within thirty days, comments on the bibliography and the glossary? [30] Mr. Machol testified at trial that this FHWA untimeliness did not "affect anything else" (Tr. 25), *i.e.*, that it did not delay progress. In addition, the original claim (Finding 66) did not seek any amounts for this Task A work. There is nothing in the record to show that the delayed approval of the bibliography and the glossary delayed KRW, or for that matter how it could have delayed KRW's performance while the chapters were being drafted. The Board finds that KRW was not delayed by the FHWA's failure to provide comments on the bibliography or the glossary within the contractually-prescribed time.

15. KRW's monthly Progress Report for April, 1987, dated May 15, 1987, reported that a time extension would be needed due to delays by the FHWA in furnishing approvals of the bibliography, the glossary, and the outline and that, with such time extension, work was proceeding in a timely manner. (RAF Tab 25; Tr. 45).

16. An event occurred in April, 1987, which would have impact upon this contract. A New York Thruway highway bridge collapsed, with fatalities, during a period of high water flow that had undermined the bridge. This event imparted a new direction to FHWA efforts and studies in the area of stream scour and bridge stability. It wished to disseminate material on how to protect bridges from undermining, and was under pressure to do so promptly. (Tr. 62, 272, 807).

17. On May 27, KRW sent a letter to Mr. Martin, the Contract Administrator, forwarding a revised project schedule, said to be necessary due to the FHWA's delays in sending comments on the bibliography, the glossary, and the manual outline. The letter requested that the FHWA advise if it had any difficulty with the revised schedule. (RAF Tab 27). No reply was received, so KRW assumed that FHWA acquiesced. (Tr. 29, 169). The graphical depiction of the work schedule attached to the May 27 letter, a revision of the Work Schedule in the contract, called for chapters to be submitted to the FHWA monthly rather than every two weeks. Specifically, the revised graphical Work Schedule submitted by KRW, now keyed to the approved outline rather than to the Task C areas, called for the Introduction to be submitted to the Contracting Officer's Technical Representative by June 1, 1987, Factors Which Affect Stream and Bridge Stability by July 1, Problem Identification by August 1, Countermeasures by September 1, and Appendices by September 15.

18. The FHWA did not respond to this letter. It also never complained to KRW that the draft chapters were not coming at bi-weekly intervals as called for by the contract. (Tr. 169). The Board finds that by its silence the FHWA acquiesced in the revised pace of delivery.

19. On June 5, 1987, as required by Task C (Finding 5.c), KRW submitted to the FHWA for comments a draft of Chapter 1 "Introduction." The transmittal noted that the chapter could not be finalized until all of the other chapters had been completed, since an introduction should include an overview. (RAF Tab 28). The draft of Chapter 2 followed in July; the draft of Chapter 3 was sent to the FHWA on August 10. (RAF Tab 32).

20. At some time during the summer of 1987, Messrs. Krylowski and Machol discussed the need for the FHWA to withhold comments on individual chapters until all chapters had been received. Significantly, Mr. Krylowski did not testify that Mr. Machol had indicated assent during those discussions. Discussion and assent are two different concepts. However, neither did Mr. Machol protest such action by the FHWA, and the monthly Progress Reports

[30] See Findings 15 and 17.

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did not mention any resultant problems until the report dated November 13, 1987 (Finding 25). (Tr. 247-248, 254). Factually, the FHWA decision not to submit comments on a chapter-by-chapter basis, for whatever reason, was contrary to the specific requirements of the contract, described in Finding 5.c. On the record, we cannot find that KRW acquiesced in this change.

21. KRW's Progress Report for July, 1987 dated August 12, stated that the planned activities for August were to "Begin revisions of chapters to incorporate FHWA comments," to submit the draft of Chapter 3, and to commence drafting Chapter 4. (RAF Tab 33).

22. KRW's Progress Report for September, 1987 dated October 15 stated that the planned activities for October were to "Begin revisions of chapters to incorporate FHWA comments." and to prepare for a meeting in Washington to discuss work to date and revisions to the manual. (RAF Tab 35).

23. Draft Chapter 4 was sent to the FHWA on September 22, 1987. KRW's covering letter noted that it would be desirable for KRW to have received comments on this and the preceding chapters before conducting a briefing. (RAF Tab 34). The KRW monthly Progress Report dated October 15, 1987 and covering the month of September, indicated that the planned activity for October was to commence revising chapters to incorporate FHWA comments and to finalize plans for a meeting with the FHWA to discuss the drafts. (RAF Tab 35).

24. After receiving the draft of chapter 4, Mr. Krylowski, the Contracting Officer's Technical Representative, commenced contacting Mr. Machol for the purpose of setting up a meeting to discuss the draft chapters. (Tr. 252). His efforts were unsuccessful until the parties finally met on December 8.

25. In its Monthly Progress Report dated November 13, 1987 (RAF Tab 38), KRW noted: (i) that no work had occurred during October; (ii) that a time extension would be necessary "as a result of not receiving FHWA comments in accordance with the project schedule"; and (iii) that in November it planned to revise draft chapters to incorporate FHWA comments, but that such activity would "depend on when KRW receives comments on material submitted to FHWA." This was the first statement in the Progress Reports that KRW was awaiting FHWA comments in order to proceed with work. The Progress Report dated December 7, 1987, covering performance during November, read to like effect. (RAF Tab 39).

26. During this period of contract performance and continuing until May 1988, KRW's monthly progress reports set forth, by named individual, the labor-hours of effort being expended on this job. Appendix I of this Opinion sets forth, *inter alia*, the effort expended by KRW through November 30, 1987, as set forth in KRW's December 7 progress report. This was the last Report KRW filed before the December 8 meeting, at which occurred events that KRW alleges constituted a change to the contract.

27. KRW and the FHWA met on December 8, 1987. The persons attending were technical personnel; it was not attended by any persons from either side who possessed actual authority to vary the terms of the contract. Mr. Machol, the sole KRW witness who was not a government employee, did not attend and testified that he had no record of what had transpired. (Tr. 42). KRW did not call Messrs. Johnson, Chang, or Richardson, the three KRW employees who were present at the meeting, as witnesses. As a result, the only evidence of what transpired at the meeting was a letter, dated December 11, 1987, in the appeal file (Finding 28) and the testimony of Messrs. Krylowski and Peter Thompson, FHWA employees who attended the meeting and were called to testify at trial. Accordingly, we accept as factual the uncontradicted testimony and writings by the other witnesses who had been present, such as Mr. Krylowski. See, for example, Findings 28 and 29.

28. A record of what transpired at the meeting is reflected in a letter of December 11, to KRW from the Contracting Officer's Technical Representative, Mr. Krylowski. The letter acknowledged that the FHWA had been delinquent in commenting upon the draft chapters. The letter also stated that the FHWA had erred in drafting the contract so as to require chapter-by-chapter review and comments by the FHWA, for it was impossible to review an individual chapter without having the benefit of the entire manual. (RAF Tab 40 and Tab 56, Item 2).

29. The letter described a change to the work product that was effected at the meeting. According to Mr. Krylowski, it was agreed by those present that the manual should be broken out into two Hydraulic Engineering Circulars, HEC-20 on "Stream Stability" and HEC-18 on "Scour at

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Bridges." According to the letter, the latter would

> "serve as a companion document to the Technical Advisory (TA) on scour currently being developed. This does not require additional work but will remove one chapter from the previous manual and call it a separate volume. Scour will be referred to in the circular on stream stability."

This change would not require KRW to gather any additional information. (Tr. 266). Mr. Krylowski, who had been present, testified that the persons present, including the KRW employees Messrs. Johnson and Richardson, were in agreement that this should be done using the material already at hand. (Tr. 267). Mr. Krylowski's letter of December 11 was to the same effect, stating that "Very little was eliminated from the manual" and that Mr. Frank Johnson, a technical employee of KRW, had "voiced the opinion (and we agree) that an effort can be made to condense much of the material we have." As noted above in Finding 27, KRW did not call Mr. Johnson, or either of the other two KRW employees present at the meeting, Messrs. Chang or Richardson, as witnesses. In the absence of contradictory testimony, we find Mr. Krylowski's description of what transpired and what Messrs. Richardson and Johnson said at the December 8 meeting to be factually correct.

30. Mr. Krylowski's letter set forth a revised outline, "subject to change" for the proposed HEC-20 "Stream Stability" reading, in its entirety:

I. INTRODUCTION

II. STABILITY FACTORS

A. Factors that affect stream

B. Factors that affect hydraulics

III. ANALYSIS PROCEDURES

A. Classify

B. Identify problems and alternative countermeasures

IV. APPENDIX

A. Aggradation/degradation

B. Lateral stability of banks

C. Countermeasures

This outline was nowhere as detailed as that which KRW had prepared under Task B (Finding 9) and which the FHWA had approved (Finding 12). (Tr. 66).

31. With regard to the proposed HEC-18 "Scour at Bridges," the letter simply stated that "Because of the urgency of the topic and the degree to which work on the subject has progressed, it was agreed that we would strive to complete HEC-18 first." The letter made no mention of what work, if any, KRW was to do regarding the proposed HEC-18. As it turned out, the FHWA contracted directly with Dr. Richardson for him to produce the circular on bridge scour, and the final product under this contract only addressed stream stability. (Tr. 114).

32. Two days before the meeting, the FHWA had given KRW's Mr. Johnson some comments on the chapter drafts that KRW had submitted. Comments were also given at the December 8 meeting and the December 11 letter also enclosed comments on the draft chapters. These were the first occasions on which the FHWA submitted comments on any of the chapters. (Tr. 30).

33. KRW argues that none of its employees attending the meeting were authorized to alter the terms under which KRW was performing. There is nothing in the record to contradict this. Nevertheless, KRW did not write directly to the Contracting Officer, when its officers learned of what transpired at the December 8 meeting and that its employees had apparently acquiesced in the revisions to the draft manual, to notify that official that KRW deemed the direction to split the manual to be a change. However, it did mention this belief in subsequent Progress Reports. See Findings 36 and 38.

34. Mr. Philip Thompson, Chief of the FHWA's Hydraulics and Geotechnical Branch, Highway Bridge Division, testified as to the scope of the two contemplated circulars and explained the difference between stream stability and scour. (Tr. 806-807). HEC-18 is the number assigned to the subject of scour at bridges. HEC-20 is the number assigned to stream stability at highway bridges. Stream stability is concerned with breach of a river and whether it is going laterally or vertically with time. Scour at bridges is concerned only with the cross-section of the bridge and what is happening to scour at that cross-section. Scour at bridges is a subset of stream stability in general.

35. On December 30, 1987, Mr. Johnson sent an internal KRW memorandum to Mr. Machol. (App. Ex. 36, page 2). The memorandum stated that much work remained because of problems other than the FHWA-directed reorganization of the draft manual:

> "I think considerable work may be necessary to overcome the fact that the figures came from numerous sources. There is no consistency in lettering on the figures; e.g., letter sizes vary all over the spectrum;

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some lettering on the figures is all caps, some are upper case and lower case; some of the figures are too cluttered; some are not legible. I think we were aware of this from the beginning, but the reviewers became somewhat critical and I can't really blame them.

"I am trying to identify the source of figures as I work on the rewrite . . . .

This memorandum makes it clear that there remained a considerable amount of editorial-type work to be performed on the draft, even if the FHWA had not directed that the work be split into two circulars. What the appellant has not done in presenting its case is to introduce evidence tending to show, on the one hand, how much work was required for corrections and editorial revisions such as were described in this passage from Mr. Johnson, which were part of the original contract work and not a compensable change, and, on the other hand, how much work flowed from the FHWA direction to delete scour.

36. On January 4, 1988, KRW submitted its Progress Report for December, 1987 (AF Tab 43), addressed to the Contract Administrator. The report stated that in January KRW planned to evaluate "the changes requested by FHWA to determine the extent of work and time that will be required to make the revisions requested." KRW took the position that this would involve identification of new tasks, development of a new schedule, and reorganization of the manual "into a format considerably different from" the previously approved format. The Report closed by stating that the project was behind schedule and that contract revisions would "be necessary to reflect the changes that have taken place from that [sic] set forth in the existing contract." A chart attached to this Progress Report stated that as of the end of November the manual was 98% completed and the project as a whole was 93% complete. The Board accepts this last statement of the status of manual and project completion, which stands uncontradicted, as factually correct.[31]

37. Based on this statement of the degree of completion in the Progress Report for December, and on the consensus by the technical representatives of both parties at the December 8 meeting that the material already on hand need only be condensed to carry out the change (Finding 29), the Board finds that as of November 30, 1987, all research to prepare a manual that included coverage of both stream stability and scour had been completed and that, therefore, no further research would need to be done to delete scour pursuant to the FHWA's direction. Bearing out this conclusion is the fact that, in the text of that Progress Report, KRW only spoke of reorganization and made no mention of any need for further research. A reordering of content, including some deletions, was all that would be required; see also Finding 60.

38. The Progress Reports for January (AF Tab 44), February (AF Tab 45), March (AF Tab 46), and April (AF Tab 48), 1988 reported that during the following months KRW planned to continue this work and reiterated the need for contract revisions. Commencing with the Progress Report for May (AF Tab 55), KRW ceased including in its Progress Reports any statements of labor hours of effort expended.

39. On March 18, 1988, Mr. Machol sent a memorandum to Mr. Richardson. (Resp Ex. 1). The Memorandum forwarded, for Mr. Richardson's review and comment, copies of Mr. Johnson's rewrites of Chapters 1 (Introduction) and 2 (Factors That Affect Stream Stability). It noted that there were "minor changes" necessary, such as correcting figure numbers. The Memorandum advised that Mr. Johnson had determined how to combine chapters 3 and 4 into one and what to place in the Appendix, and expressed the hope that Chapter 3 and the Technical Summary could be forwarded "very soon."

40. On May 27, 1988, KRW submitted drafts of the revised chapters 1 and 2 and a revised outline to the FHWA for approval and comments. (RAF Tab 51). The revised outline altered the outline Mr. Krylowski had suggested (Finding 30) by providing for additional chapters 4 "Selection of Countermeasures" and 5 "Countermeasure Design." In Mr. Krylowski's outline, countermeasures was a topic in the Appendix. The May 27 letter also split the two remaining portions of Mr. Krylowski's outline into separate Appendices. By letter of June 10, the Contracting Officer's Technical Representative advised KRW that the outline "appears complete and we suggest you proceed on the remaining chapters of the manual based upon it." The letter advised that the FHWA would accommodate KRW's request for comments on the draft chapters, but would not give final comments until KRW delivered "the complete draft manual as called for in the contract." (RAF Tab 52).

[31] See also footnote 47.

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41. On June 10, 1988, in its covering letter returning the executed Modification #1 (RAF Tab 54), KRW noted that the Modification did not give adequate time and indicated that additional compensation in an as-yet-unstated amount would be requested.[32] The letter stated that KRW had been delayed 1 1/2 months due to the FHWA delay in approving the outline. This allegation is not borne out by the record, since KRW at its own risk had proceeded with the Task C work notwithstanding the lack of written approval. (See Finding 11 and Discussion section V.) The letter also alleged that KRW had been delayed for five months due to the FHWA's failure to furnish comments on the draft chapters within the contractually-mandated thirty days.[33] Regarding the effect of the delayed comments on costs of performance, the letter stated that KRW estimated the effect of the delay in providing comments on the outline and on the chapters increased costs by 14% of the original estimate of costs for performing Task C. The letter included no basis for fixing this amount at 14%; neither does the trial testimony (see Tr. 37).

42. On June 17, 1988, Mr. Krylowski wrote KRW, advising that it was not necessary under the contract for KRW to again send chapters to the FHWA for review and that such action was not necessary to achieve a good product. Mr. Krylowski requested KRW not to submit anything but the final work, noting that the FHWA wanted the contract work complete by September 30. (RAF Tab 57; Tr. 311-312).

43. Messrs. Machol, Krylowski, and Martin met on October 24, 1988 and discussed the changes KRW was seeking. After Mr. Krylowski remarked that he would prefer to stop the contract work at that point and get what he could from KRW, Mr. Machol asked that that be put in writing. (RAF 68; Tr. 440-441, 443-445, 451).

44. On September 1, 1988, KRW filed a request for additional compensation; this request is described in Finding 64. The Contracting Officer denied this request in a letter of November 21, 1988. (AF Tab 70, Finding 65). Of significance to the instant dispute, without invoking either the termination for convenience or the termination for default provisions of the contract, without invoking the suspension of work provisions of the contract, and without stating that KRW was to proceed no further, the Contracting Officer's letter closed with the following sentence:

> "Deliver to the Federal Highway Administration in present form, all materials pertinent to this contract. In addition, please submit the enclosed forms and your final invoice."

The "enclosed forms" were DOT Form 4220.4 (2-71) "Contractor's Release" and an unnumbered FHWA Form entitled "Contractor Inventory Schedule."

45. The "Contractor's Release" form, obviously intended for use upon completion of a contract, provided for release of the United States and its employees from all claims under a contract except for certain described categories of claims. The "Contractor Inventory Schedule" appears to be for listing government property in a contractor's possession.

46. The Board finds that upon receiving the correspondence described in Finding 44, a reasonable contractor would not know what the FHWA was intending or what was to be the status of its contract. The correspondence gave rise to many questions. Was this to be a termination? If so, was it for convenience or for default? Was it to be a suspension of work? Upon receiving a letter phrased in this manner, a contractor would be reasonably entitled to ask for and *promptly* receive clarification of the FHWA's intent, for when a contracting officer wishes to direct some action, that action must be clearly stated, not ambiguous.

47. KRW sought such clarification. By letter of December 7, 1988 (RAF Tab 71), KRW sent a series of questions to the Contract Administrator regarding the November 21 letter (Findings 44 and 65). KRW asked:

> (i) if FHWA was taking the position that the FHWA was not obligated to comply with the contractual requirements for providing comments of draft submissions within 30 days;
>
> (ii) if FHWA was taking the position that the Contracting Officer's Technical Representative's directions at the December 8, 1988 meeting (Findings 27 *et seq.*) to split the manual was not a change in the scope of work;

[32] This request was eventually made in September. See Finding 64.

[33] According to the letter, he first chapter was submitted to the FHWA on June 5, so that comments would have been due on July 5. Comments were not provided until December 8, 11, and 27.

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(iii) if FHWA was taking the position that this direction did constitute additional work but would not recognize any added costs because the work was not authorized by the Contract Administrator;

(iv) under what provisions of the contract did FHWA give the direction that concluded the November 21 letter (Finding 44).

The Board finds that these questions, and especially question (iv), were reasonable in the light of the paucity of rationale set forth in the November 21 letter.

48. The FHWA did not respond to KRW's December 7 inquiry because it could not decide whether to terminate the contract for default or for convenience of the government. (Tr. 644-647, 653).

49. After three months had gone by and it had not received any response to this letter, despite having mentioned the absence of a reply in several monthly Progress Reports, on March 9, 1989, KRW wrote to Ms. Margarita Montada, the Director of the FHWA's Office of Contract and Procurement, several echelons above the Contracting Officer and the Contract Administrator. (RAF Tab 76; Tr. 100-101). This letter forwarded copies of the correspondence and requested her to stimulate a reply.

"Three months have passed since KRW wrote FHWA for clarification and assistance with regard to this contract, as yet we have not received a response.

"We are writing you as a last resort, since we believe KRW has waited an inordinate length of time for a response to our inquiries...."

Any hopes KRW may have had about receiving a timely reply to this letter were soon dashed. The letter did not reach Ms. Montada. Ms. Montada testified that, notwithstanding that the letter was addressed to her, the person opening the mail would not have passed it to her, but directly to the Contract Administrator involved.[34] (Tr. 363-366). The letter eventually reached Mr. Anthony Martoccia, Chief of the Highway Support Services and Small Purchases Division, FHWA Office of Contracts and Procurement. When a month elapsed after sending the letter to Ms. Montada, with no reply forthcoming, on April 10 KRW wrote the Contract Administrator querying as to when a reply might be expected. (RAF Tab 78).

50. Finally, on May 10, 1989, over five months after KRW had justifiably sought clarification of the last paragraph of the Contracting Officer's November 21 direction, Mr. Martoccia replied to KRW's December 5 letter. (RAF Tab 80; Tr. 102-104). His letter addressed[35] separately each of the four questions KRW had posed in that letter. The following summary of Mr. Martoccia's responses is keyed to the questions described in Finding 47, *q.v.*:

(i) Although written approval of the outline was not provided until March 19, 1987, KRW had received verbal approval on January 14. [See Findings 5.b, 9, and 11.] Furthermore, FHWA reviewers found it neither practical nor wise to review individual chapters without having the entire draft manual. "KRW was immediately informed through conversations with the Contracting Officer's Technical Representative (COTR) that all comments would be provided after the last chapter was received .... In the months that followed, KRW never asked to discuss the comments."

(ii) Yes, for the instructions to which the KRW letter refers are in fact the FHWA comments on each draft chapter. "A change would have been issued in accordance with the Changes Clause of the contract."

(iii) "The FHWA recognizes that it provided comments on draft chapters, it did not change the contract [sic]. It is clear in the contract that the COTR can give technical direction without impacting the price."

(iv) On October 24, 1988, the Contracting Officer's Technical Representative stated "that he would prefer you to stop working at this point and deliver all available materials in its present form [sic] to the FHWA. You agreed and asked that this be put in writing."[36]

This statement (iv) was not responsive to the inquiry. In fact, it was based on a misunderstanding of what had transpired. The record indicates that the Contracting Officer's Technical Representative had spoken of stopping the work and then obtaining the

[34] The Board notes the inescapable conclusion: a contractor would, as a practical matter, find it almost impossible to bring improper conduct, or a failure to act, by a member of the contracting office to the head of that office.

[35] We do not say "responded to," for comment (iv) is not responsive.

[36] See Finding 43.

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work product (Finding 43), but the Contracting Officer's November 21 missive did not mention stopping work, much less directing KRW to cease performance. Continuing the FHWA's failure to clarify its intent or to cite any specific contractual, regulatory, or statutory authority for the November 21 direction (Finding 44), Mr. Martoccia closed with the following paragraph:

> "The FHWA is demanding that you comply with the terms of the contract. You are immediately required to deliver the Technical Summary and Final Design Manual. These items were due to FHWA no later than October 31, 1989. The FHWA has provided over $100,000 in progress payments. If the above items are not delivered and accepted by the undersigned within one (1) month of this letter, I will direct a repayment of the progress payments made to KRW."

The FHWA's failure to promptly clarify the November 21 direction was due in part to its prolonged indecision regarding what should be done with this contract (Finding 48),

51. On June 9, 1989, the Contracting Officer wrote KRW advising that the FHWA was considering terminating the contract for default due to KRW's failure to complete the contract work and giving it ten days in which to present any excuses for the alleged failure. (RAF Tab 82).

52. KRW declined to sign two FHWA-proposed Modifications that would have extended the completion date, on the grounds the time offered was inadequate and the question of compensation was not addressed. (RAF Tabs 87, 91, 93, 95; Tr. 92-95, 488).

53. On September 21, 1989, the Contracting Officer wrote to KRW, stating that the draft manual produced by KRW "still misses its mark as a 'how to' document for practicing hydraulics engineers" and, as a result, FHWA would publish it as an "Implementation Package" rather than as a Hydraulic Engineering Circular. He therefore requested KRW to eliminate from the draft all references to its being a Circular. The letter also listed seven deficiencies perceived by the FHWA to date, including a September 1987 notice of a deficiency that was as yet uncorrected and KRW's inclusion in the draft of equations that yielded "unrealistic results." KRW argues in its post-trial Reply Brief [37] that it never completed the contract work because this was another change directed by the FHWA. Reviewing the paucity of evidence on the nature of this alleged change, the Board finds that to the extent this was a change, it was made to accommodate deficiencies in KRW's work product.

54. On October 26, 1989, the Chief of the FHWA Engineering and Highway Operations Implementation Division requested the Contracting Officer to terminate the contract for convenience, due to an alleged lack of cooperation by the contractor which threatened the timely availability of the manual. On November 8, 1989, the Contracting Officer issued the requested termination in the form of a very brief three-line letter, advising KRW that detailed instructions would follow within ten days. Those instructions, based on Federal Acquisition Regulation § 52.249-2, were included in a letter dated November 21, 1989. (AF Tab 16). This letter was never received by KRW, and may not have been sent; see Finding 55.

55. Eleven months later, by letter of September 27, 1990, KRW advised the Contracting Officer that it was still awaiting the detailed instructions. (RAF Tab 100). In response, the FHWA sent KRW a copy of a letter dated November 21, 1989, which it states had been mailed to KRW at that time. (RAF Tabs 101, 99 [38]) The November 21 letter set out detailed instructions for KRW to follow. At the top appears the legend "Certified Mail—Return Receipt Requested" but the record does not contain any evidence of the FHWA having received the green card, the Postal Service receipt. At the bottom of the letter appeared blanks for KRW to acknowledge receipt; the only copy in the record shows no acknowledgement. Mr. Trainer, the Contracting Officer, acknowledged that he could not prove it had actually been sent. (Tr. 494). The Board must therefore determine that the promised instructions were never received by KRW.

56. On November 5, 1990, KRW submitted what it called a "termination proposal" to the Contracting Officer." The proposal specifically excluded claims which KRW said it would be filing for delays prior to January 1, 1988 and for additional work performed after that date. The proposal sought payment of $3,676.87. The proposal also included one copy of the final manual, complete with table of contents, references, glossary, graph-

[37] Page 4.

[38] The letter at Tab 101 forwarded a copy of the letter set out in Tab 99.

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ics, and a floppy disc contained these matters. (RAF Tab 103; Tr. 116). The parties have deemed this to be the final delivery under the contract. (Tr. 808, 961; Resp. Ex. 12).

Impact Of The FHWA Direction To Alter The Manual

57. There is a deep difference of opinion between the parties regarding the actual impact of the revisions directed by the FHWA at the December 8 meeting. There is conflicting evidence in the record. We examine the testimony of various witnesses on this subject.

58. Mr. Krylowski, the Contracting Officer's Technical Representative, is not a hydraulics engineer. He possesses a Bachelor of Science degree in Aeronautics and a Masters degree in Engineering Mechanics. He has also completed the studies for a Ph.D. in Structures and Applied Mechanics. (Tr. 299). When called as a witness by KRW, Mr. Krylowski testified that the change basically only purged from the manual the material on scour. (Tr. 288). He also testified that, at the December 8 meeting, the KRW technical employees present were of similar belief (see Finding 29) and made no objection to the changes. (Tr. 267). Mr. Krylowski testified, without contradiction, that in April of 1988 Mr. Machol told him that the work should be completed within two months. (Tr. 293).

59. The respondent called Mr. Philip L. Thompson to testify as both a fact and expert witness. Mr. Thompson is Chief of the Hydraulics and Geotechnical Branch, Bridge Division, FHWA. He is a professional engineer, licensed in Virginia and Pennsylvania, possessing a masters degree in civil engineering with a focus on hydraulics and is a "national expert"—a person who provides technical assistance to state highway departments in support of the federal highway system. (Tr. 797-798, 888-889). He has been involved with the production of a substantial number of hydraulic engineering circulars published by the FHWA. (Tr. 801-802). The appellant conceded his expertise and the Board accepted him as an expert.[39] (Tr. 802).

60. Mr. Thompson, who had been involved with the contract work, testified from his position as an expert witness as follows:

(i) that, as of December, 1987, the draft manual was not ready for publication but was substantially complete, with most of the material it would eventually contain being present (Tr. 808-809, 824) (This comports with KRW's representations to this effect—see Finding 36.);

(ii) that the December 8 meeting that he attended had been called to resolve the question of direction for the manual, for its chapters did not "hang together," and that those present reached an agreement on how to overcome this (Tr. 817);

(iii) that, in his opinion, the effort involved in going from the draft manual as it existed in December, 1987 to the final manual as submitted in 1990 should not have exceeded one month if KRW had remedied the four areas of deficiencies: satisfying editorial comments, producing a chart on hydraulic factors, producing a design procedure, producing an example problem (Tr. 837);

(iv) that of these four areas of deficiency, only the first was ever rectified and the work involved in that effort should not have consumed more than one week (Tr. 838), 40 hours of effort (Tr. 846);

(v) that the removal of the material that the FHWA wished to cull from the manual and the relocating of blocks of text should not have taken more than 20 hours of effort (Tr. 833);

(vi) that the FHWA should have had the complete product by the end of January (Tr. 838);

(vii) that many deficiencies pointed out in FHWA comments were never corrected (Tr. 827, 829-832);

61. Mr. Machol was the only KRW employee, present or former, who testified. He did not testify on direct examination as to his background or credentials. On cross-examination, the respondent's counsel brought out that Mr. Machol was not a hydraulics engineer, although he had "experience" with hydraulic engineering, both educational and in the field. (Tr. 158). The record contains no details of this experience; it does not indicate that Mr. Machol in fact has any expertise. Under the contract, he is not designated

[39] In its post-trial Reply Brief (See three locations: page 6; page 15 with references to transcript page 89 on which this subject is not addressed; and page 17), the appellant seeks to limit the area of expertise of Mr. Thompson or to deny his expertise. However, at the trial the appellant did not seek to limit the area of expertise. (Tr. 802). The Board determines that Mr. Thompson's expertise, as conceded by the appellant at trial, is broad enough to cover the issues before the Board.

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as a professional staff member.[40] He signed correspondence for KRW as, and was referred to in the pre-contract proposal as, "Project Coordinator." We cannot assume that Mr. Machol has any qualifications as an expert in the area of how much technical effort should have been required to comply with the FHWA directive to split the manual. We accord his testimony none of the weight which would be accorded that of an expert.

62. Mr. Machol produced a chart (App. Ex. 1) from which he testified. The chart stated that KRW worked from mid-March, 1987 until June 20, 1989 in revising the chapters of the draft manual, at which time they were submitted to the FHWA. The chart also shows that the FHWA review was completed in late September 21, 1989. (See also Tr. 1022). Although not shown on the chart, delivery of the final document occurred in November, 1990. (Finding 56). The total period during which KRW was engaged in rewriting was therefore twenty-nine months.[41] In contrast, the chart also shows that KRW needed only ten months (even with the FHWA's failure to provide timely comments) to produce the original manual from scratch. Because of Mr. Machol's failure to attain the status of expert witness, we cannot base on his testimony a finding that in fact the effort for which KRW makes claim was technically justified, and his testimony is not probative to the issue of the extent of the effort reasonably required to reorient the draft manual. His testimony did not distinguish between the effort required to correct deficiencies and the effort to carry out the FHWA-directed revision.

63. In sum, KRW produced no witness, expert or otherwise, to testify with specificity *why* the revamping of the manual consumed the period from December, 1987 (when the alleged change was effected) until November, 1990 (when it was finally delivered), or *why* the revision took so much longer in terms of calendar months than the original effort.[42] Such testimony or other evidence of that nature is an essential part of the appellant's burden of proving that the FHWA caused the additional effort for which claim is made. Absent such proof, the Board cannot make a finding that all of the effort for which claim is made was the fault of the FHWA. In contrast, the FHWA has produced a witness, Mr. Thompson, who possesses expertise and gave his opinion as to the reasonable effect of the FHWA direction to recast the manual and the effort that should have been required to carry out that mandate. The Board therefore finds that Mr. Thompson's testimony as to these matters, set forth in Finding 60, is accurate.

The Claims

64. On September 1, 1988, KRW submitted a request for additional compensation of $48,983.41 for three categories of costs.[43] (RAF Tab 63). The calculation of this amount was based on KRW's estimate of the percentage of cost increase; no basis was given for selecting these percentages rather than some other amount. The letter referenced KRW's earlier June 10 letter. (Finding 41). The compensation sought was as follows:

a. $8,558.85 for delays and costs resulting from the FHWA's failure to furnish timely comments, an amount calculated by estimating that the resulting effort/costs was 14% of that which would otherwise have been required, and taking 14% of the amount ($61,134.70) in the contract that was attributable to Task C.

b. $33,624.08 for delays and costs for revising the manual, pursuant to the December 8 meeting (see Findings 27 *et seq.*), after it had already been prepared and submitted, calculated at 55% of the amount in the contract for Task C.

c. $6,800.00 for developing and obtaining approval of a new manual outline, pursuant to the reorganization of the manual directed at the December 8 meeting, calculated at 80% of the amount in the contract for Task B. (Tr. 196)

65. By letter of November 21, 1988 (AF Tab 70), the Contracting Officer denied this

[40] Finding 7.b.

[41] 15 months from March, 1988 to June, 1989, plus 14 months from September, 1989 to November 1990.

[42] Although KRW alleges otherwise, the record does not show the existence of any FHWA-directed changes after December, 1987. The post-December changes were suggested by KRW (Finding 40) or effected to accommodate KRW's deficiencies in performance (Finding 53).

[43] The request was not certified pursuant to section 6(c)(1) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1). It was not required to be, for the amount then sought was less than $50,000 and, as we have determined under "Date of Claim/Interest" in the "DISCUSSION" portion of this Opinion, it was not a claim within the meaning of the Act.

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request for compensation on the grounds that the facts did not support this request, without giving detailed reasons therefor other than that quoted in the following sentences:

> "You stated in your letter of June 10, 1988, that the Contracting Officer's Technical Representative required you to perform additional effort under the contract. You are reminded that SECTION G—CONTRACT ADMINISTRATION DATA, CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR), states that the COTR is not authorized to change the scope of work as stated in the contract, to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, delivery schedule, period of performance or other terms or conditions."

The letter closed with the controversial sentence[44] set forth in Finding 44.

66. On April 22, 1992, KRW submitted a certified claim for $70,076.98, but only for work performed subsequent to December 8, 1987.[45] (RAF Tab 107). KRW arrived at this figure by taking $33,179 for direct labor effort during the period between December 9, 1987 and November 9, 1989, when the contract termination became effective. December 9 was chosen as the controlling date because it was the day after the meeting (see Finding 27) at which the FHWA advised KRW that it wished to change the contents of the manual. The claim listed this amount by individuals allegedly rendering the effort, as follows:

Dr. Richardson	$ 825.00
Mr. Johnson	17,925.00
Mr. Chang	500.00
Mr. Julien	742.00
Mr. Machol	11,341.00
Mr. Mahotra	1,120.00
Mr. Kozan	570.00
Mr. Taylor	156.00

To this $33,179 KRW added overhead at 85% ($28,202.15), general and administrative expense at 18% ($11,048.61) of labor and overhead, and profit at 10% ($7,242.98) of the sum of these. These percentages were taken from the original proposal.[46] The total was $79,672.73. From this amount, KRW deducted $9,595.76, the amount KRW says it had included in its original proposal and would be attributable to the work which was yet to be performed as of December 9.[47]

67. The Contracting Officer denied this claim in its entirety by decision dated September 11, 1992, from which the instant appeal has been taken. The stated reason was that the contract was a fixed-price contract in the amount of $107,724 which had been terminated for convenience, that upon termination KRW had submitted a "final bill" in the amount of $5,740[48] which had been paid, and that therefore KRW had "been paid the entire amount due under the fixed price contract." While referring to the April 22 claim submittal (AF Tab 107, Finding 66), the decision did not address the bases for the claim KRW had filed. (RAF Tab 109). (This denial would seem to say that the payment of the termination proposal constituted an accord and satisfaction under the contract.[49] However, the termination proposal had specifically reserved the right to file the instant claims, so the defense of accord and satisfaction would not lie and we do not consider this further.)

68. By letter of March 9, 1993 to the Contracting Officer (Attachment A to the Amended Complaint[50]), KRW advised the Contracting Officer that it had erred in submitting the April 22, 1992 claim, in that it had omitted the $8,558.85 item for financial impact on KRW resulting from FHWA-caused delays prior to December 8, 1987.[51] As corrected, the claim sought $78,635.83. (Tr. 119-120).

69. On June 7, 1993, KRW filed an Amended Complaint, raising the *ad damnum* to $173,848.45. There were three elements of this $95,212.62 increase. *First,* a recalculation of direct labor claimed for each

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[44] "Deliver to the Federal Highway Administration in present form, all materials pertinent to this contract. In addition, please submit the enclosed forms and your final invoice."

[45] *I.e.,* not including the claim for the FHWA's earlier delay in furnishing comments on draft chapters. See Finding 64.a.

[46] See Finding 2.

[47] The $9,595.76 is consistent with and supports our Finding 36 as to the state of project and manual completion as of December 8, 1987.

[48] This refers to KRW's termination proposal (Finding 56).

[49] The respondent has not alleged this before the Board.

[50] See Finding 69.

[51] See Finding 64.a.

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year[52] of contract performance yielded a total of $34,305.50 rather than the previously used total of $33,179.00. *Second,* KRW made a major revision to the labor and general and administrative overhead rates, from 85% and 18% respectively over all the contract period, to the rates set out in the table in Finding 78. *Third,* KRW added $43,462.11 as "expenses to collect" the amounts claimed.[53] Notwithstanding the drastic change in dollars, the Board finds that this is essentially the claim that was before the Contracting Officer, the difference being merely the result of revising overhead rates to reflect what the appellant understood the Defense Contract Audit Agency auditor to have found, plus the adding of alleged costs to prosecute the claim.

70. The direct labor shown in the Amended Complaint as resulting from the FHWA's alleged delays and changes, $34,305.50, was broken down by individuals and fiscal years as set forth in Table 1 of this Opinion. Appendix I [Not reproduced—CCH.] to this Opinion sets forth the effort expended on a monthly basis, as expressed in statements of effort the monthly Progress Reports from performance inception until KRW ceased including the statement of effort in its monthly Reports. Comparing KRW's proposal (Finding 2), KRW's pre-change effort (Appendix I), and KRW's post-change effort, we find:

(i) Prior to the first day of December, 1987 (eleven days before the alleged change was ordered), KRW had expended a total of 1,173 labor-hours of effort (excluding secretary and draftsman). KRW is claiming for 1,089[54] labor-hours alleged incurred subsequent to January 31, 1988 (almost two months after the change). In other words, KRW is claiming that the redirected manual produced in compliance with the FHWA's December 11 directive consumed almost as much (92.8%) effort as KRW had expended to produce the manual in format as originally contemplated to a 98% stage of completion,[55] notwithstanding that no additional research was needed.[56]

Periods KRW FY Persons	2/87-1/88 1987 Hours	2/88-1/89 1988 Hours	2/89-1/90 1989 Hours	2/90-1/91 1990 Hours	TOTAL Hours
Richardson ..	28	29	0	0	57
Johnson	76	623	38	0	737
Julien	0	53	0	0	53
Chang	18	2	0	0	20
Machol	30	205	81	58	374
S/T	152	912	119	58	1,241
Mahotra	0	0	0	80	80
Kozan	0	0	38	0	38
Taylor	0	0	20	0	20
TOTAL	152	912	177	138	1,379

Table 1: Breakdown of direct labor hours claimed.

(ii) The monthly Progress Reports from October 1987 through April 1988 (the last Report containing a breakdown of labor-hours[57]) indicate that Mr. Machol personally expended zero hours during that period. The Progress Reports (see Appendix I) also show that he expended 33 hours during the period February 1 through September 30, 1987. The Amended Complaint alleges that, during the period February 1, 1987 through January 31, 1988, Mr. Machol expended 30 hours of effort due to the delays in furnishing comments and due to the change, *i.e.,* that only three hours of his effort during a twelve-month period were not additional work.

(iii) When questioned about discrepancies between hours claimed and hours reported in the Progress Reports, Mr. Machol testified that many hours had been expended which had not been reflected in the Reports. (Tr. 218 *et seq.*).

[52] The recalculation was performed as part of an exercise, requested by the Defense Contract Audit Agency auditor (Finding 77), to calculate overhead rates for each KRW fiscal year of contract performance.

[53] See Findings 72-74 and "III. Claim Prosecution Fee" under the "DISCUSSION" section of this Opinion.

[54] In Table 1, the difference obtained by subtracting 152 hours of pre-December 1, 1987 effort from the 1,241 claimed.

[55] Finding 36.

[56] Finding 29.

[57] Finding 38.

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71. Included in the hours for which claim is made are eighteen hours for the time spent in December, 1987 in preparing for and attending the December 8 meeting. Mr. Machol testified that these were hours not reflected on KRW's monthly report for that month. (Tr. 219). He further testified that, starting in December, KRW incurred much effort which was not reflected on vouchers and monthly reports. (Tr. 219-220). To the extent KRW is claiming for hours of effort that were not reflected on contemporaneous statements of effort, it is undertaking a heavy, almost insurmountable, burden of persuasion. KRW has not met that burden.

Claims Collector

72. Mr. Machol testified that KRW hired E.A. James Company to "pursue and collect" the monies due it from the FHWA. (Tr. 119). The appellant also offered into the record a notarized "To Whom It May Concern" letter dated June 6, 1993, attesting that 25% of the funds received from this claim would be paid to "the E.A. James Company at 6109 Harmon Place, Springfield, VA 22152 for services rendered for the collection of the funds." (App. Ex. 8). This is also the address reflected on the Board's docket records as the address of KRW's representative in these proceedings. The E.A. James Company is not a corporation. Rather, it is a sole proprietorship, established by Mr. Machol in November/December, 1990 after he had sold his interest in KRW. (Tr. 188). E.A. James Company is not a law firm and Mr. Machol not an attorney. (Tr. 188, 194). Because the nature of E.A. James Company's relationship to this appeal is an essential element of KRW's claim, we review in detail the other materials and evidence in the record on this point:

(i) In entering his trial appearance for the record, Mr. Machol stated that he "worked for" E.A. James Company and was also a Vice-President of KRW. (Tr. 3).

(ii) Mr. Machol testified that KRW has an expense in that it must pay 25% of the amounts collected to the E. A. James Company "as a collection agency on all of the funds it collects." (Tr. 145).

(iii) Mr. Machol testified that, when he sold his interest in KRW to Mr. George Earnhart,[58] the latter was understandably reluctant to include in the consideration any element for what might be recovered from the FHWA (Tr. 187):

"It was agreed, however, that it was to KRW's advantage, since I was familiar with those particular four claims more than he was, that after I retire, for KRW to hire E.A. James Company, *specifically me,* to work on pursuing those claims." (Emphasis added).

(iv) Regarding the ultimate disposition of the proceeds of any recovery, Mr. Machol testified (Tr. 189):

"If we collected the money after we paid expenses and the E.A. James for collecting it, half of it would go to KRW, George Earnhart, who owns 100 percent of it; the other half would go to me, which is exactly what would have been done if the money had been collected prior to my selling the business."

(v) Mr. Machol testified that E. A. James Company is a collection company, "set up to perform that and other functions." (Tr. 194).

(vi) Mr. Machol testified that E. A. James Company was being paid 25% to collect the claim, without regard to the number of hours expended *by Mr. Machol,* because, to use Mr. Machol's words, "We felt this was typical of the way a lawyer would do it." (Tr. 203). Mr. Machol also expressed the view that this amount should be paid by the FHWA because he understood that, under the Federal Acquisition Regulation, "*legal fees* can be collected and other expenses can be collected if they were incurred by the company and not within the company." (Tr. 204). (Emphasis added).

(vi) Mr. Machol further testified (Tr. 204) that:

"This involves all of the work that I performed after I left KRW and for the E.A. James. It was after November when I sold my interest in KRW and was off on my own."

(vii) Mr. Machol again testified as to the nature of the services that E. A. James Company was to perform (Tr. 230-231):

"It's taken a lot of work to prepare this claim against the Federal Highway Administration. It's taken a lot of time working with the auditor to do what had to be done to deal with the auditor which Federal Highways requested—came in.

It's taken a lot of time filing the appeals. It's taken a lot of time to come here. This

[58] See our earlier decision, referenced in Footnote 1 of this Opinion.

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is what E.A. James is getting paid for for collecting for the services performed.

As far as these four specific accounts receivable, you can call them, at the time I and Mr. Earnhart agreed that he was going to buy me out, we totalled what the assets were with the liability of the company. I determined what I would be entitled to up to that point.

He is not going to pay me for assets that he has questions that he will collect. I, on the other hand, am not going to walk away from assets which he might collect and I am entitled to a part of. So it was agreed—two different opinions—that these could be collected if effort was put in; and the opinion either we would collect them if we put the effort in and how to find the time to collect them.

So it was an excellent opportunity with my leaving the company, to enter into an agreement and say, okay, you go and you pursue these four claims. You continue as an officer of KRW with regard to these four claims. You will be paid a fee for performing that services and you will be reimbursed for out-of-pocket expenses that you incur—parking in this building, whatever else I incur as direct costs. That's what I've been doing.

So far, I've collected two of those. I get a fee. What is left over is divided between collectively E.A.—KRW and Mr. Earnhart and his wife, who are the people we sold to, and I get part of it after the expenses are paid. It's a normal type of arrangement and nothing should made [sic] out of it that isn't there." (Emphasis added).

73. In its post-trial Reply Brief,[59] KRW and Mr. Machol have made certain admissions which clearly state the functions of the E.A. James Company with regard to the claims before the Board. Due to the seriousness of what is stated, they are quoted verbatim:

"Mr. Machol is pursuing this and other KRW account receivables as an employee of the E. A. James Co. The E.A. James Co. was hired by KRW to pursue four specific account receivables (EA-8 [60]).

"55. FHWA states that the E.A. James Co. was established "to pursue KRW's three contract and one IRS dispute." [sic] The pursuit of four of KRW's account receivables is just one of many reasons for the establishment of the E. A. James Co.

"The E.A. James Co. was hired as an Agent of KRW to pursue certain account receivables. There is no requirement that the filing of a claim with a Federal Agency or processing a complaint and appearing before a BCA must be accomplished by a lawyer, so it must not be legal work. The E. A. James Co. is much more that [sic] a "collection company".

"The quantity and quantity [sic] of the work the E.A. James Co. has performed for KRW is well documented by the: . . . [61]

(4) correspondence with the BCA of December 2, 1992 and January 13, 1993;

(5) preparation and filing of the supplement to the Appeals File dated January 19, 1993;

(6) preparation and filing with the BCA the Election of Procedures on January 19, 1993;

(7) preparation and filing the KRW's Complaint with the BCA on January 25, 1993;

(8) preparation and submittal of a 16 page Interrogatories [sic] with FHWA on January 25, 1993;

(9) preparation and submittal of a motion for the extension of time with the BCA on February 17, 1993; . . .

(11) preparation of a response to FHWA's Interrogatories;

(12) preparation and submittal of Documents in response to FHWA's request to Dismiss and Compel by Subpoena of May 3, 1993;

(13) preparation and submittal of a Modification of KRW's Complaint on March 5, 1993;

(14) preparation of KRW's letter to FHWA of March 9, 1993, correcting an oversight in KRW's April 22, 1992 claim; . . .

(16) preparation and filing of argument, with the BCA, as to why the FHWA Motion, of May 3, 1993, to Dismiss KRW's complaint should not be granted;

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[59] Pages 25-28.

[60] A reference to an Appellant Exhibit. (Note by the Board.)

[61] The omitted portions of the material which follows are matters not involving filings with the Board other than the actual filing of the Notice of Appeal; the omitted items apparently relate to activities such as review or assembly of material, which may be performed by persons not satisfying Rule 29.

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(17) preparation of argument as to why FHWA's Motion, of May 3, 1993, to Compel by Subpoena should not be approved;

(18) preparation and submittal, on May 10, 1993, of KRW's response to FHWA's request for documents; . . .

(20) development of arguments as to why subpoena duces tecum, issued by BCA's May 10, 1993, [sic] should be withdrawn;

(21) preparation and filing, with the BCA, of KRW's list of witnesses for the hearing;

(22) preparation and participation in five conferences with the FHWA and Judge Robertory;

(23) preparation and submittal to FHWA, on May 24, 1993, KRW's request for a copy of the DCAA's audit report;

(24) preparation and presentation of argument, to Judge Robertory during a conference call, as to why FHWA's Motion to Compel by Subpoena, of May 28, 1993, should not be granted;

(25) preparation and filing of KRW's amended complaint, with the BCA on June 7, 1993, to reflect changes in the amount of direct labor and the OH and G&A rates that came to light as a result of special summaries that were developed at the auditor's request;

(26) preparation of documents and E. A. James serving as KRW's representative during the five day hearings before the BCA;

(27) preparation and submittal of KRW's 38 page post hearing brief, covering both statements of fact and legal arguments as to why KRW's claim should be approved; and

(28) review of FHWA's post hearing brief and the preparation and submittal of KRW's rebuttal to the statements of fact and legal arguments put forward by FHWA in its defence." . . .

"56. . . . They [Mr. Earnhart and Mr. Machol] also testified that Mr. Machol continued as an officer of KRW to pursue the collection of four of KRW's account receivables. This is the only reason Mr. Machol continued as an Officer of KRW Inc. Mr. Machol's authority, as an officer, from November 1990 on was limited to the collection of funds owed to KRW from the IRS and from three projects. This agreement was necessary if the E.A. James Co. was to pursue the four KRW account receivables."

The Board finds that each of the activities described in the numbered paragraphs quoted above, taken both separately and collectively, constitutes the practice of law and the Reply Brief constitutes an admission that the representation of KRW was in fact carried out by the E.A. James Company. The Board notes for the record, that the transcript testimony described above was the first intimation that the E.A. James Company was representing KRW in the actual proceedings before the Board, and even at that, it is only in hindsight that the true status of E.A. James Company is brought to light. If the Board had been advised that Mr. Machol and E.A. James Company were representing KRW rather than Mr. Machol as a Vice-President of KRW, he would not have been allowed to continue. The Board further notes for the record that, in presenting KRW's arguments that led to the decision in *KRW, Incorporated,* DOTBCA NO. 2572, 94-1 BCA ¶ 26,268 (1993) (see footnote 1, *supra*) Mr. Machol made the positive statement that he was representing KRW as a Vice-President of KRW, and the Board accepted his statement as truthful. At that time, E.A. James Company was represented as being a collection agency, not as a practitioner before the Board.

74. The agreement called for E.A. James Company to be paid a flat 25%. The compensation to be paid to E.A. James Company is not on a per hour or per day basis for services rendered in putting together a claim. Rather, it is a contingent fee dependent upon the recovery in this litigation. Considering all the evidence recited above, the Board finds that KRW has entered into an obligation to pay E.A. James Company a contingent fee of 25% of any recovery in return for services, including representation of the KRW before the Board. The Board also finds that, to the extent that E.A. James Company is to be paid all or a part of this fee for filing and prosecuting the appeals before the Board, as indicated in the italicized extract above from Transcript page 230, and to the extent described in the extract from the Reply Brief (Finding 73), E.A. James Company has engaged in practicing law before the Board.

Audit Report and Costs Incurred

75. KRW maintained its records on a fiscal year basis, from February 1 to January 31. Contrary to normal practice, it named its fiscal year on the basis of the calendar year in which the fiscal year began, rather than the calendar year in which it ended. Thus, the fiscal year commencing February 1, 1990 and ending on January 31, 1991 was called

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Fiscal Year 1990. (Tr. 770). The Defense Contract Audit Agency auditor, Mr. Robert Gentile, persisted in referring to KRW's fiscal years by the calendar year in which the fiscal year ended, creating some confusion in the record. (Cf. Tr. 771).

76. The FHWA obtained an Audit Report from the Defense Contract Audit Agency on KRW's claim as described in Finding 66. At that time $70,076.98 was claimed, including $33,179 in direct labor. To the direct labor was added labor overhead at 85% and general and administrative ("G&A") overhead at 18%, the rates accepted by the FHWA when it negotiated the original contract.[62] The direct labor claimed included $17,925 for Mr. Johnson. The appellant has claimed that, as a result of the change effected by the FHWA on December 8, Mr. Johnson expended 661 hours subsequent to February 1, 1988[63] and prior to February 1, 1990.[64] (See Table 1). He, Dr. Richardson, and Mr. Chang worked on no other projects for KRW. (Tr. 121; RAF 107). The Audit Report does not question the expenditure of the direct effort set forth in the claim. (Tr. 693, 697, 699). However, it qualifies that position by saying that there was no technical review of the direct labor-hours claimed.[65] We interpret this as meaning that the Defense Contract Audit Agency does not question that the labor-hours claimed were in fact expended, but expresses no opinion as to the nature of the effort involved in those hours or whether they involve compensable effort.

77. The auditor advised KRW that it would have to apply direct overhead and general and administrative overhead at rates in effect for the years in which the labor was expended, rather than a single rate over the entire period of the contract. (Tr. 122). KRW had not made any such calculations, but set about performing them. (Tr. 123; Audit Report, page 2). It calculated, for each of the four years of contract performance, a greater rate than had been claimed. (Tr. 124). These newly-calculated rates are set forth in Finding 78.

78. KRW set forth these revised labor overhead rates and G&A rates in its Amended Complaint filed June 7, 1993, as follows:

KRW Fiscal Year	Labor Overhead Rate	G&A Rate
1987	149.25%	23.55%
1988	222.18%	21.08%
1989	116.76%	17.55%
1990	94.17%	15.06%

79. In part (a) of the Audit Report, under the heading "Circumstances Affecting the Audit", the auditor discussed overhead rates. The first sentence of the second paragraph from that section, quoted below in italics, has become controversial between the parties. It is set out below in context:

> "The contractor determined its claimed indirect costs by applying the indirect rates negotiated in the contract of 85 percent and 18% for overhead and G&A, respectively. The contractor could not readily determine the actual indirect costs incurred during the claim period of the contract because its accounting system does not accumulate indirect costs by indirect expense pool.
>
> "*The contractor provided actual indirect expense rate history which reflected significantly higher indirect rates incurred when compared to the indirect rates proposed on the claim.* However, we determined the contractor's supporting documentation for its actual indirect rate calculations contained numerous deficiencies and errors. Among the deficiencies, the contractor charged all indirect costs to one account, and allocated the costs to its overhead and G&A expense pools, but was unable to support the basis of the allocation. Furthermore, the contractor could not provide adequate support for its determination of the overhead allocation base of direct labor dollars. In addition, the contractor's G&A rate calculations contained material mathematical errors ....
>
> "The contractor confirmed to us in discussions that the indirect rate history was

[62] Finding 2. These were also the rates in the original request for equitable adjustment. See Finding 66.

[63] This date, taken from the Amended Complaint, is selected because it is the only "hard" date in the record from which we can determine hours attributable solely to the change.

[64] The Amended Complaint shows no time expended by Mr. Johnson thereafter.

[65] Audit Report, page 2.

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not readily available, and because of this condition, it could not determine the profit or loss incurred under the contract. Based on the above cited inadequacies of the contractor's accounting system, and the contractor's inability to properly accumulate overhead and G&A costs, the results of our review of the allowable costs incurred and the indirect rates incurred during the claim period are therefore qualified." (Emphasis added).

80. The appellant argues that the first sentence of the second paragraph quoted in Finding 79 above ("The contractor provided . . . on the claim.") indicates that the auditor had agreed with the appellant's now-claimed overhead rates (set out in Finding 78) vice the 85% and 18% rates claimed initially (Finding 66). (Tr. 125, 128-129). After KRW had called the auditor, Mr. Gentile, to the stand as its own witness, attempting to prove its monetary claim by the auditor's testimony, the auditor testified that he found the claimed rates to be unsupported and unreliable, and therefore they were not audited. (Tr. 712-713, 721-724, 727-728). The auditor's testimony, while consistent with the Audit Report, apparently surprised the appellant, which seems to have interpreted the Report differently.

81. The Board does not accept KRW's interpretation of this sentence as correct. Read in context, we construe this sentence as meaning that during the audit KRW provided a history which purported to show that KRW's actual overhead rates were higher than the claimed 85% and 18%. The sentence does not mean that the auditor accepted the history presented him as being correct. While standing alone one *might* consider the sentence ambiguous, one must look at the sentence in context. The sentences before and after this sentence make clear that, because he deemed the material to be unreliable, the auditor would not accept the newly-proffered rates as being correct, and only because he deemed that KRW's historical records could not support *any* overhead rates, he did not question the tentative rates that had been agreed to by the FHWA during negotiations (85% and 18%) becoming the final rates. There is nothing in the record to demonstrate what the actually-incurred overhead and G&A rates were.

82. Mr. Gentile is a certified public accountant (CPA).[66] He had been such for two-and-one-half years prior to the trial and had been with the Defense Contract Audit Agency for four-and-one-half years, during which he had performed over one hundred audits. (Tr. 774). The Board therefore determines that he was qualified to express an expert opinion as to the condition of KRW's records used in support of the claim before the Board.

83. In response to a question by Mr. Machol as to whether he considered KRW's records to be "in shambles," [67] Mr. Gentile responded in the affirmative. (Tr. 785). Specifically, he testified: that while they were adequate to trace direct labor costs, KRW's records were poor, among the worst of similar size companies; that in effect there was no cost accounting system; that KRW did not use industry-accepted accounting methods or comply with the cost-accounting provisions of the Federal Acquisition Regulation; that KRW's financial records did not support the claimed overhead and general and administrative expense rates; that KRW didn't have an unallowable cost pool; that, when requested to provide data on indirect rates, it took KRW two weeks to provide them, an unduly long period. Mr. Gentile concluded that no reliance can be placed on KRW's statements of indirect costs, overhead rates, or general and administrative expense rates (Tr. 775-781).

84. In order to rebut Mr. Gentile's testimony regarding the condition of KRW's records, KRW presented testimony by Mr. George Earnhart, current president of KRW. KRW did not endeavor to present Mr. Earnhart as an expert in the field of accounting, nor was he asked to explain the accounting system or any portion of it. Mr. Earnhart testified that during September or October 1990, the Dallas Area Rapid Transit Authority had conducted an audit of KRW's records as part of the administration of a cost-plus-fixed-fee contract (apparently between the Authority and LTI Consultants, Inc., with Parsons, Brinkerhoff, Quade, and Douglas performing some sort of administrative role, and with LTI in turn subcontracting to KRW [68]), and expressed no problems. A copy of an extract from this report (App. Ex. 18) shows that it did not discuss the

[66] A certified public accountant is able to express opinions on financial reports and financial statements. Most states require that someone be a certified public accountant in order to be able to express such a formal opinion. (Tr. 792).

[67] A term first used in this case by respondent's counsel in his opening statement. (Tr. 15).

[68] The Exhibit (App. Ex. 18) contains a series of disconnected sheets taken from several more voluminous documents. The contents of the Exhibit

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condition of KRW's records, but merely stated that review of the records of KRW had "resulted in adjustments ... to KRW's overhead rates" and the adjusted overhead rates exceeded the contract ceiling, so that the latter would govern. Because the auditors were not called as witnesses and the documentation placed in the record is so sketchy, this Exhibit is entitled to little if any weight on the issue of the condition of KRW's records, and cannot overcome the first-hand testimony by Mr. Gentile. Mr. Earnhart also testified that during April, 1993, the Defense Contract Audit Agency had audited its records in connection with a proposal it had submitted to the Nuclear Regulatory Commission, and that (after some discussion), the Audit Agency had approved KRW's accounting system. However, Mr. Earnhart also testified that when he bought out Mr. Machol in late 1990, he replaced the accounting software with a new program (Tr. 935). The effect of this change was not brought out by either party, and therefore we cannot tell if this was a substantial revision to the accounting system or what would be its effect. But, clearly, the accounting system in effect when these recent audits were performed was not the accounting system in effect when costs for this contract were being recorded.

85. While the condition of the accounting system at the time of the audits may be relevant to KRW's *present* ability to record and allocate costs, it is not relevant to the ability of the accounting system in effect at the time of contract performance to properly record and allocate costs. The testimony by Mr. Earnhart regarding the recent audits is not relevant and therefore not sufficient to overcome Mr. Gentile's testimony. KRW did not present any expert testimony to contradict Mr. Gentile's statements of his opinion as to the condition of KRW's records. It has not rebutted the statement [69] in the audit report (above) regarding KRW's lack of indirect rate history or inability to determine profit or loss. On the basis of Mr. Gentile's uncontroverted testimony as to the condition of KRW's records,[70] borne out by the testimony regarding the delays KRW experienced in putting together indirect cost figures that Mr. Gentile had requested during his audit, the Board finds that, during the period of performance of this contract, KRW did not have in place an accounting system which could properly record and allocate costs, especially indirect costs.

DISCUSSION

The record amply demonstrates that there were many failings in the FHWA's administration of this contract.[71] In fairness to the Contracting Officer, it must be stated that for much of the period when problems were developing, he was absent due to extended illness. Nevertheless, the existence of contract administration deficiencies does not automatically mean that the appellant is entitled to all the compensation it seeks. The function of the Board of Contract Appeals or the Court of Federal Claims under the Contract Disputes Act is not to punish the government for its failings, but to assure to contractors that they are made whole for any loss that they may have suffered as a result of those failings. This requires a claimant to prove that it was injured and the monetary amount necessary to compensate the claimant for the injury. We proceed to consider the various claims.

I. Date of Claim /Interest

Section 12 of the Contract Disputes Act of 1978, as amended, 41 U.S.C. § 611, provides for the accrual of interest:

> "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) [41 U.S.C. § 605(a)] from the contractor until payment thereof...."

When KRW submitted its request for adjustment to the FHWA on September 1, 1988 (Finding 64), there was no dispute between the parties, and it does not appear that even KRW considered it to be a claim under the Disputes Act. Certainly, when the Contracting Officer denied it in correspondence that fell short of being a Contract Disputes Act decision (RAF Tab 630), KRW made no protest that it had not received a decision conforming to the Contract Dis-

(Footnote Continued)

are of varying degrees of legibility, and do not always indicate to which contractual relationship they are directed. Some appear to refer to a subcontract other than that between LTI and KRW.

[69] "The contractor confirmed to us in discussions that the indirect rate history was not readily available, and because of this condition, it could not determine the profit or loss incurred under the contract."

[70] Elicited from him by the appellant itself after having called him as a witness. (Finding 83).

[71] For example, see the deficiencies noted in Findings 11, 12, 14, 17, 18, 20, 44, 46, 48, 49, 50, 55, 65, and 67.

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putes Act and implementing regulations. Thus, the September 1 request for equitable adjustment was not a claim under the Act. *Dawco Construction, Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872 (Fed. Cir. 1991). Accordingly, interest did not start to run at that time.

In contrast, KRW's April 22, 1992 letter called itself the formal submission of a claim and included the certification required by the Contract Disputes Act for all claims seeking more than $50,000.00. It sought $70,076.98. It is this submission that constitutes the first formal submission of a claim satisfying the Contract Disputes Act as interpreted by the Court of Appeals in *Dawco,* and it is the date of this submission, April 22, 1992, from which interest, at the rate established pursuant to section 6(a) of the Act, must be calculated.

II. Claim Prosecution Fee

The appellant is seeking the sum of $43,462.11 as a claim prosecution fee, one-third of the amounts claimed. By agreement with E.A. James Company, KRW would pay that firm 25% of any amount recovered. E.A. James Company, a sole proprietorship owned by Mr. Machol, was formed at the end of 1990, specifically to pursue four "accounts receivable" that KRW had against various agencies. [72]

KRW argues that, although the obligation to E.A. James Company is for 25% of any amounts recovered, in order for KRW to be made whole by receiving the entire amount of compensation to which the Board may find it to be entitled, it is necessary that any such award be increased by one third. (Tr. 145-146,202). *If* the Board were to hold that the appellant were entitled to recover for the amounts paid to E.A. James, and *if* the Board were to rule that KRW were to be made whole apart from the costs of recovery, then KRW's argument would be mathematically correct. [73]

The basic rule in the United States is that each party to suits at law bears its own costs unless there is statutory authority permitting a shifting of that burden. *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 249 (1975). When the party from whom costs of litigation are sought happens to be the United States, as is the case here, there is another barrier to overcome, the doctrine of sovereign immunity. Under that doctrine, the United States is only liable to the extent it has expressly consented to subject itself to liability.[74] However archaic, unjust, and criticized this doctrine may be,[75] it still stands as a bar unless a specific waiver can be found.

Therefore, at trial, the Board specifically directed the parties to address in their post-trial briefs the legal basis for granting so much of KRW's claim as seeks 25% of any recovery as a contingent fee to be paid to E.A. James Company. (Tr. 146, 204).

The Board rules that KRW is not entitled to recover any of this claim item, for three reasons. *First,* there is no applicable statutory authority for such payment. *Second,* recovery is contrary to the mandate of regulation. *Third,* in representing the appellant, E.A. James has engaged in the unauthorized practice of law and therefore should not be entitled to receive payment for such action.

A. Lack Of Statutory Authority

The only statutory authority for the Board to award the costs of prosecuting a claim under the Contract Disputes Act, and the only waiver of sovereign immunity of which we are aware that is pertinent to this case, is the Equal Access to Justice Act, 5 U.S.C. § 504. The Act permits a prevailing, otherwise qualifying claimant to recover "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees." Paragraph 504(a)(2) provides that a claimant seeking an award of fees and other expenses under the Act shall submit its application "within thirty days of a final disposition in the adversary adjudication."

[72] The others were against the Puerto Rico Department of Transportation and Public Works, the London Transport international consultant, and Internal Revenue Service on a tax matter. (Tr. 187; Resp. Ex. 7).

[73] For example, if the Board were to rule that KRW was entitled to an equitable adjustment of $100.00, from this sum KRW would pay E.A. James Company $25.00 and KRW would only net $75.00, so that it would not be made whole. But if the award were increased by 1/3, to $133.33, then after paying E.A. James Company 25% of that sum, or $33.33, KRW would net the $100.00.

[74] See *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990) for a relatively recent discussion of sovereign immunity.

[75] For example, see the concurring opinion by Circuit Judge Plager in *Wood-Ivery System Corporation v. United States,* 1993 U.S. App. LEXIS 23178, Ct. App. Fed. Cir. No. 92-5019 (September 9, 1993).

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Although the appellant's claim, as set forth in the Amended Complaint, does request compensation for the amounts due E.A. James Company/Mr. Machol as a cost incurred in conjunction with this litigation, such a prayer in a complaint is not a valid claim under the Act; a separate, formal application is required. *Inslaw, Inc.*, DOTBCA Nos. 1609 *et al.*, 89-3 BCA ¶ 21,901 (1989) at 110, 208; *J.M.T. Machine Company, Inc. v. United States*, 829 F.2d 26 (Fed. Cir. 1987).

Under the above-quoted extract from the Equal Access to Justice Act, 5 U.S.C. § 504(a)(2), an application for relief under the Act must be submitted *after* the adjudication. See *Woodington Corporation*, DOTBCA No. 2592, 93-3 BCA ¶ 26,090 (1993). In the case of the instant appeal, the day of adjudication is the date of this Opinion. The time limits of the Equal Access to Justice Act for filing a claim thereunder are quite limited and must be strictly construed. *Nikiforos P. Kalfountzas, d/b/a Engineered Electric*, DOTBCA No. 1819, 87-2 BCA ¶ 19,768 (1987). The claim for the costs of prosecuting the underlying claim is premature.[76]

B. Regulatory Proscription

Section 31.205-33 of the Federal Acquisition Regulation, *as in effect on the date of this contract* and therefore the provision governing this contract,[77] 48 C.F.R. § 31.202-33 (1986),[78] addresses the question of whether a contractor may recover the costs of professional and consultant services. Under paragraph (a) of that section, the general rule is that costs of professional and consultant services may be recovered unless provided by an officer of the contractor or unless specifically prohibited by other paragraphs of that section. Paragraph (d) bars recovery of "costs of legal, accounting and consultant services incurred in connection with ... the prosecution of claims or appeals against the Government (see 33.201) ..."

Inasmuch as Mr. Machol is an officer of KRW as well as an employee of E.A. James Company, recovery under this section would be barred because of the provision of § 31.202-33(a) precluding reimbursement of costs of services provided by an officer.

Going further, Mr. Machol specifically testified that E.A. James Company was retained to pursue "claims" against the government. (Finding 72, items (iii) and (vii)). Since the monies due E.A. James Company are admittedly for the prosecution of claims against the government, Federal Acquisition Regulation § 31.205-33(d) precludes recovery of any amount due or paid to E.A. James Company.

The Board therefore determines that the Federal Acquisition Regulation bars recovery for these costs.

C. Unauthorized Practice Of Law

The appellant is seeking a contingent fee to be paid to E.A. James Company, which is the alter ego of Mr. Machol, for preparing and presenting the claim. This sum is arrived at because that is the way lawyers do it, according to Mr. Machol. (Finding 72(vi)). KRW's arguments as to entitlement to reimbursement for a 25% contingent fee to be paid to the E.A. James Company and the facts KRW presents in support of these arguments are clear admission that there has been an unauthorized practice of law.

Practice before this Board is governed by Rule 29 of the Board's Rules of Procedure, 48 C.F.R. § 6302.29.[79] Under Rule 29, a corporation may be represented by an officer of that corporation or by a Member of the Bar

[76] This discussion of the Equal Access to Justice Act should not be construed as a determination regarding KRW's entitlement to a recovery under the Act, or a determination as to whether the amounts paid or to be paid to E.A. James Company, either as a consultant or as a representative in litigation, qualify for reimbursement under the Act. It is well-established that the Act does not permit recovery of expenses attendant to the preparation and submission of a claim to the Contracting Officer, or of expenses incurred in the discussion of a claim with that official. See *Cox Construction Company and Haehn Management Company, JV v. United States* [35 CCF ¶ 75,660], 17 Cl. Ct. 29 (1989).

[77] The regulation governing contracts awarded at the present time, Federal Acquisition Regulation § 31.205-47(f)(1), is similar.

[78] **"31.205-33 Professional and consultant service costs.**

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor are allowable subject to paragraphs (b), (c), (d), and (e) below when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government ...

(d) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with ... defense against Government claims or appeals, or the prosecution of claims against the Government ... are unallowable ..."

[79] **"6302.29 Representation of the parties (Rule 29).**

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of any State, Territory, or the District of Columbia. Under Rule 29, a corporation may not be represented before the Board [80] by another corporation (other than a professional corporation organized under state law for the practice of law) or by an individual who is neither a member of the Bar nor a corporate officer.[81]

The sum total of the evidence set out in Findings 72 and 73 is that the representation of KRW before the Board was being conducted by E.A. James Company and by Mr. Machol as an employee of that company, rather than merely being an officer representing a corporation under the special leave granted by Rule 29.

In ruling on a Motion to Dismiss filed by the respondent, the Board considered and accepted KRW's arguments that it was represented by Mr. Machol and that Mr. Machol was a Vice-President of KRW. *KRW, Incorporated,* DOTBCA NO. 2572, 94-1 BCA ¶ 26,268 (1993), *supra,* footnote 1. The Board therefore rejected the FHWA's contention that Mr. Machol was not a proper representative of KRW and permitted his representation to continue. No mention was made to the Board at that time that the E.A. James Company had been retained by KRW to prosecute the claim, or that Mr. Machol would be representing KRW as an employee of E.A. James Company. This omission, taken with the statements and admissions by KRW in its post-trial Reply Brief (Finding 73), amounts to overreaching of the Board on the part of KRW.

If the appellant had been forthright at the time of the Motion to Dismiss and had stated that it was being represented by E.A. James Company through Mr. Machol as E.A. James Company's employee (as he states in the Reply Brief, Finding 73), rather than by Mr. Machol as KRW's corporate Vice-President (as was stated in KRW's Reply to the Motion to Dismiss), the Board would have barred E.A. James Company and Mr. Machol from conducting the representation. The Board will not allow consultants and others who are not Members of the Bar of a State or other jurisdiction to practice law through the subterfuge of a corporate officer's title.

Looking beyond Rule 29, we are aware of no Federal law (statute, regulation, or case precedence) which authorizes a person or an entity other than a member of any Bar or a corporate officer to represent a corporate appellant at the Board. The general statute regarding representation, 5 U.S.C. § 500, permits any person who has been admitted to the practice of law by any state, territory, possession, or the District of Columbia. E.A. James Company is not admitted to the practice of law in any state, etc., within the meaning of 5. U.S.C. § 500.[82]

(Footnote Continued)

(a) The Appellant. An individual appellant may appear before the Board in person, a corporation by an officer, a partnership or joint venture by a member, or any of these by an attorney-at-law admitted to practice before the highest court of the District of Columbia or any state, commonwealth, or territory of the United States. . . ."

[80] We are not addressing the question of whether a contractor may legally retain consultants for the purpose of assisting it in assembling and formatting a claim, but whether it may retain another company, not a law firm, to represent it before the Board. In the instant case, it is clear that KRW is arguing that E.A. James Company is entitled to its contingent fee money for representing KRW in prosecuting the claim before the Board. See Finding 73.

[81] Inasmuch as Rule 29 has been published in the Federal Register and the Code of Federal Regulations, it has the force and effect of Federal law. 44 U.S.C. § 1507; *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947); *Aerospatiale Helicopter Corporation,* DOTBCA No. 1905 *et al.,* 89-1 BCA ¶ 21,559 (1989) at 108,581. State law governing the practice of law must yield to Federal law governing the practice of law in Federal tribunals. *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania,* 975 F.2d 102, 111 *et al.,* (3rd Cir. 1992). Thus, Board Rule 29 permitting a non-lawyer officer of a corporation to practice before the Board takes precedence over state prohibitions against such representation (*e.g.:* Code of Virginia, § 54.1-3904, *infra*).

[82] KRW, E.A. James Company, and Mr. Machol are all residents of and physically located in the Commonwealth of Virginia. It is from Virginia that KRW filed its pleadings and participated in telephonic pretrial conferences, and the address of KRW's representative as reflected on the appearance filed with the Board is in Virginia. Therefore, KRW's prime contact is with Virginia and it is the laws of the Commonwealth of Virginia that govern the eligibility of E.A. James Company for admission to practice in the courts of that jurisdiction. E.A. James Company is not authorized to practice law in the courts of the Commonwealth. Code of Virginia, § 54.1-3904 ("Any person who practices law without being authorized or licensed shall be guilty of a Class I misdemeanor."); Virginia Unauthorized Practice Rule 1-101 ("(A) A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal . . .").

The actual trial was held in the District of Columbia. If the laws of the District of Columbia were to apply, the same result would obtain. See *In Re Amalgamated Development Company,* 375

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Accordingly, we find that there is no legal basis under which E.A. James Company could properly represent KRW in the litigation before the Board. The acts, set forth in Finding 73, which the appellant alleges were performed by E.A. James Company as part of its representation of KRW were performed contrary to federal law, to wit, 48 C.F.R. § 6302.29. The Board determines that the actions which appellant's Reply Brief states were performed by E.A. James Company, were actions taken contrary to the federal law (Rule 29) governing practice before this Board. Acts taken contrary to law should not constitute a basis for monetary gain, at the expense of the United States, to the persons performing, or *in pari materia* with the persons performing, such acts. *United States v. Mississippi Valley Generating Company,* 364 U.S, 520 (1961); *K&R Engineering Company v. United States* [27 CCF ¶ 80,205], 222 Ct. Cl. 340, 616 F.2d 469 (1980); *John B. Rich (EZ Construction Company, Subcontractor),* DOTBCA No. 2518, 93-2 BCA ¶ 25,761 (1993), affirmed on reconsideration, 93-3 BCA ¶ 25,990 (1993).

The Board therefore determines that, because E.A. James Company has improperly practiced law before the Board, the government should not bear any costs to the contractor of those improper acts.[83]

C. Conclusion

The Board therefore determines that KRW is not entitled to any recovery on account of the monies it alleges it must pay to E.A. James Company for representing it in the prosecution of the claim, for the three disparate reasons set forth above. That claim element is denied and will not be considered in the following portions of this Discussion in determining the amount of equitable adjustment to which KRW is entitled.

IV. Delays Prior to December 8, 1978

The alleged FHWA delays fall into two categories, delays in rendering the approvals necessary before KRW could commence drafting the manual (*i.e.,* approval of bibliography, glossary, outline) and delays in rendering comments on draft chapters. We consider each category separately.

A. Delays in Approvals of Bibliography, Glossary, Outline

Task A of the contract obligated the FHWA to provide written comments on, or approval of, the bibliography and the glossary within thirty days after KRW submitted the drafts of those sections for FHWA review. Task B of the contract obligated the FHWA to provide comments on or approval of the KRW-drafted outline of the manual, within thirty days after KRW submitted it for approval.

KRW submitted these three documents to the FHWA for approval on January 5, 1987. (Finding 9). Therefore, the FHWA was obligated to furnish comments on KRW's bibliography, glossary, and outline by February 4, 1987.

The FHWA treated its obligation cavalierly. The record amply demonstrates that the FHWA never satisfied its obligations under Tasks A and B to provide comments on these three documents within thirty days after receipt. Although the Contracting Officer's Technical Representative had advised the Contract Administrator on February 2 to issue the approval (Finding 11, RAF Tab 16), formal written action as required by the contract languished until March 19. Although there is adequate evidence that KRW had been told orally of approval of the outline, the Board holds the FHWA to the letter of the restrictions it imposed in the terms of the contract. Government-drafted provisions must be construed as strictly against the government as the government, in another situation, would have them construed against a contractor.

Having so determined that the FHWA failed to abide by the contract, we must ascertain whether KRW suffered injury as a result of the delays in formal approval of the bibliography, glossary, and outline. Mr. Machol acknowledged that the delayed approval of the bibliography and the glossary did not impact progress of the contract work (Finding 14). No costs have been demonstrated to have resulted from the FHWA's tardiness in regard to these two documents. Therefore, as to these two approvals, KRW is not entitled to a recovery.

We turn to the delayed approval of the outline. The contract, in bold-face type to

(Footnote Continued)

A.2d 494 (App. D.C., 1977), cert. den. 434 U.S. 924 (1977); *J.H. Marshall & Associates v. Burleson,* 313 A.2d 587 (App. D.C. 1973).

[83] We leave it to KRW and E.A. James Company to determine the effect of the contract as between them.

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emphasize its importance,[84] directed KRW not to proceed with Task C, drafting the manual, until the Contracting Officer had approved the outline "in writing." When a government contract specifies that the contractor is to await written direction to proceed with some activity, it behooves that contractor to refuse to proceed until such a writing is received. Legion are the reported cases in which contractors who were brash enough to proceed without written direction suffered pecuniarily as a result. In the instant situation, the bold type face in the contract left no doubt about the contractor's obligation.

Nevertheless, KRW struck out on Task C, proceeding to perform the work necessary to produce a draft manual. KRW elected to take the risk of plunging ahead based on oral statements by a contractually-unauthorized person, the Contracting Officer's Technical Representative, that the outline was acceptable and approved as submitted. (Finding 11). This indeed was a risk, for if the Contracting Officer were to eventually have disapproved the draft outline, KRW would undoubtedly have found itself bearing the wasted expense, due to its patent non-compliance with the contractual prohibition.

As a result, KRW commenced work on Task C right on schedule, in February. KRW has therefore failed to demonstrate that as a result of the FHWA Contracting Officer's failure to provide *written* approval of the outline within the contractually-specified period, performance was delayed or the costs of performance increased. What the facts evidence is shortcomings in the FHWA's contract administration procedures, but no actual damage suffered by KRW as a result.

B. Failure To Give Chapter-by-Chapter Comments

Task C required KRW to submit drafts of the various chapters of the manual at two-week intervals. (Finding 5.c). The FHWA acquiesced in this being stretched to monthly intervals. (Findings 17 and 18).

Task C also obligated the FHWA to provide comments on the chapters as submitted, within thirty days after their respective receipt; *i.e.*, the FHWA was obligated to provide comments on a chapter-by-chapter basis. The record amply demonstrates that the FHWA never satisfied this obligation, and that KRW did not acquiesce. (Findings 20 *et seq.*).

The FHWA states that it found that it could not provide meaningful comments on the chapters as individually submitted unless it could consider their relationship to other chapters, which required that it have before it the drafts of all chapters. The Board accepts this as true. KRW and the Contracting Officer's Technical Representative discussed this problem in the summer of 1987, but there is no evidence that KRW ever agreed to alter the provision for comments to be rendered chapter-by-chapter as the chapters were submitted. (Finding 20). The fact that KRW's Progress Report for July, 1987[85] dated August 12, stated that part of the work intended for August was to incorporate FHWA comments into the manual is evidence that KRW in fact had not assented; the fact that the FHWA did not raise with KRW the question of what comments KRW was expecting is evidence that the FHWA did not believe that KRW had assented. Once again, it was the FHWA that drafted the terms of Task C, and when those terms became embodied in the contract, it was the FHWA's obligation to honor them.

An FHWA failure to provide comments on a chapter within thirty days after submittal would not preclude KRW from proceeding to drafting the next chapter. Indeed, even if submitted in a timely manner, the comments on the first submittal (Introduction, due June 1, 1987[86]) would not have been available in time to be considered for the next chapter due (Factors, due July 1). But, a timely submittal may have reduced the need for revision later during performance, by permitting KRW to consider comments in drafting the later chapters. For example, the FHWA's Mr. Thompson testified at length regarding deficiencies in the first drafts that KRW submitted, including its failure to incorporate design problems or an example problem. (*E.g.*, Tr. 817, 831, 834-835). If the FHWA had provided comments on the individual chapters within thirty days after submission of each, as required by the contract, it is possible that the span of these deficiencies, and the commensurate corrective effort, would have been lessened.

Comparing the scheduled dates for chapter submissions in Finding 17 with the actual dates of submission in Findings 19 and 23, we find that the fourth and last chapter

[84] Finding 5.b.

[85] Finding 21.

[86] The schedule is set forth in Finding 17.

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was only submitted twenty-two days late,[87] and there is no evidence that the twenty-two days was the result of FHWA action or inaction.

Thus, as of September 22, KRW had done all that it could with the manual until comments were received. If the FHWA had submitted comments on a chapter-by-chapter basis as required by the contract, KRW could have immediately set about producing a final version of the manual, in accordance with Task D [88] as these comments were received. Indeed, this is the work that the Progress Report for September stated would be KRW's principal effort in October. (Finding 22). The absence of comments in October and November precluded any work from occurring in those months. (Finding 25).

Comments were only received on December 8. (Finding 27 *et seq.*). Since at that time the FHWA also made a change to the content of the manual, we cannot ascertain empirically how long it would have taken KRW to prepare the final manual had it received the comments earlier. We do know that KRW was precluded from doing work during October and November. It would also appear that during August and September KRW was precluded from performing revision work on previously submitted chapters, although it was drafting further chapters.

This delay would entitle KRW to a corresponding extension in the contract completion date. The Board therefore determines that, by reason of the FHWA not complying with the terms of the contract under which it was obligated to provide comments on the chapters by a certain date, KRW's performance of the contract was delayed. The issue of compensation to KRW for such delay will be addressed below under "VII. Amount To Which KRW Is Entitled."

V. The Changes of December 8, 1987

Acting under its contractual obligation to prepare a manual on *Stream Stability At Highway Structures,* to include discussion both of stream instability and of scour, KRW drafted and submitted for the FHWA's comment and approval, an outline of the manual. That outline called for an introduction and four chapters, addressing stream instability and scour. The outline was approved and KRW commenced work.

After submitting all of its draft chapters, but (as explained above) not receiving the promised comments from FHWA, KRW's technical employees attended a meeting with the FHWA set up for the purpose of discussing the organization of the draft manual's content. (Findings 27 *et seq.*). At that meeting, the FHWA conveyed its intention to cull from the draft manual the material on scour, which would be included in a separate circular to be prepared by others. The result, of course, was that KRW had to perform the tasks associated with that removal, as well as perform the other changes and revisions necessitated by the comments that the FHWA provided on at least two occasions (December 8 and 27) in December, 1987.

KRW argues that upon approval, the outline it had prepared became a part of the contract specifications and that when the FHWA, acting through the Contracting Officer's Technical Representative at the December 8 meeting, split out scour from the manual it was altering the outline and thus the contract specifications.

The FHWA argues, *inter alia,* that this could not constitute a compensable change because the persons present at that meeting lacked the actual authority to make changes to the contract work that altered the terms of the contract and affected price.

In reality, there are two questions presented in determining whether KRW is entitled to an equitable adjustment. The first is: Was there was a change to the contract requirements? If that is answered in the affirmative, the second follows: Is that change compensable?

A. Was there a change?

The contract as executed called for KRW to develop a manual which included some consideration of the problems of stream scour, as well as coverage of stream stability. KRW prepared an outline setting forth its understanding that such was actually the requirement. The FHWA approved the outline, signifying that the FHWA concurred in this interpretation. In fact, such interpretation was the only reasonable interpretation of the unambiguous specification.

Given this requirement and absent the December 8 directive to recast the manual, if KRW had submitted a draft manual not addressing scour, it would not have complied with the requirements of the contract and the FHWA could (and no doubt would)

[87] Delivered on September 22 vice the September 1 due date.

[88] Finding 5.d.

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rightly have rejected that submission as non-complying. The effect of the December 8 directive was that the Contracting Officer's Technical Representative was advising KRW that the FHWA wanted and would accept something other than what was called for by the contract.

Thus, we can only conclude that when the FHWA, acting through the Contracting Officer's Technical Representative, directed KRW to only furnish such an abbreviated manual, it was waiving a contractual requirement, regardless of whether or not the Contracting Officer himself had issued a formal contract revision. The contract requirements were altered, the product to be delivered was something other than specified by the contract. That is a change.

The argument that this could not have been a change because the Contracting Officer's Technical Representative was not authorized to change the contract is not compelling. That argument goes to the question of whether this change is compensable.

B. Is the change compensable?

The contract terms are quite clear that the Contracting Officer's Technical Representative was not authorized to make changes which would obligate the FHWA to pay an increased price for the work. (Finding 4). The law is clear that when a contractor is confronted with a direction by someone other than the Contracting Officer and is of the opinion that such direction constitutes a change, the contractor must bring the matter to the attention of the Contracting Officer.[89] *W.W. Wilkinson, Inc.*, ASBCA No. 23031, 80-2 BCA ¶ 14,749 (1980) at 72,775.[90]

The written direction to KRW to carry out the change in the contract was the December 11 letter.[91] Having received this letter, which plainly and unequivocally altered the unambiguous requirements of the contract, it was therefore incumbent upon KRW to notify the Contracting Officer and seek his decision. Under the terms of the Changes clause,[92] this notice was to have been given within thirty days thereafter.

KRW did not write to the Contracting Officer and specifically advise him that it deemed this direction to be a change, or that it deemed extra compensation was in order. However, on January 4, 1988, KRW submitted its Progress Report for December, 1987. The extract from this Report set out in Finding 36 is a clear statement that KRW considered this direction to be a change to the contract terms, the full effect of which was still being evaluated. This text was not buried deep in a document. The entire Progress Report was three pages long, the last of which was a chart. This statement appears on the very first page, and could not easily have been overlooked. This statement was essentially repeated in the following monthly Progress Reports. (Finding 38).

This Progress Report was addressed to the Contract Administrator, not to the Contracting Officer. However, when advising KRW of the appointment of Mr. Martin as Contract Administrator, the Contracting Officer had specifically directed KRW to send all administrative documents to him. (Finding 8). We consider a notice that some action is deemed to constitute a change to be such an "administrative document."

When a contracting officer's representative receives from a contractor a notice of some problem, that recipient has a duty to communicate that notice to the Contracting Officer and therefore knowledge of that notice will be imputed to the contracting officer. *Xplo Corporation,* DOTBCA No. 1250, 86-2 BCA ¶ 18,863 (1986) at 95,110; *Davis Decorating Service,* ASBCA No. 17342, 73-2 BCA ¶ 10, 107 (1973) at 47,475.

We therefore determine that on January 4, 1988, within the thirty days allowed by the Changes clause, KRW gave proper notice to the Contracting Officer that it deemed the direction set forth in the December 11 letter to constitute a change to the contract, requiring additional time and effort in an as-yet-to-be-determined amount.

Having received that notice, it was then incumbent upon the Contracting Officer, if he was opposed to issuing a change or did not agree with the contractor's contention that it was actually a change, to make some response. This the Contracting Officer did not do.

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[89] An exception, not applicable in the instant case, occurs when there is an urgent situation, as when concrete is curing. *Sigma Construction Co., Inc.*, ASBCA Nos. 37040 *et al.*, 91-2 BCA ¶ 23,926 (1991) at 119,859.

[90] We reject any argument that KRW employees present at the December 8 meeting agreed, and thereby bound KRW, to perform the changed work at no increase in contract price. They lacked actual authority to act in such matters and there is nothing in the record to imply that they were clothed with apparent authority.

[91] Findings 27 *et seq.*

[92] See the extract from paragraph (c) of the clause quoted in Finding 3.

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In this regard, we cannot overlook the Contracting Officer's Technical Representative's testimony that, regardless of what the contract called for, the Contracting Officer would accept whatever the technical personnel, the personnel who effected this waiver, were willing to accept. (Tr. 295). We cannot overlook the fact that ultimately the Contracting Officer in fact did accept the manual without the coverage of scour and did not object to its omission. The reality is that the Contracting Officer acquiesced in the alteration to the required work product.

The Board therefore concludes that the contract requirements were altered by the FHWA at the December 8 meeting, with the Contracting Officer's acquiescence/ratification. The Contracting Officer's acquiescence in those changes renders compensable any additional work performed to meet the changed requirements.

Under the terms of this fixed-price contract, the FHWA retained the power to make comments upon the drafts, which KRW would then revise to incorporate those contracts. KRW did undertake some risk, in that at the time the contract was priced, it could not ascertain the extent that FHWA comments would require reworking the drafts.

However, implicit in such arrangement is that the FHWA's power to make comments was not unbridled, but the suggested revisions must be within the scope of the contract. By the time of the December 8, 1987 meeting, the manual was 98% complete. (Finding 36 and footnote 47). KRW had incorporated coverage of scour, as was required by the terms of its contract. To the extent that it now had to revise the manual to remove that coverage, it was doing work not contemplated by the contract. Conversely, to the extent that it was making editorial changes or changes to correct deficiencies in the draft, it was performing work plainly within the scope of the contract it had executed. The effort subsequent to the meeting must be allocated between these two categories.

The Board finds that KRW is entitled to an equitable adjustment of the contract price to compensate it for the effort involved in revising the manual to remove the coverage of scour. The amount of the compensation to which KRW is so entitled will be considered in the next section of this Opinion.

VI. Amount To Which KRW Is Entitled

KRW's Amended Complaint seeks $173,848.45. This sum includes $43,462.11 as the 25% contingent fee for E.A. James Company/Mr. Machol, which the Board has above ruled is not a valid element of KRW's claim. We address the remaining claim for $130,386.34 which KRW seeks.

It is well-established that a contractor bears the burden of proving affirmative claims against the government. "[C]onclusory and generalized allegations, unsupported by specific proof and probative evidence, are not a sufficient basis to sustain an appeal .... The contractor must establish its entitlement by a preponderance of evidence." *Fred A. Arnold,* ASBCA Nos. 20150 *et al.,* 84-3 BCA ¶ 17,624 (1984) at 87,843.

In determining the amounts to which KRW is entitled, the Board may only award what KRW has legally proven. *Malissa Company v. United States* [35 CCF ¶ 75,750], 18 Cl. Ct. 672 (1989). This does not mean that KRW is burdened to prove its damages with precise, mathematical exactitude; a reasonable, albeit approximate, basis for computation will suffice. But the essential burden KRW must satisfy is to establish "the fundamental facts of liability, causation, and resultant injury." *Wunderlich Contracting Company v. United States* [11 CCF ¶ 80,069], 173 Ct. Cl. 180, 199, 351 F.2d 956, 968 (1965).

KRW, as claimant, "bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of damages will be more than mere speculation." *Willems Industries, Inc. v. United States,* 155 Ct. Cl. 360, 376 (1961), cert. den. 370 U.S. 903 (1962).

The most convincing evidence which may be considered in ascertaining effort expended are contemporaneous reports which were routinely prepared as the effort was expended. In the instant case, that would be KRW's monthly Progress Reports. While KRW has subsequently attempted, through unsupported testimony, to discredit those Reports as not including all effort (Findings 70(iii) and 71), the fact remains that they are contemporaneous documents and the best evidence.

While the Defense Contract Audit Agency auditor has not questioned the costs which KRW alleges it expended for direct labor, that is not conclusive that the costs are reimbursable to KRW. An auditor can form an opinion as to how much effort and dollars a

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contractor's records reflect were expended on a project, but it is still a contractor's burden to demonstrate how many of those hours are the result of government action rather than having been expended for some other reason for which the government is not liable (*e.g.*, contractor inefficiency, claim prosecution, etc). The auditor studiously avoided making any determination that the hours expended were the result of the change to the work; his finding was only that these hours were charged to this contract. (Finding 76).

As is detailed below, the record demonstrates KRW has essentially failed to introduce evidence to support the amounts it is seeking, although there is sufficient evidence in the record to support some compensation for the changes to the manual.

A. Amounts Due KRW As A Result Of FHWA Delays In Providing Comments

The Board has determined above that KRW was delayed due to the FHWA's failure to provide chapter-by-chapter comments within the periods established by the contract. It does not automatically follow that amounts claimed for a particular basis of claim are therefore compensable. We turn to the question of a determination of the amount, if any, of compensation that is due.

The Amended Complaint alleges that during the period February 1, 1987 through January 31, 1988[93] KRW incurred additional labor costs of $3,890.00 as the result of FHWA actions, both the delays in providing comments and the change effected at the December 8 meeting. (Table I). To this $3,890, KRW adds labor overhead at 149.25%, general and administrative overhead at 23.55%, and profit at 10% to arrive at a total of $13,177.11. The Amended Complaint does not divide this amount between the delay claim item (which was prior to December 8, 1987) and the change claim item (which was subsequent to that date).

In its first submission seeking additional compensation, that of September 1, 1988 (Finding 64), KRW had sought $8,558.85 for the FHWA's delays in providing comments on the outline (which we have held not to have given rise to an entitlement to compensation) and on the chapters (which is a viable claim). That amount had been calculated on the basis of KRW's estimate that the ensuing delays had increased KRW's cost of performance of the Task C work by 14%, and therefore KRW should receive 14% of the contract price attributable to the Task C work ($64,134.70—Finding 5.c) as an equitable adjustment for the additional effort. (Findings 64a. and 68). KRW has offered for the record no basis for its estimate that this failure caused it to incur 14% greater cost.

KRW's costs did not continue unabated during the delay period. Its professional employees were part-time employees, paid for the hours they worked. The record indicates that they received no remuneration for the months of October and November. The monthly Progress Reports for October and November, 1987 (Finding 25; Appendix I), indicate that no work was performed by any KRW employee during this period on this contract. Presumably, this means that they earned, and were paid, nothing.

The only amounts claimed for this delay are keyed to labor effort. KRW has failed to demonstrate that in fact it did suffer additional labor costs in this regard, as was its burden. We can find no evidence in the record to define, even broadly, any labor costs incurred during this delay period, much less labor costs resulting from the FHWA-caused delay. Therefore, so much of KRW's claim as seeks compensation for this delay is denied due to a failure of proof.

B. Amounts Due KRW As A Result Of The FHWA Change To The Work

The key to the determination of the amount to which KRW is entitled is the ascertainment of the additional effort *reasonably* required to perform the changed work. The extent of the actual effort is evidentiary, but it is not conclusive.

Upon weighing the evidence referenced in the Findings, the Board determines that the quantum of effort for which KRW makes claim is not reasonable. This includes a comparison of the months required for the preparation of the original draft (ten) to the months required for the revision (twenty-nine). (Finding 61). To the extent that there may be a presumption that time or monies expended by a contractor after the work is changed is reasonable, that presumption is rebutted in this case. We also consider in this balancing the fact that not all of the post-December 8 effort resulted from the change; there was much effort required to overcome the deficiencies in KRW's draft, and there has been no presentation by KRW to distinguish work required to rectify defi-

[93] KRW's Fiscal Year 1987.

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ciencies from work required to implement the change.

In determining the amount of effort which would reasonably be required to effectuate the FHWA-directed change to the work, probative evidence may be given by expert witnesses based on their analyses of the situation and probative evidence may be given by fact witnesses, persons who were involved in the work performed and can knowledgeably testify as to the extent and nature of the actual effort.[94] In presenting its case, KRW elected not to call as witnesses any persons who were or had been in its employ and had the technical capability to explain why the hours of effort were actually required. Mr. Machol, KRW's sole "friendly" witness, lacked such technical background. KRW could have called Mr. Johnson as a witness, and the various testimony regarding Mr. Johnson's background and abilities indicates that he would have been qualified to give such testimony.

When the persons having the greatest familiarity with events are not called, but a litigant seeks to rely on the testimony of one having lesser familiarity, or when a litigant fails to produce other relevant evidence known to exist, a tribunal may draw an inference that the testimony of the person not called or the evidence not introduced might not support or might actually be adverse to that litigant. *Inter-West, Ltd.,* DOTBCA No. 2238, 92-3 BCA ¶ 25,073 (1992); *TDC Management Corporation,* DOTBCA No. 1802, 91-2 BCA ¶ 23,815 (1991) at 119,258, affirmed upon reconsideration, 93-1 BCA ¶ 24,061, affirmed without opinion *sub nom. Skinner v. TDC Management Corporation,* 975 F.2d 869 (Fed. Cir. 1992).

We mention this in passing, but in this case we are not required to render decision based on an inference that, had Mr. Johnson been called, he would have given testimony not supportive of KRW's claims. Rather, we ground our decision on the only evidence before the Board regarding the effort that reasonably resulted from the FHWA-directed change to delete the material on scour, namely, the evidence and testimony set forth in Findings 58 *et seq.*

The only evidence in the record from a person of technical expertise as to what would be a reasonable time to accomplish the revisions necessitated by the deletion of the material on scour is the testimony of Mr. Thompson. The Board discounts the testimony of Messrs. Krylowski and Machol because they lack the degree of expertise in the area that was exhibited by Mr. Thompson. He testified that the deletion of the scour material and the associated relocation of text should have consumed twenty hours of effort (Finding 60(v)) and that the work should have been complete by the end of January (Finding 60(vi)).

While Mr. Thompson also testified as to other effort (Finding 60(iii) and (iv)), that effort was directed to correcting deficiencies,[95] which would not be compensable effort.

Considering this testimony as to how much time and effort the rewrite reasonably should have taken, we turn to the Progress Reports, and find that during the month of January, 1988, KRW expended a total of thirty hours of technical effort: four hours by Dr. Richardson, twenty by Mr. Johnson, and six by Mr. Chang. This is commensurate with Mr. Thompson's estimate, with due consideration of the need for non-compensable corrections.

The Board therefore determines that KRW is entitled to be compensated for twenty labor hours of effort. The Amended Complaint shows that Messrs. Richardson, Johnson, and Chang each were paid $25.00 per hour; we determine to use this figure. KRW is entitled to $500.00 to compensate it for direct labor costs of professional staff.

Mr. Machol was not part of the professional (technical) staff (Finding 7.b). The Amended Complaint alleges that he performed 344 hours of effort after January 31, 1988 (Table I); prior to then, he had performed only 53 hours (Appendix I). The Progress Reports which he signed on behalf of KRW did state that he had performed no work under this contract during the months of October 1987 through April of 1988, when the Progress Reports ceased including a statement of labor-hours. Considering that the work to be performed after December 8, 1987 was only correction of deficiencies and a reorganization of technical material which should not consume more than twenty hours, we can see no basis for such a multiplication of Mr. Machol's effort. Many of

[94] For example, a secretary or bookkeeper in a construction firm's main office might be able to testify as to the amount of effort expended, but ordinarily would not be able to knowledgeably testify as to what actually occurred in the field or the technical reasons for the expenditure of each element of that effort.

[95] Which was not completely accomplished. (Finding 60(vii)).

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these hours must have been devoted to developing the claim against the government, which is not a compensable expense; see the discussion regarding Federal Acquisition Regulation § 31.205-33, *supra*.

It is also true that the record contains several communications which he wrote during the period after December 8 that were primarily directed towards the FHWA-directed reorganization of the manual. That would be effort resulting from the redirection of the manual, and compensable. Mr. Machol would also have had to handle the details of sending correspondence to KRW's employees, by then located some distance from this office, and coordinating its employees' activities. Mr. Machol also expended effort (largely futile) in corresponding with the FHWA to ascertain the meaning of the obfuscated sentence set forth in Finding 44. Based on a review of the correspondence in the record, the Board determines that KRW is entitled to compensation for a number of hours of Mr. Machol's effort that is equal to the technical effort, namely twenty hours. Mr. Machol's rate is stated in the Amended Complaint to have been $29.00 per hour in 1988; this was not questioned by the FHWA or its auditor. We therefore allow KRW $580.00 for Mr. Machol's effort.

There is nothing in the record to indicate the nature of the work performed by any other persons, Messrs./Mesdames[96] Mahotra, Kozan, Taylor. We determine to allow KRW another twenty hours for administrative staff effort, at $12.34 per hour, the average of the rates for these three individuals ($8.00, $14.00, and $15.00 per hour—Amended Complaint), a total of $246.80.

We turn to mark-ups on this allowance of $1,326.80. Although KRW has claimed (Finding 78) overhead and general and administrative overhead rates substantially in excess of those used in negotiating the original contract (Finding 2), the record does not support the increased rates. In fact, the record does not support any overhead rates. See Findings 79, 80, 81, and 85. However, it is obvious that KRW must have had overhead expense, and it is appropriate that, absent any evidence of other rates, we hold the parties to the overhead, general and administrative overhead, and profit rates they accepted in negotiating the original contract, 85%, 18%, and 10% respectively. (Finding 2).

Thus, on the total of $1,326.80 in direct labor costs, we determine to allow markups as follows:

Direct labor	$1,326.80
Overhead @ 85%	1,127.78
Subtotal	$2,454.58
General and administrative @ 18%	441.83
Subtotal	$2,896.41
Profit @ 10%	289.65
TOTAL	$3,186.06

DECISION

KRW is entitled to an equitable adjustment in the contract price of $3,186.06, plus interest calculated in accordance with section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, from April 22, 1992 until payment.

[¶ 26,436] American Telephone & Telegraph Company, Federal Systems Advanced Technologies

DOT BCA No. 2479, October 14, 1993. Contract No. DTFA01-86-C-00034.

Procedure, Boards—Discovery—Deposition Deadline Extension.—A government motion for leave to conduct two depositions after the established deadline was denied because the government failed to show that it had good cause to waive the deadline. The government sought to conduct post-deadline depositions of two of the contractor's employees who were identified by a government consultant as having personal knowledge of the disputed events. However, when the government passed up a previous opportunity to depose the two employees, the consultant had been employed by the government for more than nine months. Thus, the government had more than ample opportunity to have questioned its consultant on matters raised during discovery and to have deposed the employees before the cutoff date.

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[96] The gender of the last two-named persons does not appear in the record.

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For the appellant: Loretta A. Cecil and Debra L. Whited, and McKenna and Cuneo, Washington, D.C., by E. Sanderson Hoe, David M. Eppsteiner, Andrew N. Patrakes, James P. Lamoureux, J. Keith Burt, Lori L. Jackson, and Richard A. Feinstein. For the government: John R. McCaw, J. Thomas Waters, Nathan Tash, Gregory C. Carter, Christian F.P. Jordan, and Robert Zuckerman, Federal Aviation Administration, Washington, D.C.

Before ROBERTORY, Administrative Judge.

ROBERTORY, Administrative Judge: The Federal Aviation Administration ("FAA" or "respondent") has moved for leave of the Board to conduct two depositions subsequent to the final deadline established by the Board for the taking of depositions. The appellant American Telephone & Telegraph Company, Federal Systems Advanced Technologies. ("AT&T"), opposes the Motion.

By Order of February 7, 1992, the Board directed that April 1, 1993 was the last day for the service of notices of depositions. This Order was based on a discovery schedule jointly proposed by the parties. Trial is scheduled to commence on November 8, 1993. The trial promises to be prolonged, involving the termination for default of a contract last priced in excess of $100,000,000.00, with a potential government claim for refund of some $55,000,000.00 in progress payments. As befits a case of such magnitude, the witness and proposed exhibit lists are extensive.

Mr. Robert H.W. Jones is a former AT&T employee, who had been involved with performance of the contract. After retirement from that company, he entered into a consultant agreement with the FAA, to provide paid consultation (at an hourly rate) on the dispute which is now before the Board. This consultant agreement commenced in August, 1992. (Jones Dep. Tr. 73). This was after the instant appeal had been filed.[1]

In addition to his being a consultant, the FAA has included Mr. Jones on its list of 54 persons whom it intends to call as witnesses in support of its case-in-chief at the trial.

On September 14, 1993, AT&T deposed Mr. Jones. The FAA's Motion summarizes what transpired at the deposition:

> "Mr. Jones testified that '[i]t was widely known and widely publicized' within AT&T around the time of contract award that AT&T could not meet the schedule for First Article Test. (Tr. at 106-109). The FAA did not uncover this widely held belief until Mr. Jones's deposition. In addition, Mr. Jones testified about his personal knowledge regarding several willful violations of the RCE contract by AT&T. The Agency was unaware of any witnesses corroborating these violations until Mr. Jones's deposition." (Motion, p.2).

Mr. Jones testified that Messrs. J.L. "Ozzie" Osborne and Matthew V. Thompson had personal knowledge of these events. (Jones Dep. Tr. 124-125). It is these individuals whose depositions the FAA now seeks. Both were, and apparently still are, AT&T employees.

Before these events, on December 1, 1992, the FAA had served notice that it intended to depose both Mr. Osborne and Mr. Thompson, along with many others. (Opp. Ex.[2] 4). The depositions were not conducted in that period, and on April 1, 1993, the FAA included Mr. Osborne on another lengthy notice of depositions. Mr. Osborne's deposition was called for May 28, in Greensboro, North Carolina. (Opp. Ex. 5). An April 2 notice of rescheduled depositions set Mr. Thompson's deposition for April 26. (Opp. Ex. 6).

The FAA further postponed Mr. Osborne's deposition, and in June the FAA advised appellant that it no longer wished to depose him. (Opp. Exs. 7-8).

Although on March 1, 1993 AT&T had included Mr. Thompson on a list of intended trial witnesses, the FAA never proceeded with the deposition it had noticed. (Mot. p. 2[3]).

Normally, when a deponent gives testimony regarding the involvement of previously unidentified persons, the Board might be willing to permit deposition of those persons after an established deadline for discovery completion. But in this case, there are other militating factors which lead to a different result.

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[1] AT&T's efforts to obtain a copy of the consulting agreement are the subject of a Motion pending before the Board on the date of this Opinion.

[2] Exhibit in support of the "Appellant's Opposition To Respondent's Motion To Conduct A Deposition Out Of Time."

[3] Although in its "Reply to Appellant's Opposition ..." the FAA takes issue with many of the statements in the Opposition, it does not dispute this statement, and therefore for purposes of the Motion we accept it as correct.

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Not only had the FAA included Mr. Jones on its list of intended witnesses, but it had also entered into an agreement under which it paid him at an hourly rate for consultant services on matters related to this litigation. At the time (May-June, 1993) when the FAA passed up its opportunity to depose Messrs. Osborne and Thompson, Mr. Jones had already been under contract to it for some nine-plus months. That was a more than a sufficient period for the FAA, knowing as it did of the impending April 1 deposition notice cut-off, to have availed itself of the unusual opportunity to have virtually unlimited access[4] to a person who was closely involved with the opponent's internal discussions. In that nine months, one would expect the FAA to have queried Mr. Jones extensively in private on the matters which were raised during the deposition.

That it failed to do so, despite amply adequate opportunity, convinces the Board that the FAA has not made out a showing of good cause sufficient to warrant waiver of the Order.

The FAA's Motion to depose Messrs. Osborne and Thompson out-of-time is denied.

[¶ 26,437] Southwest Marine, Inc.

DOT BCA No. 1687, October 22, 1993. Contract No. DTCG-31-83-C-10099.

Interpretation of Contracts—Heating and Cooling—Valve Replacement.—Under a contract to overhaul the starting air system for propulsion engines of a military vessel, a contractor's interpretation that it could use 400 pounds per square inch air system valves as adequate substitutes for the 600 psi valves it removed from the air system was not reasonable, because the contract, when read as a whole, revealed that the 400 psi valves were not equal substitutes for the 600 psi valves. After dissembling and inspecting the air system valves, the contractor noted that some of the 600 psi valves needed to be replaced. Since the 600 psi valves were no longer available from the manufacturer, the contractor concluded from a reading of the contract documents that it could use 400 psi valves in place of the 600 psi valves. The contract, however, stated that any valve or component to be renewed or replaced had to be of the same type, body and trim, and service pressure as the one being replaced. The 400 psi valves were not of the same service pressure as the 600 psi valves and could not meet air pressure requirements. Further, the contractor failed to comply with the requirements for using substituted materials.

Modifications—Constructive Changes—Substituted Item.—Under a contract to overhaul the starting air system for propulsion engines of a military vessel, the contractor's contention that the government changed the contract by requiring 1,000 pounds per square inch valves as a substitute for the 600 psi valves removed from the high section of the air system was rejected, because the government required the contractor only to install valves of the same pressure rating as the valves removed from the system. The contractor advised the government that the 600 psi valves it removed from the system were no longer available from the manufacturer and that the only valves available as an equal substitute for the 600 psi valves were 1,000 psi valves. The government's objection to the use of the 400 psi valves as replacements for the 600 psi valves was proper. The government was not shown to have directed the use of 1,000 psi valves as an equal substitute, but only to have insisted that the replacement valves be an equal substitute. In any event, the contractor did not purchase 1,000 psi valves, but instead installed 600 psi valves it had located from another supplier.

For the appellant: Jeffrey K. Kominers, Washington, D.C. For the government: Michael R. Nevarez,[1] U.S. Coast Guard, Washington, D.C.

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[4] Possibly limited by an agreement between AT&T and Mr. Jones under which the latter promised not to reveal proprietary information, which agreement would probably not extend to cover factual recitations of events. (We say "probably" because the agreement is not before the Board and the term "proprietary" does not normally include such matters. There would be serious public policy issues involved were an agreement to be interpreted to preclude a person from testifying as to transactional events, as opposed to financial matters or matters involving the fruits of research.)

[1] Mr. Michael Nevarez prosecuted this appeal while employed by the U.S. Coast Guard. He has since relocated to another Federal agency.

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Before WARE, ROBERTORY, and STERN, Administrative Judges.

WARE, Administrative Judge: This is another in a series of opinions on the numerous appeals filed by appellant, Southwest Marine, Inc., from adverse Contracting Officer decisions. In this appeal appellant seeks reversal of the Contracting Officer's decision denying in its entirety appellant's claim for an equitable adjustment of $18,572.00, for an alleged mutual mistake in the pricing of two bilateral contractual modifications, under its contract with the United States Coast Guard of the U.S. Department of Transportation. Appellant prosecuted the claim in behalf of its subcontractor, Astro Pak, Inc., who performed work on the United States Coast Guard Cutter (USCGC) *GLACIER* pursuant to the modifications in dispute. Although appellant has increased its claim before the Board to $38,306.00, only entitlement is before us for decision. On the basis of our findings and analysis below, we deny the appeal.

FINDINGS OF FACT [2]

I. *CHANGE REQUEST NO. 165*

1. Under Definite Item D-19 of the contract specifications, appellant was required to overhaul the starting air system that was used to start and control the main propulsion engines and the ship service diesel of the *USCGC GLACIER*. (Tr. 34 at 13-14; Tr. 48 at 6) A major part of the work under Item D-19 involved the inspection, removal and disassembly of valves listed therein, the cleaning and testing of such valves, and reassembling the valves. (CAF 9 at 89) Appellant entered into a subcontract with Astro Pak, Inc. for the performance of most of this work. As an "open and inspect" item, Definite Item D-19 required appellant, after performing the work thereunder, initially to submit an inspection report to the Contracting Officer evaluating the condition of the valves, and to wait for direction from the latter on whether to "recondition or renew" the starting air system valves. (Tr. 48 at 62-63) Although Paragraph 1 of Item D-19 indicates eighty-seven (87) valves were to be inspected, Item D-19 in fact listed only eighty-six (86) valves. Forty-four of the starting air system valves are listed in Paragraph 3.3.5 of Item D-19 and forty-two of the valves are listed in Paragraph 3.4.13 of Item D-19. (CAF 9; AF, Docket No. 1687, Tab 18, pp. 89, 91-94)

2. In conjunction with Paragraph 1 of Item D-19, Paragraphs 3.3.1, 3.3.2, and 3.3.3 of Item D-19 required appellant to open, disassemble, and inspect, to determine whether to "recondition or renew," and to reassemble the 44 starting air system valves listed in Paragraph 3.3.5 of that item. Appellant's valve work under these provisions was to be performed on board the vessel, and Paragraph 3.3.2 of Item D-19 required the inspection of the valves to be in the presence of respondent's inspector. (CAF 9; AF, Docket No. 1687, Tab 18, pp. 89-92; Tr. 55 at 43-44)

3. In conjunction with Paragraph 1 of Item D-19, Paragraphs 3.4.1 through 3.4.12 and 4.1 of Item D-19 required appellant to remove from the ship, open, disassemble, inspect to determine whether to recondition or renew, and reassemble and test the 42 starting air system valves listed in Paragraph 3.4.13 of Item D-19. That inspection was to take place off the ship in appellant's shop and Paragraph 3.4.10 of Item D-19 also required that inspection to take place in the presence of respondent's inspector. After inspection appellant was to reassemble the valves and conduct a hydrostatic test of each valve listed in Paragraph 3.4.13 with clean, fresh water at 900 PSI in accordance with Paragraph 4.2. (CAF 9; AF, Docket No. 1687, Tab 18, pp. 89-92; Tab 16; Tr. 46 at 8)

4. Paragraph 18.0 of Definite Item D-19 required appellant to submit the reports required above, covering the results of its inspection of the 44 starting air system valves listed in Paragraph 3.3.5 of Item D-19, and the results of its inspection of the 42 air system valves listed in Paragraph 3.4.13 of Item D-19, within 24 hours of each inspection. The valves to be inspected ranged in capacity from valves capable of handling 600 pounds per square inch ("psi") to those that controlled 150 psi; however, as pointed out below, most of the valves were in the 600 psi category. After disassembling, inspecting and testing the valves, appellant's subcontractor, Astro Pak, ascertained that 34 of the 42 valves listed in Paragraph 3.4.13 needed extra work and so notified respon-

[2] The record consists of 85 volumes of transcripts, the Contracting Officer's appeal file, a consolidated appeal file prepared by the parties, individual appellant and respondent exhibits, and Board exhibits. As used herein, "Tr." refers to "Transcript" followed by volume and page, *e.g.*, "Tr. 1 at 25;" "CAF" refers to the "Consolidated Appeal File;" "AF" refers to the "Appeal File" on individual dockets prepared by the Contracting Officer; "AX" refers to "Appellant Exhibit;" "GX" refers to "Government Exhibit" and "BX" refers to "Board Exhibit."

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dent by Inspection Deficiency Report (IDR) 7003-288, dated September 20, 1983. (AF, Docket No. 1687, Tab 17) The report specifically notified respondent that Astro Pak had been informed that the 600 psi valves listed in Paragraph 3.4.13 were "no longer in the inventory of the manufacturer as of 1952, and spare parts are no longer available as of 1962." (*Id.*; Tr. 55 at 58) The report further stated that "[a]ny corrective rework or replacement parts requires additional manhours and extensive machine work beyond the basic item requirements." (*Id.*) Although IDR 288 advised the Contracting Officer that the 600 psi valves at issue were no longer available from the "manufacturer," and that spare parts were no longer available, it did not state whether such valves were available from vendors or dealers other than the manufacturer of the 600 psi valves, or whether Astro Pak had attempted to contact a supplier or vendor other than the manufacturer in an effort to obtain the valves. (AF, Docket No. 1687, Tab Number 17; Tr. 55 at 58-60)

5. After disassembling and inspecting the 44 valves listed in Paragraph 3.3.5 of Item D-19, nearly all of which were 600 psi valves, appellant reported the results to the Contracting Officer on October 21, 1983, in IDR 325, noting therein that 3 of the 44 valves were missing, 18 valves were in satisfactory condition, and the remaining 23 valves had various stated deficiencies. (AF, Docket No. 1687, Tabs 16, 17; Tr. 48 at 11, 30)

6. Respondent received IDR 7003-288 on September 21, 1983. (AF, Docket No. 1687, Tab 17) In response, the Coast Guard issued Change Request (CR) 165, which was prepared by its inspector for Item D-19, Chief James C. Patrick, who had worked on the starting air system for two years prior to the instant contract. (AF, Docket No. 1687, Tab 15, Tr. 55 at 185-186) Because the old valves were in need of extensive repairs, Chief Patrick, in CR 165, directed the appellant to renew all 42 valves listed in Paragraphs 3.4 and 3.4.13 of Definite Item D-19 of the specifications as well as five additional valves, for a total of 47 valves to be renewed. (AF, Docket No. 1687, Tabs 16, 17; CAF 9, pp.21, 91; Tr. 55 at 45-47; Tr. 48 at 30)

7. The General Requirements of the contract defined the term "renew" to mean: "*Remove an existing piece or unit and install, in kind, a new and unused piece or unit.*" (CAF, Tab 9, p. 17, Paragraph 4.8.1) And Definite Item D-19, Paragraph 3.3.4, under the caption "Materials" states "*Any valve or components renewed are to be of the same type, body and trim material and service pressure as the one being replaced.*" (Emphasis added) (*Id.*, at p. 91) We interpret Paragraph 4.8.1 of the General Requirements and Paragraph 3.3.4 of the specifications to apply to all valves and components reported under specification Paragraphs 3.3, 3.3.5, 3.4 and 3.4.13 that appellant was required to renew, including the 47 valves it was required to renew pursuant to CR 165 and the 15 valves it was required to renew, hereinafter discussed, pursuant to CR 186. In addition to the above, Paragraph 17.0 of the General Requirements states as follows:

> *Material Quality:* Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process by trade name, make, or catalog number shall not be construed as limiting competition, and the contractor may, at his option, use any equipment, material, article or process which in the judgment of the Contracting Officer, is equal to that named. *The contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information of "or equal" products and materials which the contractor contemplates incorporating in the work.* When called for by the Contracting Officer, the contractor shall submit samples and full information concerning the material or articles which he contemplates incorporating in the work. Machinery, equipment, material, and articles installed or used without required approval shall be at risk of subsequent rejection. (*Id.*, at 24)

We interpret this paragraph of the General Requirements to require the contractor to furnish the Contracting Officer for his approval, prior to their incorporation in the work, any valves or other equipment not identical in manufacture or other salient features to that listed in the specifications and removed from the starting air system.

8. Clause 7 of the contract entitled "Inspection and Manner of Doing Work," vested in the Contracting Officer the authority to reject any nonconforming materials. (CAF 8, p. 3; also see Paragraph 8.0 of the General Requirements, entitled "Subcontractors." (CAF 9, p. 3)

AIR SYSTEM VALVE LAYOUT

9. The plans of the starting air system showed that the system was composed of three sections—a high, a middle, and an end or low section. The plans called for 600 psi

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valves in the high, or air flask, storage section, 250 psi valves rated to 400 psi in the middle section, and 150 psi valves in the end or low section. (*Id.* at 126-127; GX 422) All but 14 of the valves in the starting air system were 600 psi and, as shall be pointed out below, those valves were rated to 1000 psi. The 14 valves that were other than 600 psi, or 1000 psi rated, were either 250 rated to 400 psi or 150 psi and were located in the middle and end sections. (Tr. 55 at 200-201, 246-247, 276-277; CAF 1167, p. 51) They were designed to serve the 14 engines in the machinery spaces, *e.g.*, in the ten main and four service generators. Located on the air-out side of the 600 to 250 psi reducing station, these were the isolation valves for the main engine starters, and, as indicated above, were covered by Paragraph 3.4.13 of the specifications and by CR 165. (Tr. 55 at 275)

10. Mr. Thomas Ingersoll prepared Astro Pak's subcontract proposal for the work under CR 165 for Michael Kirst who was in charge of pricing and negotiating change requests for appellant. (Tr. 48 at 5, 7, 13, 16; AF, Docket No. 1687, Tabs 12, 14) Mr. Ingersoll testified that his cost proposal was based upon the purchase of 400 psi rated valves for the work under CR 165. (Tr. 48 at 48) He explained that he planned to install 400 psi valves in the system to replace existing 600 psi valves because the system's design was such that the pressure at the point at which the air "hits" the engines to start them was "250 psi or below," which made it evident to him that the system was a low pressure system that could use 400 psi valves. (*Id.*) His conclusion was based upon an analysis of the diagram of the valves, Drawing No. 310 WAGB-4105-9, Detail 3-B thereof, depicting typical 250 psi and 100 psi reducing stations, which he interpreted to indicate that any air going into the reducing stations would be reduced to 250 or 100 pounds. (Tr. 48 at 36; GX 421) The system reducing station depicted on the drawing shows a high inlet air pressure of 600 psi and a low outlet pressure of 250 psi. Mr. Ingersoll interpreted that part of the drawing to indicate that the reducing station reduced the pressure of the air passing through the system from its initial high pressure of 600 psi to a low pressure of 250 psi, depending upon the pressure at which the reducing valve is set. (Tr. 48 at 85-88; Tr. 55 at 34) In such circumstances, Mr. Ingersoll believed that the 400 psi valves would work just as efficient and safe as the 600 psi valves that were in the system when Astro Pak began its work. (Tr. 48 at 84)

11. While he was able to determine from the above drawing the proper pressure of the valves to be renewed, Mr. Ingersoll testified that his prebid inspection of the condition of the valves was hindered because someone had removed the ladders and deck plates leading to the engine room which prevented him from getting into and inspecting some of the spaces. However, since CR 165 [and CR 186] was negotiated and issued after award of the contract, any problems appellant may have had during its prebid inspection of the starting air system would have been superseded by the actual knowledge Astro Pak acquired during its detailed inspection of the valves prior to submitting IDR 288. Mr. Ingersoll also complained that some of the ratings on the valves he inspected were illegible because they had been heavily repainted or were crusted with grease and oil. (Tr. 48 at 31-32) But despite these conditions, Mr. Ingersoll was able to confirm his interpretation of the drawing as permitting the use of 400 psi valves by talking to the "sailors" about the system as he walked about the ship. (*Id.* at 103-04)

12. Although Mr. Ingersoll, who was not an expert, expressed the opinion that 400 psi valves constituted a satisfactory replacement for the 600 psi valves, he presented no credible evidence of any prior personal experience in substituting 400 psi valves for 600 psi valves in a similar starting air system, or in repairing, designing or installing starting air systems. Neither did appellant present any expert evidence to corroborate Mr. Ingersoll's opinion. The Board was impressed from Mr. Ingersoll's testimony that his intended use of 400 psi valves for the work under CR 165 was to a great extent motivated by the fact that such valves, in his words, allegedly were "four to five, even ten times" less expensive than the 600 psi, 1000 psi rated valves. (Tr. 48 at 40, 45-49, Tr. 39 at 85; AF, Docket No. 1687, Tab 7)

13. After receipt of Astro-Pak's prices, appellant, on October 26, 1983, submitted to respondent a price proposal of $46,894.00 for replacing 47 valves under CR 165 (IDR 288), which included a materials/subcontract line item of $38,000.00. (AF, Docket No. 1687, Tabs 14, 3) Chief Patrick and appellant's subcontractor, Astro-Pak, initially inspected the 47 valves that were to be replaced under CR 165 while the valves were on tables in Astro-Pak's shop in San Diego, California. At the time appellant submitted its price proposal for CR 165, the valves were still on the work tables in Astro-Pak's shop. (AF, Docket No. 1687, Tab 17; Tr. 55 at 56-59,

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152-154) An examination of the valves on the table revealed that all of them were made by the same manufacturer. (Tr. 55 at 217) Also quite visible from an observation of the valves was the psi pressure ratings that were boldly cast into the body of each valve for ease of reference. (*Id.* at 41, 49, 131, 215-218) While 600 psi pressure ratings were visible on most of the valves, 400 psi and 150 psi ratings were visible on other valves. Although Mr. Ingersoll testified that other valves on the table were covered with paint, grease and oil, which rendered their ratings illegible, we find it difficult to believe that Astro Pak could not remove the paint, grease and oil sufficiently to allow it to determine the ratings cast on the sides of such valves. (Tr. 48 at 31-32; Tr. 55 at 193, 215-216)

14. Neither Astro-Pak nor appellant advised respondent that Astro-Pak was pricing and intending to install 400 psi valves as substitutes for the 600 psi valves Astro Pak had removed from the system; nor does it appear from the evidence that appellant ever inquired as to the type and pressure rating of the valves Astro Pak proposed to use for the work under Change Request No. 165. In fact, in its proposal to respondent appellant did not itemize any material costs or identify valve pressure ratings or size, but simply advised respondent that its material and labor cost for renewal were largely subcontract cost items. Appellant's price proposal did, however, include six mandays for Quality Assurance and Supervision of its subcontractor Astro-Pak. (Tr. 55 at 74-76, 94-95; AF, Docket No. 1687, Tab 14).

15. After receipt of Appellant's September 20, 1983 IDR 288, Chief Patrick called a local vendor to get an estimate for the cost of materials for CR 165. (Tr. 55 at 60; AF, Docket No. 1687, Tab 15) When Chief Patrick explained that the *GLACIER* air system had a working air pressure of 600 psi, the vendor cautioned Chief Patrick that 600 psi valves were no longer being manufactured and that the only valves available for use in the system were valves having a rating up to 1000 psi. The vendor also advised Chief Patrick that while valves rated higher than 600 psi were perfectly acceptable for use in the system, valves rated lower than the 600 psi working air pressure of the system were not. On the basis of that information, Chief Patrick prepared the Government's estimate for CR 165 in the total amount of $55,212.30, using the vendor's quoted cost of 1000 psi valves. (Tr. 55 at 61-69, 103-105, 200-201, 224-225, 244-246) On October 14, 1983, LT Richard Fornaseri revised Chief Patrick's estimate for CR 165 to $54,425.99, *inter alia,* correcting Chief Patrick's application of 20% profit to "parts," to 15 percent profit on "labor" and "materials." (AF, Docket No. 1687, Tab 15 at 2)

Respondents Rejection of Nonconforming Substitutes

16. On November 17, 1983, while inspecting the work being performed under CR 165, Chief Patrick noticed that Astro Pak was installing "400 WOG" psi valves in the high section of the system. Such valves, about 8 in number and rated to 400 psi, had been installed in the 600 pound working pressure section of the system, the air flask storage section, from which Astro-Pak had removed 600 psi valves. (Tr. 55 at 96-96, 100-105, 110-112, 269-271, 275-280; GX 712; CAF 1167, pp. 51, 56) Recognizing that the 400 pound valves were significantly different in pressure from the 600 psi valves Astro-Pak had removed from that high end of the air system, and knowing that the valves in every part of the system had to be rated at least to 150 percent of the system's normal operating pressure to assure efficiency and safety, he called Mr. Ingersoll and advised him that the valves Astro Pak was installing were inadequate and that Astro-Pak should remove them and install in the system valves with the same pressure ratings as the valves it had removed from the system, or their equal. Twenty-six of the valves to be renewed under CR 165 (and fourteen of the valves to be renewed under CR 186) were 600 psi valves, rated to 1000 psi. Appellant did not request, nor had it received, the Contracting Officer's approval to substitute 400 psi valves for the 600 psi valves in the high section or any other section of the starting air system. Although objecting to the use of 400 pound valves in replacement of the 600 pound valves in the high section of the system, Chief Patrick did not object to the installation of 400 psi valves in the middle or start engine section of the system from which Astro-Pak had removed 400 psi valves, or to the use of 150 psi valves in the end or control air section of the system where 14 valves were installed that were not 600 psi valves. (Tr. 55 at 96-97, 244-245, 249-250, 278-280) Nor is there any credible evidence to indicate that Astro-Pak in fact installed new 600 psi valves rated to 1000 psi valves in the middle and end areas in slots from which it removed valves of a lesser capacity. Patrick only required that the replacement valves installed in the system be

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identical in pressure rating and otherwise equal to the valves Astro Pak removed from it. (CAF 1167 at 51; Tr. 48 at 77; Tr. 55 at 200-207, 212, 269-270, 274-279) When ordered to change the valves Mr. Ingersoll opined that 400 psi valves would be sufficient in "most cases," but he, nevertheless, advised Chief Patrick that he would "research" the matter and if the system required valves with a pressure rating higher than 400 psi, he would install them. (Tr. 55 at 77, 48-49, 51-55, 90-91, 95-98, 105; Tr. 48 at 44-45, 77) Mr. Ingersoll thereafter examined the valves at Astro-Pak's shop and ascertained that the valves Astro-Pak had removed from the 600 psi side of the system were indeed 600 psi valves. (Tr. 55 at 78; CAF 1167, pp. 50-51; GX 712)

Appellant's Installation of Identical Valves

17. After confirming that Astro Pak had removed 600 psi valves from the high side of the system, Mr. Ingersoll began calling vendors to see if he could locate identical 600 psi valves. Although the manufacturer of the 600 psi valves earlier had advised him that the 600 psi valves were no longer in production, one of the three vendors Astro Pak later contacted was able to locate a supply of 600 psi valves in its warehouse. Astro Pak purchased these 600 psi valves and installed them in the starting air system pursuant to Chief Patrick's directive. (Tr. 48 at 79, 93) Mr. Ingersoll was of the opinion that those 600 psi valves Astro Pak purchased and installed were "1000 psi valves" and so informed respondent. (Tr. 55 at 105) However, when Chief Patrick examined the new valves, he discovered that they were 600 psi valves, "rated to 1000 psi" and were identical to the old 600 psi valves rated to 1000 psi that Astro-Pak had removed from the starting air system. In fact, they were the same valves that Astro-Pak and appellant earlier had advised the Government, in IDR 288, had not been manufactured since 1952 and the parts for which had not been obtainable since 1962. (*Id.* at 105-7) The valves were fabricated by the same manufacturer that made the old valves Astro-Pak had removed from the system and were identical in every respect and feature to the old valves. It is clear from the record that when Astro-Pak and appellant advised respondent in IDR 288 that the 600 psi valves Astro-Pak removed from the air system "were no longer in the inventory of the manufacturer as of 1952, and spare parts are no longer available as of 1962," neither appellant nor Astro-Pak had sought to purchase the 600 psi valves from the particular vendor from whom the 600 psi valves ultimately were obtained. Had that effort been made, they would have discovered the availability of the identical 600 psi valves prior to issuing IDR 288 advising of their unavailability. (AF, Docket No. 1687, Tabs 15 and 17; CAF 1167, p. 56; Tr. 55 at 99-120, 157-159, 218-221, 244-246)

18. At trial, Chief James Patrick, the Government inspector who, as found above, had worked on the starting air system for two years prior to the instant contract, contradicted Mr. Ingersoll's testimony that the starting air system was a low pressure system that could operate efficiently on 400 psi valves. Chief Patrick testified that the starting air system had a normal operating pressure of 600 pounds per square inch (psi), and not 250 psi as was testified to by Mr. Ingersoll and asserted by appellant in its trial brief. He explained that only a part of the system had a working pressure of 250 psi. Referring to Paragraphs 3.1.3, 3.2.1, 3.3.5, and 3.4.13 of Definite Item D-19, Chief Patrick, using Drawing 310 WAGB-4105-9 which depicted the starting air system, explained that the working air pressure at the high end of the system was 600 psi, which pressure was reduced to 250 psi in the middle section of the system, and that it was further reduced to 100 psi in the low end of the system. That drawing also showed that the working pressure of the system, where the valves called for under CR 165 were located, *e.g.,* the valves in Paragraph 3.4.13 of the specifications, was actually 600 psi, and that the system's safety relief valve had to be set either at or greater than 600 psi. This means that for the system to operate efficiently and safely, the high end of the system must use 600 psi valves or greater. (Tr. 55 at 32-39, 96-97, 156, 165-171, 181-185)

19. In explaining the difference between the starting air system's "working air pressure" and its "rated pressure," Chief Patrick noted that while the working air pressure of the system was 600 psi, the 600 psi valves themselves were rated to 1000 psi. He pointed out that the "600 psi crossover" listed in Paragraph 3.4.13 of Definite Item D-19 placed appellant on notice that the starting air system had a working air pressure rating of 600 psi. He also verified that the first section of the starting air system had a working air pressure of 600 psi, which has valves rated to 1000 psi; the second part of the system had a working air pressure of 200 psi with valves rated to 400 psi; and the third part of the system had a working pressure of 100 psi. The 600 psi or high section

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was the storage part of the system that served as a reservoir or air storage tank for the volume of air used for starting the main engine. However, as the referenced contract drawings indicate, under the type of medium pressure system found on the *GLACIER*, all of the air, including the 600 psi air, was reduced as low as 250 or 150 psi. He stated that that does not mean, however, that the system could safely operate on 400 psi valves. (Tr. 55 at 38-40, 72-75, 87-89, 130, 140-152, 156-158, 165-172, 231-243; GX 421; GX 422; GX 423)

21. To further support his testimony that the start air system required 600 psi valves or new replacement valves rated to 1000 psi, Chief Patrick pointed out that Paragraph 3.3.3 and 4.2 of Item D-19 required appellant to perform a hydrostatic test to 900 psi, which alerted appellant that the system would have to be charged to 900 psi at least once. He explained that compressed air is dangerous, and the pressure requirements of a valve are stricter as the air pressure in the system becomes greater. Since the purpose of a valve is to isolate or activate a particular part of the system, if any valve is insufficient, the system might fail to shut off and could result in injury or jeopardize the safety of the system. (Tr. 55 at 34, 41, 49-51) More specifically, insofar as Paragraphs 3.3.3 and 4.2 of Definite Item 19 are concerned, appellant was alerted that it would have to consider certain safety matters when installing valves in the system, relating to the difference between the air pressure rating of the system and the air pressure rating of the valves. Since the working air pressure of the air starting system was 600 psi, and since the system was required to be hydrostatically tested to 900 psi, safety considerations required that the air pressure rating of the *valves* themselves be 150 per cent of the working air pressure rating of the *system* in order to withstand the higher pressures. (Tr. 55 at 209) Based upon knowledge gleaned from working with the *GLACIER* starting air system, Chief Patrick thus opined that the 400 psi valves Astro Pak installed to replace 600 psi valves could not withstand the required 900 psi hydrostatic test. (AF, Docket No. 1687, Tab 18; GX-421; Tr. 48 at 46; Tr. 55 at 40-42, 49, 54, 61, 68-69, 102-117, 125-127, 140-141, 151) If 600 psi valves (rated to 1000 psi) that could withstand such test were unavailable, he agreed with the manufacturer that the next highest rated valves that were available, *i.e.*, 1000 psi valves, or valves rated to 1000 psi, constituted the only approved equal valves on the market for replacing the 600 psi valves removed from the system. (GX-421; Tr. 48 at 80-83; Tr. 55 at 40-41, 49, 54, 61, 68-69, 102-117, 125-127) We find from the uncontroverted evidence that the valves Astro Pak removed from the high pressure end of the starting air system were 600 psi valves rated to 1000 psi. Such valves were listed in Paragraph 3.4.13 of Definite Item D-19 and were the subject of appellant's IDR 288. They also were the valves that were subject to renewal under CR 165. We further find Chief Patrick's testimony, that appellant was required to replace such valves with 600 psi valves rated to 1000 psi, rather than with 400 psi valves, was both credible and consistent with the contract requirements. (GX-421; CAF 1167, p. 51; Tr. 48 at 47, 77; Tr. 55 at 102, 110-117, 125-137, 178-180, 200, 246)

Deductive Change Request No. 229

22. When Chief Patrick was advised by appellant's IDR 288 and the manufacturer that identical 600 psi replacement valves were no longer being manufactured, he assumed appellant would not be able to replace the old valves with identical 600 psi valves. Accordingly, on the basis of the information received from Mr. Ingersoll and the manufacturer, Chief Patrick included in his estimate for new valves the cost of 1000 psi valves, the next highest rated valve to the 600 psi valves, which the manufacturer stated would constitute an equal replacement for the 600 pound valves Astro Pak had removed from the system. Chief Patrick expected the new replacement 1000 psi valves to be somewhat different from the old 600 psi valves, rated to 1000 psi. For that reason, his estimate also included an amount for new "nuts and tailpieces" for mounting the new 1000 psi valves he assumed Astro-Pak would have to purchase, since he considered it would be too expensive and unsafe for Astro-Pak to disassemble the old nuts and tail pieces from the old valves and use them on the new 1000 psi replacement valves. (Tr. 55 at 61-69, 99, 103-105, 200-201, 203-208, 224-225, 244-246)

23. As a result of Astro-Pak's installation of 600 psi valves, identical to those it had removed from the starting air system which it previously indicated were not available, the cost of the new nuts and tailpieces included in the Government's estimate, and later incorporated in the bilateral contract modification No. 47 price of $46,894.00 for CR 165, were no longer required, since Astro-Pak could use the old ones. The Government, therefore, issued a deductive change order (Change Request No. 229) reducing

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the price of the contract by the amount included therein for those items. However, that deduction was not for the full amount of $7,549.92 included in the Government's estimate for nuts and tailpieces and the labor for the sweat fitting and unsweating associated therewith, but was only $4,476.00 which the record indicates constituted a reduction primarily for labor, and an acknowledgement that appellant needed to replace some air valve nuts and tailpieces. (CAF 1167, pp. 55-56, 60-62; CAF 834, pp. 2-3; Tr. 55 at 99, 120-124, 159-163) On March 30, 1984, appellant executed, without objection, bilateral contract Modification No. 90, that reduced the contract price by $4,476.00, in accordance with deductive Change Request No. 229. (CAF 100; GX-422; Tr. 55 at 62-71, 124)

24. Southwest Marine Purchase Order Number 7003-103486 reflects that on October 20, 1983, Astro-Pak quoted appellant a price of $32,000.00 for the performance of CR 165. (AX 568; Tr. 48 at 20-26) Six days after it received the $32,000.00 price quote from Astro-Pak, appellant submitted a price proposal referred to above for the work under CR No. 165, representing to the Contracting Officer that its "Subcontractor/Rentals" cost for the work thereunder was $38,000.00. There is no explanation in the record for the difference of $6,000 in the price appellant negotiated with Astro-Pak for CR 165 and the subcontractor price set forth in appellant's CR 165 proposal to the Government. (*Id.* at 20-26, 28-29) The difference between the $46,894.00 price in bilateral contract Modification No. 47 and the $32,000.00 paid Astro-Pak for the work is $14,894.00, an amount the record indicates represented appellant's profit on the work performed under CR 165. (AF, Docket No. 1687, Tab 9; AX-568, AX-569, AX-570 and AX-571)

25. Following its removal of the 400 psi valves as ordered by Chief Patrick and the installation of new 600 psi valves that were identical in every respect to the 600 psi valves it had removed from the air system, Astro-Pak requested appellant to increase its subcontract price for CR 165 from $32,000.00 to $56,770.00, or by $24,770.00. Astro-Pak explained in its letter that its price for the work under CR 165 was based upon supplying "400 psi valves" rather than "1000 psi valves." Astro Pak's request indicated that, of the requested amount of $56,770.00, only $18,770.00 related to materials, and that 10 percent of the $18,770.00, or $1,706.36, represented its mark-up. (AF, Docket No. 1687, Tab 7, p. 2) In fact, the actual alleged increased cost of the twenty-six 600 psi valves (rated to 1000 psi) that Astro Pak actually replaced was only $16,982.00 and not $18,770.00. The record shows the cost of the twenty-six 600 psi valves was $20,088.00 and the cost of the rejected 400 psi valves was $3,106.00, or a difference of $16,982.00. (*Id.*) Astro-Pak's requested increase in the contract price of $24,770.00 thus represents $7,788.00 more than its actual increased cost of $16,982.00 for the twenty-six 600 psi replacement valves.

II. *CHANGE REQUEST NO. 186*

26. Paragraph 1 of Definite Item D-19 of the contract stated: "The starting air flasks shall be opened, cleaned, inspected and tested. The starting air system valves (87) and the air system pressure reducing valves (7) shall be reconditioned or renewed. The flask and system relief valves (13) shall be tested. The entire system shall be checked for leaks after overhauls." (CAF 9 at 89) By IDR 7003-325, dated October 21, 1983, appellant notified respondent that the 44 valves listed in Paragraph 3.3.5 were disassembled and inspected in the presence of the Coast Guard Inspector pursuant to the basic requirements of Paragraph 3.3.2. Appellant found that three one-half inch valves listed as Compressor Discharge Valves Nos. 4-77-3, 4-100-4, and 4-139-3 did not exist in the system; hence there were only 41 valves. Of those 41 valves, eighteen were inspected, found to be satisfactory and were reassembled. The remaining twenty-three of the forty-four valves were found to be in need of extra work. In CR 186 respondent directed appellant to repair eight of those valves and to renew the other fifteen valves. (AF, Docket No. 1687, Tabs 13, 16)

27. Appellant received Astro Pak's proposed price of $8,114.00 to repair and renew the valves under Paragraph 3.3.5 and included that price in its proposal with other work to be done by the appellant. As was true with its proposal for CR 165, appellant's proposal for CR 186, submitted on November 2, 1983, also was based upon the installation of 400 psi valves in all sections of the starting air system, but appellant did not mention that fact in its proposal, which merely stated that the proposal was for performance of "modification/amendment CR 186, Item D-19." (AF, Docket No. 1687, Tabs 12, 7; Tr. 48 at 48) The record indicates that the Government's estimate of $10,786.09 for the work under CR 186 was based upon the installation of 1000 psi valves in the 600 psi

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slots, which, at the time, were considered to be the only available valves of the same type, body, trim material and service pressure as the 600 psi valves appellant had removed from the starting air system. The unit cost of those valves was identical to the unit cost of the valves the Government priced under CR 165. (Tr. 55 at 67-68; 161-164; Tr. 56 at 76-77, 80-82; Rule 4 File, Docket No. 1687, Tab 13) The Government considered appellant's proposal to be fair and reasonable and accepted it for the work under paragraph 3.3.5 as evidenced in bilateral contract Modification No. 62, dated December 29, 1983. (*Id.* at Tab 8; Tr. 55 at 53-54, 90-91; CAF 1167 at 50; CAF 71)

28. Most of the valves that were the subject of CR 186 (and IDR 325) also were 600 psi valves (rated to 1000 psi) when appellant originally removed them from the air start system. (Tr. 55 at 161-164, 276-280) The valves Astro Pak actually installed under CR 186 and which the Government accepted were 600 psi valves, rated to 1000 psi. (*Id.*) As was true with the valves Astro Pal installed under CR 165, the valves it installed under CR 186 were made by the same manufacturer and had features identical to those valves Astro Pak had removed from the starting air system.

29. Appellant submitted to the respondent its price proposal of $8,114.00 for CR 186 on November 2, 1983. Despite having been told on November 21, 1983 by Chief Patrick that the renewal of the existing 600 psi valves with 400 psi valves would not be acceptable, appellant elected not to revise its $8,114.00 price proposal for the work under CR 186. Instead, appellant agreed to accept the $8,114.00 by executing contract Modification No. 62 on December 29, 1983. (AF, Docket No. 1687, Tabs 8 and 12) On "Order Date," December 22, 1983, seven days before appellant executed bilateral contract Modification No. 62 on December 29, 1983, Astro-Pak was aware of the vendor prices for the new 600 psi valves rated to 1000 psi that are in dispute. On that date, Mr. Ingersoll informed Mr. Michael Kirst during a telephone conversation that Astro-Pak desired to increase the price of CR 186 to $12,549.00. But despite having been made aware by Astro-Pak that the prices the latter had quoted were for the incorrect 400 psi valves, appellant rejected Astro-Pak's request for a price increase, and instead agreed to accept $8,114.00 by executing contract Modification No. 62 as indicated above. (AF, Docket No. 1687, Tabs 6,7 and 12; Tr. 48 at 57-58)

30. On December 29, 1983, after appellant had bilaterally executed contract modification No. 62, Mr. Ingersoll wrote appellant's Mr. Kirst, referring to their prior telephone conversation on December 22 regarding CR 186, and advising again that Astro Pak's price proposal for the CR 186 valves was based upon supplying 400 psi valves at a total cost of $1,462.00, rather than the higher priced 1000 (*i.e.,* 600) psi valves. Mr. Ingersoll accordingly requested appellant to increase its price for the work under CR 186 from $5,784.00 to $12,549.00, a difference of $6,765.00. Of the $12,549.00 requested, $6,744.00 was for materials, and 10 percent of the latter amount constituted an Astro-Pak mark-up. Therefore, $5,998.00 represented Astro Pak's actual additional cost for installing the 600 psi valves that were identical to the 600 psi valves it removed from the system. (AX-561; AF, Docket No. 1687, Tab 7, p. 3; Tab 12)

The Contracting Officer's Final Decision

31. In mid-January 1984, following completion of the work, appellant forwarded to the Contracting Officer a letter from Astro Pak asserting a mistake in its cost proposal for the work under CR 165, in the amount of $13,093.00, and for the work under CR 186, in the amount of $5,489.00. Appellant sought a total increase of $18,582.00 in the contract price, based upon its alleged mistaken cost proposals for the two change requests. (AF, Docket No. 1687, Tab 3) During a meeting convened by the Contracting Officer with appellant and Astro Pak to discuss the claim, the parties reached a tentative agreement to settle appellant's claim in the requested amount of $18,582.00. However, following a more detailed review of the matter after that meeting, the Contracting Officer communicated to appellant a firm offer of $15,928.00 to settle the matter, which offer appellant summarily rejected initially, but sought to accept some two months later. Concluding that appellant had waited too long to communicate its acceptance, the Contracting Officer ruled his offer had lapsed and thereby rejected appellant's attempted acceptance of it.

32. The disparity between appellant's original offer to perform the work under CR 165 and the Government's estimate was $7,532.00 or 14 percent. The disparity between appellant's offer to perform the work under CR 186 and the Government's estimate was $2,672.00 or 20 percent. In a formal decision dated July 15, 1985, the Contracting Officer denied appellant's claim, and stated that appellant should have

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known of the alleged mistake at the time Astro Pak submitted its proposal, or at least at the time Astro Pak purchased the 600 psi, rated to 1000 psi, valves. The Contracting Officer determined that since appellant had waited until after completing the work to complain of the alleged mistake in its proposal prices, and since the disparity between appellant's price proposals and the Government's estimates were insufficient to give the Government actual or constructive notice of the alleged mistake in the pricing of the proposals, appellant had failed to establish any basis for relief. Appellant thereafter filed this appeal from the denial of its claim, but now seeks a total of $38,306.00, or more than twice the amount of $18,582.00 it sought before the Contracting Officer. (AF, Docket No. 1687, Tab 3)

Discussion

By this appeal, appellant, Southwest Marine, Inc., seeks reformation of its contract with the United States Coast Guard for alleged unilateral and mutual mistakes made by the parties during the execution of two bilateral contract modifications, *e.g.*, Modification 47 for Change Request (CR) No. 165 and Modification No. 62 for CR No. 186, under this ship repair contract. Appellant seeks $38,306.00, which it asserts represents its increased costs resulting from the Government Inspector's direction that it purchase and install forty 1000 psi rated valves in the ship's starting air system, rather than allowing appellant to install forty 400 psi valves in the system as it had planned. Although appellant's claim before the Contracting Officer sought only $18,572.00, appellant argues that it is entitled to $38,306.00 from the Board to cover certain additional costs which its subcontractor, Astro Pak, "inadvertently omitted" from its claim amount, plus stated appellant costs, profit and interest. (Appellant's Opening Brief, p. 234) In appropriate circumstances, a dollar increase in the amount claimed before the Contracting Officer, when based upon the same operative facts as included in the original claim, does not constitute a new claim negating the exercise of jurisdiction by this Board. *Diversified Marine Technology, Inc.*, DOTBCA Nos. 2455, 2482, 93-2 BCA ¶ 25,719; *Trepte Construction Company, Inc.* ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86.

Appellant's claim for reformation based upon mutual mistake is grounded in its allegation that in negotiating the costs of renewing the valves and parts for the starting air system, pursuant to Definite Item D-19 of the contract, both parties erroneously assumed that the system could be repaired with identical or equivalent materials, "but after soliciting customary suppliers, Astro Pak found that the 600 psi valves contained in the system were no longer in the inventory of the manufacturer as of 1952, and that spare parts were no longer available as of 1962." (*Id.* at page 223) Appellant's argument continues that had both parties known of the unavailability of the 600 psi valves at the time they executed the modifications, they would have negotiated higher prices for the valves. (*Id.*) Asserting additionally the theory of unilateral mistake, appellant states that its decision to purchase and install 400 psi valves, "with its consequent risks," after it was informed of the unavailability of the 600 psi valves, was not wholly unilateral. But even if unilateral, appellant asserts, respondent either had actual notice, or should have known that appellant had made a unilateral mistake in pricing its proposals for the two modifications on the basis of 400 psi valves, rather than 1000 psi valves, by virtue of the disparities between its proposals and the Government's estimates for the work. (*Id.* at 223, 225, 230) Appellant thus argues that it is entitled to relief *via* contract reformation or, alternatively, to an equitable adjustment, for the difference in the price of the two valves, on the theory that the Government had superior knowledge of the fact and failed to disclose that 1000 psi valves were required to satisfy the specifications. (*Id.* at 233-234)

Respondent argues that there is no basis in the record for relief under any of the theories espoused by appellant and that the evidence in the case points to nothing more than a mistake in the judgement of appellant's subcontractor, Astro Pak, that it could unilaterally substitute unequal valves for those called out under the contract. Such an effort by Astro Pak, respondent argues, violated the long-established principle that the Government has the right to insist upon the materials it bargained for under the contract. (Respondent's Reply Brief, Vol. II, p. 781)

Viewing the operative facts of this case as we have found them, the Board agrees that appellant's theories grounded in reformation and superior knowledge by the Government not only are lacking in merit and are irrelevant to a resolution of this dispute, but that appellant's conclusions and extensive arguments in support of such theories are

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based upon a totally erroneous analysis of the clear evidence of the case.

Briefly summarized, the evidence shows that Definite Item D-19, an "open and inspect" item of the contract, required appellant, during its repair and renovation of the *USCGC GLACIER,* to remove, disassemble and inspect 44 starting air system valves listed in Paragraph 3.3.5 and 42 of such valves listed in Paragraph 3.4.13 of Definite Item D-19. The inspections, for which appellant engaged the services of its subcontractor, Astro Pak, were to be implemented on ship for the valves listed under Paragraph 3.3.5 and off the ship for those valves listed in Paragraph 3.4.13, all in the presence of the Government inspector. Both inspections were designed to ascertain whether to "recondition or renew" the valves during appellant's repair and modification of the *USCGC GLACIER.* Such a determination was to be made by the Contracting Officer, or his authorized agent, the Government inspector, upon receipt of appellant's post-inspection reports that were required to be submitted to the Contracting Officer within 24 hours after completion of each inspection, identifying each valve that was to be reconditioned or renewed.

The valves in the starting air system ranged in size from 600 psi, rated to 1000 psi, in the high or air flask section, 250 rated to 400 psi in the middle section, and 150 psi in the end or low section of the system. (Finding 9) All of the valves in the high section were 600 psi rated to 1000 psi, and, in fact, all of the valves in the starting air system, except 14 valves in the middle and end sections, were 600 psi valves.

The instant dispute arose when the Government inspector, Chief James Patrick, discovered during his inspection of the valves appellant was required to renew under Modification 47 (CR 165), that Astro Pak had installed about 8 valves, rated 400 psi, in the high section of the starting air system from which Astro Pak had removed 600 psi valves. Chief Patrick directed Astro Pak to remove the 400 psi valves and to replace them with valves of the same type and pressure rating as those it had removed from the system, or their equal. During a call to the manufacturer of the 600 psi valves, the inspector confirmed appellant's communication in Inspection Deficiency Report (IDR) 7093-288 that such valves had not been in the inventory of the manufacturer since 1952 and spare parts had not been available since 1962. The manufacturer told both the inspector and Astro Pak that since the 600 psi valves were not available, valves representing the next highest rating would have to be installed as substitutes for the 600 psi valves. The next highest rated valves then in production and available from the manufacturer were 1000 psi valves. Such valves constituted the only equal substitute for the 600 psi valves.

It is evident from the record, however, that the use of 1000 psi valves clearly conflicted with appellant's plans for renewing the valves under Modifications 47 and 62 (*e.g.,* CR 165 & CR 186), since the costs appellant included in its proposals for that work were based upon the purchase and use of 400 psi valves throughout the starting air system. Appellant based its conclusions that it could use 400 psi valves as adequate substitutes for the 600 psi valves it removed from the system upon Astro Pak's reading of the contract plans and specifications. However, as we have found above, Astro Pak's reading of the drawings and specifications as permitting the unilateral substitution of 400 psi valves for 600 psi valves was an unreasonable interpretation of the contract plans and specifications that was clearly contradicted by the Government inspector whose testimony demonstrated both an in-depth knowledge of the *GLACIER* starting air system, by virtue of his experience in working with the system, as well as a close familiarity with the applicable contract plans and specifications.

But the element of appellant's case that makes it particularly weak is that, on the question of replacing existing parts, the contract was very explicit in defining what constituted "renewal," expressly stating that "Any valve or components renewed are to be of the same type, body and trim material and service pressure as the one being replaced." (Finding 7) That the 400 psi valves appellant sought to install were not of the same service pressure as the 600 psi valves was evident from the uncontroverted testimony of Chief Patrick who, using the referenced contract drawings, showed that the 600 pounds per square inch working air pressure requirement of the starting air system simply could not be met by 400 psi valves, which could render the system unsafe. (Findings 18-21)

Moreover, the contract was just as clear in delineating the conditions under which valves and other equipment might be substituted for that required under the contract. When the contractor contemplated making such a substitution, the contract required it to "... furnish to the Contracting Officer for

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his approval the name of the manufacturer, the model number, and other identifying data and information of 'or equal' products and materials...." Appellant failed to comply with that requirement either before or after installing the 400 psi valves in the starting air system and it produced no credible proof that the 400 psi valves constituted equal products for the 600 psi valves for which they were offered as substitutes.

That the Government is entitled to full compliance with all of the terms of the contract, including the drawings and specifications, and is not obliged to accept anything less, is a principle of Government contract law that is now well-established. *Inter-West, LTD.,* DOTBCA Nos. 2238, 2238-E, 92-3 BCA ¶ 25,073 (1992) at p. 124,981; affirmed, without opinion, *sub nom. Inter-West, LTD. v. Andrew Card, Secretary of Transportation,* 996 F. 2d 1235 (Fed. Cir. 1993); *Fusco-Amatruda Co.,* DOT BCA 67-23, 68-1 BCA 6745; *Hilltop Electric Construction, Inc.,* DOTBCA No. 78-6, 78-2 BCA ¶ 13,421; *Laurence J. Rice, Inc.,* DOTBCA No. 67-17, 68-2 BCA ¶ 7103. This Board has held that inherent in this principle is the rule that a contractor "cannot substitute its own judgment for that of the specifications and supply something different than that called for in the specifications on the ground that the item furnished was, in its opinion, just as suitable." If the contractor does so, he acts at his own risk. *R&M Mechanical Contractors, Inc.,* DOTBCA No. 75-51, 76-2 BCA ¶ 12,084 at 58,034. Since Astro Pak's attempt to install 400 psi valves in the starting air system in place of the 600 psi valves clearly violated this rule, the Contracting Officer's authorized agent properly rejected the 400 psi valves.

Appellant argues alternatively on brief that "To the extent that respondent's inspector insisted that Astro Pak renew existing Paragraph 3.3 air valves rated at *less* than 600 psi with 1000 psi rated valves, such direction plainly exceeded the requirement of the contract." (Appellant's Rebuttal Brief, Vol. II, page 402) Appellant contends that such actions by the inspector constituted a constructive change in the contract requirements for which it should recover. But that argument is merely theoretical since appellant could not produce at trial any specific evidence to controvert Chief Patrick's testimony that he did not object to Astro Pak installing 400 psi valves in the middle or end areas where valves in those categories originally were installed and that his directive only required Astro Pak to install in the system valves of the same pressure rating as the valves it had removed from the system, or their equal. (Finding 16)

Finally, we find equally lacking in merit appellant's additional argument that the Government constructively changed the contract by requiring Astro Pak to supply 1000 psi valves for all of the valves it was required to install under CR 165 and CR 186, rather than allowing it to install 400 psi valves as it intended, since replacement 600 psi valves were physically impossible to purchase. (Appellant's Opening Brief, pp. 226, 231, 233; Appellant's Rebuttal Brief, Vol. II, p. 403) Again, appellant totally misreads a critical part of the evidence in the record, which, standing alone, is dispositive of its appeal. On the one hand, the evidence clearly demonstrates that Astro Pak did not purchase and install "1000 psi valves," but, instead, installed 600 psi valves rated to 1000 psi that were fabricated by the same manufacturer that produced the 600 psi valves it removed from the system. Those valves, which appellant purchased from a supplier other than the manufacturer of the valves, who happened to have had them in its warehouse inventory, were identical in all salient features to the original 600 psi valves Astro Pak removed from the starting air system. It is obvious from the record that had appellant contacted that particular supplier at the conclusion of its inspection, there would have been no need for it to have sent IDR 709-288 to the Contracting Officer erroneously inferring that the 600 psi valves were no longer available. (Finding 17)

On the other hand, appellant's argument must fail since, even if the 600 psi valves were unavailable, it could not have installed 400 psi valves in the starting air system's 600 psi capacity valve slots for safety and other reasons.

For all of the above reasons, we deny the appeal.

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[¶ 26,438] Vista Computer Services, Inc. v. Department of Transportation; Digicon Corporation, Inc., Intervenor

GSBCA No. 12590-P, October 4, 1993.

Protests, GSBCA—Suspension of Procurement Authority—Critical Operation.—A protester's request for suspension of an agency's authority to procure computer support services was denied because the computer services being procured were critical to the agency's operation of an aviation safety hotline and its ability to take immediate action in response to possible flight safety violations. The computer services also enabled the government to track millions of financial transactions. If the delegation of procurement authority for the support services contract had been suspended as requested by the protester, the government would have been without support services from the time of expiration of the incumbent's contracts until the decision on the merits was issued. The protester asserted that there was an alternative method of proceeding, which was to modify the contract with the incumbent in order to extend the contract's expiration date. However, this was not a valid alternative means by which the government could satisfy its needs, because the contract had already been amended twice to extend the life of the contract and no further amendments could be granted beyond the extended performance period.

For the protester: Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C., by Ronald K. Henry, John Schryber, Gary Thompson, and Kenneth L. Marcus. For the government: John R. McCaw, Jr., Anthony L. Washington, George P. Kinsey, and Loren Mulraine, Federal Aviation Administration, Department of Transportation, Washington, D.C. For the intervenor, Digicon Corporation, Inc.: Alan M. Grayson and Fred A. Cohen.

Before DEGRAFF, Administrative Judge.

DEGRAFF, Administrative Judge: In this protest, Vista Computer Services, Inc. (Vista) challenges the award of a contract by the Federal Aviation Administration (FAA) to Digicon Corporation, Inc. (Digicon). The contract requires Digicon to provide a variety of computer support services to the FAA's headquarters. The FAA entered into the contract pursuant to a delegation of procurement authority from the General Services Administration, which permitted the FAA to conduct a competitive procurement among contractors eligible to participate in the Small Business Administration's section 8(a) program. Vista requested that the Board suspend the delegation of procurement authority to the FAA, pending a decision upon the merits of the case. The FAA contested suspension, and a hearing was held on September 30, 1993. Later that same day, the Board advised the parties that it was denying Vista's request for a suspension.

In order to avoid a suspension, the FAA was required to establish that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board." 40 U.S.C. § 759(f)(3)(A) (1988). The effect of a suspension must be "drastic, direct and unavoidable through use of alternative methods of proceeding in order for a request for suspension to be denied." *Spectrum Leasing Corp.*, GSBCA 9881-P, 89-1 BCA ¶ 21,513, at 108,357, 1989 BPD ¶ 28, at 3. The evidence presented at the hearing establishes that the computer support services being acquired are critical to the FAA's mission and that interests of the United States would have been significantly affected by a suspension. The evidence also establishes that there were urgent and compelling circumstances which would not have permitted waiting for a decision upon the merits of the case.

The computer support services being procured enable the FAA to operate its aviation safety hotline and to take immediate action in response to possible flight safety violations. The hotline is accessible twenty-four hours each day, seven days each week. The services being acquired also enable the FAA to track millions of financial transactions in order to determine the amount of funds it has available, to obligate funds, to ensure that funds are available for payments to contractors, to ensure that funds are used appropriately, to take any needed corrective action, and to avoid violating the Anti-Deficiency Act. The effect of an interruption in the computer support services would be drastic and direct, upon both public safety and public funds.

As of the date of the suspension hearing, September 30, 1993, the FAA was acquiring its computer support services from three incumbent contractors. All three incumbents'

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contracts were due to expire at the end of the day. In addition, the delegation of procurement authority that enabled the FAA to contract with one incumbent, World Computer Systems, Inc. (World), did not provide the FAA with the authority to contract with World past the end of the day. That delegation of procurement authority had been amended twice in order to permit the FAA to extend the life of the World contract, and the FAA understood that no more amendments would be granted. World provided a much greater amount of services than did the other two contractors.

If the Board had suspended the delegation of procurement authority for the Digicon contract, as Vista requested, the result would have been that the FAA would have been without the services it needs beginning October 1, 1993, when the three incumbents' contracts expired, until the decision upon the merits is issued (a date which may be as late as December 1, 1993). FAA personnel testified that they knew of no alternative method of obtaining these services if the delegation of procurement authority were suspended.

Vista did not disagree with the FAA concerning the critical need for the services that are being procured. Nor did Vista disagree with the FAA concerning the need for there to be no interruption in these services. Vista maintained, however, that no suspension was necessary because the FAA did not have to do without services until December 1, 1993. Vista asserted that the FAA had an alternative method of proceeding, which was to modify the contract with World in order to extend the contract's expiration date by two or three months. Vista directed the Board's attention to the decisions in *Blue Cross and Blue Shield,* GSBCA 10480-P, 90-2 BCA ¶ 22,670, 1990 BPD ¶ 33, and *RGI, Inc.,* GSBCA 11348-P, 91-3 BCA ¶ 24,249, 1991 BPD ¶ 176.

In *Blue Cross* and *RGI,* the Board suspended the agencies' delegations of procurement authority because there were incumbent contractors whose contracts could be modified in order to extend their periods of performance and to maintain the status quo. In neither case was there any legal impediment to a contract modification. In our case, there was such an impediment to extending World's period of performance. The delegation of procurement authority that permitted the FAA to contract with World did not provide the FAA with the authority to contract beyond September 30, 1993. The FAA was not free to disregard the terms of the delegation by entering into a contract modification which would have extended the contract past September 30, 1993. *See CACI, Inc. v. Stone* [38 CCF ¶ 76,501], 990 F.2d 1233 (Fed. Cir. 1993).

Even if there had been no legal impediment to a modification of the World contract, the FAA introduced evidence to establish that continuation with World was not a viable alternative. As the transition from World to Digicon began, World terminated its employees and thirteen of those employees were hired by Digicon. In the opinion of the FAA technical officer assigned to the World contract, these employees were critical to World's performance and their absence would have had a disastrous effect upon World's ability to perform during any suspension period.

World's vice president testified that World was ready, willing, and able to continue to perform if the Board had granted the request for a suspension. When asked how World would obtain the personnel necessary to perform, he explained that World had identified a complete replacement team, some of whom were not currently employed by World, but "most" of whom would be available to begin work immediately. There was conflicting testimony concerning whether the thirteen former World employees who had been hired by Digicon would have been available to World, if the Board had granted a suspension. Vista introduced testimony that was somewhat unclear concerning whether World and Digicon had even an informal agreement concerning these employees. Digicon introduced testimony that it had hired World employees that Digicon believed would fulfill its needs in performing other contracts, and that it would not have held positions open for employees who chose to work for World during any suspension period.

It was clear from the testimony that World was willing to assist the FAA in any way possible during a suspension period. It was not so clear that World would have been able to live up to its good intentions. Employees who were crucial to World's performance had been hired by Digicon, and Digicon did not intend to lend those employees to World during any suspension period. Not all of World's replacement team was employed by World, nor were all members of the team available immediately. On balance, FAA's evidence establishes that an extension of World's performance period would not have provided the FAA with an alternative means of acquiring the services that it

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needs, even if there had been no legal impediment to an extension.

Even if there had been no legal impediment to extending World's contract and all of World's staff had remained available, an extension of World's contract would not have provided the FAA with an alternative method of procuring the services that it needs. As noted above, the contract that was awarded to Digicon replaces three contracts and, as a result, the scope of work for the Digicon contract is different from the scope of work that was performed by World. The FAA was not obligated to amend the scope of World's contract in order to provide itself with an alternative method of proceeding.

At the hearing, Vista attempted to establish that the other two incumbents' contracts could have been extended by the FAA. But Vista's evidence—which consisted of a telephone conversation between Vista and a technical person for one of the contractors and between Vista and the office manager for the second contractor—was not persuasive. The contracting officer did not know whether either of the other two contractors was willing to continue to perform. Even if the FAA could have extended these two contracts, this would not have provided the FAA with an alternative means of meeting its needs, given that the bulk of the services were being provided by World.

In summary, the absence of a delegation of procurement authority which would have permitted the FAA to contract with World past September 30, 1993, precluded the FAA from modifying World's contract to extend the contract's expiration beyond that date. Even if World's contract could have been extended, the FAA established that an extension of World's contract would not have provided the FAA with an alternative means of meeting its needs during any suspension period. For these reasons, Vista's request for a suspension was denied.

At approximately 5:00 p.m. on September 30, 1993, seven hours before World's contract was to expire, Vista orally requested reconsideration of the decision. Only one of Vista's arguments requires comment. Vista asserted that no delegation of procurement authority was needed to continue with World or, alternatively, that the FAA could have utilized a blanket delegation of procurement authority to continue with World. The time to introduce facts in support of this argument was during the suspension hearing. The contracting officer testified at some length concerning the FAA's alternatives if a suspension were to issue, and he was clearly familiar with the delegations of procurement authority. No time limit was placed on either party at the hearing and nearly all of the FAA's witnesses, including the contracting officer, were present the entire time. Because no facts were presented in support of Vista's argument during the hearing, Vista's allegations did not warrant reconsideration.

In addition, even if Vista's allegations have merit, the "alternative" suggested by Vista is that the FAA could have entered into a sole source contract with World—not that the FAA could have extended World's existing contract. An agency does not have an alternative to suspension simply because it might be able to enter into a new sole source contract with an incumbent contractor. For these reasons, Vista's request for reconsideration was denied.

[¶ 26,439] Integrated Systems Group, Inc., Unitek Technology, Inc. v. Department of Labor; Dunn Computer Corporation and QSOFT, Inc., Intervenors

GSBCA Nos. 12581-P, 12592-P, October 7, 1993.

Protests, GSBCA—Interested Party—Exclusion from Competitive Range.—A protester lacked standing to protest the award of a contract under a procurement for computer equipment because, having failed to timely challenge its exclusion from the competitive range, it lost its status as an interested party with respect to the procurement. The protester contended that the letter it received from the contracting officer was insufficient to alert it to its basis of protest, because the letter did not include relevant price information. The letter, however, explicitly informed the protester that it had been eliminated from the competitive range because it did not meet the requirement for desktop units. The lack of price information was immaterial in these circumstances.

For the protester, Integrated Systems Group, Inc.: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the protester,

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Unitek Technology, Inc.: Eugene D. Rossel, President. For the government: Vaughn Hill, Annaliese Impink, and Herman J. Narcho, Office of the Solicitor, Department of Labor, Washington, D.C. For the intervenor, Dunn Computer Corporation: Thomas P. Dunn, President. For the intervenor, QSOFT, Inc.: S.N. Mohanty, President.

Before HYATT, HENDLEY, and GOODMAN, Administrative Judges.

HYATT, Administrative Judge: On September 20, 1993, Integrated Systems Group, Inc. (ISG) protested respondent's award, on September 17, 1993, of a contract to CompuAdd Corporation for the procurement of personal computers and peripherals. Respondent has moved for dismissal of the protest. For the reasons stated, we grant respondent's motion.

Background

Respondent, the Department of Labor, Mine Safety and Health Administration (MHSA), issued request for proposals (RFP) number S2732002 on February 10, 1993. The RFP sought proposals for the procurement of four hundred 486/33 personal computers and peripherals. The closing date for initial proposals was March 31, 1993. Eighteen prospective contractors, including ISG, submitted proposals.

After reviewing the proposals received in response to the RFP, the contracting officer determined that thirteen proposals, including that of ISG, were outside of the competitive range for purposes of conducting discussions and would no longer be considered for award. The thirteen offerors were so informed by the contracting officer in letters dated June 3, 1993.

ISG received its letter on June 9, 1993. The letter stated, in pertinent part:

> Your proposal ... has fallen outside the competitive range based on your technical proposal which offered a [sic] ISG 433D Full Tower Workstation. Our solicitation calls for a desktop system unit. A revised proposal will not be considered.

ISG did not file a protest within ten days of receipt of this letter. The contracting officer conducted discussions with the remaining offerors and solicited best and final offers.

On September 17, 1993, protester learned that the contract had been awarded to CompuAdd in the amount of $1,399,148. ISG filed its protest of the award on September 20, 1993. The protest initially alleged that the award was improper because ISG's proposal was technically acceptable and lower in price. Subsequently, ISG amended its protest complaint to allege that its exclusion from the competitive range was improper.

On September 27, 1993, another firm, Unitek Technology Inc., which had remained in the competitive range and had submitted a best and final offer, also protested the award decision on the ground that its offer was technically acceptable and lower in price than the offer selected for award.

Discussion

Respondent has moved to dismiss the ISG protest because ISG failed to challenge the competitive range determination within ten working days of receiving the contracting officer's letter dated June 3. Once the period for filing a timely protest of the competitive range decision lapsed, respondent asserts, ISG lost its status as an interested party with respect to this procurement.

ISG responds that the letter it received from the contracting officer was insufficient to alert it to its basis of protest because of the absence of any price information in that letter. ISG contends that only after it learned of the amount of the award was it in a position to conclude the regulatory requirements applicable to a competitive range determination may have been violated. As such, ISG maintains that its protest was timely filed on September 20.

The Board has addressed similar situations in its decisions in *Trimble Navigation Ltd. v. Department of Transportation,* GSBCA 11692-P, 93-1 BCA ¶ 25,341, 1992 BPD ¶ 62, and *RMTC Systems, Inc. v. Department of the Army,* GSBCA 12249-P, 93-2 BCA ¶ 25,721, 1993 BPD ¶ 30. In *Trimble Navigation Ltd.,* we found the offeror had received notification of its elimination from the competitive range in a letter that stated its proposal was deemed "not to be technically acceptable." The letter further stated that the technical evaluation team had determined that the proposal failed to meet minimum requirements and would require a "major rewrite." The letter otherwise contained no specific detail as to why the proposal was unacceptable. Trimble waited approximately one and one-half months to file a protest. 93-1 BCA at 126,240, 1992 BPD ¶ 62, at 4.

The Board flatly rejected Trimble's argument that the generic explanation regarding

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its elimination was inadequate notice of its basis for protest, thus tolling the ten day period established under the Board's Rule 5(b)(3)(ii).[1] Rather, "where an offeror is told it has been excluded from the competitive range because its offer is technically *unacceptable,* the offeror has received sufficient notification of an adverse agency action and must file its protest within ten working days of such notification." 93-1 BCA at 126,241, 1992 BPD ¶ 62, at 5. In reaching this conclusion, the Board reasoned that to allow an offeror to wait for an award decision and a post-award debriefing

> could severely prejudice the procurement process by potentially requiring agencies to redo months of negotiations and evaluations should such a protester prevail. Such a system would prejudice other vendors as well and unnecessarily prolong—at additional expense—the procurement process in contravention of the Brooks Act's stated support for the "goals of economic and efficient procurement."

Id. at 126,242, 1992 BPD ¶ 62, at 6-7.

ISG's notification, if anything, was more explicit than the letter provided to Trimble. ISG was pointedly told that it had been disqualified because its proposed product did not meet the specification for desktop units. ISG did not timely protest this adverse action. The lack of price information is immaterial in these circumstances. Having failed to protest the competitive range decision in a timely manner, and thus having not participated in the subsequent conduct of the procurement,[2] ISG is no longer an interested party to pursue a protest of the award decision. *RMTC Systems, Inc.,* 93-2 BCA at 127,997, 1993 BPD ¶ 30, at 3; *Trimble Navigation, Ltd.,* 93-2 BCA at 126,240, 1992 BCA ¶ 62, at 3-4; *Berkshire Computer Products,* GSBCA 11539-P, 92-1 BCA ¶ 24,587, at 126,685-86, 1991 BPD ¶ 302, at 3-4.

Decision

Respondent's motion is **GRANTED.** GSBCA 12581-P is **DISMISSED FOR LACK OF AN INTERESTED PARTY.**

[¶ 26,440] Federal Computer Corporation, I-Net, Inc. v. Department of Justice; International Data Products Corporation and Tisoft, Inc., Intervenors

GSBCA Nos. 12560-P, 12566-P, September 21, 1993.

Foreign Acquisitions—Trade Agreements Act of 1979—Nondesignated Country.—Although a protester alleged that the award of a contract for automatic data processing equipment violated the Trade Agreements Act because components allegedly included in the equipment were not manufactured in a designated country, the board concluded that the protest could not be summarily resolved, because there remained disputed factual issues concerning where the components were produced and transformed. Although the determination of whether the government violated the Act in making the award was a legal determination, it was wholly dependent upon the facts to be established in the course of the proceedings.

For the protester, Federal Computer Corporation: David S. Kovach and Doyle & Bachman, Washington, D.C., by James D. Bachman, Ron R. Hutchinson, and Scott A. Ford. For the protester, I-Net, Inc.: David W. Wells, Vice President and General Counsel, and Dickstein, Shapiro & Morin, Vienna, Virginia, by Richard J. Conway and Joel Freid. For the government: James R. Dietz, Federal Bureau of Investigation, Department of Justice, Washington, D.C., and R. Alan Miller, Civil Division, Department of Justice, Washington, D.C. For the intervenor, International Data Products Corporation: D. Oscar Fuster, Vice President. For the intervenor, Tisoft, Inc.: Hogan & Hartson, Washington, D.C., by William A. Bradford, Jr., Pierre M. Donahue, Timothy L. Schroer, David W. Burgett, Robert J. Kenney, Jr., Douglas A. Fellman, Thomas L. McGovern III, and James K. Trefil.

Before LABELLA, HYATT, and GOODMAN, Administrative Judges.

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[1] 48 CFR 6101.5(b)(3)(ii) (1992).

[2] *Cf. Federal Data Corp. v. United States* [36 CCF ¶ 75,913], 911 F.2d 699 (Fed. Cir. 1990) (offeror which withdrew from procurement not an interested party to protest Government actions respecting subsequent conduct of the procurement process).

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LABELLA, Administrative Judge: Federal Computer Corporation (FCC) and I-Net, Inc. have filed protests against the award of a contract to Tisoft, Inc. by the Federal Bureau of Investigation (respondent or FBI). The contract is for the acquisition of hardware, software, maintenance, integration support and technical support services to upgrade Tempest Intelligent Workstations. FCC and I-Net intervened in each other's protests; Tisoft intervened in both protests; and International Data Products Corporation intervened in FCC's protest.

The protests allege in part that the FBI violated the Trade Agreements Act (TAA) in awarding the contract to Tisoft because the trackball and token ring adapter included with Tisoft's equipment were manufactured in Taiwan. Both FCC and I-Net have moved for summary relief. We deny both motions.

Discussion

The TAA directs the President to prohibit the procurement of products from foreign countries which are not designated pursuant to 19 U.S.C. § 2511(b). 19 U.S.C. § 2512(a) (1988). The solicitation included both Federal Acquisition Regulation (FAR) clause 52.225-8, *Buy American Act—Trade Aqreements Act—Balance of Payments Program Certificate* and FAR clause 52.225-9, *Buy American Act—Trade Agreements Act—Balance of Payments Program,* which implement the Act.

Protesters argue that a physical inspection of both the trackball and token ring adapter revealed that the products are manufactured in Taiwan in that they bear a "Made in Taiwan" mark. Taiwan is not a designated country under the Act. Thus, they say, the award would violate applicable statute and regulation.

Respondent and intervenor Tisoft submitted a unified response to protesters' motions. The FBI and Tisoft agree that some component parts of the products are from Taiwan, and that the circuit board of the token ring adapter is marked "Made in Taiwan." However, they contend that both products will be populated in the United States using component parts from both the United States and foreign suppliers. The response is supported by declarations from executives of Tisoft's suppliers.

The Board has previously stated that

> ... summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. ... The court must view all the evidence in a light most favorable to the opponent (or non-movant) and draw all reasonable inferences in its favor.

Richard S. Carson & Associates, Inc., GSBCA 9411-P, 88-2 BCA ¶ 20,778, (quoting *Armco, Inc. v. Cyclops Corp.,* 791 F.2d 147, 149 (Fed. Cir. 1986)). The facts concerning whether and where the trackball and the token ring adapter are populated and transformed are in dispute. While the determination of whether respondent violated the Act by awarding the contract to Tisoft is a legal determination, it is wholly dependent upon the facts to be established in the course of the proceeding. Based on the properly supported factual contentions raised in the response to the motions for summary relief, the FBI and Tisoft must be given an opportunity to establish the relevant disputed facts.

Decision

Protesters' motions for summary relief are **DENIED**.

[¶ 26,441] Federal Computer Corporation, I-Net, Inc. v. Department of Justice; International Data Products Corporation and Tisoft, Inc., Intervenors

GSBCA No. 12560-P, 12566-P, September 29, 1993.

Protests, GSBCA—Procedure—Discovery.—An attorney retained by an awardee was not denied access to protected material, despite concerns of protesters that the attorney would use the protected material for purposes other than the instant protest, because the board determined that the awardee should be given an opportunity to select counsel to represent it in the remedy phase of the protest and in dealing with recent allegations of violations of the Procurement Integrity Act. The protesters pointed to the attorney's practice in white collar criminal defense as a basis for their objections to access to protected material and contended that the only documents that would relate to a defense by the awardee against possible criminal charges were documents generated or received by the awardee. The protesters, however, did not comment on the attorney's practice of commer-

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cial litigation or explain how the attorney's practice in this area would provide a basis for denying access to the protect material.

For the protester, Federal Computer Corporation: David S. Kovach and Doyle & Bachman, Washington, D.C., by James D. Bachman, Ron R. Hutchinson, and Scott A. Ford. For the protester, I-Net, Inc.: David W. Wells, Vice President and General Counsel, and Dickstein, Shapiro & Morin, Vienna, Virginia, by Richard J. Conway and Joel Freid. For the government: James R. Dietz, Federal Bureau of Investigation, Department of Justice, Washington, D.C., and R. Alan Miller, Civil Division, Department of Justice, Washington, D.C. For the intervenor, International Data Products Corporation: Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., by Carl J. Peckinpaugh. For the intervenor, Tisoft, Inc.: Hogan & Hartson, Washington, D.C., by William A. Bradford, Jr., Pierre M. Donahue, Timothy L. Schroer, David W. Burgett, Robert J. Kenney, Jr., Douglas A. Fellman, Thomas L. McGovern III, and James K. Trefil.

Before LABELLA, Administrative Judge.

LABELLA, Administrative Judge:

ORDER

The Board has received and reviewed the statement of Ty Cobb, Esq., attorney with the law firm of Hogan & Hartson, which has been retained by Tisoft, Inc. to represent that company in these protests. Mr. Cobb stated that he has no role in the "competitive decisionmaking" of Tisoft. Mr. Cobb has also stated that he is familiar with the terms of the protective order dated August 31, 1993, and will abide by its terms and conditions in handling any protective material which is produced in connection with this case.

During a prehearing conference held on September 24, 1993, the Board continued a stay in these proceedings so that the Government would have a period of time to investigate allegations concerning the procurement and to determine possible remedies. On September 27, 1993, the Government notified the Board and the parties that it would reach a determination on these issues within fourteen calendar days. With the agreement of the parties, the Board suspended the proceedings until October 13, 1993.

Both Federal Computer Corporation (FCC) and I-Net objected to the admission of Mr. Cobb to the protective order. FCC objects to admission because Mr. Cobb's area of practice is white collar criminal law. FCC contends that there is no need to allow Mr. Cobb access to review protected documents because the only documents which would relate to a defense by Tisoft against possible criminal charges are documents generated or received by Tisoft. FCC argues that these documents could be supplied to Mr. Cobb by Tisoft notwithstanding the protective order.

I-Net objects to admission on two separate grounds. First, I-Net argues that Mr. Cobb's assistance in the remedy phase of the protests is not necessary because Tisoft is already represented by eight attorneys. I-Net further contends that Mr. Cobb already has access to Tisoft documents which includes all the information he might need to represent Tisoft on the issue of remedy. Second, I-Net argues that Mr. Cobb "evidently will be representing Tisoft concerning possible Government investigatory matters, matters not part of the subject protests." As such, it contends, granting Mr. Cobb access would be inconsistent with the terms of the protective order by permitting use of protected material for purposes other than the protests.

Tisoft contends that FCC's objection is a "transparent and improper effort" to use Board procedures to influence the FBI's determination on how to end contractual relations with Tisoft. Tisoft argues that its counsel must have access to all documents that might bear on the conduct of this procurement and the type of remedy to be afforded to protesters.

The Board has considered the arguments advanced by both Tisoft and the protesters on the issue of access to the protective order. Both protesters have pointed to Mr. Cobb's practice in white collar criminal defense as a ground for their objections, but have failed to comment on Mr. Cobb's practice in the area of commercial litigation. While their concerns are duly noted, Tisoft should have the opportunity to select counsel to represent it in the remedy phase of these pro-

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tests and in dealing with recent allegations of violations of the Procurement Integrity Act. Thus, the Board will allow Mr. Cobb access to protected materials.

[¶ 26,442] Federal Computer Corporation, I-Net, Inc. v. Department of Justice; International Data Products Corporation and Tisoft, Inc., Intervenors

GSBCA Nos. 12560-P, 12566-P, September 24, 1993.

Protests, GSBCA—Interested Party—Noncompliant Proposal.—Although the government maintained that a protester lost its interested party status as a result of offering a noncompliant proposal under a best value procurement, the board ruled that the protester had standing to challenge the contract award because there was no showing that the protester's proposal was not compliant. The government asserted that the protester's best and final offer was nonresponsive because it did not comply with two mandatory requirements of the solicitation, but the government's actions during the course of the procurement contradicted its position. The government never treated the protester's BAFO as noncompliant or informed the protester that its proposal was ineligible for award. The purported noncompliant proposal did not cause the government to oust the protester from consideration for award in the source-selection decisions and the cost-technical trade-off analysis. Instead, the contracting officer evaluated the proposal and downgraded the protester's shortcomings in the cost-technical trade-off analysis.

Protests, GSBCA—Interested Party—Next-in-Line Rule.—The government's contention that a protester, not being the next in line for contract award under a best value procurement, was not an interested party to challenge the award of the contract was rejected because, if the offeror did prevail on the counts of its protest, the ranking of the offerors would change and the offeror would have an opportunity to receive the contract award. The next-in-line rule is applicable when there is a reliable and final ranking of all evaluated offers. The rule was inapplicable in the instant case, because the protest allegations, if proven, would have altered the rankings. Further, the board noted that the rule, which was articulated in a federal court decision, was applied in cases involving negotiated procurements. Unlike negotiated procurements, where the contract is awarded to the low cost, technically compliant offeror and where cost becomes the deciding factor, offerors in a best value procurement propose different packages of products and services. Given the differences and the nonstandardization of the vendors' solutions, the board concluded that the next-in-line rule was not appropriate for best value procurements.

For the protester, Federal Computer Corporation: David S. Kovach and Doyle & Bachman, Washington, D.C., by James D. Bachman, Ron R. Hutchinson, and Scott A. Ford. For the protester, I-Net, Inc.: David W. Wells, Vice President and General Counsel, and Dickstein, Shapiro & Morin, Vienna, Virginia, by Richard J. Conway and Joel Freid. For the government: James R. Dietz, Federal Bureau of Investigation, Department of Justice, Washington, D.C., and R. Alan Miller, Civil Division, Department of Justice, Washington, D.C. For the intervenor, International Data Products Corporation: D. Oscar Fuster, Vice President. For the intervenor, Tisoft, Inc.: Hogan & Hartson, Washington, D.C., by William A. Bradford, Jr., Pierre M. Donahue, Timothy L. Schroer, David W. Burgett, Robert J. Kenney, Jr., Douglas A. Fellman, Thomas L. McGovern III, and James K. Trefil.

Before LABELLA, HYATT, and GOODMAN, Administrative Judges.

LABELLA, Administrative Judge: Federal Computer Corporation (FCC or protester) has filed a protest against the award of a contract to Tisoft, Inc. by the Federal Bureau of Investigation (FBI or respondent). The contract is for the acquisition of hardware, software, maintenance, integration support, and technical support services to upgrade Tempest Intelligent Workstations. This decision considers and denies respondent's motion to dismiss.

Background

In this case, the FBI conducted a best value procurement. Protest File, Exhibit 6. As stated in Section M.1 of the solicitation, the contracting officer would award the contract to "that offeror whose proposal offers the greatest advantage to the Government

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considering (a) the technical merits of the proposal and possible LTD [Live Test Demonstration] and (b) the system life cost/price." *Id.*

The protest alleges in part that the FBI conducted unequal discussions with FCC and Tisoft which affected the best value analysis. Both Tisoft and FCC submitted revisions to their initial technical proposals prior to the FBI's request for best and final offers (BAFOs). FCC contends that Tisoft was informed that its revisions were unacceptable prior to the submission of its BAFO, while FCC received no notice of deficiencies in its revised technical proposal between the time it submitted its revisions and the request for BAFOs. In a separate count, FCC also alleges that respondent's best value analysis was defective. Additional counts have been raised, but are not determinative of this motion.

Respondent filed a motion to dismiss the protest for protester's lack of interested party status. The FBI argues that FCC's BAFO was "nonresponsive" with respect to two mandatory items of the solicitation and that FCC was not next in line for award. Respondent seeks to apply the decision of our appellate authority in *United States v. International Business Machines Corp.* [36 CCF ¶75,772], 892 F.2d 1006 (Fed. Cir. 1989) (*IBM*), in support of its position that FCC is not an interested party to bring this protest.

Discussion

Noncompliance with the requirements of the solicitation

Respondent relies on the Federal Circuit's holding in *IBM* to support its first argument that FCC lacks standing because its proposal was noncompliant. In *IBM,* the court held that a nonresponsive bidder in a sealed bid procurement lacks a direct economic interest in the award. 892 F.2d at 1012. The bidder's standing to protest an award is predicated on the responsiveness of its bid. *Id.* Respondent argues that FCC's BAFO was "nonresponsive" because it failed to comply with two mandatory requirements of the solicitation. These two aspects of FCC's proposal that respondent now deems "nonresponsive," however, did not cause respondent to oust FCC from consideration for award in its source selection decision and the cost-technical tradeoff analysis. Protest File, Exhibit 80. Rather, that analysis shows that FCC was considered "below average" with respect to one of the subfactors for which this particular aspect of its proposal was evaluated. It was not considered at that time to be unacceptable for failure to meet a mandatory requirement. Indeed, this same approach in FCC's proposal that is now deemed unacceptable as not meeting mandatory requirements resulted in a grade of "average" with respect to all other subfactors within the general "discriminator" under which it was considered in the tradeoff analysis. We must reject respondent's request to apply the *IBM* responsiveness rule in this case.

The FBI's actions during the course of this procurement contradict the argument it advances in its motion. Respondent never treated FCC's BAFO as noncompliant. Instead, the contracting officer evaluated the proposal and downgraded FCC's "shortcomings" in the cost-technical tradeoff analysis to "below average" and "average." If FCC's BAFO was actually noncompliant as respondent contends, the contracting officer should have informed FCC of that fact and not included FCC in the source selection. *See* 48 CFR 15.609(b) (1993), (FAR 15.609(b)) (if contracting officer determines after discussions that a proposal no longer has a reasonable chance of being selected for award, it may no longer be considered for selection). *Centel Federal Systems, Inc. v. Department of the Army,* GSBCA 11238-P, et al., 91-2 BCA ¶24,028, at 120,303, 1991 BPD ¶123, at 11. At no time did the contracting officer treat FCC's BAFO as noncompliant nor was FCC informed that its proposal was no longer eligible for award. *See* FAR 15.609(c) (contracting officer must notify unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award).

In making its argument, respondent is inviting the Board to apply the responsiveness rule articulated in *IBM* to best value procurements. While the Board has applied the *IBM*'s next in line rule to negotiated procurements in limited circumstances, neither party cited, nor was the Board able to independently locate, any case where the Board applied *IBM*'s rule of responsiveness to a negotiated procurement, let alone a best value procurement. Thus, the Board declines respondent's invitation to extend the rule to best value procurements where the protester was not rejected as unacceptable, was included in the tradeoff analysis, and such action forms the basis for the protest. As stated below, a best value procurement is not sufficiently analogous to a sealed bid procurement to justify extending the rule in these circumstances.

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Moreover, even assuming, *arguendo,* that FCC's BAFO was noncompliant, FCC would still be an interested party. FCC's position would be analogous to an offeror which protests its exclusion from the competitive range. An offeror which believes that its exclusion from the competitive range violates the requirements of a statute or regulation may file a timely protest with the Board. *See, e.g., ST Systems Corp.,* GSBCA 11207-P, 91-3 BCA ¶ 24,201, 1991 BPD ¶ 154. If FCC's BAFO was noncompliant and FCC was no longer eligible for award, FCC still would be able to file a protest if it believed the decision violated a statute or regulation. FCC's position is even stronger than this—it complains that inadequate discussions had a potentially detrimental effect on its proposal. If this is true, there is no telling what FCC's proposal would have looked like if FCC had had the benefit of agency compliance with law. If this protest is granted, further discussions and new BAFOs would be required and FCC's BAFO would have to be re-evaluated with all the BAFOs which remained in the competitive range. Thus, FCC would still be an interested party.

Next in line for award

Respondent also argues the best value analysis shows that FCC was not next in line for award. The argument is based on the court's holding in *IBM* that a bidder that was not next in line for award was not an interested party as required by 40 U.S.C. § 759(f)(9)(B) (1988). 892 F.2d at 1011. An interested party is defined as an offeror whose direct economic interest is affected by the award. 40 U.S.C. § 759(f)(9)(B). Respondent contends that another offeror was determined by the contracting officer to be next in line for award, technically and in price, as well as based upon the best value analysis. Because FCC was not the next offeror in line for award, respondent argues, it is not an interested party and, thus, lacks standing.

In making its argument, respondent notes that the Board has applied the next in line rule articulated in *IBM* to negotiated procurements where the contract was awarded to the low cost, technically compliant offeror and where all proposals were judged technically equal and cost became the deciding factor. *See Computer Maintenance Corp. v. Department of the Army,* GSBCA 11718-P, 92-2 BCA ¶ 24,893, 1992 BPD ¶ 85; *Rocky Mountain Trading Co.,* GSBCA 11121-P, 91-2 BCA ¶ 23,877, 1991 BPD ¶ 71. While the Board has applied the rule to cases with negotiated procurements which closely resemble sealed bid procurements, this in no way means that the rule is applicable to all negotiated procurements. Respondent argues that the *IBM* rule could be applied in this case consistent with the Board's precedent because FCC has not challenged the best value evaluation of the firm that is next in line. Again, we disagree with respondent's argument.

The existence of a reliable and final ranking of all evaluated offers is essential to the application of the *IBM* rule. *See Data Switch Corp.,* GSBCA 11582-P, 92-1 BCA ¶ 24,673 (1991), 1992 BPD ¶ 23. As the Board has recently stated, "application of the rule [is] inappropriate where the protest allegations, if proven, will result in relief which alters or cancels the original ranking of offerors." *Service & Training, Inc. v. Department of the Air Force,* GSBCA 12220-P, 93-2 BCA ¶ 25,855, at 128,653, 1993 BPD ¶ 52, at 5. This change will occur where the protester has put the ranking of offerors directly at issue. FCC's protest in this case has done exactly that. FCC contends that the FBI conducted unequal discussions among the offerors which affected the best value analysis. If this allegation is proven during the course of the proceedings, the present ranking of offerors may change. Thus, the Board cannot say, as the court could in *IBM,* that the protester still will not receive the award even if it prevails.

Furthermore, in the limited circumstances where the Board has applied the *IBM* rule in cases involving negotiated procurements, the facts were closely analogous to sealed bid procurements. However, a best value procurement differs from a sealed bid procurement in virtually every regard. Bidders in a sealed bid procurement offer the same or similar products and services, and will vary only as to price. Offerors in a best value procurement will be proposing different packages of products and services, and, thus, will differ in more ways than price. Because of these differences and the nonstandardization of the vendors' offered solutions, the rationale behind the *IBM* rule is not appropriate for best value procurements. While the Board does not foreclose the possibility that the *IBM* rule could be applied to a best value procurement, it is difficult to imagine a factual scenario in which that could occur. Therefore, FCC is an interested party and the Board has jurisdiction to hear the protest.

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Decision

The respondent's motion to dismiss is DENIED.

[¶ 26,443] QSOFT, Incorporated v. Small Business Administration; Contemporary Technologies, Inc., Intervenor

GSBCA No. 12558-P, September 20, 1993.

Protests, GSBCA—Interested Party—SBA 8(a) Procurements.—A protest against an award of a contract for automatic data processing support services under the Small Business Act 8(a) program was dismissed for lack of jurisdiction because the SBA determined that the protester was ineligible for award of an 8(a) contract at the time it submitted its proposal. Although the protester contended that the contracting officer had determined that the protester was in line for award and had a direct economic interest in award, any conclusion reached by the contracting officer before the solicitation's many amendments was of no consequence. Moreover, the SBA, rather than the contracting officer, was responsible for determining the protester's eligibility under the 8(a) program.

For the protester: J. Patrick McMahon, Vienna, Virginia. For the government: John W. Klein, Audrey H. Liebross, and Christopher Holleman, Office of General Counsel, Small Business Administration, Washington, D.C. For the intervenor, Contemporary Technologies, Inc.: Cohen & White, Washington, D.C., by David S. Cohen, Paralee White, Nikki Koulizakis, and G. Brent Connor.

Before LABELLA, BORWICK, and DEGRAFF, Administrative Judges.

DEGRAFF, Administrative Judge: On August 27, 1993, QSoft, Inc. (QSoft) filed its complaint in this case, protesting the decision of the Small Business Administration (SBA) to award a contract to Contemporary Technologies, Inc. (CTI). On September 13, 1993, SBA filed a motion to dismiss, asserting that the Board lacks jurisdiction to entertain this protest. On September 17, 1993, QSoft filed its opposition to SBA's motion. Pursuant to 40 U.S.C. § 759(f)(1988), we possess jurisdiction to consider a protest filed by an "interested party" who requests that we review a contracting officer's decision. Because QSoft is not an interested party in connection with the procurement at issue here, we grant SBA's motion to dismiss.

Background

The 8(a) Program

Sections 8(a) and 7(j) of the Small Business Act establish the Minority Small Business and Capital Ownership Development Program, commonly known as the 8(a) program. The statute authorizes SBA to enter into contracts with other Government agencies and to subcontract the performance of these contracts to small businesses owned and controlled by socially and economically disadvantaged individuals. The purpose of the program is to provide assistance to such businesses so that they are able to compete equally in the marketplace. 15 U.S.C.A. § § 636(j) and 637(a) (1993).

The Small Business Act and SBA's implementing regulations establish the eligibility criteria for participating in the 8(a) program. Generally, a firm must meet certain size requirements and must be owned and controlled by socially and economically disadvantaged individuals. 15 U.S.C. § 637(a) 13 CFR Part 124 (1993). Within SBA, the Office of Minority Small Business and Capital Ownership Development (MSB&COD) is responsible for handling matters relating to 8(a) program eligibility. 15 U.S.C. § 637(a)(8), 13 CFR 124.3.

If MSB&COD determines that a firm is eligible to participate in the 8(a) program, the firm may participate in the program for nine years. The first four years of participation are called the developmental stage, and the remaining five years of participation are known as the transitional stage. 15 U.S.C. § 636(j)(12), 13 CFR 124.110, 124.303. In order to ensure that a firm moves into the marketplace and does not become dependent upon 8(a) contracts, SBA requires 8(a) program participants to obtain business outside the 8(a) program. 15 U.S.C. § 636(j)(10)(I), 13 CFR 124.312. During a firm's transitional stage, it is required by SBA to achieve certain targets of non-8(a) contract revenue. *Id.* For instance, a firm in the third year of its

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transitional stage must achieve thirty-five to forty-five percent of its business from non-8(a) contracts, and a firm in the fourth year of its transitional stage must achieve forty-five to fifty-five percent of its business from non-8(a) contracts. 13 CFR 124.312(c)(4).

If a firm fails to achieve the minimum percentage of non-8(a) contract revenue, SBA is authorized to implement certain remedial measures, such as requiring the firm to attend business management seminars or restricting the firm's access to 8(a) contracts. 15 U.S.C. § 636(j)(10)(I)(iii)(V), 13 CFR 124.312(c)(6), 124.312(c)(12). In order to receive an 8(a) contract during the transitional stage of the program, a firm must certify either that it has complied with the non-8(a) business revenue target or that it is in compliance with any remedial measures imposed by SBA. 15 U.S.C. § 636(j)(10)(I)(iii)(III), 13 CFR 124.312(c)(11).

SBA may award either sole source 8(a) contracts or competitive 8(a) contracts. 15 U.S.C. § 637(a)(1)(B), 13 CFR Part 124. If a contract is to be awarded competitively, the procuring agency will conduct the competition in accordance with the Federal Acquisition Regulation (FAR). 13 CFR 124.311(f). The procedures for awarding an 8(a) contract are set forth in the FAR at Subpart 19.8. 48 CFR 19.800-19.812 (1992) (FAR 19.800-19.812). According to FAR 19.805-2(c), SBA—not the procuring agency—is responsible for determining the eligibility of a firm to receive award of an 8(a) contract. Further, this regulation provides that SBA will determine a firm's eligibility for award as of the time of submission of initial offers which include price. FAR 19.805-2(c). SBA's regulations provide that, if an offeror is in the transitional stage and has not achieved its non-8(a) business revenue target, this will not affect the firm's eligibility for award, so long as SBA and the firm have agreed upon a remedial plan. 13 CFR 124.311(f)(5)(iv).

SBA may terminate a firm's participation in the 8(a) program prior to the expiration of nine years, for good cause. 15 U.S.C. § 636(j)(10)(F), 13 CFR 124.209. If SBA terminates a firm's participation, the firm may appeal the termination to SBA's Office of Hearings and Appeals. 15 U.S.C. § § 636(f)(10)(G), 637(a)(9), 13 CFR 124.210. No appeal may be taken from SBA's decision to require remedial measures of a firm which fails to meet its non-8(a) business revenue targets. 15 U.S.C. § 636(j)(10)(I)(V).

The Procurement At Issue Here

SBA's Central Office decided to procure application software development services and, in a letter dated April 7, 1992, to MSB&COD, the Central Office offered to fulfill its requirements by means of a competition among 8(a) firms. Protest File, Exhibit 41. On April 13, 1992, MSB&COD accepted the Central Office's offer to fulfill its requirements in this manner. *Id.*

The Central Office issued solicitation SBA-92-8-FDS on June 1, 1992, and QSoft submitted its proposal on July 14, 1992. Protest File, Exhibits 1, 14. Subsequently, the solicitation was amended six times and offerors were permitted to submit revised proposals. Protest File, Exhibits 5-10. On May 24, 1993, QSoft and Central Office representatives entered into discussions concerning technical and cost issues and, on June 1, 1993, QSoft submitted its best and final offer. Complaint ¶ ¶ 12, 16; Protest File, Exhibit 21.

On June 2, 1993, the Central Office advised MSB&COD that three firms were within the competitive range, and requested that MSB&COD determine whether these firms were eligible for award of an 8(a) contract. Protest File, Exhibit 41. MSB&COD determined that, at the time QSoft submitted its proposal, it had not met its non-8(a) business revenue target. SBA's Motion to Dismiss, Exhibit 1; Protest File, Exhibit 41. Specifically, MSB&COD determined that QSoft was in the third year of its transitional stage at the time it submitted its proposal on July 14, 1992. Although SBA's regulations required QSoft to generate thirty-five to forty-five percent of its revenue from non-8(a) sources during the third year of its transitional stage, as of the end of the third quarter of 1992, QSoft had generated only 2.8 percent of its revenue from non-8(a) sources. This figure remained the same at the end of 1992. *Id.* In addition, MSB&COD determined that QSoft did not have an approved remedial plan in place at the time it submitted its proposal. *Id.*

Because at the time it submitted its proposal, QSoft had not met its non-8(a) business revenue targets and because QSoft had no remedial plan in place, MSB&COD determined that QSoft was not eligible for award of this 8(a) contract. MSB&COD advised the Central Office of QSoft's ineligibility in a memorandum dated June 14, 1983. Protest File, Exhibit 41. The Central Office notified QSoft of MSB&COD's determination in a letter dated August 18, 1993. *Id.*, Exhibit 43.

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SBA notified CTI on August 18, 1993, that it was the successful offeror. *Id.*

The Protest

In its complaint, QSoft sets forth two grounds for its protest. In Count I, QSoft alleges that SBA failed to evaluate Qsoft's technical and cost proposals properly. In Count II, QSoft alleges that the contracting officer —and not the appropriate authority within SBA—made the determination that QSoft was not eligible for award. Alternatively, QSoft alleges that the eligibility determination was made at the wrong time. QSoft also alleges that the eligibility determination is incorrect.

Discussion

The procurement at issue here is for automatic data processing support services. Thus, pursuant to 40 U.S.C. § 759(f)(1988), we possess jurisdiction to entertain this case so long as it was filed by an interested party who asks us to review a decision by a contracting officer which is alleged to violate a statute or regulation. The term "interested party" is defined at 40 U.S.C. § 759(f)(9)(B) as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." A protester who has no chance of being awarded the contract lacks a "direct economic interest" in the award and so is not an interested party. *United States v. International Business Machines, Inc.* [36 CCF ¶ 75,772], 892 F.2d 1006 (Fed. Cir. 1989); *C.M.P. Corp.*, GSBCA 11115-P, 91-2 BCA ¶ 23,854, 1991 BPD ¶ 55.

Competition for award of the contract at issue here was limited to firms eligible to receive award of an 8(a) contract, and QSoft does not complain about this limitation. The FAR provides that 8(a) eligibility will be evaluated as of the date that a firm submits its initial proposal. FAR 19.805-2(c). Unless QSoft was an eligible 8(a) firm when it submitted its initial proposal in July 1992, it is not eligible for award of this contract. If QSoft is not eligible for award, it is not an interested party and we lack jurisdiction to consider either count of the protest.

There is no basis for QSoft's allegation that the contracting officer determined that QSoft is not eligible for award. It is clear from the record that MSB&COD—not the contracting officer —determined that QSoft was not an eligible 8(a) firm at the time it submitted its proposal and, thus, not eligible for award. According to statute and regulation, MSB&COD is the proper authority to make such an eligibility determination.

To the extent QSoft argues that we possess jurisdiction because the contracting officer should have been alerted to some deficiency in the timing or the correctness of MSB&COD's decision, we disagree. Concerning timing, the regulations clearly require that QSoft must have been eligible as of the date that it submitted its initial proposal, and the evidence is clear that MSB&COD examined QSoft's eligibility as of that date. If QSoft is arguing that MSB&COD should have conducted its examination earlier than it did, this argument is not supported by any regulatory or statutory requirement. FAR 19.805-2(c)(2). Additionally, although QSoft asserts that it had a remedial plan in effect, the evidence submitted by QSoft to support its assertion demonstrates only that in October 1992, SBA was considering QSoft's plan. We find no facts to suggest that the contracting officer should have been alerted to a flaw in MSB&COD's decision. Further, given that the statute does not permit even an administrative appeal of decisions concerning remedial plans, if we were to find that the contracting officer should have been aware of some inadequacy in MSB&COD's process, we are not certain what duty, if any, we would impose upon the contracting officer.

QSoft argues that it must be an interested party because it is participating as an intervenor in a protest concerning this procurement currently pending before the General Accounting Office (GAO). This argument is not persuasive. Assuming that GAO's definition of "interested party" is the same as ours, we do not know whether GAO has considered the propriety of permitting QSoft to participate in its protest. Even if our definitions are identical and even if GAO has decided to permit QSoft to participate, we would not be bound by GAO's decision.

QSoft also argues that we possess jurisdiction to entertain a protest concerning the propriety of any agency decision, no matter whether the decision was made by a contracting officer or by someone else within the agency, not acting for the contracting officer in connection with the procurement. We disagree. Our authorizing legislation is quite clear and cannot be read as broadly as QSoft would like.

Finally, QSoft argues that it has an economic interest in the award of this contract because, QSoft alleges, the contracting officer determined that QSoft was in line for award in September 1992. Even though we

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will accept QSoft's allegation as true, its argument fails. After September 1992, the solicitation was amended six times and offerors were permitted to submit revised proposals, so any conclusion reached by the contracting officer in September 1992 is of no consequence. More important, as we explain above, MSB&COD—not the contracting officer—was responsible for determining whether QSoft is eligible for award and MSB&COD determined that QSoft is not eligible. Because QSoft is not eligible for award, it is immaterial that, at some point during the rather lengthy history of this procurement, the contracting officer might have determined that QSoft was in line for award.

Decision

Because MSB&COD determined that QSoft is not eligible for award, QSoft lacks a direct economic interest in the award and so is not an interested party. For this reason, we lack jurisdiction to consider this protest. SBA's motion to dismiss is granted and the protest is **DISMISSED FOR LACK OF JURISDICTION.** The suspension of SBA's procurement authority lapses by its terms.

[¶ 26,444] Integrated Systems Group, Inc. v. Department of the Army

GSBCA No. 12538-P(12369-P), October 5, 1993. IFB No. DACW31-93-B-0032.

Protests, GSBCA—Interested Party—Direct Economic Interest.—A government motion to dismiss a protest against an award under a Small Business Administration set-aside for computer workstations on the ground that the protester was not an interested party was denied, despite the government's contention that the protester lacked a direct economic interest in contract award, because the government did not show that granting the protest would automatically put a lower-priced bidder in line for award of the contract ahead of the protester. Although the lower-priced bidder also checked a box in the bid's certification section that indicated that it would not furnish a product manufactured by a domestic small business, its protest ground was different from the protester's ground. The protester alleged that it checked the wrong box as a result of a clerical error, whereas the lower-priced bidder contended that no small business could truthfully check the other box, which the lower-priced bidder interpreted as requiring that every component of the system be manufactured by a small business in the United States.

Responsiveness of Bids—Commitment to Be Bound—Certification Requirement.—A protest against an award of a Small Business Administration set-aside for computer workstations was denied because the protester's failure to comply with the bid's certification requirements rendered the bid nonresponsive. By checking a box in the certification requirement section that indicated that the protester would not furnish a product manufactured by a domestic small business, the protester certified that it would not comply with a material requirement of the solicitation. The protester contended that its failure to comply with the certification requirement resulted from a mistake, which it wanted to correct. However, certification, which involves a performance commitment by a bidder, is not a minor informality or irregularity that allows for such correction.

Mistakes—Correction—Responsiveness.—A protester's bid under a Small Business Administration set-aside for computer workstations was properly rejected as nonresponsive, despite the protester's contention that the bid when read as a whole was responsive, because statements in the cover letter and technical literature, as well as the certification that the protester would not supply a system manufactured by a domestic small business, rendered its bid ambiguous and unacceptable. Although the protester alleged that the certification resulted from a clerical error, correction is limited to bids that as submitted are responsive to the invitation. Correction of nonresponsive bids to make them responsive is not permitted.

For the protester: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Craig R. Schmauder and William A. Richards, Office of the Chief Counsel, Corps of Engineers, Department of the Army,

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Washington, D.C., and Richard W. Kommers and Richard P. White, Corps of Engineers, Department of the Army, Baltimore, Maryland.

Before PARKER, DANIELS, and HENDLEY, Administrative Judges.

PARKER, Administrative Judge: Integrated Systems Group, Inc. (ISG), protests the decision of the U.S. Army Corps of Engineers to reject as nonresponsive ISG's bid to supply personal computer workstations. For the reasons discussed below, we deny the protest.

Findings of Fact

1. The U.S. Army Corps of Engineers issued Invitation for Bids (IFB) No. DACW31-93-B-0032 on February 22, 1993, for the purchase of twenty-five personal computer workstations. Protest File, Exhibit 2.

2. Paragraph I.16 of the solicitation incorporated the clause found at Federal Acquisition Regulation (FAR) section 52.219-6, "Notice of Total Small Business Set-Aside." Paragraph C of that clause states in part as follows:

> Agreement. A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

Protest File, Exhibit 2 at I-19 to I-20.

3. The cover letter which accompanied ISG's bid stated:

> We understand and accept all terms and conditions contained in the proposal documents.

Protest File, Exhibit 3.

4. Unfortunately, however, the bid itself at Section K.11 said:

> (a) Representation. The offeror represents and certifies as part of its offer that it /[check mark]/ is, /__/ is not a small business concern and that /__/ all, /[check mark]/ not all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands.

Protest File, Exhibit 3 at K-10. Although ISG intended to indicate that the system it bid would be manufactured by a small business in the United States, an ISG employee inadvertently checked the wrong box. Declaration of Steve Mills (Sept. 15, 1993).

5. The technical literature submitted as part of ISG's bid stated on the first page that:

> Integrated Systems Group specializes in the design, manufacturing and marketing of a comprehensive range of personal computers.
>
> ....
>
> In-house manufacturing and extensive testing prior to shipping, makes quality and performance pertinent features of all ISG systems.

Protest File, Exhibit 3 at part II C.

6. On March 31, 1993, ISG and another bidder, Unitek Technology, Inc., were informed that their bids had been rejected as nonresponsive to the solicitation. Protest File, Exhibits 12, 13. Unitek, like ISG, had checked the box indicating that its system would not be manufactured by a small business in the United States. Both firms were told that "the bid does not establish your legal obligation to comply with Clause I.16—Notice of Total Small Business Set-Aside." *Id.* Unitek's bid was lower in price than ISG's bid. *Id.*, Exhibit 7.

7. On April 6, Unitek protested to the agency the rejection of its bid. Unitek asserted that 75 percent of its bid price represented work performed domestically by Unitek in manufacturing the computers and that no bidder could provide a computer system made up entirely of domestically manufactured components. Protest File, Exhibit 15. ISG also protested to the agency, asserting its "clerical error" theory. *Id.*, Exhibit 16.

8. Both firms also intervened in a protest of the same procurement filed at the Board by R&S Computers & Memory Enhancement Products. Protest File, Exhibit 35. ISG additionally filed its own Board protest, again asserting clerical error. *Id.*, Exhibit 32. The protests were dismissed without prejudice in accordance with a stipulation by the parties. The parties agreed to dismiss the Board protests in order to permit respondent to address them as agency level protests. The parties further agreed that the protests could be reinstated within ten days following any adverse decision on the agency protests. *Id.*, Exhibits 42, 43.

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9. Following respondent's denial of the agency protests, ISG filed this protest, which is a reinstatement of its original Board protest. None of the other bidders have intervened in this protest or filed protests of their own.

Discussion

Interested Party

Respondent moves the Board to dismiss ISG's protest for lack of an interested party. According to respondent, even if ISG prevails in its protest, it would not receive the award because Unitek, a lower-priced bidder, made the same mistake and would likewise be permitted to correct its bid.

We deny respondent's motion. Respondent is correct that, under the Brooks Act, only an "interested party" may pursue a protest at the Board. 40 U.S.C. § 759(f)(1) (1988). An interested party is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 40 U.S.C. § 759(f)(9)(B). Construing this language, our appellate authority has stated that:

> the right to protest an agency's procurement practices before the Board is limited and may be exercised only by an actual or prospective bidder who would have been in line to receive the challenged award. The Board's protest authority does not extend to disappointed bidders who have no chance of receiving the contract.

Federal Data Corp. v. United States [36 CCF ¶ 75,913], 911 F.2d 699, 703 (Fed. Cir. 1990).

We do not agree with respondent, however, that Unitek would necessarily receive the award if ISG's protest were to be granted. Although Unitek, like ISG, checked the box indicating that its bid product would not be manufactured by a small business in the United States, Unitek's ground of protest was different than ISG's ground. ISG alleges that it checked the wrong box as the result of a clerical error. As discussed below, in order to win this protest, ISG must prove that its bid, standing alone, unambiguously obligated ISG to supply systems manufactured by a small business in the United States, notwithstanding the erroneous certification.

Unitek, on the other hand, did not allege that it checked the wrong box; essentially, Unitek alleged that no small business could truthfully check the other box, which Unitek interpreted as requiring that every *component* of the system be manufactured by a small business in the United States. Unitek did not argue that its bid, standing alone, obligated it to comply with the solicitation. As respondent correctly pointed out in its decision in Unitek's agency protest, the issue there was whether Unitek was entitled to *supplement* its bid with a post-award explanation of its responsiveness. Respondent held that Unitek was not permitted to do so and neither respondent nor Unitek has asked the Board to reverse that decision. Thus, we disagree with respondent that granting ISG's protest here would automatically put Unitek ahead of ISG in line for award of the contract. Respondent's motion is denied.

The Merits

Having said all that, we now deny ISG's protest on the merits. In government contract law, it is beyond cavil that "[t]o be considered for award, a bid must comply in all material respects with the invitation for bids." *Integrated Systems Group, Inc. v. Department of Commerce,* GSBCA 12420-P, 93-3 BCA ¶ 26,198, 1993 BPD ¶ 164, at 4 (June 15, 1993); 48 CFR 14.301(a) (1992) (FAR 14.301(a)). As the Comptroller General has stated, "[a] bid as submitted must represent an offer to perform, without exception, the exact thing called for in the IFB, so that upon acceptance, the contractor will be bound to perform in accordance with all the terms and conditions of the IFB." *Bulloch International, Inc.,* B-237369, 90-1 CPD ¶ 153, at 4 (Feb. 5, 1990). Thus, a responsive bid "is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation." *Propper Manufacturing Co.,* B-233321, et al., 89-1 CPD ¶ 58, at 2 (Jan. 23, 1989). A bid which is ambiguous may not be accepted by the Government. *Southwestern Bell Corp.,* GSBCA 10321-P, 90-1 BCA ¶ 22,545, 1989 BPD ¶ 376.

By checking the box indicating that it would not furnish a product manufactured by a domestic small business, ISG certified that it would *not* comply with the requirements of the solicitation. ISG alleges that it made a mistake, which it would now like to correct. As discussed below, we hold that respondent correctly determined that such a correction would not be permissible.

Two sections of the Federal Acquisition Regulation discuss situations in which a bid may be "corrected." FAR 14.405 provides as follows:

> A minor informality or irregularity is one that is merely a matter of form and not of

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substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being offered.

Numerous decisions of the Comptroller General make it clear that failure to comply with the certification requirement at issue here is not a minor informality or irregularity because the certification "involves a performance commitment by the bidder." *Wright Associates, Inc.*, B-238756, 90-1 CPD ¶ 549, at 2 (June 12, 1990).[1]

> The end item certification involves a performance obligation of the bidder, should it become the contractor, enforceable by the government. It reflects the view that the socioeconomic aims of the set-aside program are served only if the supplies are manufactured by small business concerns and reflects the Small Business Administration's requirement that a small business set-aside contractor furnish the product of a small business concern. . . . A bidder's failure to make such a commitment in its bid renders the bid nonresponsive because the government, upon acceptance of the bid, would not be able to require the bidder to supply items manufactured by small business concerns.

Morgan Lumber Sales, B-234997, 89-1 CPD ¶ 410, at 1-2 (Apr. 28, 1989); *see Hankins Lumber Co.*, B-248108, 92-2 CPD ¶ 50 (July 27, 1992) ("Where a bid fails to include a properly completed certification which contains performance requirements designed to accomplish the purposes of a small business set-aside, the bid is nonresponsive and must be rejected").

As protester points out, the Comptroller General has, in some cases, permitted the Government to overlook a bidder's failure to complete the required certification where the bidder is otherwise obligated by FAR 52.219-6 to supply the product of a domestic small business. The Comptroller General reasoned in these cases that, since the bidders did not take exception to the requirement, they were obligated to supply the product of a domestic small business. *See Certified Slings, Inc.*, B-243085, 91-1 BPD ¶ 442 (May 6, 1991); *Concorde Battery Corp.*, B-235119, 89-2 CPD ¶ 4 (June 30, 1989). In no case, however, has the Comptroller General permitted a bidder to "correct" an erroneous certification stating that the bidder will *not* supply the product of a domestic small business.

Protester also calls our attention to FAR 14.406, the other section which in certain circumstances permits correction of a bid:

> After opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section 14.406. Such actions shall be taken before award.

FAR 14.406-1. Not all mistakes are subject to correction, however. Section 14.406 continues:

> **14.406-2 Apparent clerical mistakes.**
>
> (a) Any clerical mistake, *apparent on its face in the bid*, may be corrected by the contracting officer before award. . . . Examples of apparent mistakes are—
>
> (1) Obvious misplacement of a decimal point;
>
> (2) Obviously incorrect discounts . . .;
>
> (3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and
>
> (4) Obvious mistake in designation of unit. . . .
>
> **14.406-3 Other mistakes disclosed before award.**
>
> In order to minimize delays in contract awards, administrative determinations may be made as described in this 14.406-3 in connection with mistakes in bids alleged after opening of bids and before award. *The authority to permit correction of bids is limited to bids that, as submitted, are responsive to the invitation and may not be used to permit correction of bids to make them responsive.* This au-

[1] The failure to complete (or erroneously completing) the small business size status portion of the representation is a waivable minor informality. The size status certification involves only the firm's eligibility for award, whereas the second portion of the representation, at issue here, is not waivable "because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies." *Lynd Gear of Michigan, Inc.*, B-224068, 86-2 CPD ¶ 247, at 2 (Sept. 2, 1986).

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thority is in addition to that in 14.406-2 or that may be otherwise available.

FAR 14.406-2, -3 (emphasis added). These sections of the FAR do not permit a bid which is non-responsive in a material way to be corrected to become responsive. *Southwestern Bell Corp.* To permit such material corrections would create a basic unfairness in the bidding process. *University Systems, Inc. v. Department of Energy,* GSBCA 11754-P, 92-1 BCA ¶ 24,932, 1992 BPD ¶ 93.

Protester characterizes its mistake as a clerical error, arguing that, notwithstanding its certification to the contrary, its bid unambiguously obligated protester to supply a system manufactured by a small business in the United States. Thus, according to protester, its bid was responsive on its face. Protester points to (1) the statement in the cover letter attached to its bid which stated that ISG understood and accepted the terms and conditions of the IFB, and (2) the statement on the first page of its technical literature indicating that ISG is a manufacturer of personal computers.

We agree with respondent that these statements, combined with ISG's certification that it would *not* supply a system manufactured by a domestic small business, rendered ISG's bid ambiguous at best and, therefore, unacceptable. A general statement that all furnished equipment will meet specifications cannot override specific performance information contained in the appropriate bid sections. *See University Systems, Inc.* Similarly, the announcement in general terms that ISG is a manufacturer of personal computers contained on the first page of ISG's technical literature does not negate ISG's certification that its bid system would not be manufactured by a domestic small business. ISG's bid nowhere stated that ISG would manufacture the particular system bid here. In fact, it said just the opposite.

The Comptroller General explained our reasoning well in a similar case, *Propper Manufacturing Co.* There, the protester, a small business manufacturer of blood testing kits, claimed that when its bid was read as a whole, it was apparent that only small business end items would be provided, notwithstanding the protester's erroneous certification. Specifically, Propper argued that Food and Drug Administration files referenced by numbers contained in its bid did not indicate that the test kits would be manufactured anywhere other than protester's own manufacturing plant. The Comptroller General said:

> Regardless of [protester's] contention that this certification was the result of a clerical error, because acceptance of [protester's] bid would not legally obligate the company to furnish small business products, we agree that the bid must be rejected as nonresponsive. With respect to [protester's] post-bid explanation of what it actually intended, responsiveness is determined from the face of the bid itself; to allow a bidder to make its nonresponsive bid responsive after opening would be tantamount to permitting it to submit a new bid, and thus, may not be permitted.
>
> Even if [protester's] bid could be read as [protester] suggests and we were to accept the contents of the referenced FDA filings as part of its bid, [protester's] bid is, at best, ambiguous since it contains a specific certification that [protester] will not be supplying small business products and an apparent contradictory statement incorporated by reference that its place of performance is a small business.

Id. at 3 (citations omitted). Here, as in *Propper,* ISG certified that it would not comply with the requirement to supply a product manufactured by a domestic small business. That certification, which related to a material requirement of the solicitation, rendered ISG's bid nonresponsive. We agree with the Comptroller General that the integrity of the bidding process requires that such bids be rejected.

Decision

The protest is **DENIED.** The suspension of respondent's delegation of procurement authority lapses by its terms.

[¶ 26,445] Wood & Company v. Department of the Treasury

GSBCA No. 12534-TD, October 8, 1993.

Contract Disputes, Claims—Submission to Contracting Officer—Same Set of Operative Facts.—A building renovation contractor's second claim for extended field and office overhead associated with delays caused by government orders to install a new heating,

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ventilating, and air-conditioning system was properly dismissed for lack of jurisdiction because the allegedly separate second claim involved the same set of operative facts as a previous claim that was denied by the contracting officer. The contractor did not appeal the denial of its previous claim to the board within 90 days after receipt of the contracting officer's decision. Although the contractor's second claim, which was made in an undated letter to the agency, demanded a larger payment and asserted a longer delay period than the contractor had initially claimed, the second claim was not a separate claim. Both claims were premised on the theory that the government's requirement for additional HVAC work delayed project completion and caused the contractor to incur additional costs.

For the appellant: Milton A. Wood, President. For the government: David H. Brunjes, Office of the Legal Counsel, Federal Law Enforcement Training Center, Glynco, Georgia.

Before DANIELS, VERGILIO, and DEGRAFF, Administrative Judges.

DANIELS, Administrative Judge: The Department of the Treasury (Treasury), respondent, moves to dismiss for lack of jurisdiction an appeal filed by Wood & Company (Wood). We grant the motion.

Findings of Fact

1. Treasury awarded to Wood a contract in the amount of $310,012 to renovate a building in Glynco, Georgia. Appeal File, Exhibit 1.

2. While Wood was performing the contract, Treasury and Wood agreed that the latter should install a new heating, ventilating, and air conditioning (HVAC) system in the building in return for additional compensation. The parties could not agree on a price for this work, however, and the contracting officer unilaterally modified the contract to increase payments by $8,186.71. Motion to Dismiss, Exhibits A, B.

3. Wood took exception to the amount set by the contracting officer and demanded payment of an additional $9,893. Appeal File, Exhibit 17. The contracting officer recognized this letter as a claim and asked for supporting documentation. *Id.*, Exhibit 19. Wood then specified that in addition to previously identified costs, it believed that it was entitled to $4,264 in "extended job overhead" and $3,120 for "exerted office overhead," each representing the costs associated with twenty-six days of delay. *Id.*, Exhibit 20.

4. On April 2, 1993, the contracting officer rendered a decision which addressed four separate claims filed by Wood with respect to this contract. Among these claims was the one for delay costs related to installation of the HVAC system. This claim was denied in its entirety; the contracting officer held that because the contract modification regarding this installation did not involve a suspension of work, overhead could only be recovered as a percentage of the direct cost of the installation. Appeal File, Exhibit 24.

5. On June 2, 1993, Wood appealed the contracting officer's April 2 decision to this Board. The appeal was clearly limited to one aspect of the decision—the portion that denied a claim for additional payments for allegedly extra roofing work. Motion to Dismiss, Exhibits F-H.

6. On June 21, 1993, Treasury received an undated letter from Wood claiming that the contractor is entitled to payment in the amount of $31,040.03 for "extended field and office overhead" resulting from the agency's having delayed contract completion by forty-nine days by requiring that the additional HVAC work be performed. Complaint, Exhibit 1.

7. By letter dated July 22, 1993, the contracting officer responded, "Your letter sought to reopen our consideration of your HVAC claim .... My Final Decision letter to you on April 2, 1993—specifically in the second through fourth paragraphs—defined our response on the HVAC claim." Appeal File, Exhibit 25. The fourth paragraph is the one that denies the delay claim referenced in paragraph 3, above.

8. On August 6, 1993, Wood filed at this Board a notice of appeal of what it denominated the contracting officer's "final decision ... issued July 22, 1993." Wood additionally (and contradictorily) maintained that by the letter of July 22, the contracting officer had "denied Wood & Company the right to file a new and separate claim."

Discussion

The Contract Disputes Act of 1978 provides two means for a Government contractor to challenge a contracting officer's decision on a claim. The contractor may appeal the decision, within ninety days from its receipt, to the appropriate agency board

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of contract appeals. 41 U.S.C. § 606 (1988). Alternatively, within twelve months from the date of receipt of the decision, the contractor may bring an action directly on the claim in the United States Court of Federal Claims. 41 U.S.C.A. § 609(a) (West Supp. 1993).

The deadline for filing an appeal with a board of contract appeals is unforgiving; it has been strictly construed by the Court of Appeals for the Federal Circuit, because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the board of jurisdiction to consider the case on its merits. *Cosmic Construction Co. v. United States* [30 CCF ¶ 70,732], 697 F.2d 1389 (Fed. Cir. 1982); *Elden-Rider, Inc.*, GSBCA 8643, 90-2 BCA ¶ 22,878, at 114,901, *aff'd*, 935 F.2d 281 (table) (Fed. Cir. 1991); *George's Lawn & Rental Service, Inc.*, GSBCA 10087, 89-3 BCA ¶ 22,081.

Treasury contends that Wood has made one claim for costs associated with delays caused by the requirement to install a new HVAC system, and that that claim was resolved by the contracting officer's decision dated April 2. Wood did not appeal the denial of that claim to this Board within ninety days of receiving it, and consequently, Treasury says, the firm is barred from proceeding with it now at this Board.[1] According to the agency, Wood's letter of July 22 merely restates the earlier claim, albeit in grander dress. Because the second letter did not constitute a separate claim, Treasury concludes, the contracting officer's response to it cannot trigger the running of a separate ninety-day period in which to file an appeal.

Wood insists to the contrary that its demand of June 21 was "a separate new claim ... which is completely and absolutely different from the [earlier] claim." The contractor says that its "claim on 6-21-93 has no similarity in any form at all" to the other one. Wood maintains that because the appeal was filed within ninety days of the contracting officer's response to the second claim, the Board has jurisdiction to hear the case.

In deciding whether two allegedly separate claims "are merely various aspects of a single claim, involving a common set of operative facts, or are in fact separate claims," this Board follows a rule established by the Court of Federal Claims. The rule is that the "determining factor ... is not the characterization placed on the claim by the contractor, but whether the demand for relief arose out of essentially interrelated conduct and services and the same, or closely connected, facts." *Singleton Contracting Corp.*, GSBCA 9614, et al. (Oct. 4, 1988), at 3; *see also D.L. Kaufman, Inc.*, GSBCA 11040, et al., 91-2 BCA ¶ 23,843; *Richerson Construction. Inc.*, GSBCA 10653, 91-1 BCA ¶ 23,538 (1990); *LDG Timber Enterprises, Inc. v. United States* [32 CCF ¶ 73,681], 8 Cl. Ct. 445, 452 n.9 (1985); *Walsky Construction Co. v. United States* [31 CCF ¶ 71,677], 3 Cl. Ct. 615, 618-19 (1983).

Here, Wood's letter of June 21 was essentially nothing more than a reiteration of its initial claim. The two demands are both premised on the theory that by ordering supplemental work on the HVAC system, Treasury delayed completion of the entire project and thereby caused Wood to incur additional overhead costs with respect to both its office and the jobsite. The fact that the second letter asserts a longer period of delay and asks payment of a larger amount does not make this letter a separate claim. *Cf. Tecom, Inc. v. United States* [32 CCF ¶ 72,428], 732 F.2d 935, 938 (Fed. Cir. 1984) (increasing amount of claim to greater than $50,000, based on further information, does not implicate Contract Disputes Act's requirement for certification of claim).

If Wood's theory were valid, the Act's limitation on access to a board of contract appeals could be evaded with impunity. A contractor who concluded, more than ninety days after having a claim rejected, that it wanted a board to hear an appeal of the contracting officer's decision, could always get that consideration. It would simply have to file a second claim which was immaterially different from the first, wait for the expected denial, and submit an appeal within ninety days of receipt of that rejec-

[1] Actually, Treasury counts days from the date of the decision, not the date of receipt—something which is not envisioned by the statute. Wood has not alleged that it received the decision on any particular date, however. In such circumstances, we presume that receipt occurred five days after mailing. *Global Radon Testing Services, Inc. v. General Services Administration*, GSBCA 12517, 94-1 BCA ¶ 26,389 (Aug. 27, 1993); *Berkshire Computer Products*, GSBCA 11539-P, 92-1 BCA ¶ 24,587, at 122,686, 1991 BPD ¶ 302, at 4. Whether Wood received the decision on the date it was written or five days later is immaterial for the purpose of resolution of Treasury's motion; the date of filing of the instant appeal is more than ninety days later than either of these dates.

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tion. This is clearly not the result Congress intended when it wrote the limitation into the statute.

Decision

This appeal was filed more than ninety days after Wood received the contracting officer's decision which it now challenges. The Board consequently does not have jurisdiction to hear the case. The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

[¶ 26,446] Data Equipment, Inc. v. Department of the Air Force; Small Business Administration, Intervenor

GSBCA No. 12506-P, September 28, 1993.

Small Business—8(a) Procurements—Withdrawal of Procurement from 8(a) Program.—A protest against the withdrawal of a procurement's software requirements from the Small Business Administration 8(a) program and the purchase of the software requirements outside the 8(a) program was denied because, during the attempted 8(a) procurement, the government discovered that the required supplies were manufactured only by a large business. The protester knew that the required products were those of a large business because its proposal indicated that it was not offering the products of a small business. Award of the contract to the protester would have violated regulations governing 8(a) procurements. Moreover, the government did not obtain a waiver of the requirement that the products be manufactured by a small business. Before an award was made under the solicitation, the government properly corrected its error of initiating an 8(a) procurement for products that could only be produced by a large business. In the absence of an improper motive in the government's decision not to seek a waiver of the nonmanufacturer rule, the board lacked a basis for questioning the agency's decision.

For the protester: Mattox & Associates, Colorado Springs, Colorado, by Judith Ward Mattox and Ronald L. Roberts. For the government: Clarence D. Long III, Office of the General Counsel, Department of the Air Force, Washington, D.C. For the intervenor, Small Business Administration: David R. Gray, Office of General Counsel, Small Business Administration, Washington, D.C.

Before HENDLEY, HYATT, and DEGRAFF, Administrative Judges.

HENDLEY, Administrative Judge: By agreement of the parties, the protest is being decided on the record inasmuch as there are no facts in dispute. Although mistakes were made, the mistakes were recognized and corrected by the respondent, the Department of the Air Force, United States Air Force Academy (Academy), so that the protested award made to another firm was proper. There were no violations of statute or regulation in the award made, and for that reason we deny the protest.

Findings of Fact

1. The protester, Data Equipment, Inc., has been certified by the intervenor, the Small Business Administration (SBA), as a socially and economically disadvantaged small business and is a current participant in the SBA's "8(a)" program. Affidavit of Bill Bailey (Bailey Affidavit) (September 1, 1993) at 1. By letter dated May 5, 1993, the Academy offered one of its purchase requirements to the SBA for its 8(a) program. The requirement was for the acquisition, installation, and testing of Banyan Vines Software, compatible with the Academy's existing computer systems equipment. In its offering letter to the SBA, the Academy suggested the protester as the 8(a) firm to be matched to the requirement. The Academy also indicated that it estimated that an award would be made on or about June 30, 1993. Protest File, Exhibit 3.

2. On May 11, 1993, the SBA's Assistant District Director for Minority Small Business and Capital Ownership Development (the 8(a) program), Mr. Bailey, in the SBA's Denver, Colorado, District Office, accepted the offered requirement on behalf of the SBA for the 8(a) program and matched it to the protester as the 8(a) firm that could perform the requirement. Protest File, Exhibit 4. On or about June 18, 1993, the Academy

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issued a solicitation for the requirement. Protest File, Exhibit 6. On July 1, 1993, the protester responded with its final revised proposal. Protest File, Exhibit 8. It is the respondent's failure to accept this proposal that is the basis of this protest.

3. In its proposal, the protester represented that it "is ... a regular dealer in ... the supplies offered." The protester further represented and certified "that it is ... a small business concern and that ... not all end items to be furnished will be manufactured or produced by a small business concern in the United States ...." Protest File, Exhibit 8. The parties do not dispute that the protester is a small disadvantaged regular dealer who was offering the products of Banyan Vines, a large business.

The Confusion

4. On July 1, 1993, Ms. Kirby, a Contract Officer[1] for the 8(a) program in the SBA Denver District Office, was contacted by telephone by Ms. Goforth, the Academy's Associate Director for Small Business, Director of Contracting. Ms. Goforth was concerned that the protester would be unable to comply with the "limitation on subcontracting rule" because the protester was not a manufacturer. Affidavit of Tracey Kirby (Kirby Affidavit) (September 1, 1993) at 2. The limitation on subcontracting rule essentially requires the 8(a) contractor itself to perform work that constitutes at least half the cost of manufacturing the supplies without considering the cost of the material, and Ms. Kirby so informed Ms. Goforth. Ms. Kirby explained to Ms. Goforth that the subcontracting rule exempts regular dealers from the work performance requirements of the rule. Ms. Kirby believed that Ms. Goforth understood the application of that rule and that it presented no obstacle in the procurement inasmuch as the protester was a regular dealer, and hence exempt from the rule. *Id.* Obviously, no dealer could possibly comply with such a requirement because a dealer supplies the product of the manufacturer of the product.

5. Nonetheless, on July 6, 1993, Ms. Goforth sent a written request to the SBA's Denver office seeking a waiver of the subcontracting rule. Protest File, Exhibit 14; Kirby Affidavit at 3. After some discussion within the SBA's Denver office, the SBA officials agreed that there was no need for a waiver of the subcontracting rule inasmuch as the rule did not apply to dealers. *Id.* Ms. Kirby then faxed a document to Ms. Goforth which explained the operation of the subcontracting rule. *Id.*; Protest File, Exhibit 13. Ms. Kirby considered the Academy's concerns to be resolved. Kirby Affidavit at 4.

Back on Track

6. On July 16, 1993, Ms. Goforth telephoned Mr. Bailey of the SBA's Denver office and informed him that there was a problem in complying with the "nonmanufacturer rule." The nonmanufacturer rule requires the 8(a) contractor to supply the product of a small business manufacturer. She informed Mr. Bailey, apparently for the first time, that the procurement specified the product of Banyan Vines, a large business. After reviewing the nonmanufacturer rule, Mr. Bailey telephoned Ms. Goforth and informed her that he agreed with her that the nonmanufacturer rule would preclude the award under the 8(a) program unless the rule could be waived. Mr. Bailey and Ms. Goforth discussed obtaining a waiver of the nonmanufacturer rule. The upshot of that discussion was the recognition by the Academy that obtaining a waiver to the nonmanufacturer rule could well be time consuming and without any certainty of success. Ms. Goforth and Mr. Bailey concluded that the Academy had two options: (1) the Academy could request a waiver from the SBA of the nonmanufacturer rule, or (2) the Academy could withdraw the procurement from the 8(a) program and use an alternative procurement method. Mr. Bailey advised Ms. Goforth that if the Academy decided to withdraw the procurement from the 8(a) program, he would need its decision in writing. Bailey Affidavit at 4.

7. On July 20, 1993, Ms. Goforth, on behalf of the Academy, faxed a letter to Mr. Bailey informing the SBA that the Academy was withdrawing the procurement from both the protester and the 8(a) program. Bailey Affidavit at 4; Protest File, Exhibit 18. On July 21, 1993, Mr. Bailey faxed his concurrence to the procurement being withdrawn from the 8(a) program. Protest File, Exhibit 19. On that date he also telephoned the protester and informed it that the procurement had been withdrawn from both the protester and the 8(a) program by the Academy since the nonmanufacturer rule precluded the award and the Air Force Academy's time constraints did not permit obtaining a waiver of the rule. Bailey Affidavit at 5.

[1] Note that the individual was a "Contract Officer" and not a Contracting Officer.

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8. The Academy purchased the requirements here in issue from other than the protester using other procurement methods outside the 8(a) program.

Discussion

The operative facts of this case are clear. The Air Force Academy initially attempted to procure its requirements in accordance with the 8(a) program. During the course of the attempted 8(a) program procurement, the Air Force Academy discovered that the supplies it required were manufactured by a large business. The protester must have known that the required products were those of a large business because, in its proposal, it did not represent that all end items to be furnished would be manufactured or produced by a small business concern but instead specifically represented that it did not offer the products of a small business.

The nonmanufacturer rule is part of the Small Business Act which provides, in pertinent part:

> (A) An otherwise responsible business concern that is in compliance with the requirements of subparagraph (B) shall not be denied the opportunity to submit and have considered its offer for any procurement contract for the supply of a product to be let .... solely because such concern is other than the actual manufacturer or processor of the product to be supplied under the contract.
>
> (B) To be in compliance with the requirements referred to in subparagraph (A), such a business concern shall—
>
> (i) be primarily engaged in the wholesale or retail trade;
>
> ....
>
> (iii) be a regular dealer, as defined pursuant to section 35(a) of Title 41 (popularly referred to as the Walsh-Healey Public Contracts Act), in the product to be offered the Government . . .; and
>
> (iv) *represent that it will supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted*—
>
> (I) by the Administrator, after reviewing a determination by the contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required of an offeror by the solicitation; or
>
> (II) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

15 U.S.C. § 637(a)(17)(A) and (B) (1988 & Supp. IV 1992) (emphasis added). This statutory requirement is mirrored in the Federal Acquisition Regulation (FAR) 19.102(f), and in the SBA regulations, 13 CFR 121.906 (manufactured products under small business set-aside procurements) and 121.1106 (manufactured products under section 8(a) contracts). Under the SBA regulations governing 8(a) contracts, the SBA requires:

> (a) *General.* In section 8(a) contracts for the procurement of manufactured [2] products, in order to qualify as a small concern, the section 8(a) concern must be either a manufacturer or a regular dealer under the Walsh-Healey Public Contracts Act . . . and, in addition, must manufacture the end item being produced, or must comply with the requirements of paragraph (b). . . .
>
> (b) *Nonmanufacturers.* (1) A concern need not be the manufacturer of the item(s) being acquired under a manufacturing contract, if the concern:
>
> (i) Is a small business concern under this part under a 500-employee size standard;
>
> (ii) Is primarily engaged in the wholesale or retail trade;
>
> (iii) Represents that it will supply the product of a small business concern that is the manufacturer of the end product,. . . or obtains a waiver of such requirement. . . .

13 CFR 121.1106(a) and (b) (1993).

The basic difficulty with the protester's position is that the respondent not only did not violate any statute or regulation, it would have done so had it awarded the contract to the protester. All parties recognize that the protester is a small disadvantaged business dealer which offered the product of a large business. The protester, quite properly, did not represent that it was offering the product of a small business concern. It could not properly do so because the products called for are manufactured or produced by a large business. No waiver of the requirement that the products to be furnished be manufactured by a small business was obtained.

[2] The regulations make an obvious and necessary distinction between contracts for goods and contracts for services.

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The respondent erred in initiating an 8(a) procurement when the products to be supplied are only produced by a large business when it did not have a waiver. Inasmuch as the protester specifically did not, in its response to the erroneous solicitation, offer the product of a small business, it surely recognized that it was offering the products of a large business. The respondent's error was properly corrected prior to any award being made under that solicitation. There is nothing improper in an agency correcting its mistakes. In fact, it should always do so.

Should the respondent have sought a waiver from the SBA for the requirement that the products being furnished be manufactured by a small business? Whether an agency seeks a waiver of such a requirement is more than simply a matter of "business judgment." An agency's decision to seek, or not to seek, such a waiver from the SBA is more in the nature of a programmatic decision rather than a business judgment decision. It is essentially a decision not to set-aside the procurement for purchase under the 8(a) program. In the absence of any hint of a corrupt or unscrupulous motive in the respondent's decision not to seek a waiver of the nonmanufacturer rule, there is no basis upon which we could question the agency's decision on this issue.

Decision

The protest is **DENIED.**

[¶ 26,447] Coastal Computer Consultants Corporation v. Department of the Treasury

GSBCA No. 12504-P, September 27, 1993. (The text below is the redacted version issued to the public on October 5, 1993.)

Discussions—Technical Leveling—Proof.—A protester that was the only offeror under a solicitation for a multichannel communications unit was not entitled to a directed award, despite its contention that the agency committed technical leveling by revealing proprietary information to competitors during a market survey, because the capabilities of equipment manufactured by other offerors and available on the open market do not constitute the proprietary information of a used equipment dealer such as the protester.

For the protester: Patrick E. Collins, Manager of Government Sales. For the government: Frederick G. Petrick, Jr., and Patricia S. Grady, Office of the Comptroller of the Currency, Department of the Treasury, Washington, D.C.

Before DEVINE, HENDLEY, and HYATT, Administrative Judges.

DEVINE, Administrative Judge: Coastal Computer Consultants Corporation (Coastal) was the only offeror that responded to a solicitation issued by the Government seeking to buy certain electronic equipment. Coastal offered used brand name equipment. The Government found Coastal's price to be unreasonably high and cancelled the solicitation, causing Coastal to file this protest.

Findings of Fact

The Office of the Comptroller of the Currency (OCC), in need of a multi-channel communications unit, placed a synopsis in the Commerce Business Daily for February 10, 1993, stating its intent to purchase a channel-to-channel communications unit Model 9088-I-4 (HostNet 9088) from Data Switch Corporation. Protest File, Exhibit 3. In response to the notice Coastal offered a HostNet 9088, thus demonstrating the existence of some competition. However, OCC did not issue a solicitation for the equipment until Coastal had filed a protest of its failure to do so with this Board. As a part of the settlement of that protest, OCC agreed to issue a solicitation. It did so on April 6, 1993, soliciting protester and Data Switch Corporation. Protest File, Exhibit 5. The solicitation sought offers to supply a HostNet 9088 together with software, delivery, and installation. *Id.* Protester asked OCC to amend the solicitation to include a functional description of the equipment sought rather than simply describing it by make and model. Protest File, Exhibit 6. OCC agreed and amended its solicitation to include a functional description, on April 22, 1993. At that time, protester believed that OCC did not know that the IBM 3088-1 would meet its needs. Protester responded to the amended solicitation by offering a used IBM 3088-1 for the sum of $65,000. Protest File, Exhibit 8. Data Switch did not respond to

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the solicitation, nor did anyone else. Protest File, Exhibit 17. Since protester was the only offeror, OCC conducted a market survey to determine whether its price for the used IBM was reasonable. Protest File, Exhibits 12 and 19. OCC solicited quotes from five suppliers for a used IBM 3088-1, delivered, installed, and warranted for six months. Protest File, Exhibit 12. It received three replies.

Id. The average of these prices is $39,382. A new IBM 3088-1 cost somewhere between $72,000 and $118,000, depending on where it was purchased, according to protester. Apparently because of the survey results, OCC asked protester for a best and final offer, but protester did not change its price. Protest File, Exhibits 14 and 15. On July 15, 1993, OCC found that protester's price was not reasonable, and that cancelling the solicitation would increase competition. Protest File, Exhibit 17. OCC then rejected protester's offer to supply the IBM 3088-1 for $65,000 and cancelled the solicitation on the same day. *Id.*

The Parties' Contentions

The present protest was filed on July 26, 1993. Its principal complaints are these:

(1) That the agency used protester's proprietary information to change its acquisition plan to the benefit of protester's competitors. Protester regarded the fact that it knew, but OCC apparently did not, that an IBM 3088-1 would meet OCC's needs, as protester's own proprietary secret. When OCC did its market survey based on the IBM 3088-1, according to protester, it tipped off its competitors to the fact that the IBM machine would also meet OCC's needs. Thus OCC revealed protester's "technical solution" to the problem. Protester dubs this "technical levelling."

(2) That in conducting the market survey OCC sought a price on only the machine itself and did not include all of the software and maintenance called for by the solicitation. Protester calls this a violation of FAR 15.402(b), which deals with the duty of the procuring contracting officer to supply identical information to all prospective offerors. Protester also complains that two other, much higher prices for the IBM 3088 were known to OCC but weren't used in its price determinations. Both were prices for new equipment, one in the amount of approximately $117,000 and one in the amount of $72,000.

It is protester's view that the proper way to rectify the situation is not to re-solicit but to accept its still-outstanding offer immediately.

OCC denies that technical levelling or other improper conduct took place. It also denies that the quoted Federal Acquisition Regulation has anything to do with market surveys, and insists that the price at which protester is offering the IBM machine is unreasonably high.

Both parties have submitted their cases for decision on the record.

The Government's Motions

OCC has filed three motions seeking to dismiss the protest. The first is a motion for summary judgment, the second is a motion to dismiss for tardy filing, and the third is a motion to dismiss for failure to state a claim. The last two motions are labelled "affirmative defenses." OCC also objects to protester's amendment to its protest complaint which, in essence, merely asserts that its $65,000 price is reasonable. This last objection is without any merit and is overruled.

The motion for summary judgment was overtaken by events when the parties submitted their cases on the record. The decision on this motion is subsumed in the decision on the merits.

The motion to dismiss as untimely filed is denied. OCC says that protester knew the operative facts of its protest more than 10 days prior to its filing, which assertion is generally true. However, until the OCC cancelled the procurement on July 15, 1993, protester had no reason to complain. Thereafter it filed its protest within 10 working days, as required by our Rules.

The motion to dismiss for failure to state a claim is also denied. Protester stated a claim of sorts, but its proof is lacking.

Discussion

Protester complains that the Government only discovered that an IBM 3088-1 would meet its needs as well as a HostNet 9088 as a result of reading protester's proposal, and then proceeded to commit the sin of technical levelling when it "gave away" this "proprietary secret" to protester's prospective competitors during the conduct of a market survey designed to determine the reasonableness of protester's $65,000 price. The trouble with this theory is that it just isn't so. The OCC knew at the time it published its CBD notice that the IBM machine would meet its needs. However, it also knew that

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the price for a new IBM was some $30,000 higher than the equivalent HostNet machine. In any event the capabilities of a machine manufactured by others and available on the open market can hardly be said to be the proprietary information of a used equipment dealer such as protester. The Government's market survey did not in any way amount to technical levelling.

Protester's final complaint, that the Government, in conducting its market survey, did not include delivery, installation, warranty costs, and software in its requests for price quotations, is also not supported by the evidence. The Government's unrefuted evidence shows that the price quotes received included delivery, installation and warranty costs in each case. The quotes did not include software costs because protester had advised the contracting officer that the IBM 3088-1 required no additional software.

Protester believes it is entitled to a directed award since it is the only offeror, a result which would not only not increase competition but would eliminate it entirely. That is not the purpose of the Brooks Act. The Government is not required to accept an unreasonable offer simply because it was the only offer made. FAR 15.608(b).

OCC has indicated that it will begin this procurement over again by inserting a new notice in the CBD. If it does so any solicitation issued as a result will include protester.

Decision

For the reasons stated the protest is **DENIED**.

[¶ 26,448] Metropolitan Technical Services, Inc. v. Defense Information Systems Agency; Computer Management Corporation, Intervenor

GSBCA No. 12490-P, September 30, 1993. (The text below is the redacted version issued to the public on October 12, 1993.) Contract No. RFP DCA-100-93-R-0042.

Selection of Contractor—Evaluation of Proposals—Propriety of Evaluation.—The award of a contract for personal computers was improper because the government failed to properly evaluate the protester's proposal. The solicitation contained a list of equipment to be procured that included a mid-size tower. The technical evaluation team determined that the protester's proposal was technically unacceptable because the team interpreted the proposal to offer a "baby tower," whereas the proposal actually referred to a "baby AT mainboard" that would fit into a mid-size or full-size tower. The government and the protester stipulated that the government's determination that the proposal was technically unacceptable was not supported by the evidence.

For the protester: Johnson & Roche, McLean, Virginia, by Elizabeth N. Forgotson and Jon E. Shields. For the government: Roger B. Sabin, Eileen P. Manley, and Capt. Daniel M. Kline, Office of General Counsel, Defense Information Systems Agency, Arlington, Virginia. For the intervenor, Computer Management Corporation: Kinosky & Associates, Arlington, Virginia, by Barbara S. Kinosky and Dale M. Race.

Before GOODMAN, DEVINE, and NEILL, Administrative Judges.

GOODMAN, Administrative Judge: On July 8, 1993, Metropolitan Technical Services, Inc. (MTS or protester) protested the award by the Defense Information Systems Agency (DISA or respondent) of a contract pursuant to RFP DCA-100-93-R-0042 (the solicitation) for personal computers. The awardee, Computer Management Corporation (CMC or intervenor), has intervened in this protest as an intervenor of right. On August 5, 1993, protester filed an amended protest complaint.

On August 5, 1993, CMC filed a motion to dismiss the original protest complaint, and, on August 6, 1993, it filed a motion to dismiss the four additional counts of the amended complaint. On August 6, 1993, respondent also filed a motion to dismiss the four additional counts of the amended complaint. By decision dated September 3, 1993, The Board denied intervenor's motion to dismiss the original protest complaint and dismissed, *sua sponte*, the amended complaint. The only issue remaining in this protest is that raised by protester's original protest complaint—whether respondent properly evaluated protester's proposal with regard to the size of the tower offered by protester.

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A hearing on the merits was scheduled for September 13, 1993. On that date, protester and respondent filed a stipulation with the Board with regard to the factual issues remaining in the protest,[1] and, pursuant to Board Rules 9 and 11,[2] protester, respondent, and intervenor elected to have the protest decided on the written record. For the reasons set out herein, we grant the protest.

Findings of Fact [3]

The Solicitation

1. The solicitation calls for 200 486/33 ET personal computer systems or equal, and is a total set-aside for small business. Pursuant to 48 CFR 15.610(a) (Federal Acquisition Regulation (FAR) 15.610(a)), the contract was to be awarded without discussions. Closing date for receipt of proposals was originally February 18, 1993. Protest File, Exhibits 2, 3, 4, 7.

2. The solicitation contains a list of salient characteristics[4] for the equipment to be procured, which includes:

> 486/33E Mid size tower w/16MB RAM on the motherboard; expandable to 64MB on the motherboard
>
> baseline performance requirements: Norton computing index 72+, Disk Speed 10+
>
> 21 inch, .28 dot pitch, flat display multifrequency color monitor with 1024 × 768 resolution
>
> 256 color display video card; SVGA adapter with 1MB VRAM
>
> Mid Tower full metal case

Protest File, Exhibit 2.

3. The solicitation was amended three times. Amendment 0001, dated January 25, 1993, responded to several pre-closing vendor questions. Protest File, Exhibit 3. Amendment 0002, dated February 16, 1993, extended the closing date to March 9, 1993. Protest File, Exhibit 4. Amendment 0003, dated February 25, 1993, extended the closing date to March 16, 1993. Protest File, Exhibit 7.

Evaluation of Proposals

4. offerors responded to the solicitation. offerors, including protester, submitted price proposals lower than CMC's price, but were determined to be technically unacceptable.[5] Protest File, Exhibit 14 at 3.

5. According to the contracting officer, a "sanitization process" was performed by which all references to price were removed from the proposals before the proposals were reviewed by the technical evaluation team. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit A at 12-13, 48-49.[6]

6. Mr. Thomas F. Bennett, the chairman of the technical evaluation team that evaluated the technical proposals, described the evaluation procedures as they related to the MTS proposal. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 62-63; Bennett Deposition at 62-63, 76-99.

The MTS Proposal

7. The MTS proposal contains a cover letter dated March 15, 1993. This letter reads, in relevant part:

> Enclosed you will find technical specifications for components comprising the quoted system. All components meet or exceed the requirement in Exhibit A (salient characteristics), and the questions and answers sections of the amendments.

---

[1] While intervenor was not a party to this stipulation, it has not offered evidence in opposition to the matters stated in the stipulation, and has elected to have the protest decided on the written record.

[2] 48 CFR 6101 (1992).

[3] Findings of Fact 1-19 were contained in the Board's previous decision dated September 3, 1993. Protester and respondent, by stipulation filed with the Board on September 13, 1993, agreed that these findings of fact "are adopted by the respondent and the protester as applying to the merits of this protest." Stipulation ¶ 1.

[4] The list of salient characteristics was prepared by Mr. Thomas F. Bennett, the chairman of respondent's technical evaluation team. Deposition of Thomas F. Bennett (Bennett Deposition) (August 4, 1993) at 12.

[5] The other offerors were found to be technically unacceptable because they had failed the

[6] To support its response to the motions to dismiss, protester submitted portions of the depositions of the contracting officer, Ms. Barbara G. Redina, and the chairman of the technical evaluation team for the solicitation, Mr. Thomas F. Bennett. The Board requested complete copies of the depositions before rendering its decision of September 3, 1993. Thereafter, respondent and protester stipulated to the admission into evidence of both depositions. Stipulation ¶ 2. Intervenor, having received a copy of the stipulation, raised no objection to the admission of the depositions. Intervenor's Election for Decision on the Record.

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We have also tested our assembled system using Norton Utilities, Version 5.0 and found it exceeds the Norton computing index of 72+ and the disk speed of 10+.

Protest File, Exhibit 8.

8. The MTS proposal also contains the salient characteristics sheet from the solicitation with handwriting by MTS on the sheet, together with seven pages of descriptive literature. The salient characteristics sheet contains a reference to a "mid size tower" and "mid tower full metal case." The MTS proposal did not separately price components. There was not a separate quote for the price of the tower. Protest File, Exhibit 8.

9. The March 15, 1993, cover letter from MTS and the salient specifications sheet with handwriting by MTS on the sheet, together with the seven pages of descriptive literature, was transmitted from the contracting officer to the technical evaluation team. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit A at 48-49.[7]

10. According to Mr. Bennett, the evaluation team considered the MTS cover letter and the MTS annotated salient characteristics sheet as part of the MTS technical proposal. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 62-63.

11. Unless contradicted by other technical specifications provided by protester, the evaluation team's methodology was to accept the salient characteristics sheet as indicating that the components listed in the salient characteristics were offered by MTS. Nothing in the descriptive literature submitted by MTS contradicted either the annotated salient characteristics sheet or the cover letter, nor did either indicate that MTS did not offer the components listed therein. Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit B at 25-28, 30-33, 77-81; Protest File, Exhibits 8, 9, 37.

12. In the descriptive literature supplied by MTS in its proposal, the manufacturer of the hard drive included the phrase "[s]pecifications subject to change without notice" at the bottom corner of its description of the product. Protest File, Exhibits 8 at 39th unnumbered page, 37 at 4th unnumbered page. Likewise, another manufacturer printed on its description of the "Specifications Subject to Change Without Notice." *Id.*, Exhibits 8 at 44th unnumbered page, 37 at 9th unnumbered page.

13. MTS alleges that it submitted separate technical and cost proposals as required by section L-500(b) of the solicitation. Protest File, Exhibit 2 at 25th unnumbered page; Protester's Memorandum of Points and Authorities in Response to Intervenor's Motion to Dismiss, Exhibit C.

Evaluation of the MTS Proposal

14. The technical evaluation team determined MTS's proposal was technically unacceptable because it interpreted the proposal to offer a "baby tower" rather than a mid-size or full-size tower. Protest File, Exhibit 12.

15. The technical evaluation team's finding that MTS's proposal was technically unacceptable was based upon its determination that the only indication of size in the MTS technical proposal was on the technical specification sheet for the Main Board," where, included among the list of technical components or characteristics, was a reference to "Baby AT Size 8.5" × 13"." Protest File, Exhibit 28.

16. After reviewing the entire technical specification sheet for the mainboard, the technical evaluation team determined that the specification of the "Baby AT 8.5" × 13" " referred to the size of the case or tower, not just to the size of the mainboard. As such, the technical evaluation team determined that MTS was offering a "baby tower" rather than a mid-sized tower, as required by the solicitation. Protest File, Exhibit 28.

17. The chairman of the technical evaluation team did not know at what point the team terminated its evaluation of protester's technical proposal. Bennett Deposition at 99.

18. Mr. Bennett testified that a Baby AT mainboard could fit into a mid-size or full-size tower, and that there is no requirement

[7] This factual finding was further clarified on August 18, 1993, by stipulation between protester and respondent which states:

1. ... the MTS technical proposal which was transmitted to the Technical Evaluation team for evaluation contained at least nine pages, seven of which are the technical specifications sheets found at Tab 37 (protected) [Supplemental Protest File, Exhibit 37], together with the March 15, 1993 cover letter found at Tab 37, together with the salient specification sheet as annotated and found at Tab 37.

Stipulation ¶ 1.

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that a Baby AT size mainboard be installed in any particular size tower. Bennett Deposition at 87.

The Original Protest Complaint

19. Protester alleges in its original protest complaint that it submitted a technically compliant proposal. It alleges that it did not offer a "baby tower," and that the Government misevaluated the proposal. Complaint ¶ ¶ 8-10.

Stipulation by Protester and Respondent

20. Respondent's determination that protester's proposal, submitted in response to solicitation DCA100-93-R-0042, was technically unacceptable was not supported by substantial evidence. Stipulation ¶ 3.

Discussion

Respondent and protester have stipulated that respondent's determination that protester's proposal was technically unacceptable was not supported by substantial evidence. Finding 20. Intervenor has offered no evidence contrary to the stipulation of protester and respondent. The Board, therefore, finds that respondent improperly evaluated protester's proposal as to the size of the tower offered.

Decision

The protest is **GRANTED.** Respondent's delegation of procurement authority is revised as follows: respondent is directed by the Board to 1) reevaluate protester's proposal and make an award consistent with the terms of the solicitation, or 2) if respondent determines that the solicitation did not reflect respondent's needs, revise the solicitation to accurately reflect its current justifiable needs, or 3) otherwise proceed in accordance with statute and regulation. The Board's order of July 13, 1993, suspending respondent's delegation of procurement authority hereby lapses in accordance with its terms.

[¶ 26,449] Government Micro Resources, Inc. v. Department of the Treasury

GSBCA No. 12364-TD, October 7, 1993.

Procedure, Boards—Discovery—Protective Order.—A contractor's request to protect the identity of its supplier, a description of equipment supplied, and the prices and discounts offered was denied because the contractor did not prove that the disclosure of confidential or privileged information would result from the disclosure. A party seeking a protective order must prove that a specific injury will result from the disclosure. The contractor did not meet that burden with regard to the information it sought to protect, because the contract was already in the public domain. A protective order cannot be used to protect the prices and discounts offered by a contractor, because that information is basic to the essence of the claim and to the board's analysis. Once negotiations are over and the contract has been awarded, there is no reason to protect the information.

For the appellant: Cohen & White, Washington, D.C., by Andrew J. Mohr and Alan J. Shusterman. For the government: Ingrid D. Falanga, Daniel J. Mazella, and David A. Ingold, Financial Management Service, Department of the Treasury, Washington, D.C.

Before LABELLA, Administrative Judge.

LABELLA, Administrative Judge: The Board has received several letters concerning the scope of the protective order in this appeal. Government Micro Resources, Inc. (GMR) seeks to protect the identity of its supplier, International Business Machines Corporation (IBM), the description of the equipment at issue, and the prices and discounts IBM offered to GMR. The Financial Management Service (FMS) seeks to protect the identity of an offeror who was subject to an audit by the Defense Contract Audit Agency (DCAA) in a wholly unrelated matter.

Background

FMS issued a solicitation to GMR on August 18, 1992, seeking an offer on Direct Access Storage Device equipment. GMR obtained price quotes from IBM on the equipment required to satisfy FMS' needs. IBM's quote consisted of the commercial list price for each item and the total list price for all items. The quote also listed a bundled dollar discount for all items. The discount was subtracted from the list price to provide GMR's cost for the products.

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When preparing the item-by-item product cost required by the solicitation, a GMR employee divided GMR's cost by the IBM list price to obtain GMR's cost figure. GMR alleges that the employee mistakenly used this cost figure as GMR's discount in all subsequent cost and pricing calculations.

FMS awarded the contract to GMR on September 28, 1992. After receiving the award, GMR discovered its mistake and, on September 30, informed FMS that it had made a bid mistake. GMR was informed by the contracting officer that there were no legal or factual grounds on which to reform or rescind the contract. Subsequently, GMR delivered the equipment and filed a certified claim for the mistake in bid. The claim was again denied and GMR filed an appeal at the Board.

Discussion

FMS objects to GMR's request on two grounds. FMS argues that the information is in the public domain and that disclosure will not cause GMR a specific injury. FMS notes that the contract, which is already in the public domain, contains a description of the equipment and identifies its manufacturer. Furthermore, FMS contends that neither GMR nor IBM will suffer a specific injury if pricing and discount information is disclosed. It asserts that GMR has not demonstrated that an injury to IBM would result from disclosure of either price quotations or discounts offered by IBM.

The Board has considered the submissions made by both parties. "A party seeking a protective order to prevent disclosure of confidential or privileged information bears the burden of showing specific injury that will result from disclosure." *Tidewater Consultants, Inc.*, GSBCA 8069-P, 85-3 BCA ¶ 18,294, at 91,804. We have agreed not to reveal trade secrets or certain proprietary information that is scrupulously held in confidence, e.g., burdens and overhead rates of the contractor that are held in confidence. *See, e.g., HFS, Inc. v. National Archives and Records Administration*, GSBCA 12010-P, 93-2 BCA ¶ 25,817, at 128,532; *Presearch, Inc.*, GSBCA 8075-P, 85-3 BCA ¶ 18,297, at 91,818-819.

GMR has not met that burden with regard to the information it seeks to protect. The identity of IBM and a description of the equipment involved in this procurement have been revealed in GMR's contract with FMS. This contract is already in the public domain. The protective order cannot be used to protect information to which the public already has access. *See, e.g., Smith v. BIC Corp.*, 869 F.2d 194, 199-200 (3rd Cir. 1989); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866, 904 (E.D.Pa. 1981); *University Systems, Inc. v. Defense Nuclear Agency*, GSBCA 11813-P, 92-3 BCA ¶ 25,173, at 125,452 n.1.

Similarly, the protective order cannot be used to protect the prices and discounts offered by IBM to GMR. This information is so basic to the essence of GMR's claim and to the Board's analysis that we need to discuss it in our decision. The Board's proceedings are presumptively open to the public. *Presearch, Inc.*, GSBCA 8075-P, 85-3 BCA ¶ 18,297, at 91,818. This presumption ensures that the public is aware of how government spending impacts the public fisc. This Board does not operate in secret and intends to assure public access to information whose disclosure would not significantly harm specific governmental interests, or a party's trade secrets or proprietary information.

As we stated in *Tidewater*, "The negotiations are over and the contract has been awarded. We cannot discern a reason to now protect [the information]." 85-3 BCA at 91,805. GMR has not presented, and the Board does not know, a reason to protect the price and outdated discount information that is at the heart of this claim of mistake in bid and appeal. Because GMR has not demonstrated a specific injury which would result from disclosure, its request to protect the information is denied.

FMS has sought protection of the identity of a nonparty who was the subject of an audit conducted by the DCAA. GMR has not objected to protecting the nonparty's identity. FMS is using discount information contained in the audit report to demonstrate that the contracting officer was not on notice of GMR's alleged mistake. The identity of this nonparty in an unrelated procurement, as opposed to the discount information, is not essential to the disposition of this appeal. Thus, the Board need not disclose the identity of the offeror in its decision and will not do so. To this limited extent, the Board grants the Government's request to protect the identity of this entity which is not a party to this action.

Decision

Appellant's request to protect the identity of its supplier; a description of the equipment; and the prices and discounts offered by IBM is **DENIED.** The Government's re-

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quest to protect the identity of a nonparty to this action that was the subject of a DCAA audit report is, without objection, **GRANTED.**

[¶ 26,450] 301 Howard Street Associates v. General Services Administration

GSBCA Nos. 10971, 10975, 11942, September 30, 1993.

Contract Disputes, Certification—Amount of Claim—Sum Capable of Calculation.—The reservation of potential upward adjustment in claims for lost and increased rent did not render the claims improperly qualified, because the amount of the claims was calculable from the facts provided. The government contended that the board did not have jurisdiction, because the claims did not seek a specific amount and were therefore improperly certified. However, the claims themselves constituted a clear and unequivocal statement that gave the contracting officer adequate notice of their basis and of the amount sought. The contractor need submit only the amount of the costs it has incurred or a basis upon which the contracting officer can compute that amount. The government's motion to dismiss was denied because the amount due would become plain and easily calculable once the board determined whether the government was at fault.

Contract Disputes, Certification—Adequacy—Sum Certain.—A claim for an equitable adjustment caused by a change in the scope and cost of tenant improvements in a lease was dismissed for lack of jurisdiction because the contractor failed to state a dollar amount. The contractor alleged that the cost of providing tenant improvements increased as a result of the government's delay in providing layout plans and in providing multiple plans. However, the contractor submitted only its original estimate for work, presumably as a benchmark for determining the unspecified increased costs. Although the claim submitted to the contracting officer mentioned aspects of the build-out costs, it failed to state a dollar amount sought for the adjustment. The contractor noted that the costs were ongoing and that their full impact could not be determined at the time the claim was submitted. However, because the claim was for additional compensation but stated no specific dollar amount for the increased costs, it was not a proper claim under the Contract Disputes Act.

Modifications—Constructive Changes—Delay in Providing Plans.—A government delay in providing final layout plans was a constructive change for which the contractor was entitled to an equitable adjustment, because the Changes clause permitted an adjustment when a change caused an increase in the contractor's cost of or in the time required for performance. Under a lease agreement, the government was obligated to provide layout plans for two separate blocks of floor space; however, the government delayed delivery of adequate layout plans for seven months and three months respectively. Although the contractor alleged that the government breached the contract by delaying delivery of the plans, the government was entitled to make changes in the specifications and in the space layout. The contractor was also entitled to an equitable adjustment to compensate for the delay.

Delays—Causation—Permit Problems.—A delay in obtaining building permits was not compensable, because the delay was directly attributable to factors outside the government's control that were not foreseeable by either party, and the contract provided no relief for such a delay. Under a lease agreement, the contractor was obligated to make improvements pursuant to the government's plans. However, the government delayed delivery of the plans for several months, which the contractor alleged resulted in an increase in more time than historically required to obtain the permits. The time was increased, however, primarily because of the backlog caused by the October 1989 San Francisco earthquake. The contractor failed to show that the government was the sole proximate cause for the delay and that there was no concurrent cause that would have equally delayed the project.

Pricing of Adjustments—Methods of Calculation—Lost Marketability.—The fair value of build-out, services, and utilities that had been amortized in a rental rate were subtracted from a lump-sum price adjustment for lost marketability for a period the government delayed providing adequate layout plans, because the contractor did not incur those

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costs for that time period. Under a lease agreement and contract to build out space to the government's specifications, the government admitted that this was the proper measure of relief if the board found the contractor to be entitled to damages for delays caused by the government.

Modifications—Reduction in Requirements or Prices—Net Usable Square Feet.—The government was not entitled to reduce rent, even though there was a loss of net usable square feet of floor space, because the space was lost as the result of the addition of fire corridors that were required by a code change that took effect after the anticipatory occupancy date. Under a lease agreement and contract to build out space to the government's specifications, the government delayed delivery of plans by several months. The addition of fire-rated corridors was required by a building code change that became effective for applications for permits filed after January 1, 1990. Had occupancy taken place as planned in December 1989, the new code would not have applied to this space. The contractor was entitled to a lump-sum payment equal to the reduction in rent attributable to the change in the rental rate made by the government. The rental rate was increased for future rental payments to take into account the same reductions.

Performance—Directions by Government—Fire-Rated Corridors.—The cost of constructing fire-rated corridors was compensable because the government required the work and the contractor did not amortize the cost in its rental rate. Under a lease agreement and contract to build out space to the government's specifications, the government delayed delivery of plans by several months. The government alleged that the fire-rated corridors were unnecessary for the space. However, the government's own layout plans required their construction and amounted to a change from the original plans.

Performance—Permits and Licenses—Business Judgment.—The costs of permit applications were not recoverable as damages, because the government did not require the contractor to apply for more than one permit, and the contractor made an independent business judgment regarding how to proceed. Under a lease agreement and contract to build out space to the government's specifications, the contractor bore the risk of an increase in permit costs resulting from its own business decisions.

Delays—Adjustments—Administrative Work and Build-Out Escalation.—Although a contractor demonstrated that its total costs increased above its budgeted costs for administrative work and build-out, it was not entitled to an adjustment, because it failed to present sufficient evidence that the government was the sole cause of the increase in administrative build-out costs. Under a lease agreement and contract to build out space to the government's specifications, the government delayed delivery of plans by several months. However, the evidence showed that the cost increase was due to the contractor's business decisions on how to perform the work rather than to a requirement imposed by the government. The contractor also failed to present credible evidence of the extent of the government's responsibility for any additional effort and costs incurred for the effort.

For the appellant: Pettit & Martin, San Francisco, California, by Patrick Martell and Bryant Zimmerman. For the government: Robert W. Schlattman and M. Leah Wright, Office of General Counsel, General Services Administration, Washington, D.C.

Before LABELLA, BORWICK, and WILLIAMS, Administrative Judges.

LABELLA, Administrative Judge: These consolidated appeals involve a lease entered into by the General Services Administration, GSA or respondent, with 301 Howard Street Associates, appellant or lessor, of commercial office space in downtown San Francisco, California, for use by the General Accounting Office (GAO).

On November 7, 1990, appellant appealed from the deemed denial of its certified Claim No. 1 to the contracting officer dated June 21, 1990, for lost rent stemming from GSA's delayed occupancy and late commencement of rental payments. This appeal was docketed as GSBCA 10971. On November 8, 1990, appellant appealed from the deemed denial of its certified Claim No. 2 to the contracting officer dated August 30, 1990. Claim No. 2 requested an equitable adjustment for changes (additional work) required in connection with the build-out of the space; for the reduction in the net usable square footage of the leased space caused by

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the applicability of building code changes imposed after award of the lease contract that allegedly became applicable only because of Government-caused delay in providing appellant the layout drawings; and for various increased costs incurred in performing tenant improvements caused by the Government's delay in providing layout plans. This appeal was docketed as GSBCA 10975.

After the Government moved to dismiss these appeals on the ground that the Board lacked jurisdiction because the claims failed to state a definite amount and thus were not properly certified, appellant, while opposing such dismissal, submitted a restated certified claim to the contracting officer as a precaution against possible dismissal of the appeals. In submitting its claims, appellant revised and withdrew certain elements of the previous submission for Claim No. 2 resulting in an amended total claim of $282,214. On May 27, 1992, the contracting officer denied the claim and on July 29, 1992, the Board received appellant's appeal of this decision and assigned it docket number GSBCA 11942. On the basis of the Government's unopposed motion, this matter was consolidated with the other pending appeals regarding this lease contract.

For the reasons stated below, we deny respondent's motion to dismiss GSBCA 10971 for lack of jurisdiction, grant in part the motion and deny it in part with respect to GSBCA 10975, grant both of those appeals in part, and grant in part the appeal in GSBCA 11942.

Findings of Fact

1. By solicitation dated December 12, 1988, GSA requested offers for a five-year lease of office space with twenty-six inside parking spaces located within a discrete area of the city of San Francisco, California. The tenant agency was to be the GAO. Transcript at 64. Offers were due by December 29, 1988, and were to remain open until February 15, 1989. As originally solicited, the leased space was to be provided complete with tenant improvements which were to be built out in accordance with the Government's plans and ready for occupancy no later than June 1, 1989. Appeal File, Vol. A, Exhibit 1.[1]

2. On June 16, 1989, appellant[2] was awarded Lease No. GS-09B-88650 for Block A, or 26,090 net usable square feet (NUSF) of space consisting of the entire eleventh and twelfth floors at newly constructed premises at 301 Howard Street, San Francisco. Appeal File, Vol. A, Exhibit 1. The lease was for a term of five years to begin on the day the space was certified by the Government as complete and ready for occupancy. Under the revised schedule in the lease at the time of award, and the schedule submitted to GSA by appellant, the anticipated occupancy date for this space was December 26, 1989. *Id.*, Vol. K, Exhibit 220.

3. The lease imposed a requirement that the lessor alter the space by completing necessary build-out, or tenant improvements, after receipt of Government-approved (GSA's) layout drawings and receipt of building permits. Appeal File, Vol. A, Exhibit 1 at § 6. Within forty-five days after award or receipt of plans and samples from the lessor, whichever was later, GSA was required to deliver layout drawings giving the location and requirements for rooms, corridors, stairways and other information necessary to perform the build-out and finish selections to the lessor. *Id.* at § 44; Transcript at 75, 76. Supplemental Lease Agreement (SLA) Number 1 dated November 7, 1989, established August 1, 1989, as the date by which layout drawings and finish selections were required to be furnished to appellant for Block A. Appeal File, Vol. A, Exhibit 2. These were to be used by the lessor to complete the construction documents for the build-out and for obtaining building permits. Transcript at 75.

4. The record contains a preliminary budget for the build-out of the leased space which is dated two weeks after the execution of the lease. Appeal File, Vol. E, Exhibit 144. The Executive Vice President of Continental Development Corporation, who is the representative of both partners in the day-to-day operations of the building, testified as to how the rental rate was developed. He stated:

> A. The rental rate was a very carefully considered analysis of Number One, what we thought to be the market rate less what we felt would be a competitive rental

[1] The numerous appeal files and trial exhibits in these consolidated appeals have been consecutively numbered and are contained in volumes numbered A through L. With the exception of volume B, the exhibits therein are consecutively numbered in Arabic numerals. The exhibits in volume B are numbered consecutively in Roman numerals.

[2] 301 Howard Street Associates is a California general partnership which is owned fifty percent by Continental San Francisco Corporation, a wholly-owned subsidiary of Continental Development Corporation. The other fifty percent is owned by Palladin USA, Inc.

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rate in comparison with the rest of the market. We felt that the costs were important in terms of what would be the tenant improvement cost to provide the improvements in accordance with the solicitation and probably more importantly the timing, the timing of the originally envisioned occupancy under this solicitation was considerably earlier than the award was finally made.

....

JUDGE LaBELLA: Excuse me, Counsel. This was a series of questions having to do with how he decided what the rental rates should be, and this was the last point. Were there any factors that play into that [which] you have not mentioned . . . ?

THE WITNESS: Well, the timing which I have not quite finished elaborating on, the timing was very important because we had looked at the rental income stream from the lease to help in the building operating expenses and, since it was a newer building, the income stream toward our pro forma costs and in anticipation of paying the ongoing operating expenses and paying the loan payments and paying the security service and all those people, was important and another consideration why we chose to be very competitive and to look favorably at this lease because of the size and its timing.

Transcript at 61-63. This official also testified as to the development of the preliminary budget document for the build-out for the eleventh and twelfth floors of the leased premises. This document, Appeal File, Vol. E, Exhibit 144, post-dates the execution of the lease by two weeks, and was developed from a review of the plans and requirements of the lease by estimating the cost based upon consultation with subcontractors and consultants and recent experiences for certain items. Transcript at 77-78. It was an effort to "conceptually estimate the cost of improvements." *Id.* He conducted comparisons of this budget to other space for purposes of satisfying himself that it was in the right range and not way beyond the norm. *Id.* at 83. In this regard he stated:

At that time we had a norm based upon the type and level of our building improvements and based upon other buildouts that we have had that were running for full floor tenants in the neighborhood of $28, $29, $30 a square foot, probably averaging about $29 a square foot.

....

This budget was right on, as I recall. I believe this came out at about $29 a square foot ....

Id. at 83-84. The record in this case contains no evidence that a budget for build-out costs was specifically considered prior to bidding in determining the rental rate offered by appellant, although tenant improvement costs were to be amortized in the rent except for lump sum items requested and paid for separately. Indeed, the evidence supports a conclusion that other factors relating to competing market rates, size of the leased premises, and cash flow relating to operating expenses and loan service were the most significant factors in determining the rental rate.

5. On November 7, 1989, a portion of the tenth floor—6,358 NUSF—was added to the lease and denominated Block B of the lease. Appeal File, Vol. A, Exhibit 2. This space was also to be used by the GAO. The Government was to deliver layout plans for Block B by December 1, 1989. At the time SLA Number 1 was executed, on November 7, 1989, the Government had not yet delivered layout plans for Block A, which were overdue, and the SLA specifically provided that execution of the lease of Block B should not be construed as a waiver or limitation of the damages accruing for the Government's late delivery of plans for Block A. *Id.*

6. Appellant's project manager, Mr. Figone, testified that he prepared bar charts representing appellant's original contract work schedule and the as-built construction schedule. Appeal File, Vol. K, Exhibits 220, 221. He testified that he allowed four and one half weeks to produce construction drawings and two weeks for permit processing. Transcript at 145. These documents also indicate that appellant would have completed the tenant improvements for the eleventh and twelfth floors by December 26, 1989, if the Government had furnished layout drawings within forty-five days of award as required by the lease contract.

The December 5, 1989 plans

7. Appellant received its first set of layout drawings from GSA on December 5, 1989, for both Blocks A and B. Appeal File, Vol. C, Exhibit 13. The transmittal letter noted changes to additional private stairwells proposed to be built within the leased space and further stated that the stairwells had been approved for location only, thereby leaving open the question whether or not they would be built. *Id.* Accompanying the transmittal was a list of seventeen additional

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items for which prices were requested. Appellant's Project Manager testified that upon review of the Government-furnished drawings he determined that he could not proceed with the project because there were inadequacies in the drawings and extra work was indicated which had not been approved. Transcript at 181-82.

8. The Government's contracting officer, whom the Board qualified as an expert regarding the sufficiency of layout drawings, testified that generally the type of drawings furnished on December 5 would be adequate for the contractor to provide construction drawings. The contracting officer admitted, however, that he was only generally familiar with the lease requirements and had no specific knowledge of them. Transcript at 637. His view that the drawings could be converted to construction drawings was somewhat qualified by at least one problem identified by appellant's project manager, i.e., maintaining adequate inside clearance because of a problem with the wall intersecting the window mullion. *Id.* at 661. He also was uncertain as to the effect of the fire code requirements. *Id.* at 666.

9. On December 11, 1989, appellant's project manager and project architect, Gensler and Associates, met with GAO and GSA representatives. Transcript at 183. Appellant's Project Manager discussed a number of ambiguities and conflicts observed in the December 5 drawings. *Id.* Some of the problems discussed are contained in a formal list the project manager finalized on December 15. Appeal File, Vol. D, Exhibit 106. Some significant deficiencies contained in the December 5 drawings are apparent: (1) requirement for a receptionist station shown on the drawings was not provided for in the lease contract, (2) maintaining necessary height clearance at the interface of diagonal exterior walls and partition walls, (3) locations where perimeter insets intersect with partition walls are required to be offset from centerline of mullion, (4) insufficient clearance for handicap exiting, and (5) noncompliance with fire code requirements for fire-rated corridors. *Id;* Transcript at 166-71, 186-91.

10. The GAO representative also advised at the meeting that she would effect some layout changes and submit revised layout drawings by December 18. GSA's Realty Specialist who attended the December 11 meeting testified that there was no discussion of code changes to take effect on January 1, 1990, which would require fire-rated corridors, Transcript at 769, and that it was her understanding that GAO would submit some minor changes and that construction drawings would be prepared once these minor changes were received. Transcript at 771.

11. On the following day there was another meeting between the GAO representative and Gensler at which there was discussion of the requirement for a fire-rated corridor between exit stairwells that was contained in the code that was to take effect on January 1, 1990. This code change would apply to this project because the late delivery of layout drawings on December 5 would necessarily result in obtaining building permits after the January 1 effective date. The December 5 layout drawings do not provide for these fire-rated corridors. Appeal File, Vol. K, Exhibit 222. This fact alone required significant changes to the layout drawings because the fire-rated corridor would be built into some of the net usable square footage that GSA had laid out, rendering the December 5 drawing inaccurate. Transcript at 769-70. GAO retained Gensler to assist in revising the plans to accommodate this change. Transcript at 790; Appeal File, Vol. K, Exhibit 218. The architect also advised appellant that since these changes were significant, construction drawings would be started upon receipt of the revised layout drawings. On December 12, GSA's Realty Specialist received a call from Gensler who advised of the code change and that this would affect the December 5 plans. Transcript at 769. Appellant's Project Manager also advised respondent of this by letter dated December 13, 1989. Appeal File, Vol. C, Exhibit 14. During the period appellant awaited production of revised drawings, appellant made repeated requests to GSA for such plans and alerted GSA to the lost rent that continued to accrue. *Id.*, Exhibits 15-18. Appellant was not advised by respondent to go forward with construction drawings on the basis of the December 5 layout plans. Transcript at 191.

12. While there is conflicting testimony regarding the adequacy of the December 5 drawings irrespective of the code changes, the preponderance of the evidence convinces us that a reasonable lessor would need revised layout plans before producing construction drawings adequate to obtaining requisite building permits in the circumstances. Finding 9. There is no question, however, that the addition of fire-rated corridors required revised layout plans. We also consider that GSA was given prompt and clear notice of this fact and of appellant's

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intention to proceed with construction drawings only after it received revised layout plans.

13. Our findings regarding the adequacy of the December 5 drawings are confirmed by GSA's issuance of the next set of drawings which took place on March 5, 1990.[3] Appeal File, Vol. C, Exhibit 21 and Vol. K, Exhibit 223. There were significant differences between the December and March drawings to accommodate layout changes required as a result of the discrepancies noted in Finding 9. *Id.*, Vol. K, Exhibits 222, 223; Transcript at 202-06.

Requirement for fire-rated corridors

14. The building's core contained two fire stairways, one on each side of the core, and included the latest available fire protection apparatus and life safety system, including smoke detectors and rapid-response sprinklers. The building had been constructed in accordance with the San Francisco Codes applicable at the time, in the mid-1980s. The code required, at the time this lease was executed, that fire exits be separated by a distance equal to at least one-half the diagonal measure of the building; and required construction of a fire resistant corridor connecting the exits if it did not meet or exceed that distance in separation. However, the corridor was not required in buildings having rapid-response sprinklers or other fire safety features, such as those present at the leased premises. Appeal File, Vol. L, Exhibit 232; Transcript at 445. Appellant's fifteenth floor was a full floor tenancy comparable to the eleventh and twelfth floors of the GAO lease. Appellant received permit approval for the fifteenth floor in January 1989 without having to build a fire-rated corridor connecting the two exits. Transcript at 442-44.

15. Mr. Keith Brown, an architect and expert in San Francisco building codes, space planning, and design, Transcript at 374, testified that in 1987 he assisted in developing the hypothetical floor plan for 301 Howard Street that was used for showing prospective tenants how the space might be utilized. *Id.* at 380. During that effort, Mr. Brown discussed the exit separation issue with officials of the Bureau of Building Inspection (BBI), including both the head of plan checking and the current head of BBI. During those discussions, it was concluded that one-hour fire-rated corridors were not required for the full-floor tenant floors of 301 Howard Street because they met all three criteria established by the BBI in a code ruling issued August 21, 1986. *Id.* at 382-84; Appeal File, Vol. L, Exhibit 232. In mid-1989 San Francisco adopted a new code that went into effect on January 1, 1990. According to Mr. Brown, at the time the new code was adopted, the prior interpretations were rescinded, and one-hour fire-rated corridors became required if exit stairwells were separated by less than half the diagonal of the building in linear feet. Transcript at 385. The new code applied to all building permit applications filed after its effective date. *Id.* at 387. According to Mr. Brown, prior to January 1, 1990, the eleventh and twelfth floor plans would have received a permit without fire-rated corridors connecting the exits due to the 1986 interpretation excepting floors that met the three criteria—single floor tenant, full sprinklers throughout entire floors, and rapid-response sprinklerheads.

16. GSA has attempted to show in its brief that fire-rated corridors were not required by the new 1990 code in a building with the features of appellant's building. However, credible expert testimony adequately established that it was the city's interpretation of the new code and the disallowance of prior exceptions that created the need for additional fire related measures in this case. We credit this testimony and conclude that the new code as interpreted by the city did not permit appellant to go forward on the basis of the December 5 layouts. Moreover, if the layout drawings had been delivered to the lessor by early August, as required by the lease, permit applications would have been submitted in early September 1989 and the new building code would not have applied to this build-out. Appeal File, Vol. K, Exhibit 220.

17. GSA has interpreted the lease as requiring a reduction in the NUSF attributable to the addition of the two corridors and a consequent reduction in the rent payable to appellant. It based its interpretation on lease Section 24 which provides that rent would only be paid for NUSF and excludes corridors "required by local codes" from that definition. The revised layout which included fire-rated corridors reduced the NUSF on the eleventh and twelfth floors by a total of 1,076 NUSF, or $118,360 over the five-year term of the lease. Appeal File, Vol. F, Ex-

[3] Both the December and March drawings were produced by architects employed or retained by GAO. Transcript at 711-12. In both instances, however, the drawings were approved and furnished to appellant by GSA.

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hibit 166 and Vol. J, Exhibit 202. The San Francisco Board of Examiners approved this remodeling work on the condition that the drawings provide for fire-rated corridors. *Id.*, Vol. F, Exhibit 160 at 5.

The March 5, 1990 plans

18. On March 5, 1990, GSA issued the next set of layout drawings. Appeal File, Vol. K, Exhibit 223. These drawings contained many changes from the December 5 drawings, including the addition of fire-rated corridors connecting the exit stairways, and changes to the configuration of rooms which corrected prior inadequacies. *Id.*; Transcript at 202-04. The March drawings continued to show openings for a set of private internal stairways, however the transmittal letter from GSA stated that these stairways had been approved only for location and not for actual construction. Appeal File, Vol. C, Exhibit 21. Appellant's Project Manager testified that in early February he finalized a proposal to actually design these stairwells and sent the proposal to GSA. Transcript at 213. While on April 13, 1990, the parties entered into Supplemental Lease Agreement No. 2 for the design of the stairwells, Appeal File, Vol. A, Exhibit 5, GSA has never approved construction of these stairwells and they have never been built. Transcript at 206.

19. Appellant initially proceeded with the preparation of construction drawings based on the March plans but eventually discontinued that effort based on perceived inadequacies and conflicts in the plans. Transcript at 216-19. Appellant's Project Manager testified that although GSA was required to identify the finishes it desired, they were not included with the March drawings. *Id.* at 217. By letter dated March 29, 1990, appellant advised the contracting officer that the March 5 plans failed to conform to contract requirements in several respects and included a tabulation of nine specific issues that appellant believed needed to be addressed. Appeal File, Vol. C, Exhibit 23. Notably, the issue of the private internal stairs was not listed among the issues to be resolved. This letter also gave notice to GSA that unless clear direction was provided by April 13, 1990, appellant would proceed with the work as envisioned in the original lease.

20. By letter dated April 13, 1990, the contracting officer responded to the questions raised by appellant regarding the buildout. Appeal File, Vol. C, Exhibit 26. He further expressed surprise in learning that appellant was not proceeding with construction plans on the basis of the March 5 drawings. It was GSA's intention that any further changes requested by the tenant agency to the March 5 floorplans would be held and processed as alteration projects after the initial build-out was completed. *Id.*, Vol. J, Exhibit 204. At the hearing, the contracting officer expressed the view that GSA's response of April 13 was an adequate one. Transcript at 715-16. He testified convincingly that most of the items did not affect the completion of construction drawings, e.g., the failure to provide the architectural finishes with the March 5 drawings. These finishes normally are provided at a later time, *id.* at 705, and are not essential to the preparation of construction drawings because they pertain to surfaces rather than to the structure of the space. *Id.* at 725. He did admit to a potential problem with two of the items listed by appellant. *Id.* at 705. As to appellant's item number seven regarding a possible change in the structural floor load for a file room, he correctly pointed out that appellant did not receive such indication from the layout plans but rather from the client agency. Appellant's responsibility in such circumstances was to proceed in accordance with GSA's layout directions. *Id.* at 705-06. The contracting officer also stated that it was "a little bothersome" to him that the layout drawing for the mini-computer room identified wall-hung furniture while appellant believed this conflicted with the requirement for acoustical tile on walls. He stated it would be a problem only if the walls could not be reinforced to hang the furniture because of the acoustical tile. *Id.* at 706. Appellant, however, has presented no evidence to that effect. As to appellant's remaining items of concern, the contracting officer correctly pointed out that such concerns do not involve a difficulty with the layout plans, per se, but rather with directions or information received directly from the tenant agency.

21. We agree with the contracting officer that these problems should have been resolved by merely referring to the lease agreement as the controlling document. Transcript at 705-16. In any event, an adequate and timely response by GSA provided clarification to appellant. We find no substantial basis in the record for concluding that the March 5 plans were inadequate for purposes of producing construction drawings and permit approval.

22. By letter dated April 27, 1990, GSA provided its finish selections to appellant. Appeal File, Vol. C, Exhibit 30.

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Construction and the permits

23. Appellant's Project Manager testified that he actually planned to begin construction of the tenant improvements prior to receipt of permit approval by the city.

> Q During the time that you allocated toward permitting, is there any other work that can be done while the permit applications are being processed by whichever authority processes them?
>
> A Yeah. About four or five weeks' worth of work can go from start and we can do all of the rough-ins, all the work, until we need rough-in inspections. So that means we can frame walls, we can even [dry] rock one side, we can stub in all the electrical, we can put in all the ceiling grid, the light fixtures, all the wiring—we can't close the ceiling up, we can't button up the second side of any drywall, and we can't lay any carpet if we have stuff on the floor. So all that can go on until we need inspections.
>
> Q So that can go on while the permitting process—
>
> A While the permitting is in process, yes.

Transcript at 154.

24. As to the permit applications made in this case, appellant's project manager testified that "[w]e submitted the 10th floor [permit application] on May 31st, I think we submitted the 11th floor [permit application] about two weeks later, mid-June, and then about the 28th of June we submitted the 12th floor [permit application], so they were about two-week intervals." Transcript at 174. Completion of construction drawings and commencement of construction would have more or less coincided with the timing of the applications for permits, as indicated on appellant's bar graph, Appeal File, Vol. K, Exhibit 221. Although construction of tenant improvements began at about the time applications for permits were made, or shortly after that time in the case of the tenth floor, delays in obtaining permit approvals caused the construction on the tenth and eleventh floors to be interrupted for significant periods of time. *Id.*, Vol. K and Vol. D, Exhibit 136; Transcript at 164-65. The delay in obtaining a permit for the tenth floor caused a break or delay in the construction for approximately one month and a delay of nearly two months occurred in the construction of the eleventh floor as a result of delays in obtaining a permit for that floor. Appeal File, Vol. K, Exhibit 221. Appellant's Project Manager testified that but for these interruptions, actual construction on the eleventh floor took place over a period of eleven weeks plus a couple of days and the twelfth floor work was done over a period of slightly less than thirteen weeks. *Id.;* Transcript at 164-65. The bar graph shows that construction of the tenth floor was completed in approximately thirteen weeks excluding the one month break in construction. Appeal File, Vol. K, Exhibit 221. The entire build-out period, including interruptions for permit approvals, was approximately twenty weeks. *Id.*

25. In its Claim No. 1, appellant states that the Government's actions caused a delay which impacted appellant's efforts to obtain permits. Appellant notes that after the October 1989 earthquake, the San Francisco Building Department was overloaded with building requests and that the permit process took seven to nine weeks, whereas prior to the earthquake this process could be completed in two weeks. *Id.*, Vol. A, Exhibit 7 at 2. In its Claim No. 2, appellant states that the earthquake increased the normal permit processing time from two weeks, as assumed in its bid, to almost thirteen weeks. *Id.*, Vol. B, Exhibit VII.

26. Upon completion of the work appellant notified the Government that the space would be delivered ready for occupancy on November 8, 1990. Appeal File, Vol. C, Exhibit 83. Subsequently, the parties executed a condition survey report which recorded measurement of the leased space and established a total of 6,358 NUSF of leased space on the tenth floor and 25,014 NUSF on the eleventh and twelfth floors for a total of 31,372 NUSF. *Id.*, Vol. J, Exhibit 202. The measurement of 25,014 NUSF for the upper two floors represents a reduction of 1,076 NUSF from the space anticipated in the original lease document. *Id.*, Vol. A, Exhibits 1 and 2. On August 15, 1991, the parties executed Supplemental Lease Agreement No. 5 which set the lease term as beginning November 8, 1990 and ending on November 7, 1995 for Blocks A and B. *Id.*, Vol. K, Exhibit 217. This document reserves appellant's claims as follows:

> In executing this Supplemental Lease Agreement, the Government acknowledges that Lessor reserves its claim to recover from the Government all rent, rent escalation and all damages, including losses, liabilities and all additional costs of performance caused by the delayed acceptance of the space and alleged breaches of the Lease, including claims for additional costs, as reflected in the complaint before

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the General Services Board of Contract Appeals, Docket No. 10975.

Id.

The claim for lost rent through November 8, 1990

27. By letter dated June 21, 1990, appellant filed its certified Claim No. 1 for lost rent with the contracting officer. Appeal File, Vol. A, Exhibit 7. This claim seeks an equitable adjustment under the Changes clause for damages in the form of lost rent due to the Government's delay in providing layout drawings which in turn delayed the original planned occupancy dates of December 26, 1989 for Block A and March 31, 1990 for Block B through the revised projected occupancy date of October 30, 1990. This claim provides for a deduction for services and utilities not provided and requests a total sum of $439,508.66. No alternative remedy was sought in the claim presented to the contracting officer.

28. Appellant's initial complaint filed in this proceeding, GSBCA 10971, essentially restates the claim of June 21 with appropriate adjustments to cover the entire period through November 8, 1990, which was the occupancy date as agreed to by the parties. Appeal File, Vol. K, Exhibit 217. Appellant claimed a total of $464,301. Correspondence File, GSBCA 10971. Appellant subsequently amended its complaint and revised this claim upward to $502,821.14, to reflect the correct monthly rental rate established in Supplemental Lease Agreement No. 5. *Id.*, Vol. K, Exhibit 217.[4]

29. In both its original and amended complaints appellant added alternative requests for relief not originally presented to the contracting officer. Appellant requested that the Board reform the lease contract so that the five-year lease period be deemed to have commenced on December 26, 1989 for Block A and on March 31, 1990 for Block B. Correspondence File, GSBCA 10971, Complaints dated December 14, 1990 and January 10, 1991. Under this alternative appellant seeks what it deems the full rental rate without any deductions for services and utilities not provided, for a total of $604,036.62. This was also the only amount sought at trial. Appeal File, Vol. K, Exhibit 226. These amounts are calculated to compensate appellant for a "corridor loss" of $20,581, i.e., the rent for Block A includes payment for the fire corridor area.

30. The Government seeks to reduce the amount claimed for lost rent by any reduction in operating expenses that appellant has been able to save in the sense that some anticipated expenses were not actually incurred during the period of delayed occupancy. The lease, in Section 27 of the miscellaneous provisions, deals with the issue of the owner's savings due to reduced operating expenses during a period of Government-declared vacancy:

> 27 ADJUSTMENT FOR VACANT PREMISES GSAR 552.270-25
>
> IF THE GOVERNMENT FAILS TO OCCUPY ANY PORTION OF THE LEASED PREMISES OR VACATES THE PREMISES IN WHOLE OR IN PART PRIOR TO EXPIRATION OF THE FIRM TERM OF THE LEASE, THE RENTAL RATE SHALL BE REDUCED AS FOLLOWS:
>
> THE RATE SHALL BE REDUCED BY THAT PORTION OF THE COSTS PER SQUARE FOOT OF OPERATING EXPENSES NOT REQUIRED TO MAINTAIN THE SPACE. SAID REDUCTION SHALL OCCUR AFTER THE GOVERNMENT GIVES 30 DAYS PRIOR NOTICE TO THE LESSOR, AND SHALL CONTINUE IN EFFECT UNTIL THE GOVERNMENT OCCUPIES THE PREMISES OR THE LEASE EXPIRES OR IS TERMINATED.

Appeal File, Vol. A, Exhibit 1 at 10 of 33. No thirty-day notice of delayed occupancy, however, was ever provided to the lessor. Appellant's expert in Government leasing and construction contracts, a former GSA employee and consultant, testified as to the purpose of this adjustment clause:

> It's my understanding, in my experience, that this clause was written to cover situations where the government is tied up in a firm-term lease and the agency either goes out of business or changes their missions.... and they have to vacate leased space at some point *after the time it was delivered.* And in those situations the government gives the lessor 30 days prior written notice....
>
> Q Do you have an opinion as to whether this particular clause applies in the situation we've been taking about the last two days?
>
> A I don't think it has any application to this for several reasons. One, I'm not

[4] The amount claimed for Block A includes $20,581 of rent for the space taken up by the fire-rated corridor which the Government has excluded from its calculation of NUSF.

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aware that the government ever gave 301 Howard Street 30 days notice of their intent to employ this clause and two, the reason they probably did not is because, like I said earlier, the intent of this clause is to come into operation when the government is already in a leased situation and they are trying to reduce their cost for some remaining term that they are unable to terminate. In this case the lease had not beg[u]n in the government's eyes, so there would be no vehicle for them to implement this.

Transcript at 421-23 (emphasis added).

The claim for "corridor loss" for remainder of lease term

31. The Government is required under the lease to pay rent on a square foot rate only for areas included in the computation of NUSF as that term is defined in the lease. Appeal File, Vol. A, Exhibit 1 at 9 of 33. This computation resulted in the exclusion of the fire-rated corridor areas on floors eleven and twelve and a reduction in the rent. Because the construction of fire-rated corridors became necessary only as a result of the Government's delay in producing layout drawings and because such corridors were not required at the time the lease was signed, appellant believes it is entitled to be paid the rental rate for this excluded area for the duration of the lease. This claim for an adjustment of $143,440 in the full five-year lease term to account for the reduction in NUSF initially was a part of appellant's Claim No. 2 dated August 30, 1990. *Id.*, Vol. B, Exhibit VII. It also was included in its amended claim of February 14, 1992, although it reduced both the amount of NUSF lost due to the corridors as well as the dollar amount claimed for this item. Appellant's claim of February 14 requests payment of $118,360 as compensation for the reduced space for the duration of the lease. Correspondence File, GSBCA 11942. At trial, appellant further adjusted the amount claimed for this item to be consistent with its demand for reformation of the lease term. Thus it takes into account the loss of rent for the corridor space already included in the demand for lost rent through November 8, 1990. On the assumption that the lease term would be reformed, appellant's "Summary of Claim," Appeal File, Vol. K, Exhibit 226, adjusts the amount claimed downward to $97,779.

The claim for construction of fire-rated corridors

32. Appellant seeks the cost of constructing the fire-rated corridors on the eleventh and twelfth floors, an expense it did not anticipate at the time it entered into the lease. These costs were first claimed in appellant's resubmitted claim of February 14, 1992, in an amount of $93,284. Correspondence File, GSBCA 11942. This amount later was reduced significantly. Appellant's Project Manager testified at trial that he computed this cost by determining the materials and labor that were used to construct the corridors, and subtracting the costs of materials and labor that would have been incurred if the corridors had not been built. The resulting estimated figure is $14,760.97 for each corridor, for a total of $29,521.94. Transcript at 253-54, 257-60, 264; Appeal File, Vol. K, Exhibit 225.

The claim for increased permit application fees

33. Appellant's Claim No. 2 dated August 30, 1990, makes a claim for "Change in Scope and Cost of Build Out." In connection with this claim, appellant articulates no dollar amount but states various general categories of increased build-out costs. Among those mentioned are appellant's costs incurred in applying for three separate "fast track" building permits—one for each floor—in order to accelerate performance. This process allowed appellant to treat each floor as an independent project and proceed on an incremental basis. Appeal File, Vol. B, Exhibit VII. Appellant's original Claim No. 2 sought the difference in cost of fees but the amount of such fees was unknown at that time. The appellant's resubmitted claim of February 14, 1992, states that the additional cost of fees for obtaining permits is $4,388.

34. Appellant now seeks $4,649 as increased costs of permit applications which it claims is owed as a result of the Government's breach. Appellant's claim summary arrives at this figure by determining the total reasonable permit cost for Blocks A and B ($8,717) and then subtracting this figure from what it claims is the total permit costs ($13,366) as increased "by the delays in delivering plans, the defects in the plans, and the need to divide the permit applications into several separate steps." *Id.*, Vol K, Exhibit 226 at 4. Appellant's Claim No. 2 as resubmitted on February 14, 1992, explains that "[i]n order to allow the alteration work to proceed in areas where permits were obtainable, Lessor applied for and received three separate 'fast track' permits." Appel-

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lant's Manager for Administration testified that the budgeted permit cost of $7,000 for Block A was derived from appellant's historical permit costs for other build-out space. Transcript at 356-59. It does not appear to be derived from an analysis of the actual anticipated GAO build-out work but rather from a calculation of historical square footage cost for permits. Appellant's Project Manager testified as to why these costs were incurred:

> Q Do you know why you incurred the cost?
>
> A There were two reasons: [One is] that in permit fee calculations, some of the fees are a single set fee for each permit. So you're going to pay only that one if you apply for one permit. And you're going to pay it three times if you applied for three permits. The other thing that transpired is that the city evaluates some components of the permit based on the value of their perceived value of the cost of the work. Every time you send an application there is a box in there wherein you write in the value of the work that you want to give to them. At one time they used to follow and accept our prices that we gave them. Later, and especially into 1990 after the earthquake when they were fighting to capture fees in operating cost, they started implementing their own evaluations. They actually have their own publications they can follow. But they are not bound by any rules. And they can put a value in as they want. And that's what they started doing is they would scratch off our valuations that we consistently used to use, and they increased the value, therefore, the permit fees went up.

Transcript at 265-66. He further testified that the $13,366 cost figure includes the cost of hiring an expediter to expedite the permit processing. *Id.* at 268.

The claim for extraordinary administration

35. Appellant's Claim No. 2 dated August 30, 1990, requests an equitable adjustment for "Change in Scope and Cost of Build Out." One of the many elements mentioned under this general category is the extraordinary administrative cost associated with the Government's multiple layout submissions. This claim, however, fails to state any dollar amount for this work. Appeal File, Vol. B, Exhibit VII. Appellant's resubmitted claim dated February 14, 1992, states that the cost incurred for additional administrative effort caused by late receipt of plans, changes, and deficient plans was $17,127. Correspondence File, GSBCA 11942. It appears that this amount includes the administrative work associated with the three building permits. *Id.*

36. At trial, appellant alleged that excessive administrative (labor) costs were incurred by appellant's administrative staff in dealing with the Government's late issuance of layout drawings, the repetitive issuance of drawings, and the need for resolution of conflicts on the drawings. The amount of this claim as asserted at trial was $24,189. Appeal File, Vol. K, Exhibit 226. It appears to be based upon the Project Manager's comparison of the actual administrative staff costs attributed to this project—$25,885 in salaries for appellant's employees and $7,061.75 for services of appellant's consultant, for a total of $32,950 —with the administrative staff costs for a project on another floor. He estimated the latter cost to be $8,761 on the basis of an assumed cost per square foot. Transcript at 272-74. Appellant seeks the difference of $24,189.

37. Another element of claimed excess administration costs relates to the cost of employing architects and engineers for the build-out work. As in the above claim for administrative (labor) costs, appellant's original Claim No. 2 does not state a dollar amount for its alleged extra costs incurred for architects and engineers. The only express reference to the cost associated with architects and engineers was in the attachment (Tab No. 2) which shows merely the amount budgeted for this category of work and which presumably was amortized as part of appellant's basis for formulating its rental rate. This work was actually budgeted for Block A at $59,212, or $2.27 per square foot. Appeal File, Vol. L, Exhibit 236. It is unclear whether this budgeted amount represents merely appellant's historical costs reduced to a square footage charge or whether it represents an estimate of the actual services to be required under this lease. The earliest budget document in the record, dated June 30, 1989, post-dates the lease by two weeks. *Id,* Vol. E, Exhibit 144. Appellant's resubmitted claim dated February 14, 1992, makes a lump sum demand of $47,041, which includes the alleged extra costs for architects and engineers, extraordinary administrative work, and blueprint costs.

38. At trial, appellant claimed that a reasonable cost for architects and engineers for Blocks A and B was $73,645 and that its actual costs were $99,284. Transcript at 282-84; Appeal File, Vol. L, Exhibit 236 and Vol. K, Exhibit 226. Thus, appellant now seeks reimbursement of $25,639 for excess costs of architects and engineers. *Id.*

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39. Appellant's Project Manager testified that increased architect costs were incurred for the following reasons:

> A. . . . Even though Gensler was working with GAO to do the layout drawings, somewhere in that transition they started trying to produce construction drawings for us. And all these ambiguities that we've discussed, they went on for so long and time just etched away. Every time we had a meeting you had to rework the drawings and they had questions, as they were sitting down and trying to fit in the layout to finish the stuff, in that process they would find problems. You have to stop work. You had to clarify it, break away from it, wait for the answers to come back. It all takes time.

Transcript at 282-83.

40. The final element of appellant's claim for extraordinary administration relates to the costs for additional blueprints. There was no specific reference to the extra costs of producing blueprints in appellant's original Claim No. 2, but this element was included in the lump sum demanded for various items listed in its resubmitted claim dated February 14, 1992. At trial, appellant sought a total of $1,146 for producing additional blueprints. This is the difference between the actual costs incurred for Blocks A and B and the originally budgeted costs for Block A with a pro-rata increase for Block B. Costs budgeted for Block A were based on appellant's historical blueprint cost for various jobs which was converted to a square foot cost and then adjusting larger jobs downward for economies of scale. Transcript at 285. Appellant's Project Manager explained why he believed appellant incurred increased blueprint costs:

> A. Going back to the explanation I just was explaining why we had increased A and E cost, architect costs. While they're working on these drawings they're getting input from us, and if we're having meetings we had to produce another set of drawings. Well, the drawings, if they are not finished, they just keep being redone. So every time you have a new meeting the drawings have been revised so there's new input so you have to produce another set of drawings. And every time you crank them out you have to go out and blueprint cranks them out and it's another 50 bucks or whatever it cost.

Id. at 284-85. On cross examination of appellant's Project Manager counsel sought to obtain a clearer picture of this problem:

> Q. Isn't [it] true that yesterday I believe you said that Gensler was stuck when they looked at the March plans submitted by the government?
>
> A. No. I don't believe that's what I said. What I said was that they called me and said that they were trying to extrapolate the information and get [it] into the CAD system. And, in relation to everything that [had] transpired up to that point, the questions that I had asked about the conflicts and ambiguities, the stuff that they introduced to whatever answers we did get, if in fact we got answers, there obviously were things that were unanswered and they could not go forward any more. And what specific relationship that has to do with the March drawings, I am not sure. I am just saying in that point in time all the information that we had and if it included the drawings, it included the issues that were still outstanding, that's where they were. They could not finalize background drawings to go forward.
>
> Q. And isn't [it] odd that Gensler would have those, would perceive those conflicts, since it prepared the March drawings?
>
> . . . .
>
> A. . . . Now I do understand that part of the problem [was] that GAO was feeding Gensler changes and more information. And that they were trying to get them to put in and apparently saying go ahead and do this, but all those changes, none of those changes were part of our contract work. So there was this duality of conflict I think that Gensler was dealing with. They had one party saying one thing and another party is saying something else. And there was a real dilemma in there. I don't exactly [know] what transpired.
>
> . . . .
>
> A. . . . Here again the conflict is they each had a different agenda. GAO wasn't following the contract that I had with GSA. They would have a new agenda. So I think there [were] some problems being generated here. But it was not by me.

Transcript at 311-13.

The claim for increased labor, equipment, and materials

41. In its original Claim No. 2, submitted on August 30, 1990, appellant claimed an equitable adjustment under the Changes clause of the lease on the basis that GSA's delay caused the cost of build-out to increase from its original estimate. Appellant, however, did not state any dollar amount for this segment of its claim but promised to

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supplement the claim when it "identified the full cost difference for this item." It did list various categories of increased costs for this claim: increased cost of permits, increases in its administrative costs due to multiple layout submittals; "subcontractor, consultant and associated cost increases;" and "increases due to renegotiation of union contracts for skilled workers and laborers, as well as increases in material costs ..." Appeal File, Vol. B, Exhibit VII.

42. In resubmitting this claim on February 14, 1992, appellant no longer requested an equitable adjustment under the Changes clause as previously claimed but rather asserted a breach of contract and set forth, inter alia, a claim for $2,986 for "[i]ncreased costs of labor, materials and equipment caused [by] increases in the cost of doing the alteration work required under the Lease." The claim contains no explanation as to precisely how this amount was determined. Correspondence File, GSBCA 11942. This resubmitted claim also seeks, apart from the claim for $2,986, as separate elements: damages stemming from reduction of rent and added construction costs (fire-rated corridors) as a result of new code provisions requiring additional corridors; additional fees for building permits; extra costs of extraordinary administrative work, architects/engineers fees and blueprint costs; and a profit factor for the claimed extra work. All of these latter elements of the restated claim, except for the claimed profit factor for the extra work, are treated separately above in accordance with the "Summary of Claim" presented at trial. Appeal File, Vol. K, Exhibit 226.[5]

43. Appellant's employee in charge of day-to-day operations of the leased premises testified that appellant's Office Manager and Construction Coordinator had a significant role in preparing the claim summary document in evidence at Appeal File, Vol. K, Exhibit 226, and used extensively at trial to prove entitlement on a total cost basis. "Her role primarily was to check back on the accounting records of construction costs of verifying administrative time, and breaking out certain of the expense claims that are set forth in the claim." Transcript at 133. Appellant's Project Manager testified that he helped produce the formation and presentation of appellant's claim for increased labor, equipment and materials as presented in Exhibit 226. Transcript at 276. He stated that increased costs in these categories were incurred because appellant's "budgeting and pricing was put together from early 1989 and we were not able to price out and contract for the work until mid 1990, almost a year and a half later." *Id.* at 277. As to the direct causes of cost increases he testified:

> A. We had during that timeframe almost every union renegotiated for increased wages. We had some material cost increases; copper and conduit prices were erratic and usually increasing during that timeframe. A lot of the fabricated and manufactured materials had increases in cost. Anything that was put together, electrical fixtures, all of these things had [a] tendency to go up by 20 percent or something.

Id. at 277-78.

44. At trial appellant pursued a total cost theory of relief for increased labor, equipment, and materials. Appellant's Exhibit 226 sets out appellant's total costs for all tenant improvement work, including additional work requested and separately paid for by GSA. Appellant deducts from this total cost amounts claimed separately for permits, blueprints, architect and engineer costs, and amounts it was separately reimbursed by GSA presumably for additional work required. The exhibit shows unreimbursed construction costs for Blocks A and B as $1,084,332. From this amount appellant has deducted its "reasonable budgeted costs" for Blocks A and B in the amount of $874,148 to arrive at increased construction costs of $210,184. From this amount it then deducts the cost of constructing the fire-rated corridors, $29,522, which are claimed separately, for a total claim for increase in construction costs of $180,622.

45. On the last day of trial this claim was substantially revised and reduced on rebuttal to $60,661 to account for a $120,000 error discovered in appellant's construction cost records. *Id.* at 802-04. This error erroneously inflated appellant's base figure for its total cost of tenant work.

Relevant lease provisions

46. The lease contains GSA Form 3517 (Rev. 3/89), General Clauses (Acquisition of Leasehold Interests in Real Property). Appeal File, Vol. A, Exhibit I. This document

[5] This exhibit makes no claim for profit, but appellant's counsel resurrects a profit factor in Appellant's Reply Brief. It argues therein that appellant is entitled to a liberal profit percentage in the range of fifteen to twenty-five percent. Appellant fails to state what element or figure this profit factor should be applied to.

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provides for changes in the Government requirements:

17. 552/270-21 CHANGES (JUNE 1985)

(a) The Contracting Officer may at any time, by written order, make changes within the general scope of this lease in any one or more of the following:

(1) Specifications.

(2) Work or services.

(3) Amount of space.

(4) Facilities or space layout.

(b) If any such change causes an increase or decrease in the Lessor's cost of, or the time required for, performance under this contract, whether or not changed by the order, the Contracting Officer shall modify the lease by (1) making an equitable adjustment in the rental rate, (2) making a lump sum price adjustment, or (3) revising the delivery schedule.

(c) If such change causes an increase in costs under this contract, the Lessor shall submit any "proposal for adjustment" (hereafter referred to as proposal) under the clause at 552.270-20, Proposal for Adjustment.

(d) Adjustments for operating expenses in vacant leased premises will be in accordance with the clause at 552.270-25, Adjustment for Vacant Premises.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.

(f) No services or work for which an additional cost or fee will be charged by the Lessor will be furnished without the prior written authorization of the Contracting Officer or a designated representative of the Contracting Officer.

Id.

47. Other relevant provisions of the General Clauses follow:

5. 552.270-27 DELIVERY AND CONDITION

Unless the Government elects to have the space occupied in increments, the space must be delivered ready for occupancy as a complete unit. The Government reserves the right to determine when the space is ready to occupy.

7. MEASUREMENT FOR PAYMENT (APRIL 1984)

When space is offered and accepted, the space will be mutually measured upon delivery. Payment will be made on the basis of actual measurement; however, payment will not be made for delivered space which is in excess of the maximum square footage solicited.

20. 552.270-15 APPLICABLE CODES AND ORDINANCES (JUNE 1985)

The Lessor, as part of the rental consideration, agrees to comply with all codes and ordinances applicable to the ownership and operation of the building in which the leased space is situated and, at his own expense, to obtain all necessary permits and related items.

Appeal File, Vol. A, Exhibit 1.

48. The lease agreement also incorporated solicitation provisions as a part of the lease. A provision relevant to the Government's reduction in the rent because of the reduction in NUSF provides:

24. NET USABLE SPACE

Net usable space is the method of measurement for the area for which GSA will pay a square foot rate. It is determined as follows:

If the space is on a single tenancy floor, compute the inside gross area by measuring...

....

In all measurements, ... deduct the following from the gross area including their enclosing walls:

....

corridors in place or required by local codes and ordinances.

Appeal File, Vol. A, Exhibit 1.

Discussion

Respondent's motion to dismiss

The Government has moved to dismiss the appeals in GSBCA 10971 and 10975 for lack of jurisdiction on the basis that the claims presented to the contracting officer in these cases did not seek a particular requested amount. It argues that a proper claim must be for a specific amount of money and, as required by the Federal Acquisition Regulation, seek payment of money in a sum certain. 48 CFR § 33.201. Respondent argues that "appellant's statements that '... the amount of damages for which the Government is liable on this claim is indeterminable...' and that the certified claim figure '... represents the *minimum* amount the government is liable for' render the claims in these appeals qualified." Respondent would distinguish this case from the one considered in *Mary Lou Fashions,* ASBCA 29318, 84-2 BCA ¶ 17,483 at 87,100, because in *Mary Lou* the contrac-

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tor said that the amount being certified was correct at the time of certification while appellant in these appeals states that the amounts it is seeking are "indeterminable."

Appellant argues that the claims as submitted were proper and that only future costs and losses, dependent on resolution of legal issues and future Government conduct, were reserved. At the time the claims were submitted, appellant claims it could not accurately predict when GSA would stop the delays. It contends that acknowledgment of a potential upward adjustment of a claimed amount does not improperly qualify a claim or deprive the Board of jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA), citing to *Computer Sciences, Inc.*, ASBCA 27275, 83-1 BCA ¶ 16,452 at 81,843. Appellant also argues that *Mary Lou Fashions* supports its position because the board there held that the specific reservation of right to change the claim did not affect the validity of the claim or certification. Finally, appellant contends that even if there had been no demand for a minimum monetary amount appellant's demand is still a proper "claim" as that term is defined by regulation to include the "adjustment or interpretation of contract terms, or other relief arising under or related to the contract." 48 CFR § 33.201.

In some respects this case is similar to *Mary Lou Fashions*. In that case, the contractor certified a claim for $944,201.05. There was a detailed breakdown of costs which included two estimated items. The board concluded that the claim was for a sum certain which was not qualified. The fact that two items were estimated did not render the certification invalid. The use of estimates can be justified on the basis that the contracting officer has been made aware of the basic parameter of the claim, even though the amount may change in light of new evidence. *Heritage Reporting Co. v. General Services Administration*, GSBCA 10396, 92-1 BCA ¶ 24,740.

Because the circumstances in each of these claims (Nos. 1 and 2) are quite different, we treat each separately and reach different conclusions with respect to each. The first claim dated June 21, 1990, Appeal File, Vol. A, Exhibit 7, is a claim for an equitable adjustment for lost rent or marketability due to the Government's delay in providing adequate layout drawings. The claim states a specific period of delay (a definite start date and a projected ending date), imputes responsibility for delay to specific Government action (failure to provide layout drawings), seeks a specific dollar adjustment ($439,508.66), and explains how appellant calculated the amount sought (lost rent for the delay period less an adjustment for services and utilities). What is indeterminate in this claim is any possible future delays that might occur. In other words, appellant reserved the right of a potential upward adjustment for any further delays. This possibility does not render this claim improperly qualified or the certification of such a claim inadequate. *Computer Sciences*, 83-1 BCA at 81,843. Once the Board determines whether or not the Government is at fault for the delay in layout drawings and the period of delay, the amounts due for lost marketability or rent would immediately become plain and easily calculable. Where the amount of the claim is calculable from the facts provided with the claim, a claim need not be rejected despite the absence of a precise dollar amount. *Metric Const. v. United States* [30 CCF ¶ 70,793], 1 Cl. Ct. 383 (1983). We therefore conclude that Claim No. 1 stated a sum certain and was properly certified and presented to the contracting officer for decision. As such, we have jurisdiction on the basis of the contracting officer's deemed denial of the claim in GSBCA 10971.

Claim No. 2, dated August 30, 1990, is a claim for an equitable adjustment in contract price for three GSA-ordered changes: 1) change in amount of NUSF space; 2) change in scope and cost of build-out, and 3) change in lease term. Regarding the first change, appellant's claim seeks payment at the rental rate for the reduction in NUSF due to the construction of fire corridors, which it views to be a change from the original lease requirement. It seeks payment of a specified amount for this space calculated at the rental rate for the entire five-year term of the lease. This claim for an adjustment due to the reduction in NUSF allegedly caused by the Government suffices as "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). The contractor need submit only the amount of costs it has incurred or a basis upon which the contracting officer could compute the amount. *25 New Chardon Street Ltd. Partnership v. United States* [36 CCF ¶ 75,952], 19 Cl. Ct. 208 (1990). We have jurisdiction over this request for an equitable adjustment because the contractor has asserted with sufficient specificity a right to additional compensation and has explained precisely how it has

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computed the amount requested. It is enough if the amount in dispute can be "easily determined by a simple mathematical calculation or from the contractor's submission to the contracting officer ...." *Metric Construction Co., Inc. v. United States* [34 CCF ¶ 75,424], 14 Cl. Ct. 177 (1988). *See also Quality Diesel Engines, Inc.*, GSBCA 11332-COM, 92-1 BCA ¶ 24,410 (1991) at 121,849 (claim which set forth the amount to which appellant believes it is entitled and the method by which the amount was calculated is sufficient even though appellant stated that the claim may increase when more information was provided by the respondent).

Appellant's claim for "change in scope and cost of build-out" seeks an equitable adjustment because the cost of providing tenant improvements increased as a result of the Government's delay in providing layout plans and in providing multiple plans. The claim as submitted to the contracting officer mentions various aspects of the build-out costs that increased as a result; e.g., the costs of obtaining permits; additional manhours and administrative cost to review, identify, and price multiple changes in the scope of work; and increases in material costs and wages for skilled workers and laborers. Appellant, however, fails to state any dollar amount sought for this adjustment and merely presents its original estimate for the build-out work, presumably as a benchmark for determining its unspecified increased costs. By way of explanation, appellant noted that these costs were ongoing and their full impact could not be determined at that time.

Although appellant presumably knew at the time it submitted this claim to the contracting officer that its costs for tenant improvements were increasing, it failed to state any sum certain for this demand for equitable adjustment. Because this claim is essentially one for additional compensation but states no specific dollar amount representing its increased costs, under the authorities cited above it is not a proper CDA claim and we dismiss it for lack of jurisdiction. *Essex Electro Engineers, Inc., v. United States* [38 CCF ¶ 76,304], 960 F.2d 1576, 1581 (Fed. Cir. 1992).

The final portion of Claim No. 2 relates to an alleged change in lease term. Many elements included under this rubric have been withdrawn, e.g., "Impact on Rent Free Period," "Parking Fees Impact," and "Change In Fair Market Value." Correspondence File, GSBCA 11942, Appellant's Resubmitted Claim dated February 14, 1992. Another element of this claim relates to the issue of lost market time caused by the delay in the commencement of the lease which is duplicative of the request for an adjustment in Claim No. 1. The only other element under this general heading is yet another demand for an adjustment to compensate for additional administrative labor expended as a result of the multiple submissions of layout plans. However, appellant once again failed to specify any dollar amount for this demand, and it is dismissed for the same reasons as stated above.

In conclusion, we deny the Government's motion to dismiss Claim No. 1. As to Claim No. 2, we deny the motion with respect to the claim for the equitable adjustment for the change in amount of NUSF and grant the motion with respect to the remaining elements of Claim No. 2.

The merits

Claim No. 1: Loss of rent/marketability

The Government was obligated under the lease agreement to provide layout plans for Block A by August 1, 1989, Finding 3, and for Block B by December 1, 1989, Finding 5. We have found as fact that the Government delayed delivery of adequate layout plans until March 5, 1990. Findings 12, 13, 18-21. This amounted to a delay of seven months and four days in the delivery of plans for Block A and a delay of three months and four days in the delivery of plans for Block B. Appellant, however, seeks recovery for a greater period of time than merely the delay in providing layout plans. It seeks compensation for the full period running from the original planned occupancy date of December 26, 1989, through the date the tenant improvements were completed and the premises was ready for occupancy, i.e., November 8, 1990, a period of slightly more than ten months for Block A. A lesser period is sought for Block B on the basis that the anticipated occupancy date was March 31, 1990. These longer periods reflected in appellant's claim include periods of extended delays in obtaining permits for the tenth and eleventh floors. Finding 24. Alternatively, appellant's complaints seek to have the lease reformed to commence on the date the parties originally anticipated occupancy to occur and to run for five years from that date.

Under the contract's Changes clause, the Government is entitled to make changes in the specifications and in space layout. The Government, in fact, changed the specification that required it to provide layouts

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within the prescribed time frame. We hold that the Government's delay in providing final layout plans is properly addressed as a constructive change under the Changes clause. This is the relief appellant originally requested of the contracting officer. Appellant is not entitled to recovery on the basis of a breach of contract for which reformation of the lease term is requested, given the Government's rights under the Changes clause.[6] In addition, the parties expressly agreed in Supplemental Lease Agreement No. 5 that the five-year term would run beginning November 8, 1990 and continue through November 7, 1995. This agreement did not reserve any submitted claim for reformation of the lease term, and we see no basis for providing relief in contradiction to the express agreement of the parties.

The Changes clause permits an adjustment where a change causes an increase in the lessor's cost of, or the time required for, performance. Of the three methods provided to compensate the lessor for its losses, the one that most appropriately accomplishes this is a lump sum price adjustment for appellant's loss of marketability for the period the Government was at fault for delay in commencement of occupancy and rental payments.

Appellant has proven that the Government clearly was responsible for the delay in providing layout plans and we grant an equitable adjustment to compensate for that delay. We think the additional delay in obtaining building permits, however, was not the Government's fault. It is more directly attributable to factors outside the Government's control which were not foreseeable by either party and for which the contract provides no relief. *Robert L. Rich d.b.a. Unitranco*, DOT CAB 1026, 82-2 BCA ¶ 15,900 at 98,823-33. The evidence shows that the time required to obtain permits substantially increased from appellant's historical experiences for the leased building primarily because of the backlog caused by the October 1989 earthquake in San Francisco. Finding 25. As to any other cause of delay or increased costs in performing the build-out, appellant has not met its burden of proving that the Government was responsible for any such delay. The contractor must show that the Government was the sole proximate cause of the delay and there were no concurrent causes which would have equally delayed the project. *Avedon Corp. v. United States* [35 CCF ¶ 75,577] 15 Cl.Ct. 648, 653 (1988). Appellant has not met this burden.

Thus, we award appellant a lump sum price adjustment equivalent to the rental rate for the period the Government delayed providing adequate layout plans, i.e., from August 1, 1989 through March 5, 1990, for Block A and from December 1, 1989 through March 5, 1990, for Block B. We reduce this amount by the fair value of build-out, services, and utilities which were amortized in the rental rate, the cost of which appellant did not incur for the time period covering this period of lost marketability. In determining how much of an adjustment to allow, we turn to the contracting officer's request of the appellant to revise its claim by reducing the full rental rates for Blocks A and B to reflect an adjustment for appellant's unincurred costs that had been amortized into the rent. Appellant thereafter provided the contracting officer with its operating and build-out costs that were amortized in its full rental rates. The Government's post hearing brief admits that this is the proper measure of relief assuming the Board finds appellant to be entitled to damages for delays caused by the Government. We agree that this is the appropriate measure of damages. As reduced by these unincurred costs, the monthly rental rate per square foot for Block A is $.96 and the daily rate is $.032. For Block B the adjusted rates per square foot are $1.40 per month and $.047 per day. Appeal File, Vol. C, Exhibit 46. Accordingly, appellant is entitled to an equitable adjustment for Block A covering seven months and four days of lost marketability for an award of $178,664.32. For Block B it is entitled to an adjustment equal to three months and four days rent at the above rates for an award of $27,898.90. This comes to a total adjustment of $206,563.22 for both blocks of space.

Claim for corridor loss for lease term

Appellant's Claim No. 2, dated August 30, 1990, seeks a lump sum equitable adjustment to compensate for the reduction of 1,076 NUSF on the eleventh and twelfth floors. The Government reduced the rent to account for the reduction in NUSF due to the addition of fire-rated corridors required by the building code change that took effect after the anticipated occupancy date. Finding 17. Respondent's sole defense is that

[6] Counsel put forth this demand as an alternative basis for relief in the pleadings and argued this at hearing.

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there was no code change and thus appellant is not entitled to relief.

There is no merit to respondent's defense. The only credible expert testimony adduced at trial clearly shows that prior interpretations of the code were rescinded and one-hour fire-rated corridors were required in the circumstances applicable to this leased space for permit applications filed after January 1, 1990. Findings 15, 16. Indeed, the city's approval of the build-out was given on the basis of drawings that provide for fire-rated corridors. Finding 17.

At the time this lease was entered into the parties agreed to lease the entire eleventh and twelfth floors, described as consisting of 26,090 NUSF, at an agreed annual and monthly rate established for the combined floors. The Government interpreted the contract provision for Net Usable Space, Finding 47, as permitting it to convert the lump sum annual and monthly rates for the entire eleventh and twelfth floors to a square footage rate computed on the basis of 26,090 NUSF, and then to adjust the rental rate to account for the reduction of 1,076 NUSF. In support of this action it relies on the provision in the Measurement for Payment clause, Finding 46, that payment will be made on the basis of actual measurement. Irrespective of whether the Government's interpretation was correct, we think the Government constructively changed (reduced) the amount of space it initially agreed to rent. While the parties' bargain was that appellant would comply with all applicable codes, Finding 47, appellant never agreed to assume the risk of significantly reduced NUSF and rental income resulting from code changes affecting tenant improvements required to be made after the anticipated build-out period initially agreed to by the parties.

The initial layout plans provided by the Government on December 5, 1989, as drawn, would have had no effect on the amount of NUSF for these floors. The March plans which were drawn, in part, to accommodate the new building code interpretations that took effect on January 1, 1990, reduced the amount of NUSF by 1,076 because of the addition of fire rated corridors. Had occupancy taken place as planned on December 26, 1989, the new code would not have applied to this space. Because appellant's bargain reasonably did not assume the risk of such a code change during this vastly extended period, the Government's insistence that appellant comply is a constructive change for which an equitable adjustment is due under the Changes clause.

The Changes clause permits making an equitable adjustment in the rental rate as well as a lump sum price adjustment. We award appellant a lump sum equal to the reduction in rent attributable to the change in the rental rate due to the reduction in NUSF taken by the Government for the period commencing November 8, 1990 through the month preceeding the date of payment of this award. Because the lease term has not yet expired, we also increase the rental rate for future rental payments to take into account the reduction taken by the Government that is attributable to the reduction in NUSF. The record before us is inadequate to determine the precise adjustments to be made for this claim and we therefore return this matter to the contracting officer for calculation of the appropriate adjustments and amounts due. Our intention here is for the contracting officer to retain the monthly and daily amounts provided for in the lease agreement for the eleventh and twelfth floors without reducing the rent for the diminution in NUSF.

The claim for construction of fire-rated corridors

Appellant seeks the cost of constructing the fire-rated corridors on the eleventh and twelfth floors. It did not anticipate this expense at the time it entered into the lease agreement and the cost of performing this work was not amortized into the rent. Finding 32. At trial appellant's Project Manager credibly testified as to the actual extra cost of performing this work. The total amount shown at trial to be due for this work is $29,521.94. *Id.*

The Government objects to any award for this work because it does not believe fire-rated corridors were necessary for this space and it questions the adequacy of the proof offered by appellant for the cost of this item. As indicated above, there is no merit to the Government's position that such corridors were not required. Indeed, the Government's own layout plans dated March 5, 1990, required their construction which amounted to a change from its original December plans. While the Government properly notes the changing proof offered by appellant for this work, we are satisfied that appellant's Project Manager's testimony at trial provides sufficient proof of the actual cost of this work. Because the Government required this work and appellant did not amortize it in its rental rate, appellant is entitled to an equitable adjustment under

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the Changes clause in the amount of $29,521.94. It is also entitled to a ten percent profit for this extra work for a total award of $32,474.13.

The claim for increased permit application fees

Appellant seeks $4,388 as increased costs of permit applications as damages for the Government's alleged breach of contract. Finding 34. We deny this claim because we conclude that the Government neither caused nor required this expenditure and did not breach the lease agreement so as to be responsible for such damages. As indicated above, we have determined that appellant is entitled to certain equitable adjustments under the Changes clause rather than breach damages. We make no such award for any increased cost of permit application because the Government did not require appellant to apply for more than one permit and appellant made an independent business judgment regarding how best to proceed. Appellant assumed the risk of any escalation in permit costs resulting from its own business decision.

Costs for extraordinary administrative work and build-out escalation

To the extent these claims are a part of Claim No. 2 dated August 30, 1990, they were dismissed for lack of jurisdiction. They were resubmitted in the claim dated February 14, 1992. There appellant sought $17,127 for the additional administrative effort caused by late receipt of plans, changes, and deficient plans; $28,842 as increased costs for architect/engineer services required for the build-out effort and in the repetitive permit applications; and $1,072 for additional costs for blueprints necessitated by changes to plans. These three elements comprised its total claim of $47,041 for extraordinary administrative work. Finding 37. In addition, appellant's February 14 claim requests $2,986 to compensate for increased costs of construction. Finding 42. These amounts were claimed as damages for the Government's alleged breach of the lease agreement.

At trial, appellant presented evidence in support of these claims on the basis of increased total costs in the administration and construction of this project. Although we have determined that the Government changed the contract work and we have allowed recovery for the proven cost of those changes where appellant has provided sufficient evidence to support an award, we do not find that the Government breached its lease contract with appellant. Nor do we think appellant has presented sufficient evidence that solely the Government caused these administrative and construction costs to increase. Appellant did demonstrate that its total costs increased somewhat from its budgeted costs in the areas at issue here. Findings 38-40, 43, 44. The evidence shows that in many respects the increase was due to appellant's own business decisions on how best to perform the contract work rather than because of any requirement imposed by the Government. Even if the Government imposed some extra work on appellant as a result of its actions, appellant has failed to present credible evidence of the extent of the Government's responsibility for any such additional effort and the cost incurred for that effort. Appellant's evidence of total build-out cost for this project does not segregate or exclude, for example, the cost of providing lump sum items or extras which the Government has separately paid for. Finding 44. We are unable to determine from this record whether the recovery sought for architects/engineers expenses, administrative labor costs, and blueprint costs were increased by the lump sum items included in the total build-out costs and whether the amounts being sought have been adjusted for any such increase. Nor does the evidence show the administrative costs associated with certain actions that are essentially appellant's responsibility, e.g., administrative costs associated with obtaining permits.

We agree with the Government's argument that appellant's total cost approach for recovery must fail here. This is because appellant has not proven that the nature of the particular losses makes it impossible or highly impracticable to determine them with a reasonable degree of accuracy and that appellant was not responsible for the added expense. *David J. Tierney,* GSBCA 7107 *et al.,* 88-2 BCA ¶ 20,806 at 105,170. We also have grave concern with the reliability of the evidence presented, given the diverse and varied claims submitted by appellant and the questionable accuracy and reliability of the evidence presented at trial. Finding 45.

Decision

We **DENY** respondent's motion to dismiss GSBCA 10971 (Claim No. 1), **DENY IN PART** respondent's motion to dismiss the portion of GSBCA 10975 (Claim No. 2) relating to appellant's claim for an equitable adjustment for the change in NUSF, and **GRANT** both of those claims in part. We

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GRANT the motion to dismiss with respect to the remaining claims in GSBCA 10975. We **GRANT** Claim No. 1 and award appellant $206,563.22 for lost marketability for blocks A and B. We **GRANT** the claim for construction of fire-rated corridors in GSBCA 11942 and award it $32,474.13, and **DENY** the remaining claims in that appeal. We **REMAND** GSBCA 10975 to the contracting officer for a determination of quantum in accordance with this decision. Interest shall be paid in accordance with the Contract Disputes Act, 41 U.S.C. § 611 (1988).

[¶ 26,451] Michael Weller, Inc. v. Navajo and Hopi Indian Relocation Commission

GSBCA Nos. 10627-NHI, 11411-NHI, September 24, 1993.

Procedure, Boards—Pleadings—Appendices to Reply Brief.—In an appeal involving claims filed by a contractor under a contract for the renovation of residential housing units, the contractor's motion to strike appendices attached to the government's reply brief was denied because the appendices related to disputed issues prominent in the appeal and the contractor could not be found to have been surprised by the government's use of these appendices.

For the appellant: Paul M. Meador. For the government: Margaret Lee Baskette and Edward E. Risha, Civil Division, Department of Justice, Washington, D.C.

Before BORWICK, Administrative Judge.

BORWICK, Administrative Judge: Appellant moves to strike appendices attached to respondent's reply brief related to four topics: (1) use of building codes in construing the scope of work of the contract; (2) alleged excess labor rate; (3) newly calculated deductions related to withdrawn changes; and (4) overtime calculations. Appellant argues unfair surprise because to its post-hearing brief, respondent has attached appendices which were not entered at the hearing. For the reasons below, we deny appellant's motion.

These cases involve appeals of claims filed under two time and material contracts for repair and renovation of residential housing on the Navajo/Hopi Indian reservation. Appellant filed a claim for direct costs (changes and suspension of work) on the two contracts amounting to $461,983.19, overhead of $587,308.35 and miscellaneous expenses of $108,331.37, for a total quantum of $1,157,622.86. Appeal File, Exhibit 117. The contracting officer denied the claims, with one exception, because the contracts' limitation of cost clauses barred additional compensation.

Appendix A is a list of alleged changes which were actually contained in the contracts. This appendix lists the applicable work order (entitled notice of intent to repair or NOIR), a list of twenty-five items detailed in the contract and, where applicable, a list of building code references to standards for some of the tasks to be performed. Appellant objects to the use of building codes in the appendix.

Appellant cannot claim that it was surprised by the Government's reliance upon building codes. The contracts incorporated the building codes by reference. Appeal File, Exhibit 2. In its answer to appellant's complaint, the Government denied Weller's allegations that the scope of work was not defined before the award of the contract. Respondent's Answer, ¶ 5. The scope of contract issue was present in the case from the beginning of the litigation. Whether the building codes gave definition to the contracts' scope of work was the subject of a colloquy at trial between respondent's witness and the panel chairman. Transcript at 1939-41. Moreover, the panel chairman requested at trial that the Government submit the codes as part of the record. Transcript at 1953. The Government has done so by submitting the codes, as well as an appendix pointing out where the alleged "changes" were contemplated by the codes incorporated in the contracts.

Appendix B is a compilation of alleged excess rate overcharges by subcontractors. These alleged excess labor rates also featured prominently in the case. The Government maintained that appellant used subcontractors who charged for labor in excess of the Davis-Bacon rates that Weller had bid in its proposal. The contracting of-

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ficer, in his final decision on a claim for extra work performed in October of 1988, limited appellant to the Davis-Bacon rates Weller had bid. Appeal File, Exhibit 174. In his opening statement, Weller's counsel identified this issue as a prominent one. Transcript at 15-16. There is no ground for surprise about this issue. Respondent's appendix B is nothing more than extrapolations from evidence in the record and is not improperly introduced. *Vuyanich v. Republic National Bank of Dallas,* 505 F. Supp. 224, 259 (N.D. Tex. 1980), *rev'd in part on other grounds,* 723 F.2d 1195 (5th Cir. 1984).

Respondent introduces appendix C to its brief quantifying the withdrawn changes on quantum. Appellant's position was that there were withdrawn changes, but that the claimed amount remains the same on a total cost basis. Transcript at 537-38. Respondent's position was that the withdrawn changes reduced quantum. *Id.* at 540-41. The Board asked appellant to quantify the cost of the withdrawn changes. *Id.* at 546. Like appendix B, respondent's appendix C is nothing more than extrapolations from evidence in the record and is not improperly attached to the brief.

The alleged improper charging of overtime also was a substantial issue at trial. *See* Appeal File, Exhibits 7, 11; Transcript at 1932-33. Respondent furnished appendix D which merely sums the overtime wages claimed by Weller. We see no impropriety on the part of the Government in introducing the appendix.

Decision

Appellant's motion to strike is **DENIED.**

[¶ 26,452] Air Speed Tool Company v. General Services Administration

GSBCA Nos. 10118, 10119, 10120, September 30, 1993.

Defaults, Grounds—Performance Requirements—Quality Control.—Default terminations of contracts for ratchet sets and hammers were proper because the record showed that the contractor failed to meet the requirements of the contract's Quality Approved Manufacturer Agreement clause, that it lacked an acceptable point of production or inspection, and that it failed to deliver acceptable levels of ratchet sets and hammers under the purchase orders. The ratchet sets delivered under the purchase orders had unacceptably slow running speeds, and the contractor failed to take corrective action under the QAMA clause. In addition, the contractor failed to show that the conclusions and actions of the agency were arbitrary and capricious. The record showed that the contractor did not have a quality control system that would have assured the delivery of acceptable goods. The agency was entitled to recover the amount paid for the items returned.

For the appellant: Takahashi & Associates, Washington, D.C., by Kenneth K. Takahashi. For the government: Thomas Y. Hawkins, Office of Regional Counsel, General Services Administration, San Francisco, California.

Before VERGILIO, LABELLA, and HENDLEY, Administrative Judges.

VERGILIO, ADMINISTRATIVE JUDGE: Air Speed Tool Company, appellant, had two contracts with the General Services Administration (GSA), respondent. The agency terminated for default the contractor's right to proceed under one of the contracts. Separately, after determining that the contractor had delivered non-compliant goods under specific purchase orders issued under the two contracts and after the agency had returned the items because the contractor had failed to take corrective action, the agency terminated for default the contractor's right to proceed under the specified purchase orders. The agency also claimed entitlement to $142,977.58 for payments previously made to the contractor for the returned items.

Through a filing dated June 18, 1989, the contractor appealed the terminations for default of its contract, and of its purchase orders issued under the two contracts, as well as the agency's claims for reimbursements.

The Board concludes that the agency properly terminated for default the contract and the purchase orders. With respect to the contract, the contractor lacked a quality control system acceptable under the contract and was producing unacceptable items. With respect to the purchase orders, the contractor had delivered items not compliant with performance requirements. Contrary to the terms of the contract, the

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contractor failed to replace the items or take other appropriate corrective action.

The agency has failed to substantiate its claim for reimbursement in excess of the contract item price of the items returned. Therefore, the amount of the agency claim for reimbursement is reduced by $532.56 in one appeal. Accordingly, the Board denies two of the appeals, and grants in part the one appeal under which the agency claim is reduced. The contractor must pay the Government $142,445.

Findings of Fact

The 622 contract

1. With an effective date of May 8, 1987, GSA awarded to Air Speed an indefinite-quantity contract (the 622 contract) for pneumatic ratchet sets (item 16) at the unit price of $155. Appeal File, Exhibit 1.[1] Although no supporting contract documentation exists in the record, apparently the contract was later modified to include an indefinite-quantity award for pneumatic portable hammers (item 15)—no party suggests otherwise. *Id.*

2. The contract required the ratchet wrench to operate at a minimum of 280 rpm, and that the air consumption at no load be a maximum of 16 SCFM. Each set was to include seven hexagonal sockets (from 3/8" to 3/4" in increments of 1/16") and two spark plug sockets. Appeal File, Exhibit 1, Amendment 4 at 2-3; Respondent's Exhibits 5, 6. The parties agree that the hexagonal socket openings were required to satisfy gauging requirements, while the spark plug sockets had to satisfy differently specified tolerances. *Id.* and *e.g.*, Appeal File, Exhibits 12, 20, 24.

3. The contractor identified in the contract its Los Angeles, California facility as the production and inspection points for the ratchet sets (item 16) and hammers (item 15). Appeal File, Exhibit 1 at 31.

4. The contract's Quality Approved Manufacturer Agreement (QAMA) clause, E-FSS-539, requires that the contractor maintain a quality control system which complies with all requirements of Federal Standard 368A and that an acceptable quality control system must exist throughout the contract period. Appeal File, Exhibit 1 at 31; Respondent's Exhibit 1. Under the clause, the Government reserves the right to inspect prior to acceptance at all times and places including the point of manufacture. Moreover, "During the contract period, a Government representative will periodically select samples of material produced under the current contract for Government verification inspection and testing." Finally,

> Notwithstanding any other provision of this contract concerning the conclusiveness of acceptance by the Government, any supplies or production lots shipped under this contract found to be defective in material and workmanship, or otherwise not in conformity with the requirements of the contract within a period of *12* months after acceptance shall at the Government[']s option be replaced, repaired or otherwise corrected by the contractor at no cost to the Government within 30 calendar days ... after receipt of notice to replace or correct.

Appeal File, Exhibit 1 at 31; Respondent's Exhibit 1. Additionally, "This contract may be terminated for default if subsequent Government inspection discloses that plant quality and progress controls are not being maintained, subspecification material is being shipped, or for failure to comply with any provisions required by the QAMA." Appeal File, Exhibit 1 at 32.

5. The contract incorporates clauses from the FAR (Federal Acquisition Regulation): 52.246-2 Inspection of Supplies—Fixed-Price (Apr. 1984) ("If the contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may ... terminate the contract for default.") and 52.249-8 Default (Fixed-Price Supply and Service) (Apr. 1984). *Id.*, Exhibit 1 at 37 and Exhibit 2, GSA Form 3507 at 8 (¶ 42) and 11 (¶ 51).

Performance under the 622 contract

6. By letter dated November 8, 1988, eighteen months into the contract, the contractor informed the agency that it was moving its manufacturing facility from Los Angeles to San Carlos, California. The letter stated that San Carlos would become the points of manufacture and inspection effective December 1, 1988. The contractor requested that the contract be amended accordingly. Appeal File, Exhibit 9.

7. In response, by letter dated November 16, 1988, the agency notified the contractor

[1] An appeal file is associated with each appeal. For ease of reference, unless otherwise stated, citations are to exhibits in the appeal file of GSBCA 10118. Parallel citations to identical exhibits in the multiple appeal files are not indicated.

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that it would inspect the San Carlos facility "to determine if this plant has the capability to perform in accordance with the terms and conditions of the contracts." The production/inspection points remained unchanged, as did the delivery due dates for purchase orders. Appeal File, Exhibit 10.

8. On December 1 and 21, 1988, the agency inspected the San Carlos facility. The agency "found this plant not fully operational, and not capable of performing in accordance with contractual requirements." The agency provided the contractor with a cure notice, dated January 12, 1989. The notice specified unacceptable conditions, indicated that the contractor had ten calendar days from receipt to cure the conditions, and specified that failure to cure could result in a termination for default. Appeal File, Exhibit 12. At no time in 1989 did the contractor have an acceptable place of production or inspection under the contract. Transcript at 87-89.

9. While the contractor was attempting to change its production and inspection points, the agency instituted lot-by-lot inspections of the ratchets and hammers. Appeal File, Exhibit 14; Transcript at 17, 19.

10. By letter dated February 4, 1989, the contractor responded to the rejection by the agency of some of its ratchet sets inspected at Los Angeles. Appeal File, Exhibit 20. (The agency had concluded that certain socket openings were not within tolerances measured with go/no-go gauges. *Id.*, Exhibits 16-18.) The contractor contended that the agency used the improper standard for testing conformance—Federal Standard 346C not 346A. Moreover, the contractor asserted: "Since nominal nut opening sizes are acceptable on 2 [the two spark plug sockets] of the 9 [sockets], it would most certainly follow that the extremely close tolerances specified in Fed. Std. 346C are not really required on any of the sockets, for the end use envisioned for this item." The letter continued:

> In view of the above inconsistencies in the contract requirements and the fact that we know the quality of products supplied will meet all practical application tests, we would recommend that a deviation be granted on these orders to permit the same nut end opening requirements to be applied to all sockets as are required for the $5/8''$ and $13/16''$ [spark plug socket] sizes.
>
> In reviewing the specification defects discussed above, we would suggest that this contract be ammended (sic) either to specifiy [sic] ANSI 107.2-1975 and Fed. Std. 346C dated April 28, 1976 or that the nut end openings on all sockets be nominal sizes as with the spark plug sockets.
>
> Without this clarification, and since receiving this 308 rejection, we have no alternative but to change our normal sampling procedures as used in the past to 100% inspection, to preclude the possibility of future rejections .... We have replacement sockets on order to insure that all referenced orders can be reworked to pass your present inspection procedures and will be able to submit all orders for acceptance by February 17, 1989.

Id., Exhibit 20.

11. By letter dated March 21, 1989, the agency responded to the contractor's letter dated February 4. After noting that a contract modification had been issued to incorporate Federal Standard 346C in lieu of 346A, the letter stated that after reviewing the standards, the agency "found that both editions have the same gaging requirements for the ... sockets" at issue. Appeal File, Exhibit 24. The contractor has not demonstrated that this conclusion is inaccurate; namely, the two standards have the same gauging requirements for the relevant sockets.

12. The contractor responded to the inspection reports underlying the agency's letter of March 21, stating in part:

> We have sampled all seven regular sockets from the rejected lot ... and find that they will pass the hex. opening requirements if subjected to the same standards as required of the spark plug sockets. It is totally inconsistent to accept one set of standards on the spark plug sockets and reject the regular sockets when they also will meet these same standards.
>
> ....
>
> ... The fact that the sockets as supplied will perform practically in the intended use, should be considered in our request for contract modification. The $3/8''$ and $3/4''$ sockets that refused to accept the go gage are still large enough to fit on a $3/8''$ or $3/4''$ nut. The $9/16''$ sockets that accepted the no-go gage will still drive a $9/16''$ nut efficiently, and most importantly without introducing any safety hazard. We feel that the requested modification is entirely consistent with the inherent flexibility of this item description.
>
> ....

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> We do not feel that these orders should be terminated since the items furnished meet all practical requirements and secondly, items conforming to all technical requirements are immediately available. The reason for the initial non-conformable is because the standard sampling procedures would not detect these discrepancies. Only by inspecting 100% can we insure that a given sample will conform.

Appeal File, Exhibit 29.

13. A separate letter dated March 21, 1989, from the agency to the contractor concerns four purchase orders issued under the contract, for which delivery, acceptance and payment had occurred. Based upon complaints received, the agency took and inspected samples from the orders. Appeal File, Exhibit 26. The agency's inspections revealed one deficiency applicable to all four orders: the ratchet wrenches operated at a speed below the required 280 rpm minimum. *Id.*, GSBCA 10120, Exhibits 5-8. The agency found other deficiencies in some sets, such as wrenches becoming inoperable during testing and hexagonal socket openings failing the gauging tests. *Id.* Referencing the warranty provision of the contract, Finding 4, the letter directed the contractor to replace the defective material, with the contractor to offer replacement material within thirty calendar days. The letter alerted the contractor: "Failure to offer replacement material within the time frame specified above, or failure to offer material conforming to all requirements of the contract, may result in the termination of your right to proceed with the performance of the aforementioned purchase orders" under the termination for default clause. Appeal File, Exhibit 26.

14. By letter dated April 1, 1989, the contractor responded to the letters of March 21. Regarding the agency's conclusion that the wrenches failed to meet the minimum speed requirement, the contractor suggested that there was an error in the agency's testing procedures. "All tools produced are tested 100% for rpm and always run in excess of 400 rpm when tested with a strobotac [a registered name of an electronic stroboscope]." Further, the letter stated that "even the slightest load applied to this type of tool will immediately slow it down. .... The only accurate method to measure the rpm is with a strobotac. We do not believe these tools would fail this test if tested correctly." Appeal File, Exhibit 30. Despite the assertion that tools had been 100% tested, the contractor has introduced no such results into the record in support of its contention. Testimony of the contractor's president suggests that, at best, the contractor tested using mechanical means and extrapolated results to exceed the 280 rpm minimum requirement. Transcript, Vol. 2 at 192.

15. In the letter of April 1, the contractor reiterated its position regarding the hexagonal sockets. It contended that the requirement

> could easily be waived without adverse effect on the usability of the ratchet set. The go-no go requirement is only applicable to 7 of the 9 sockets supplied. The other 2 spark plug sockets have no such stringent dimensional requirements. Since this test is not required on the spark plug sockets, [it] is obvious that it is not an "absolute" necessity on the 7 regular length sockets in order to obtain commercially suitable sockets.

Appeal File, Exhibit 30. The contractor noted its willingness to offer "a modification to this effect on these orders. This solution would be far more cost effective than to endure the time lost for the return and rework of these orders for this feature." *Id.* The contractor further offered to replace the tools found inoperable during testing. *Id.*

16. A laboratory test record dated April 3, 1989, shows that a sample from a purchase order of pneumatic hammers was tested in March 1989. Appeal File, Exhibit 35. The sample and order were rejected because a tool would not operate. *Id.*, Exhibit 34. Previously, in February 1989, samples from the purchase order had been inspected and rejected—the pneumatic hammers failed to operate, totally or other than intermittently, at the prescribed pressure and chisels were of unacceptably low hardness. *Id.*, Exhibits 21, 22. In a letter dated February 28, to the agency, the contractor stated that it had retested the lot and concluded that all tools operated at the prescribed pressure. The contractor confirmed the findings of low hardness; it explained that previously rejected material had become commingled during the move to San Carlos. The contractor submitted new chisels which were tested in March 1989. *Id.*, Exhibit 23. No documentation in the record supports the contention of the contractor that the pneumatic hammers it ultimately supplied under the purchase order were compliant with the contract requirements.

17. By letter dated May 4, 1989, the agency terminated for default the contractor's right to proceed with the performance of the 622 contract. Appeal File, Exhibit 36.

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Noting the importance of manufacturing standards in the industry, and the need for interchangeable and properly fitting parts, the letter rejected the proposed deviation for hexagonal socket standards. The termination stated that the contractor had consistently delivered ratchet sets and pneumatic hammers failing to conform with contractual requirements. "These failures demonstrate to the Government that your firm is unable, or unwilling, to take the necessary steps to operate an effective Quality Control System," as required by the Quality Approved Manufacturer Agreement, clause E-FSS-539, Finding 4.

18. By letter dated June 2, 1989, the agency terminated for default the contractor's right to proceed with the performance of four specific purchase orders for ratchet sets, Finding 13. Appeal File, GSBCA 10120, Exhibit 12. The letter states that in conducting its tests the agency, indeed, had utilized the contractor-suggested methods of testing the speed of the ratchet wrenches. Noting the importance of manufacturing standards in the industry, and the need for interchangeable and properly fitting parts, the letter rejected the proposed deviation for hexagonal socket standards. The letter specifies that the contractor "has failed to offer replacement material to the Government within the time frame prescribed in Clause E-FSS-539. [Finding 4.] Therefore, you have failed to deliver within the purview of" the termination for default clause, Finding 5.

19. The letter terminating for default the four orders further states, with references to check numbers and dates of payment, that the agency had previously paid for items received under the four orders. The total quantity stated for the four orders is 718. The letter requires, as a Government claim, that the contractor reimburse the Government $111,512.58—718 sets at $155.31 each. Appeal File, GSBCA 10120, Exhibit 12. The record does not indicate any basis for seeking reimbursement in excess of the unit price, $155.00, Finding 1.

20. The agency supports the claim with a bill of lading which indicates, by purchase order number, the quantity of ratchet sets returned to the contractor. Respondent's Exhibit 4. Unexplained in the record are the discrepancies between the purchase order quantities and the number of items referenced per purchase order in the bill of lading. The bill of lading shows that under two purchase orders more items were returned than were purchased, under one purchase order the agency returned the same number of items as purchased, and under one purchase order, two fewer items were returned than purchased. *Id.*, Appeal File, GSBCA 10120, Exhibit 12. The record supports the agency's claim to the extent that 716 (not 718) ratchet sets were returned under the terminated purchase orders.

The 629 contract

21. The agency awarded Air Speed a fixed-price, definite quantity contract—the 629 contract—for ratchet sets (468 sets at the unit price of $155 in the amount of $72,540). The effective date of the award is June 2, 1987. Appeal File, GSBCA 10119, Exhibit 1 at 1.

22. The ratchet set is described in terms identical to those in the 622 contract, Finding 2. Appeal File, GSBCA 10119, Exhibit 1 at 2-3. In the contract, the contractor identifies its San Carlos facility as the production point and the Los Angeles facility as the inspection point. *Id.* at 8. The Quality Approved Manufacturer Agreement clause, Finding 4, and the Inspection of Supply and Default clauses, Finding 5, are identical in the two contracts. Appeal File, GSBCA 10119, Exhibits 1, 2.

23. A laboratory test record dated January 31, 1989, indicates that of four sets sampled from one purchase order, one wrench utilized more than the prescribed maximum air consumption, the speed of another wrench was below the prescribed minimum, and one socket from an unspecified set was improperly gauged; all other items tested passed. Appeal File, GSBCA 10119, Exhibit 6. A laboratory test record dated February 10, 1989, indicates that all wrenches sampled from another purchase order failed to operate at the minimum speed; all other tests were successful. *Id.*, Exhibit 5.

24. By letter dated March 21, 1989 (the third letter with that date), the agency informed the contractor that the agency had determined that 203 ratchet sets previously delivered (and paid for) under the 629 contract were defective. These ratchet sets had been shipped under two purchase orders in quantities of 176 and 27. The letter specifies the defects found during inspection, Finding 23. Also, the letter states that the Quality Approved Manufacturer Agreement clause, Findings 4, 22, obligated the contractor to replace the defective material. The contractor was reminded that it was "required to offer the replacement material within **thirty (30) calendar days**, or such longer period as the Contracting Officer may au-

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thorize in writing, after the receipt of this letter." Further,

> Failure to offer replacement material within the time frame specified above, or failure to offer material conforming to all requirements of the contract, may result in the termination of your right to proceed with the performance of the aforementioned purchase orders, pursuant to [the Termination for Default clause].

Appeal File, GSBCA 10119, Exhibit 3.

25. By letter dated April 1, 1989, the contractor responded to the letters of March 21. The contractor's response is set forth in Findings 14 and 15. Additionally, the contractor offered to replace the tool which exceeded the air consumption requirement. Appeal File, Exhibit 30.

26. By letter dated May 18, 1989, the agency terminated for default the contractor's right to proceed with the performance of the two purchase orders. Appeal File, GSBCA 10119, Exhibit 10. The letter states that in conducting its tests the agency, indeed, had utilized the contractor-suggested methods of testing the speed of the ratchet wrenches. Noting the importance of manufacturing standards in the industry, and the need for interchangeable and properly fitting parts, the letter rejected the proposed deviation for hexagonal socket standards. The letter specifies that the contractor "has failed to offer replacement material to the Government within the time frame prescribed in Clause E-FSS-539. [Finding 4.] Therefore, you have failed to deliver within the purview of" the termination for default clause, Finding 5.

27. The letter terminating for default the two orders further states, with references to check numbers and dates of payment, that the agency had previously paid for items received under the orders. The total quantity stated for the two orders is 203. The letter requires, as a Government claim, that the contractor reimburse the Government $31,465—203 sets at $155. Appeal File, GSBCA 10119, Exhibit 10.

28. The agency supports the claim with a bill of lading which indicates, by purchase order number, the quantity of ratchet sets returned to the contractor. The document indicates that 203 sets were returned under the two purchase orders. Respondent's Exhibit 4.

Other information

Sampling

29. Under the Quality Approved Manufacturer Agreement clause, the agency samples ratchet sets and pneumatic hammer sets for inspection. In selecting sample sizes and in determining the acceptable quality levels (that is, the number of failures in a sampling which justified rejection of the lot), the agency relied upon the agency's Quality Assurance Handbook and Military Standard 105. Transcript, Vol. 2 at 170, Vol. 3 at 20-25. Some samples taken by the agency were smaller than those dictated in these guidelines. Appellant's Exhibit 4; Appeal File, GSBCA 10120, Exhibits 3, 5, 7, 8. However, in every instance, a sufficient number of sets was unacceptable to justify rejection had the proper sample size been taken. For example, for a lot of 236 sets, 8 samples should have been taken; 2 failures would support rejection of the lot. Appellant's Exhibit 4. Thus, although a sample of four sets was tested (rather than eight), the failure of three wrenches to operate at the minimum speed, justified rejection of the lot. Appeal File, GSBCA 10120, Exhibit 8.

Testing—socket openings

30. The agency utilized go/no-go gauges to test hexagonal socket openings for compliance with the contractual requirements. The testimony of the agency demonstrates that this testing complied with the terms of the contract and accepted practices within the industry. Transcript at 104-05; Vol. 2 at 48. Allegations by the contractor that testing instruments were improperly calibrated, and that testing conditions were unacceptable are not supported by the record. The contractor's contemporaneous letters do not state that the contractor's testing demonstrated compliance; rather, the contractor requested a deviation from the requirements, and stated that the sockets complied with less stringent standards. Findings 10, 12, 15.

Testing—wrench speed

31. In testing the ratchet wrenches, the agency used an electronic stroboscope. Appeal File, Exhibit 33; Transcript, Vol. 2 at 46-47. The agency tested the free-running speed of the ratchet; that is, no load was placed on the ratchet during testing. Transcript, Vol. 2 at 46-48, 50, 65-77. The record demonstrates that the agency properly conducted the testing and that the results are reliable. *Id.* The testing conformed to the testing procedures recommended by the con-

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tractor during the course of performance. Findings 14, 18.

32. At the hearing on the merits, the president of the contractor testified that the speed should have been tested with a load, and that such testing would have resulted in greater speeds than no-load testing produced. Transcript, Vol. 3 at 92. Although this witness testified as "an expert in the area of ratchet and impact sockets," the testimony was not persuasive or credible. No test results were introduced in support of the testimony. The individual appeared ready to testify to whatever would support the latest theory of recovery. *Id.* at 171-72. The Board discounts the testimony of this individual as not credible.

Testing and conclusions

33. The record reveals that the testing and the acceptance/rejection of ratchets and hammers occurred in accordance with the terms of the contract and methodologies accepted within the industry.

34. By letters dated June 16 and 18, 1989, the contractor appealed the terminations for default of the 622 contract (GSBCA 10118), the two purchase orders under the 629 contract (GSBCA 10119), and the four purchase orders under the 622 contract (GSBCA 10120).

Discussion

The contractor contends that each of the terminations for default was improper. It seeks reversal of the terminations and withdrawals of the claims for reimbursement.[2] The agency bears the burden of proof for both aspects of its claims—the terminations for default and the reimbursements.

The record demonstrates that under the 622 contract, the contractor failed to satisfy the Quality Approved Manufacturer Agreement clause; did not have an acceptable point of production or inspection after December 1; and was failing to deliver acceptable levels of ratchet sets and pneumatic hammers under the purchase orders. The agency's termination for default of the contract is well-justified by the record.

The record demonstrates that the ratchet sets delivered under the six purchase orders under the two contracts failed to comply with contract requirements. The principal failure was the unacceptably slow running speed of the ratchet set. The testings and conclusions of the agency are fully supported in the record. The contractor was obligated to take corrective action under the Quality Approved Manufacturer Agreement clause. The contractor failed to act in accordance with the clause. The resulting terminations for default of the purchase orders were justified.

The conclusions and actions of the agency were neither arbitrary nor capricious. Contrary to the assertions of the contractor, the determinations were not made in violation of the provisions of FAR 49.402, 48 CFR 49.402 (1992), and were not inconsistent with the dictates of *Darwin Construction Co. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593 (Fed. Cir. 1987). The contractor's failures to provide acceptable ratchet sets and pneumatic hammers did not represent isolated incidents. The contractor lacked a quality control system which would have assured the delivery of acceptable goods. The agency simply sought to enforce the terms of its contracts, which contained express requirements for adequate control processes, and for design and performance characteristics of the items. The contractor was unable to satisfy its contractual obligations to deliver acceptable items and to timely take corrective action regarding unacceptable items. The agency was not obligated to accept and retain unsatisfactory material.

The agency appropriately rejected as unacceptable and returned ratchet sets under the two contracts. Having not justified its entitlement to a greater amount, the agency is entitled to the amount it had paid for the items returned. The amount of recovery is limited to $155 for each item returned. Under the four purchase orders terminated under the 622 contract, the record demonstrates that 716 rejected sets were returned. Thus, of the agency's claim, the Board allows $110,980 ($155 × 716), and disallows $532.58 (the $.31 per unit sought in excess of $155, and the 2 additional sets not shown to have been returned). Under the two purchase orders terminated under the 629 contract, the agency has justified the entirety of its claim $31,465 ($155 × 203). Hence, the agency is entitled to $142,445 ($155 × 919).

[2] In its post-hearing brief, the agency seeks reimbursement of $144,977.58. The agency offers no explanation for the variation from the figures in the termination letters. The Board views the agency claims as totalling $142,977.58.

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Decision

The agency has demonstrated the appropriateness of the three terminations for default. The agency has fully justified its claim for reimbursement in the GSBCA 10119 appeal, and has justified all but $532.58 of its claim for reimbursement in the GSBCA 10120 appeal. Accordingly, the Board **DENIES** the appeals in GSBCA 10118 and 10119, and **GRANTS IN PART** the appeal in GSBCA 10120. The agency has demonstrated entitlement to $142,455.

[¶ 26,453] Michael-Mark Ltd.

IBCA Nos. 2697, 2890, 2891, 2892, 2893, 2894, 2895, October 1, 1993. Contract No. OR952-CT8-1165.

Modifications—Reduction in Requirements or Prices—Access Methods.—Under a contract for the construction of a fish passage at a waterway, the government's downward price adjustment for the contractor's cost savings resulting from its allegedly improper use of a temporary access spur rather than the contractually approved access method was improper because the government failed to sustain its burden of establishing that the reduction was warranted. During the project, the government was concerned not that the contractor built a temporary road access spur but that the quantities of fill or rock placed in the stream bed exceeded the amount specified in state land permits. However, there was no indication that the temporary spur caused any environmental damage, nor was it clear that the government had properly calculated the original permit quantities of fill and rock. In any event, the state agency's rapid authorization of increases in the amount of the fill indicated that it was not particularly concerned about the changes in the permit amount.

Interpretation of Contracts—Reasonableness—Temporary Access Road.—Under a contract to construct a fish passage, the government's interpretation of the contract as completely disallowing the contractor's construction and use of a temporary access road to the waterway was unreasonable because the contract, when read as a whole, specifically provided for temporary access roads. Under the Operations and Storage Areas clause, the contractor could obtain authorization from the contracting officer to construct temporary roadways. The Project/Site Conditions clause contained a diagram that showed two potential alternative access roads to the jobsite. The Conditions clause further provided that access roads were not to be built unless indicated on the drawings or approved in writing by the contracting officer. Thus, it was clear that the contract unambiguously allowed for the construction and use of temporary access roads.

Interpretation of Contracts—Interpretation During Performance—Implied Approval.—Under a contract to construct a fish passage at a waterway, the contractor's conclusion that the government had approved its construction of a temporary access road to the construction site was reasonable because the failure of the contracting officer's representative and the government inspector to object to the access road constituted an implied approval of the contractor's interpretation that it could construct the road. The contractor had informed the COR of its intent to construct the temporary road. Further, the contractor obtained the appropriate state permits for the access road, secured the COR's approval of the permits, and met with the government to discuss the construction of the road access. The government inspector and the COR were present during the contractor's construction of the road. Even after the COR became concerned about turbidity in the waterway, he did not instruct the contractor to stop work. The lack of objection was evidence that the contractor's position was reasonable, particularly since the contracting officer had delegated the matter of the access road to the COR.

Pricing of Adjustments—Jury Verdict Technique—Extra Excavation.—In calculating the costs of performing extra excavation work under a contract for the construction of a fish passage, the board ruled that the jury verdict approach was the proper method of arriving at a price per cubic yard for the excavated material, because there was no more reliable method of computing the costs, the government had conceded that the costs had

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been incurred, and there was sufficient evidence to make a reasonable approximation of the costs.

Pricing of Adjustments—Jury Verdict Technique—Unilateral Modification.—In determining quantum over a unilateral modification that increased the contract amount as the result of additional excavation work but then reduced the amount to reflect the deletion of boulder work, the board measured damages by the jury verdict method because liability was not at issue, there was no more reliable method of determining damages, and there was adequate evidence to make a fair approximation of damages.

Site Conditions—Contract Indications, Category I—Competent Rock.—Mud seams, rotten seams, and clay material encountered by a contractor while excavating under a contract for the construction of a fish passage constituted a compensable Category I differing site condition because the contract indicated that the contractor would encounter competent rock, largely bedrock, including massively bedded sandstone. The materials encountered by the contractor were clearly unforeseeable and caused it to spend extra time and incur additional costs.

Acceleration Claims—Constructive Acceleration—Excusable Delay.—Under a contract for the construction of a fish passage, a contractor's claim for constructive acceleration allegedly resulting from the government's delay in granting a time extension and partial suspension of work was denied because the contractor failed to prove that the government was responsible for the delay. The government's partial suspension of work did not result from action on the part of the government, but it arose out of the contractor's violation of state land-use permits. The contractor's request for a time extension beyond the in-stream work closure date, occasioned by the difficulties associated with a differing site condition, was also beyond the government's control, because the contractor had chosen the period for in-stream work.

For the appellant: Bennett, Yazbeck & O'Halloran, Portland, Oregon, by J. William Bennett. For the government: Richard A. DeClerck, Department Counsel, Portland, Oregon.

Before ROME and PACKWOOD, Administrative Judges.

ROME, Administrative Judge: Michael Mark (MM) has appealed from the contracting officer's decisions under its above contract with the Bureau of Land Management (BLM), in the amount, after modification, of $582,729.29, for the construction of a three-part fishway to facilitate the passage of anadromous salmonids[1] over Lake Creek Falls in Oregon. The fishway included a Lower Slide[2], Upper Slide and Lake Creek Falls Treatment (Falls). Post-hearing briefing was complete in March, 1993. MM's active appeals are as follows:

(1) IBCA 2890—entitlement and quantum dispute over unilateral modification 6's $37,832.40 contract price reduction on account of MM's allegedly improper use of a temporary access spur. MM seeks the $37,832.40.

(2) IBCA 2891—quantum dispute over unilateral modification 7's net contract price increase of $12,497.50 for site profile differences. MM seeks an additional $56,480.86.

(3) IBCA 2892—quantum dispute over unilateral modification 5, which increased the contract amount for certain work additions, but decreased it due to the deletion of boulder work, for a net decrease of $4,681. MM seeks $14,636.26.

(4) IBCA 2893—entitlement and quantum dispute over the denial of MM's claim for extra costs due to alleged differing site conditions in the form of clay, mud seams or rotten seams at the Lower Slide and Falls. MM seeks $74,287.59.

(5) IBCA 2894 and 2895—entitlement and quantum dispute over the denial of MM's claims for acceleration and impact associated with a partial suspend work order, the profile changes and the alleged differing site conditions. MM seeks $10,782.47.

[1] Anadromous fish are those which migrate upstream to spawn.

[2] "Slide is a local term for [an area] where water flows over a smooth slab of rock and does not indicate an area of slope instability" (AX 33 at 2).

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Findings of Fact

I. *Background*

1. In 1985, BLM contracted with Buell and Associates, Inc., to analyze feasibility and options for a fish passage (Government's Exhibit (GX) 61). Buell's April 1986 report (Buell Report) was a "reconnaissance level analysis intended to assist in preliminary design. *A more thorough analysis with more complete geological testing will be required* to accompany any final design effort" (AF 5 at 298 (emphasis added)). Concerning test blasting upstream from Lake Creek Falls, "there were no mud seams visible in the blasted pool or visible joints in rock that had been blasted from the pool ... There is no evidence of potential problems with minor blasting for foundations or footing" (AF 5 at 303). The Buell Report apparently was not part of the contract solicitation, but the Golder Report, *infra,* which largely was included in the contract, refers to the Buell Report. It is not clear from the record whether the Buell Report was made available to bidders.

2. Neither BLM, nor its design consultants, conducted the further geological testing intended by Buell (Appellant's Exhibit (AX) 31; Tr. 144).

3. In 1987 BLM issued a Lake Creek Aquatic Habitat Management Plan, relying upon the Buell Report and proposing a fishway for the Falls constructed either with prefabricated modular aluminum counterflow "steep pass" fishway sections or with the fishway cast in place with steel or aluminum counterflow structures. Metal fish ladders were to be fabricated offsite, with components moved onsite for assembly. Materials were to be moved using cables off Oregon State Highway 36, with "no roads or trails needed" (AX 80 at 25). The Management Plan contained a $45,000 estimate for an access road for Falls work, however, with a total Falls estimate of $395,000 (AX 80 at 26).

4. In May, 1987, BLM completed an Environmental Assessment Report, which again referenced off-site fabrication of the fish ladder, the lack of need for roads or "new" trails, and the cable access system. However, the Falls cost estimate remained at the same $395,000 that had included the access road (GX 52 at 17, 20, 24; GX 61).

5. After State approval of the fish passage plan, BLM contracted with Fish Pro, Inc., in September 1987, to develop the plans and specifications, following the off-site fabrication, portable ladder plan. Fish Pro's contract stated that its access to the work site, and that of the construction contractor, was to be limited to existing facilities and that "*[no] new access roads shall be constructed* on site *without written authorization of the Contracting Officer.*" Based upon what it deemed to be excellent exposure of rock and soil materials, Fish Pro proposed, and BLM accepted, that borings along the fish passage alignment would not be necessary (GX 59, § C.5.3C. (emphasis added); GX 61).

6. Fish Pro hired Golder Associates for a geotechnical design study. Golder completed it in December, 1987 (Golder Report); most of it was included in MM's contract (AX 33; Tr. 443).

7. Fish Pro recommended changing the plan for a portable fish ladder built offsite and the design was modified to a cast in place concrete structure (AX 54, interrog. resp. G.1 and 2; AX 72 at 3). This design contemplated 582 c.y. of excavation, 186 c.y. of backfill, and 168 c.y. of concrete (AX 58; Tr. 15, 16, 461-66).

8. The Environmental Report had noted that, in 1971, the State had proposed a concrete, cast in place fish ladder that would have required an access road for construction. That plan had been rejected due to perceived major site impacts and over $2 million in cost (GX 52 at 18). The concrete, cast in place design ultimately accepted by BLM was not the same as this earlier design (AX 54, interrog. resp. G.3.(a)).

9. BLM issued the solicitation on June 6, 1988, with bid opening scheduled for July 6 (Appeal File (AF) 2 at 34). On about June 7, in a combined application, BLM sought permits from the Corps of Engineers (Corps) and Oregon's Division of State Lands (State Lands). The application stated that about 87.5 c.y. of fill, which was largely concrete, and about 360 c.y. of removal (excavation), would be required for the project. Of the 360 c.y., 300 were estimated for the Falls. The application stated that "no roads are to be built;" the Lower and Upper slides were to be built using hand equipment; the Lower Slide involved placing five cement weirs on "*bedrock*" in the channel and excavating "*bedrock*" pools; and the "*channel is over 95% bedrock.*" The application included a map which labeled the Lower Slide as the "Lower *Bedrock* Slide." The permit application was included as part of the contract documents (AF 2 at 51, 52, 53, 55 (emphasis added); Tr. 923).

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10. On June 23, 1988, the Contracting Officer's Representative (COR), Mr. Bruce Runge, conducted a pre-bid site tour, attended by MM's project manager and vice president, Mr. Robert G. Thomas, and seven other prospective bidders (Tr. 101, 393-94, 871-72). Mr. Runge warned against tree injury during construction (Tr. 401). Mr. Thomas previously had reviewed the solicitation. Its provisions and the massively bedded sandstone he observed on site indicated sound, good rock to him (Tr. 411, 609). The only bidder concern that Mr. Runge recalled was whether the contract would contain the necessary permits, not yet in the solicitation (Tr. 405, 415-16, 609, 876, 885).

11. On June 29, 1988, bid opening was postponed indefinitely due to permit complications (AF 2 at 60).

12. On August 4, 1988, State Lands issued to BLM a fill/removal permit authorizing removal of up to 360 c.y. of material and the placement of up to 87.5 c.y. for the fishway construction. The permit stated that violations could cause its revocation or an action for damages. The permit holder, *i.e.*, BLM, was responsible for the construction contractor's activities. State Lands retained authority to halt temporarily or to modify the project in the case of excessive turbidity or damage to natural resources. The permit was included as part of the contract documents (AF 2 AT 48-49).

13. On August 11, 1988, the Corps issued its permit to BLM, authorizing the creation of a fish passage at the Lower Slide, Upper Slide and Falls, "by placing 87.5 [c.y.] of fill below ordinary high water." Of the 87.5 c.y., about 34 were designated for the Falls. The permit provided for the protection of vegetation; that "[c]are shall be taken to prevent any petroleum products, chemicals, or other deleterious materials from entering the water;" and that "[w]ork in the waterway shall be done so as to minimize turbidity increases in the water that tend to degrade water quality and damage aquatic life" (AF 2 at 40, 41). The permit was included as part of the contract documents.

14. On August 22, 1988, amendment 2 at the solicitation set a new bid opening for September 12, 1988, and added that the contractor was to perform administrative activities, such as schedule and other submittals, during the first stream closure period, about September 15, 1988, through July 1, 1989. Regarding the permits obtained, the amendment stated:

> *The amount of fill material — 87.5 [c.y.] — shown on the [two permits] was estimated for joint permit application purposes only.* The contractor will be responsible for determining the actual quantities required for completion of the entire project. Should the quantities estimated by the Contractor differ from those quantities estimated for application purposes, a request for modification to the permit *will* be performed by the BLM. [Emphasis added.] [3]

(AF 2 at 37). The amendment pointed out that State Lands and the Corps retained authority to suspend temporarily or to modify the project if the water quality, fish or wildlife were being adversely affected and that the contractor would have to comply with any mitigating measures directed by either agency.

15. On September 19, 1988, BLM awarded the contract to MM in its lump sum bid amount of $308,000, covering the Upper and Lower Slides (AF 2 at 35). On October 6, 1988, BLM issued modification 1 to cover the Falls, in MM's lump sum bid amount of $300,000, increasing the total contract amount to $608,000 (AF 2 at 33, 61).

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[3] MM urges that the permits' fill and removal amounts erroneously were linked to the original, portable fish ladder, "steep pass" design (Tr. 710-12). It alleges that the ultimate design is not "steep pass," but COR Runge stated that the original design was an "Alaska steep pass" structure, and the design selected, a "Denil steep pass." The Corps permit covers a "Denil Steep-pass fishway" (AX 2 at 40).

The COR alleged that permit quantities did not pertain to all fill and excavation necessary for the project, but to permanent fill to be placed in the stream, and that the permits covered the correct quantities for the job as soliciated (Tr. 923-34).

Fish Pro's president, Mr. Edward Donahue, stated that the highline access alternative in the contract was not based upon the earlier, portable ladder, design, but he did not have an explanation for the differences in Fish Pro's fill and excavation estimates and the permits' fill and removal figures. This was not explored with him at any length, however (Tr. 460, 462).

Mr. Thomas believed contemporaneously that the fill allotted was sufficient for his stream access plans. Upon close review at hearing, he stated that the permit amounts were not correct. He had not been particularly concerned about the amounts, given the contract provision that they were estimates and that BLM would modify them if necessary. *See* Tr. 418, 692-93.

In view of our resolution of IBCA 2890, and the confusion in the record, we do not make a finding on whether the permits were incorrectly based.

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II. *The Contract*

A. *Special and General Provisions*

The contract, with a 370-day performance time (AF 2 at 61), included the following pertinent Special and General provisions:

16. The COR was authorized to clarify technical requirements, and to review and approve work clearly within the scope of work. He was not authorized to issue changes under the Changes clause or to modify the scope of work (AF 2 at 63, § 1).

17. Under the Suspension of Work clause, the contracting officer could order the contractor, in writing, to suspend, delay or interrupt all or part of the work for a period deemed appropriate by the contracting officer for the Government's convenience. If for an unreasonable period, the contractor might be entitled to a price adjustment, unless the disruption were due to its fault or negligence (AF 2 at 68).

18. If the contractor submitted cost or pricing data in connection with pricing modifications, the Government had audit rights (AF 2 at 68).

19. The Differing Site Conditions clause provide:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

If there were a differing site condition, and if it caused an increase in the contractor's cost or work time, an equitable adjustment to the contract was to be made (AF 2 at 99).

20. The Site Investigation and Conditions Affecting the Work clause provided:

> (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature * * * of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling * * * of materials; (2) the availability of * * * roads; * * * (4) the conformation and conditions of the ground * * * The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contractor. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.
>
> (b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government.

(AF 2 at 100).

21. The contractor was to preserve and protect all vegetation, including trees (AF 2 at 101, § 52).

22. Under the Operations and Storage Areas clause, the contractor was to "use only established roadways, *or use temporary roadways, constructed by the Contractor when and as authorized by the Contracting Officer*" (AF 2 at 102, § 53(c) (emphasis added)).

23. Under the Changes clause, the contracting officer, by written change order, could make changes in the work within the scope of the contract, including changes in the specifications; manner of work; Government-furnished site; or directing accelerated performance. Any other written or oral order of the contracting officer (including direction, instruction, interpretation or determination) that caused a change was to be treated as a change order upon the contractor's written notice. If a change caused an increase in contract cost or time, the contracting officer was to make an equitable adjustment (AF 2 at 106).

24. Under the Inspection of Construction clause, "[t]he presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization" (AF 2 at 111, § 62(d)).

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25. The contractor was subject to default under the Default clause if it refused or failed to prosecute the work or any part of it with the diligence to ensure its completion within the contract time period (AF 2 at 120).

B. *Specifications*

Division 1 of the specifications, General Requirements, contained the following pertinent specifications:

26. The Project/Site Conditions clause provided:

A. Access to the Work: The access to the site is via Oregon Highway 36.

1. At the [Falls] (upper Denil fishpass) access to the treatment area shall be by track equipment and high-line. *Figure 1 shows the potential points of access to the construction area* * * *. Access to the construction area will be limited before July 1, and after September 15, depending on constraints of fill-removal permit acquired by BLM.

Once track equipment is located at the work area, it shall remain on south side of the creek until required work has been completed. Continual creek crossings with track equipment is not allowed and precautions shall be taken to avoid gas, oil and grease spills into the creek.

* * * * * * *

3. Boulder placement at the upper and lower slide shall be accomplished with an overhead high-line cable or by other means approved by the Contracting Officer.

4. Concrete required at each location should be pumped from Highway 36 (downhill) or mixed on site. If the contractor chooses to use pre-cast concrete, these concrete sections shall be high-lined to their placement locations.

B. Seasonal Closure for In-Stream Construction Period: The preferred work period for in-water work recommended by the Oregon Department of Fish and Wildlife [ODFW] * * * is from July 1 to September 15. Extensions * * * may be obtained by [BLM] from [State Lands] * * * in consultation with [ODFW], depending on climatic conditions and stream flows. Construction work could continue after September 15 until Mid-October or before July 1 under low stream flow conditions, if and when extensions are granted.

* * * * * * *

C. Environmental Considerations: * * *

1. Care must be taken to minimize the impact of construction on this area * * *.

2. Construction activities shall minimize damage to the stream banks and stream beds. [Emphasis added.]

(AF 2 at 146-47).

27. "Figure 1" showed two potential alternative access roads, marked with dotted lines and described as "*Alternate Access (to be approved by BLM) for Tracked Equipment*" (AF 2 at 149 (emphasis added); Tr. 681, 874).

Division 2 of the specifications, Site Work, contained the following pertinent clauses:

28. The Project Conditions clause provided:

A. Work Limits: Areas to be cleared and grubbed shall be limited to only those areas to be excavated, *access locations,* and stock pile areas, *as shown on the drawings* and defined in the specifications.

* * * * * * *

C. Access Roads: Access roads shall not be constructed *unless indicated on the drawings or* written approval is given by the Contracting Officer. [Emphasis added.]

(AF 2 at 164).

29. Part 1.01 provided that section 02500, which consisted entirely of the Golder Report, was included: "to provide the technical data necessary for the contractor to properly plan for blasting and construction at the proposed treatment sites. The [Golder Report] should be carefully reviewed by the contractor and the blasting specialist when preparing bid documents and construction submittals" (AF 2 at 172).

30. Division 2, § 1.04D., provided that all blasting was to be in accordance with Golder Report recommendations (AF 2 at 167).

31. Blasting requirements were contained in § 3.01 as well. "Plan, sections and profiles" of areas where rock was to be removed were stated to be shown on the drawings (§ 3.01A.1.). Blasting for rock was to be completed only to the depth approved. Drilling and blasting was to be done under the direction of experienced, well qualified foremen (§ 3.01B.2.). The contractor was to employ an experienced blasting consultant to develop its blast plan (§ 3.01C.1). Individual shot plans were to be submitted to the contracting officer for review 24 hours in advance (§ 3.01C.2) (AF 2 at 167-68).

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The Project Site Conditions clause provided:

A. Environmental Considerations:

1. *Stabilization and Closure of Construction Access Roads:* Upon completion of the project, *access roads shall be barricaded,* as specified herein.

a. Barricade: *All access spurs [4] shall be barricaded upon completion of use or if work is suspended* due to seasonal closure.

Barricades shall consist of digging a trench perpendicular to the centerline of *the spur road* * * *.

* * * * * * *

4. Minimum Clearance of Vegetation: The only vegetation that shall be cut or removed from stream banks is that which is growing on or immmediately adjacent to designated sites of planned stream bank excavation or at designated stream crossings. This restriction is intended to provide efficient and safe operation of equipment without causing unnecessary damage to stream side vegetation. Any deviation from this procedure shall be approved in advance by the Contracting Officer.

(AF 2 at 169-70).

33. The Execution and Installation clauses referred the contractor to the drawings to determine the amount of streambed and stream bank excavation (AF 2 at 170-71).

34. The Site Preparation clause, under specifications Division 3, Concrete, provided:

All boulders and existing concrete surfaces that will be in contact with new concrete shall be cleaned of all dirt, moss and other foreign material by pressure washing with water. Pressure washer shall be capable of producing 2000 PSI at the nozzle.

(AF 2 at 198).

C. *Drawings*

The following drawings are of particular relevance:

35. Sheet 3 depicted boulder placement at the Lower Slide. At the lower boulder placement area, 16 boulders were to be relocated and pinned in place, and at the upper area, 36 boulders. Per Detail M on sheet 14, each boulder was to be pinned to a depth equal to 100 percent of the rock's thickness by drilling through the boulder into the rock below, and by using #10 rebar and epoxy to secure it. Alternate strength anchoring methods proposed by the contractor would be considered. Sheet 3 also depicted the construction of weirs. Notes to the drawing provided that the contracting officer was to determine all boulder placement and removal; the location of all weir notches; and the final dimensions and location of weirs (AF 2 at 217, 227).

36. Sheet 9, pertaining to the Falls, on Details D, E and F, depicted a tapered trench, with a concrete cover over the tapered area (AF 2 at 223). The concrete cover or "slab," as MM refers to it, is an attempt, after the Falls trench has been excavated and backfilled, to reestablish the former bedrock surface, albeit with concrete (Tr. 655). Drawing E stated that the contractor was to "use controlled blasting to maintain 1:4 sloped face and minimize overbreak." The drawings required backfilling the excavated tapered area with excavated materials (AF 2 at 223).

D. *The Golder Report*

37. The Golder Report included a narrative, figures depicting sandstone and siltstone rock layers, and specifications for rock excavation and blasting. It described its geotechnical study as "a review of the [Buell Report], detailed geologic mapping at each of the proposed sites, engineering analysis, and preparation of final geotechnical design recommendations." It concluded that "the proposed fish passage structures appear feasible geotechnically as currently planned" (AX 33 at 57).

38. The Golder field work was limited to surficial geologic mapping and its analysis, conclusions and recommendations were limited accordingly (AX 31).

39. Pertinent provisions of the Golder Report included in the contract were:

3. *SITE CONDITIONS*

3.1 *Lake Creek*

* * * The gentler river bank slopes tend to be underlain by soil (colluvium, alluvium, or landslide debris) and *the steeper slopes are underlain by bedrock.*

At every proposed fish passageway location, *bedrock* of the Tyee Formation, is at or near the surface. The *bedrock consists of massively bedded* (beds one and one-half to greater than five feet thick), *strong,*

[4] MM refers to its access construction as a "spur" or "ramp", and objects to BLM's description of it as a "road." We use the terms interchangeably. It is clear from photographs that it was temporary and not what a layman would describe as a "road."

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fine sandstone interlayered with *thinly bedded* (beds one to six inches thick) *medium strong, fine sandstone* with *occasional thin (one to three inches thick) siltstone beds.* The massively bedded sandstone tends to form layers more resistant to erosion while the thinly bedded sandstone and siltstone are less resistant to erosion. Where exposed on the sides of the creek, the massively bedded sandstone tends to form ledges and overhangs, while the thinly bedded sandstone forms recesses * * *. *Lake Creek tends to flow directly on bedrock* and there is only a minor amount of alluvium within the active stream channel. In the creek-bed, the sandstone tends to sound hollow when struck with a hammer and appears to be detached, since the upper one-half to one inch breaks easily into flakes and plates parallel to the orientation of the bedding, generally less than six inches in maximum dimension. *The sandstone which directly underlies the flakes is usually hard and unweathered.* This suggests that the sandstone is somewhat susceptible to slaking.

* * * *The bedrock* tends to be unjointed to very poorly jointed, with bedding planes being the primary discontinuity. The *bedding planes are tight,* have moderate roughness, *and contain no infilling.* The Upper and Lower Slides are due to stream flow *over resistant, massive sandstone beds* * * *.

3.1.1 Lake Creek Falls

* * * The upper part of the waterfall is *underlain by massively bedded sandstone* * * *. Underlying the massive sandstone are *thin sandstone beds generally less than three inches thick* * * *. The thin sandstone beds overlie another series of massive sandstone beds* * * *.

* * * * * * *

3.1.3 Lower Slide

* * * *The side channel consists of* * * * *a middle section that is underlain by boulders, an upper bedrock section* * * * *and a boulder plug* * * *. The right bank of the side channel is underlain by ancient landslide debris which is composed of a chaotic mixture of silty sand and boulders. The landslide debris does not appear to be active* * * *. The left bank of the side channel is a bedrock knob,* which also forms the right bank of the main channel * * *. The *bedrock that underlies the upper and lower bedrock sections* of side channel was the same bed that forms the overhang on the right bank of the Upper Slide * * *.

* * * * * * *

4.1 *Lake Creek*

Based on the preliminary design drawings and the site explorations, *the three Lake Creek solutions appear to be all founded on bedrock. The bedrock at the Lake Creek sites consists of strong, massively bedded, sandstone and moderately strong to strong, thinly bedded sandstone with occasional thin, weak, siltstone beds.* These materials should provide adequate foundation support.

Rock and soil excavation will be required for the three Lake Creek solutions. The *majority of the excavation will be in rock* with minor soil excavation above Lake Creek Falls in the upper solution.

* * * * * * *

The majority of the rock consists of strong sandstone and will require blasting to excavate. The upper six inches to one foot of rock in the areas away from the stream channel is weathered and may be rippable, depending on the type of equipment used. A blasting test was performed by [Buell] and is desribed in their report. Based on this test, [Buell] determined that *controlled blasting is feasible for rock excavation* at the site * * *.

The greatest amount of excavation will be required in the [Falls], where a cut up to 18 feet will be necessary for the second fishway. *This entire cut will be in rock* * * *. *The rock exposed in the water fall face is sound,* but dips outward slightly, and care should be exercised during blasting in order to prevent weakening of the surrounding rock which could lead to instability.

* * * * * * *

4.3 *Other Considerations*

Much of the excavations for the Lake Creek solutions will be below the level of Lake Creek. Surface water drainage provisions for the excavations should be made * * *.

While we did not observe significant groundwater flow within the intact rock, groundwater seepage may occur into the excavations. The groundwater seepage may be exacerbated by the blasting, which may fracture the rock and create additional avenues for water flow * * *.

Access to the Lake Creek sites by heavy equipment will be difficult due to the terrain.

We recommend that a qualified geotechnical engineer observe the critical aspects of

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the construction of the fishways * * *. [Emphasis added.]

(AF 2 at 175-81).

40. An appendix to the report, also included in the contract, defined the term "rock" as follows:

Rock is defined as sound and solid masses of mineral matter in place and of such hardness and texture that, when it is encountered, it cannot be excavated by three passes of a ripper tooth mounted on a hydraulic excavator with a bucket curling force of at least 25,700 pounds and a stick crowd force of at least 26,100 pounds, or two passes of a single-shank ripper mounted on a Caterpillar D-8 Crawler tractor (or equivalent). [Emphasis added.]

(AF 2 at 192).

41. Mr. Clifford C. Knitter, an engineering geologist with a master of science degree in geology, employed by Golder, was offered, and qualified by the Board, as an expert. He was a principal participant in the Golder Report and co-signed it (AX 33 at 11). He admits that it described the contract site as "primarily a rock site" (Tr. 476-78, 530-31).

42. BLM omitted the signature page of the Golder Report's introductory narrative from the contract. It provided:

There are possible variations in subsurface conditions based on surficial mapping and in the groundwater conditions with time. We recommend a contingency for unanticipated conditions be included in the construction schedule and budget. Further, we recommend that we be retained to perform monitoring and testing during construction to confirm the conditions indicated by the explorations and/or provide corrective recommendations adapted to the conditions revealed during the work. [Emphasis added.]

(AX 33 at 11).

43. On October 28, 1988, BLM held a prework conference and issued the Notice to Proceed, effective October 31. MM submitted a preliminary "Construction Value and Schedule" depicting its estimated schedule and the approximate contract dollars attributable to types of work (AF 5 at 521-27). The schedule referred to highway access to the project, ramps and roadways, and other mobilization work, in the total amount of $60,000. The access discussion was inconclusive, as project start was more than 6 months away. The schedule also included log and boulder placement in the total amount of $28,000 (AF 5 at 525-26; AX 95; Tr. 584-85, 878-79).

III. Additional Facts Particular to IBCA 2890

Access Road/Modification 6 Claim

44. Mr. Thomas, who prepared MM's bid, read the contract to provide that he could build a temporary access road at the Falls. He elected that method, rather than a highline method, after reviewing the site and the contract's environmental strictures. An access road appeared to him to be the only reasonable and logical way to access the Falls without adversely impacting the area. *See* Tr. 392, 401, 405-14, 422, 455, 458-59, 548-49, 586, 591-93, 714, 994-95.

45. Fish Pro's Mr. Donahue acknowledged that the contract provided for a temporary access road, as opposed to a permanent road (Tr. 460-61).

46. Prior to construction, MM applied, on January 31, 1989, to the Oregon Department of Transportation for two permits for construction of a temporary approach road to the Lower Slide and a temporary approach road off Highway 36 to the Falls. The permits were granted on February 15, 1989, with the approaches to be removed and the permits to expire on November 1, 1989. On February 20, 1989, MM submitted the permits to BLM and COR Runge approved them on March 20, 1989 (AF 4 at 124-26; Tr. 426-27, 429).

47. On June 7, 1989, MM and BLM met and addressed MM's wish to start construction before July 1, and Falls access.

48. Regarding access, the COR's notes of the June 7 meeting record that Project Manager Thomas "explained way of gaining access to [Falls]. Contractor not sure exactly how access is gained, using fills, culverts, filter clothes [*sic*], flat cars, ramps, and unknown yet" (AF 4 at 134).

49. At the meeting, MM provided Submittal No. 11, dated June 5, 1989, "Plan to Provide Equipment to the Work Sites." Its attachments showed: an access road across a privately-owned embankment above the stream from Highway 36; a ramp and landing; use of native materials for fill required for the access ramp; a culvert placed in the stream to be covered with clean boulders and rock; a notation that the material would be removed upon completion of the work and the site restored per specifications; and a notation that MM intended to use an excavator and track drills at the Falls, with no limitation as to tracked equipment. The

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COR testified that "he had no idea exactly what [MM] was going to use." There is no evidence that he had any concern or inquired (AF 4 at 1130-33; AX 70; Tr. 881-82).

50. The COR neither formally approved nor disapproved the submittal, but Mr. Thomas believed that MM had made its plan to use a temporary access spur with various types of equipment clear (Tr. 429-32, 590). The COR stated that he was acting upon his belief that MM did not seek a reply (which MM disputes) (Tr. 883, 995). We find that, in the absence of a reply or any disapproval, MM reasonably proceeded on the premise that its access and in-stream culvert plans were acceptable (Tr. 995).

51. The COR acknowledged that, in general terms, the culvert placement at the bottom of the access ramp was essentially what MM did during construciton (Tr. 948).

52. Mr. Wayne Elliott, BLM's Area Manager, acknowledged that he had had a publicist attend the June 7, 1989, meeting "to be able to gather a news story from our meeting." After the meeting, the Lake Creek Basin News reported upon the construction plans. The report included a copy of a drawing showing a construction access road to the Falls and noting that there would be temporary fill and culverts. The drawing was a copy of one originally prepared by Buell. Its use is consistent with MM's claim that it notified BLM about its intended access to the Falls and its use of fill and a culvert in the stream (AF 4 at 137; GX 15; Tr. 119, 125-26).

53. Also on June 7, 1989, BLM secured approval from ODFW for MM to begin work then, three weeks before the contract's July 1, 1989, date for in-stream work (AF 5 at 514; Tr. 886).

54. MM obtained approval from private landowners adjacent to the project for its access plan (AF 1 at 26, 27; GX 68).

55. MM commenced its access spur by building an approach off Highway 36. The COR was fully aware of the access spur. Mr. Thomas had several conversations with him about it (Tr. 217-21).

56. Both BLM's inspector, Mr. David Evans (Tr. 728, 730), and COR Runge, kept detailed diaries. Commencing as early as June 22, 1989, the diaries contain notifications by MM and observations by the COR and the inspector that the MM was planning to build, and was building, a temporary access road from Highway 36 to the streambed and that it had placed a 48-inch culvert into the stream (AF 3 at 236, 238, 468-69, 472, 480).

57. It was not until June 29, 1989, that the COR discussed any permit concerns with MM. The inspector's June 29, 1989, diary notes that MM was using dump trucks to haul rock for the access road; that rock had been placed to the culvert; that he had noticed an increase in turbidity in the water; that rock fill for the road had been pushed into the river; and that this was not within the Corps and State Lands permits. The COR's diary for that day records: "Discussed access road w/ Bob T., explained to Bob T. that action was not in [the Corps or State Lands permits] & they are on their own; watch out for turbidity problem @ culvert." Thus, the COR allowed work to continue and MM was not told that it could not use rubber-tired equipment (AF 3 at 234, 466-67).

58. Inspector Evans' diary notes that at 8:10 AM on June 30, 1989: "Access road for the [Falls] still being constructed. Rock has been placed approximately 15 feet into the river. There has been work done in the river to divert the water thru the culvert. Sandbags are currently being placed to force the entire flow of the river thru the culvert" (AF 3 at 462). Mr. Evans telephoned the COR about the stated activities. Later the same morning, after Mr. Evans noticed that a considerable amount of rock had been added to the access spur, he called the COR again (Tr. 731).

59. The COR acknowledged that he had been aware of the intended use of the culvert at least as of June 29, 1989, and that he had known of the in-stream activity by early morning on Friday, June 30 (Tr. 953). Nevertheless, it was not until 11:10 AM on Friday that he verbally instructed Mr. Thomas to stop the instream work (AF 3 at 228). The COR subsequently issued a written partial suspension of work order, on the ground that MM's in-stream operations violated BLM's permits (AF 3 at 226; Tr. 954-56). The order affected only work on the Falls access; other work could continue. Mr. Thomas informed the COR that MM would work the weekend and possibly the Fourth of July (AF 3 at 228, 231; Tr. 36).

60. By the time the COR issued the partial suspend work order, the access spur, with approach built to and across the culvert, was about 90 percent complete (Tr. 223).

61. After the COR issued the order, he took immediate steps to notify the Corps, State Lands, and ODFW. He also notified

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the contracting officer and questioned whether he had taken the proper action. She left the decision to him. The COR also told her that the access spur would yield substantial savings to MM. In his opinion the job had not been bid considering such a spur (AF 3 at 228-31; AF 5 at 493-94; Tr. 39).

62. On Monday, July 3, 1989, ODFW told the COR that there was minimum impact upon fish from MM's actions; it did not say whether the State Lands permit had been violated. The COR proposed a change to the permits by adding 110 c.y. of clean rock, of which 80 were in place, and 40 c.y. of sandbags, of which 20 were in place, to the allowable fill amount. An ODFW biologist opined that BLM was "nitpicking" (AF 3 at 224-25).

63. On July 5, 1989, BLM was notified that the Corps and State Lands had approved permit modification. It was noted that the fill was temporary and the modification deemed small. The COR issued a Resume Work Order stating that BLM's permits had been amended to allow the 150 c.y. of clean rock and sandbags, to be removed when the work season concluded, on or before September 15, 1989 (AF 3 at 220, 222; GX 23, 24).

64. It is clear from the record that BLM was not concerned that MM had built a temporary spur. Rather, the focus of BLM's concern was its belief that the quantities of temporary fill or rock placed in the streambed violated the Corps and State Lands permits.

65. On July 7, 1989, State Lands confirmed the permit modification, opining that the earlier permit had not authorized a road, but concluding that MM's actions had resulted from "an apparent lack of communication between the contractor and BLM;" and that no fishery impacts were likely from temporary use of the road and temporary stream diversion. The revised permit authorized the removal of up to 360 c.y. of material and placement of 150 c.y. at the Falls. Of the 150 c.y., 110 could be used for the temporary access road (AF 5 at 490-91).

66. MM did not work over the weekend. It worked Monday, July 3, but did not work on the holiday (Tr. 36).

67. By letter of August 2, 1989, MM notified the contracting officer that the partial suspension order had disrupted the project's momentum and schedule, "requiring acceleration and/or additional time." MM sought a 7-day extension (AF 1 at 18). On August 28, 1989, the contracting officer issued a final decision denying MM's request (AF 1 at 3) (MM has abandoned the extension aspect of its claim, as we discuss below).

68. After the resume work order, MM proceeded to dump fill rock into the stream bed and to place sandbags (AF 3 at 454). It drove its equipment, including rubber-tired and tracked, down the access ramp, over the culvert and onto the streambed to construct the fish ladder (Tr. 277).

69. MM used highline methods, both helicopter and cable, and conveyor belting, to deliver and remove materials to and from the Upper and Lower Slides, but used the access road to transport concrete and supplies at the Falls (Tr. 52, 694-96).

70. On August 28, 1989, the contracting officer forwarded to MM a draft contract modification, stating that, due to MM's use of the access road, substantial savings should accrue to BLM. She asked for MM's savings estimate (AF 5 at 423; Tr. 39, 43-44).

71. Eventually BLM provided its own estimate of savings, based upon helicopter and other highline work methods (AF 4 at 255; Tr. 44-45). By letter of March 12, 1990, MM stressed: "Our bid for the [Falls] does not include the use of a highline. We are overwhelmed by your estimate and opposite approach to the access route chosen by the Contractor which was practical and environmentally acceptable" (AF 4 at 166).

72. By letters of April 2 and 23, 1990, MM declared that it had clearly and properly notified BLM of its planned access method; and that low-water stream crossing was a "common statewide practice" (AF 4 at 112). MM reiterated that its bid had not included highline access to the Falls, because "the highline concept was not workable" (AF 4 at 76).

73. With its April 23 letter, MM submitted a March 15, 1990, report by Dallas C. Hemphill, P.E., of Logging International, Inc., concerning access alternatives for the project (AF 4 at 80; AX 78). Mr. Hemphill concluded:

> 2. The highline, even if technically feasible (probable, although not proven), would have had an unacceptable and illegal environmental impact on riparian vegetation, would have been impractical to operate, could have had safety problems, and would have posed a greatly increased risk of failing to meet schedule.
>
> 3. The as-built access route was practical, permitted the best chance to meet project schedule, and produced environmentally acceptable results. It was

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approved by the Oregon State Department of Forestry and the landowner.

(AX 78 at 1).

74. On October 4, 1990, effective August 28, 1989, the contracting officer issued her final decision asserting BLM's claim for a contract price reduction of $37,832.40 and implemented it by unilateral modification 6 (AF 1 at 62-90; AF 2 at 5-8).

75. The contracting officer arrived at modification 6 by applying her interpretation of the contract's Value Engineering clause and reducing by 45 percent an $80,000 savings estimate by the COR (AF 1 at 80; AF 4 at 35; Tr. 45).

76. On December 6, 1990, MM appealed (AF 1 at 211).

77. In 1991, BLM asked the Forest Service (FS) to provide its estimate concerning various claims at issue. The FS' September 27, 1991, report estimates savings to MM on account of the temporary access spur at $61,891 (GX 27, 71).

78. There is no evidence that MM caused any environmental damage. Indeed, upon the public dedication of the project, Congressman DeFazio and a BLM spokesman praised MM's work as exceptional—a "beautiful job" and "spectacular," offering a high return on dollars invested. The Congressman stated: "We got an enhancement without any loss. I wish that all natural resources we dealt with could come out this way." BLM's counsel acknowledged that BLM does not have any complaint about project results and the COR confirmed that MM did excellent work under difficult conditions (AX 99 B; Tr. 555-59, 864, 986-87; and see below).

IV. Additional Facts Particular To IBCA 2891

Profile Differences Claim

A. *General Facts*

79. On June 23, 1989, MM notified BLM about profile differences, found by MM's surveyor, Mr. Jim Peterson, from those depicted in the contract. This affected excavation and concrete quantities (AF 1 at 100; AF 5 at 436). The parties have agreed to a total of 38 c.y. of extra excavation at the Lower and Upper Slides. They have not agreed upon price per c.y., however, or upon Falls excavation quantities and price, or upon extra concrete, and price, at all three areas (AF 1 at 107; GX 28; Tr. 54, 308-09).

80. Negotiations were protracted, with MM changing its quantities and price claims frequently (AF 1 at 96-114; AF 5 at 273).

81. On December 1, 1989, the contracting officer wrote to MM that, at the Falls, it had excavated 522.54 c.y., including 15 c.y. of taper omitted from the surveyor's figures. She stated that this was 8.97 c.y. less than the 531.51 of c.y., with taper, reflected on the contract profile. BLM did not seek a price deduction (AF 1 at 103-04). A taper is for safety purposes, to impede rock from falling over the top of an unstable trench. When rock breaks cleanly, there may be no safety reason for a taper. BLM accepted the trench in the manner built, because the trench was stable (Tr. 57, 60, 384, 767).

82. The parties disputed the role of taper. MM claimed that its bid price had not considered tapered excavation, because the contract documents had indicated to it that the area would break cleanly (AF 1 at 105). BLM asserted that the contract required a tapered trench at the Falls, and that MM's bid should have included the additional controlled blasting and excavation required to form it (AF 1 at 105; see AF 5 at 271; Tr. 54-55).

83. On February 21, 1990, MM responded that BLM's "interpretation on trench excavation requiring a one on four slope in 'solid rock' * * * agrees with neither good construction practices nor our interpretation" (AF 4 at 260).

84. In fact, Mr. Peterson had started to stake the Falls for a taper, which he believed the contract required. However, MM directed him to stake for a vertical cut to be drilled and blasted, stating that, because the taper was to be backfilled and covered with concrete anyway, a vertical cut would save time and money (Tr. 57, 313-14, 320, 354-55, 382-84, 764-65).

85. Mr. Jerry R. Wallace of Landworks Northwest, Inc. (Landworks), MM's blasting subcontractor, and Landworks' chief drill operator, Mr. David McGarr, confirmed that no blasting was aimed at constructing a 1:4 taper and that MM drilled vertical walls (GX 69; Tr. 845).

86. Inspector Evans confirmed that MM did not construct the taper, but added that it "got fairly good breakage on the neat line, and there was no need to do it" (Tr. 764, 767). He also acknowledged that Mr. Peterson did an "excellant job" of laying out project neat lines; an "excellent job on his surveying;" and was "very good" about rede-

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fining the area after drilling operations (Tr. 757-58, 767).

87. However, some taper resulted naturally from blasting (backbreak) and excavation. From visual inspection, Mr. Peterson opined that more taper had resulted naturally, and MM had been required to remove more backbreak, than called for under the contract (Tr. 321, 382-84, 764).

88. Photographs show that some trench is not tapered; some is tapered at more than a 1:4 slope (GX 49; Tr. 355-62).

89. At MM's request, Mr. Peterson recomputed Falls excavation volumes, finding that actual excavation exceeded contract planned quantities by 61.5 c.y. (AF 4 at 172; Tr. 314-15, 603).

90. Mr. Peterson superimposed a 1:4 slope upon his initial vertical cross-section measurements; he did not measure actual taper resulting from MM's operations (AF 4 at 68; Tr. 321, 325-26).

91. On October 4, 1990, the contracting officer issued her final decision on MM's profile difference claim, and implemented it by unilateral modification 7. She allowed $11,609 for the 38 c.y. excavation increase at the Lower and Upper Falls, at a price of $305.50 per c.y.; found a net 8.97 c.y. excavation reduction at the Falls (even acknowledging 15 c.y. of backbreak) but took no price deduction; allowed $467.50 for 1.87 c.y. of extra concrete at the Upper Slide, at $250 per c.y.; allowed $1,725 for 6.9 c.y. in extra concrete at the Falls, at $250 per c.y.; and found a $1,304 reduction due to a 3.26 c.y. decrease in concrete at the Lower Slide, at $400 per c.y. The net effect was to increase the contract amount by $12,497.50 (AF 1 at 94-115; GX 31; Tr. 57-64).

92. The contracting officer largely had relied upon the calculations of Dana Cork, a BLM engineer (GX 32; GX 74; Tr. 94).

93. MM appealed on December 6, 1990 (AF 1 at 211).

94. The FS' September 27, 1991, report found about $1,300 more due than had BLM (GX 27, 71).

95. Post-hearing, MM claims (including direct costs and burden and net of amounts paid by modification 7): $13,820.50 for the Lower Slide; $10,114.57 for the Upper Slide; and $30,667.15 for the Falls,[5] for a total of $54,602.22. MM's claim is not based upon a per c.y. measurement, but upon alleged total extra costs. MM claims, nonetheless, that its c.y. bid price for Lower Slide work can be extrapolated from its bid record, and that direct costs as bid were $818 per c.y., net of burden (AX 6, 88 at 11, 89, 94; Tr. 647-57; MM reply br. at 29).

96. MM alleges that changes in weir location due to Lower Slide profile differences increased rebar costs (As Built Plan, Sheet 3; Tr. 263-66). The weight of the evidence is that minor shifting in locations was to minimize excavation and that MM's problems were due partly to inexperienced labor (AF 3 at 203, 208, 212, 214, 222). Further, the contract authorized the contracting officer to determine final weir dimensions and locations (AF 2 at 217; Tr. 905).

97. MM's claim also includes the cost of: a second excavator at the Falls, because, due to profile changes, the one excavator planned no longer could maneuver as anticipated; 24 hours of survey layout and expenses for stream diversion and safety nets; blasting expenses; and additional labor to move material from the site (AX 89B; Tr. 604-06).

B. *Special Cost Findings*

The Defense Contract Audit Agency (DCAA) audited MM's claims and issued a report on May 28, 1992, made part of the record. We have thoroughly reviewed the audit, the parties' submissions in response, and all other relevant materials of record. Our findings in each appeal are based upon all information submitted.

98. MM disputes the contracting officer's estimates of $250 and $400 per c.y. for fill and structural concrete, respectively, but has not provided probative evidence to rebut those amounts nor her allowance of 1.87 c.y. in additional concrete at the Upper Slide and her 3.26 c.y. reduction at the Lower Slide.

[5] This includes $2,800 in alleged extra costs due to a 7 c.y. increase in concrete for the cover slab required by the contract (AX 89E; Tr. 655-57). This was not included in MM's claim to the contracting officer. The Contract Disputes Act of 1978 (CDA) requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). This is a jurisdictional prerequisite to our consideration of the claim. *Paragon Energy Corp. v. United States* [28 CCF ¶ 81,290], 645 F.2d 966, 967 (Ct. Cl. 1981). We find the claim for the concrete slab to be factually distinct from the other concrete claims MM submitted to the contracting officer and, thus, do not consider it. *See Blaze Construction Co.*, IBCA 2863, 91-3 BCA ¶ 24,071 at 120, 502-03.

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99. MM has successfully controverted the contracting officer's per c.y. $305.50 excavation cost (GX 29 at 5-7). (The FS estimate for the Lower Slide was $346.50 per c.y. (GX 27, 71)). BLM's calculations, at $13.25/hour (GX 9 at 2), underestimated labor costs (see BLM's estimate of $17.00/hour for the access road claim (AF 1 at 81-84)); did not clearly include all applicable indirect costs; and did not address all relevant work (AX 89, 94; Tr. 640-45, 773-75).

100. We are not satisfied with MM's calculations either, however, which contain numerous inconsistencies. However, we find merit in its claim and allow a portion of it, below.

101. In determining the per c.y. direct cost for the 38 c.y. of extra excavation at the Upper and Lower Slides, we have considered the auditor's objections to MM's accounting system and attendant difficulties in segregating extra costs from costs of required work. However, we find that certain excess direct costs can be identified and traced to invoices, time cards, and the like. Labor is categorized by equipment use and equipment operators' hours. Based upon jury verdict, discussed below, we find that the reasonable direct cost per c.y. is $550.

102. The parties agree that MM's jobsite overhead (JSO) pool includes $108,184 (MM's Audit Response at 6).

103. However, the audit report concluded that some costs were unallowable per the Federal Acquisition Regulation, and that others were classified improperly as JSO instead of home office overhead (HOO). Having reviewed the evidence, including a May 13, 1993, submission by DCAA's Branch Manager of its Western Region (BLM's Reply to Audit Report, Attch. 2), we find that, except for telephone expenses, MM has failed to rebut the audit findings. With respect to $3,998 in telephone expenses, we find that $3,400 reasonably can be allocated to JSO and we adjust upward the audit's accepted JSO pool accordingly, for allowable JSO pool costs of $54,357.

104. BLM asserts that the JSO rate should be 9.46 percent, and MM, 12.79 percent (MM Audit Response, Ex. A at 2). We accept the auditor's computed direct JSO base of $538,750 (MM Audit Response, Ex. A at 1) and find that the proper JSO rate is 10.08 percent ($54,357 divided by $538,750).

105. The parties have agreed, and we find, that MM's HOO rate is acceptable at 7.43 percent and its profit at 10 percent (MM's Audit Response, Ex. A at 3).

106. We thus find that MM is entitled to $13,735.66 on its claims for overexcavation and extra concrete at the Upper and Lower Slides, as follows:

Lower Slide Direct Cost (25 c.y. × $550 per c.y.)	$13,750.00
JSO at 10.08%	1,386.00
Subtotal	$15,136.00
HOO at 7.43%	1,124.60
Subtotal	$16,260.60
Profit at 10%	1,626.06
Subtotal	$17,886.66
Upper Slide Direct Cost (12.9 c.y. × $550 per c.y.)	$ 7,095.00
JSO at 10.08%	715.17
Subtotal	$ 7,810.17
HOO at 7.43%	580.29
Subtotal	$ 8,390.46
Profit at 10%	839.04
Subtotal	$ 9,229.50
Subtotal Lower and Upper Slide ($17,886.66 + $9,229.50)	$27,116.16
Less Adjustments Paid Mod. 7	(11,609.00)
Adjusted Total	$15,507.16
Less Concrete Paid Mod. 7 Upper Slide Area	(467.50)
	$15,039.66
Less Concrete Reduction Mod 7 Lower Slide Area	(1,304.00)
TOTAL LOWER AND UPPER SLIDE QUANTUM	$13,735.66

107. Regarding MM's claim for additional costs of excavation and concrete due to profile differences at the Falls, we find that the contracting officer's allowance of 15 c.y. for taper was reasonable and that her other cost calculations were reasonable and supported by the record. We have considered MM's arguments, but find them unpersuasive.

V. Additional Facts Particular to IBCA 2892 Claim Related to Increased Weir and Channel Excavation Work and Decreased Boulder Work

A. *General Background*

108. Commencing in June, 1989, the contracting officer sought five contract changes and proposed pricing from MM: (1) deletion of the relocation and pinning work covering 52 boulders depicted on drawing 3; (2) addition of a 12-foot concrete weir at the Lower

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Slide (3) excavation of an entrance channel at the Falls; (4) excavation of an exit channel at the Falls; and (5) excavation of an entrance channel downstream from the Upper Slide (AF 5 at 395-402, 510).

109. On August 8, 1989, MM submitted a cost proposal for items 1-4, including a reduction of $4,706.13 for deletion of the boulder work; addition of $15,348 for construction of the weir; and an addition of $5,666.15 for excavation of the Falls entrance and exit channels. It did not price item 5 (AF 5 at 474).

110. On August 15, 1989, BLM questioned the proposed boulder price reduction on the ground that MM had included $28,000 in its value schedule at job commencement for the boulder work and placement of a log weir. BLM also thought the proposed price for the additional weir work to be inordinately high. MM responded that it would like to settle the matter. By October 11, 1989, MM had completed all work and submitted an invoice for item 5 at $1756.03 (AF 5 at 360-63, 459-60).

111. Ultimately BLM offered a $7,800 reduction for the deleted boulders and a $7,500 addition for items 2-5. MM proposed a $5,400 deletion and a $9,800 increase (AF 4 at 39, 51, 65-68).

112. It developed that the item 2 weir contained about 2.72 c.y. of concrete; item 3 excavation was designed at 1.71 c.y.; item 4 excavation at 2.02 c.y.; and item 5 excavation at 1.15 c.y. (AF 1 at 129-31; Tr. 48).

113. On July 24, 1990, the contracting officer issued unilateral modification 5, effective August 1, 1989: item 1, $10,400 reduction; item 2, $3,550 increase; item 3, $1,380 increase; item 4, $940 increase; and item 5, $605 increase, *i.e.*, a $6,475 increase for items 2-5, but a net price decrease of $3925, due to item 1 (AF 2 at 9-10).[6]

114. On August 6, 1990, MM objected to the unilateral modification, and to BLM's withholding of contract funds to offset MM's alleged savings due to its use of the temporary access spur and the deletion of the boulder work. MM requested a final decision and BLM's cost estimate backing modification 5 (AF-4 at 23).

115. The contracting officer issued her final decision on October 4, 1990, sustaining modification 5, and included BLM's estimate. MM appealed on December 6, 1990 (AF 1 at 120-38, 211).

116. The FS estimated a $16,330 deduction for item 1, at $314 per boulder, based upon 3 labor crew-hours per boulder and its conclusion that the work was labor-intensive; a $3,820 increase for item 2; a $1,940 increase for item 3; a $1,335 increase for item 4; and a $1,010 increase for item 5, netting a larger overall deduction, $8,225, than that of modification 5 (GX 27).

B. *Particular Findings Concerning Item 1*

117. BLM estimated cost savings of $266.60 per boulder, but reduced the contract price by only $200 per boulder (AF 1 at 127-28, 134; AF 2 at 9-10; AF 5 at 320-21).

118. On January 2, 1990, MM submitted comparative costs to BLM showing $40 and $50 per boulder for projects it had performed for the State of Oregon (AF 5 at 291-92). Although that work was performed mechanically, with excavators and support items such as trucks and a loader, rather than by the hand labor called for under the instant contract, MM asserted that the cost per excavator was five times the cost of one laborer, and the cost for trucks and loaders double the cost of one laborer (AF 1 at 128; AF 4 at 259).

119. BLM relied upon MM's $28,000 value schedule, above. BLM estimated the cost of the log weir at $2,600 and asserted that the $25,400 balance thus reflected MM's original boulder cost estimate. MM's value schedule for the boulder and log work, which it had planned to do early, had included "up front" money, not associated with the work, but to assist with cash flow (AF 1 at 128; Tr. 712-13).

120. The COR had prepared BLM's savings estimate. At hearing he stated that he relied upon his personal experience, on-job observations, and approximate sizes and weights of the boulders, but he appeared uncertain about the basis for his estimate (Tr. 906-07). Moreover, the contracting officer and the COR did not have much experience with estimating costs of boulder movement (AF 4 at 66).

121. On the job, with 2 laborers, MM had moved at least one boulder in less than an hour (AF 4 at 67; Tr. 993-94).

122. MM's post-hearing calculation of the proper deduction for the item 1 boulder

[6] Mod. 5 reflects an additional decrease of $756 for work added, then deleted before performance. This no longer is in dispute.

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work is $6,616.08. This includes direct costs of $2,196.56 for 2 man hours at $20.04 per hour (104 hours) and the winch and supplies to move and place each boulder; $1,867.18 for 57.2 hours of labor and the supplies and equipment to drill and subsurface the boulders; and $856.05 for 13 hours of labor, plus material and supplies, to mix and place epoxy; plus burden. MM asserts that its estimate reflects its bid cost of labor and equipment. Because the contracting officer deducted $10,400, MM seeks $3,783.92 (AX 93-A; Tr. 993-94; MM's post-hearing br. at 51-52).

123. MM's estimate omits work (AF 4 at 67) and includes only 183.57 pounds of rebar, while the contract required considerably more (absent a contracting officer-approved alternative) (AF 2 at 227).

124. We find both BLM's and MM's estimates to be flawed. By jury verdict, we find that $8,000 is a reasonable approximation of what the deleted boulder work would have cost MM to perform; and that MM, therefore, is entitled to $2,400 ($10,400—$8,000) on account of BLM's excessive deduction.

C. *Particular Findings Concerning Items 2-5*

125. For item 2, MM now presents its costs and burden at $8,168.56 and seeks $4,618.56 in addition to the $3550 added by modification 5 (MM's post-hearing br. at 53).

126. For item 3, MM now claims $3,462.52 in costs and burden and seeks $2,082.52 in addition to the $1,380.00 added by modification 5 (MM post-hearing br. at 54).

127. For item 4, MM now claims $2,946.24 in costs and burden and seeks $2,006.24 in addition to the $940 added by modification 5 (MM post-hearing br. at 55).

128. For item 5, MM now claims $1,994.02 in costs and burden and seeks $1,389.02 in addition to the $605 added by modification 5 (MM post-hearing br. at 56).

129. In reaching her cost estimate for items 2-5, the contracting officer relied chiefly upon the COR's and inspector's diaries (AF 4 at 67). BLM did not use information from MM's diaries. The parties' disparate labor hour figures are due in part to the fact that MM worked on weekends when neither the COR nor the inspector were present (AF 4 at 67).

130. The DCAA audit reports that MM's claimed costs are insufficiently linked to its accounting system (which the auditor finds limited in any event), but are based, at least in part, upon individual checks, invoices and certified payrolls. MM has challenged the report. Because the audit was admitted post-hearing, we give it somewhat less weight than we otherwise might. Moreover, our review of the evidence persuades us that items 2-5 cost more than modification 5 allowed. By jury verdict, and based upon the data MM has presented, we find that $8,300 is a reasonable approximation of the costs of the added work, and that MM is entitled to $1,825 ($8,300—$6,475) in addition to that allowed by modification 5 for items 2-5.

In sum, MM is entitled to $4,225 ($2,400+ $1,825) on its IBCA 2892 claims.

VI. Additional Facts Particular To IBCA 2893

Differing Site Conditions Claim

131. Mr. Knitter acknowledged that the omission of the warnings in the Golder Report's last page could have affected bidders' pricing and Mr. Thomas so testified (Tr. 499-500, 614).

132. Mr. Thomas had no geology training, but had considerable experience with rock excavation and blasting (Tr. 387).

133. It was not common practice for bidders to secure their own geotechnical evaluations, due to time constraints and the considerable expense involved (Tr. 612-13).

134. On July 13, 1989, MM changed its blasting pattern because it had encountered soft mud seams, which absorbed blast, dissipated it, and diminished its effectiveness. Many of the areas had to be reshot three times (AF 3 at 422; Tr. 623, 790, 854).

135. On July 20, 1989, MM encountered a large void, which slowed its production (AF 3 at 427).

136. The inspector recorded that blaster Wallace was having trouble securing materials from MM. This was only a temporary impediment, and when Mr. Wallace consulted Mr. Thomas, he responded immediately (AF 3 at 426-27; Tr. 831, 838). It is apparent that some perceived problems originated with personality conflicts among some of BLM's personnel and the blaster, on the one hand, and one or more of MM's supervisors, on the other. We find that alleged management problems were greatly overshadowed by the actual physical difficulties at the site.

137. Mr. Wallace developed a subdrilling blasting plan with which MM concurred. Subdrilling to achieve grade in rock is standard industry practice (GX 69; Tr. 687-88, 843).

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138. The mud seams repeatedly caused drills to plug, requiring replacement or extra time (Tr. 240, 628).

139. On July 26, 1989, MM notified the contracting officer in writing that it had encountered differing site conditions in the form of "clay and/or mud seams and bottom" (AF 5 at 484-85; Tr. 27, 65).

140. On August 4, 1989, MM sought a 14-day extension, with excess costs to be determined, due to "mud, clay, rotten rock seams, and a soft clay bottom." MM enclosed Mr. Peterson's figures concerning the extent of mud seams and clay; an evaluation from Mr. Charles R. Lane, vice president of Northwest Testing Laboratories (Northwest), who had inspected the site on July 31 and reviewed the portions of the Golder Report contained in the contract; and a blasting report from Landworks, (AF 5 at 477-81).

141. Mr. Lane is a registered, senior, civil engineer with over 44 years' experience, over 35 in geotechnical work in the study of soils and foundation conditions. He was offered, and qualified by the board, as an expert (Tr. 178-81).

142. Mr. Lane's August 4, 1989, report noted:

> The [Golder Report] implies that the contractor will encounter massive bedded sandstone underlain by thin sandstone beds. The bedding plans were expected to be tight and contained no infilling.
>
> During our inspection of July 31, 1989, we observed a number of seams within trench excavation through the sandstone beds, which were very weathered soft and several feet in thickness * * *.
>
> It is well established that soft seams within units presents special difficulties in blasting of this type of rock (?) formation, thus additional expenses.

(AF 5 at 480).

143. Landworks' report, dated July 31, 1989, stated:

> * * * I am reiterating the *several problems* associated with blasting in the bedded sandstone layers * * *
>
> Due to the uniqueness of this project and the restrictions placed upon it by the Owner (with regards to overbreak and environmental damage), *exceptional* solutions were required * * *
>
> *The geology of the rock itself was a critical factor. It included a massive, strong layer of sandstone underlain by softer layers of siltstone which contained stretches of a soft, almost mud-like layer.* Finally, especially near the lower end, *there is a void filled with water* (see drill log).
>
> * * * with this Lake Creek rock formation being *softer at the bottom than at the top and of dissimilar materials throughout,* these [blasting] shock waves are transmitted at different velocities. Because the softer materials transmit slower than do the harder rock, they have tendency to absorb the magnitude of the explosion—thereby creating a special blasting situation.
>
> * * * * * * *
>
> Additionally, the open air/water seams created another potential endangerment. Water is an excellent transmitter of shock waves along an uninterrupted layer. *These water seams ran close to horizontal* and when the first holes were detonated the [shock] wave was rapidly conveyed laterally down the trench line risking possible disruption of the power column of the later delay charges * * *. [Emphasis added.]

(AF 5 at 481).

144. Mr. Wallace authored Landworks' report. He had no financial interest that would cause him to exaggerate because he worked on a time and materials basis (Tr. 829, 865).

145. Mr. Wallace testified for BLM at hearing, whose personnel clearly held him in high regard. BLM described him and his chief driller, Mr. McGarr, as very experienced and very good (Tr. 792). He was not offered as an expert witness, however. BLM and Mr. Wallace attempted to diminish the import of his July 31, 1989, report, including his use of the phrase "almost mud-like" and other aspects (Tr. 829-38).

146. Mr. Wallace had visited the site in Spring, 1989, and had read the contract plans before undertaking his subcontract. He had not taken part in MM's bidding evaluation (Tr. 684-85, 827, 859). He testified at hearing, that "in general" the plans depicted what he had encountered (Tr. 859). Upon further questioning, he acknowledged:

> I would be forced to admit that because of my experience in the industry that *I adopt a worse-case scenario,* and the conditions could have been worse, but they were—I will be straightforward in saying that *they were very bad conditions.* I felt that they were within the scope of the job. I felt that although as bad as they were, they were there. *By no means do I have to minimize how tough a job it was. This was an extremely technical and tough job.* I didn't

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think that it was something that couldn't be handled though. [Emphasis added.]

(Tr. 864).

147. Mr. Wallace also acknowledged that it was not reasonable to expect the voids encountered at trench bottom (Tr. 850).

148. Mr. Wallace's testimony persuaded the Board that he was, indeed, exceptionally knowledgeable and experienced, but not that the site conditions were reflected in the contract.

149. Although he felt that MM should have anticipated the conditions, the COR also acknowledged that the job was difficult and that MM did excellent work:

It was a tough job. There's no doubt about that. But going into it up front, you should recognize that and make adjustments in your bid to accommodate that. I mean, it was no cakewalk to get down in there. It wasn't really the best working conditions, and it was a tough job. [MM] did an excellent job on the construction. In fact, you know, you really couldn't have expected a better project. They did excellent work * * *.

(Tr. 986-87).

150. The COR's weekly progress report dated June 16, 1989, noted a "slight" problem with a "mud lense" in test blasting. His daily report for June 16, however, stated that "a mud seam in the C-Weir absorbed much of the [blast] energy causing surface breakage to be nill." The COR's August 1, 1989, diary recorded a soft area in the Falls trench for which no bedrock bottom had yet been found (AF 3 at 168; 283, 488).

151. On August 7, 1989, after MM had claimed differing site conditions, the inspector opined to the contracting officer that some of MM's extra excavation and costs resulted from inexperienced labor and poor crew and subcontractor supervision (AF 3 at 400). On August 9, 1989, the COR recorded hand-excavation below grade in an already overexcavated zone (AF 3 at 150-51).

152. The inspector said that he had informed MM that the blasting plan contained too much subdrilling. He attributed problems to that, or to inexperiened drillers who did not clean their boreholes often enough (Tr. 745, 752, 756, 791). At the same time, he highly praised blaster Wallace and his chief driller, Mr. McGarr, and stated that he did not have a concern during the project about grade control or drill hole depth (Tr. 819-20).

153. Landwork's crew, including Mr. McGarr, drilled at the Falls; MM's crew drilled at the Lower Slide (Tr. 686). In Mr. Wallace's experience, although he did not observe all drilling, only one of MM's operators had a problem due to inexperience, which he corrected upon instruction from Mr. Wallace. Mr. Wallace acknowledged that the problem had stemmed from the mud-like conditions as well as from inexperience (Tr. 855-56).

154. Mr. Wallace had no concern about grade control; the one problem he recalled was due to the "mud" (Tr. 842, 856).

155. Due to these apparent conflicts, and to inspector Evans' and the COR's sometimes equivocal manner of responding to questions at hearing, we give their criticisms of MM some, but not great, weight.

156. Inspector Evans admits that Mr. Peterson is an excellent surveyor. We found Mr. Peterson to be highly credible. He was on site during most of the project. After all of the excavation was completed, he profiled the trench bottom to record the overexcavation that he attributed to geological problems at the site. He identified the problems as soft seams that would break up and wash away, and that had to be eliminated before construction could begin. He measured the depth of the areas that "were obviously not solid consolidated rock" (Tr. 321-22). The maximum depth of such a seam was about 2 feet (GX 34; Tr. 66).

157. While the plans depicted only about 2.1 c.y. of backfill, 68.4 c.y. were required. Mr. Peterson and Mr. Thomas attributed the extra excavation to the soft seams, which rendered the area unstable (GX 34; Tr. 324, 372, 624-25).

158. In response to MM's request for a 14-day extension, BLM asked that geologist Kristie H. Ward from its Eugene District office visit the site. She had not been there previously during construction. She visited the site on August 10, 1989, and concluded that the Golder Report reflected the site conditions. She advised the contracting officer that "to further support our case" BLM should "bring Golder in". She submitted a declaration, but did not appear at hearing (AF 5 at 469-71; GX 73; Tr. 65-66).

159. On August 14, 1989, Golder Report signatory, Mr. Knitter, visited the site with Ms. Ward (GX 73; Tr. 478). By that time, excavation had been completed and the trench floor covered with concrete. The walls still were exposed. Mr. Knitter's August 30, 1989, report opined that the site

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conditions were consistent with the Golder Report (AF 5 at 413-17).

160. At hearing, albeit describing it as a "slight deviation," Mr. Knitter acknowledged that: "some of the material exposed in the excavation was a little weaker than what I would have expected to have seen based on exposures on the face. The silty sandstone layers were a weaker rock than I would have expected to see there" (Tr. 481).

161. Mr. Knitter also admitted that he had expected weak rock that he had observed at the waterfall face to improve and become harder, further in, but that it had not improved (Tr. 521-22).

162. When Mr. Knitter had performed his studies for the Golder Report, in October, 1987, water volume in the stream had been low. He had never been at the site during the Spring, the time of year when the pre-bid tour occurred, and water levels were high (Tr. 509-10, 530, 546, 607-08).

163. We find that Mr. Knitter's testimony suffered from speculation (*see, e.g.,* Tr. 484-87, 511-12), and from his obvious bias as principal author of the Golder Report, and do not accord it great weight.

164. BLM attributes some of MM's problems to power washing, but the contract required that boulders, and existing concrete surfaces to be in contact with new concrete, be cleaned by a pressure washer capable of producing 2000 PSI at the nozzle (AF 2 at 198). MM used a $1\frac{1}{2}$ inch hose to attempt to reduce the negative effect of high pressure water upon the soft-seamed rock (AX 99B).

165. Moreover, even after Mr. Thomas informed the COR that washing was causing trouble with the siltstone rock layers, the COR stressed that all rock was to be washed before concrete was poured (AF 3 at 121).

166. MM's supervisor was aware that boulders had to be power-washed, but the COR and the inspector directed him to power wash "everything" including the exposed cut areas and the excavated trench. This created a "slurry" when it hit the mud seams, weakened them, and contaminated the site. MM then was directed to re-wash (Tr. 300-01).

167. Mr. Thomas' August 24, 1989, letter to the contracting officer reported:

> Seams of foriegn (sic) material in the trench have caused extraordinary time, effort, and cost to clean up for placing concrete in the walls and resting areas.
>
> The process is to shovel out rock and dirt, wash with fire hose, power wash, blow out with air, vacuum residue, and pump the water out.
>
> The seams of clay or rotten rock during this process will stay but generally will ravel off into the wall form zone requiring the contractor to do one or all of the above steps, generally more than twice. This date we have been required to stop placing forms and reclean three times today.

(AX 41).

168. On October 10, 1989, MM's supervisor recorded:

> No matter how deep or what spacing the [drill holes for blasting] were, the shot went to and followed the same mud seam.
>
> Near the end of digging, the Inspectors tested back into the rock seams and had us wash the debris and soft spots out with our 2000# pressure washer.
>
> They would take rebar and poke it into cracks and on the sides and bottom and then have us wash again and again and again. Every time we pressure washed, it would make a slurry of a mud type which would contaminate the rest of the weirs and bottom of the slide area and then we had to wash again. I think we washed 6 or 7 times with high pressure and 6 or 7 times with our 2" low pressure pumps.

(AX 26). The slurry forced MM to construct a sandbag dike and to pump the contaminated water to a disposal site so that it would not enter the stream (*Id.;* Tr. 261).

169. The Board viewed MM's video of the construction work, in conjunction with Mr. Thomas' testimony, and found the video to be a compelling demonstration of the "muddy" or unduly soft seams that caused MM so much difficulty (AX 99B; Tr. 534-53).

170. Testimony from one of MM's excavator operators, Mr. James J. Godfrey, confirmed extensive problems with mud layers. Had the Falls been a normal rock excavation job it would have taken a week or less to conclude but, due to the problems encountered, it took closer to a month (Tr. 564-70).

171. In 1989, during construction, MM continued to provide information as to the extent of the mud and rotten rock layers and associated time and costs and BLM continued to dispute its claim (AF 5 at 381, 425).

172. In March, 1990, expert Lane submitted another report to MM, concluding that a differing site condition had been encountered subsurface; the contract documents, including the Golder Report, would not lead a prudent contractor to suspect that highly

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weathered sandstone seams, "near mud in character," would be encountered; and the highly weathered seams would cause overbreak and poor blasting characteristics, increasing the time and cost of the work (AF 4 at 108-09).

173. At hearing, Mr. Lane stated that the mud seams would not have been predictable absent diamond core borings, which BLM should have conducted (Tr. 186-88). Mr. Knitter confirmed that, based upon what Golder considered to be "excellent exposures of the bedrock and other geological units," and due to difficult access problems, Golder had not conducted any subsurface borings (Tr. 479).

174. By final decision of October 4, 1990, the contracting officer denied MM's claim; it appealed on December 6, 1990 (AF 1 at 140-63, 211).

175. Mr. Herbert G. Schlicker, a consulting geologist with a master of science degree in geology and 42 years' experience with the geology of Northwest Oregon, was offered, and admitted by the Board, as an expert in pertinent local geology. He reviewed the Buell Report and the contract, including the Golder Report. Although he did not visit the site during construction (as he had not yet been retained), he had been at the site previously and had reviewed it as a geologist. He also viewed MM's construction video. Mr. Schlicker's April 3, 1991, report and his expert testimony concluded that there were Type I and Type II differing site conditions resulting in extra costs (AX 35; Tr. 138-78).

176. Mr. Schlicker's report stated:

> No place within the [contract] documents was there a reference to a material other than rock. The material referred to as "hard sandstone", "soft sandstone", "moderately soft sandstone", "shale", "thin-bedded shale", and "thin-bedded sandstone" all refer to rock in the proper geologic terms. The mention of "hard massive layers of sandstone underlain by softer, erodible shale", still refers to competent rock.

(AX 35). In brief, Mr. Schlicker's testimony was that a "siltstone seam" was "fine-grained sedimentary rock composed of silt," which could have thin to very thin layers, but was nonetheless stone; a "mud seam" was "a layer of mud," probably surrounding fragments of harder rock, "a mixture of silt, sand and clay," but it was not stone; there was no reference to "mud" seams in the contract documents; yet "mud" or "clay" seams existed within the sandstone beds and affected three-fourths of the site, based upon his review of Mr. Peterson's survey profile (GX 34; Tr. 146, 154-55, 162).

177. Mr. Schlicker acknowledged that indentures in the site outcroppings, especially at the waterfall face, would indicate sandstone and siltstone layers, but normally such layers improve and get harder further into the rock (Tr. 150-51). Mr. Knitter's testimony to the same effect (above) confirmed this conclusion.

178. Mr. Schlicker was positive that it was not possible that what MM described as mud seams were actually sandstone or siltstone layers broken down or eroded as a result of drilling, blasting, fire hose washing, or excavation activities (Tr. 158).

179. Mr. Schlicker concluded that only subsurface, seismic or drilling investigations, which were not done by BLM, could have determined the adequacy of the subsurface material at the site (AX 35; Tr. 169, 175).

180. Although there were aspects of expert Schlicker's testimony that we did not find persuasive, as a whole, he was more persuasive than expert Knitter, and convinced the Board, in conjunction with expert Lane's report and testimony, and the other testimony and documents of record, that MM encountered, and was damaged by, Type I differing site conditions.

181. Mr. Thomas calculated that about 53.5 percent of the Lower Slide work, and about 19 percent of the excavation and 41.4 percent of the concrete structure work at the Falls, was extra work due to the differing site conditions (AX 94).

182. MM claims $9,811.76 in extra direct costs at the Lower Slide, and $45,429.28 in extra direct costs at the Falls; plus JSO at 14.9 percent, HOO at 6.4 percent, and profit at 10 percent, for each site; for a total differing site condition claim of $74,287.59 (MM post-hearing br. at 49).

183. Based upon jury verdict, discussed below, we find that MM is entitled to $47,427.68 on its differing site conditions claim, as follows:

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Lower Slide Direct Cost	
($9,811.76 × 66%)	$ 6,475.76
JSO at 10.08%	652.75
Subtotal	$ 7,128.51
HOO at 7.43%	529.64
Subtotal	$ 7,658.15
Profit at 10%	765.81
Total Lower Slide	$ 8,423.96
Falls Direct Cost	
Excav. ($25,420.10 × 66%)	$16,777.26
Conc. ($20,009.18 × 66%)	$13,206.05
Subtotal	$29,983.31
JSO at 10.08%	3,022.31
Subtotal	$33,005.62
HOO at 7.43%	2,452.31
Subtotal	$35,457.93
Profit at 10%	3,545.79
Total Falls	$39,003.72
Total Lower Slide	$ 8,423.96
Total Falls	$39,003.72
Grand total	$47,427.68

VII. Additional Facts Particular to IBCA 2894

Acceleration Claim and IBCA 2895 Impact Claim

184. On July 26, 1989, MM notified the contracting officer of various problems which would result in "acceleration and/or additional time and cost." The contracting officer responded that she was unable to determine whether additional time was warranted until she was provided more specific information, and advised MM that its in-stream work had to be completed by September 15, 1989, the contract due date. Thereafter, MM requested a 14-day extension due to the mud seam problems. On August 8, 1989, MM notified the contracting officer that, pending a decision on its extension requests, it had added personnel, equipment, and work time (AF 5 at 475, 477-78, 482-85).

185. On August 10, 1989, the contracting officer visited the site and inquired whether in-stream work would be completed by September 15. Mr. Thomas was pessimistic. On August 15, 1989, the contracting officer issued a cure notice, giving MM 10 days to show substantial progress evidencing that in-stream work would be completed by September 15. She also requested a revised work schedule (AF 5 at 462-64).

186. By letter of August 15, 1989, MM again requested an extension to October 5, 1989, and stated that the changed conditions and suspension of work, without any time extension, had forced MM to accelerate (AF 5 at 457-58).

187. On August 24, 1989, MM notified the contracting officer that the mud seams had caused extraordinary time, effort and cost (AF 5 at 437).

188. ODFW had chosen the period for in-stream work, from July 1 to September 15, to protect fish and wildlife. As noted, the contract provided that BLM might be able to obtain earlier entry or extensions, from State Lands, in consultation with ODFW, depending upon climatic conditions and stream flows (AF 2 at 146; GX 61; Tr. 25).

189. When MM sought to secure an extension directly, it was informed that it was BLM's responsibility. BLM could not let MM know until the State could evaluate climatic conditions. Because MM did not know whether an extension would be granted, and because BLM had issued the cure notice, MM worked overtime (Tr. 83-84, 128, 672, 696, 706).

190. MM's labor hours increased on about August 7; peaked on August 15; then declined (GX 42, 43). MM asserts that the decline was due to the conclusion of labor intensive tasks on the Upper and Lower Slides and notes that 683 overtime hours were reported for the weeks ending August 19 through September 15 (AX 84 at 9-11; MM reply br. at 49).

191. At 9 PM on September 13, 1989, ODFW notified BLM that MM's in-stream work could extend to September 22, 1989, and BLM so notified MM on September 14 (AF 5 at 378, 384).

192. On September 22 BLM notified MM that ODFW had granted an additional extension, to September 29 (AF 5 at 376; Tr. 128).

193. At project outset, MM had requested permission to enter the stream early. On June 7, 1989, ODFW approval was confirmed, but MM did not start in-stream work until June 15 (AF 5 at 514; Tr. 25, 26).

194. MM thus was granted additional time for in-stream work of 23 days before the July 1 contract date, and an additional 14 days after the contract's September 15, 1989, closure date, for a total of 37 extra days.

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195. By letter of October 6, 1989, MM notified the contracting officer that in-stream work had been substantially complete as of September 14, with the exception of boulder placement and access removal, completed on September 22, and that all other work was completed on October 2, 1989 (AF 5 at 366).

196. On August 3, 1990, MM submitted a claim for constructive acceleration in the amount of $22,541.78, due to "government actions" in failing timely to extend the contract schedule for excusable delays (AF 4 at 27-32).

197. In her October 4, 1990, final decision, the contracting officer denied MM's acceleration claim; MM appealed on December 6, 1990 (AF 1 at 165-78, 211).

198. At hearing, MM merged its acceleration claim with its impact claim (IBCA 2895), because the only definable alleged impact costs were overtime labor hours (*See* AX 91; Tr. 670).

Because we deny these claims upon legal grounds, below, we make no further findings regarding them.

Discussion

IBCA 2890

[1] The contracting officer found that MM had incurred $37,832.40 in savings due to its purportedly unauthorized use at the Falls of a temporary access spur, rather than allegedly contract-required highline access methods. By unilateral modification 6, she adjusted the contract price downward accordingly. BLM bears the burden of proof that the price reduction was warranted. *See Nager Electric Co. v. United States* [16 CCF ¶ 80,367] 442 F.2d 936, 946 (Ct. Cl. 1971); *J.S. Alberici Construction Co.*, GSBCA Nos. 11024, 91-3 BCA ¶ 24,205 at 121,076.

In fact, BLM's focus during the project was not upon MM's construction and use of the temporary spur, but rather upon BLM's concern that fill to be placed in the stream would exceed the amount specified in BLM's State Lands and Corps permits (Finding of Fact (FF) 64). The record is unclear as to whether BLM properly calculated the original permit quantities, but it is clear that the contract provided that the amounts were estimates for permit application purposes only; that the contractor was to determine actual quantities; and that "modification to the permit *will* be performed by the BLM" (FF 14). It is also apparent that the State Lands and the Corps were not particularly concerned about the change in permit amount; they rapidly authorized amendment (FF 62, 65).

[2] Regarding BLM's belated contention that the contract prohibited the construction and use of a temporary access road at the Falls, we noted recently in *Hardrives*, IBCA 2319, *et al.*, 1993 IBCA LEXIS 4 (August 4, 1993) that it is elementary that:

> Contract interpretation begins with the plain language of the agreement. * * * "[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose * * * an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." [Citations omitted.]

See also Gould, Inc. v. United States [37 CCF ¶ 76,108], 935 F.2d 1271, 1274 (Fed. Cir. 1991). When we read the contract to harmonize, and give a reasonable meaning to all of its parts, it is apparent that its general provisions and specifications—and a figure included in the specifications—specifically provide for temporary access roads.

Under the Operations and Storage Areas clause, the contractor was to "use only established roadways, *or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer*" (FF 22). The Project/Site Conditions clause provided that access to the Falls was to be by track equipment and highline and that "*Figure 1 shows the potential points of access to the construction area*" (FF 26).

"Figure 1" showed two potential alternative access roads, marked with dotted lines and described as "*Alternate Access (to be approved by BLM) for Tracked Equipment*" (FF 27). The Project Conditions clause provided that access locations, as shown on the drawings, were among areas that could be cleared and grubbed, and that access roads were not to be built *unless indicated on the drawings or* the contracting officer gave written approval (FF 28). The Project Site Conditions clause discussed the stabilization and closure of access roads upon project completion (FF 32).

Thus, it is clear that the contract unambiguously allowed for the construction and use of a temporary access spur. As we noted in *Hardrives, supra*, "in order for a contract to be ambiguous, it must be *reasonably* susceptible of more than one interpretation" (emphasis in original) (citing *Edward R. Marden Corp. v. United States* [33 CCF

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¶ 74,642], 803 F.2d 701, 705 (Fed. Cir. 1986). BLM's interpretation of the contract as entirely disallowing construction and use of a temporary access road to the Falls is unreasonable.

BLM's arguments rest in part upon its Management and Environmental Assessment Plans and its design contract with Fish Pro. Although the Plans provided that no roads or "new" trails would be needed, both included an estimate for the cost of an access road (FF 3, 4). Therefore, the reference to "no roads" logically could be interpreted to mean "no new permanent roads." Indeed, the Fish Pro contract merely provided that no new access roads were to be constructed without the contracting officer's authorization (FF 5). Regardless, neither the Plans nor the Fish Pro contract were part of MM's contract with BLM.

BLM also cites its application for the State Lands and Corps permits, which, along with the permits, ultimately was included in the solicitation package. MM was not a party to those documents, and only the application states that "no roads are to be built" (FF 9). The contract's specific provisions allowing for access roads, however, belie any interpretation other than that the reference, once more, logically was to permanent roads. In fact, the president of Fish Pro, which drafted the specifications, acknowledged that the contract provided for a temporary access road, as opposed to a permanent road (FF 45).

[3] Further, we have found that MM reasonably concluded that BLM had approved its temporary access spur and in-stream work plans, based upon the following: MM had (1) informed the COR about its intent to construct the temporary road well in advance of construction; (2) sought appropriate State permits for approach roads for the Lower Slide and Falls, which were granted on condition that the approaches be removed upon completion; (3) secured the COR's approval of the permits in March, 1989; and (4) met with BLM on June 7, 1989, addressed Falls access, and delivered Submittal No. 11, dated June 5, 1989, "Plan to Provide Equipment to the Work Sites," with attachments showing: an access road across a privately-owned embankment above the stream from Highway 36; a ramp and landing; use of native materials for fill required for the access ramp; a culvert placed in the stream to be covered with clean boulders and rock; a notation that the material would be removed upon completion of the work and the site restored per specifications; and a notation that MM intended to use an excavator and track drills at the Falls, with no limitation as to tracked equipment (FF 46-50).

MM's notice to BLM of its access and in-stream work plans was confirmed by a press report of the June 7 meeting, which included a copy of a drawing showing a construction access road to the Falls and noted that there would be temporary fill and culverts (FF 52). The COR acknowledged that, in general terms, the culvert placement at the bottom of the access ramp was essentially what MM did during construction (FF 51).

Moreover, BLM's inspector and the COR were present daily, communicating with MM about the access spur, and observing its construction, including use of rubber-tired, as well as tracked equipment. Even after the COR became concerned about some turbidity in the stream, he did not instruct MM to stop work. By the time the COR issued the partial suspend work order, the access spur, with approach built to and across the culvert, was about 90 percent complete. Even after MM was allowed to resume work, there is no evidence that the COR, the inspector, or the contracting officer, ever disallowed the use of the rubber-tired equipment (FF 54-60).

That an inspector is present during work, and does not object to it contemporaneously, is evidence that a contractor's position is reasonable. *White Buffalo Construction,* IBCA Nos. 2166, 2173, 91-1 BCA ¶ 23,540 at 118,048. Here, not only BLM's inspector, but its COR, were present while MM was constructing the temporary access spur. Further, the court of appeals has held, albeit in a different context, that "[w]hen an official of the contracting agency is not the contracting officer, but has been sent by the contracting officer for the express purpose of giving guidance in connection with the contract, the contractor is justified in relying on his representations." *Max Drill, Inc. v. United States* [15 CCF ¶ 83,691], 427 F.2d 1233, 1243 (Ct. Cl. 1970).

In this case, the COR was authorized under the contract to clarify technical requirements, and to review and approve work clearly within the scope of work. He was not authorized to issue changes under the Changes clause or to modify the scope of work (FF 16), but approval of the temporary access spur, envisioned as a possibility by the contract, did not constitute such a change or modification. Indeed, the contracting officer delegated the matter of the

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access spur and in-stream permit requirements to the COR, even after he notified her about his concerns pertaining to permit violation (FF 61). When the contracting officer's authorized representative and inspector impliedly approve a contractor's interpretation of a contract, as here, the contractor is justified in relying upon that approval. *WRB Corp. v. United States* [12 CCF ¶ 81,781], 183 Ct. Cl. 409, 449-50 (1968).

We perceive no windfall to MM because its bid was not based upon use of a highline access method at the Falls (FF 71, 72) and BIM has failed to meet its burden to prove the reduction justified.

Decision

Accordingly, IBCA 2890 is sustained in the amount of $37,832.40.

IBCA-2891

[4] In this quantum dispute, MM seeks costs, in addition to those awarded by unilateral modification 7, for extra excavation and concrete resulting from acknowledged site profile differences from those depicted in the contract. Our fact findings, including special cost findings, are set forth in detail above. As we noted, we used a jury verdict approach to arrive at a $550 per c.y. direct cost amount for 38 c.y. of extra excavation at the Upper and Lower Slides.

A jury verdict approach may be used when (1) clear proof of injury exists; (2) there is no more reliable method for computing damages; and (3) the evidence is sufficient to make a fair and reasonable approximation of the damages. *Dawco Construction, Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 880 (Fed. Cir. 1991); *B&M Roofing & Painting Co.*, ASBCA No. 44323, 93-1 BCA ¶ 25,504 at 127,033.

BLM conceded "injury." We found that there was sufficient data in the record, from BLM and from MM, to permit us to make a fair judgment as to MM's resulting extra direct costs; and there was no more reliable method of doing so.

Decision

Accordingly, as presented in our fact findings, IBCA 2891 is sustained in the amount of $13,735.66 and is otherwise denied.

IBCA 2892

[5] Again, for this quantum dispute over unilateral modification 5, which increased the contract amount due to additional excavation and weir work, but reduced it due to the deletion of boulder work—for an overall net price reduction—our findings are detailed above.

As to the boulders, when a contracting officer issues a unilateral change order deleting work and reducing the contract price, the Government bears the burden to prove that the amount of the adjustment is reasonable. *Nager Electric, supra; Zurfluh Enterprises, Inc.*, VABCA No. 1941, 85-1 ¶ 17,789 at 88,908. As to the appropriate upward adjustment for the contract changes which added more work, MM bears the burden of proof. *Lemar Construction Co.*, ASBCA Nos. 31161, 31719, 88-1 BCA ¶ 20,429 at 103,332. With respect to the deductive change, and the additive changes, the measure of adjustment is the difference between the reasonable cost to the contractor of performing without the change and performing with it. *Id.; Zurfluh; Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683.

As we explained, BLM did not persuade us that the full amount of its deletion was reasonable and properly based. BIM's efforts at proof failed in part because they were speculative, or not adequately based upon the job at hand and MM's actual experience.

At the same time, MM did not persuade us that it was entitled to the full upward adjustment it sought. It is not required to prove the amount of its damages "with absolute certainty or mathematical exactitude * * * It is sufficient if [it] furnishes the court with a reasonable basis for computation, even though the result is only approximate." *Wunderlich Contracting Co. v. United States* [11 CCF ¶ 80,069], 351 F.2d 956, 968 (1965) (citations omitted). It must do more than offer conclusory evidence, or evidence based solely upon speculative estimates, though. *Id.; Lemar, supra.*

MM's quantum proof, including in this appeal and others, was far from ideal. That proof was hampered by a succession of changes in the amounts claimed. However, MM's proof eventually improved after it acquired counsel, and it was sufficiently grounded in actual time and costs, and in credible testimony, to form a basis for recovery.

Thus, once more, with respect to each adjustment, we resorted to a jury verdict, because liability was not at issue; there was adequate data in the record to enable us to reach such a verdict; and there was no more reliable method.

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Decision

Accordingly, as presented in our fact findings, IBCA 2892 is sustained in the total amount of $4,225 and is otherwise denied.

IBCA 2893

[6] Among alternative arguments, MM seeks an equitable adjustment based upon paragraph (a)(1) of the contract's Differing Site Conditions clause, due to the presence of clay, mud seams, or rotten seams at the Lower Slide and Falls, contrary to contract indications. Because we find for MM on this ground, we do not reach its other theories.

The contract's Differing Site Conditions clause provides in pertinent part, that "(a) [t]he Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in [the] contract" (FF 19). If the contractor establishes such a "Type I" differing site condition, it may be entitled to an equitable adjustment. The Federal Circuit has summarized the proof required:

> [T]he contractor must prove, by a preponderance of the evidence, "that the conditions 'indicated' in the contract differ materially from those it encounters during performance." * * * The conditions actually encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding. * * * The contractor also must show that it reasonably relied upon its interpretation of the contract and contract-related documents and that it was damaged as a result of the material variation between the expected and the encountered conditions. * * *.
>
> "A contractor cannot be eligible for an equitable adjustment for changed conditions unless the contract indicated what those conditions would supposedly be." * * *. The bid documents or the contract must contain "reasonably plain or positive indications" that subsurface conditions were different from what was actually encountered. * * *.

Stuyvesant Dredging Co. v. United States [34 CCF ¶ 75,414], 834 F.2d 1576, 1581 (Fed. Cir. 1987); *accord White & McNeil Excavating, Inc.*, IBCA No. 2448, 92-1 BCA ¶ 24,534 at 122,439, *affirmed mem., White & McNeil Excavating, Inc. v. Manuel Lujan, Secretary of the Interior*, No. 93-1013 (Fed. Cir. May 5, 1993).

It is apparent from the contract provisions, including the Golder Report, and from the testimony of experts Lane and Schlicker, that the contract indicated that MM would encounter competent rock, largely bedrock, including massively bedded sandstone. The thinner sandstone or siltstone layers that were mentioned still referred to competent rock. Bedding planes were described as "tight" and containing "no infilling." Even BLM's expert, Mr. Knitter, described the contract as indicating "primarily a rock site" (FF 9, 39-41, 143, 176-77).

Mr. Thomas relied upon the contract representations in bidding. He is an experienced contractor, but he is not a geologist. It is not standard for contractors in his industry to secure their own geotechnical reports. The contract indications of competent rock appeared to be confirmed by Mr. Thomas' site visit, where he observed massively bedded sandstone and sound, good rock (FF 10, 132-33).

Despite the contract's exculpatory Site Investigation and Conditions Affecting the Work clause, a bidder is not required to hire his own geologist, make extensive engineering efforts, or conduct tests which even the Government has not performed (here, borings) to verify the conditions he reasonably assumes he will encounter based upon the contract and his site visit. *Stock & Grove, Inc. v. United States* [19 CCF ¶ 82,913], 493 F.2d 629, 631 (Ct. Cl. 1974); *Richard P. Murray Co.*, AGBCA No. 77-152-4 A&B, 86-2 BCA ¶ 18,804 at 94,755-56 (collecting cases).

It is eveident from the record, including testimony from MM's personnel, its construction video, and the expert testimony of Mr. Lane and Mr. Schlicker, which we have found persuasive, that the mud seams, rotten seams and clay-like material MM encountered at the Lower Slide and the Falls differed materially from the contract's indications, were not reasonably foreseeable,and caused MM substantial extra time and costs (FF 131-83).

As to quantum, once more we reached our determination by jury verdict, which we found to be the fairest and most reliable method under the circumstances, and adequately grounded in the record, and found that MM is entitled to recover $47,427.68 on its differing site conditions claim.

Decision

Accordingly, IBCA 2893 is sustained in the amount of $47,427.68 and is otherwise denied.

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IBCA 2894 and IBCA 2895

[7] MM asserts that BLM subjected it to constructive acceleration under the Changes clause (FF 23) and it seeks impact costs, all overtime expenses. It contends that BLM's partial suspension of work, and the changed conditions encountered by MM, coupled with BLM'S refusal to grant, or delay in granting, requested time extensions, forced MM to accelerate. To prove constructive acceleration under the circumstances alleged, the contractor must establish (1) a period of excusable delay; (2) adequately supported notice to the Government of the excusable delay and request for an extension of time (unless a Government order directs acceleration without regard to any such delay); (3) the Government's failure or refusal to grant the requested extension within a reasonable time; (4) the Government's order, express or implied, that the contractor take steps to overcome the excusable delay; or complete the work at the earliest possible date; or complete the work by a given date earlier than that to which the contractor otherwise would be entitled by virtue of the excusable delay; and (5) reasonable efforts by the contractor to accelerate, which resulted in added costs. *Fermont Division, Dynamics Corp. of America,* ASBCA No. 15806, 75-1 BCA ¶ 11,139 at 52,999-53,000, *aff'd.* 216 Ct. Cl. 448 (1978).

MM has not met its burden of proof. Its first, 7-day, extension request, due to BLM's 5-1/2-day partial suspend work order, arose out of MM's violation of the State Lands and Corps in-stream fill limits. BLM was bound to stop the work and to seek amendment of the permits because it was the responsible party as the permit holder. The amount of fill placed in the stream was clearly within MM's control, even if it had misunderstood, or misread, the permits. It had not asked BLM to modify the permits at any point.

Further, the period of the partial suspend work order covered three days when MM did not work in any event—two weekend days and the Fourth of July holiday. BLM acted with great dispatch to secure the necessary permit amendments. In any case, the partial nature of the suspend work order allowed MM to work in other parts of the project (FF 59, 61, 63, 66).

MM's request for a 14-day extension beyond the contract's September 15 in-stream work closure date, due to the differing site conditions encountered, was not in BLM's control either. ODFW had chosen the period for in-stream work. The contract provided that BLM might be able to obtain earlier entry or extensions, from State Lands, in consultation with ODFW, depending upon climatic conditions and stream flows, and BLM attempted to do so. It notified MM as soon as it received the requisite State approval (FF 188-89, 191-92).

Moreover, BLM was successful in securing extra work time for MM, although it was not required to do so under the contract. MM was granted 23 days' additional time for in-stream work before the contract's July 1 start date, and an additional 14 days after its September 15, 1989, closure date, for a total of 37 extra days. MM actually substantially completed in-stream work on September 14, 1989. It's overtime increased for a while, but its overall labor hours decreased during the operative period (FF 190-95). Also, we note that the deletion of the labor-intensive boulder work (which the record reflects more than offset the time necessary to perform the work added by modification No. 5) netted MM a savings in time that it otherwise would have had to expend. Finally, we consider that our jury verdict in MM's IBCA 2893 differing site conditions appeal amply compensates MM for the extra time, and resulting monies, it expended due to those conditions.

Decision

Accordingly, IBCA 2894 and IBCA 2895 are denied.

IBCA 2697

[8] In this early appeal MM challenged the denial of its claim during performance for a 7-day extension due to BLM's partial suspend work order. MM timely completed the contract; described its extension request as moot; and subsumed the acceleration and impact aspects of IBCA 2697 into its unsuccessful appeals, IBCA 2894 and 2895. Therefore, we dismiss IBCA 2697 with prejudice.

Summary

IBCA 2890 is sustained in the amount of $37,832.40; IBCA 2891 is sustained in the amount of $13,735.66; IBCA 2892 is sustained in the amount of $4,225; IBCA 2893 is sustained in the amount of $47,427.68;

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IBCA 2894 and 2895 are denied. IBCA 2697 is dismissed with prejudice.

MM is thus entitled to a total of $103,220.74, plus interest in accordance with the CDA, 41 U.S.C. § 611.

[¶ 26,454] Neiman Sawmill, Inc.

AGBCA No. 93-196-10, October 21, 1993.

Attorney Fees and Costs Under Equal Access to Justice Act—Application Timeliness—Final Disposition.—A timber sale contractor's application for attorney fees and costs in connection with the dismissal of a government claim for refunds was timely because it was filed within 150 days of the board's decision. The Contract Disputes Act provides for appeal by an agency within 120 days from receipt of the board's decision. When neither party takes any action to interrupt the running of the CDA appeal period, the board's decision is final in 120 days and the prevailing party has an additional 30 days to file its application. The contractor's application was received by the board 135 days after the government received the decision.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Government Position.—The government's position in an appeal concerning unique issues, including minimum base rates for timber in the instance of fire loss following enhancement of value resulting from road construction, was substantially justified because it would satisfy a reasonable person and had a reasonable basis in law and fact. The case was further complicated by a contract price modification after the forest fire and by a modification increasing road work. The contractor was thus not entitled to recover attorney fees and costs under the Equal Access to Justice Act.

For the appellant: Saltman & Stevens, P.C., Washington, D.C., by Alan I. Saltman. For the government: Daniel B. Rosenbluth, Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado.

Before DOHERTY, HOURY, and GISH, Administrative Judges.

DOHERTY, Administative Judge: This is a decision on Applicant's Application for Attorney Fees and Costs in the amount of $35,468.94[1] under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Under the Act, fees and costs (up to $75 per hour)[2] may be awarded to the prevailing party when the Government's position was not substantially justified. The Government concedes that Neiman was a prevailing party. Applicant sought and recovered $70,558.97 claimed by the Government. The Government opposes the application on the grounds that the Government's position was substantially justified. The Government also questions the timeliness of the claim and the reasonableness of the fees.

The underlying appeal for which recovery of fees is sought was *Neiman Sawmill, Inc.*, AGBCA Nos. 90-203-1, 91-119-1 and 92-187-1, 93-2 BCA ¶ 25,686.[3] The appeal related to Applicant's Forest Service timber sale contract, No. 03-2530, awarded October 7, 1981. Under terms of the sale, Applicant built roads necessary to remove the purchased timber.

Applicant was compensated for the road construction with purchaser credit. Under normal circumstances, that credit could be used to offset the price of timber removed in

[1] The figure for fees and costs includes those for the underlying appeal and also for the prosecution of this action for fees. Attorney fees and costs incurred in the preparation of the EAJA application and responding to the Government's response are includible. *Fulton Hauling Corp.*, PSBCA No. 2778, 93-1 BCA ¶ 25,249; *S.T. Research Corp.*, ASBCA No. 39600, 92-3 BCA ¶ 25,160.

[2] Applicant acknowledges in the claim that the maximum attorney fee rate is limited to $75 per hour. An example of a holding of this Board to that effect is found in *Eagle Contracting, Inc.*, AGBCA No. 93-114-10, 93-3 BCA ¶ 26,049. Fees charged, exceeding $59,000, could not be fully reconciled from supporting documentation.

[3] Citation is to a ruling on Cross Motions for Partial Summary Judgment favorable to Appellant. Remaining issues were dismissed on motion of Appellant without objection by the Government in an unpublished Order of Dismissal dated February 22, 1993.

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excess of a fixed base rate. In the case decided, timber was destroyed by fire after credit had been earned and allowed but before title had transferred to Applicant. The price of the timber remaining was renegotiated to a lesser amount and road work was added without considering the effect on base rate limitations in the contract.

The Government acknowledged liability for the timber loss, but sought refund of the base rate value that could not be offset against above-base rate payments for the timber that was harvested at the new reduced rates.

As a preliminary matter, the Government asserts Applicant's claim for fees and costs is not timely. The Government argues as follows:

> 1) The applicable rules at 7 CFR, Subtitle A, Part 1, Subtitle J, Provision 1.193, *Time for filing application* states [sic] an EAJA application must be submitted "... in no case later than 30 days after final disposition of the proceeding by the Department." Final disposition is defined to include BCA decision resolving "...the merits of the proceeding." If "review["] or "reconsideration" is sought or taken of a decision, time periods shall be extended pending "final disposition" of the underlying controversy.

The Government goes on to argue the time for claiming fees is limited to 30 days from the date of the decision when no appeal is taken. The Government did not, in this case, appeal the Board's ruling.

The provision that the Government paraphrases in its reference allows filing of a claim within 30 days following final disposition and then states more completely at (b):

> For the purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Department and to the courts.

The Contract Disputes Act (CDA) provides for appeal by an agency within 120 days from receipt of a copy of the Board's decision (41 U.S.C. § 607). Board records indicate the Government received the opinion January 5, 1993. Applicant's application for attorney fees and expenses was received by the Board May 20, 1993. That is 135 days after the Government received the decision.

Where neither party takes any action to interrupt the running of the CDA appeal period, the Board's decision is final in 120 days. A prevailing appellant has an additional 30 days to file its application for attorney fees (5 U.S.C. § 504(a)(2); *J.M.T. Mach. Co. v. United States* [34 CCF ¶ 75,326], 826 F.2d 1042, 1048 (Fed. Cir. 1987); *Corban Indus., Inc.*, VABCA No. 2181E, 2559T/E, 89-2 BCA ¶ 21,677. Compare the present case with *Forest Dev., Inc.*, AGBCA No. 86-132-10, 88-3 BCA ¶ 21,123 regarding an application for fees relative to an unappealable decision of this Board under expedited procedures in which it was noted the time for application was limited to 30 days from final disposition.[4]

We find Applicant's claim for attorney fees and costs to be timely filed within the established 150-day limit.

The Government is not, however, liable for such fees and costs if its opposition to the underlying appeals was substantially justified. Relying on the case of *Pierce v. Underwood*, 487 U.S. 552, 100 S. Ct. 2541 (1988), this Board has considered the standard to mean justification to a degree that would satisfy a reasonable person and have a reasonable basis in law and fact. *Giuliani Contracting Co.*, AGBCA No. 91-166-10, 92-2 BCA ¶ 24,930. We find the Government to have met this standard.[5]

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[4] The underlying cases were dismissed by Order February 22, 1993, received by Appellant on February 23 and the Government on February 25. There followed correspondence through early March concerning whether the final dismissal was consistent with agreement reached by the parties. We need not decide the effect of such on extending the time for claims as Applicant's application was within 150 days of the Order. We note, however, all action may not extend the time for claims. *J-I-J Constr. Co.*, ENG BCA No. 4815-F, 86-3 BCA ¶ 19,126.

[5] Our decision is determined on the basis of the record, as a whole, which was made in the adversary adjudication for which fees and other expenses are sought. We have not considered factual supplemental material offered by the parties accompanying their submissions in this proceeding. 5 U.S.C. § 504(a)(1); *AST Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 42118, 93-3 BCA ¶ 25,979; *see Digital Servs. Group, Inc.*, DOT BCA No. 1817E, 93-1 BCA ¶ 25,358, in which that board distinguishes the circumstances of a case with a complete record, as found here, from one where the case was settled, limiting the record.

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The case decided was one of unsettled law involving limited precedent and requiring the Board to struggle with contract provisions dealing with minimum base rates for timber in the instance of fire loss, following enhancement of value flowing from road construction. The case was further complicated by the parties having modified the contract price following a forest fire, and again to increase road work, without raising the questions relative thereto that were then brought to the Board. The case represented issues sufficiently unique that the Government was well within the standard in testing its interpretation of the case.

DECISION

We deny the application for attorney fees and expenses. We make no finding or decision on the reasonableness of the claimed amount.

[¶ 26,455] Harney County Gypsum Company

AGBCA No. 93-190-1, October 26, 1993.

Contract Disputes, Jurisdiction—Contract as Basis for Jurisdiction—Request for Quotations.—An offeror's claim for lost profits under a request for quotations for the rental of an excavator and operator for stabilizing a fish habitat was dismissed for lack of jurisdiction because the RFQ did not create a contract, and the offeror was not a contractor under the Contract Disputes Act. The government was not obligated to issue a purchase order to the offeror, despite the offeror's submittal of the lowest quote. The government's issuance of a purchase order in response to the low quotation was an offer that the government was free to withdraw at any time until accepted. The offeror did not submit a written acceptance or furnish the excavator and operator. Its offer to begin work more than one week after the estimated starting date was a counteroffer that the government rejected. The government's withdrawal of its offer and discussions with the firm that submitted the next-low quote did not constitute a breach of contract or a convenience termination.

Awards—Existence of Contract—Estoppel.—The government was not estopped from seeking the dismissal of a claim under a request for quotations in connection with a creek rehabilitation program, despite the government's previous stipulation that an oral contract was awarded to the offeror, because the contracting officer who stipulated as to the existence of a contract was legally incorrect, and the defense of estoppel is not available to parties relying on incorrect legal advice. Although boards of contract appeals generally accept stipulations as to the facts, boards are not bound by conclusions regarding questions of law, such as the existence of a contract. Under its *de novo* review authority, the board corrected the contracting officer's erroneous conclusion that the Forest Service orally awarded a contract for the creek rehabilitation project to the offeror.

For the appellant: David B. Hydes, P.C., Canyon City, Oregon. For the government: Jeffrey K. Handy, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before EATON, GISH, and SETO, Administrative Judges.

EATON, Administrative Judge: This appeal concerns Request for Quotations (RFQ) No. 02-93-0314, which the Forest Service, U.S. Department of Agriculture, issued on October 9, 1992. The agency sought prices for rental of a "walking excavator" with operator for use in stabilizing and improving fish habitat on Fishhole Creek, within the Fremont National Forest, Oregon. The RFQ included an estimated starting date of October 23, 1992, for an estimated 140 hours of work. Time for performance was critical due to expected fall rains, falling temperatures, and State of Oregon permission to work in the stream only between October 26 and November 10, 1992.

Harney County Gypsum Company of Burns, Oregon (Appellant), provided the lowest quotation, $74 an hour; however it advised the Forest Service that its equipment would not be available until either October 30 or November 2, 1992. The Contracting Officer (CO) contacted the firm submitting the next-low quote, $78 an hour, which agreed to perform the work, complet-

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ing it in 138 1/4 hours between October 27 and November 9, 1992.

Appellant filed pre-award bid protests, first at the agency level and then with the General Accounting Office (GAO), arguing that it had an oral contract with the Forest Service. Before the GAO issued a decision, the CO agreed to settle under the regulations applicable to termination for the convenience of the Government. Appellant withdrew the bid protest and submitted a claim for $5,900 in lost profits and $500 in attorney's fees.

In a final decision dated March 4, 1993, the CO denied the $5,900 claim, stating that the Federal Acquisition Regulation (FAR), Part 49, does not allow anticipatory profits on termination claims, but granted the claim for attorney's fees. Appellant timely appealed. On September 13, 1993, the Government filed a Motion to Dismiss, or in the alternative, a Motion for Summary Judgment. Appellant opposes the Motions.

The Board dismisses the appeal, finding that under the FAR provisions applicable to small purchases, there was no contract between Appellant and the Forest Service. Appellant is not a "contractor," defined by the Contract Disputes Act as a party to a Government contract other than the Government, 41 U.S.C. § 601(4), and therefore has no standing to file a claim under the Act.

FINDINGS OF FACT

1. The Forest Service, U.S. Department of Agriculture, issued RFQ No. 02-93-0314, the Fishhole Creek Rehabilitation Project, on October 9, 1992. The agency sought hourly rates for rental of a "walking excavator" with operator for use in stabilizing and improving fish habitat on Fishhole Creek in the Bly Ranger District of the Fremont National Forest, Oregon. (Appeal File (AF) 1, 8.) According to the vicinity map, the project was to begin 10.2 miles south of Bly, Oregon, and end 1.1 miles further downstream (AF 37).

2. Quotations were due by close of business on October 20 (AF 1), with an estimated starting date of October 23, 1992. An estimated 140 hours of work were to be completed within 18 calendar days, with contract time counted from the effective date of a Notice to Proceed. Work was required to begin no later than 10 calendar days after such effective date. (AF 14.)

3. The RFQ, on Standard Form 18, stated:

> **IMPORTANT:** This is a request for information, and quotations furnished are not offers ... This request does not commit the Government to pay any costs incurred in the preparation of the submission of this quotation or to contract for supplies or services.

(AF 1.)

4. With regard to evaluation of quotations, the RFQ further stated:

> The Government will issue an order as a result of this Request for Quotations to the responsible quoter whose quote conforming to the solicitation will be most advantageous to the Government, cost or price and other factors considered.
>
> The Government may issue orders to other than the lowest quote (sic], waive minor informalities or irregularities in quotes received or elect not to award at all. If necessary, the Government may conduct discussions with any or all quoters.

(AF 5.)

5. On October 20, 1992, Appellant submitted a telephone quotation of $74 an hour, or $10,360 for the estimated 140 hours (AF 39). This was the lowest quote received by the Forest Service (CO's Statement for AF page (p.) 2). Appellant confirmed the quotation on October 21, 1992, when the CO called to set Monday, October 26, 1992, as the date for move-in and a pre-work meeting (AF 40).

6. According to Forest Service memos of telephone calls on October 23, 1992, Appellant advised both the CO and the CO's Representative (COR) that Monday, November 2, was the earliest date it would be available. Later the same day, Appellant advised the CO that equipment and an operator could be available on Friday, October 30, 1992. There are conflicting versions of the parties' subsequent discussions re proposed starting dates. According to the Forest Service memos, the COR told Appellant she had not planned to work on Friday but could be there. (AF 41, 42.) Appellant's owner-operator, however, states that he agreed to Monday for the pre-work meeting and starting date solely for the convenience of the Forest Service, which was working 4-day weeks (Affidavit of Farris Benton, Oct. 4, 1993).

7. The delay in starting was not acceptable to the Ranger District's fisheries biologist who was to serve as project manager. A forest fire had denuded slopes that drained into the stream, and log structures that were to provide siltation control needed to be placed before fall rains washed ash and soil into the stream and increased flow and depth, making placement difficult if not impossible. Falling temperatures were also a concern be-

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cause epoxy glues to be used in anchoring the log structures are not effective at less than 40 degrees Fahrenheit. In addition, because of potential damage to eggs of the brown trout, the State of Oregon had agreed to waive a prohibition against machine activity in the stream only from October 26 to November 10, 1992. (AF 47; CO's Statement for AF p. 1.)

8. The CO therefore contacted All Terrain Excavating, which had submitted the next-low quote, $78 an hour. This firm began performance on October 27 and completed work on November 9, 1992, using 138 1/4 hours. (AF 41-46, 52; CO's Statement for AF p. 2.)

9. Appellant filed an agency-level bid protest which the Forest Service denied on November 3, 1992 (AF 48; CO's Statement for AF p. 2). On November 12, 1992, Appellant protested to the GAO, alleging that the Forest Service had accepted its bid on October 21, 1992. Appellant argued that because the RFQ called for work to begin within 10 calendar days of the effective date of a Notice to Proceed, its proposed starting date of November 2, 1992, should have been acceptable, and the CO's attempt to enforce an earlier date constituted an improper change in contract terms. Appellant sought $5,180 in lost profits, plus costs and attorney's fees. (AF 48-51.)

10. On December 3, 1992, the CO advised Appellant by telephone that the Forest Service would be willing to negotiate a termination for the convenience of the Government (AF 52-54).

11. Appellant provided the CO with a one-page summary of costs allegedly incurred in preparing to perform:

Transport excavator from West of Ukiah [CA.] to Burns Shop 178 miles @ $4	$712.00
Pilot Car 178 miles @ $.90	160.20
Labor (change bucket to 1 1/2 yard bucket) Shop time 4 hours @ $38	152.00
Bid Preparation	200.00
Two trips to John Day [OR.] to consult attorney 9 hours @ $50	450.00
Miscellaneous calls, fax, meals	150.00
TOTAL	$1,824.20

(AF 55.)

12. On December 14, 1992, the CO wrote Appellant stating that he accepted Appellant's position that the Government had entered into a "verbal contract" with Appellant and had then terminated the contract. He requested a documented termination proposal, separating costs incurred in pursuing the bid protest. (AF 62.)

13. On December 22, 1992, Appellant withdrew the bid protest, which had not yet been decided, on the basis of the CO's letter. Appellant again advised the CO that it was seeking lost profits of $5,900 plus $500 in attorney's fees (AF 63, 64). The CO sought clarification in view of the claim for $1,824.20 in expenses (AF 67). Appellant responded with an offer to settle for $6,400 ($5,900 + $500) (AF 68).

14. On March 4, 1993, the CO issued a final decision finding that Appellant had done no work under the contract, which had been entered into and terminated within a 2-day period. The CO quoted the FAR, 48 CFR § 49.202, which specifically states "Anticipatory profits and consequential damages shall not be allowed" on termination claims. The CO denied the claim for $5,900, but granted $500 for attorney's fees, noting that Appellant had received legal assistance and that the amount claimed appeared reasonable. (AF 76-81.)

15. In a Notice of Appeal dated April 26, 1993, Appellant seeks $5,900 in anticipated profits or, alternatively, $1,824.20 in costs of preparation for performance. Appellant also seeks an additional $750 in attorney's fees.

16. As indicated above, the Government has now filed a Motion to Dismiss, or in the alternative, a Motion for Summary Judgment. Appellant opposes.

DISCUSSION

There is no dispute that Appellant submitted the lowest quotation for the Fishhole Creek Rehabilitation Project, and that Forest Service officials orally advised Appellant of its status (Finding of Fact (FF) 5). The

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only controverted facts in this case relate to proposed starting dates (FF 6). Interpreting these in the light most favorable to Appellant, as the non-moving party, we find that Appellant's equipment and operator would have been available on Friday, October 30, 1992, and that Appellant agreed to wait until the following Monday solely for the convenience of the Forest Service.

These actions, however, did not create a contract, or even an implied-in-fact contract. There was merely a request for prices and a discussion of Appellant's availability. *See RMTC Sys.*, AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873. When the Government acquires goods or services valued at $25,000 or less from commercial sources under the FAR provisions covering small purchases, 48 CFR § 13.000, traditional roles regarding offer and acceptance are reversed. As clearly stated on Standard Form 18, the RFQ is for information only. The FAR describes the legal effect of quotations as follows:

> (a) *A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract* (see 15.402(e)).[1] Therefore, issuance by the Government of an order for supplies or services in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract comes into being when the supplier accepts the offer.
>
> (b) When appropriate, the contracting officer may request the supplier to indicate acceptance of an order by notification to the Government, preferably in writing. In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.
>
> (c) If the Government issues an order resulting from a quotation, the Government may (by written notice to the supplier, at any time before acceptance occurs) withdraw, amend, or cancel its offer.

(48 CFR § 13.108.) (Emphasis added.)[2]

Under this regulation, the Government remained free to withdraw its offer at any time until Appellant accepted. Appellant submitted no written acceptance; all communications were by telephone (FF 5, 6). Nor did Appellant furnish the requested excavator and operator, much less proceed to the point of substantial performance. Appellant apparently moved equipment from another job near Ukiah, California, back to its place of business in Burns, Oregon (FF 11). There is, however, no evidence that Appellant transferred the excavator from Burns to the project site near Bly, Oregon, a distance of more than 180 miles.[3]

The Government, moreover, was under no obligation to issue a purchase order to Appellant merely because it submitted the lowest quote (FF 4). Appellant's offer to begin work more than a week after the estimated starting date of October 23, 1992, was at best a counteroffer that the Government rejected. *Oak Ridge Precision Indus., Inc.*, EBCA No. 330-10-84, 85-2 BCA ¶ 18,035. The Government's withdrawal of the offer and discussions with the firm submitting the next-low quote therefore constituted neither a breach of contract nor a termination for the convenience of the Government.

In responding to the Government's Motions, Appellant asserts that the issue of whether a contract was formed is not even before the Board. "[T]he Government is now collaterally estopped from making this argument since it has already stipulated that a contract was awarded and formed in the GAO protest." As a result of this position, Appellant concludes, the protest was resolved as moot.[4]

The defense of estoppel is generally not available to parties relying on incorrect legal advice from Government officials. Considering the clear import of the FAR's small purchase procedures, the CO in this case was

[1] 48 CFR § 15.402(e) similarly states that a quotation received in response to an RFQ is not an offer, cannot be accepted by the Government to form a binding contract, and is informational in character.

[2] The Board called the attention of counsel for both parties to the FAR small purchase procedures during a telephone conference call on August 19, 1993. By letter dated August 27, 1993, counsel advised the Board that Appellant nevertheless wished to proceed with the appeal. (Correspondence File.)

[3] Rand McNally Road Atlas, 69th Ed. (1993).

[4] Appellant withdrew the protest prior to issuance of a GAO decision. Had the case been decided, there is no doubt the Comptroller General would also have found that no contract existed between Appellant and the Forest Service. *See Fed. Acquisition Management Training Serv.*, B-248171, B-248873, 92-2 CPD ¶ 214; *Data Vault Corp.*, B-248664, 92-2 CPD ¶ 166.

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legally incorrect in agreeing that an oral contract had been awarded and could be terminated for the convenience of the Government. We reject what is essentially the same argument, *i.e.,* that the CO stipulated a contract had been awarded to Appellant. The Board's review of CO decisions is *de novo;* a CO's findings of fact are not binding in any subsequent proceeding. 41 U.S.C. § 605(a); *Assurance Co. v. United States* [33 CCF ¶ 75,181], 813 F.2d 1202 (Fed. Cir. 1987). More importantly, while the Board generally accepts stipulations of the parties as to the facts, whether a contract came into being is a question of law, and the Board is not bound by the conclusions of the parties. *Federal Data Corp.,* GSBCA No. 8488-P, 1986 BPD ¶ 91.

Pursuant to our *de novo* review authority, we correct the CO's erroneous conclusion that the Forest Service orally awarded a contract for the Fishhole Creek Rehabilitation Project to Appellant. *Cf. Sefco Constructors,* VABCA No. 2747 *et al.,* 93-1 BCA ¶ 25,458 (CO erred in compensating contractor for supervisory labor expenses; Board corrects by disallowing the expenses). Appellant is not a "contractor" within the meaning of the Contract Disputes Act, 41 U.S.C. § 601(4); the CO's final decision on its claim was therefore a nullity; and we have no jurisdiction over an appeal from that decision. We do not reach Appellant's claims for termination costs and additional attorney's fees.

RULING

The appeal is dismissed for lack of jurisdiction.

[¶ 26,456] Buse Timber & Sales, Inc.

AGBCA Nos. 90-168-1, 90-200-1, October 29, 1993. Contract No. 069939.

Sales of Government Property—Timber Sales—Vandalism.—A timber sale contractor's timber-value loss recovery of the costs incurred in dealing with timber that was damaged by spikes placed by ecoterrorist vandals was not limited to the actual loss of volume, because the entire sale unit was affected by the spiking. The contractor's timber-value loss recovery claim included damages and downtime at its sawmill, the cost of labor and equipment for sorting logs in its log yard, and an administration cost consisting of wages and travel. The government did not show that the contractor failed to mitigate damages.

Sales of Government Property—Timber Sales—Timeliness of Claims.—A timber sale contractor's claim for the loss of volume resulting from tree spiking by ecoterrorist vandals was denied as untimely filed because the contractor failed to file its claim within 60 days of written notice that the sale was closed. The contractor sought to avoid the contract's time restrictions by bifurcating its claim into the previously submitted initial portion and a subsequent additional portion. However, the contractor's second submission was separate and distinct from the first and required a contracting officer's decision to determine its validity.

For the appellant: Saltman & Stevens, P.C., Washington, D.C., by Alan I. Saltman. For the government: Arno Reifenberg, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before GISH, HOURY, and EATON, Administrative Judges.

GISH, Administrative Judge: These appeals arose out of a timber sale between the Forest Service (FS), U.S. Department of Agriculture, and Buse Timber & Sales, Inc. (Appellant). The sale was awarded to Appellant on May 5, 1988, and was completed in a satisfactory manner on May 19, 1989. The sale is identified as contract No. 069939 and called the Alpine II Buyout.

On September 30, 1988, after award but before all the timber had been removed from the sale area, Appellant discovered metal spikes in some of the trees remaining to be cut. These spikes appear to have been placed by vandals or what is described as "ecoterrorism," with the intent to disrupt timber harvesting in the area. Appellant submitted a claim (AGBCA No. 90-168-1) in the amount of $12,231.08 for costs incurred due to the spiking in the sale area. The Contracting Officer (CO) initially denied the claim in its entirety, but in a written decision dated December 19, 1989, reconsidered

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and allowed $750 as an offer of settlement. This offer was rejected by Appellant, who appealed in a timely manner to the Board. By letter dated May 7, 1990, Appellant submitted another claim (AGBCA No. 90-200-1) to the CO in the amount of $3,749.76 for the loss of volume in logs that were spiked. The CO denied the claim on the basis that it had not been timely filed within the 60 days allowed by the contract for filing claims. Appellant timely appealed this decision to the Board.

The parties waived a hearing, submitted a joint statement of facts and filed briefs with attached declarations as agreed. The record consists of the Joint Statement of Facts, the declarations, and the Rule 4 Appeal File. The Board has jurisdiction under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. § 601 *et seq.*).

FINDINGS OF FACT

Findings 1 through 21 are quoted directly from the parties' Joint Statement of Facts (JSF), which we adopt:

1. On May 19, 1988, the FS awarded the Alpine II Buyout timber sale, contract No. 069939, on the Skykomish Ranger District of the Mt. Baker-Snoqualmie National Forest, to Buse Timber & Sales, Inc. (Buse).

2. On September 30, 1988, after contract award, Buse discovered metal spikes in some of the trees remaining to be harvested on the sale area. The spiking occurred after contract award but before Buse removed the timber from the sale area.

3. Buse immediately informed the FS of the spiking.

4. Contract provision B8.11 specifies that title to the timber remains in the FS until the timber has been cut, scaled, removed from the sale area, and paid for by the timber purchaser.

5. At the time of the spiking, and of the damage caused thereby, and thus at the time of the timber value loss, the FS held title to the timber.

6. The damage to the timber was not caused by any fault or negligence on the part of Buse.

7. Upon discovering the spikes, Buse undertook special efforts to ensure the safe removal and processing of the spiked logs. Buse marked the logs remaining on the sale area so that it could segregate them from other logs at its mill yard.

8. Some logs from the area that was spiked had already been removed by Buse to its mill yard when the spiking was discovered. As a result of its discovery of the spiking, Buse had to separate out with heavy equipment the logs which it had previously harvested from the Alpine II sale areas so that it could manually review those logs, and the marked logs, with metal detectors.

9. Buse incurred costs for labor and equipment in the amount of $8,240.35 in order to perform these segregation and metal detection activities.

10. Fifty-six logs, each approximately 24 inches by 8 feet, were spiked.

11. The spikes were located approximately 5 feet from the butt of each log.

12. In order to remove the spikes, Buse made a V-cut in the center of each spiked log. This resulted in a loss of approximately 6 feet of lumber on one-half of each spiked log which Buse calculates as a loss of an average 124 board feet of lumber per log.

13. As a result of the presence of undetected spikes in the logs it processed through its mill, Buse's saw blades were damaged. This resulted in downtime of Buse's sawmill and excess labor costs in the amount of $3,701.73.

14. On June 19, 1989, Buse filed the initial portion of its claim with the contracting officer in the amount of $12,231.08. [Appellant's claim summary indicates this amount is composed of $3,701.73 from sawmill repairs and downtime, $8,240.35 for labor and equipment cost to sort the logs in the log yard, and $289 administrative costs (Appeal File (AF) pages (pp.) 4, 5).]

15. On July 31, 1989, the CO denied Buse's claim.

16. By letter dated December 4, 1989, the CO reconsidered his July 31, 1989 decision and again denied Buse's June 19, 1989 claim. In this letter, however, the CO proposed to settle the matter Buse [sic] for $750.

17. By letter dated December 8, 1989, Buse rejected the CO's settlement offer.

18. By letter dated December 19, 1989, the CO granted $750 of the $12,231.08 claimed by Buse and denied the rest.

19. By notice of appeal dated March 19, 1990, Buse appealed from the CO's final decision to this Board. The appeal was docketed as AGBCA No. 90-168-1.

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20. By letter dated May 7, 1990, Buse submitted the additional portion of its claim to the CO in the amount of $3,749.76.

21. By letter dated May 18, 1990, the CO declined to consider Buse's claim of May 18, 1990 on the grounds that it was untimely.

22. The contract contained the following provisions:

B8.11 Title Passage. All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been cut, Scaled, removed from Sale Area or other authorized cutting area and paid for, at which time title shall vest in Purchaser.

* * * * *

B8.12 Liability for Loss. If Included Timber is destroyed or damaged by fire, wind, flood, insects, disease or *similar cause*, the party holding title shall bear the timber-value loss resulting from such destruction or damage, except that such losses after removal of timber from Sale Area, but before scaling, shall be borne by Purchaser at Current Contract Rates and Required Deposits. There shall be no obligation for Forest Service to supply, or for Purchaser to accept and pay for, other timber in lieu of that destroyed or damaged. This subsection shall not be construed to relieve either party of liability for negligence.

(AF 40.) (Emphasis added.)

23. Upon discovery of the spikes, pursuant to FS policy, Appellant was given the option by the FS to leave the spiked timber, accept FS help in locating the spiked trees/logs or remove it at Buse's expense (AF 110). The Timber Sale Officer indicated that if the effort to find the spikes had been conducted in the sale unit it would have been a simpler and less costly effort than doing it in the mill yard (Declaration of Glen R. Katzenberger dated October 26, 1992).

24. Contract provision C9.21—Submission of Claims requires claims to be filed with the CO not later than 60 days after receipt of FS written notice that the sale is closed (AF 106). Appellant received written notice that the sale was closed and advice that any claim should be filed within 60 days on May 22, 1989 (AF 121).

DISCUSSION

Although some of the spiked logs were discovered at Appellant's mill (Finding of Fact (FF) 13), *i.e.*, after title passed, Appellant argues long and hard that so long as title to the timber remained in the FS when the damage or destruction occurred, the timber-value loss must be borne by the FS. It does not appear that the FS is in serious disagreement. Contract provision B8.12 is a risk allocation clause that places the risk of loss of the subject matter (timber-value) on the party holding title, except that such loss occurring after removal from the sale area and before scaling is to be borne by the purchaser at current contract rates plus deposits. We agree with Appellant that the location of the timber at the time of loss or damage, not the location when the damage is discovered, is determinative. Thus the loss in this instance is to be borne by the FS. (FF 22.) Determining the party to bear the loss is not the problem. The difficulty in this appeal is in determining what is or is not timber-value loss.

In *Ken Rogge Lumber Co.*, AGBCA No. 84-145-3, 84-2 BCA ¶ 17,381, we found that theft was a "similar cause" within provision B8.12 of the contract. In this case we find that vandalism is also a "similar cause" in that it is without the fault and beyond the control of either party. Accordingly, Appellant is entitled to the loss of value directly resulting from the spiking of the trees. If we were to apply the *Rogge* case narrowly to the present facts, Appellant would be limited to recovery of only the bid price times the actual loss of volume. Appellant did not claim this in its June 19, 1989, claim.

Appellant's June 19, 1989, claim is for damages and downtime at Appellant's sawmill, $3,701.73; for labor and equipment sorting logs in its log yard, $8,240.35; and an administration cost consisting of wages and travel, $289, a total of $12,231.08.

We conclude that when, as here, an entire sale unit is affected under the terms of B8.12, the reference to "timber-value loss" within the contract could include more than an actual loss of volume. Ideally, a timber-value loss would be reflected in the difference between a contract price without spikes and a contract price with spikes. We do not, however, have any record as to what that difference might be.

Under the somewhat unique facts of this case the costs claimed by Appellant appear to be comparable to increased costs to harvest the timber. These costs would be reflected in a purchaser's bid for the timber if the spiking had been known at that time. We do not hold that a purchaser may treat the problem when it is discovered later in any way it chooses. It is under the duty to

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mitigate damages. The FS asserts that Appellant's dealing with the problem in the field might have resulted in lower costs. This would not, however, have affected the logs already moved into Appellant's mill yard prior to the discovery of the spiking. There is nothing in the record as to any less costly method to handle the situation other than a FS policy statement. FS policy, however, is not a part of the contract, and the Timber Sale Officer's affidavit indicating that not a great deal was required at the unit to identify the trees or logs that were spiked was not persuasive. Nor does it deal with the logs already at the mill. (FF 23.) The FS has not shown that Appellant failed to mitigate damages. We conclude in this instance that Appellant is entitled to the $12,231.08 for costs incurred in dealing with the spiked timber.

Appellant's $3,749.76 claim is for the loss of volume (124 board feet per log, 56 logs times 124 = 6,944 board feet). The CO declined to consider this claim on the basis that the contract required all claims to be filed within 60 days of written notice that the sale was closed. Appellant received such notice on May 22, 1989. The claim, however, is dated May 7, 1990.

Appellant seeks to avoid the contract time restrictions on presentation of claims by referring to its June 19, 1989, claim as the "initial" portion of its claim and the May 7, 1990, claim as the "additional" portion of its claim. The claim may not be bifurcated in such a manner. The claim submitted in 1989 neither mentioned nor gave any suggestion that an additional claim was to follow. A claim must state a sum certain, be the subject of a CO's decision, and involve the same operative facts. Appellant's second submission was separate and distinct from the first and required the CO to consider different operative facts to determine that claim's validity. We find the 1990 claim falls within the restrictions of the contract provisions regarding timely presentation of claims to the CO (FF 22). Such restrictions are valid and have been enforced by this Board and the U.S. Court of Appeals for the Federal Circuit. *Do-Well Mach. Shop, Inc., v. United States* [35 CCF ¶ 75,633], 870 F.2d 637, (Fed. Cir. 1989); *William E. Swart, dba TDS Logging,* AGBCA No. 91-111-1, 92-1 BCA ¶ 24,510; *Malhuer Lumber Co.,* AGBCA No. 87-398-3, 91-1 BCA ¶ 23,545; *P & M Cedar Prod.,* AGBCA 85-276-3, 86-2 BCA ¶ 18,947.

Although we need not decide the damages for the loss of volume claim we note Appellant has claimed lumber product value for sales in Japan, which is neither a loss in scale volume nor a measure of timber-value loss. Moreover, Appellant has not shown that the amount claimed as a loss of timber volume would have been a deduction from the scaling cylinder at the time of scaling if the spiking had been known at that time.

This claim is denied as untimely filed.

DECISION

Appeal No. AGBCA 90-168-1 is allowed in the amount of $12,231.08.

Appeal No. AGBCA 90-200-1 is denied.

[¶ 26,457] Essex Electro Engineers, Inc.

ASBCA No. 46047, October 21, 1993. Contract No. DAAK70-87-C-0036.

Payments, Prompt—Interest—Effect of Settlement Agreement.—Although the government was delayed in obtaining funding to pay a contractor the agreed amount for the settlement of a convenience termination claim, the contractor was not entitled to receive Prompt Payment interest prior to the execution of the contract modification incorporating the settlement agreement, because the agreement made payment dependent on the execution of the modification. The parties had negotiated and reached the settlement amount on the premise that payment would be made by a certain date, but the government was delayed in obtaining the needed funding. The contractor contended that the PPA interest penalty accrued while the modification awaited execution. However, the board, having noted that there was no date recited in the agreement for payment, concluded that the payment of PPA interest was contingent upon the execution of the modification. This conclusion was consistent with the requirements under the Termination for Convenience clause.

For the appellant: Israel and Raley, Washington, D.C., by Charles E. Raley. For the government: Col. Riggs L. Wilks, Jr., JAGC., Chief Trial Attorney, and Maj. Terry L. Elling, JAGC, Trial Attorney.

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Before BURG and RUBERRY, Administrative Judges.

BURG, Administrative Judge: Appellant filed a timely appeal from the contracting officer's decision denying its claim for Prompt Payment Act (PPA) interest for alleged late payment of the amount which the parties had agreed by written settlement agreement appellant should receive in settlement of two appeals pending before this Board. Since the amount involved in this appeal is less than $50,000, appellant has elected to have this appeal processed on an accelerated basis pursuant to Board Rule 12.3. The Government filed a Motion for Summary Judgment on the basis that appellant's invoice submitted prior to issuance of the unilateral contract modification was not a "proper invoice" for PPA interest purposes and, since payment was made before receipt of another invoice, no PPA interest is due. Appellant opposes the Government's Motion for Summary Judgment and has filed a Cross Motion for Summary Judgment. Only entitlement is before the Board.

FINDINGS OF FACT

On 3 December 1992 the parties agreed to a convenience termination settlement of two appeals then pending before this Board, ASBCA No. 43396, a partial default termination of the contract, and ASBCA No. 44184, a deemed denial of a convenience termination settlement claim. The settlement amount of $3,247,563 included an amount for Contract Disputes Act (CDA) interest calculated to 31 December 1992. The parties finalized the written agreement on 14 December 1992. It recited, in pertinent part, the following:

> ARTICLE I. The Government agrees to pay the Contractor the sum of three million two hundred and forty-seven thousand and five hundred and sixty-three dollars ($3,247,563.00) in full satisfaction of the Contractor's claims under ASBCA Nos. 43396 and 44184 and in full satisfaction of any and all remaining matters arising under Contract No. DAAK70-87-C-0036 within 30 days [sic] after the execution of the Contract Modification which incorporates this Agreement.

(R4, tab 1) The crossed-out phrase in Article I of the settlement agreement was the last revision made to the agreement and was made by striking out the words "within 30 days" and initialling in the margin. Appellant signed the settlement agreement on 14 December 1992 and forwarded it to the contracting officer on that date along with its final Invoice in the amount of $3,247,563.

The parties understood and agreed that the modification would be promptly issued and that PPA interest penalty on the amount due under the settlement agreement would commence if the payment was not timely made (Complaint and Answer ¶ 5). The letter of transmittal, dated 14 December 1992, stated:

> We understand that, immediately upon receipt, you will also sign and date the enclosure, sign a unilateral Modification, and submit the enclosed Invoice for a prompt payment.

(R4, tab 10) The contracting officer signed the settlement agreement on 17 December 1992 and returned it to appellant to initial the revision deleting the crossed-out phrase, *supra*. Appellant initialed this revision and returned the fully executed agreement along with a "Duplicate" of its 14 December 1992 invoice and a letter of transmittal concerning same on 18 December 1992. Since there were insufficient funds remaining in the contract to pay the amount due under the settlement agreement, on 16 December 1992 the contracting officer requested funds at the earliest possible date, preferably by close of business on 23 December 1992, making it quite clear that it was important to provide funding promptly and indicating that the Government might be required to pay interest if payment was delayed. (R4(b), tab 11)

On 10 February 1993, in response to a request from the Government trial attorney, appellant submitted a Certificate of Current Cost and Pricing Data, protesting that it was not required when there was a "ligitation settlement." Because of an unexplained delay in obtaining funds, the contracting officer did not issue a unilateral modification incorporating the settlement agreement until 19 February 1993. She then immediately submitted appellant's final invoice for payment. Due to a posting error by the Government against this contract, there again were insufficient funds to pay the total amount set forth in the settlement agreement. On 11 March 1993 the Government issued a check for partial payment in the amount of $3,216,596.55, leaving a balance due under the agreement of $30,966.45. Appellant received the partial payment on 22 March 1993. No PPA interest penalty was included in the payment. The remaining $30,966.45 was paid appellant by check dated 6 May 1993. Appellant submitted no final invoice after the 18 December 1992 submittal.

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The PPA was enacted in 1982 and amended in 1988. The parties entered into the instant contract in July 1987, prior to the effective date of the PPA Amendment of 1988. The Director of the Office of Management and Budget issued implementing regulations to the original PPA, OMB Circular A-125 (Circular A-125), dated 25 August 1982.* Pertinent portions are set forth below:

3. *Policy.* Agencies will make payments as close as possible to, but not later than, the due date .... Payment will be based on receipt of proper invoices and satisfactory performance of contract terms.... Agencies will pay interest penalties ... without the need for business concerns requesting them ....

4. *Definitions.* For purposes of this circular, the following definitions apply:

* * * * *

i. *Due date*—the date on which Federal payment should be made. Determination of such dates is discussed in section 7 of this circular.

* * * * *

m. *Proper invoice*—a bill or written request for payment provided by a business concern for property or services rendered. A proper invoice must meet the requirements of Section 6.b. of this Circular.

* * * * *

6. *Payment Standards.* Payments will be made as close as possible to, but not later than, the due date following receipt of a proper invoice and acceptance of the property or services consistent with Treasury regulations (I Treasury Financial Manual 6-8040.20). To establish adequate documentation to support payments of interest penalties, the following information must be included in contract, invoices, and receiving reports.

* * * * *

b. A proper invoice must include:

—Name of the business concern and invoice date.

—Contract number, or other authorization for delivery of property or services.

—Description, price, and quantity of property and services actually delivered or rendered.

—Shipping and payment terms.

—Other substantiating documentation or information as required by the contract.

—Name where practicable, title, phone number, and complete mailing address of responsible official to whom payment is sent.

Invoices received by the designated billing office will be stamped or otherwise annotated with the date received in that office. Notice of apparent error, defect, or impropriety in an invoice will be given to a business concern within 15 days of receipt of an invoice ... and suitably documented.

* * * * *

7. *Determining Due Dates.* Payment will be made as close as possible to, but not later than, the thirtieth day after receipt of an invoice as defined in Section 4.n. of this circular, except as follows:

—In those limited circumstances when a specific payment date is provided for in the contract, payment will be made as close as possible to, but not later than, that date.

* * * * *

8. *Payment of Interest Penalty.*

a. An interest penalty will be paid automatically when due without regard to whether the business concern has requested payment when all of the following conditions are met:

—There is a contract or purchase order with a business concern.

—Acceptance of property or services has occurred and there is no disagreement over quantity, quality, or other contract provisions.

—A proper invoice has been received ... or the agency fails to give notice that the invoice is not proper within 15 days of receipt of an invoice ....

—Payment is made to the business concern more than 15 days after the due date ....

* * * * *

c. Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of a contract .... Claims concerning disputes, and any inter-

* Appellant has based its arguments on the provisions of the PPA as amended in 1988 and regulations and amendment to A-125 as a result of such amendments. Regulations issued following enactment of the 1988 Amendments to the PPA would not be applicable to this appeal since the contract was awarded prior to the effective date of those amendments.

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est that may be payable with respect to the period while the dispute is being settled will be resolved in accordance with the provisions in the Contract Disputes Act of 1978 (41 U.S.C. § § 601 *et seq.*).

9. *Calculation of Interest Penalties.* Whenever a proper invoice ... is paid after the due date plus 15 days ... interest will be included automatically with the payment of the interest rate applicable on the payment date without regard to whether the business concern has requested payment....

* * * * *

—When an agency fails to make notification of an improper invoice within 15 days ..., the number of days allowed for payment of the corrected, proper invoice will be reduced by the number of days between the fifteenth day and the day notification was transmitted to the business concern. Calculation of interest penalties, if any, will be based on an adjusted due date reflecting the reduced number of days allowable for payment.

Interest penalties under the Prompt Payment Act will not continue to accrue: (1) After the filing of a claim for such penalties under the Contract Disputes Act of 1978, or (2) for more than one year. Interest penalties of less than one dollar need not be paid.

No Prompt Payment clause appeared in the FAR until after this contract was executed. The applicable provision would have been the Invoice clause (52.232-7000) which was required pursuant to DOD FAR Supplement 33.070. It provided that

33.070 Contract Clause.

(a) The Prompt Payment Act (Public Law 97-177) provides that a contractor will be paid interest penalties when certain payments by the Government are not made on time or when discounts are taken for payments that are not made within the discount period. The act applies to payments made on contracts awarded on or after 1 October 1982. Under the act, interest penalties are due if the contractor is not paid for delivery of complete items of supplies within 15 days after the required payment date .... Claims for interest penalties not paid may be made under the Contract Disputes Act.

(b) The required payment date for purposes of the Prompt Payment Act is the date on which payment is due under the terms of the contract or, if a specific date on which payment is due is not established by the contract, 30 days after the later of the date on which a proper invoice is received in the designated paying office or the date on which supplies or services are accepted....

(c) Interest penalties begin to accrue on the day after the required payment date and end on the date on which payment of the amount due is made. Interest penalties do not continue to accrue under the Prompt Payment Act after the filing of a claim for such penalties under the Contract Disputes Act or for more than one year. Interest penalties also do not accrue under the Prompt Payment Act when payment is not made within the prescribed period after the required payment date because of a dispute over the amount of the payment or other allegations concerning compliance with the contract.

The Invoice clause provided the following:

INVOICES (OCT 1982)

(a) An invoice is a written request for payment under the contract for supplies delivered or for services rendered. In order to be proper, an invoice must include as applicable the following:

(1) invoice date;

(2) name of contractor;

(3) contract number (including order number, if any), contract line item number, contract description of supplies or services, quantity, contract unit of measure and unit price, and extended total;

(4) shipment number and date of shipment (bill of lading number and weight of shipment will be shown for shipments on Government bills of lading);

(5) name and address to which payment is to be sent (which must be the same as that in the contract or on a proper notice of assignment);

(6) name (where practicable), title, phone number and mailing address of person to be notified in event of a defective invoice; and

(7) any other inforamtion [sic] or documentation required by other provisions of the contract (such as evidence of shipment).

(b) For purposes of determining if interest begins to accrue under the Prompt Payment Act (Public Law 97-177):

(1) a proper invoice will be deemed to have been received when it is received by the office designated in the contract for receipt of invoices and acceptance of the

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supplies delivered or services rendered has occurred;

(2) payment shall be considered made on the date on which a check for such payment is dated;

(3) payment terms (e.g., "net 20") offered by the Contractor will not be deemed a "required payment date;" and

(4) the following periods of time will not be included

(i) after receipt of an improper invoice and prior to notice of any defect or impropriety, but not to exceed 15 days (or any lesser period established by this contract); and

(ii) between the date of a notice of any defect or impropriety and the date a proper invoice is received. When the notice is in writing, it shall be considered made on the date shown on the notice.

Appellant's final invoice complied with the requirements of the Invoice clause, *supra*. In her decision of 30 April 1993, the contracting officer determined that the invoice submitted by appellant on 14 December 1992 and resubmitted on 18 December 1992 did not become a "proper invoice" until the contract modification of 19 February 1993 incorporating the settlement agreement. It was not until briefing in this appeal that the Government raised the issue that no "proper invoice" was ever submitted by appellant since no invoice was submitted after the contract modification was issued.

On 29 March 1993 appellant filed a claim for PPA interest penalty on $3,216,596.55 from 16 January 1993 (30 days after execution of the settlement agreement) to 11 March 1993 and on $30,966.45 to the date of the claim, 29 March 1993. Appellant also sought an additional $5,000 PPA penalty because the interest penalty claimed in connection with the partial payment was not paid within 10 days of the partial payment. By final decision, dated 30 April 1993, the contracting officer denied appellant's claim for PPA interest penalty and for the additional $5,000 penalty on the $3,216,596.55 since it was paid within 30 days of the execution of the contract modification, 19 February 1993, upon which date, in the contracting officer's opinion, appellant's invoice became a "proper invoice." The contracting officer's decision also concluded that PPA interest penalty was due on $30,966.45 from 22 March 1993 until paid. Appellant filed a timely appeal seeking PPA interest penalty on the $3,216,596.55 from 16 January 1993 to 11 March 1993 and on the unpaid balance until 29 March 1993 and CDA interest thereafter and for payment of a $5,000 PPA penalty. The contract is subject to both the PPA and the CDA.

One of the factors which delayed resolution of the settlement agreement between 3 and 14 December 1992 was concern of appellant's counsel that relating the payment of interest to the execution of the contract modification would permit the contracting officer to control when any PPA interest penalty would begin (R4(b), tab 7). Affidavits by appellant's counsel submitted with its Cross Motion for Summary Judgment state (1) that language concerning interest if payment was not received by 31 December 1992 or shortly thereafter was causing difficulty in drafting the settlement agreement and was eliminated from the agreement because of representation by Government counsel that PPA interest penalty would apply if payment was not received by 31 December 1992 or shortly thereafter, and (2) that Government counsel acknowledged in a telephone call from appellant's counsel in February 1993 that interest was accruing, that the Government was not "playing games" and, should the agency refuse to pay PPA interest penalty, he would not support the agency in any appeal that appellant was required to file. In the reply to appellant's cross motion, Government counsel noted in a footnote that Government representatives had no intention of behaving in other than an honorable manner and that any statements by counsel concerning accruing of interest penalty were in the mistaken belief that the contract modification had been executed and that respondent "regrets any confusion this caused on Appellant's part, but denies that the delay in executing the modification can now serve as a basis for Government liability."

DECISION

We grant summary judgment when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. No material facts are in dispute in this appeal. The question which must be decided is when payment was due under the facts here present. Appellant argues that this was within 30 days following the effective date of the settlement agreement by the parties (16 January 1993) which was after the date of submittal of its final invoice based on the settlement agreement. The Government argues that appellant never submitted a "proper invoice" since no invoice was submitted after execution of the contract modi-

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fication and that the contracting officer's decision that PPA interest penalty applied to the $30,966.45 was in error since appellant never submitted a "proper invoice" as defined by the regulations and OMB Circular A-125 implementing the PPA. Alternatively, the Government argues that, should we conclude a proper invoice was filed, the earliest payment became due was 30 days after issuance of the contract modification incorporating the settlement agreement, and that, since payment of $3,216,596.55 occurred within that 30 days, any PPA interest penalty would only apply to the $30,966.45.

It is clear that the parties negotiated and reached the settlement amount on the premise that payment would be made by 31 December 1992 or shortly thereafter. The primary question which we must resolve is whether the delay in obtaining proper funding to pay the agreed amount extended the permissible date of payment beyond that contemplated by the parties. We have set forth in our findings those portions of the applicable Circular A-125 and clause which we feel pertinent to our decision. The parties argued the merits of this appeal based on the PPA as amended in 1988 and the OMB Circular A-125 issued implementing the amended Act. Since this contract was executed prior to the effective date of the amended PPA and the implementing regulations, our decision is based on the statute and regulations in effect at the time the contract was executed, namely, the 1982 PPA and Revised OMB Circular A-125 (FR Doc. 87-13252 filed 6-8-87).

The language of the settlement agreement was negotiated between the parties and could have been more specific. The critical language is that found in Article I of the settlement agreement, read after the elimination of the phrase "within 30 days" so it read as follows:

> The Government agrees to pay the Contractor ... in full satisfaction of the Contractor's claims under ASBCA Nos. 43396 and 44184 and in full satisfaction of any and all remaining matters arising under Contract No. DAAK70-87-C-0036 *after the execution of the Contract Modification which incorporates this Agreement.* [Emphasis added]

The settlement agreement did not recite the date for payment. It did make payment dependent on the execution of the contract modification incorporating the agreement. That event occurred on 19 February 1993. Appellant submitted its final invoice on 14 December 1992 and resubmitted it with the settlement agreement on 18 December 1992. It was not notified that its final invoice was not proper within the fifteen days after receipt required by Circular A-125. Not until the Government's Motion for Summary Judgment, long after payment has been made, was appellant's invoice challenged as not being a "proper invoice" because it was submitted prior to the execution of the contract modification. In our view appellant's final invoice met all the requirements of the Invoice clause, *supra,* and we have so found. This was also the view of the contracting officer as recited in her decision denying appellant's request for interest penalty where she concluded that appellant's invoice became a "proper invoice" for payment upon the execution of the contract modification. To hold otherwise would put form over substance.

Since the earliest indication appellant's invoice was not a "proper invoice" at the time it was submitted was the issuance of the contracting officer's decision on 30 April 1993, this was well after the 15-day requirement for notification of improper invoice established by Circular A-125. Under Paragraph 9 of A-125 the number of days allowed for payment must be reduced by the number of days between the fifteenth day after submittal of the invoice, 18 December 1992, and the day notification was transmitted to appellant, 30 April 1993. *Cf. Bruce-Anderson Co., Inc.,* ASBCA No. 34489, 88-1 BCA ¶ 20,355. Since this period was in excess of the 45 days permitted for payment under the 1982 PPA, we conclude that payment became due immediately upon execution of the contract modification incorporating the settlement agreement, 19 February 1993.

In reaching our conclusion we have considered various contract clauses and provisions of the Federal Acquisition Regulation (FAR) not discussed by the parties but which bear on our result, some of which we indicate below. Since the settlement reached by the parties was a termination for convenience the various requirements under the Termination for Convenience clause and regulations pertaining to a termination for convenience are relevant. These include (1) the FAR 49.001 definition of "Settlement agreement" which requires a "written agreement in the form of an amendment to a contract"; (2) FAR 49.109-1 requiring execution of a termination settlement by the contractor and the termination contracting officer (TCO) on Standard Form 30; (3) FAR

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49.112-2 requiring a contractor to submit a voucher or invoice after execution of a settlement agreement; (4) Subparagraph (e) of the Termination for Convenience clause, FAR 52.249-2, requiring the contract to be amended and the contractor paid the agreed amount; (5) the requirement for a Certificate of Current Cost of Pricing Data required by FAR 15.804-4(h); and (6) FAR 43.103 and 301 which require that SF 30 shall be used to reflect supplemental agreements. The Payment clause (FAR 52.232-1) which requires the Government to pay upon submittal of a proper invoice the *price stipulated in the contract* also required the contract to be amended to reflect the new contract price before payment could be made. That the parties may have intended a different result does not permit us to ignore these various requirements or to reform the contract to reflect this mistake in law. The settlement agreement could have been prepared to provide for the contingency of delay in issuing the contract modification on SF 30. It did not do so.

The Government's Motion for Summary Judgment is denied. Appellant's Cross Motion for Summary Judgment is granted in part and denied in part. Appellant is entitled to PPA interest penalty on $3,216,596.55 from 20 February 1993 until payment was made on 11 March 1993 and on the remaining unpaid balance of $30,966.45 until receipt by the contracting officer of appellant's claim of 29 March 1993. Thereafter, CDA interest is due on the unpaid balance until date of payment, 6 May 1993, and on the entire unpaid PPA interest penalty until paid. Since, as previously noted, the 1987 contract involved in this appeal was subject to the 1982 PPA and not to the PPA as amended in 1988, appellant is not entitled to the $5,000 penalty for the Government's failure to make timely payment.

The appeal is sustained to the extent indicated above.

[¶ 26,458] Eurostyle Incorporated

ASBCA No. 45934, October 20, 1993. Contract No. DMA700-91-C-0032.

Contract Disputes, Claims—Nonmonetary Claim—Incorporation of Monetary Claim.—A contractor's claim for a time extension did not assert a demand for money, even though the contractor contended that the claim for the time extension incorporated by reference prior correspondence sent to the contracting officer that set forth the amount of the monetary demand, because the claim did not specifically incorporate any monetary claims. The fact that the claim was certified did not transform it into a claim for the payment of money.

Contract Disputes, Certification—Adequacy—Correction of Defect.—A contractor's letter that submitted additional documentation in support of an earlier claim for a time extension did not serve as a valid monetary claim, because the contractor did not include any certification with the letter, a defect that could not be corrected under the Federal Courts Administration Act of 1992. Although the Federal Courts Administration Act amended the certification requirements of the CDA so that a certification defect does not act to deprive a court or a board of contract appeals of jurisdiction, the board concluded that the complete absence of a certification was a defect that could not be corrected under the Act. A claim submitted to a contracting officer without a certification renders the claim invalid and precludes the board from exercising jurisdiction.

For the appellant: Lloyd Pooker, Vice President. For the government: Larry J. Olson, Assistant General Counsel, Defense Mapping Agency, St. Louis, Missouri.

Before RUBERRY, RIISMANDEL, and TING, Administrative Judges.

RUBERRY, Administrative Judge: This appeal arises under a fixed-price contract to renovate and repair a dining hall facility at the Defense Mapping Agency Aerospace Center in St. Louis, Missouri. Appellant timely appealed from a final decision of the contracting officer denying appellant's request for an extension of time to perform and assessing liquidated damages. The Government moves to strike portions of the complaint, alleging that appellant's demand for monetary compensation has not been

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submitted to the contracting officer in accordance with the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. Appellant has responded in opposition.

STATEMENT OF FACTS

The above-referenced contract was awarded to appellant on 26 September 1991 (R4, tab 83). The contract included the standard LIQUIDATED DAMAGES-CONSTRUCTION clause (APR 1984), FAR 52.212-5. The liquidated damage rate was $165 for each day of delay. On 15 October 1991, appellant received the notice to proceed, establishing 10 August 1992 as the contract completion date.

Delays occurred in construction, most notably involving the foundation work. By letter dated 14 September 1992, appellant requested a time extension of 161 calendar days (to 18 January 1993) and $125,907.30 for alleged Government caused delays (R4 Supp., tab 105). Included was a list of critical delay causing events and a breakdown of appellant's costs with supporting documentation. By letter dated 11 November 1992, appellant reiterated its previous request and proposed meeting with the Government in order to "resolve this matter as to time and money." (R4 Supp., tab 119)

On 1 December 1992, the Government issued unilateral Modification P00024, establishing 24 December 1992 as the new contract completion date for all work except the installation of the serving line equipment which was to be completed no later than 31 January 1993 (R4, tab 17). The modification warned that liquidated damages would be assessed for performance beyond those dates. Further, it stated that appellant would receive "an equitable adjustment for the time extension at a later date."

By letter dated 3 December 1992, appellant objected to the 24 December completion date of Modification P00024 and requested to be fully compensated for delays through 31 January 1993 (R4 Supp., tab 125). On 10 December 1992, appellant submitted a claim to the contracting officer for 38 additional calendar days (an extension to 31 January 1993) and requested a final decision (R4, tab 12). The claim was accompanied by a properly-worded certification, executed by Lloyd Pooker, Vice President. However, no mention was made in the 10 December submission of any monetary claim.

By letter dated 16 December 1992, appellant submitted additional documentation in support of its "equitable adjustment on the time extension" and provided a "cost recap of the monies claimed." The total cost based on a 31 January 1993 contract completion date (excluding home office overhead expenses) was $108,748.16. No certification accompanied this letter. (R4 Supp., tab 127)

On 30 December 1992, the Government notified appellant that in accordance with Contract Modification P00024 and the contract's liquidated damages clause, effective 25 December 1992, liquidated damages had begun and would continue until all work (except the installation of the service line equipment, which was to be completed by 31 January 1993) had been completed (R4, tab 3B).

The Government considered the contract work complete on 12 February 1993. By final decision of that same date, the contracting officer denied an extension of time beyond 24 December 1992 and determined that assessment of liquidated damages "is proper" (R4, tab 5). The decision did not address appellant's entitlement to any damages for delay.

By letter dated 22 February 1993, the contracting officer notified appellant that liquidated damages were assessed for the period 25 December 1992 through 11 February 1993, at $165 per day, for a total of $8,085 (R4, tab 3A). Unilateral Modification P00032, dated 4 March 1993, formally assessed the liquidated damages and decreased the contract price by that amount (R4, tab 3).

Appellant filed a timely notice of appeal from the 12 February final decision. Appellant indicated that it was seeking: (1) a contract time extension from 24 December 1992 until 12 February 1993 (50 calendar days), (2) remission of liquidated damages, and (3) monetary compensation for time, labor, and material costs from 10 August 1992 to 12 February 1993, estimated at $176,000. Appellant's complaint reasserted its demand for an extension of time and specified $174,132.47 plus interest as its requested monetary relief. That figure includes the $8,085 liquidated damages assessment.

CONTENTIONS OF THE PARTIES

The Government contends that appellant's claim sought only an extension of time for the completion of the contract and did not demand the payment of money. It asserts that as a consequence, the issue of appellant's entitlement to delay damages is beyond the scope of this appeal. In addition, the Government argues that at the time ap-

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pellant filed its claim with the contracting officer, the parties were not yet in "dispute" over appellant's possible entitlement to an equitable price adjustment.

Appellant contends that it did assert a monetary claim in its 10 December 1992 letter. Appellant argues that the claim incorporated by reference prior correspondence sent to the contracting officer which set forth in detail the amount of money requested. Appellant asserts that the contracting officer's failure to render a decision on its monetary claim is essentially a deemed denial of the claim, an appeal from which the Board has jurisdiction.

DECISION

The CDA requires that "[a]ll claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). Further, monetary claims in excess of $50,000 must be properly certified. 41 U.S.C. § 605(c)(1). In *Ebasco Environmental,* ASBCA No. 44547, 93-3 BCA ¶ 26,220 (9 July 1993), we stated:

> In determining whether or not appellant submitted a "claim" within the meaning of the CDA, we employ a "common sense" analysis. *Transamerica Insurance Corp. v. United States* [38 CCF ¶ 76,374], 973 F.2d 1572, 1579 (Fed. Cir. 1992). "All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States,* 811 F.2d 586, 592 (Fed. Cir. 1987).

Appellant's claim submitted to the contracting officer on 10 December 1992 clearly and unequivocally sought a contract time extension of 38 calendar days, *i.e.,* until 31 January 1993. What the claim did not do is assert any demand for money. Even though appellant referenced earlier meetings and correspondence in its 10 December claim, it did not specifically "incorporate" any monetary claims. Under the circumstances, we cannot expect the contracting officer to be put on notice of appellant's request for money. The fact that the claim was certified does not transform it into a claim for payment of money.

Appellant's 16 December 1992 letter also fails to serve as a valid monetary claim under the CDA. Although requesting over $50,000, appellant did not provide any certification with that letter. The certification which accompanied the 10 December claim did not relate to a monetary claim. Nor may such an earlier certification be applied to a later claim. *Davey Compressor Co.,* ASBCA No. 43893, 92-3 BCA ¶ 25,096 at 125,128; *Santa Fe Engineers, Inc.,* ASBCA No. 36292, 92-2 BCA ¶ 24,795 at 123,682.

The Federal Courts Administration Act of 1992, P.L. No. 102-752, § 907(a), 106 Stat. 4506, 4518 (29 October 1992), amended the certification requirements of the CDA, 41 U.S.C. § 605(c), so that "a *defect* in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim." [Emphasis added] However, the complete absence of any certification is not a mere defect which may be corrected under the Act in order for the Board to retain jurisdiction. To hold otherwise would ignore and circumvent the legislative purpose of the certification requirement. *See Ingalls Shipbuilding, Inc. v. O'Keefe* [38 CCF ¶ 76,470], 986 F.2d 486 (Fed. Cir. 1993). Therefore, in clearly distinguishing between a defective certification and a "claim" submitted to a contracting officer unaccompanied by any certification, we note that the latter occurrence continues to render a claim invalid and precludes the Board from exercising jurisdiction. *Applied Science Associates, Inc.,* EBCA No. 9301146, 26 March 1993.

In *Skip Kirchdorfer, Inc.,* ASBCA Nos. 40515 *et al.,* 93-3 BCA ¶ 25,899 at 128,834, we stated:

> [T]he proper scope of an appeal processed under the CDA involving a contractor's claims against the Government "is circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Stencel Aero Engineering Corp.,* ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315....
>
> Moreover, the appeal's scope cannot be enlarged by the pleadings. Matters extraneous to the foregoing parameters, "raised by a party in its pleadings ..., are outside the purview of the appeal and beyond our jurisdiction." *Magnavox Government and Industrial Electronics Co.,* ASBCA No. 32834, 91-2 BCA ¶ 23,758 at 118,989.

As we have noted, appellant submitted a valid claim for an extension of time. It was denied by the contracting officer's final decision and a proper appeal was noticed therefrom. The Government does not contest this issue. Appellant also filed a proper appeal from the contracting officer's final decision and the contract modification assessing

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liquidated damages. However, we have determined that appellant did not submit to the contracting officer a monetary claim for delay damages. Accordingly, the issue of appellant's entitlement to payment of money (aside from appellant's demand for remission of liquidated damages) is beyond the scope of the appeal and must be stricken from the complaint.

CONCLUSION

The Government's motion to strike is granted in part. Only appellant's entitlement to a time extension and the Government's assessment of liquidated damages are before the Board for adjudication. All references to appellant's claim for payment of money due to alleged Government-caused delays are stricken from the complaint. This action is without prejudice to appellant's right to submit a proper monetary claim to the contracting officer and to timely appeal from an adverse decision or failure to render a decision.

[¶ 26,459] J.W. Creech, Inc.

ASBCA Nos. 45317, 45454, October 26, 1993. Contract No. N62470-86-C-6125.

Liquidated Damages—Substantial Performance—Summary Judgment.—The propriety of the assessment of liquidated damages for the failure to complete a building could not be summarily determined in favor of the contractor, because the fact question of whether the contractor was required to hang shielded doors for substantial completion remained unresolved. Under a contract for the construction of a high-altitude electromagnetic pulse-shielded building, the contractor contended that the government should have established a beneficial occupancy date in July 1990 because, after that date, the government was able to award follow-on contracts to various third parties, and the contractor performed no more significant work on the project. However, all justifiable inferences are to be made in favor of a nonmovant in opposition to a motion for summary judgment. The government stated that the purpose of the project was to provide and secure the building, complete and ready for use, and that without the doors, the shield was not properly functional. Thus, a reasonable fact finder could possibly decide the question of substantial completion in favor of the government.

Liquidated Damages—Propriety of Assessment—Concurrent Delays.—The propriety of the assessment of liquidated damages for a period of government-caused delay could not be summarily determined, because the fact question with respect to whether there was a causal connection between the contractor's delay in substantially completing a contract and the government's actions was relevant and material. Under a contract for the construction of a high-altitude electromagnetic pulse-shielded building, the contractor sought a summary judgment, averring that any delay by the contractor was concurrent with government-caused delay and that therefore the assessment of liquidated damages was improper. The contractor's motion for summary judgment was denied because a reasonable fact finder could decide the question of "causal connection" in favor of the government.

Performance—Specifications—Performance v. Design Requirements.—The government's contention that a contractor was precluded, as a matter of law, from recovering an equitable adjustment for a purported defective specification inasmuch as the contract contained a performance rather than a design specification was denied because the basis for the claim was not a defective specification. Under a contract for the construction of a high-altitude electromagnetic pulse-shielded building, the contractor contended that the building, as designed by the government, incorporated a large variety of dissimilar metals, possessed a negative air pressure, and had stray currents. The basis for the claim was that the overall building design caused corrosion and attenuation problems and that the direction to perform extra work was a contract change. Thus, there was no straightforward defective corrosion specification claim upon which the government could obtain partial summary judgment by pointing to the existence of a performance specification. The labeling of the specification provisions as performance or design would not resolve the claim.

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For the appellant: Hofheimer, Nusbaum, McPhaul & Samuels, P.C., Norfolk, Virginia, by Beth Hirsch Berman. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, Stephanie Cates-Harman, Assistant Director, and Jennifer Ryan Franchina, Trial Attorney.

Before HARTMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

HARTMAN, Administrative Judge: Appellant has moved for partial summary judgment, contending that the Navy's assessment of liquidated damages was improper because (a) appellant's contract performance was "substantially complete" on or before the contract completion date and (b), even if the Board were to disagree, any "delay [by appellant] was concurrent with a [Navy] delay over which [appellant] had no control." The Navy also has moved for partial summary judgment, contending that appellant is precluded from recovering an equitable adjustment based upon a purportedly defective corrosion prevention specification because the contract contains a performance, rather than "design," specification. Both parties argue that the other's motion should be denied due to the existence of disputed material facts.

UNDISPUTED FACTS

During July of 1988, the Navy awarded to appellant, J.W. Creech, Inc. ("Creech"), fixed-price contract No. N6247-86-C-6125 in the amount of $4,970,998.00 for the construction of a High-Altitude Electro-Magnetic Pulse ("HEMP") shielded building known as the Satellite Terminal Building and located at the Naval Security Group Activity, Northwest, in Chesapeake, Virginia. Specification section 01010 summarized the parties' contract as follows:

> 1. GENERAL INTENTION: It is the declared and acknowledged intention and meaning to provide and secure Satellite Terminal Building, complete and ready for use.
>
> 2. GENERAL DESCRIPTION: The work includes precast concrete wall panels, composite steel roof structure, land piling, a completely welded high electromagnetic pulse shield encompassing the entire building, raised access flooring, acoustical wall panels and ceiling, electrical power service upgrade, lighting, fire suppression system, HVAC system, auxiliary generators, and OPS system and incidental related work.

(R4, tab 1 at 56; compl. ¶ ¶ 2,3; ans. ¶ ¶ 2,3)

Specification section 13094 set forth detailed requirements for the "hemp shielded enclosure, welded type." It provided, in part, as follows:

> 1.2 HEMP PROTECTION SYSTEM GENERAL REQUIREMENTS:
>
> 1.2.1 HEMP Protection System: The High Altitude Electromagnetic Pulse (HEMP) protection system is designed to provide protection for specified critical electronics equipment. The protection system is essential to the function of the facility and the quality and installation of its components are key considerations under the requirements of this contract. If conflicts occur between the specifications contained in this section and other sections of the specifications, this shall be pointed out to the Contracting Officer in writing. In general, this section shall govern.
>
> 1.2.1.1 Penetrations: No penetrations of the HEMP shield other than those specified or indicated shall be allowed without prior written approval of the Contracting Officer.
>
> 1.3 HEMP PROTECTION SYSTEM COMPONENTS:
>
> 1.3.1 Shield: * * *
>
> 1.3.2 Penetrations: * * *
>
> 1.3.2.1 Waiveguide ... Penetrations: * * *
>
> 1.3.2.2 Pipe Penetrations: * * *
>
> 1.3.2.3 Electrical Filters: * * *
>
> 1.3.2.4 Doors: All RF shielded doors shall be supplied as complete assemblies, including frames and hardware, shall comply with all requirements stated herein and shall be welded into place in accordance with provisions of this section. All such doors shall be equipped with sensors to indicate when open and doors shall be interlocked where indicated to prevent simultaneous opening.
>
> 1.4 GENERAL REQUIREMENTS:
>
> * * *
>
> 1.4.3 Shielding Work: All shielding work shall be provided as an integral part of the overall facility construction.... It shall be the responsibility of the Contractor under this section of the specification, to supply and install all materials necessary for a complete, tested and operational shielding

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system. The shielding shall be continuous....

* * *

1.4.6 Prevention of Corrosion: All metallic materials exposed to the weather shall be protected against corrosion.

1.4.7 Testing and Inspection: The Contractor shall be responsible for the testing and overall performance of the shielding system as specified herein.

(R4, tab 1 at 363-65) (emphasis supplied)

The parties' contract required that performance be completed within 540 calendar days after Creech's receiving award or 14 January 1990. It further required that, if Creech failed to complete the work within the time specified or any extension thereof, Creech "shall pay to the Government as liquidated damages the sum of $2,950.00 for each day of delay." (R4, tab 1 at 1, 67)

The parties' contract incorporated by reference both the standard "Use and Possession Prior to Completion" (FAR 52.236-11) and "Other Contracts" (FAR 52.236-8) clauses (R4, tab 1 at 39). The former provides that:

> The Government shall have the right to take possession of or use any completed or partially completed part of the work.... The Government's possession or use shall not be deemed an acceptance of any work under the contract.

The latter provides that:

> The Government may undertake or award other contracts for additional work at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with Government employees and shall carefully adapt scheduling and performing the work under this contract to accommodate the additional work, heeding any direction that may be provided by the Contracting Officer.

After receipt of contract award, Creech entered into subcontracts for the performance of various aspects of the contract work. For example, by letter dated 26 August 1988, Creech advised Barlows Incorporated ("Barlows") of its intent to enter into "a subcontract for all materials, equipment, labor and professional services required by the plans and specifications ... for a complete and tested HEMP Shielding System." (Gov't exh. 1; see R4, tabs 4 through 7)

During performance of the Navy contract, problems developed with respect to Barlows' supply of seven HEMP shielded doors, which the parties referred to as "RF" or "Barshield" doors (see, e.g., R4, tabs 4, 27, 32, 34). A test report regarding shielding effectiveness, which was prepared for Barlows by Advanced Measurement Systems, Inc., based upon tests conducted between 12 June and 12 July, 1990, stated that all RF doors at the building failed to meet specified fields and frequencies (R4, tab 17 at 257). On 6 August 1990, Creech advised Barlows by letter that: "[t]he ROICC and J.W. Creech Inc. have *not* acknowledged that the rapid corrosion on the tin plated areas on the Barshield doors is a design problem," "[a]t this point, we believe that the tin plating has *never* been installed to a proper thickness;" "[w]e are very dissatisfied with the door installation provided by Barlows;" and, although Creech reluctantly agreed to reimburse Barlows for the expense of replating the doors in May 1990 because Barlows indicated the rusting problem was due to improper protection by Creech, Creech has photographs demonstrating that, after the "work was done, only a few days passed before the problem occurred again" (Gov't exh. 8) (emphasis in original).

Four days later, on 10 August 1990, Creech's superintendent stated in a field note that "Barlows again has not fulfilled their promise to complete repairs for these doors," but has advised this date "that door #2, which has been re-tinned, will be delivered to the jobsite Monday," "Ted will be on site [Monday] to complete the mechanical repairs to doors 1, 6, & 7 which do not operate at this time," and "the field replating of the RF doors will begin next week" (Gov't exh. 9). Creech's superintendent further stated in his daily log for 10 August that he had spoken with the Navy's assistant resident officer in charge of construction ("AROICC") and been advised the Navy was "not going to take the building until the TAB[S] reports are submitted" for review and "all corrections completed" (app. exh. E).

The advice noted by the superintendent is in accordance with Navy practice. Generally, when having a building constructed, the Navy requires that testing, adjusting and balancing ("TABS") of the heating, ventilation and air conditioning ("HVAC") system be performed before it establishes a beneficial occupancy date ("BOD") in order to ensure that the HVAC system is operating in accordance with contract specifications. However, on occasion, "[t]he Navy will accept and take BOD of a facility prior to completing first season TABS in emer-

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gency situations when for certain reasons the using activity must occupy the facility." (App. exh. D at 6-7)

On 17 September 1990, the Navy advised Creech that "[t]he Government has initiated work to install material and equipment that is required by the using activity once it moves in," "FAR 52.236-8 ... allows the Government to undertake or award other contracts for additional work at or near the site of work under this contract," "[t]he work [that] Barlows, Inc. is performing under a separate Government contract will not affect their [sic] performance under your contract," and "[t]he completion of the HEMP door installation to comply with the contracts [sic] specifications is your firms [sic] responsibility" (app. exh. B). Three days later on 21 September 1990, Creech's superintendent noted in his daily log he had been advised by the Navy's AROICC that "Barlows has been given the go ahead on the follow up contract" and the Navy "would not give us a warranty start date until [it] ha[d] a BOD date which [it] cannot furnish until the second season TAB[S] report is complete" (app. exh. F).

By letter dated 24 September 1990, Creech notified Barlows that its "completion of the Barshield doors" was "a major concern" of Creech's and Creech "expect[s] Barlows Inc. to take immediate action to complete this work ..." Creech enclosed with its letter a copy of a report from the job site, which stated that some door jams contained rust and two doors were not operating properly. (Gov't exh. 4)

In a field note dated 6 November 1990, Creech's superintendent stated as follows:

> We have four (4) exterior RF doors on the building and none of them operate at all, #1 door will not open at all, and #6 and #7 controls do not work at all and of course #4 door is not here. The building cannot be secured, the only way to keep the doors shut is to place something in the door mechanism to jamb the sprocket or put a wedge under doors #6 and #7, number 4 door opening has a piece of plywood over the opening which was supposed to be a temporary closer and is fastened with ... wire which can be cut with any sharp instrument, it has been about two (2) months now that the door was removed.

By letter dated the same day, Creech advised Barlows that, while they both were awaiting a report explaining the rapid corrosion experienced with the door plating, Creech expected Barlows "to immediately return all of the Barshield doors to the job and have them operating so that the building can be secured." (Gov't exh. 3)

In a daily report executed 13 November 1990, Creech's superintendent noted that "Barlows returned RF door #4," but "[d]oors #6 & 7 still not working" (R4, tab 4 at 14). On 28 November 1990, Creech notified Barlows that "it is absolutely essential that these doors be placed in proper working order and all corrosive problems solved" (Gov't exh. 5).

On 28 December 1990, Barlows furnished Creech with a copy of a report from Mazia Tech-Com Services, Inc., a specialist in corrosion prevention. It also advised Creech as follows:

> The Mazia report attributes the rapid corrosion being experienced at the Satellite Terminal Building to the following factors.
>
> The incorporation of a large variety of dissimilar metals in the construction of the building. A negative air pressure system present in the facility. The direct exposure of the R/F Doors to the natural elements, and the presence of stray currents in the building.
>
> We would like to caution J.W. Creech, that until all the contributing factors listed in the report are addressed and properly treated the Navy will continue to experience corrosive problems which will ultimately cause the facility to be inoperable.

(R4, tab 27)

On 1 February 1991, representatives of Creech, Barlows, the door manufacturer, and the Navy met to discuss the corrosion of the RF doors. After the meeting, the Navy's construction representative noted on the daily report that it "appears to me that contractor is no closer to resolving problem now than when problem first was noted." (R4, tab 4 at 24)

In a letter to Creech dated 4 March 1991, the Navy stated that "replating of the door frame at door number 5 was completed on 1 March 1991," "[i]t was determined that the repaired door satisfies the minimum contract requirements concerning magnetic, electric, and plane wave attenuation," "the government will allow you to perform the same repair on the remaining exterior doors," and "failure to complete repairs or failure of the repairs due to weathering will result in replacement of the doors." The Navy also stated that "[t]he doors are a necessary item to establish the SATCOM building as substantially complete," and "liquidated damages have been accumulat-

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ing at a rate of $2,950.00 a day since 14 January 1990." (Gov't exh. 13)

During the first half of April, employees of Barlows were at the site working on the doors. The Navy's construction representative noted on a daily report dated 10 April 1991 that "#6 door did not pass magnetic field test," "it appears as if ringer stock has ... corrosion and they do not know why this was happening," and "it seems that one problem gets corrected and another comes to take its place." (R4, tab 4 at 45-56)

By letter dated 9 July 1991, the Navy's supervisory general engineer advised Creech that "test reports demonstrating that the doors meet the magnetic attenuation and plane wave requirements in the format specified in the contract have still not been received and the doors will not be officially accepted until such information is provided" (R4, tab 33). Approximately three weeks later, on 2 August 1991, Barlows submitted to Creech a claim for $255,348.24 regarding the doors, which provided in part as follows:

> Barlows, Inc. installed the Barshield doors in strict accordance with the contract specification. The doors meet all the contract specifications .... The Navy through a combination of mistakes has designed a system that cannot meet their own [Electromagnetic Pulse Attenuation test] specification. Barlows, Inc. has proceeded to try and meet these specifications under direction by the Navy although we have pointed out that the specifications are impossible to meet.

(R4, tab 34)

On 15 August 1991, by modification No. P00033, the Navy unilaterally amended the contract to: reduce the price by $97,760.00 for seven HEMP doors failing to meet contract testing requirements; grant time extensions until October of 1990 consisting of 87, 60, and 131 calendar days, respectively, for "Government-caused delays during design of additional HEMP Shield penetrations," "Government-caused delay in providing filtered power," and "unusually severe weather;" and assess liquidated damages beginning in October 1990 for 199 calendar days and totalling $587,050.00. The Navy established the BOD of the building as 6 May 1991 and did not assess liquidated damages for any days thereafter even though it contends that the facility was not usably complete as of that date. (R4, tabs 2 at 68-69, 35)

In December 1991, Barlows again submitted a claim to Creech. The new claim stated that:

> JW Creech has never delivered the shielded enclosure in a condition that a true and proper [attenuation] test could be conducted. Barlows has protested the actions by JW Creech for repeatedly insisting that Barlows retest and work on the doors while the shield was in no condition to test .... JW Creech through their [sic] actions have caused Barlows to expend substantial sums of money to demonstrate that the doors are not the fault of the low ambient RF levels that exist on site.

(R4, tab 41)

Due to the negative air pressure problem existing in the building, TABS work could not be completed and demonstrate compliance with the air flows indicated in the contract. The Navy retained another contractor to perform a redesign of the HVAC system and correct the negative air pressure problem. Upon completion of the other contractor's work, TABS was performed successfully and, in December 1991, the HVAC system for the building became fully operational in accordance with the contract specifications. (App. exh. D at 7)

On 23 March 1992, Creech submitted a certified claim to the Navy seeking an equitable adjustment in the contract price of $817,000.00 and rescission of the liquidated damages assessment. Creech's claim was divided into nine parts: a section addressing liquidated damages and eight sections each addressing a different change order proposal previously rejected by the Navy. (R4, tab 45)

One of the change order proposals addressed in the claim was No. 58 dated 28 June 1991. With respect to that proposal, the claim provided, in part, as follows:

> [A]fter much work was done to try to discover how the doors might have failed, it was proved conclusively that the Building had failed, not the doors. That is, the numerous leaks in the Building's shield thwarted all efforts to obtain accurate readings as to the doors' effectiveness.
>
> * * *
>
> Barlows ... was the subcontractor responsible for manufacturing and installing the HEMP shielded doors. Barlows has proven to the Navy through test after test that the HEMP doors meet the contract specifications in so far as any doors can meet the contract specifications. That is to say because of the Building's design and construction materials certain magnetic

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wave attenuation levels cannot be achieved .... In addition, Barlows was unable to provide the required test reports showing compliance with the Contract in July of 1990 because the Building's shield was compromised by numerous design problems that had not yet been corrected.

* * *

Creech has been advised that the replacement doors have not met the requirements of NSA 65-6. The fact that no doors have passed NSA 65-6 is an indication that ... the specifications are impossible to meet under the present design of the Building.

(R4, tab 45 at 6, 11-12)

By final decision dated 28 October 1992, the Navy's contracting officer denied Creech's claim in its entirety, except a $3,094.00 change order claim concerning construction of a shed to protect electrical equipment (R4, tab 50). With respect to the HEMP doors, the contracting officer stated that:

Construction of the building and its stainless steel shield including the installation of the doors continued until June 1990.... The [June-July 1990 test] report from the testing firm showed that the shield, including the doors, did not meet the attenuation requirements of the contract. It also stated that corrosion was present on the doors. On July 27, 1990, Barlows began work to correct the corrosion problem on the doors....

In December 1990 ..., Barlows provided a report by Mazia ... which set forth several alleged reasons for the corrosion.... These allegations were reviewed by Navy experts and were found to be unsubstantiated.

By April 3, 1991, all the doors had been successfully replated which presumably solved the corrosion problem.... By letter dated April 11, 1991, the ROICC advised you that the doors did not meet the attenuation requirements of the contract.

* * *

For the building to serve its intended purpose, the HEMP shield system had to function properly. It is clear from the foregoing that Barlows was involved in attempting to correct the corrosion problems with the doors until April 1991. Under these circumstances, it would not be reasonable to conclude that the facility was useably complete on July 19, 1990. Furthermore, since the doors that Barlows provided failed to meet the contract specifications regarding corrosion and attenuation testing, the costs and time to rework and retest the doors is your responsibility.

[R4, tab 50 at 5-6)

During November 1992, Creech appealed the contracting officer's decision to this Board. On 22 December 1992, Creech filed a seven-count complaint corresponding generally to the claim it submitted to the contracting officer (see R4, tab 50). Count six stated that "[t]he Navy wrongfully refused: (a) to apply MIL-STD-1888-125 to determine the effectiveness of the HEMP shielded doors supplied by Barlows, (b) to acknowledge the need for outer vestibules to protect the doors from certain unusual conditions at the project site, (c) to acknowledge that its plating specifications for the doors were deficient, (d) to accept the test results of the doors despite the fact that the tests demonstrated that the doors' HEMP shielding effectiveness was at least as great as that of the Building and of the replacement doors which the Navy accepted, and (e) to compensate Barlows and Creech for the extra costs of $350,604.63 they incurred in trying to meet the Navy's unreasonable demands and prove the effectiveness of the doors' shield" (compl. ¶ 42).

At a scheduling conference conducted on 29 April 1993, Creech indicated it wished to file a motion for partial summary judgment and a scheduling order was issued by the Board establishing dates for the filing of briefs, including an August 1993 date for Creech to "file its response to any cross-motion by the Government." On 27 May 1993, Creech filed a 10-page motion for partial summary judgment concerning the assessment of liquidated damages, which had an appendix containing seven exhibits. In July 1993, the Navy filed a 16-page opposition to Creech's motion and a four-page motion for partial summary judgment concerning "defective plating specifications." During August 1993, Creech filed a five-page opposition to the Navy's motion. It also submitted, as part of the same document, a 17-page reply to the Navy's opposition to Creech's motion with an appendix containing 14 additional exhibits. There was no provision in the Board's order for the filing of such a document and Creech did not request leave to file the document.

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DECISION

Rule 5(b) expressly permits the Board to "entertain and rule upon other appropriate [*i.e* nonjurisdictional] motions," such as motions for summary judgment. The standards set forth for Fed. R. Civ. P. 56 guide the Board in resolving a motion for summary judgment. *E.g., Lear Siegler, Inc.,* ASBCA No. 30224, 86-3 BCA ¶ 19,155 at 96,794; *Allied Repair Service, Inc.,* ASBCA No. 26619, 82-1 BCA ¶ 15,785 at 78,162-63.

A motion for summary judgment, or partial summary judgment, is to be granted only when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of demonstrating both elements and the nonmovant is entitled to have all inferences drawn in its favor. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Mingus Constructors, Inc. v. United States* [33 CCF ¶ 75,126], 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Paragon Van Lines, Inc.,* ASBCA No. 32294, 87-1 ¶ 19,366 at 97,942.

The fact that both parties have moved for summary judgment does not mean that judgment as a matter of law must be granted for one side or the other. Each party's motion is evaluated on its own merits and properly denied if there is a dispute regarding a material fact. *E.g., Mingus Constructors,* 812 F.2d at 1391.

A fact is material if it may affect the outcome, that is, the finding of the fact is relevant and necessary to the proceeding. A genuine dispute exists with respect to the fact if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *E.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-50 (1986); *Opryland USA, Inc. v. Great American Music Show, Inc.,* 970 F.2d 847, 849-50 (Fed. Cir. 1992). A non-moving party, thus, need not present its entire case in response to a motion for summary judgment in order to defeat that motion. It need only present sufficient evidence to demonstrate a specific conflict as to a material fact. *Opryland USA,* 970 F.2d at 850; *Lemelson v. TRW, Inc.,* 760 F.2d 1254, 1261 (Fed. Cir. 1985); *Military Industrial Supply Co.,* ASBCA No. 43872, 93-1 BCA ¶ 25,312.

I. *Creech's Motion*

In its motion for partial summary judgment, Creech contends that its contract performance was "substantially complete" in July of 1990, about two months before the October 1990 extended completion date, and the Navy's assessment of liquidated damages thus was improper. According to Creech, a BOD should have been established by the Navy for the building in July 1990 because the "Government was able to let follow-on contracts to various third parties" and "Creech performed no more significant work on the Project" thereafter (app. br. at 4).

The Navy, however, asserts that Creech's motion must be denied because there is a genuine dispute regarding a material fact, *i.e.,* whether the Satellite Building project was "substantially complete" in July 1990. According to the Navy, the project was not "substantially complete" because "the contract defines the intended purpose" of the facility as a "completed HEMP Building," "as late as 6 November 1990 . . . the [HEMP] doors were not even on site," and "the doors were essential to complete the Project." (Gov't br. at 5-9, 15-16).

As a matter of "law," liquidated damages may not be assessed under a construction contract where a project is "substantially complete" on or before the scheduled completion date. *E.g., Seaboard Surety Co.,* ASBCA No. 43281, 93-1 BCA ¶ 25,510 at 127,045; *Maysons Piping Contractors, Inc.,* ASBCA Nos. 28446, 29036, 86-1 BCA ¶ 18,626 at 93,594. However, whether a project was "substantially complete" on or before the completion date is a question of "fact." *E.g., Seaboard Surety, supra,* at 127,045; *Lindwall Construction Co.,* ASBCA No. 23148, 79-1 BCA ¶ 13,822.

A factual finding with respect to whether the Satellite Building project was or was not substantially complete thus is relevant and necessary to a determination of the propriety of the Navy's liquidated damages assessment here, and material to resolution of this appeal. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248; *Opryland USA,* 970 F.2d at 849-50; *Maysons Piping, supra,* at 93,594; *Titan Mountain States Construction Corp.,* ASBCA Nos. 22617, 22930, 23095, 23188, 85-1 BCA ¶ 17,931 at 89,807; *Electronic & Missile Facilities, Inc.,* ASBCA No. 10077, 66-1 BCA ¶ 5493. Creech, therefore, is entitled to grant of partial summary judgment on the issue only if the Navy fails to reference, in opposition to Creech's motion, sufficient evidence showing that a reasonable fact finder could decide the "substantial completion" question in favor of the Navy. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248-50; *Paragon Podiatry Labo-*

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ratory v. KLM Laboratories, 984 F.2d 1182, 1185 (Fed. Cir. 1993); *Patten Co.,* ASBCA No. 35319, 89-3 BCA ¶ 21,957 at 110,449; *R.J. Crowley, Inc.,* GSBCA No. 11080 (9521)-REIN, 92-1 BCA ¶ 24,499 at 122,274-75.

In opposing Creech's motion, the Navy cites sections 01010 and 13094 of the Specification as indicating that the intended purpose of the project was to "provide and secure Satellite Terminal Building, complete and ready for use" with a "HEMP Protection System" (Gov't br. at 4-5). It also references various documents generated during contract performance, such as test reports and Creech's correspondence, which are quoted or paraphrased above, as indicating that in July 1990 the RF doors, a principal component of the HEMP shield, were not properly functioning or even otherwise securing the building (Gov't br. at 6-10, 15-16). Based upon an examination of the evidence presented by the Navy and a drawing of all inferences in favor of the Navy, the nonmovant, as required when evaluating a summary judgment motion, a reasonable fact finder could possibly decide the question of "substantial completion" in favor of the Navy. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248-50; *Mingus Constructors,* 812 F.2d at 1391; *Robert E. McKee, Inc.,* ASBCA No. 33643, 90-1 BCA ¶ 22,391 at 112,511; *Titan Mountain, supra,* at 89,807; *Joseph Morton, Co.,* GSBCA No. 4876, 82-2 ¶ 15,839 at 78,524; *Pathman Construction Co.,* ASBCA No. 16781, 74-2 BCA ¶ 10,785 at 51,299-300; *Electronic & Missile, supra,* at 25,741.

Creech argues in its motion that the Navy's assertions regarding the building being not substantially complete should not be believed because the Navy "has taken inconsistent positions regarding the HEMP shielded doors" (app. br. at 7-10). However, it is well-established that the evidence which is presented by a nonmovant in opposition "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Cooper v. Ford Motor Co.,* 748 F.2d 677, 679 (Fed. Cir. 1984); *accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 255.

While summary judgment motions are an important means of conserving judicial and other resources, they are not to be employed to deny a party a chance to prove a worthy case. *Lemelson,* 760 F.2d at 1260; *Cooper,* 748 F.2d at 680. The Board's role in deciding motions for summary judgment is not to resolve material factual issues, but to determine whether such issues are present. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 249; *Lemelson,* 760 F.2d at 1260; *John's Janitorial Services, Inc.,* ASBCA No. 34234, 90-3 BCA ¶ 22,973 at 115,366. Where reasonable minds could differ concerning the import of evidence, as here, summary judgment simply is inappropriate. *E.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248-51.

Creech also contends in its motion that, even if the Board does not determine the building was "substantially complete" in July 1990, it is entitled to partial summary judgment regarding the propriety of the liquidated damages assessment because any "delay [by it] was concurrent with a [Navy] delay over which [it] had no control." According to Creech, the Navy "routinely requires [TABS] of the [HVAC] system to be completed prior to establishing a BOD for a project," "[t]he HVAC system for the project did not become fully operational for the Building until December, 1991," and "[t]he TABS work could not be completed and demonstrate the HVAC system's compliance with the Contract until that date because of 'the negative air pressure problem that existed in the . . . Building' " (app. br. at 6-7).

The Navy again responds that partial summary judgment is precluded by the existence of a genuine dispute with respect to a material fact, which this time is whether Creech's delay in substantially completing the project was "affected by completion of the TABS testing." According to the Navy, "the TABS work did not cause any delay [to Creech] during this period" because the Navy "did not require [Creech] to perform the final TABS (testing) on the portions of the system that were affected by negative pressure." (Gov't br. at 12-15)

Creech is incorrect in arguing in its motion that an "assessment of liquidated damages is improper where *any* period of delay is contemporaneous with delays not caused by the contractor" (app. br. at 5) (emphasis added). It is well-established that, where the Government has delayed part of the contract work, it properly can assess liquidated damages if there was no causal connection between its actions and the contractor's late completion. *E.g., Fehlhaber Corp. v. United States,* 151 F. Supp. 817, 825-26, 138 Ct. Cl. 571, 585-86, *cert. denied,* 355 U.S. 877 (1957); *G. Bliudzius Contractors, Inc.,* ASBCA Nos. 42366, 42368, 43269, 42370, 93-3 BCA ¶ 26,074 (18 May 1993); *William M. Wilson's Sons, Inc.,* ASBCA No. 30553, 85-2 BCA ¶ 18,028 at 90,484-85; *Blackhawk Heating & Plumbing Co.,* GSBCA No. 2432, 76-1 BCA ¶ 11,649 at 55,579.

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A factual finding with respect to whether there was a causal connection between Creech's delay in substantially completing the building and the Navy's actions regarding TABS therefore also is relevant and necessary to determination of the propriety of the Navy's liquidated damages assessment here, and material to resolution of this appeal. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248; *Opryland USA,* 970 F.2d at 849-50; *Rivera Construction Co.,* ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 at 104,85; *William M. Wilson's, supra,* at 90,484-85; *Titan Mountain, supra,* at 89,807. As a result, Creech again is entitled to partial summary judgment upon the liquidated damages assessment issue only if the Navy fails to reference sufficient evidence showing a reasonable fact finder could decide the factual question in its favor. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248-50; *Paragon Podiatry,* 984 F.2d at 1185.

In opposing Creech's motion, the Navy references various documents, which are quoted or paraphrased above, as indicating that it did not insist upon TABS completion for establishment of a BOD and thus TABS work had no connection to Creech's delay in substantially completing the project (Gov't br. at 12-16). Moreover, Creech itself supplies as exhibit D to its brief responses to interrogatories by the Navy, which are attested to under oath, stating that the Navy does not always insist upon TABS completion prior to establishing a BOD and did not do so here. Based on an examination of the evidence presented and drawing all inferences in favor of the Navy, the nonmovant, as required, a reasonable fact finder could decide the question of "causal connection" in favor of the Navy. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248-50; *Mingus Constructors,* 812 F.2d at 1391; *William M. Wilson's, supra,* at 90,484-85. Accordingly, genuine disputes exist with respect to material facts precluding grant of Creech's motion.

II. *Navy's Motion*

In its motion for partial summary judgment, the Navy contends Creech is precluded, as a matter of law, from recovering an equitable adjustment based on a purportedly defective corrosion prevention specification because the parties' contract contains a performance, rather than design specification. According to the Navy, paragraph 1.4.6 of Specification section 13094 simply specifies the results to be obtained and leaves to Creech the responsibility of determining how to achieve those results. (Gov't br. at 18-20).

Creech responds that the Navy's motion must be denied because there is a factual dispute regarding whether the relevant Specification provisions are properly labeled as "design" or "performance" or, alternatively, because the Specification provisions clearly must be characterized as "design." In their arguments concerning the door corrosion claim, however, the Navy and Creech both lose sight of the actual claim presented.

While Creech asserts somewhat inartfully in one sentence of its complaint that "[t]he Navy wrongfully refused . . . to acknowledge that its plating specifications for the doors were deficient," that assertion does not necessarily constitute a defective "corrosion" specification claim. Barlows, the interested subcontractor, appears never to have asserted that the Navy specified a procedure for preventing door corrosion, which it followed and found to be defective. Rather, as discussed above, Barlows has asserted that rapid corrosion of the doors occurred because "the building," as designed by the Navy, incorporated a large variety of dissimilar metals, possessed a negative air pressure, and had stray currents. In the various claims submitted by Barlows to Creech, and more importantly the claim Creech submitted to the contracting officer, the basis set forth for obtaining an equitable adjustment with respect to door work was that doors "protected against corrosion" were supplied in accordance with the Specification, the overall "building" design caused corrosion and attenuation problems, and direction to perform extra work concerning door corrosion and attenuation was a contract "change."

The claim, therefore, is not one founded upon a purportedly defective "corrosion" specification, and the labeling of corrosion specification provisions as "performance" or "design" will not resolve it. *See, e.g., Blake Construction Co. v. United States* [38 CCF ¶ 76,478], 987 F.2d 743, 746 (Fed. Cir. 1993); *MM-Wave Technology,* ASBCA No. 41606, 93-1 BCA ¶ 25,272; *compare Foster Wheeler Corp. v. United States,* 513 F.2d 588, 206 Ct. Cl. 533 (1975), *with Hol-Gar Manufacturing Corp. v. United States* [11 CCF ¶ 80,438], 360 F.2d 634, 175 Ct. Cl. 518 (1966). Accordingly, there is no simple straight-forward defective "corrosion" specification claim upon which the Navy can obtain partial summary judgment by pointing to the existence of a "performance" specification, and the Navy's motion attempting to do just that must be denied.

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*CONCLUSION**

The parties' motions for partial summary judgment are both denied. The Board will be contacting the parties shortly to schedule a status conference at which the parties will be expected to advise the Board of their proposed schedule for further proceedings in these appeals.

[¶ 26,460] Contract Management, Inc.

ASBCA No. 44885, October 25, 1993. Contract No. DAKF01-90-D-0004.

Modifications—Bar to Claims—Release by Contractor.—A release was not a bar to claims for alleged losses suffered during the base contract year, because only the option years were the subject of the parties' pricing agreement. A contractor claimed that the government did not order needed services under a requirements contract for custodial services at a military base. The government contended that the claim was barred by a release contained in a modification. However, releases must be scrutinized to determine the true intent of the parties. The government's reading of the release ignored two separate references to the contractor's proposal, which was limited to pricing of the option periods and resulted in a modification. In this case, the release did not bar the claim for the base contract year.

Indefinite Delivery Contracts—Requirements Contracts—Summary Judgment.—A claim alleging that the government improperly changed the nature of a requirements contract was not appropriate for summary judgment, because there were genuine issues of material fact relating to whether the contracting officer acted in good faith in determining what the government's custodial requirements would be. Although the contractor acknowledged that in a requirements contract, the contractor bears the risk that the government's actual requirements will fall short of the contractual estimates, it contended that the contracting officer did not order needed custodial services. Moreover, the record was insufficient for the board to determine whether the reductions in the frequency of scheduled services were accomplished by contract modifications or were the result of delivery orders issued by the contracting officer.

For the appellant: Timothy H. Power, Walnut Creek, California. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Michael G. Skennion, JAGC, Trial Attorney.

Before PARK-CONROY, RUBERRY, and FREEMAN, Administrative Judges.

PARK-CONROY, Administrative Judge: This appeal involves a requirements contract for custodial services at the Presidio of San Francisco, CA. Appellant has filed a motion for summary judgment on entitlement which has been opposed by the Government. We deny the motion.

Findings of Fact for Purposes of Summary Judgment

The Army awarded Contract No. DAKF01-90-D-0004 for janitorial services at the Presidio of San Francisco, CA to appellant on 26 January 1990 for a base year beginning 1 February 1990, at an estimated amount of $1,218,649.32. The contract provided for two, one-year option periods. The standard Requirements (APR 1984) (FAR

* To expedite proceedings in these appeals, we have not returned to Creech the copies of its opposition to the Navy's motion, which contain a lengthy reply to the Navy's opposition to Creech's motion, for the submission of an opposition in accordance with the Board's order on briefing, but allowed the document to become part of the record. However, in fairness to the Navy, which complied with the Board's order, we have not considered Creech's "reply," other than to note that the documents appended to it support denial of Creech's motion based upon the existence of a genuine dispute with respect to a material fact. The appended affidavits, which contain similar language and purport to explain what was intended by various statements set forth in documents generated during contract performance (app. exh. H, K1, K2), show that Creech is asking the Board to draw inferences in its favor regarding what transpired, when in resolving such a motion inferences must be drawn in favor of the nonmovant, as explained above.

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52.216-21), Ordering (APR 1984) (FAR 52.216-18), Delivery Order Limitations (APR 1984) (FAR 52.216-19), and Changes—Fixed Price (AUG 1987) with Alternate II (APR 1984) (FAR 52.243-01) clauses were incorporated by reference.

Appellant's prior contracts for these services had been fixed-price contracts for definite quantities of services. However, the contract at issue here was written as a unit price requirements contract. Both scheduled cleaning services and special or project cleaning in particular buildings were identified by individually-priced contract line items which contained a description of the work to be performed and estimated quantities. For scheduled cleaning services, the frequency of service was specified on the contract drawing floor plans of the areas to be serviced. Required work was to be ordered by the contracting officer via a delivery order.

It is undisputed that services performed as the result of delivery orders issued during the first six months of the base contract year roughly approximated the Government's estimated requirements. Thus, only the requirements for the last six months of the base contract period (1 August 1990 through 31 January 1991) are contested (R4, tab 97).

A "WEEKLY BULLETIN," issued 6 August 1990, advised that a reduction in the frequency of custodial services would be implemented. According to the bulletin, latrines would be cleaned only three days a week and hallways and stairways would be cleaned only once each week, except for a few high visibility and heavily used areas where the frequency of cleaning would be reduced. Beginning 3 August 1990, bilateral contract modifications incorporating revisions to drawings of floor plans of the buildings covered by the contract were executed to implement reductions in the frequency of services and the omission of some services completely in some buildings. Four such modifications (P00011 through P00014) were executed by the parties during the last six months of the base contract year, all at no change to the dollar value of the contract (R4, tabs 12 through 15). The changes in the custodial services ordered from appellant were due solely to a lack of funds (exh. G-1).

According to Mr. James Cominella, appellant's president, the reduction in the frequency of services ordered during the last six months of the base contract year caused appellant financial loss consisting of management costs resulting from the contractual staffing requirements together with labor and material costs associated with stocking bathrooms with consumable supplies (Cominella aff'd at ¶ 7).

By a letter dated 11 January 1991, appellant requested that an equitable adjustment in the pricing structure be negotiated prior to the exercise of the first option (R4, tab 91). The contracting officer responded on 15 January 1991 and expressed his willingness to make the option bilateral and to negotiate an adjustment to the contract pricing. He requested a proposal to adjust the line item prices for the option period, which appellant provided on 18 January 1991. (Cominella aff'd at ¶¶ 9 and 10, and attach.) Further information about appellant's proposed pricing was requested by the Government in a 29 January 1991 letter (Cominella aff'd at ¶ 11, and attach.).

Pending negotiations on the proposed pricing structure, the Government issued unilateral Modification P00015 exercising the first option on 30 January 1991 (R4, tab 16; Cominella aff'd at ¶ 12). On 6 February 1991, bilateral Modification P00016 was issued (R4, tab 17). Mr. Cominella's affidavit states that he and Government contracting personnel, specifically, Mr. Allen R. Harvell and Ms. Joyce Cavales, all understood that the proposal requested by the Government and the negotiations which followed related only to repricing the option period line item prices (Cominella aff'd at ¶¶ 13-15). His statement was not disputed by the Government.

Modification P00016 corrected the performance period to run from 1 February 1991 through 31 January 1992, added two new line items, changed the price of six other line items, and "[i]ncorporate[d] the revised bid schedule for the first and second option years." Modification P00016 also contained the following release:

> H. In consideration of the modification agreed to herein as a complete adjustment for the contractor's proposal, the Contractor hereby releases the Government from any and all liability under this modification for further equitable adjustments attributable to such facts or circumstances giving rise to the contractor's proposal for adjustments.

By a letter dated 14 May 1991, appellant submitted a request for an equitable adjustment for alleged losses suffered during the last six months of the base contract year (R4, tab 92). The request was denied by the contracting officer on 19 August 1991 (R4, tab 93). An appeal from the denial of its request was docketed as ASBCA No. 43526, but dis-

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missed on 19 February 1992 for lack of jurisdiction under *Dawco Construction, Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872 (Fed. Cir. 1991) (R4, tab 94). Thereafter, appellant submitted a properly certified claim, this time in the amount of $96,884 (R4, tab 97), which was denied in a final decision issued by the contracting officer on 6 July 1992 (R4, tab 98). This appeal was docketed on 23 July 1992.

DECISION

Appellant has moved for summary judgment asserting that it is entitled to judgment as a matter of law. The Government opposes the motion, contending that there are disputed factual issues, that appellant is not entitled to compensation under the legal theory it asserts, and that the motion is premature because there has been no significant discovery. The Government has also asserted that appellant's claim is barred by the release contained in Modification P00016.

The Release

Releases are to be scrutinized to determine the true intent of the parties. *E.g., Leslie & Elliott,* ASBCA No. 36271, 89-1 BCA ¶ 21,263. The Government's reading of the release contained in Modification P00016 ignores two separate references to "the contractor's proposal." It is undisputed that the proposal referred to was appellant's 18 January 1991 proposal. The subsequent correspondence and negotiations between appellant and the Government relating to that proposal were limited to pricing of the option periods and resulted in the agreement contained in Modification P00016. There are no material facts in dispute regarding the release contained in Modification P00016. Only the option years were the subject of the parties' pricing agreement. The release does not bar appellant's claim for the base contract year.

Appellant's Motion for Summary Judgment

Appellant acknowledges that, in a requirements contract, the contractor typically bears the risk that the Government's actual requirements will fall short of the contractual estimates. It asserts, however, that in this case, the Government improperly changed the nature of its requirements after contract award when the contracting officer did not order needed custodial services.

The Government responds that the Requirements clause obligated the contracting officer to order only the services that were "required to be purchased." According to the Government, appellant has incorrectly equated the word "requirements" with the word "wants." It asserts that the contracting officer's discretion in purchasing "required" services is subject only to the exercise of good faith and adequate funds. Its legal argument is based upon *Arcon-Pacific Contractors,* ASBCA No. 25057, 82-2 BCA ¶ 15,838.

We have considered the respective legal contentions the parties have advanced and conclude that the record is not now such that we are able to rule upon the merits of these contentions. For example, there are no facts from which we can make any finding about how the parties interpreted those descriptions indicating that a service would be performed a given number of times weekly. Nor are we able to ascertain whether the reductions in the frequency of scheduled services were accomplished only by contract modifications or whether some were also the result of delivery orders issued by the contracting officer. In this regard, no facts or arguments have been presented regarding whether Modifications P00011 through P00014, which were bilateral, may operate as an accord and satisfaction.

Moreover, there are genuine issues of material fact relating to whether the contracting officer, confronted with funding difficulties, acted in good faith in determining what the Government's custodial requirements would be, as well as how to fulfill them. Of particular relevance are facts establishing what Government and contractor personnel knew about the nature and extent of the funding difficulties, both at the time the previous definite quantities contract was restructured into a requirements contract and when the contract was finally awarded, and what factors influenced the contracting officer in his evaluation of the custodial needs, the resources available, the priorities and the most economical method of satisfying the conflicting needs.

Conclusion

Appellant's claim is not barred by the release contained in Modification P00016.

Appellant's motion for summary judgment is denied. The parties are directed to provide the Board with two alternative dates during the month of March 1994 for the hearing of this appeal.

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[¶ 26,461] Phoenix Petroleum Company

ASBCA Nos. 42763, 45412, 45413, 46671, October 25, 1993. Contract Nos. DLA600-89-D-0572, DLA600-90-D-0542.

Contract Disputes, Claims—Submission to Contracting Officer—Counterclaims.—The board did not have jurisdiction over a counterclaim advanced for the first time in a complaint, because the counterclaim was never submitted to the contracting officer for a decision. Under an indefinite quantity contract for deliveries of fuel, the government sought to recover an alleged overpayment. The contractor counterclaimed for breach damages, alleging that the government had not purchased the required minimum amount of fuel. However, the inclusion of a monetary claim in a complaint as a counterclaim is not sufficient to confer jurisdiction, because board rules do not authorize counterclaims. Earlier versions of board rules had provided for counterclaims, and the board interpreted the omission of any reference to counterclaims in the current rules as not granting authority to hear them. Thus, the board did not have authority to hear even those counterclaims arising out of the same transaction or occurrence that gave rise to the appeal.

Contract Disputes, Contracting Officer's Decision—Failure to Decide—Deemed Denial.—The board deemed a claim denied and assumed jurisdiction because the contracting officer failed to issue a decision within 60 days after the contractor submitted its claim. The contractor sought an equitable adjustment, alleging that the government had not purchased the required minimum quantity of fuel required by an indefinite quantity contract. The claim was first advanced as a counterclaim without having been submitted to the contracting officer. However, the contractor filed a claim while the government's motion to dismiss the counterclaim was pending. The government had conducted discovery on the claim, and the issue remained in dispute. Moreover, no useful purpose would be served by dismissing or suspending the appeal, even if it was filed before the expiration of the 60-day period.

Contract Disputes, Certification—Elements of Certification—Knowledge and Belief.—The board was not deprived of jurisdiction over a claim, even though the contractor failed to certify that the supporting data were accurate and complete "to the best of his knowledge and belief," because the claim was filed after October 29, 1992, the effective date of the Federal Courts Administration Act. Because the claim and appeal were governed by the provisions of the Act, the contractor was directed to submit a complete certification to the board within 15 days of the date of the decision.

Contract Appeals, Jurisdiction—Boards of Contract Appeals—Enforcement.—Even if a contractor had a valid judgment against the government from another tribunal, the board could not direct the government to pay, because the board does not have enforcement authority. A contractor counterclaimed against the government in an appeal arising out of an indefinite quantity contract, requesting the board to enter an order that the government pay the contractor the amount that the government admitted that it owed in bankruptcy proceedings. However, the admissions were not before the board, and it was not clear that they related to a contract made by an agency under the jurisdiction of the board.

For the appellant: Paul Crowley, Exton, Pennsylvania. For the government: John J. Ralston and Howard Phifer, Trial Attorneys, Defense Fuel Supply Center (DLA), Alexandria, Virginia.

Before TUNKS, RUBERRY, and RIISMANDEL, Administrative Judges.

TUNKS, Administrative Judge:

BACKGROUND

Appellant was awarded two indefinite quantity contracts for deliveries of JP-4 fuel during FY 1990 and 1991. Both contracts contained the clause entitled "Economic Price Adjustment—Published Market Price" (EPA clause). Contract DLA600-89-D-0572 contained the September 1987 version of the clause and Contract DLA600-90-D-0542 contained the December 1989 version.

Contract 0542 was terminated for default on 15 January 1991 and the appeal therefrom was docketed as ASBCA No. 42763.

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Because of subsequent bankruptcy proceedings, ASBCA No. 42763 was dismissed without prejudice. The appeal was reinstated in January 1993.

By decision dated 10 September 1992, the contracting officer asserted that appellant had been overpaid $42,022.00 under the EPA clause in Contract 0572, $52,868.31 under the EPA clause in Contract 0542 and was indebted to the Government in the amount of $682,280.31 for excess reprocurement costs under Contract 0542.

Appellant timely appealed the contracting officer's decision to the Board. On 9 December 1992, the Board assigned three docket numbers to the appeals. ASBCA No. 45412 was assigned to the overpayment claim in Contract 0572; ASBCA No. 45413 was assigned to the overpayment claim in Contract 0542; ASBCA No. 45414 was assigned to the claim for excess reprocurement costs in Contract 0542. Appellant thereafter filed complaints in all appeals, including the appeal from the contracting officer's decision terminating Contract 0542 for default. All four appeals were consolidated for hearing. The appeal in ASBCA No. 45414 was subsequently dismissed without prejudice subject to reinstatement pending the Board's decision on the default termination in ASBCA No. 42763.

ASBCA No. 45412: MOTION TO DISMISS APPELLANT'S COUNTERCLAIM FOR LACK OF SUBJECT MATTER JURISDICTION

In its complaint of 1 February 1993, appellant denied liability for the price adjustment claimed by the Government under Contract 0542 and asserted a "counterclaim" for breach damages of $100,000 plus interest alleging that the Government had not purchased the required minimum quantity of fuel.

On 7 June 1993, appellant submitted its claim to the contracting officer for a decision requesting $126,629.81 in damages. Appellant certified its claim as follows:

> Pursuant to the requirements of the Contract Disputes Act of 1978 (41 USC 601-613), I hereby certify that this claim is made in good faith, that the data relating to contract volume and profit per gallon is accurate and complete and that the amount requested accurately reflects the contract adjustment for which Phoenix believes the government is liable.

By letter of 13 August 1993, the contracting officer admitted that the Government had underlifted the contract by 1,513,162 gallons and requested appellant to submit supporting documentation or an explanation of the $0.82 per gallon figure appellant used in calculating the claim. The contracting officer has not issued a decision on the claim.

On 9 July 1993, the Government moved to dismiss the "counterclaim" for lack of jurisdiction because no contracting officer's decision has been issued and to strike from the complaint the allegations relating thereto. In its 11 August 1993 response to the Government's motion to dismiss, appellant emphasized the common aspects of the underlift issue with matters involved in the other appeals and the "redundancy" of a contracting officer's formal written decision when the Government's positions have been clearly stated. Appellant also stated that it would appeal such a decision if issued and amend its pleadings accordingly.

DECISION

Under the Contract Disputes Act (CDA), all claims by a contractor against the Government must be in writing and submitted to the contracting officer for a decision before we can take jurisdiction over an appeal. 41 U.S.C. § § 605(a). The contracting officer's decision has been described as the "linchpin" of our jurisdiction under the CDA. Without it, we have no jurisdiction. *Ball, Ball, & Brosamer v. United States,* 878 F.2d 1426 (Fed. Cir. 1984); *Paragon Energy Corp. v. United States* [28 CCF ¶ 81,290], 645 F.2d 966 (Ct. Cl. 1981).

Since there is no dispute that appellant's "counterclaim" was advanced for the first time in the complaint, that it was never submitted to the contracting officer for a decision and that the contracting officer has not issued a decision, we have no jurisdiction to decide the claim. *Al Bosgraaf & Sons. Inc.,* ASBCA No. 43372, 92-1 BCA ¶ 24,746; *Solar Foam Insulation,* ASBCA No. 46278, 94-1 BCA ¶ 26,288, decision 6 August 1993.

The inclusion of a monetary claim in the complaint as a "counterclaim" is not sufficient to confer jurisdiction on the Board. Board Rule 6, which sets forth the requirements for pleadings, does not authorize counterclaims. While earlier versions of the Rules provided for counterclaims, the present Rules, which apply to appeals processed under the CDA, omit any reference to counterclaims. We have interpreted this omission to mean that we do not have authority to hear such counterclaims, even those arising out of the same transaction or occur-

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rence which gave rise to the appeal. *Trans World Maintenance, Inc.*, ASBCA No. 37480, 89-2 BCA ¶ 21,856; *Holly Corp.*, ASBCA No. 24975, 80-2 BCA ¶ 14,675.

Accordingly, Count V (¶ 31-34) and the pertinent part of the prayer in the complaint are stricken and the claim stated therein is dismissed without prejudice.

However, the Board has jurisdiction of a contractor's claim if the contracting officer does not issue a decision on the claim within 60 days or notify appellant of the date on which a decision will be issued. 41 U.S.C. § 605(c)(5). Any failure of the contracting officer to issue a decision within the period required will be deemed to be a denial of the claim and will authorize the commencement of an appeal. Moreover, where no useful purpose would be served by dismissing or suspending an appeal, even if it was filed before the expiration of the 60-day period, we have retained jurisdiction. *Emerson* Electric Co., ASBCA No. 31184, 86-2 ¶ 18,979 (jurisdiction retained even though appeal filed prior to contracting officer's decision because the Government had expressed its position on the claim thereby crystalizing the claim into a dispute ripe for adjudication) and cases cited therein.

Appellant submitted its claim to the contracting officer on 7 June 1993. The sixty days prescribed by the CDA have passed and the record does not indicate that the contracting officer advised appellant of when the decision would be issued. We deem the contracting officer to have denied appellant's claim, particularly in view of his letter of 13 August 1993 admitting that the Government had underlifted the contract by 1,513,162 gallons and requesting information regarding appellant's calculation of damages. Appellant has not responded to this request and the matter remains in dispute.

ASBCA No. 45412, which includes appellant's 7 June 1993 claim, has been consolidated with ASBCA Nos. 45413 and 42763 and all three appeals are set for hearing on 2 November 1993. The Government has conducted discovery regarding this claim. The respective positions of the parties have been "clearly crystalized into a dispute ripe for adjudication" and "no useful purpose would be served by returning the matter to the contracting officer for decision." *Monaco Enterprises, Inc.*, ASBCA Nos. 27142, 27423, 86-2 BCA ¶ 18,922, 95,435, quoting *R.G. Robbins Co., Inc.*, ASBCA No. 26521, 82-1 BCA ¶ 15,643, 77,273.

In these circumstances, we consider the statement in appellant's response to the Government's motion as a notice of appeal from the deemed denial of its claim. Inasamuch as more than 60 days have passed from the submission of the claim, the premature appeal does not prevent us from assuming jurisdiction. *SCM Corporation v. United States*, 225 Ct. Cl. 647 (1980); *Fuel Storage Corporation*, ASBCA No. 26994, 83-1 BCA ¶ 16,418 at 81,683 and cases cited therein.

Hence, we retain jurisdiction over the 7 June 1993 claim. A separate docket number, ASBCA No. 46671, has been assigned to that appeal. It is consolidated with ASBCA Nos. 45412, 45413 and 42763. The parties are considered to have waived the pleadings and the appeal will be heard with the other appeals on 2 November 1993.

The Government's motion to dismiss is denied in this regard.

There still remains the issue of the incomplete or defective certification of the claim. Under the second prong of the certification required by 41 U.S.C. § 605(c)(1), a contractor must certify that "the supporting data are accurate and complete *to the best of his knowledge and belief*" (emphasis added). Appellant's certification does not contain the underlined phrase. Under 41 U.S.C. 605(c)(6), defects in a certification do not deprive the Board of jurisdiction over claims filed after 29 October 1992 as long as the defects are corrected before a decision is issued. Both appellant's claim and appeal were filed after that date and thus are governed by the provisions of the Federal Courts Administration Act, Pub. L. 102-572, § 907(a)(1)(b), 106 Stat. 4518 (enacted 29 October 1992). Accordingly, appellant is directed to submit a complete certification to the Board within 15 days of this decision.

ASBCA No. 45413: RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Under Contract 0542, the second indefinite quantity contract for JP-4 in dispute, appellant invoiced and received payment for deliveries of fuel at the interim billing price under the EPA clause of that contract. At times, the interim billing price exceeded the final adjusted price. On 10 September 1992, the contracting officer issued a decision asserting that appellant owed the Government $52,868.49, the difference between the interim billing price and the final adjusted price. The Government moves for summary judgment alleging that it is entitled as a matter of law to recover the overpayment. Ap-

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pellant does not oppose the motion, but, in its complaint, requests the Board to "enter an order . . . that the Government pay Phoenix the $317,003.53 it has admitted it owes Phoenix [in bankruptcy proceedings], plus interest" as an offset.

DECISION

There being no dispute as to appellant's indebtedness to the Government in the amount of $52,868.49, we hold that the Government is entitled to recover that amount from appellant. Appellant's counterclaim is a different matter.

As we indicated in the decision in ASBCA No. 45412, the CDA requires that all claims by a contractor against the Government be submitted to the contracting officer for a decision before we have jurisdiction over an appeal. 41 U.S.C. §§ 605(a). *Ball, Ball, & Brosamer, supra; Paragon Energy Corp., supra.* Consistent with that requirement, the Board's rules do not provide for counterclaims. Since appellant's claim has not been submitted to the contracting officer for a decision, we do not have jurisdiction to decide appellant's offset claim.

Appellant's counterclaim is based upon admissions the Government purportedly made during proceedings before the Bankruptcy Court. Those admissions are not before us and we do not even know if they relate to a contract made by an agency under the cognizance of this Board. If appellant has a valid judgment against the Government from some other tribunal, this Board cannot direct the Government to pay appellant because we do not have enforcement authority. *Gichner Mobile Systems,* ASBCA No. 25344, 84-1 BCA ¶ 16,995, *aff'd on motion for recon.,* 84-2 BCA ¶ 17,291.

The Government's motion for summary judgment is granted and appellant's counterclaim is dismissed for lack of jurisdiction. The appeal is denied.

ASBCA No. 42763: RESPONDENT'S MOTION TO STRIKE PORTIONS OF APPELLANT'S COMPLAINT AS PREMATURE

The Government's motion to strike paragraphs 49 and 50 of the Complaint is denied. Paragraphs 60 and 61 are monetary claims against the Government. Since these claims have not been submitted to the contracting officer for a decision, we do not have jurisdiction. Paragraphs 60 and 61 are stricken and those claims are dismissed without prejudice.

[¶ 26,462] Alliance Properties, Inc.

ASBCA No. 42451, October 14, 1993. Contract No. DAKF57-87-C-0031.

Interpretation of Contracts—Interpretation During Performance—Predispute Interpretation.—The government's interpretation of a contract was untenable because it was contrary to the parties' construction of the contract prior to the dispute and because it ignored various words of the contract. In a contract for family housing unit maintenance services, the government alleged that its actions before the dispute arose were mistaken. However, the parties' construction prior to the dispute is entitled to great weight. Moreover, the government's new interpretation would ignore most of the words of the contract, and it was rejected in favor of the construction that was used by the parties prior to the dispute and that harmonized all of the provisions of the contract.

Indefinite Delivery Contracts—Price Adjustment for Variation—Applicable Work Item.—A contractor sustained damage as a result of the government's inaccurate estimate of the work to be done under service orders for a particular task under an indefinite delivery contract for family housing unit maintenance services, even though most of the work ordered would have to have been performed under another portion of the contract for contractor-scheduled punch list work, because the contractor's costs for service-order work were different from those for contractor-scheduled work. The contractor and all other bidders had bid lower unit prices for the contractor-scheduled services than for an unawarded bid item under which the contractor would have been required to perform the same punch list work by service orders.

For the appellant: Corona, Balistreri & Ramseyer, San Diego, California, by William J. Braun. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. David C. Hoffman, JAGC, and Capt. Mitchell R. Chitwood, JAGC, Trial Attorneys.

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Before HARTMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

HARTMAN, Administrative Judge: This is a timely appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.*, from a contracting officer's final decision denying a claim by appellant for an equitable adjustment in contract price based upon (a) variations between the quantities of service order work estimated to be supplied and actually procured by the Government and (b) the performance of preventive maintenance work allegedly beyond that specified. Pursuant to Rule 11, the parties have elected to waive a hearing and submit the case for decision on the record. Only the issue of entitlement is before us for decision.

STATEMENT OF FACTS

During the 1980s, the Department of the Army had approximately eight separate contracts to obtain family housing unit maintenance services, such as bathtub refinishing, door repair, chimney cleaning, cleaning of quarters, and interior painting, at Fort Lewis. Under these "requirement" type contracts, an occupant of a family housing unit or an Army maintenance employee would request the performance of specified work and the Army's contracting office would then distribute to the appropriate contractor a service order directing performance of the work. (App. supp. R4, tab 2)

In fiscal year 1987, however, the Army determined that it would benefit from awarding only one contract, which would require performance of the family housing maintenance services previously performed by a variety of contractors plus additional services. It therefore issued invitation for bids ("IFB") No. DAKF57-87-B-0032. (*See id.;* R4, tab 1; stip. ¶ 1)

The IFB had a base period of seven months with two 12-month option periods, and contained three bid items. A note on the IFB bid schedule stated that either the second or third bid item would be awarded, "but not both." (R4, tab 1 at 8-12)

The first bid item was for the provision of annual chimney cleaning and quarterly inspection of playground equipment, both of which were "contractor scheduled" work, and the provision of 27 different tasks which were set forth in technical exhibit ("Tech. Exh.") 19 of the IFB and to be performed pursuant to service orders issued by the Army. The first 26 tasks set forth in Tech. Exh. 19 were housing unit maintenance work such as interior quarters painting and cleaning, and repair or replacement of glass, shades, blinds, doors, sinks, bathtubs, countertops, and telephone lines. Task No. 27 of the exhibit was "Occupied between occupancy maintenance or preventative maintenance." Quantities for each of the 27 tasks were set forth in the exhibit based upon "historical data." The quantities for Task No. 27 were 100 units during the base period and 120 units during each option period. Paragraph 4.2 of Section 3 of the IFB stated that the Tech. Exh. 19 "quantities are estimated, but any task number should not be over 120% of the total amount anticipated." * (R4, tab 1 at 5, 8-10, 31-33, 50-51, 158-160; stip. ¶ ¶ 1 through 4)

The second bid item was Between Occupancy Maintenance ("BOM"), which would be "ordered by service order" for a particular housing unit and require the contractor to examine the unit using a standard punchlist prepared by the Army and "correct deficient items" found. BOM was to be performed in 895 unoccupied units during the base year and 1,080 unoccupied units during an option year. It also was to be performed as "preventative maintenance" in approximately 70 occupied units "which ha[d] not been newly assigned" during the base year and 80 occupied units "which ha[d] not been newly assigned" during an option year. This latter work in occupied units did not include approximately 35 unoccupied units during the base period and 40 unoccupied units during an option period "for which BOM was ordered, but which were occupied prior to the completion of BOM." (R4, tab 1 at 6, 8-10, 60, 62, 65, 68, 70-81)

The third bid item was Preventative Maintenance ("PM"), which also was referred to in the contract as "Preventive Maintenance." PM required the contractor to examine housing units using the same punchlist as BOM and correct deficiencies found. While periods for completing PM were set forth, the contractor could schedule the times for performing PM in units. The contractor would submit for approval within 10 calendar days after award of the PM bid

* The IFB initially provided that "any task number should not be over 150% of the total amount anticipated." However, in response to a comment by one of the bidders during the pre-bid conference that "[a]llowing the quantities of T[ech.] E[xh.] 19 to be exceded by 150% creates a very large cost exposure for the contractor," the Army amended the IFB to reduce "the percentage on any task number" from 150 to 120. (R4, tabs 1, 2)

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item an annual schedule, which showed each housing area and the month(s) PM would be accomplished, and "update" that schedule monthly during contract performance. Paragraph 2.1 of Section 5 of the IFB expressly stated that:

> Preventative Maintenance (PM) if awarded shall be accomplished in accordance with the contractor's approved schedule. All quarters shall be completed during a one-year contract period .... Work in occupied quarters shall be completed within 5 working days after the work starts. PM in unoccupied quarters shall be completed within the time frame specified in paragraphs 1.2 thru 1.2.8 of this Section.

One constraint, however, existed with respect to the contractor's scheduling of PM. Paragraph 1.2 of Section 6 of the IFB provided as follows:

> *Preventative Maintenance (PM),* if awarded, shall be accomplished in conformance with the contractor's approved and updated schedule.... Quarters that are vacant shall be given first priority for each housing area in which PM is to be accomplished. There should not be more than a 10% change per month in the contractor's schedule for vacant quarters priority. For example, if 300 quarters are scheduled for preventative maintenance in a month, the contractor will not be required by the Government to change the schedule for more than 30 vacant quarters. If over 30 are requested by the Government, the contractor may or may not change the schedule as an option, but no additional time or money will be allowed if the contractor changes more than the anticipated 10% variance in vacant quarters per month. [Emphasis added]

Paragraph 5.1.2 of Section 3 of the IFB further provided as follows:

> The contractor shall at Government request (telephonic conversation from the Contracting Office) and at no additional cost, change the approved scheduled work by a maximum of 10% of the quarters scheduled a month. The contractor shall note the requested changes on the monthly log and the Daily Inspection Report.

PM would be performed upon 2,081 housing units during the base period and 3,569 units during an option year. (R4, tab 1 at 5, 8-10, 32, 50, 51, 62, 66, 68, 70-81; stip. ¶¶ 6 through 8)

With respect to "unoccupied quarters," the IFB stated that, "[i]n accordance with Army Regulation (AR) 210-50, Family Housing Management, the Fort Lewis goal is to obtain a 99% occupancy rate, which means that unoccupied quarters can only remain vacant for relatively short periods of time." The IFB further stated that work performed in unoccupied units is generally limited to BOM, major painting and repairs, cleaning, insulation of basement water pipes, and replacement of hardwood and vinyl flooring, some of which is performed under other Government contracts. The IFB noted that "the contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or Government employee," "[r]esolution of problems with cooperation or coordination will be done by the Government within two working days after notification by the contractor" and, "since all ordered work [in unoccupied quarters] must be accomplished at the same time, close coordination and good management is required." Paragraphs 1.2 through 1.2.8 of Section 5 of the IFB set forth specific periods for completing performance of BOM in unoccupied quarters, which depended upon the nature and number of tasks to be accomplished and which ranged from one to several days after the contractor's receipt of the Army's service order. (R4, tab 1 at 36-37, 58, 63-66)

In calculating its bid for the first bid item, appellant, Alliance Properties, Inc. ("Alliance"), relied on the Army's representation that "any task number [quantity the Army actually ordered] should not be over 120% of the total amount anticipated" (Gov't supp. R4, vol. IV, tabs 3, 4, 5, 21; app. supp. R4, tab 25 at 39-49, 76). For the base period, Alliance bid $905,800, $351,925, and $349,650, respectively, for the three bid items. For the first option year, it bid $1,287,000, $455,400, and $445,500, respectively. For the second option year, it bid $1,260,000, $450,000, and $441,000, respectively. Alliance, like each of the other bidders, bid a per unit cost for the second bid item which was greater than that for the third bid item. (R4, tab 1; app. supp. R4, tab 1; see affidavit of F.A. Johnston)

In February 1987, the Army awarded fixed-price contract No. DAKF57-87-C-0032 for the first and third bid items to Alliance. The parties' contract contained the provisions set forth in the IFB and incorporated by reference a standard changes clause (FAR 52.243-1, ALT-I). It did not, however, include any provision for computing adjustments based on variations in estimated

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quantities. (R4, tab 1; app. supp. R4, tab 3; stip. ¶ 1)

Shortly after commencement of and throughout the contract base period, Alliance complained to the Army it was having to expend significantly more resources upon performance of PM than it had anticipated and attributed this to various factors allegedly within the control of the Army. Those factors included: failure by Army personnel living in the housing units to utilize a self-help repair program available to them and referenced in the IFB; refusal by Army personnel to issue service orders for required work under bid item one because PM was scheduled to be performed on the units in the near future under bid item three; and refusal by Army maintenance personnel to complete work requested by personnel occupying housing units because PM would be performed on the units needing work in the near future and require the contractor to complete the work the maintenance personnel normally were to accomplish. (R4, tabs 6, 11, 12, 16, 17, 22, 23, 44, 51, 53)

During the seven-month contract base period, the Army issued service orders directing the performance of various tasks listed on Tech. Exh. 19 in quantities which exceeded 120 percent of the estimated quantities set forth for those tasks in Tech. Exh. 19. For example, with respect to Task No. 27, the Army issued service orders for 254 units or more than 250 percent of the estimated quantity of 100 units. (R4, tabs 1, 27, 37; app. supp. R4, tab 16 at 4; stip. ¶ ¶ 1, 9, 10)

In August of 1987, the Army exercised its option under the contract for the first 12-month option period. During the first option period, the Army again issued service orders directing performance of various tasks listed on Tech. Exh. 19 in quantities which exceeded 120 percent of the estimated quantities set forth for those tasks. For example, with respect to Task No. 27, the Army issued service orders for 548 units or more than 450 percent of the estimated quantity of 120 units. (R4, tabs 28, 54, 56, 57, 59, 60, 62, 64; app. supp. R4, tab 5; stip. ¶ ¶ 12, 18, 19)

The additional constraints set forth in the contract for performing service orders made Alliance's performance of service order PM and BOM more expensive than performance of contractor scheduled PM under the third bid item (R4, tab 1; app. supp. R4, tab 1; affidavit of F.A. Johnston; April 1993, affidavit of M. Crabtree). After Alliance indicated it was considering pursuit of a claim regarding Tech. Exh. 19 task quantities exceeding those estimated, the Army proposed modifying Tech. Exh. 19 to increase some of the quantities set forth and requested Alliance submit a cost proposal for such a modification. With respect to Task No. 27, the Army proposed: (1) altering the description to read only "Occupied PM;" (2) reducing the quantity of units estimated for the item by 20; and (3) adding a new "Task No. 28" described as "Unoccupied PM" and possessing an estimated quantity of 540. (R4, tabs 22, 37, 38, 43, 46, 54; stip ¶ ¶ 13)

While Alliance submitted the cost proposal requested, the Army rejected its proposal because of "budget restraints" and requested it submit a proposal for an alternate modification. With respect to Task No. 27, the Army's second proposed modification simply changed the description to read "Unoccupied preventive maintenance," which the contracting officer stated would "more correctly reflect the actual use of this item," and increased the quantity estimated by approximately 300 units more than performed as of that date, *i.e.*, to 540 units, which the contracting officer stated would require Alliance "to stop scheduling quarters [for PM] at 3,269 quarters and the remaining 300 quarters would be ordered under the new revised Task Item Number 27." Alliance submitted a second cost proposal to the Army, but the parties' contract was not modified to incorporate that or any other proposal regarding task quantities which exceeded by more than 120 percent those estimated for the base period and first option year. (R4, tabs 42, 47, 57, 58, 60; stip ¶ ¶ 14 through 17)

During March 1990, Alliance submitted a certified claim to the Army's contracting officer seeking over $1 million for Tech. Exh. 19 task quantity overruns which exceeded 120 percent of estimated quantities and for work directed to be performed in excess of that required under the PM bid item (R4, tabs 85, 87; stip. ¶ 23). In a final decision dated 5 December 1990, the contracting officer denied Alliance's claim (R4, tab 96; stip. ¶ 24). By letter dated 30 January 1991, Alliance appealed the contracting officer's decision to this Board (R4, tab 97). Thereafter, the parties submitted the required Rule 4 file, various supplements to the Rule 4 file (which include deposition transcripts), a stipulation of facts, several affidavits, initial and reply briefs, and a "Request For Partial Dismissal With Prejudice."

The latter submission advised that: the parties had settled claims concerning "excess

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quantities performed ... for all Task Items, except Task Item No. 27;" this "settlement will be reduced to writing and executed as a bilateral [contract] modification;" Alliance "has decided to present no evidence" concerning "work performed in excess of what the contract required ... under the Preventive Maintenance line item[ ];" the parties therefore "mutually request that the Board dismiss this issue with prejudice;" and the submission has been reviewed by the bankruptcy trustee for Alliance, but "[n]o dismissal should occur until the Attorney for [Alliance] provides formal notice that the Bankruptcy Court has approved" the parties' actions. On 1 October 1993, Alliance's counsel notified the Board the "Bankruptcy Court approved the Partial Settlement Agreement entered into."

DECISION

Based upon the parties' partial dismissal request and Alliance's notice of 1 October 1993, there is no need to resolve the parts of this appeal concerning (a) furnishing of task quantities, other than Task No. 27, in exceess of 120 percent of estimated task quantities or (b) performance of PM bid item work beyond that contractually required. The former has become moot, *see, e.g., Local No. 8-6, Oil, Chemical & Atomic Workers Int'l Union v. Missouri,* 361 U.S. 363, 367-71 (1960); *Federal Data Corp. v. SMS Data Products Group, Inc.* [34 CCF ¶ 75,284], 819 F.2d 277, 279-80 (Fed. Cir. 1987), and the latter has been abandoned by Alliance. The only issue remaining in this appeal, therefore, is whether Alliance is entitled to an adjustment in the contract price for furnishing quantities of Task No. 27 during the base period and first option year exceeding 120 percent of quantities estimated to be supplied.

It is well-established that, when a Government contract contains a material representation which the contractor relies upon in bidding and has no reason to know is erroneous, the contractor can obtain an adjustment in the contract price under the standard changes or differing site condition clauses if the representation later is found to be incorrect and results in increased performance costs. *E.g., Summit Timber Co. v. United States* [29 CCF ¶ 82,507], 677 F.2d 852, 857-59, 230 Ct. Cl. 434, 445-46 (1982); *Morrison-Knudsen Co. v. United States* [12 CCF ¶ 81,901], 397 F.2d 826, 842-44, 184 Ct. Cl. 661, 685-90 (1968); *Schutt Construction Co. v. United States* [11 CCF ¶ 80,177], 353 F.2d 1018, 1021, 173 Ct. Cl. 836, 841-42 (1965); *Clement-Mtarri Companies,* ASBCA No. 38170, 92-3 BCA ¶ 25,192 at 125,538, *appeal docketed,* No. 93-1268 (Fed. Cir. Mar. 17, 1993); *Southeastern Services, Inc.,* ASBCA No. 21278, 78-2 BCA ¶ 13,239 at 64,755.

The parties' contract here represented that the Tech. Exh. 19 task "quantities are estimated, but **any task number should not be over 120% of the total amount anticipated"** (emphasis added). Such a representation is intended to guide bidders in eliminating from their bids allowances to protect themselves against the risk of having to supply a greater quantity of services than necessary and thus constitutes a material representation. *See, e.g., Medart v. Austin* [38 CCF ¶ 76,349], 967 F.2d 579, 582 (Fed. Cir. 1992); *Morrison-Knudsen,* 397 F.2d at 841, 184 Ct. Cl. at 685; *Womack v. United States* [12 CCF ¶ 81,795], 389 F.2d 793, 801, 182 Ct. Cl. 399, 412-13 (1968); *Southeastern Services, supra,* at 64,755; *compare Schutt Construction,* 353 F.2d at 1019, 1021, 173 Ct. Cl. at 838, 841-42, *with Raytheon Support Services Co.,* ASBCA No. 35688, 89-3 BCA ¶ 22,200, *aff'd,* 909 F.2d 1496 (Fed. Cir. 1990) (table).

As found above, Alliance relied upon this positive representation in preparing its bid. No reason is apparent why Alliance should have known that the Army's representation was incorrect. The Army has not contended in this appeal that clear and unequivocal contract language disclaimed the representation, that there was any other strong warning to potential bidders not to rely upon the representation in calculating their bids, or that a bidder could readily have determined for itself that the representation was in error. Alliance's reliance upon the representation therefore was reasonable. *See, e.g., Timber Investors, Inc. v. United States* [25 CCF ¶ 82,894], 587 F.2d 472, 477-78, 218 Ct. Cl. 408, 418-20 (1978); *Community Heating & Plumbing Co.,* ASBCA No. 33839, 89-3 BCA ¶ 22,149 at 111,474-75.

Further, as found above, the representation—that "any task number should not be over 120% of the total amount anticipated"—was incorrect with respect to Task No. 27 for both the base and first option periods. The parties have stipulated that the actual quantities ordered by the Army of Task No. 27 for those periods were 254 and 548, respectively, or more than 250 percent and 450 percent of the quantities set forth in Tech. Exh. 19, respectively. Thus, based upon the undisputed facts, Alliance appears entitled to an equitable adjustment if it in-

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curred increased performance costs because of the representation.

The Army argues, however, that the actual quantities of Task No. 27 which were ordered should be ignored because "[w]ork that was designated as Task Item No. 27 was actually performed under a separate provision of the contract, and is inapplicable to the estimates in the Task List" (Gov't br. at 2). According to the Army, all but 17 of the activities for which service orders were issued by the Army under Task No. 27 were for "unoccupied PM," which the Army was entitled to receive under the third bid item. While the parties disagree about the number of housing units which were "unoccupied" during Alliance's performance of Task No. 27 service orders, that factual issue need not be considered because the Army's current construction of the contract is untenable.

A contract is to be construed "as a whole" in a manner which harmonizes all of its provisions. *E.g., State of Arizona v. United States,* 575 F.2d 855, 863, 216 Ct. Cl. 221, 235 (1978). Contract language is to be given the meaning that would be attributed to it by a reasonably intelligent person acquainted with the circumstances surrounding the contract. *Alvin, Ltd. v. USPS* [34 CCF ¶ 75,255], 816 F.2d 1562, 1565 (Fed. Cir. 1987); *Firestone Tire & Rubber Co. v. United States* [16 CCF ¶ 80,450], 444 F.2d 547, 551, 195 Ct. Cl. 21, 30 (1971).

Application of these principles to the contract provisions here shows that, under the PM bid item, a contractor was free to schedule the housing units upon which it would perform PM during a particular month, but was required (within specified limits) to perform PM first on units it had scheduled which were "unoccupied" when requested to do so by the Army. The Army was not free to direct performance of PM in any housing unit under the PM bid item, as contended by the Army in this appeal. The Army could only direct performance of PM in an unoccupied unit which already was scheduled for PM by the contractor and where the number of scheduled units for which it had directed PM performance during a month was no more than 10 percent of the total number of units scheduled by the contractor for PM that month.

Under the plain language of the contract, the only possible authority for the Army ordering performance of PM in units *not* scheduled by the contractor for PM was the second bid item to perform BOM, which essentially was the same work as PM only in unoccupied units and which the Army elected *not* to award, and Task No. 27 of the first bid item, which appears to have been designed to allow the Army to obtain (in a limited number of units) work it could not otherwise direct be performed by service order. In the event BOM was awarded, Task No. 27 allowed the Army to issue service orders for the performance of BOM in newly assigned occupied units, activity not authorized under the BOM bid item. In the event PM was awarded, Task No. 27 allowed the Army to issue service orders for the performance of PM in any occupied or unoccupied unit, activity not authorized under the PM bid item.

The parties construed the contract in this fashion prior to a dispute arising regarding Task No. 27 quantities. As both parties acknowledge in their briefs, the Army issued service orders under Task No. 27 for the performance of PM in both occupied and unoccupied units not scheduled by Alliance for PM. While the Army characterizes its actions before the parties' dispute arose as "mistaken," the parties' construction of the contract prior to dispute is entitled to great weight. *E.g., Alvin Ltd.,* 816 F.2d at 1566; *Petrofsky v. United States* [19 CCF ¶ 82,740], 488 F.2d 1394, 1402, 203 Ct. Cl. 347, 361 (1973). Further, the Army's new found construction ignores various words of the contract. For example, paragraph 1.2 of Section 6 concerning the third bid item provides that vacant quarters "shall be given first priority for each housing area in which PM is to be accomplished" and PM "shall be accomplished in conformance with the contractor's approved and updated schedule." To allow the Army under the third bid item to order PM in vacant quarters not scheduled for PM by the contractor effectively would eliminate most of these words from the contract. A contract interpretation which eliminates words from a contract is unreasonable. *E.g., Astro-Space Laboratories, Inc. v. United States* [18 CCF ¶ 81,894], 470 F.2d 1003, 1010, 200 Ct. Cl. 282, 295 (1972). Accordingly, the Army's new found construction must be rejected in favor of the construction set forth above, which harmonizes all of the provisions of the contract, and the Army cannot avoid grant of an equitable adjustment if Alliance incurred increased performance costs because of the Army's representation.

The Army suggests in its briefs that Alliance incurred no extra cost as a result of the erroneous representation. According to the Army, grant of an equitable adjustment to Alliance "would be a double payment for

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work that the contractor was already required to perform under the contract" (Gov't br. at 22). Because this phase of the appeal "is limited to entitlement only, Alliance has not presented detailed documentation of the quantum of entitlement" (app. br. at 13). Contrary to the suggestion of the Army, however, Alliance has presented sufficient information to conclude that it sustained an injury as a result of the erroneous representation. *Compare Viktoria Fit Internationale Spedition,* ASBCA No. 39703, 92-2 BCA ¶ 24,968 at 124,418 and *JBS Missouri, Inc.,* ASBCA No. 34044, 87-2 BCA ¶ 19,904 at 100,693 *with Southeastern Services, supra,* at 64,756-59.

While the Army is correct that, during the first option period if a service order was not issued under the first bid item to perform PM or BOM on a unit, Alliance was required to perform PM on the unit under the third bid item, the same is not true for the base period. Alliance only was required to perform PM on 2,081 units during the base period. By ordering Alliance to perform PM or BOM on 134 more units than represented would occur under the first bid item, the Army therefore clearly directed work that would not otherwise have been performed under the third bid item, *i.e.,* the incurrence of extra labor and material costs.

Moreover, the Army's basic supposition—that it cost the same to perform PM under the third bid item as to perform PM or BOM directed by service order under the first bid item—is not supported by the record. The ability of the Army to issue a service order under Task No. 27 of bid item one for the performance of PM is similar to the ability of the Army to have issued a service order under the second bid item (if it had been awarded) for the performance of BOM. In both cases, the Army directs the contractor to examine housing units using an Army punchlist and correct deficiencies found within a specified period after receipt of the Army's order. As found above, Alliance and every other bidder on the contract bid a greater per unit cost for BOM under the second bid item than for PM under the third bid item. Such action was to be expected because additional constraints set forth in the contract for performing service orders, such as completion of work within only a couple of days of order receipt, made performance of service order PM and BOM more expensive than performance of contractor scheduled PM under the third bid item. As F. Allan Johnston, President of Alliance, stated in his affidavit, "it was more expensive for Alliance to perform a Task [ ] No. 27 preventative maintenance ... due to the requirement that Alliance mobilize to an individual housing unit and perform the preventative maintenance upon the Army's issuance of a written Service Order, rather than performing the preventative maintenance in a pre-planned, contiguous and cost-efficient manner." The Army's assertion that the Board should not consider Mr. Johnston's affidavit because the Army did not have an opportunity to "cross-examine" him (Gov't reply br. at 2-3) is without merit. The Army was free to depose Mr. Johnston during discovery and ask him any questions it desired. Also, the Army "stipulated" to submitting this appeal on the record knowing that both parties would have an opportunity to submit further evidence prior to the Board declaring the record closed under Rule 13.

CONCLUSION

The part of this appeal which concerns furnishing of work beyond that required by the PM bid item is dismissed with prejudice. The part of this appeal concerning furnishing of task quantities exceeding 120 percent of quantities estimated, other than Task No. 27, is dismissed as moot. The remainder of this appeal, which concerns furnishing quantities during the base period and first option year of Task No. 27 exceeding 120 percent of the quantities estimated to be supplied, is sustained and remanded to the contracting officer for a determination of quantum.

[¶ 26,463] Reflectone, Inc.

ASBCA No. 42363, October 25, 1993. Contract No. F33657-83-C-2141.

Contract Disputes, Claims—Alternative Claims—Same Set of Facts.—Two counts of an amended complaint were allowed because they were not new claims but rather were new legal theories based on the same set of operative facts alleged in the original complaint. The government alleged that the two counts were factually separate and distinct from the original complaint and cited newly discovered evidence from interrogatories and

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depositions. However, the evidence was substantially the same as that offered in support of other government motions.

For the appellant: Dickstein, Shapiro & Morin, Washington, D.C., by Victor J. Zupa, Howard Shiffman, Brian J. Siebel, and Gregory Baruch. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, Maj. Daniel Godale, USAF, and Mark Landers, Trial Attorneys.

Before PARK-CONROY, RUBERRY, and SPECTOR, Administrative Judges.

PARK-CONROY, Administrative Judge: At issue is the Government's motion to dismiss two new causes of action alleged in the amended complaint: Count VII, which alleges a breach of the Government's implied duty to cooperate; and Count VIII, which alleges the Government required appellant to perform work outside the scope of the contract requirements. The Government asserts that Counts VII and VIII should be dismissed for lack of jurisdiction because no underlying claim alleging a failure to cooperate or out-of-scope work was ever presented to the contracting officer for a final decision. We deny the motion.

Background

The claim upon which this appeal is based sought an equitable adjustment on Contract No. F33657-83-C-2141 which was awarded to appellant on 5 August 1983 for the design and manufacture of an Aerial Refueling Part Task Trainer (ARPTT) for pilots of the C-5A/C-141B aircraft. Appellant entered into a contract with the Farrand Optical Company, Inc. (FOCI) to manufacture a Direct View With Depth (DVWD) optical vision system for the ARPTT, but subsequently terminated FOCI and undertook the design and development work associated with the direct view visual system itself.

In its 8 December 1989 claim, appellant asserted that the FOCI DVWD visual system was not an off-the-shelf system as appellant had been led to believe, but that it was developmental and required extraordinary effort to produce. The claim was denied by a contracting officer's decision dated 22 October 1990. The original complaint asserted that appellant was required to undertake extensive and unanticipated design and development effort which led to problems in manufacturing the direct view visual system and that the Air Force treated the contract as a total developmental contract rather than a "build to spec" production contract with some front-end development work. It alleged the following six causes of action: Count I (Impossibility of Performance); Count II (Economic/Commercial Impracticability of Performance); Count III (Mutual Mistake); Count IV (Superior Knowledge); Count V (Implied Warranty of Commercial Availability); and Count VI (Implied Warranty of Specification).

On 2 April 1993, appellant filed an amended complaint which raised two additional causes of action: Count VII (failure to cooperate) and Count VIII (out-of-scope work). On 9 April 1993, the Government moved to strike the amended complaint asserting, among other things, that appellant had raised new legal and factual issues which had not been presented to the contracting officer. By an order dated 21 April 1993, the Board denied the Government's motion to strike finding that "Counts VII and VIII are based upon the same set of operative facts that formed the basis of the claim presented to the contracting officer." On 26 April 1993, the Government moved for reconsideration of the Board's 21 April 1993 order. The motion was denied by an order dated 3 May 1993.

Discussion

The Government's current motion asserts that we should dismiss these same two counts of the amended complaint on grounds they "are factually separate and distinct from Counts I-VI of the original Complaint" and that, "[a]s such, they are separate claims and not just new legal theories based on the same operative facts (Gov't br. at 1). In support of its motion, the Government points to "evidence" that it describes as "newly discovered through interrogatories and depositions." This "evidence" consists of an affidavit by the contracting officer, an excerpt from the transcript of the deposition of Mr. Richard Johnson, appellant's ARPTT program manager, and appellant's answers to Interrogatory No. 2 of the Government's Second Set of Discovery Requests and Interrogatory No. 577 of the Government's Sixth Set of Discovery Requests.

Appellant opposes the motion on grounds the Board has already decided this issue. It asserts the Government's current motion is based upon essentially the same information the Government presented in its earlier mo-

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tions to strike and for reconsideration. It further asserts, as it did before, that Counts VII and VIII of the Amended Complaint are based upon the same set of operative facts.

We agree with appellant that the affidavit of the contracting officer now offered by the Government is substantially the same as that offered in support of the Government's motion for reconsideration of the Board's 21 April 1993 order denying its motion to strike. As to the deposition transcript excerpts, Mr. Johnson's affidavit dispels any notion that he was either responsible for submitting appellant's claim or that the excerpts of his testimony support the Government's contention that Counts VII and VIII are factually separate and distinct from Counts I through VI.

Finally, we are satisfied with appellant's explanation of (1) the differences between Interrogatory Nos. 2 and 577, in particular that Interrogatory No. 2 did not ask for, and appellant did not provide, "a comprehensive set of TDs [test discrepancy reports] which related to its claim" and (2) the relationship between the technical discrepancy reports identified in these two interrogatory answers (app. br. at 6-7).

DECISION

Appellant's claim raised all of the problems it encountered with the ARPTT visual system. Counts VII and VIII of the amended complaint merely allege new legal theories based upon the same set of operative facts. *See e.g., Standard Technology, Inc.*, ASBCA No. 41831, 91-2 BCA ¶ 23,936.

This is the third occasion upon which the Board has been asked by the Government to decide this issue. We do not anticipate that we will be called upon to address this issue again.

The Government's motion to dismiss is denied.

[¶ 26,464] Engineering Construction, Inc., by Trustee in Bankruptcy

ASBCA No. 42132, October 28, 1993. Contract No. N62474-86-C-6527.

Site Conditions—Relief for Differing Site Conditions—Waiver of Obstructions.—Under a contract for the replacement of fuel pipelines, a contractor was not entitled to an equitable adjustment for debris encountered during excavation, despite its contention that the debris constituted a differing site condition, because in exchange for cost savings resulting from the government's granting of the contractor's request to abandon the old fuel lines and to reroute the new fuel lines, the contractor waived any claims for future obstructions. Although the waiver did not cover all difficulties that might be encountered while excavating, the board concluded that, as a matter of law, the debris constituted obstructions.

Site Conditions—Contract Indications, Category I—Soil Conditions.—Under a contract for the replacement of fuel pipelines, a contractor was not entitled to an equitable adjustment for the removal and replacement of allegedly contaminated soil, despite its contention that the soil constituted a differing site condition, because the record did not show that the relatively small amount of soil at issue was contaminated. Moreover, the government did not "force" the contractor to haul the soil from the project site and to replace it with imported sand, as alleged by the contractor. Further, the specifications also provided for the use of sand as a borrow material at no extra cost to the government.

Delays—Adjustments—Proof.—Under a contract for the replacement of fuel pipelines, the contractor was not entitled to an equitable adjustment for any delay resulting from problems with debris, water leaks, tie-ins of pipelines, and accommodation of the government's barge-loading schedule, because the board concluded that the contractor's progress on the job was not delayed by any of these alleged problems.

For the appellant: Carr, McClellan, Ingersoll, Thompson & Horn, Burlingame, California, by David M. McKim. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Richard L. Spector, Trial Attorney, Western Division, Naval Facilities Engineering Command, San Bruno, California.

Before PAUL, RIISMANDEL, and RUBERRY, Administrative Judges.

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PAUL, Administrative Judge: This is a timely appeal of a contracting officer's decision denying appellant Engineering Construction Inc.'s (ECI) claim for an equitable adjustment in an amount of $295,671. A two-day hearing was held in San Francisco, California, and each party later filed two post-hearing briefs. The Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq.*, is applicable, and only issues of entitlement are before us for decision.

FINDINGS OF FACT

1. On 1 June 1988, the Naval Facilities Engineering Command (NAVFAC), Western Division, and ECI entered into contract No. N62474-86-C-6527 to remove, dispose of, and replace two fuel pipelines at the Point Molate Fuel Depot, Richmond, California. The face amount of this fixed-price contract was $457,480, and the contractual completion date was 11 January 1989 (R4, tab 1).

2. The contract incorporated by reference, *inter alia*, the following standard clauses: "FAR 52.212-12, Suspension of Work (APR 1984)"; "FAR 52.233-1 Disputes (APR 1984)"; "FAR 52.236-2, Differing Site Conditions (APR 1984)"; and "FAR 52.243-4, Changes (APR 1984)" (R4, tab 1).

3. In addition, the contract contained a detailed set of specifications and drawings. Particularly pertinent to this appeal are several subparagraphs which appear in section 02200 of the specifications entitled "Earthwork." For example, subparagraph "1.6.1 Shroing [sic] and Sheeting" required ECI to "[p]rovide shoring, bracing, cribbing, underpinning and sheeting where indicated." In addition, subparagraph "1.6.2 Dewatering" stated: "Include in dewatering the collection and disposal of all forms of surface and subsurface water that are encountered in the course of construction." Further, subparagraph 1.6.2.2 required ECI to:

> Operate the dewatering system continuously, 24 hours per day, 7 days per week until such time as construction work below existing water levels is complete, unless directed otherwise. Measure and record the performance of the dewatering system at the same time each day by use of suitable observation wells or piezometers installed in conjunction with the dewatering system.

(R4, tab 1)

4. Part 2 of section 02200 of the specifications was entitled "Products." It set forth the following contractual requirements:

> 2.1 SOIL MATERIALS: In general, shall be free of debris, roots, wood, scrap material, vegetable matter, refuse, soft unsound particles, frozen, deleterious, or objectionable materials.
>
> 2.1.1 Backfill: Shall conform to the general requirements for soil materials above and shall be material excavated on the site of this project. All particles larger than 1-1/2 inches shall be removed from backfill material.
>
> 2.1.2 Subgrade Material for Roads and Paved Areas: Shall conform to the general requirements for soil materials above and shall be classified as GW, GP, GM, SW, SP, SM by ASTM D2487 and meet the following: liquid limit shall not exceed 35 percent when tested in accordance with ASTM D423, plasticity index shall not exceed 12 percent when tested in accordance with ASTM D424, and not more than 25 percent by weight shall be finer than the No. 200 sieve.
>
> 2.1.3 Bedding Around Piping: Shall be sand and have a maximum particle size of 1/2 inch.
>
> 2.1.4 Sand: Shall conform to the general requirements for soil materials above and shall be clean, coarse grained material classified as SW or SP by ASTM D2487 of which not more than 10 percent by weight shall be finer than the No. 200 sieve.
>
> 2.1.5 Topsoil: Shall be material free of subsoil, stumps, rocks larger than one inch diameter, brush, weeds, toxic substances, and other material or substance detrimental to plant growth. Topsoil shall be a natural, friable soil representative of productive soils in the vicinity.
>
> 2.1.6 Borrow: Shall be materials conforming to the requirements for sand, bedding and backfill. Obtain borrow materials from approved sources off Government property.

(R4, tab 1)

5. Prior to the commencement of excavation, ECI's superintendent, Mr. Chuck Odem, became concerned that his firm had not properly estimated the job. Specifically, he concluded that ECI had not placed enough money in its bid to cover the costs of "isolating and blinding" the two fuel pipelines. Accordingly, Mr. Odem proposed to the Navy's construction representative, Mr. Richard Webb, the abandonment in place of the existing pipelines and a rerouting of the replacement pipelines (tr. 2/97-100).

6. At the time when he devised this scheme, Mr. Odem estimated that its accept-

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ance by the Navy would result in a savings for ECI of "probably 25 percent of the contract" price. Mr. Odem described these savings in the following terms:

> There was much less excavation. There was no demolition of pipe at all. There was no hauling of pipe at all. There was no isolating, there was no cleaning, there was no burning. There was no trench installation, or shoring installation, shoring removal. In fact, shoring was almost, almost nonexistent. And the whole complexion of the job changed radically.

(Tr. 2/100-01)

7. Mr. Odem's testimony in this regard was corroborated by that of Mr. Webb who testified:

> There was [sic] some costs savings that would be involved here. One is, by going with a shallower excavation, say five foot compacted to the average of eight foot on the other one, it eliminated that much more backfill that he had to do. When he pulled the old pipes out, he would have had that additional amount of material to put back in. It eliminated disposal of the two 20-inch pipes that was [sic] in place. It took away a lot of the requirement for shoring. Because, all of a sudden, instead of being down eight foot, we were now four foot. As a matter of fact, I believe on the drawing that ultimately everybody agreed on, it showed 4'11", 5 foot being the magic number for shoring. Anything beyond that required shoring; anything above that, you know, discretionary. There was considerable cost savings there, you know.

(Tr. 1/194-95) Based upon the credible testimony of both Mr. Odem and Mr. Webb, the Board finds that ECI's rerouting proposal encompassed significant cost savings for the contractor.

8. The Navy's construction representatives concurred with ECI's proposal to abandon the existing fuel lines in place and to reroute the new lines. However, recognizing the substantial cost savings to ECI which were inherent in the scheme, Mr. Webb and Mr. Fortunado J. Esguerra, the Navy's contract administrator, demanded that ECI grant the Navy a *quid pro quo*. Accordingly, Mr. Lenny Silvia, ECI's project manager, executed a written waiver on 19 August 1988 in which he stated: "We waive any claims of future obstructions in lieu of abandoning two 20" lines." (Tr. 1/196-201; R4, tab 5).

9. ECI commenced excavation, and, during the month of August 1988, it encountered several unmarked obstructions, including eight lines and debris in a small area in the form of some old railroad ties, a telephone pole, and 60 to 70 bricks. These obstructions did not delay ECI's progress on the job. As Mr. Odem, ECI's superintendent, testified, the debris in its entirety was "[n]ot enough to fill the back of a pickup truck, actually." (Tr. 2/106) Moreover, ECI's crew continued to work on the job site. Finally, as Mr. Webb noted in his job diary:

> Contractor has uncovered approximately 14 pipes or obstructions to date—he has not ask [sic] for obstruction nor turned in the obstruction log.

(Exh. G-1)

10. Also during the month of August, ECI encountered a small volume of hydrocarbons during excavation. On 3 August 1988, Mr. Silvia wrote to the Navy, in pertinent part, as follows:

> On August 01, 1988, we started excavation for the pipelines. We removed approximately 5 cubic yards of earth, of which fifty (50) percent was contaminated with Hydrocarbon. At this time, we have set the contaminated soil along the side of the pipeline trench, as excavated. Our evaluation of the situation is that the entire pipeline will require import fill material. We also feel that the services of a special hazard waste handler/hauler and disposal site is required. This entire excavation and backfill process now becomes very tedious and time consuming.
>
> The process may be as follows:
>
> 1. Purchase the services of licensed hauler.
>
> 2. Hauler places disposal bins on site.
>
> 3. Engineering Construction, Inc. excavates and fills bins.
>
> 4. Hauler removes and replaces bins.
>
> 5. Engineering Construction, Inc. replaces native soil removed, with new import.

(Exh. A-4)

11. The Navy investigated the situation, and Mr. Webb, the Navy's construction representative, described the results of the investigation in these terms:

> In the beginning, on or about August 2 or 3, when he [ECI] was digging east of valve box 19, an abandoned storm drain line was broken. Water and some hydrocarbons material, petroleum products, ran out of that. In the bottom of that excavation, there was a small amount of soil that, on top of it, was water with oil floating on top of it. That material, at that time, it was unknown whether it was contaminated or not. It was alleged, I believe, in

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the letter of August 4, that it was contaminated material. That material was dug out of the excavation, and, as excess material, taken down to the drum storage lot. It was discovered on August 11 that no contamination existed. That we didn't have it. There was not enough hydrocarbons in the soil to be classified as contaminated material.

So, I guess what I'm trying to say is: between August 5, or 6, or 7, and August 11, there was a question there about a small amount of material. I'd say a dump-truck load, or maybe two dump-truck loads, that may be contaminated.

(Tr. 2/19-20) The discovery on 11 August to which Mr. Webb referred was a soils test conducted by LCDR Vickers of the ROICC office which led him to conclude that the volume of hydrocarbons in the soil was negligible. LCDR Vickers described this test in a memorandum dated 23 January 1990 (R4, tab 14). Moreover, Mr. Esguerra alluded to this test in a memorandum of telephone call which was dated 11 August 1988. He wrote:

1. In accordance with Ref(a), following were discussed:

(a) Regarding your letter of 03 Aug 1988 (Received 09 Aug 1988) the soil was tested and was determined that the soil was not contaminated.

(b) LCDR C. Vickers conducted the test with his environmental group.

(c) You may proceed [sic] your operations as usual.

(Exh. A-7) In contrast, ECI did not proffer any credible, substantiated evidence demonstrating that the soil at issue was contaminated. Accordingly, based upon the weight of the evidence, we conclude that the soil was not contaminated.

12. The incidents relating to the presence of both debris and hydrocarbons in the excavated soil generated a controversy between the parties. Largely because the Navy had accommodated ECI and had allowed it to leave the existing pipelines in place, there was, in Mr. Webb's words, "a great deal more excess material than there was material to be used, reused." Mr. Webb testified further:

So, basically, what you had, you dug out, say 60 inches of material, what you actually had to put back in is backfill amounting to 8 to 12 inches of material. So, you had the difference between, say one foot and five foot.

(Tr. 2/16) Based upon Mr. Webb's credible testimony, the Board finds that ECI would have been forced to transport substantial quantities of excavated soil beyond the location of the project regardless of whether the soil contained debris or hydrocarbons.

13. As a further accommodation to ECI, the Navy allowed it to spread any excess soil which contained debris behind the so-called "drum storage lot" which was located at the fuel depot. In addition, the Navy permitted ECI to spread excess soil which contained hydrocarbons on the drum storage lot itself. Finally, in accordance with subsections 2.1.4. and 2.1.6 of section 02200 of the specifications, the Navy gave ECI permission to use sand in certain areas in place of native backfill (tr. 2/52; exh. G-1).

14. However, ECI was not content with these solutions; and, on 19 August 1988, it forwarded the following letter to the ROICC's office:

On August 10, 1988, during our meeting at the jobsite, the Navy representative determined that the excavated material was not contaminated with hazardous waste, however, it was determined that the native soil was not suitable for backfill, due to miscellaneous debris too large for compaction. The debris that was found included a telephone pole ten (10) feet long, red brick, old building lumber, and alike.

Also noted at the meeting; purchasing and hauling the import backfill for the area of trench between the sand around the pipe and the base rock under asphalt would be a change in the scope of work; the hauling and spreading of the native fill is an extra to the contract.

We will submit the estimate for change order after the actual necessary cubic yards have been determined.

(Exh. A-8)

15. On 15 September 1988, Mr. Esguerra, the Navy's contract administrator, responded to ECI's letter in these terms:

In your letter of 19 August 1988 (received 29 August 1988), you mentioned that the Navy determined that the excavated materials were not contaminated, and that the native soil was not suitable for backfill because it contained debris (power pole, red brick, old building etc).

Furthermore, you stated that the hauling of the imported backfill is an extra cost to the contract which you intend to submit later.

Your costs for backfill are covered as part of the original contract by virtue of your agreement to waive unforeseen conditions

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costs in exchange for approval of your request to abandon the two (2) 20-inch lines in place. (See enclosed letter dated 08 August 1988.)

(Exh. A-9)

16. ECI replied to the Navy's letter on 20 September 1988. It wrote:

This letter is in response to your document 913.3:FJE:bab:5757, dated September 15, 1988.

The backfill you refer to as being part of our original contract, is not. The U.S. Navy's own specification disqualifies the native soil as suitable backfill material, due to the size and quantity of debris existing. Specification Section No. 2.1, limits the largest size of solids to $1^1/_2$"; 3.4.1, required compaction of 95%.

Further, your letter mentions that we agreed to waive unforseen [sic] conditions, that is incorrect. Our letter of August 08, 1988 provides a waiver of additional claims, due to obstructions in the excavation of the pipeline.

Our request for additional compensation to haul in new import backfill material is due to changing site conditions, not obstructions impeding the installation of pipe.

(Exh. A-9)

17. Mr. Esguerra forwarded a response to ECI's letter on 30 September 1988, in which he stated:

The contract specification does not in any way disqualify the suitability of the native soil as backfill material. I call your attention to Specification Section 02200, Para 2.1 Soil Materials. It only requires that materials "in general, shall be free of debris, roots, wood, scrap material, vegetable matter, refuse, soft unsound particles, frozen, deleterious or objectionable materials".

Also, consider Specification Section 02200 Para. 2.1.1 Backfill. Per that requirement, backfill "shall conform to the general requirements for soil materials above *and shall be materials excavated on the site of this project.* All particles larger than $1^1/_2$ inches shall be removed from backfill material". This provides for removal of large particles by the Contractor.

However, if you decide that it is more convenient for you to dispose and replace the backfill materials, you may do so. In accordance with Specification Section 02200, para. 2.1.6 Borrow. It provides that you may "obtain materials *from approved sources* off government property". This is an option which you can exercise at no additional cost to the government

Your request for additional compensation to haul in new import backfill is no [sic] justified and is denied due to the following:

(1) The excavation materials from the trench which could have been reused were hauled away without direction or concurrence from the Government. You hauled it away at your own volition.

(2) During the 22 September 1988 telephone conversation between Lenny Silva, ECI, and Fort J. Esguerra, ROICC, you were informed that the borrow pit had been approved.

(3) On 27 September 1988, you hauled in new imported backfill at your own volition and without Government direction or concurrence.

(Exh. A-10)

18. None of these developments relating to backfill impacted upon ECI's job performance, and its workers continued to report to the job site on a daily basis throughout the period of this controversy (exh. G-1, -2; tr. 2/30).

19. Also during the month of August 1988, ECI encountered a minor, but persistent, water leak in the area of excavation. Mr. Webb gave credible testimony concerning the situation in these terms:

Going back about two or three weeks, when the contractor was digging next to valve box 11, there was a line that was uncovered that two things was happening with this line: One is there was a fluid, a water, that was coming out of this line. The second thing that was happening is ground water was following this line as it came down, and ground water was coming into the trench, too. It initially was addressed by sticking a plastic—and this, again, is a diary entry—there was a plastic pipe that was stuck in the inside of this pipe that was used to divert the water. As the job went on, it became real hard to get Public Works to fix this. Mainly, is because I don't think nobody understood exactly where the line came from or how to shut it off.

On or about the date of this daily report, 8-26, a decision was made, and I talked to Chuck Odem. What was ultimately done is we put a plumber's plug in it and tightened the plumber's plug, and that stopped the water leaking. For the two to three weeks prior to that, the water did—there was

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water leaking from this pipe. There was ground water coming out of this pipe. It ran into the ditch and went over to a monitoring well that was right next to this, that was being used as a dewatering station for this contract. It never stopped work. Work continued, work progressed through the whole course of this, as evidenced by all the daily reports and the number of men on the job, and those type of issues.

(Tr. 2/29-30)

20. Mr. Webb's testimony in this regard was corroborated by Mr. Odem, ECI's superintendent. He testified:

We excavated over to a Navy-installed sump pump, water separator pump. We excavated over to it and allowed the water to run to it to clear it out. We were—we had to do—as part of our contract, we were obligated to take care of ground water. It had been determined that this was primarily ground water running in, and they had allowed us to excavate the Navy's installation and allow it to take care of the ground water.

Mr. Odem also testified that, although this situation extended over a period of several weeks, it did not interfere in any way with ECI's progress on the job (tr. 2/112). Accordingly, the Board finds that this minor leakage did not delay ECI's work on the project.[1]

21. Subparagraph 2.2.2 of section 01011 of the specifications provided, in pertinent part, that:

One of the 20" pipelines, either existing or new, shall remain in service at all times during the period of construction. Provide 14 days notice prior to taking either pipeline out of service.

(R4, tab 1) On 7 October 1988 ECI gave notice to the Navy requesting the availability of pipeline "B." The Navy informed ECI that the line would be available on 21 October, but ECI responded that it would not need the line until 24 October. ECI's crew worked on the jobsite on 24 October, and the line was made available on 25 October (tr. 2/32-33; exh. G-2). The Board finds that ECI's progress was not delayed by any failure of the Navy to make pipeline "B" available in a timely fashion.

22. On 29 November 1988, ECI notified the Navy of its need for the availability of pipeline "A." The Navy responded that the line would be available on 5 December 1988, and the parties agreed that ECI's crew would return on that date. ECI decided not to return to the job site until 12 December, and the line was available on that date (tr. 2/34-35; exh. G-1, -2). We find that ECI's progress was not delayed by any failure of the Navy to make pipeline "A" available in a timely fashion.[2]

23. On 10 April 1989, ECI forwarded a claim to the Navy's contracting officer in which it sought relief as follows:

I. There are three distinct elements of additional cost our firm experienced during the course of actually constructing this project. The first element of our claim is the following summary of additional work that has not yet been paid:

1. The additional costs to remove the sluffing [sic]—saturated and contaminated soils near valve box #19; to shore and "dewater" the excavation; and to replace the contaminated soil with import.

2. The additional cost to load out the sluffing [sic]—saturated and contaminated soil; transport the same soil to the drum storage site; and to unload, deck, spread and turnover the same soil at the drum storage site (excluding Dirtworks subcontract).

3. The additional cost to import and handle a suitable backfill material.

4. The additional paving cost to pave areas of existing pavement that cracked and/or had to be removed due to sluffing [sic] soil conditions.

5. The additional cost to excavate, backfill and compact areas of the trench excavation removed due to a saturated sluffing [sic] soil condition.

6. The additional cost to provide dewatering capability to remove contaminated ground water as required throughout the project.

TOTAL DIRECT COST (Excluding margin, bonds, insurance and financing)	$72,528.00

[1] ECI also complained that soil in this area was "sloughing off" into the excavation. However, as indicated by Mr. Webb in his testimony, this phenomenon was the result of ECI's failure to comply with the contract's shoring requirements (tr. 2/56-59; R4, tab 1).

[2] There is no credible record evidence demonstrating that ECI's progress was delayed as a result of its accommodation of the Navy's barge loading schedule.

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II. The second element of additional cost experienced by our firm was a series of critical time delays as follows:

08/02/88—	Daily Report identifies 2 c.d. of delay created by conflict with existing pipe.
08/26/88—	Daily Report identifies 21 c.d. of delay created by a severe sewer leak and public Works' inability to repair leak.
10/11/88—	Daily Report identifies 14 c.d. of delay created by the Navy's inability to provide scheduled tie-ins. (Note: specified notification period applies only to utilities!)
10/14/88—	Daily Report identifies a 3 c.d. delay to accommodate the Navy's barge loading schedule.
12/12/88—	Daily time sheets identify 11 c.d. of time lost due to the tie-ins being unavailable.
TOTAL DAYS DELAYED	51 c.d.
TOTAL TIME DELAY COST ($1145.14/c.d. × 51 c.d.)	$58,402.00

(Note: Appendix "A" for detailed time-related daily cost)

III. The third element of cost is the inefficiencies and minor delays created by working in hydrocarbon contaminated environment. Obviously, workers compelled to breath [sic] petroleum distillates and to be constantly exposed to the skin irritations of contaminated soils while being concerned with the potential of fire/explosion simply are not as productive as workers on a typical welded, buried steel pipeline.

In an effort to accurately quantify the loss of productivity costs created by being compelled to work in a noxious environment, we have chosen to use the recommendations of the Mechanical Contractor's Association of America. Their published research, in Bulletin No. 58, states that a severe degradation in attitude and moral [sic] caused by a hazardous location and poor site conditions is anticipated to create a 30% loss of productivity. Now, after having endured the actual construction of the Point Molate fuel line replacement in a fuel contaminated environment, our firm is in a position to concur with the Mechanical Contractors Association findings.

As of March 28, 1989, our firm has spent a total of $182,454.00 in labor. Using the Mechanical Contractors Association guides, the actual loss of productivity created by the contaminated soils is 30% of $182,454.00 or $54,736.00. Therefore, the total additional costs created by being compelled to construct the fuel line replacement through fuel contaminated soils and pockets of man-deposited rubble and debris are as follows:

A.	TOTAL DIRECT COST	$ 72,528.00
B.	TIME DELAY COST	58,402.00
C.	LOSS OF PRODUCTIVITY	54,736.00
	SUBTOTAL OF ECI DIRECT COST:	$185,666.00
D.	SUBCONTRACTORS	
	1. Dirtworks (contaminate soil removal, disposal, decking)	$ 24,750.00
	2. Gilbert Construction (removal of petroleum sludge from concrete)	8,597.00
	3. Med-Tox (soils contamination testing)	840.00
	TOTAL DIRECT COST:	$219,853.00
	23.83% Home Office Overhead	52,391.00
	SUBTOTAL:	$272,244.00
	7% Margin	$ 19,057.00
	SUBTOTAL:	$291,301.00
	1.5% Bonds and insurance	$ 4,370.00
	TOTAL COST: (Created by the petroleum contaminated soil and man-deposited debris)	$295,671.00

(R4, tab 10)

24. on 14 March 1990, the Navy's contracting officer issued a final decision in which he denied ECI's claim in its entirety. He stated, in pertinent part:

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VALVE BOX 19 TO 20 RELOCATION

You contend you are entitled to additional compensation for costs incurred because the material you encountered in the excavation between valve boxes 19 and 20 was unusable due to gradation and the existence of debris, stating the Government warranted the material was usable as backfill.

You located the new lines between valve boxes 19 and 20 parallel to (removed horizontally from and substantially shallower than) the existing lines which you capped and abandoned in place.

Between valve box 19 and 20, you encountered a small amount of debris (a 10′ pole, some bricks and some lumber) and you found the excavated material contains a substantial amount of rock that would not pass a 1-1/2″ screen. It is these events that give rise to this portion of your claim.

Relative to the material you discovered in your trench between valve boxes 19 and 20, you elected to follow an alignment of your own design which was removed horizontally from the existing piping so that you could not reasonably assume you would encounter the backfill for the existing pipes. The design was yours, not the Navy's, and you, not the Navy, are responsible for its adequacy. Further and as evidenced by entries in daily reports, diaries and other memoranda, you supplemented your proposal by assuming the cost of encountering any obstacles (any piping that crossed your trench and crossed the existing fuel pipelines the contract required to be removed, for example). It is this last item that gives evidence of some consideration to the Navy. Otherwise, you escaped a considerable amount of work that was contemplated in the contract without any benefit to the Navy. Accordingly, there is no merit in this portion of your claim.

CONTAMINATED SOIL AND WATER

You contend the presence of hydrocarbons and water in the trench adjacent to (North of) valve box 19 and between valve boxes 19 and 11 was a hazardous differing site condition for which you are entitled to additional compensation.

You cut away and capped the two 20″ lines from valve boxes 11 and 19, running the new lines exiting valve box 19 toward valve box 11 in a more horizontal (shallower) attitude than required in the contract documents, so that they ran above the abandoned and capped existing lines to a point near valve box 11 where you installed ells that directed the new lines down to ells on new lines exiting valve box 11 at the elevation of the existing lines.

On 2 August 1988, you encountered and broke a six or eight inch diameter clay drain line East of valve box 11 which ran parallel with and at the same level as the 20″ lines. The broken line discharged water for approximately two hours and then a heavy black oil identified by station personnel as Navy Special (which hasn't been stored at Pt. Molate for many years). The line was plugged and abandoned.

On 3 August 1988, you reported finding hydrocarbons in the trench along the North wall of valve box 19. You have subsequently stated you encountered hydrocarbons in the trench between valve boxes 11 and 19. It is these events that give rise to this portion of your claim for increased costs. You have subsequently stated you discovered a large quantity of oil in a Eucalyptus grove South of valve boxes 11 and 19 and infer the oil migrated from there into your trench.

The concentration of water borne hydrocarbons in your trench was tested by the Navy's station personnel and found to be within allowable limits. The samples you had Med-Tox test were taken by your employee, not a laboratory technician, and hence you haven't presented evidence they are representative samples of the concentrations at the sources or the extent of contamination.

You have attempted to elicit the intervention of Congressman George Miller, Senator Alan Cranston, the Contra Costa County Environmental Health Group, the Environmental Protection Agency, and numerous individuals in the Bay Area Water Quality Control Board. No citations have been issued relative to the conditions of which you complained.

The photographs of excavated spoil shows material from between valve boxes 19 and 20 (oversize rock) not oil contaminated material and the photographs of oil in the excavations do not prove there was more than a film of oil present. You have not proven that the oil you say you found in the eucalyptus grove migrated into your excavation.

Relative to the existence of hydrocarbons in your trench, the work is being conducted in the middle of a Navy tank farm that has been in operation for many years, long before environmental quality was a matter of public concern to the extent it is

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now or governed the behavior of people managing tank farms. It would be unreasonable to assume that you would not encounter hydrocarbons in any excavation, particularly when you were replacing one pair of 20" diameter fuel lines with another pair of 20" diameter fuel lines. Your contract, while it neither says you will or will not encounter hydrocarbons in trenching, clearly contemplated your encountering both water and hydrocarbons and made provisions therefor, none of which include increasing the contract price. You have not demonstrated that you encountered a differing site condition in that it does not differ from that indicated in the contract or normally inhering in the work.

Based upon the foregoing, your claim is denied.

(R4, tab 17)

25. This appeal followed.

DECISION

ECI argues initially that the debris which it encountered at the onset of excavation constituted a differing site condition for which it should receive compensation. In formulating this contention, ECI overlooks the fact that the route of excavation was altered at its request and that it achieved substantial cost savings as a result of this rerouting. Moreover, ECI also ignores the waiver which it executed as consideration for these savings. We do not read this waiver as broadly as the Government to encompass all difficulties which ECI might have encountered while excavating. The Board does conclude, as a matter of law, however, that the debris at issue constituted "obstructions" and that, therefore, it squarely fit within the parameters of ECI's waiver. Accordingly, we must deny this claim.[3]

ECI raises similar allegations concerning soil which it contends was contaminated by hydrocarbons. It argues that this purported contamination constituted a differing site condition and that it was entitled to relief under the theory of a constructive change because it was "forced" to "haul away contaminated soil, spread and aerate saturated soil, and import replacement." First, the weight of the evidence does not support ECI's contention that the relatively small amount of soil at issue was contaminated. Indeed, we have found that it was not. Moreover, the Navy did not "force" ECI to haul this soil from the project site and to replace it with imported sand. It merely accommodated ECI's request and provided ECI with a convenient location to place the soil. Finally, we simply note, as a matter of law, that subparagraph 2.1.6 of section 02200 of the specifications provided the use of sand as a borrow material at no extra cost to the Government. Hence, we deny ECI's claim in this regard.[4]

ECI's third major argument is that it is entitled to recover for 51 days' of delay which resulted from problems with debris, water leaks, tie-ins of pipelines, and accommodation of the Navy's barge loading schedule. As a part of our factual findings, the Board has carefully examined each of these delay claims and has concluded that ECI's progress on the job was not delayed by any of these alleged problems. Therefore, we conclude that ECI's delay claim is devoid of merit.

CONCLUSION

The appeal is denied.

[¶ 26,465] Stapp Towing Company, Inc.

ASBCA Nos. 41584, 41585, 41586, 41590, October 25, 1993. Contract Nos. ILWX 35697-S, 02773-S, 40073-S, 14445-S.

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[3] ECI also appears to contend that it should not have been required to screen excavated soil to remove particles larger than one and one-half inches. It thus overlooks the fact that, because there was far more excavated soil than was needed for purposes of backfilling, it would have been forced to haul this soil away under any circumstances. ECI also misinterprets subparagraph 2.1.1 of section 02200 of the specifications which clearly required it to remove large particles "from backfill material."

[4] ECI also apparently argues that it should recoup purported additional costs relating to dewatering and sloughing. In performing dewatering, ECI was merely complying with contractual requirements. Further, as we have found, the sloughing at issue resulted from ECI's failure to provide the contractually required shoring materials. Therefore, ECI is not entitled to recover any additional costs which may have resulted from these occurrences.

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Delays—Adjustments—Demurrage.—Under the Equipment Ordered but Not Used clause of a contract for the movement of diesel marine fuel that was canceled by the government and awarded to another contractor, the original contractor was entitled to recover the specified demurrage, despite the government's contention that the contractor's allegedly late tender of performance justified the cancellation, because the government failed to show that the contractor was unreasonably late in arriving at the loading point. The record showed that the government knew that the contractor was off-loading other cargo when it was awarded the contract. The government ordered the contractor to finish off-loading and to proceed to the load point whenever reasonable. The government wrongfully moved the fuel without informing the contractor and canceled the contract when the contractor attempted to load.

Interpretation of Contracts—Moving and Storage—Equipment Ordered but Not Used Clause.—Under the Equipment Ordered but Not Used clause of a contract for the movement of diesel marine fuel that was canceled by the government and awarded to another contractor, the original contractor was entitled to the demurrage rate under the clause, despite the government's contention that the clause included an unenforceable liquidated damages provision that resulted in a penalty, because the clause was an alternate rate of compensation from the per barrel rate to be used if the contractor moved the fuel, rather than liquidated damages. In the clause, as written by the government, the government agreed to pay the contractor on an hourly basis in exchange for government's exercise of its right to cancel the contract. The contractor was entitled to the amounts it invoiced under the disputed contract.

For the appellant: Gardner & Kewley, Metairie, Louisiana, by Van M. Davidson, Jr. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Scott L. Kilgore, JAGC, Trial Attorney.

Before STEMPLER, RUBERRY, and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: These are timely appeals from refusals to issue decisions on appellant's claims resulting from the Government's cancelling the contracts in dispute.[1] A hearing was held and the parties have filed briefs. Both entitlement and quantum are before us. The Contract Disputes Act is applicable.

FINDINGS OF FACT[2]

Stapp Towing Company, Inc. (Stapp) is a duly licensed Texas corporation doing business in Texas. Its corporate headquarters is located in Dickinson, Texas. At all times relevant to these proceedings, Stapp was in business providing barge transportation services for petroleum products on the inland waterways of the United States. It provided these services primarily to the United States Army Military Traffic Management Command (MTMC).

ASBCA No. 41584

On 24 June 1988, MTMC requested a bid from Stapp to provide transportation services for fuel. The Government's solicitation was for shipment by barge on 1 July 1988 of approximately 75,000 barrels of diesel marine fuel from the Chevron USA facility in Pascagoula, MS, to Amerada Hess Corporation Terminal in Galena Park, TX. The same day, Stapp telephoned its bid to MTMC, quoting a price of $.85/bbl and $450/hour demurrage.[3] The Government awarded the contract[4] (designated No. ILWX 35697-S) to Stapp. In each of these appeals, the Government awarded the contract to the lowest per barrel bidder. The demurrage rate was not evaluated by the

[1] Our opinions concerning jurisdiction over these disputes appear at 92-2 BCA ¶ 24,862, supplemented on reconsid., 92-3 BCA ¶ 25,190. Familiarity with these opinions is presumed.

[2] There are very few facts in dispute. Most of the facts have been taken from the written stipulations of the parties, exh. B-1, 2, 3, 4.

[3] Demurrage is the amount paid to the carrier per hour for excess time a carrier spends waiting to on-load or off-load cargo.

[4] The contract in these instances is represented by a standard form (MTE Form 273). In three of the four moves in dispute, no Form 273 was issued because the moves were cancelled before the form could be issued. Both parties contend that in all instances the terms of their contracts are represented by the MTE Form 273.

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Government unless the per barrel bids were equal.

On 26 June 1988, at 0800, Stapp's ship and barges (the tow) departed Dickinson Bayou, TX on orders from MTMC. On 27 June 1988 at 2000, the tow arrived at Chevron and remained on standby until 1 July 1988 at 1200. At that time, the Defense Logistics Agency-Defense Fuel Region South (DFRS)[5] informed Stapp that the contract had been cancelled. The Government cancelled Stapp's contract because it had a long term contract with another contractor and some of this contractor's equipment became available to perform the transportation services at issue. Stapp then redirected its tow to its next loading point, arriving at Chevron USA facility in Port Arthur, TX on 5 July at 1500.

Stapp invoiced the Government for $100,350, representing 223 hours at the $450 demurrage rate pursuant to the Equipment Ordered But Not Used clause (*infra*). The Government refused to pay the invoice, and on 17 July 1990 Stapp filed a certified claim which the Government refused to issue a decision on. Stapp filed a proper appeal to this Board.

The contract contains the following relevant provisions:

GENERAL PROVISIONS

EQUIPMENT: Equipment tendered shall be suitable to load intended cargo, equipped for complete discharge of cargo at carrier's expense, have permanent gauge point marks, and calibration charts shall be readily available to Government Representatives. Information as to standards of cleanliness of vessels may be secured from the Government Inspector at the loading point. In the event the equipment tendered is determined by the Government Inspector to be unsuitable for loading the intended cargo, carrier has the option to perform further cleaning at his expense, [sic] substitute equipment to meet the scheduled lift date. Time so used in cleaning shall not be considered as used laytime.

EQUIPMENT ORDERED BUT NOT USED. When equipment is placed for loading on orders of the Government, and such orders are subsequently cancelled, charges will be assessed at the agreed hourly demurrage rate. Demurrage will be computed beginning on the hour and date the equipment departs from the home terminal or point of dispatch and will continue until the hour and date the equipment returns to the home terminal or subsequent loading point. Release may be accomplished by telephone and confirmed in writing.

TIME OF PERFORMANCE: Upon receipt of notification (verbal or written) from the Military Department controlling this movement or its authorized representative, carrier will proceed to the designated loading point so as to arrive on the specified readiness date or such later date as may be authorized by the Military Department controlling the movement(s). Upon completion of loading, carrier will proceed to accomplish the transportation forthwith. In the event the carrier is unable to provide equipment within 24 hours of the date ordered the Government shall arrange for substitute equipment. The carrier shall be responsible to bear the costs of any additional charges incurred by the Government in arranging for substitute equipment.

ASBCA NO. 41585

On 26 October 1988, MTMC requested a bid from Stapp for a 31 October 1988 movement of 65,000 barrels of JP-4 from Phillips 66, Freeport, TX to Amerada Hess Corporation, Galena Park, TX. The same day Stapp telephoned its bid of $.615/bbl and $400/hour demurrage to the Government, and it was accepted. The contract was designated ILWX 02773-S.

On 30 October 1988 at 0645, Stapp's tow departed Dickinson Bayou, TX. The tow arrived at the Phillips loading dock at 0600 on 31 October 1988. Prior to arrival, the barges employed by Stapp underwent a laboratory analysis by a testing laboratory which established that the barges were not corroded. The last load for the barges being used was Government fuel. At 0610 on 31 October, the Government inspector at the Phillips docks informed Stapp that the barges were turned down due to corrosion.[6] By 1145 on 2 November 1988, Stapp's tow was at the Platzer Shipyard in Green's Bayou, TX to have the barges cleaned. At 1525 on that date, DFRS informed Stapp that the contract was being cancelled pursuant to the Time of Performance clause of the contract because of the

[5] DFRS is authorized to take contractual actions under the instruments in dispute.

[6] The corrosion test is a standard test for certifying barges are "clean" in accordance with applicable standards.

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delay in Stapp providing the equipment for the movement. Stapp continued the cleaning and returned to its home port of Dickinson Bayou, TX on 5 November 1988 at 1115.

Stapp invoiced the Government for $59,400, representing 148 1/2 hours at the $400 demurrage rate, and $7,108.93 for the barge cleaning. The Government did not pay the invoice. On 3 August 1990 Stapp filed a certified claim which the Government refused to issue a decision on. Stapp filed a proper appeal to this Board.

The contract contains the following relevant provisions:

GENERAL PROVISIONS

EQUIPMENT: Equipment tendered shall be suitable to load intended cargo, equipped for complete discharge of cargo at carrier's expense, have permanent gauge point marks, and calibration charts shall be readily available to Government Representatives. Information as to standards of cleanliness of vessels may be secured from the Government Inspector at the loading point. In the event the equipment tendered is determined by the Government Inspector to be unsuitable for loading the intended cargo, carrier has the option to perform further cleaning at his expense, [sic] substitute equipment to meet the scheduled lift date. Time so used in cleaning shall not be considered as used laytime.

EQUIPMENT ORDERED BUT NOT USED. When equipment is placed for loading on orders of the Government, and such orders are subsequently cancelled, charges will be assessed at the agreed hourly demurrage rate. Demurrage will be computed beginning on the hour and date the equipment departs from the home terminal or point of dispatch and will continue until the hour and date the equipment returns to the home terminal or subsequent loading point. Release may be accomplished by telephone and confirmed in writing.

TIME OF PERFORMANCE: Upon receipt of notification (verbal or written) from the Military Department controlling this movement or its authorized representative, carrier will proceed to the designated loading point so as to arrive on the specified readiness date or such later date as may be authorized by the Military Department controlling the movement(s). Upon completion of loading, carrier will proceed to accomplish the transportation forthwith. In the event the carrier is unable to provide equipment within 24 hours of the date ordered the Government shall arrange for substitute equipment. The carrier shall be responsible to bear the costs of any additional charges incurred by the Government in arranging for substitute equipment.

ASBCA NO. 41586

On 28 July 1988, MTMC requested a bid from Stapp for the movement of 25,000 barrels of JP-5 from Mobil Oil Corporation Refinery, Beaumont, TX to the Pensacola Naval Air Station, FL to be loaded on 9 September 1988. On 2 September 1988, Stapp telephoned its bid of .91/bbl and $300/hour demurrage to MTMC. The Government selected Stapp and the contract was designated ILWX 40073-S. On 7 September 1988 at 1800, Stapp's tow departed its home port. On 8 September at 1201, while the tow was in route to Mobil, DFRS informed Stapp that the contract was cancelled because the Mobil fuel was not in compliance with the applicable standards. At 1215 Stapp directed its tow to return to its home port. It arrived on 9 September 1988 at 0600.

Stapp invoiced the Government for $10,800, representing 36 hours at the demurrage rate of $300. The Government did not pay the invoice and on 17 July 1990 Stapp filed a claim. The Government refused to issue a decision on the claim and Stapp filed a proper appeal to this Board.

The contract contains the following relevant provisions:

GENERAL PROVISIONS

EQUIPMENT: Equipment tendered shall be suitable to load intended cargo, equipped for complete discharge of cargo at carrier's expense, have permanent gauge point marks, and calibration charts shall be readily available to Government Representatives. Information as to standards of cleanliness of vessels may be secured from the Government Inspector at the loading point. In the event the equipment tendered is determined by the Government Inspector to be unsuitable for loading the intended cargo, carrier has the option to perform further cleaning at his expense, [sic] substitute equipment to meet the scheduled lift date. Time so used in cleaning shall not be considered as used laytime.

EQUIPMENT ORDERED BUT NOT USED. When equipment is placed for loading on orders of the Government, and such orders are subsequently cancelled,

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charges will be assessed at the agreed hourly demurrage rate. Demurrage will be computed beginning on the hour and date the equipment departs from the home terminal or point of dispatch and will continue until the hour and date the equipment returns to the home terminal or subsequent loading point. Release may be accomplished by telephone and confirmed in writing.

TIME OF PERFORMAMCE: Upon receipt of notification (verbal or written) from the Military Department controlling this movement or its authorized representative, carrier will proceed to the designated loading point so as to arrive on the specified readiness date or such later date as may be authorized by the Military Department controlling the movement(s). Upon completion of loading, carrier will proceed to accomplish the transportation forthwith. In the event the carrier is unable to provide equipment within 24 hours of the date ordered the Government shall arrange for substitute equipment. The carrier shall be responsible to bear the costs of any additional charges incurred by the Government in arranging for substitute equipment.

ASBCA NO. 41590

On 1 February 1990, MTMC requested a bid from Stapp for a 9 February 1990 movement of 75,000 barrels of diesel marine fuel from the Chevron docks in Pascagoula, MS to Amerada Hess in Galena Park, TX. On 2 February 1990, Stapp telephoned its bid of $1.30/bbl and $500/hour demurrage. Another company was awarded the contract. Nonetheless, on 2 and 5 February, DFRS inquired of Stapp if it had the equipment available to perform and what equipment would be used. On 5 February 1990 at 1621, DFRS awarded contract ILWX 14445-S to Stapp and ordered Stapp to send a tug boat and three barges to Pascagoula, MS after they finished pumping off another fuel load. On 7 February 1990 at 0010, Stapp finished discharging its load, prepared to depart and at 0240, Stapp's tow departed for Pascagoula. On 12 February 1990, DFRS called Stapp and requested the tow's position. Stapp's tow arrived at Chevron at 13 February at 0345. On 13 February at 0800, Stapp called DFRS to inform it that Stapp had attempted to load at Chevron, but that Chevron had no orders to load fuel to Stapp. At 0927, DFRS called Stapp and informed it that the contract had been cancelled and awarded to another company and the fuel had been moved on 12 February. Stapp ordered its tow to proceed to the next job at Corpus Christi, TX arriving on 23 February at 1945.

Stapp invoiced the Government $198,000, representing 396 hours at the $500 demurrage rate. The Government did not pay the invoice. On 9 July 1990 Stapp filed a certified claim and the Government refused to issue a decision. Stapp filed a proper appeal to this Board.

The contract contains the following relevant provisions:

GENERAL PROVISIONS

EQUIPMENT: Equipment tendered shall be suitable to load intended cargo, equipped for complete discharge of cargo at carrier's expense, have permanent gauge point marks, and calibration charts shall be readily available to Government Representatives. Information as to standards of cleanliness of vessels may be secured from the Government Inspector at the loading point. In the event the equipment tendered is determined by the Government Inspector to be unsuitable for loading the intended cargo, carrier has the option to perform further cleaning at his expense, [sic] substitute equipment to meet the scheduled lift date. Time so used in cleaning shall not be considered as used laytime.

EQUIPMENT ORDERED BUT NOT USED. When equipment is placed for loading on orders of the Government, and such orders are subsequently cancelled, charges will be assessed at the agreed hourly demurrage rate. Demurrage will be computed beginning on the hour and date the equipment departs from the home terminal or point of dispatch and will continue until the hour and date the equipment returns to the home terminal or subsequent loading point. Release may be accomplished by telephone and confirmed in writing.

TIME OF PERFORMANCE: Upon receipt of notification (verbal or written) from the Military Department controlling this movement or its authorized representative, carrier will proceed to the designated loading point so as to arrive on the specified readiness date or such later date as may be authorized by the Military Department controlling the movement(s). Upon completion of loading, carrier will proceed to accomplish the transportation forthwith. In the event the carrier is unable to provide equipment within 24 hours

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of the date ordered the Government shall arrange for substitute equipment. The carrier shall be responsible to bear the costs of any additional charges incurred by the Government in arranging for substitute equipment.

With respect to all of the cancelled contracts, Stapp has not calculated its actual damages, although it is possible to reconstruct its actual costs or a close estimate thereof.

The demurrage rates set by Stapp were set based on Stapp's prior experience with the Government. Stapp considered the length of time it takes the Government to pay for moves, the moves for which Stapp considered itself never to have been paid by the Government, and the number of times the Government disputes the number of demurrage hours incurred. Stapp also uses the rates as an incentive to have its ships loaded promptly. They are not set in an attempt to estimate any potential damages from the Government cancelling a contract. Prior to, and subsequent to the contracts in dispute, the Government paid Stapp its demurrage rate when the Government cancelled a MTMC contract. There is no evidence in the record as to why these four contracts were treated differently.

CONTENTIONS OF THE PARTIES

It is Stapp's position that the contracts are valid and it is entitled to have the terms enforced, including the Equipment Ordered But Not Used (EOBNU) clause. Stapp denies that the demurrage rate in this clause operates as an unenforceable penalty in the nature of liquidated damages.

The Government concedes liability in ASBCA Nos. 41584, 41585 ad 41586. It contests liability in ASBCA No. 41590 on the basis that Stapp was late in arriving at the loading point and therefore the Government was entitled to cancel without liability.

As to quantum, it is the Government's position that the portion of the EOBNU clause that entitles Stapp to be paid the demurrage rate if the Government cancels the contract amounts to a liquidated damages provision. The Government argues that this liquidated damages provision is unenforceable because it is a penalty because: (1) it was not intended to be a measure of the prospective damage Stapp might incur, (2) Stapp's potential damages at the time of contracting were not difficult to estimate, and (3) the liquidated damages amount did not bear a reasonable relationship to Stapp's potential damages. Since the liquidated damage provision is allegedly unenforceable, the Government reasons that Stapp must prove its actual damages and since Stapp made no attempt to do so, it must take nothing.

DECISION

ENTITLEMENT

The Government concedes entitlement for ASBCA Nos. 41584, 41585 and 41586. As to 41590, the Government would have us hold that Stapp was late in tendering performance and therefore the Government's cancellation was justified. We cannot so hold. While it is true that the original load date for the movement was 9 February 1990, that contract was awarded to another contractor. Subsequently, the Government awarded the movement (the record does not disclose what happened to the original contractor) to Stapp knowing that Stapp was off-loading another cargo at the time. In fact, the Government ordered Stapp to finish off-loading and then to proceed to the load point. Stapp did so. There is no evidence that the time between contracting (5 February) and Stapp's arrival at the load point (13 February) was unreasonable. We hold that the load date for Stapp's contract, agreed to by the parties, was whatever date Stapp could reasonably arrive considering the Government's orders to finish unloading. The Government's actions of moving the fuel on 12 February, not even telling Stapp, and then cancelling the contract when Stapp attempted to load on 13 February was wrongful and entitled Stapp to the specified demurrage.

QUANTUM

The Government's challenge to quantum consists of an allegation that the EOBNU clause contains a provision that is a liquidated damages provision and results in a penalty and is therefore unenforceable, particularly since in three of the four contracts, this provision results in Stapp receiving more compensation than if it had performed the contract. We will find liquidated damage provisions to be a penalty if they are not fair and reasonable attempts to fix compensation for anticipated loss caused by one party, if at the time of contracting actual damages are not uncertain in nature and amount or if the amount does not bear a reasonable relationship to the anticipated loss. *Rivera-Cotty Corporation,* ASBCA No. 32291, 86-3 BCA ¶ 19,148. The clause itself does not make reference to liquidated damages. It requires that when the Government orders equip-

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ment but subsequently cancels the order, the Government will pay the contractor the hourly demurrage rate from the time the equipment departs until it returns or arrives at its next loading point. We do not view the EOBNU clause to be in the nature of liquidated damages. Instead, we view it as an alternate rate of compensation from the per barrel rate to be used if the fuel was moved by Stapp. In the clause, authored by the Government, in exchange for the right to cancel the contract, the Government agrees to pay Stapp on an hourly basis if such cancellation right is exercised. Whether such a provision is prudent, especially in light of the fact that the demurrage rate was not evaluated when the contractors were selected is not for us to determine. Apparently the Government has paid claims of this nature to Stapp prior to these contracts and subsequent to these contracts. The Government has not attempted to distinguish these four contracts from the other contracts between Stapp and MTMC in which the demurrage rate was paid. Why the demurrage rates were not evaluated is not revealed in the record, but when all provisions of a bid are not evaluated, results that distress one of the parties can result. *DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 19,960. Having canceled the contract pursuant to the terms of the EOBNU clause, the Government is required to fulfill its obligations under that clause and pay Stapp the demurrage rate. Stapp is entitled to the amounts it invoiced under each of the contracts in dispute.

CONCLUSION

The appeals are sustained. CDA interest shall run from 20 July 1990 [7] in ASBCA No. 41584, from 7 August 1990 for ASBCA No. 41585, from 20 July 1990 for ASBCA No. 41586, and from 12 July 1990 for ASBCA No. 41590.

[¶ 26,466] Hudson Contracting, Inc.

ASBCA No. 41023, October 27, 1993. Contract No. N62467-84-C-5119.

Site Conditions—Government Duty—Designation of Inspector.—Under a contract for the construction of a storm drainage system, the government's failure to designate an inspector or authorized person to receive notice of a subsurface condition encountered by the contractor was a constructive change, because the failure to make the designation was a breach of the government's duty to cooperate. The parties had agreed that the contractor would perform ditch excavation work on a holiday to avoid interfering with the government's use of a roadway. While excavating across the width of the roadway, the contractor encountered a two-inch pipe that was not shown on the drawings and did not know whether the line was gas or water or whether the line was active or abandoned. Pending directions from the government, the contractor covered the exposed line, filled the excavation, and paved the area with a temporary road surface. The contractor was entitled to recover the costs of performing this extra work.

Site Conditions—Contract Indications, Category I—Underground Pipe.—A submerged pipe encountered by a contractor while performing excavation work under a contract for a storm drainage system was a Category I differing site condition because the condition encountered differed from contract indications. There was no indication in the drawings of any pipe at the bottom of the ditch the contractor was digging across the roadway.

Site Conditions—Contract Indications, Category I—Absence of Indications.—An underground waterline encountered by a construction contractor while performing work preparatory to the installation of a ditch was not a Category I changed condition, because the contract did not contain any express representations regarding either the depth or the location of the waterline. The drawings depicted the waterline, but they did not show the depth at which it was buried. A general note on the drawings stated that all utility locations were "approximate" and directed the contractor to verify all locations. The failure to depict

[7] In the absence of evidence to the contrary, we presume the claims were received in the ordinary course of the mail.

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the depth at which the line was buried, coupled with the notice that the depiction of the waterline was approximate, precluded a finding that there were any express contract indications regarding the waterline.

Modifications—Bar to Claims—Accord and Satisfaction.—A contractor's differing site condition claim for the costs of removing a six-inch waterline encountered while excavating under a contract for the construction of a water drainage system was barred by accord and satisfaction, because this claim was the same claim as that addressed in a modification. The contractor's differing site condition claim for costs incurred in relocating a one-half-inch waterline and its differing site condition claim for the costs of removing a three-inch waterline encountered while excavating the work site were not barred by accord and satisfaction, because these claims were not included in the modification.

Site Conditions—Contract Indications, Category I—Underground Power Lines.—Underground power lines encountered by a contractor while digging a ditch under a contract for a storm drainage system was a Category I differing site condition because the underground condition differed from contract indications. There was no indication in the drawings of any underground duct bank containing power lines in the area where the contractor was excavating the ditch.

Site Conditions—Contract Indications, Category I—Underground Sewer Line.—A sewer line encased in concrete that was encountered by a contractor while excavating a ditch was a Category I differing site condition because the underground sewer line differed from contract indications. The sewer line was not shown in the contract drawings, and it was first disclosed when encountered during excavation.

Modifications—Bar to Claims—Demobilization Costs.—Under a contract for the construction of a water drainage system, a contractor's claim for the costs of demobilizing at the site of deleted work and remobilizing at another site was barred by a contract modification because there was no reservation in the release of a right to later assert this claim.

Performance—Direction by Government—Interpretation of Directive.—The costs of diverting workmen from ongoing tasks in order to perform repair work called for under a government directive were not compensable to a contractor under a contract for the construction of a water drainage system, even though the directive stated that the contractor was to give priority to the repair work, because the terms of the direction merely required prompt correction of the defects before the repair work was begun. Under its ordinary meaning, a direction to give "first priority" to repairs does not order the interruption of other work in favor of the repairs.

Site Conditions—Inspection—Visibility of Condition.—A small wooden bridge encountered by a construction contractor during ditch excavation work was not a compensable differing site condition, because the bridge was plainly visible and should have been discovered during a prebid site visit. A plainly visible bridge could not be an unknown condition under Category II or a latent condition under Category I.

Delays—Suspension of Work—Untimely Determination.—A suspension of work ordered by the government so that it could determine whether particular trees were to be removed from the path of ditch excavation was compensable to a construction contractor, because the government's failure to make a decision until after the commencement of contract performance was unreasonable. The contract drawings showed the exact route of the ditch excavation work. Prior to award of the contract, the trees in the path of the ditch could have been identified at the site and a decision made as to preservation or removal. The failure to make that decision until the contractor had arrived at the project site and prepared to remove the trees rendered the suspension unreasonable.

Performance—Risks and Duties—Safety Devices.—Under a contract for the construction of a water drainage system, a contractor was not entitled to recover the costs of complying with a direction to upgrade a walkway over an excavated area to improve safety, because it was obligated under the contract to protect persons using such walkways, and the initial walkway installed by the contractor had deteriorated following a rainfall. The

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Accident Prevention clause of the contract required the contractor to comply with all pertinent provisions of the U.S. Army Corps of Engineers Safety and Health Requirements Manual. The manual provided that walkways or bridges with guardrails were to be provided where people or equipment were required to cross excavation areas. The initial walkway that the contractor provided created plain risks of injury to persons using the structure and thus fell short of what was required under the contract.

Performance—Interference by Government—Ditch Line.—Under a contract for the construction of a water drainage system, a government direction that a contractor postpone excavating ditch lines until after a scheduled military ceremony was a breach of the government's implied duty to avoid interfering with contract performance, because the direction was not related to contract performance or to the normal operation of the naval station where the contract was being performed.

Performance—Directions by Government—Leaking Valves.—The government's direction that a construction contractor excavate and repair leaking water pipes amounted to a constructive change because the direction was issued under the mistaken belief that the leaking pipes were caused by the contractor during excavation. The contract required the contractor to repair any damage to facilities resulting from its failure to exercise reasonable care in performing the work. Although the government believed the leaks were caused during the construction of the ditches, it was shown that the leaks did not result from any action on the part of the contractor.

Delays—Approval Delays—Pipe Inspections.—Although the government's approval of pipe installation was delayed for a few hours after the expiration of the 24-hour advance notice the contractor gave to the government that the work was ready for inspection, the contractor was not entitled to recover the costs of keeping workers at the site for backfill work to be performed upon approval, because it was not shown that the approval delay was unreasonable. The contractor was required to show that the government violated some standard with respect to approval time. The only evidence of delay was that the approval was delayed a few hours after expiration of the 24-hour advance notice to the government. The purpose of the notice was to afford enough advance notice of the contractor's requirement to permit proper scheduling of the inspector's time, not to establish a standard of delay reasonableness.

Performance—Interference by Government—Work Schedule Conflict.—Under a contract for the construction of a drainage system, the government breached its duty to cooperate with a contractor by failing to resolve a conflict in the work schedules of the contractor and another contractor working at the same location, because the government, having awarded the two contracts, had a duty to resolve the competing work schedules by directing the order of work at the location. The contractor's excavation of a ditch was delayed by a fence and by equipment belonging to the other contractor that was located in the path of the ditch. The other contractor refused to move its equipment until it completed work at the location. The equipment located in the path of the ditch could have readily been moved to accommodate the contractor. The government gave up trying to assist the contractor after the other contractor refused to interrupt its work. The government's refusal to take action to obtain a reasonable accommodation of the contractor's needs from the other contractor constituted a breach of its duty to cooperate.

Performance—Interference by Government—Implied Duty.—The government breached its implied duty not to impede performance under a contract for the construction of a water drainage system, because the government's public work personnel mistakenly opened a fire hydrant on the work site that later washed out ditches constructed under the contract. When government personnel tested fire hydrants, the open hydrant released water on the project site that caused the damage in question.

Awards—Existence of Contract—Oral Agreement.—An oral arrangement between a construction contractor and a government inspector relating to an exchange of services could not be avoided for lack of authority on the part of the government official, because the government official's authority under the contract was sufficient to enter into the arrangement in question. Under the arrangement, the contractor agreed to allow the

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government to use the contractor's backhoe on an unrelated project. In exchange, the government agreed to make available to the contractor a government-owned front-end loader. After the contractor performed its part of the arrangement, the government refused to carry out its part, asserting that furnishing government-owned equipment was not permissible. The scope of the authority of the government official, however, was sufficient to include making government property available to the contractor pursuant to the Government Property clause of the contract. The contracting officer had vested the government official with broad authority as to contract administration.

Performance—Specifications—Erosion Control.—Erosion control specifications under a contract for the construction of a drainage system were not defective, despite the contractor's contention that they were insufficient for the conditions of the highly eroded soil at the project site, because the specifications were shown to conform to industry standards and were suited to the conditions of the soil at the site. In any event, the contractor's failure to control erosion as required by the specifications made it unlikely that the defects in the specifications could have caused the erosion damage at issue.

Performance—Specifications—Design of Ditches.—Under a contract for the construction of a water drainage system, the contractor's contention that the design of the system was defective by failing to take into account surface runoff was rejected because the contract specifically made the contractor responsible for undertaking the necessary measures to prevent erosion, including control of runoff from the project site. The contract indicated several techniques, including the installation of berms, to control the erosion. Furthermore, the contractor should have been on notice from its prebid site inspection of the possibility of substantial runoff.

Performance—Specifications—Earth v. Concrete Ditches.—Under a contract for the construction of a water drainage system, the contractor's contention that the design was defective for prescribing earthen rather than concrete ditches to control the highly erodible soils was rejected because the highly erodible soil conditions could have been controlled by the contractor through dewatering and prompt vegetation.

Performance—Specifications—Shallow Ditch Design.—Under a contract for the construction of a water drainage system, the government's design of shallow ditches below the water table that caused a constant flow of water-borne soil and resulted in the accumulation of sediment in the ditches was defective, because this sedimentation resulted from the design of the drainage system rather than the actions of the contractor. The sediment resulting from the design was not capable of being successfully controlled during the term of the contract. The sedimentation attributable to the action of the running water was chargeable to the government. On the other hand, the costs of removing sediment because of conditions that were the responsibility of the contractor, such as sediment from surface runoff or sediment left in the ditch, were not recoverable by the contractor.

Performance—Direction by Government—Removal of Berms.—Under a contract for the construction of a water drainage system, the government's direction that a contractor remove berms in tail ditches and the nearby section of a larger ditch was a constructive change because the removal of the berms at the edge of the large ditch left the ditch sides unprotected from surface runoff, permitting the later washout of the area. The removal of the berms allowed surface runoff from later rainstorms to sheet down the slopes of the large ditch and wash away the growing grass planted by the contractor.

Performance—Risks and Duties—Unfinished Government Work.—Although the government stated that it would assume the responsibility for reseeding ditches that had not been successfully vegetated by the contractor, the contractor was not entitled to recover the costs of being directed to finish the reseeding work begun by the government, because the contractor's completion of the work was in discharge of its existing contractual obligation. The government's work did not cause additional expense to the contractor. On the contrary, that work benefited the contractor inasmuch as the contractor was liable for the entire effort of reseeding.

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For the appellant: Russell S. Gill, Biloxi, Mississippi. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Garrett L. Ressing, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before MOED, RIISMANDEL, and RUBERRY, Administrative Judges.

MOED, Administrative Judge: Appellant (hereinafter "Hudson") constructed a storm drainage system at the Naval Construction Battalion Center, Gulfport, MS (hereinafter "the Center") and now seeks increases in contract price for: (a) underground utility lines assertedly not shown in the contract drawings; (b) directions, acts, and omissions by representatives of the Government allegedly amounting to changes; and (c) repair of erosion damage to the drainage ditches constructed under the contract. Only entitlement is now to be decided.

FINDINGS OF FACT

1. On 29 September 1987, as the result of small business-restricted sealed bidding, Hudson was awarded a fixed-price contract in the amount of $516,275 for construction of the Phase II Storm Drainage System at the Center. The date in the contract for completion of the work, as adjusted pursuant to bilateral modifications, was 18 August 1988. This was also the date of substantial completion of the work (R4, tab V). The contract contains the standard clauses for construction contracts including the "Differing Site Conditions", FAR 52.236-2, and "Site Investigation and Conditions Affecting the Work", FAR 52.236-3, clauses.

2. The work under the contract consisted primarily of the construction of a system of open, earthen-sided storm drainage ditches. Reinforced concrete pipe (RCP) culverts, supported at the ends by concrete headwalls, were used for continuing the system under roads and paved areas. The ditch system consisted of two large, deep ditches ("trunks") with numerous branches feeding in or carrying away drainage water. One trunk, referred to as the "Big Ditch", ran north-south between Sixth and Eighth Streets, with a connection to the existing drainage ditch system (the "Phase I" system) at Eighth Street. The other trunk, which was connected to the Big Ditch, ran east-west along Sixth Street.

3. Ancillary work under the contract included relocation of utilities in the path of construction and establishing grass and vegetation and taking other measures for controlling soil erosion in the ditches and in adjacent areas disturbed by construction.

4. On 29 August 1989 Hudson submitted a written request to the contracting officer for contract price increases totalling $98,772.17 in regard to approximately 75 instances of extra work arising from alleged constructive changes or differing site conditions. That amount contains $46,706.48 for added costs of the individual items. The amount sought for 71 of these is $500 or less. The remaining four items range between $2023 and $6,566. The remaining $52,065.69 relates to Hudson's assertion that the extra work added two additional months to the period of performance of the contract. The amount sought is for the costs of rented and owned equipment, site superintendence, project management, and operation of a site office during that two month period.

5. The parties were unable to resolve any of these claims through negotiation (R4, tab H). Hudson requested a written decision of the contracting officer on the claims. After three promised dates for issuance of the decision had been missed, Hudson filed a notice of appeal, dated 15 May 1990, based on the deemed denial of these claims. The claims have been certified pursuant to section 6(c)(1) of the Contract Disputes Act (CDA), 41 U.S.C. § 601(c)(1).

6. No proof was offered as to the items in the paragraphs of Hudson's document, dated 29 August 1989, numbered 51 and 75.

The items for which proof was presented are grouped herein for decision in the following categories: (a) claims for undisclosed underground utility lines (b) claims relating to directions by the Government for added work; (c) claims for other acts or omissions of the Government; and (d) claims relating to repair of the ditches.

Undisclosed Underground Utility Lines

Event 25 November 1987

FINDINGS OF FACT

7. Section 01011 ("General Paragraphs") of the specifications provides, in pertinent part, as follows:

> 7. Interference with station operations: The Contractor shall schedule his work as to cause the least amount of interference with Station operations.
>
> * * *

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28. WORK OUTSIDE REGULAR HOURS: If the Contractor desires to carry on work outside regular hours or on Saturdays, Sundays, or holidays, he shall submit an application to the Contracting Officer. The Contractor shall allow ample time to enable satisfactory arrangements to be made by the Government for inspecting the work in progress.

8. On 26 November 1987, Hudson encountered an existing 2" pipe, not shown in the drawings, in the bottom of the ditch that it was digging across Bainbridge Avenue at Sixth Street. The event is recorded in a Daily Report to Inspector (DRI) dated 25 November 1987, which was a Wednesday. That date is erroneous. The DRI and the testimony of knowledgeable Hudson and Government personnel agree, however, that the event occurred on a "holiday", which would have been 26 November 1987, Thanksgiving Day, and we so find the fact.

9. The location of the ditch was a roadway used for the movement of troops. The Government would not allow interference with that use and, for that reason, would not permit the ditch to be dug during regular weekday hours. In these circumstances, Hudson proposed, and the ROICC agreed, that the work would be performed on the Thanksgiving holiday.

10. On Thanksgiving Day, 26 November 1987, when the 2" pipe was encountered, no one was on duty in the ROICC office to receive and respond to notice of the condition. Hudson had no knowledge or means for knowing whether the line was gas or water or whether it was an active or abandoned line. In the circumstances, pending notice to, and directions from, the ROICC, Hudson covered over the exposed lines; filled up the excavation and covered it with a temporary surface of shell material; erected barriers; and demobilized its equipment and personnel from that location. (Tr. 1/55)

11. Hudson gave the Government notice of the condition on Monday, 30 November 1987 (tr. 3/161-62). That was the first day after the occurrence on which personnel were present in the ROICC's office to receive such notice. (Tr. 1/52-53, 3/157) Thereafter, on 28 January 1988, the ROICC informed Hudson that this was an abandoned water line that could be removed (CRR, DRI 28 January 1988; tr. 3/158). Hudson now seeks to recover for filling up the excavation, installing the crushed shell temporary road surface, and maintaining that surface until receipt of direction from the ROICC (tr. 1/56).

DECISION

We need not decide whether digging the ditch outside of regular working hours in order to accommodate the Government's operational needs came within the scope of Hudson's responsibilities for work scheduling under para. 7 of Section. 01011 of the specifications. Whether or not it was entitled to that accommodation, when the Government ordered the work to be performed outside regular hours, it incurred a duty to cooperate with Hudson in performing the work under those circumstances. That duty included designating an inspector or other authorized person to receive notice of subsurface conditions encountered and to give instructions with respect thereto. The breach of the duty of cooperation in failing to make that designation was a constructive change, entitling Hudson to an equitable adjustment for the resulting added costs.

The pipe encountered here constituted a Type I differing site condition. In the absence of an inspector or authorized ROICC representative at the time of encountering the pipe, it was reasonable for Hudson to take the measures described above for preservation of the *status quo* until notice of the condition could be given and directions obtained. Those costs are recoverable as part of the equitable adjustment due Hudson for the constructive change and the differing site condition.

Event 3 December 1987

FINDINGS OF FACT

12. In the course of clearing trees along Sixth Street preparatory to installation of a ditch, Hudson hit and burst a live 8" water line buried 12 inches below the surface. This caused the area to flood, interrupting the progress of work and requiring repair of the line. Contract drawing 4/28 depicts the line but does not show the depth at which it was buried (tr. 3/163-64).

13. General Note 1 on contract Drawing 1/28 states that "[a]ll utility locations are approximate" and directs that the contractor "field verify all locations to insure [sic] that no injury to utilities result." In addition, Section 01012 ("Additional General Paragraphs") of the specification states in Para. 8 that:

> The approximate locations of all known underground utilities and cables are indicated on the contract drawings and/or described/verified by the permit clearance review. The Contractor shall determine

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the exact location and depth by ... approved methods before any excavation.

14. The depth at which the line was encountered was more shallow than the 18-inch depth normally specified for burial of water lines. It is not unusual, however, to encounter these lines at other depths (tr. 3/304-06).

DECISION

This condition does not qualify as either a Category I or II differing site condition. For Category I to apply, the depth must have been "indicated" in the contract. The failure to show the depth of burial in the drawing coupled with the notice that the depiction of the line was the "approximate location" precludes finding such an indication. For Category II to apply, the condition must be of an "unusual nature." It was not unusual to encounter such a line at a depth of 12 inches. *Sandwich Islands Construction, Inc.*, ASBCA No. 35244, 88-3 BCA ¶ 21,143. There is no entitlement to recover on this claim.

Events 16 March, 17-18 March, and 6 April 1988

FINDINGS OF FACT

15. Bilateral contract modifications P00001 through -00008, granting equitable adjustments of price and performance time for various causes, each contains the following text:

> Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect and/or delays arising out of or incidental to the work as herein revised.

16. *Event 16 March 1988*—Hudson encountered a $1/2''$ line "in ditch line in front of hobby shop" and a $1\,1/4''$ line at "north end of same ditch" which were not shown in the drawings. Pursuant to the ROICC's direction, Hudson reburied the lines below the ditches and now seeks a price increase for that work.

17. The Government states that Hudson has been paid for that work under bilateral modification P00007, dated 22 July 1988. That modification covered eight items of extra work in consideration of which the contract price and performance time were increased. Items 5 and 6 in that group relate to gas lines, not shown on the contract drawings, at "various locations." Item 5 is for capping abandoned lines. Item 6 is for relocating live lines. The record of negotiations underlying that modification does not contain any indication that the lines encountered on 16 March 1988 were included in the price adjustments agreed to.

18. In these circumstances, we are not persuaded by the testimony given more than four years later by Mr. Paul Semmes, the ROICC's project manager, who negotiated modification P00007, that the relocation of the lines encountered on 16 March 1988 was included in that modification (tr. 3/202-03).

19. *Event 17-18 March 1988*—On 17 March 1988, Hudson encountered a six-inch water line, not shown in the drawings, in the path of the ditch on the north side of Fourth Street, which is also known as Marvin Shields Boulevard. Because of the risk of added damage to that line farther down the ditch if the excavation were continued, Hudson requested instructions from the ROICC prior to proceeding further (tr. 1/110). Hudson had not received such instructions as of noontime, the next day, 18 March 1988. It then demobilized at that site and remobilized and began working at another location (DRI, CRR 18 March 1988). Hudson was subsequently directed to remove the line. Its present claim is for the costs of the earlier demobilization and remobilization.

20. Item G of bilateral Modification P00005, effective 3 May 1988, provides for an increase in price for removal of the water line. The negotiators for this matter were Messrs. Allen, Hudson's project manager, and Semmes (exh. G-10). Hudson contends that the costs now claimed were not included in the price adjustment for that item but has produced no evidence in support of that contention. Mr. Allen, who had testified concerning the condition at the hearing, was not asked about the matter.

21. *Event 6 April 1988*—On this date, Hudson encountered a 3-inch water line, not shown in the drawings, in the path of the ditch at Simms Avenue and Fifth Street and stopped work at that location pending instructions from the Government. The next morning, 7 April 1988, the Government shut the water off and instructed Hudson to cut the pipe in place (CRR 7 April 1988). The Government asserts that this item was settled by the parties in contract Modification P00006. This is incorrect inasmuch as the item in that modification relates to a 3-inch line at a different location, namely, at Taylor Avenue near the Navy Lodge.

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DECISION

The Government had the burden of proving that Hudson has already been fully compensated for the above events. It has failed to meet that burden as to the events of 16 March and 6 April 1988. Hudson is entitled to recover equitable adjustments under the Differing Site Conditions clause for the added costs of these events.

As to the event of 17-18 March 1988, however, the preponderance of the evidence is that the condition for which claim is made is the same as that addressed in the parties' bilateral contract modification. There is no evidence of any exceptions or reservations from the generality of the release in that agreement. In these circumstances, the release is required to be enforced in accordance with its terms, thereby barring the claim. *Hobbs Construction & Development, Inc.*, ASBCA Nos. 30432, *et al.*, 91-2 BCA ¶ 24,014 at 120,228.

Events 25 April and 13 May 1988

FINDINGS OF FACT

22. *Event 25 April 1988*—Hudson encountered an underground duct bank containing power lines in the ditch being constructed on Taylor Avenue adjacent to the DAC site. The duct bank, which was not shown in the drawings, could not readily be relocated, necessitating additional work by Hudson in working around it in construction of the ditch.

23. *Event 13 May 1988*—On this date, Hudson encountered a small, 4-inch storm drain in the ditch line behind the EM Club that was not shown in the drawings. Work was stopped at that location pending instructions from the Government. On the next business day, 16 May 1988, Hudson was informed that the drain had been abandoned and was directed to remove the same.

DECISION

The added costs of these occurrences are compensable to Hudson as Type I differing site conditions.

Event 1 July 1988

FINDINGS OF FACT

24. Hudson encountered an existing 8-inch sewer pipe encased in concrete, not shown in the drawings, in the path of the ditch on Sixth Street. When notified of the obstruction, the ROICC directed that the pipe be left in place as there were no funds for relocation thereof. The pipe blocked the flow of water in the ditch, causing the accumulation of sediment at that point. Hudson seeks to recover the added costs of repeated cleanouts of the blockage performed in order to maintain the flow of drainage water.

DECISION

The sewer pipe, which was not shown in the drawings and was first disclosed when encountered during excavation for the ditch, constituted a Category I differing site condition. Pursuant to that clause, Hudson is entitled to an equitable adjustment for the added expense caused by the Government's election to keep the obstructing pipe in place.

Directions by the Government

Event 12 November 1987

FINDINGS OF FACT

25. This relates to a section of a 42" RCP pipe installed by Hudson along the south side of Sixth Street. The location of the pipe was determinable by reference to: (a) contract Drawing 4A/28 showing the path of the center line of the ditch for that section of the system; (b) Detail 4 on contract Drawing 28/28 showing the slopes of the ditch sides and dimensions of adjoining surfaces; and (c) General Note 6 on contract Drawing 1/28 directing Hudson to "move center line of ditch as required to accommodate side slopes of the ditch." During the initial installation, Hudson failed to apply Detail No. 4, resulting in an incorrect location of the pipe. The ROICC discovered the error, calculated the correct location of the pipe, and directed Hudson to relocate the same accordingly. (Tr. 3/134, 143) Hudson seeks to be paid for the relocation on the ground that the drawings were ambiguous in this respect.

DECISION

Hudson does not dispute that the pipe had been incorrectly installed. It contends that it should be compensated for the reinstallation because the Government had applied "obtuse and confusing calculations" for locating the pipe and that the drawings are ambiguous. No evidence for these allegations has been presented. On that record, the reinstallation of the pipe was for correction of a defect, precluding recovery for the costs thereof.

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Event 12 February 1988

FINDINGS OF FACT

26. On this date, the ROICC directed Hudson to stop work on a ditch being dug on the south side of Sixth Street and to move to another location behind Navy housing. The Government had decided to delete the ditch from the contract as not needed for the reason that the existing drainage features in the area were sufficient (tr. 3/165).

27. Hudson could not immediately employ his forces at the new location because the route of the ditch had not yet been staked out. As a result, those forces could not be employed and were idled for the remainder of the day (tr. 1/63). The deletion of the ditch was implemented in para. 2 of bilateral Contract modification P00006, dated 1 July 1988.

DECISION

Hudson asserts that the costs of demobilization at the former site, remobilization at the new site, and idled forces were not covered by the settlement of the item in Contract Modification P00006. The basis of that contention is the allegation, unsupported in the record, that the Government had a general policy not to pay for such costs. Lacking a reservation in the release of a right to later assert the claim, the same is barred.

Event 19 February 1988

FINDINGS OF FACT

28. Mr. E. T. Hale, Hudson's superintendent, testified that on this date, Hudson was directed by Mr. Semmes and Mr. Bogue, the Government's inspector, to "give first priority" to straightening head walls that had been installed at Fourth and Sixth Streets. (Hale deposition, 12 April 1991 at 35-36). Hudson diverted workmen from other ongoing tasks on the project to perform that work with consequent disruption. The contract included the standard Inspection of Construction clause (FAR 52.246-12).

29. The "Daily Report to Inspector" (DRI) dated 19 February 1988, prepared by Hale and furnished for the record by Hudson, contains a notation confirming the issuance of the above directive. The notation, however, is absent from the copy of the DRI for that date produced from the Government's files as well as from the Construction Representative's Report (CRR) submitted by the Government inspector for that date.

30. In his testimony at the hearing, Mr. Semmes denied issuing that directive (tr. 3/180). He asserted that the DRI offered by Hudson was the one originally prepared and submitted to the Government and that after he had protested that the notation reflected a misperception of his statement, Hudson had voluntarily revised the DRI to the version submitted by the Government (tr. 3/313).

31. On that record, there is not a preponderance of evidence that Mr. Semmes directed that the head wall corrections be given "first priority." Moreover, even if issued, on its face, the directive does not require the interruption of other work in order to perform the repairs. There is nothing in the record supporting Hudson's interpretation of the alleged directive as containing that requirement.

DECISION

Under its ordinary meaning, a direction to give "first priority" to the repairs does not order the interruption of other work in favor of the repairs. Hudson has not produced evidence showing nor are we persuaded that it was justified, without inquiry, in giving the direction that additional connotation. Lacking that evidence, the terms of the directive merely required prompt correction of the defects, i.e., before *new* work was undertaken. Since that reasonable interpretation directs no more than was already required of Hudson under the "Inspection of Construction" clause of the contract, FAR 52.246-12, the added costs claimed would not be recoverable even had issuance of the directive been proved.

Event 20 February 1988

FINDINGS OF FACT

32. Reinforced concrete culverts were installed to carry the stream of drainage water under roads. After installing the culverts and backfilling, a temporary road surface of crushed shell material was put down. The temporary surface was to be replaced by a permanent asphalted surface.

33. Hudson contends that on 20 February 1988, Mr. Semmes directed Hudson "to be through with [permanent surfaces for] road crossings by 2-26-88." Hudson alleged that it had scheduled the work for later completion, but submitted no evidence of the scheduled date. The construction schedule that the contract required be prepared and maintained pursuant to the "Progress Charts and Equipment Delivery Schedule" clause of the specifications, Section. 01011, para. 16, and the "Schedule for Construction Contracts

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(APR 1984)" clause of the General Provisions, FAR 52.236-15, was not produced.

34. The record contains a letter, dated 24 February 1988, not challenged by Hudson, stating that at a meeting on 10 February 1988, Hudson had agreed that "all road crossings would be paved by 26 February [19]88" (R4, Section. I, tab J). That letter makes it clear that Hudson proceeded with the work under agreement and not under the compulsion of an order.

35. The damages claimed by Hudson are based on the assertion that in order to comply with the direction, it was required to divert resources from other aspects of the project, resulting in disruption of such work. There is no evidence whatever of such diversion. To the contrary, the CRR's and DRI's show that Hudson had been installing permanent surfaces for road crossings for at least one month prior to issuance of that directive on 20 February 1988. There is no indication that the pace of that work changed after that date or that other work was deferred to afford resources for the permanent road crossings. Hudson did not complete the work by 26 February 1988 and was still occupied therewith in March, 1988.

DECISION

This claim fails as being unsupported in the record and contrary to fact.

Event 22 February 1988

FINDINGS OF FACT

36. Hudson seeks to recover the cost of removing a small wooden foot bridge over an existing ditch that was also in the path of a new ditch (tr. 3/324). Section 02050 ("Demolition and Removal") of the specifications, para. 2.1.1 calls for the removal of such structures. The bridge was not shown in the drawings but would have been visible during the pre-bid site visit.

DECISION

Hudson seeks to recover the cost of removing the bridge pursuant to the "Differing Site Conditions" clause. Inasmuch as the bridge was plainly visible during a site inspection, it could not be an "unknown" condition under Category 2 or a "latent" condition under Category 1. *Vann v. United States* [14 CCF ¶ 83,353], 420 F.2d 968 (Ct. Cl. 1970).

Event 23 February 1988

FINDINGS OF FACT

37. The parties are in dispute as to whether Mr. Semmes directed Hudson on this date to start excavation at Colby Avenue, then move the crew to First Street to finish certain work and then move to a ditch under construction behind the family housing area for further work. (Hale deposition, *supra* at 39). Mr. Semmes denied giving the direction (tr. 3/186, 325). It is not necessary to resolve that conflict because there is no evidence whatever that Hudson complied with such a direction.

DECISION

Lacking compliance with the direction, no increased costs could have been incurred thereby. The absence of damages precludes recovery. *Crown Laundry & Dry Cleaners*, ASBCA No. 28163, 85-3 BCA ¶ 18,349.

Events 25, 29 February, and 3 June 1988

FINDINGS OF FACT

38. Specification section 02202 ("Earthwork for Utilities"), para. 7.1 ("Surface Preparation; Clearing and Grubbing") contains the following direction:

> Remove trees, stumps, brush, and other organic and nonorganic debris within the limits of construction. Protect from damage sound trees and shrubs which do not interfere with the construction.

39. Specification section 01560 ("Environmental Protection"), para. 3.2 provides that "[e]xcept in areas indicated to be cleared, the Contractor shall not remove, cut, deface, injure trees or shrubs without special permission from the Contracting Officer."

40. The Government was anxious to preserve as many trees on the site as possible. On 25 February 1988, while preparing to cut down trees that were in the path of a ditch north of First Street, Hudson received a direction from Mr. Semmes to suspend that activity until further notice. The contract contains the standard Suspension of Work clause (FAR 52.212-12).

41. The order was issued because the Government wished to identify the particular trees that were to be removed. That identification required determination of the boundaries of the ditch at that location including the width of the ditch at the top and how far back from those boundaries trees would have to be removed. (Tr. 1/87-88) The trees within the boundaries were identified within two hours after issuance of the order.

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It was then rescinded and Hudson was permitted to cut the trees down (tr. 1/87). As a result of the order, a person employed by Hudson to cut down the trees was unable to perform that work when scheduled and was sent away from the site to await rescheduling (DRI 25 February 1988).

42. On 29 February 1988, Hudson encountered three trees in the ditch line west of the McDonald's restaurant and south of Fourth street. In the hope of saving some of the trees, Hudson was directed by the Government to cut them down one by one, allowing individual decisions to be made. Leaving the trees in place turned out to be impractical, however, because cutting the ditch sides to the slopes required by the drawings would have left roots of the trees exposed, resulting in eventual death of the trees. In the end, the Government directed the removal of all of these trees (tr. 3/325). Hudson incurred added expense for removal of the trees piecemeal rather than all at one time as had been expected. (Tr. 1/90-92)

43. Hudson also seeks to recover added costs incurred on 3 June 1988 for removing a tree in the ditch line behind the Enlisted Men's Club. This was a large old tree that the Government wished to preserve. Hudson was directed to delay cutting the tree down so as to allow the Government to investigate how it might be saved. Here again, Hudson's tree removal subcontractor, who had come to the site to perform the work, had to be sent away (tr. 3/247). In the end, the Government decided that saving the tree was not feasible. At added cost to Hudson, the subcontractor was brought back and the tree removed.

44. Bilateral Modification P00007, dated 22 July 1988 contains six groups of additional work to be performed in consideration of a price increase of $11,926.43 and a time extension of 14 days. The second group contains various items including "remove tree at Enlisted Mens Club." The negotiation memorandum prepared by Mr. Semmes indicates that the equitable adjustment in price agreed on for this group included $150 for removal of the tree (exh. A-7).

45. The $150 amount was the cost of remobilizing the subcontractor (tr. 3/373). Hudson now seeks to recover the cost of removing the stump, at an added cost of $130, which was accomplished subsequently by Hudson with its own forces (tr. 1/166). This amount was discussed during the negotiations and excluded from the equitable adjustment inasmuch as removal of the tree was already required by the contract (tr. 3/374).

DECISION

Under the "Suspension of Work" clause of the contract, Hudson was entitled to compensation for increased costs of performance if an order suspended, delayed or interrupted the work "for an unreasonable period of time." The order of 25 February 1988 was issued in order to determine whether trees in the path of the ditch could be saved. The contract drawings showed the exact route of the new ditch. Prior to award of the contract, the trees in the path of the ditch could have been identified on the site and a decision made as to preservation or removal. The failure to make that decision until Hudson had arrived at that location and prepared to remove the trees as directed by the specification rendered the suspension ordered on 25 February 1988 unreasonable in its entirety and entitles Hudson to be compensated for the costs occasioned by such disruption. *Pathman Construction Co.*, ASBCA No. 22003, 82-1 BCA ¶ 15,790 at 78,190.

The order issued on 29 February 1988 delaying removal of the group of trees until the Government had made individual decisions constituted a constructive change to the specifications which did not confer that right upon the Government but simply provided for removal of trees in the path of the ditch. Hudson is entitled to an equitable adjustment for the added costs of that decision step.

The denial of Hudson's claim for the cost of removing the stump of the tree cut down on 3 June 1988 was correct. This was work already required under the contract. This tree was situated in the path of the ditch and, therefore, was required to be removed pursuant to Specification section 02202, para. 7.1 directing removal of trees and stumps within the limits of construction.

Event 3 March 1988

FINDINGS OF FACT

46. Hudson had installed and backfilled an underground culvert along the side of Building 314 fronting on Sixth Street. Over the fill, Hudson had installed a temporary berm of crushed shell surmounted with unsupported wood planks for access to the building entrance on that side. After a rainfall, the backfill on the sides of the berm would be filled with muck and mud. There was also a

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side entrance, unaffected by construction, which was reached over a concrete sidewalk.

47. In time, the berm deteriorated and eroded causing a risk of persons losing balance on the boards and toppling into the muck and mire (tr. 3/189-93). On 3 March 1988, Mr. Semmes directed Hudson to upgrade the installation by building temporary walkways.

48. The "Accident Prevention" clause of the contract requires the contractor to "comply with all pertinent provisions of the U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 335-1-1 dated October 1987." Para. 23.A.10 of the Manual provides that "[w]alkways or bridges with guardrails shall be provided where people or equipment are required or permitted to cross over excavations." Subsequent to the direction, Hudson installed a walkway of planks covered with plywood with uprights connected with a ribbon to serve as a guardrail. The Government acquiesced to this installation which remained in place until the work in the area was completed (tr. 3/192). Appellant claims that the upgrading was not required by the contract and seeks compensation therefor.

DECISION

Under the "Accident Prevention" clause of the contract, Hudson had the basic obligation to "provide for protecting the lives of employees and other persons" in performing this contract. That general obligation is the standard for measuring the sufficiency of Hudson's performance of the specific obligation to provide walkways or bridges with guardrails for people crossing excavations. In that context, the installation initially provided by Hudson created plain risks of injury to persons using the same and, thus, plainly fell short of what was required by the contract. The upgraded installation was no more than was required by the contract in the first instance. Hudson is, therefore, not entitled to additional compensation for the costs of that work. The claim is without merit.

Event 29 March 1988

FINDINGS OF FACT

49. On 29 March 1988, Mr. Semmes directed Hudson to postpone any digging of new ditch lines in the area south of Fifth Street and east of Bainbridge Avenue until after 11 April 1988. A Navy ceremonial event was scheduled in that area during 7-11 April and Mr. Semmes believed that open ditches and piles of dirt would detract from the occasion. Hudson was working in the area at the time of the direction. As the result thereof, Hudson was compelled to stop that work, reschedule the same, and move its forces elsewhere (tr. 1/112-13).

DECISION

Hudson's work was interrupted in order to accommodate needs of the Government unrelated either to the contract or to normal naval station operations that might have been anticipated by Hudson and allowance made therefor. In these circumstances, the interruption was a breach of the Government's implied obligation to avoid conduct interfering with performance of the contract. The breach amounted to a constructive change and the increased costs are compensable accordingly. *Nichols Dynamics, Inc.*, ASBCA Nos. 17949, 18203, 75-2 BCA ¶ 11,556.

Event 20 April 1988

FINDINGS OF FACT

50. Specification section 02050 ("Demolition and Removal"), para. 1.2 requires daily removal of rubbish and debris and forbids accumulations inside or outside the buildings. The General Provisions of the contract contain the standard "Cleaning Up" clause, FAR 52.236.12, requiring Hudson to "at all times keep the work area, including storage areas, free from accumulations of waste materials." Debris from construction had accumulated at various work sites under this contract. Previously, at a meeting with the Government on 19 January 1988, Hudson had agreed to remove the debris daily from the sites.

51. That agreement notwithstanding, Hudson continued to allow accumulation of debris at its work sites. On 20 April 1988, Mr. Semmes directed Hudson to clean up its construction yard and to stack pipes and other materials in an orderly manner. Hudson's DRI, signed by Mr. Hale, contains a statement that it was directed to stop work in order to perform this work. Mr. Hale's discovery deposition, admitted to the record in lieu of his testimony, does not address this matter.

52. At the hearing, Mr. Semmes denied directing Hudson to stop other work in order to accomplish the clean-up. The record establishes only that Hudson was directed to clean up its work and storage areas. The evidence is not sufficient to find that Hudson was also directed to stop work on the

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contract in order to accomplish the cleanup. Furthermore, there is no evidence that Hudson performed the clean-up or that it sustained any added costs from the stop work order, if any was issued.

DECISION

The claim is without merit. The order to maintain the work sites in an orderly condition, free of debris demanded no more than what was already required by the contract. Even if we could find that Hudson was ordered to stop work in order to perform that task, there can be no recovery therefor as Hudson has failed to show that it complied with said order and incurred added costs thereby.

Events 13, 21, and 24 June 1988

FINDINGS OF FACT

53. On 13 and 24 June 1988, the Government informed Hudson that leakage from existing water pipes beneath ditches constructed under this contract had been found. In the belief that the leaks were caused during construction of the ditches, the Government directed Hudson to excavate the pipes and to repair the leaks. The contract contains the standard "Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements" clause, FAR 52.236-9, requiring Hudson to repair any damage to facilities "resulting from failure to ... exercise reasonable care in performing the work." Hudson excavated the pipes and, in both instances, found the installations to be in good order with no leakage present. (Tr. 1/167-68, 170)

54. On 21 June 1988, Hudson was notified by the Government of an asserted leak in a water line installed by Hudson. Upon investigation, Hudson found that the leak came from a cracked valve, not associated with Hudson's work, in an existing line. We so find. Hudson repaired the crack and covered over the line. (Tr. 1/169) Its claim is for the costs of the repair and the preceding investigation.

DECISION

As to the events of 13 and 24 June 1988, the Government's directions to excavate and repair the water pipes, issued under the erroneous belief that the pipes had been damaged by Hudson, constituted constructive changes. *Tecom, Inc.*, ASBCA No. 26022, 82-2 BCA ¶ 16,121 at 80,028. Hudson is entitled to an equitable adjustment for added costs of complying with those directions.

As to the event of 21 June 1988, Hudson is entitled to an equitable adjustment for this work under para. (h) of the "Inspection Of Construction" clause, FAR 52.246-12, which provides an equitable adjustment for costs of examination and reconstruction where work deemed defective and ordered to be corrected by the contracting officer is examined and found to meet contract requirements.

Other Acts and Omissions of the Government

Event 27 January 1988

FINDINGS OF FACT

55. Section 02721 ("Storm Drainage System") of the specifications provides in para. 6 ("Installation") that "[a]ll pipe shall be inspected and approved before being covered and concealed." On 27 January 1988, Hudson completed installation of a section of pipe at Bainbridge Avenue and Sixth Street. It was the general practice on that project to give the Government 24 hours advance notice for outages and inspections requiring the presence of an inspector (tr. 1/60).

56. In accordance with that practice, Hudson gave 24 hours notice requesting Government inspection of the connections and joints in the pipe prior to backfilling and covering the installation. An inspector did not appear at the site until several hours after expiration of the 24 hours. Upon inspection, the installation was approved. Hudson had workers and equipment at the site, ready to backfill the excavation upon approval of the installation. Hudson's claim is for costs of keeping these resources on standby awaiting the appearance of the inspector, after the expiration of the 24 hour period. (Tr. 1/59-62)

DECISION

In order to recover the added costs claimed, Hudson must show that Government approval of the installation was unreasonably delayed. That fact is not established merely by showing the length of time taken to give approval. There must also be evidence establishing a standard as to what Hudson could reasonably have anticipated for approval time in relation to this particular element of the work and the status of the project. Without such a standard, it is not possible to find that a delay was unreasonable. *Law v. United States* [16 CCF ¶ 80,286], 195 Ct. Cl. 370, 384-5 (1971); *R. J. Crowley, Inc.*, ASBCA No. 35679, 88-3 BCA ¶ 21,151.

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The only evidence presented here is that the approval was delayed for a few hours after expiration of 24 hours advance notice to the Government that the installation was ready for inspection. Since that period applied across the board to all types of outages and approvals where a Government inspector was needed, it must have been intended simply to afford enough advance notice of contractor's requirements to permit proper scheduling of the inspectors' time. There was no evidence that once notice was received, inspections would uniformly be held within that same 24-hour period. Under these facts, the notice period was not indicative of how long Hudson should have reasonably expected to wait for inspection and approval of this particular installation. In the absence of proof of unreasonable delay of approval, there is no entitlement to recover on this claim.

Access to the DAC Site

FINDINGS OF FACT

57. The Government awarded a contract to TAC Construction Co. for construction of a Dependents Activity Center (DAC) at the Center. The record does not indicate the date of award of the DAC contract. The DAC was not shown on the drawings for the present contract.

58. On 16 February 1988, Hudson notified the Government that the route shown on the drawings would take a ditch across a driveway for the DAC not shown on the drawings. In response to Hudson's notice, the ROICC advised that direction would be given within two days (CRR 16 February 1988). At the time of giving notice, Hudson had not yet reached the location of the driveway in constructing the ditch. It first reached that point on 5 March 1988. On that date, for lack of directions from the Government as to the route of the ditch, Hudson was required to stop digging at that location and to redeploy its forces elsewhere. (DRI 5 March 1988).

59. The Government provided direction on 8 March 1988. It sent Hudson a request for a proposal to change the route of the ditch, in accordance with an attached drawing, so as to avoid the driveway. Without submitting any proposal, Hudson re-routed the ditch in accordance with the drawing. The re-routing had no significant effect on the length of the ditch and, thus, no cost consequence. For that reason, the parties decided to forgo a contract modification memorializing the route change (tr. 3/198).

60. *Event 5 March 1988*—Hudson was delayed excavating a ditch through the DAC site by a fence and equipment, belonging to TAC, that were located in the path of the ditch. TAC would not remove these installations until the related DAC work had been completed several weeks later. The Government was notified of the situation but was unsuccessful in obtaining TAC's agreement to earlier access to the site for Hudson. Pending completion of TAC's work, Hudson demobilized its forces from that location and mobilized at another location of the project (tr. 1/105). Hudson seeks to recover the added costs of moving and returning to that location. The contract contains the standard "Other Contracts (APR 1984)" clause, FAR 52.236-8.

61. *Events 30 March—15 April 1988*—On 30 March 1988, material and equipment stored by TAC prevented Hudson from bringing a ditch through another area of the DAC site (tr. 1/113). TAC told Hudson that the items would be removed by 4 April 1988 (DRI 30 March 1988). On that date, TAC's material and equipment were still in place, preventing progress of the ditch. The Government was informed of that delay, communicated with TAC concerning the matter, but was unsuccessful in securing the removal of TAC's materials. (Tr. 1/118) TAC removed the materials on 15 April 1988, enabling Hudson to proceed with the ditch (DRI 15 April 1988). The Government was kept informed of these events by notations in the DRI's and by oral reports to the ROICC inspector and Mr. Semmes.

62. The TAC property located in the path of the ditch in the foregoing instances consisted of stored materials and temporary installations, all of which could have readily been moved aside to allow construction of the ditch. In these circumstances, we find that three days after receipt of notice from Hudson was a reasonable time for the Government to have issued directions to TAC for removal of its property and for that action to have been accomplished.

63. *Event 26 April 1988*—The drawings required a 3:1 slope for the sides of a ditch on Taylor Avenue adjacent to the DAC. Some of the surface area required to be excavated to obtain that slope was on TAC's work site, necessitating removal of a fence erected, and materials stored, by TAC. Notice of this situation was given to the Government on 26 April 1988. On the same day, after discussion with Hudson, the Government directed that the slope be steepened to 2:1, which obviated the need for excavation

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on TAC's work site. The change did not entail any increased work on the part of Hudson (tr. 1/133). Hudson's claim is for standby costs of deployed labor and equipment pending resolution of the matter.

DECISION

Although the DAC project was not shown on the contract drawings, Hudson was on notice, pursuant to the "Other Contracts" clause of the General Provisions, that the Government might award a contract involving construction on or near the routes of the ditches. Under the clause, in the event of such award, Hudson was obliged, to "fully cooperate with the other contractors . . . and . . . carefully adapt scheduling and performing the work under this contract to accommodate the additional work."

If there was a conflict between the schedules of Hudson and the other contractor that could not be resolved by agreement, Hudson's only available course was to obtain directions from the Government. Hudson did not have the option of imposing its own solution on the other contractor. Doing so might violate the provision of the "Other Contracts" clause that forbade Hudson to "commit or permit any act that will interfere with the performance by any other contractor."

On its part, once it received notice of such a conflict, the Government was obligated, pursuant to its implied duty of cooperation, to timely take action to obtain a reasonable accommodation of Hudson's needs from the other contractor. *Robert R. Marquis, Inc.*, ASBCA No. 38438, 92-1 BCA ¶ 24,692 at 123,170-71.

With respect to the events of 16 February, 5 March, and 30 March 1988, the Government gave up trying to help Hudson after TAC refused to interrupt its work to accommodate Hudson's schedule. TAC's property and equipment could have been readily moved to allow Hudson's work to proceed. The only reason indicated by the record for TAC's refusal to move its materials was its preference for uninterrupted completion of its work.

Having awarded contracts that resulted in these two contractors being in the same place, at the same time, the Government had a responsibility to resolve the competing schedules and direct the order of work for that location. Its neglect to do so with respect to the events of 16 February, 5 March, and 30 March 1988 was a breach of its implied duty of cooperation with Hudson, entitling the latter to an equitable adjustment of the contract price for the increased costs incurred for demobilization and remobilization on these occasions.

We reach a different result with respect to the event of 26 April 1988. Here the Government gave prompt direction that solved the access problem by avoiding the need for entering the DAC site. Accordingly, there is no liability for any added costs incurred by Hudson pending that direction.

Events 8 June, 15, 21, and 25 July 1988

FINDINGS OF FACT

64. On 8 June 1988, Government public works personnel mistakenly left a fire hydrant open in the vicinity of a newly constructed ditch on the east side of Simms Avenue, south of Fifth Street.

65. On 15 and 25 July 1988, Government personnel testing fire hydrants on Sixth Street allowed water to be released with too much force, causing damage to ditch slopes, washing out nearby ditches constructed under this contract, and destroying newly installed mulching and grassing. Hudson performed repairs in both instances and seeks to recover the added costs.

66. On 21 July 1988, Center public works personnel re-routed a water line that was in the line of Hudson's ditch at Sixth Street and Evans Avenue. That work caused damage to the ditch structure and to the grassing in place, which was left unrepaired by the Government personnel. Hudson thereafter made those repairs and now seeks to recover the added cost therefor. (Tr. 1/181)

DECISION

The Government's actions causing damage to Hudson's installations were a breach of its implied obligation not to impede its contractor's performance. Hudson is entitled to an equitable adjustment for the increased costs resulting from that damage. *Volentine & Littleton v. United States,* 144 Ct. Cl. 723 (1959).

Event 22 June 1988

FINDINGS OF FACT

67. On this date, an employee of the Center's Public Works office, accompanied by the ROICC's inspector for this contract, proposed an arrangement whereby Hudson would furnish the Government a backhoe with operator to be used for one hour for an unrelated project being carried out by the Public Works office at the Center. In ex-

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change, the Government would make available to Hudson a Government-owned front end loader that Hudson needed for use in installing a piece of large-diameter RCP pipe in a ditch on Sixth Street. The contract contains the standard "Government-Furnished Property" clauses, FAR 52.245-2 and -4, and the standard "Changes" clause, FAR 52.243-4.

68. Hudson agreed to the arrangement and thereafter gave the Government the use of its backhoe and operator. Subsequently, however, the ROICC disavowed and refused to carry out his part of the arrangement, asserting that furnishing the Government-owned equipment was not permissible. Hudson seeks to recover the cost of carrying out its end of the bargain.

69. The record does not specifically address Mr. Semmes' knowledge of the arrangement prior to the Government's disavowal thereof. Circumstantial evidence indicates, however, that he must have learned of it soon after it was made. It was described by Hudson in the DRI for 22 June 1988, the day of the agreement. DRI's were submitted no later than the next day to the ROICC inspector and passed to, and read by, Mr. Semmes (tr. 3/224-25). In addition, as contract administrator, he would have been told of the matter by the inspector who was present at the time of the arrangement or learned of it during his daily visits to the work site (tr. 3/151).

70. The record indicates that Mr. Semmes had the authority to enter into this type of arrangement. Almost all of the written directives in the record from the Government to Hudson relating to actual performance of the work are signed by Mr. Semmes as project engineer. Correspondence from Hudson on these matters to the Government was invariably addressed to Mr. Semmes. The letters deal with a broad range of matters. In these letters, the directions or advices were given directly by Mr. Semmes under his own authority. In no instance, was there a deferral or referral of decision to the contracting officer or the ROICC.

DECISION

The Government defends against this claim on the ground that as an oral agreement, it is invalid and that it was entered into without requisite authority. Both contentions are without merit.

An oral agreement can be enforced if the proponent is able to prove a meeting of the minds as to the terms of the arrangement, the terms themselves, and an agreement to be bound thereto. *Essex Electro Engineers, Inc.*, ASBCA Nos. 30118, 30119, 88-1 BCA ¶ 20,440; *QES, Inc.*, ASBCA No. 22497, 78-2 BCA ¶ 13,462 at 65,789. Hudson has satisfied that burden by proving that a bargain as to the exchange of services was made and showing the terms and conditions thereof.

The agreement cannot be avoided for lack of authority to bind the Government. The contracting officer had allowed Mr. Semmes to exercise broad authority as to contract administration in his own name and position. The scope of that authority was sufficient to include making Government property available to Hudson pursuant to the "Government Property" clause for a single, minor use under the contract. Mr. Semmes' agreement to the transaction would, therefore, be binding on the Government. *Urban Pathfinders, Inc.*, ASBCA No. 23134, 79-1 BCA ¶ 13,709; *Urban Laboratories*, ASBCA No. 24905, 84-3 BCA ¶ 17,515.

While the record is adequate to show that Mr. Semmes must have known of the arrangement soon after it was effected, that knowledge would be imputed to him in any event by virtue of his supervision of the inspector who was a party to the transaction as well as his extensive day-to-day involvement in the progress of the contract. *Southwestern Sheet Metal Works, Inc.*, ASBCA No. 22748, 79-1 BCA ¶ 13,744. With actual or constructive knowledge thereof, Mr. Semmes could have terminated or disavowed the arrangement. Instead, it was allowed to proceed.

As conceived by the parties' representatives, the arrangement called for an exchange of performances, with Hudson's coming first. When Hudson's services were accomplished and accepted, a unilateral contract came into effect, binding the Government to render its own offered performance. *Amplitronics, Inc.*, ASBCA No. 33732, 87-2 BCA ¶ 19,906 at 100,704. Upon its refusal to do so, the Government became liable for damages for that breach. The amount expended to secure the performance promised by the Government from another source, rather than reimbursement of the costs of its own performance, as claimed by Hudson, is the correct measure of such damages. Restatement (Second) of Contracts § 347 (1979).

Event 29 June 1988

FINDINGS OF FACT

71. As positioned in the contract drawings, a wing wall to be erected by Hudson on the

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south side of Fifth Street near Dong Xoia Avenue would have been directly in the path of a large existing water main. After Hudson brought the conflict to the attention of the ROICC, the matter was resolved by changing the angle of the wing wall and shortening the wall so as to avoid the pipe. The change was carried out without any added cost (tr. 3/362).

DECISION

Inasmuch as there was no increase in cost incurred as the result of this defect in the drawings, there is no entitlement to recover on this item.

REPAIR OF EROSION DAMAGE

Hudson seeks to recover added costs incurred during the period July-October 1988 for repair of erosion damage to the ditches caused by water.

FINDINGS OF FACT

Soil Conditions and Related Needs for Erosion Control

72. The subsurface soils in the areas of the ditches were typically sandy to silty to a depth of 18 to 30 feet, predominantly Plummer loamy sand. All of the soils were fine sandy soils, with only small amounts of clay.

73. The paucity of clay in the soil made the ditches highly susceptible to erosion (exh. G-20 at 19). Clay acts as a binder, imparting cohesiveness to soil, enabling it to better resist erosion from rain and wind. Ditch surfaces built in sandy soils which are not protected from erosion, will readily wash away in the rain (tr. 1/151-52). In working with such soils, the basic rule is to leave the smallest practical area of unprotected soil exposed to rain for the shortest possible time. Each exposure of unprotected soil to rain accelerates and exacerbates erosion that has already begun, making it increasingly difficult to stop or reverse that process. These considerations made it crucial for Hudson to take measures against erosion promptly upon beginning excavation for the ditches. (Exh. G-20 at 8; tr. 2/287-88)

Specification Requirements

74. The practices set forth above were embedded in the contract specifications. Section 01560 ("Environmental Protection"), Para. 4 ("Erosion and Sediment Control Measures") contains the following pertinent provisions:

4.2 Reduction of Exposure of Unprotected Erodible Soils: Earthwork brought to final grade shall immediately be finished as indicated and specified. Side slopes and back slopes shall be protected immediately upon completion of rough grading. All earthwork shall be planned and conducted in such a manner as to minimize the duration of exposure of unprotected soils.

75. An essential element of a program for controlling erosion in ditches constructed in sandy, unstable soils, such as those found here, was the prompt installation of vegetation on the slopes and immediately adjacent areas (exh. G-20 at 5). Section 01560 ("Environmental Protection"), Para. 4.3. provides:

Temporary Protection of Erodible Soils: Such methods as may be necessary shall be utilized to effectively prevent erosion and control sedimentation, including, but not limited to, the following:

* * *

4.3.2 Vegetation and Mulch: Temporary protection shall be provided on all side and back slopes as soon as rough grading is completed or sufficient soil is exposed to require protection to prevent erosion. Such protection shall be by accelerated growth of permanent vegetation, temporary vegetation, mulching or netting. Slopes too steep for stabilization by other means shall be stabilized by hydroseeding, mulching anchored in place, covering by anchored netting, sodding, or such combination of these and other methods as may be necessary for effective erosion control.

76. Also relevant is Section 0281 ("Grassing"), para. 6.7, as follows:

6.7 Winter Cover: All areas to be grassed shall be protected against erosion at all times. For protection during winter months Italian rye grass shall be planted . . . on all areas which are not protected by permanent grass.

77. Damage to the slopes in the form of gullies, erosion, and loss of grass on the slopes, can also be caused by the sheeting action of rain water running off adjoining roads and parking lots into the ditches. Characteristically, runoff from such developed surfaces would be much faster than runoff from undeveloped areas, such as open fields (tr. 2/160-61). Section 01560 ("Environmental Protection") of the specification requires the following:

4.3.1 Mechanical Retardation and Control of Run-off [sic]: The rate of run-off from the construction site shall be mechanically retarded and controlled. This includes construction of diversion ditches, benches,

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and berms, to retard and divert run-off to protected drainage courses.

78. Berms are placed on the surfaces adjoining construction sites to prevent surface runoff of rain unto the ditch slopes. They are normally constructed of earthen material, installed on both sides for the full length of the ditches. (Tr. 3/39-40) They serve to channel flows of rain water to flumes which are interspersed at suitable intervals on the sides of ditches to safely direct water channeled by the berms to the ditch bottoms (tr. 2/56).

Erosion Related to Ground Water Conditions

79. The water table at the site was ordinarily 5-6 feet below the surface (tr. 3/9). Rainfall would cause that level to rise. Winter rains would cause greater increases in ground water level than summer rains which sustained evaporation loss prior to reaching the subsurface (tr. 2/162). The ground water was contained in a layer of water-bearing sand, 12-18 inches thick. A band of impermeable clay beneath that layer prevented the ground water from percolating to lower soil levels.

80. The Center is located in the Gulf coast area of Mississippi. Contractors performing construction in that area can expect to encounter ground water close to the surface and are aware that measures to control the effects thereof must be taken in connection with subsurface work (tr. 2/255-56). Mr. Robert Allen, who prepared Hudson's bid for this contract and subsequently served as project manager, was experienced in the construction of subsurface installations in that locality. Moreover, as the result of performing previous projects at the Center for construction of underground utilities such as sewer and storm drains, he was familiar with ground water conditions and water table height prevailing at the Center.

81. Mr. Allen took that knowledge and experience into account in calculating Hudson's bid for the instant contract. He also had also visited the site in connection with the preparation of Hudson's bid and had then observed the existing ditch system (Phase I). (Tr. 2/5-6)

82. The Big Ditch was the deepest one in the project. It was designed with a depth of 10-12 feet from the invert to ground level. That placed the water table 5 feet above the invert (tr. 2/169-70). The large ditch, which ran along Sixth Street, had the same configuration. Hudson contends that the force of ground water escaping into the ditch after breach of the water table during excavation of the ditch would cause the ditch wall to collapse and sand to pile up in bottom of the ditch. Hudson asserts that this was the main cause of erosion and accumulation of sediment in these ditches. Expert testimony to that effect was presented by Hudson.

83. While the foregoing scenario is plausible, it is contradicted by other evidence indicating that surface water runoff, not ground water action, was the main cause of erosion in these ditches. Erosion from ground water action is evidenced by gullies starting from the bottoms of the ditch walls and moving upward. However, the numerous photographs in the record depicting erosion in the large ditches (exh. A-11, -18, G-21 to -23, -29), uniformly show the gullies starting at the top of the ditch, proceeding downward. This indicates erosion caused by surface water runoff. (Tr. 3/27)

84. To the extent that ground water was the cause of erosion in the Big Ditch and the other deep ditches, Hudson could have substantially limited and reduced this damage through a combination of prompt vegetation of the exposed surfaces and allowing sufficient time for dewatering of the soil after initial excavation and after rainfall. This could have been accomplished by dividing the project into segments, allowing some of the areas to dewater while work proceeded in others.

85. In some of the shallow ditches serving as branches of the system, the contract drawings placed the bottoms of the ditches directly in the water table, resulting in a constant flow of ground water in the ditch. The flowing water carried soil away from the bottom and sides of the ditch. The water-borne soil, referred to as "running sand", caused further erosion and, in turn, increased accumulation of sediment from erosion in the ditches (tr. 1/179). Under normal amounts of rainfall, the level of water in the ditch would cause merely a rounding of the bottom of the ditch (tr. 3/15). Significant rain fall, resulting in a higher water table and greater volume of water-bearing sand, would cause increased erosion and sedimentation. (Tr. 2/173)

86. Even by taking all required and necessary measures, Hudson could not have completely stopped erosion from running sand during the term of this contract. So long as water flowed in these ditches, dewatering and, in turn, establishment of vegetation in the ditch bottoms, could not be readily accomplished. Significant reduction of erosion

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and sedimentation from running sand had to await dry periods during which water-tolerant vegetation could be established. This involved effort over an extended period, which would be longer than the term of this contract. (Tr. 3/15-18, 3/97)

87. *Sedimentation of the Ditches*—Large amounts of soil (hereinafter "sediment") were deposited in the ditches as the result of erosion. Hudson was required to frequently dig out accumulations of sediment in order to bring the ditches back to the depths required by the drawings. Some of this effort could have been saved had the drainage water in the ditches moved at a greater velocity. This would have "scoured" away most of the accumulated sediment. Instead, the water moved very slowly through the ditches, allowing the sediment deposit to remain undisturbed.

88. The low velocity of the water was caused by the very flat grade of the ditch system, which was a Government design requirement. The flatness was ascertainable from examination of the drawings which showed the grades of the ditches. The flat grade was required because the ditches emptied outside the Center into a drainage system maintained by the City of Gulfport, MS. Allowing the drainage water to enter that system at too high a speed might cause flooding. The objective of the design was to store the water in the ditches and feed it slowly into the municipal system (tr. 2/76-77).

89. *Phase I Ditches*—The design of the Phase II ditch system was based on, and virtually identical to, the Phase I ditch system that had been built several years earlier. The Phase II system emptied into the Phase I ditch system on Eighth Street, near Building 348. From that location, the Phase I ditch proceeded west along Eighth Street, turned north at Colby Avenue, exiting the Center, and ultimately emptied into the Gulfport municipal drainage system. (Tr. 2/140-42) The Phase I ditches were earthen, as deep as the Big Ditch under this contract, and had been successfully stabilized throughout with grass.

90. At the hearing, Hudson sought to attribute the successful stabilization of the Phase I ditches and the lack of success in stabilizing the Phase II ditches to differences in prevailing ground water conditions. Hudson pointed to the section of the Phase I system adjoining Eighth Street which had been constructed on an embankment of compacted fill, topped with asphalt with well-maintained shoulders, which was approximately 13 feet above ground level at the ditch. Under these conditions, rain striking the asphalted road surface would flow down directly into the ditch, never becoming part of the ground water. Hudson contrasted these conditions with the terrain surrounding the Phase II system. That system abutted long, flat, wide areas in which rainfall could readily percolate into the soil and become part of the ground water. (Tr. 2/206-07)

91. The difference in results between the Phase I and II systems does not derive from differences in terrain. The Phase I system contains successfully grassed sections next to terrain similar to that adjoining the Phase II ditches. This indicates that good erosion control, rather than better ground water conditions, was responsible for the successful stabilization of the Phase I ditches. (Tr. 2/197; exh. A-18, photo. no. 18)

92. *Alternate System Designs*—The Phase II ditch system was intended to satisfy the Government's need for additional storm drainage that would also have sufficient water storage capacity for a ten-year storm (tr. 2/134). There were two alternative designs for meeting that need. Neither of these would have resulted in the erosion problems associated with earthen ditches surfaced with vegetation—the design employed in this contract. The first alternative was a system utilizing large-diameter reinforced concrete pipe with suitable inlets, catch basins, and manholes for capturing and carrying away drainage water.

93. Without special features for surface storage of additional water, such a pipe system would not have provided enough storage capacity for a 10-year storm (tr. 2/236, 2/240-41). The other approach would have been to line the ditches entirely with concrete or with concrete bottoms and sides of rip-rap (tr. 2/84). While these approaches would have avoided the damage and expense of soil erosion they, likely, would have been much more costly than the earthen-sided ditches specified here.

Chronology

94. Hudson began excavating for the ditches early in November 1987. As of January, 1988, it had taken no measures to control erosion. There was erosion throughout the ditches. (Tr. 3/114-15) Uncompleted ditches were left ungrassed and unprotected pending completion of work (tr. 2/37-38). Unprotected, bare piles of dirt were everywhere. Temporary measures to seal off uncompleted areas from erosion were not taken (tr. 3/67).

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95. Hudson devoted very little effort to establishing vegetation upon completion of rough grading or exposure of sufficient soil to require protection to prevent erosion, as required by the specification. For the highly erodible soil present here, temporary vegetation should have been established on an almost daily basis, no less often than every three to four days, and never as much as a week apart. The objective is to have vegetation in place when the first rain occurs, so that the erosional process does not have the opportunity to begin. (Tr. 3/106) In late winter—early spring 1987-1988, soils were left unprotected and exposed by Hudson for three to four weeks. This was entirely too long a period. (Tr. 3/110-11)

96. The emphasis of Hudson's vegetation program was on the establishment of permanent grass for completed ditches. Here, also, Hudson's practices were conducive to erosion. After accomplishing all the work preparatory to vegetation, Hudson would delay calling in its grassing subcontractor until "there was enough area ... where it would be justifiable to do; we just didn't do just a small area" (tr. 1/153). The rationale was that "the grassing contractor could not just come [to] do a little bit at a time; he had to have enough area to be worth his while" (tr. 1/152). He "ha[d] to have a few acres before he c[ould] crank up" (tr. 2/37). As much as one or two months might pass before the subcontractor was brought in. If there were rainfall during that interval, all of the work preparatory to seeding, including final grading and application of top soil, would be lost.

97. Throughout the period through March 1988, there was also a failure to promptly take measures to control runoff into the ditches from adjoining improved areas. The sheeting action of rain water running off adjoining roads and parking lots into the ditches caused damage to the ditches in the form of gullies, erosion, and loss of grass on the surfaces.

98. Berms to control runoff should have been installed at the outset of construction. In bidding the contract, however, Hudson had not planned to install either berms or flumes. The berms were first installed sometime after February 1988 (tr. 2/122) at the suggestion of local Government personnel as a means of controlling the substantial damage being caused by runoff (tr. 2/54).

99. The berms were placed along the Big Ditch on the way to the outfall at Eighth Street and along the deeper ditches between Sixth and Seventh Street and along Sixth Street. Hudson obtained good growth of grass on slopes at locations where berms had been installed. (Tr. 2/44-45, 55). Hudson acknowledged, however, that berms might beneficially also have been used near the shallower ditches (tr. 2/54).

100. As of 10 March 1988, the ditches were in a highly eroded condition with some almost completely filled in with soil and sediment (tr. 3/296-97). Several areas had been ready for, and awaiting, grassing for more than a month. New ditches were being opened and not being grassed. On that date, the Government directed Hudson to grass all disturbed areas, as required by Specification section 02821, para. 5, within seven days (R4, tab K; tr. 3/297-98). That provision states:

> 5. Requirements: All areas within the limits of work not indicated for development otherwise, and all other areas disturbed by the Contractor's operations, shall be grassed. For erosion control measures, refer to specification section entitled "Environmental Protection."

101. Hudson carried out the Government's direction. However, as of 8 April 1988, additional areas had been excavated and had not yet been planted with temporary vegetation. In addition, repairs were needed where washouts had occurred. By letter of 8 April 1988, Hudson was directed to accomplish the additional grassing and repairs by 15 April 1988 (R4, tab L). Very little of the grassing effort was successful. As of 11 May 1988, only 20 percent of the area seeded was covered with growing grass (R4, tab P). In order to secure final acceptance of grassing under the contract, Hudson was required to establish "healthy and growing" permanent grass on 97 percent of the area with no bare surfaces wider than 12 inches. Section 02821, para. 6.9.

102. *Rainfall*—During February and March 1988, there was unusually heavy rainfall which exacerbated the effects of Hudson's failure to institute adequate erosion control measures. In February, the rainfall totalled 11.25 inches versus the norm of 4.8 inches. In March, there was a total of 8.5 inches of rain versus 5.1 inches normal. (Tr. 2/163) Rainfall was less than normal during April-July, 1988 and, therefore, did not contribute to erosion or lack of success in establishing vegetation. August and September 1988 had abnormally high rainfall, with 16.45 inches of rain versus a normal amount of 5.5 inches in August and 13.27 actual rainfall in September versus 8 inches of rain normally occurring.

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Completion of the Contract

103. A final inspection of the work was conducted on 29 July 1988. This resulted in a discrepancy list containing many items related to the condition of the ditches (R4, tab T). Among these items were: "provide adequate erosion control" and "repair washouts and provide erosion control under all bridges and around all headwalls." Other items called for regrading of ditches to meet specified elevations and elimination of low and high points in the bottom of the ditches; and rework of ditches to repair washouts and erosion.

104. *Substantial Completion*—By letter of 16 November 1988 the ROICC notified Hudson that the contract work was deemed substantially complete as of 18 August 1988 (R4, tab V). As indicated in that letter, however, many corrective actions from the final inspection discrepancy list still remained to be accomplished.

105. In the letter dated 16 November 1988, Mr. Semmes had informed Hudson that final payment would be withheld until all of the listed discrepancies had been corrected. On 6 January 1989, the parties met and agreed that the balance of the price would be paid upon accomplishment of a reduced list of defect corrections (R4, tab IIa). Hudson did not accomplish all of the deficiency correction agreed to.

106. The Government agreed on 3 March 1989 to a further reduction of the number of deficiencies required to be corrected as a condition to final payment (R4, tab IID). Hudson then returned to the site and performed a large portion of the deficiency correction for which it received payment of $10,000, leaving $3,000 which has remained unpaid (tr. 1/214). That withholding is not addressed in Hudson's submittal of 29 August 1989 which is the subject of this appeal.

Hudson's Claims

Hudson seeks to recover the following added costs of repair and maintenance of the ditches:

Events 13-20, 23, 27-29 July, 1-3 August, 31 August-2 September.

12-15 September, and 19 September—4 October 1988

FINDINGS OF FACT

107. On these dates, Hudson repaired damage to the ditches caused by erosion. The evidence for these claims consists almost entirely of entries in DRI's submitted by Hudson. With the exception of several instances of repairs precipitated by rain, there is no indication of the causes of damage repaired. The repairs included re-sloping ditch sides; replacement of topsoil, re-fertilization, reseeding, and re-mulching of surfaces; and removing accumulations of sediment from the ditches.

DECISION

Hudson seeks to recover for the repair of the ditches, renewal of vegetation, and removal of sediment accomplished in the course of the contract. Ordinarily, costs of such work would be Hudson's responsibility pursuant to the provision of the standard "Permits and Responsibilities (APR 1984)" clause of the contract that makes the contractor responsible for "all materials delivered and work performed until completion and acceptance of the entire work." That includes repair of damage caused by rain. *Tyler Construction Co.*, ASBCA No. 39365, 91-1 BCA ¶ 23,646.

Hudson contends, however, that the Government is responsible for the costs of this work because it was occasioned by defective specifications for erosion control and defective design of the work.

Hudson asserts that the erosion control techniques specified in the contract were insufficient for the conditions of the highly eroded soil found here. Hudson asserts that it "performed the standard erosion control techniques that are used throughout the industry, and specified in this contract ... in such a manner that had there not been a design defect, the grassing, etc. would have worked" (app. br. at 45). Hudson's assertion does not conform to fact. From the beginning of construction in November 1987 until at least March 1988, Hudson made little or no effort to control erosion as required by the specification. During that period, large areas of soil were allowed to remain unprotected against erosion. This was especially destructive in February and March 1988 which were marked by unusually heavy rainfall. Grassing was unduly delayed during that period. As of 11 May 1988, with a contract requirement of 97 percent coverage with healthy, growing grass, only 20 percent coverage had been achieved.

The record does not support the assertion that the specifications for erosion control were defective. It shows, instead, that they conformed to the standards of the industry and were substantially suited to the conditions of highly erodible soil at the site. In any event, the fact that Hudson did not

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carry out those specifications to any significant extent during a large part of the ditch construction, makes it unlikely that defects in the specifications could have caused the damage now claimed. *See, Gulf & Western Precision Engineering Co. v. United States* [22 CCF ¶80,736], 543 F.2d 125 (Ct. Cl. 1976).

Hudson claims that the design was defective in several respects. First that, it did not take into account surface runoff from areas beyond the limits of construction under this contract (app. br. at 47). The contention is without merit. Section 01560, para. 4.3. of the specification required Hudson to undertake "such measures as may be necessary" to prevent erosion including, in para. 4.3.1, mechanical retardation and control of runoff from the construction site. The specification named several techniques, including installation of berms. From its pre-bid site visit, Hudson would have been on notice of the possibility of substantial runoff of rain, emanating from adjacent streets and other improved surfaces, onto the construction site and thence into the ditches and could, and should, have made appropriate cost allowances therefor.

The second aspect in which the design is claimed to have been defective is in prescribing earthen, rather than concrete-lined, ditches. In Hudson's view, the earthen ditch design was unsuitable in the circumstances of highly erodible soils and elevated water table. The record indicates, however, that these conditions could have been substantially mitigated and controlled through dewatering and prompt vegetation. These techniques would have been effective in achieving stabilization of the walls and bottoms of the deeper ditches against erosion from ground water. They had been successful during construction of the predecessor Phase I ditches which presented ground water conditions similar to those prevailing for the large ditches under the instant Phase II project.

Hudson's contention is partially correct, however. The drawings located the bottoms of shallow ditches in the water table. That action resulted in a constant flow of waterborne soil ("running sand") in the ditches. Establishment of vegetation in the ditch bottoms which would have stabilized the soil against erosion from the flowing water could not be accomplished during the period of the contract. A longer term was needed. Until that stabilization occurred, running sand would continue, with consequent erosion and deposit of sediment.

Hudson was required to frequently remove sediment from erosion that was filling up the ditches. Under the contract, Hudson was required to deliver ditches with the depths shown in the drawings. To the extent that the sedimentation was caused by failure to implement measures that would have stabilized ditch surfaces and prevented erosion, removal was for Hudson's account.

Sedimentation in the shallow branch ditches had various causes. In common with the Big Ditch and the other deep ditches, sedimentation was caused by erosion from rain and surface runoff. A cause of sedimentation unique to the shallow ditches was sedimentation caused by the action of running sand. That condition was not capable of being successfully controlled during the term of the contract. Inasmuch as the sedimentation was the proximate result of its design of the ditches which placed the bottoms in the ditches in the water table, at depths of 5 feet to 6 feet, removal of soil deposited thereby is chargeable to the Government and Hudson is entitled to an equitable adjustment under the Changes clause to that extent.

The record does not break out the portion of sediment removal cost attributable to the action of running sand. However, after evaluating the extent of sedimentation due to causes which were the responsibility of Hudson, namely, sediment deposited by erosion from rain and surface runoff and sediment left in place by the flat grade of the ditch system, we hold that 50 percent of the cost of removing sediment from the shallow ditches (*i.e.*, depths of 5 feet to 6 feet) is attributable to sedimentation caused by running sand.

Another aspect of the ditch design in respect of which added costs are claimed is the flatness of grade in the ditches. The lack of grade caused the water in the ditches to move so slowly that soil carried in the water was deposited in the bottoms of the ditches, increasing sedimentation. The slow movement also allowed accumulations of sediment to remain in place that would have otherwise been scoured away under conditions of normal water velocity.

While the drawings showed the grades of individual sections of ditch, the contract did not inform Hudson of the anticipated low velocity of water in the system or the probable effects thereof on sediment deposit or removal. The Government had designed the system with very little grade to mitigate high velocity of drainage water from the Phase I and II systems, overwhelming the

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Gulfport municipal system that received the water.

Hudson knew or should have known of the flat grade of the ditches. This information was shown in the drawings. The fact that water located in a flat plane moves slowly under normal conditions is within the common knowledge of ordinary individuals. An experienced construction contractor such as Hudson, should be capable of foreseeing the effects, as to sedimentation, of slowly moving drainage water that occurred here. The control of sedimentation from that source was part of the work of building ditches and maintaining them, until acceptance, to the depths shown in the drawings. Moreover, the design was not defective but was based on achieving the more important goal of avoiding damage from high velocity drainage. Accordingly, Hudson is not entitled to added compensation for the costs associated with that work.

Other Claims for Ditch Repairs

Event 8 July 1988

FINDINGS OF FACT

108. The ditch on Sixth Street is carried under Young Avenue in a 42-inch RCP culvert. Repeatedly, the ditch and culvert filled up with sand, requiring frequent clean-out in order to maintain the flow of drainage water. The claim is for the expense of that work. Hudson asserts that the sediment came from the water in the ditch and had been deposited in the ditch and culvert as the result of the low velocity of the water flow, caused, in turn, by the insufficient grade and slope of the ditch (tr. 1/174-75). Contrary to that assertion, however, is evidence that the sediment is soil washed off from nearby ditch and headwall areas that Hudson left unprotected from erosion (tr. 3/261). On that record, we cannot find causation as urged by Hudson.

DECISION

In addition to our comments on the flatness of the grade, any liability of the Government for sedimentation of the ditches is precluded in the present instance because Hudson's failure to carry out contract requirements for erosion control was at least as likely the cause of the sedimentation as the low velocity of the water in the ditch.

Event 26 July 1988

FINDINGS OF FACT

109. This relates to a location on Sixth Street and Young Avenue where an existing shallow ditch was connected to the new large ditch along Sixth Street constructed under this contract. As the result of a difference in elevation between the existing ditch and the new ditch, drainage water from the existing ditch descended into the new ditch at a very steep angle, causing erosion in the new ditch. The difference in elevation between the ditches, however, was addressed in contract drawing 1/28, in Keyed Note 2, which required Hudson to "grade back [from the new ditch] to invert of existing ditch at a maximum 5:1 slope."

110. Hudson encountered difficulties, not described in the record, in constructing that slope and requested that a concrete flume be substituted as the connection between the ditches. A change order for the flume was requested. The request was refused. Hudson was told, instead, that performing the work as closely as possible to the requirement would be sufficient. (Tr. 3/266-74)

111. Hudson regraded the existing ditch as best it could to meet the contract requirement. The connection, however, appeared as a defect in the discrepancy list resulting from final inspection on 29 July 1988 for failure to conform to the specified 5:1 slope. One of these locations was Sixth Street and Young Avenue. Hudson performed work relating to that item on 3 August 1988 (DRI 3 August 1988) and now seeks to recover the costs thereof. Exactly what work was performed and how it compared to the contract requirement is not indicated in the record.

112. Mr. Allen testified that authorization to Hudson to "do the best it could" had been given also in instances of difficulty in building ditch sides to prescribed slopes and that, here also, Hudson had been held to the contract requirement. These locations and the individual situations, however, are not further addressed in the record.

DECISION

It is undisputed that the connection between the new and existing ditches noted as a deficiency at the final inspection did not conform to the specification. The work was subsequently re-performed and apparently accepted as conforming. Hudson contends that the rejection was wrongful inasmuch as it had earlier been permitted to accomplish the work "as close as possible" to the specification. There is no evidence, however, as to

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what was done pursuant to that agreement. In the absence of that evidence and in the light of Hudson's successful reperformance, we must conclude that what was required was also "possible." The initial rejection of the work was, thus, proper and costs of reperformance are, therefore, for Hudson's own account.

Event 7-9 September 1988

FINDINGS OF FACT

113. Hudson installed berms on a section of the Big Ditch between Sixth and Seventh Streets in order to protect the slopes from surface runoff. In addition, in order to better direct the runoff away from the ditch, Mr. Semmes proposed, and Hudson agreed that temporary subsidiary ditches (also known as "tail" ditches), coming off each side of the Big Ditch, be dug to catch and drain off surface runoff water and feed the same into the Big Ditch. The tail ditches were dug on 7-8 September 1988. Berms were then installed enclosing the sides of the tail ditches and the portions of the Big Ditch where the tail ditches came in.

114. The abnormally large rainfall in September 1988 caused so much water to be channeled into the tail ditches, that they became heavily eroded and could no longer serve their intended function. At that juncture, Mr. Semmes directed Hudson to remove the berms that had been installed around the tail ditches and the nearby section of the Big Ditch (tr. 3/293). The removal of the berms allowed surface runoff from later rain storms to sheet down the slopes of the Big Ditch and wash away growing grass that Hudson had planted (tr. 1/208-09, 3/365). Hudson seeks to recover the cost of repairing that damage. Alternate courses of action were available for dealing with the runoff that would have produced less damage to the ditch. One alternative was to leave the berms at the edge of the ditch in place and install a temporary flume, as permitted by Section 01560, para. 4.3.1, to convey the runoff to the bottom of the ditch without damage to the ditch walls.

115. There is an issue as to the scope of the direction given for removal of berms. Mr. Allen testified that Hudson was directed to remove all berms throughout the project. Mr. Semmes, the ROICC's project manager, testified that the direction related only to the above location only and, furthermore, that the berms elsewhere in the project actually remained in place until removed subsequent to beneficial occupancy as part of the final dressing-up of the ditches (tr. 3/366-67). We find the facts in accordance with Mr. Semmes' testimony. Directions of the magnitude and broad scope alleged here by Hudson were invariably noted in the DRI's. There is no such notation here and no other substantiation of that direction. Moreover it is unreasonable to believe that the Government would have issued such a direction. It made no sense for the Government to entirely deprive itself of protection of berms throughout the project on the ground that berms in one particular location had not been successful.

DECISION

The events culminating in the destruction of the vegetation planted by Hudson began with a suggestion from Mr. Semmes for installation of the tail ditches to diminish the force of surface runoff on the Big Ditch at that location. Hudson was free to proceed in another manner if it viewed the suggestion as infeasible. It was, therefore, Hudson's concurrence—not the Government's direction that prompted the construction of the tail ditches. *See, Singer Co., Librascope Div. v. United States* [24 CCF ¶ 81,914], 568 F.2d 695 (Ct. Cl. 1977).

Hudson had no such choice as to the removal of the berms. This was done by direction of the Government. Why the Government would direct removal of all berms in the locality rather than simply those enclosing the tail ditches that had become useless is not explained in the record. Suffice it to say that the removal of the berms at the edge of the Big Ditch, left the ditch sides unprotected from surface runoff, permitting later washout of the growing grass.

The contract requirements in Section 01560, para. 4.3.1 relating to control of surface runoff were of the performance type, vesting in Hudson both the right and obligation to choose the appropriate means for carrying out the requirement to "effectively prevent erosion and control sedimentation." After failure of the tail ditches, courses of action were available to Hudson that were less destructive than removal of the berms as directed by the Government. The Government's directive deprived Hudson of the right and opportunity to take such a course. As such, it amounted to a constructive change entitling Hudson to an equitable adjustment for the added costs proximately resulting therefrom. *CWC, Inc.*, ASBCA No. 28847, 84-2 BCA ¶ 17,282.

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Event 15 September 1988

FINDINGS OF FACT

116. Hudson alleges that it was directed to remove a sediment build-up in a Phase II ditch behind the family housing area that had been caused by the activities of other contractors (claim, para. 62). There is no evidence in the record substantiating the claim.

DECISION

The claim fails for lack of proof.

Erosion Control by the Government

FINDINGS OF FACT

117. On 3 August 1988, using its own forces, the Government began re-mulching and reseeding ditches built under this contract along Sixth Street that had not been successfully vegetated by Hudson. The ROICC told Hudson that it was no longer responsible for vegetation of those areas (tr. 1/202, 204). Hudson continued to repair vegetation in other areas and to remove accumulations of sediment from the ditches.

118. On 24 August 1988, the Government ordered Hudson to complete repairs that had been started by the Government in an area of the ditch on Sixth Street near Building 113. Pursuant to that order, Hudson placed new topsoil on 30 August 1988 (tr. 1/205-07; DRI 30 August 1988). It regraded the ditch sides near Building 113 on 7 September 1988 in preparation for application of sod by the Government (DRI 7 September 1988). Hudson seeks to recover the costs of that work.

DECISION

Under the standard "Use and Possession Prior to Completion (APR 1984)" clause of the contract, FAR 52.236-11, the Government had the right to "take possession of or use any completed or partially completed part of the work." Hudson's liability for correction of defects, however, would survive the takeover. The clause provides that "[t]he Government's possession or use shall not be deemed the acceptance of any work under the contract."

The clause allows recovery where "use or possession by the Government ... causes additional expense to the contractor." The Government's work in re-seeding and re-mulching the ditches did not cause additional expense to Hudson. To the contrary, that work ameliorated Hudson's expenses inasmuch as it was liable for the entire effort pursuant to the "Inspection of Construction" clause of the contract. Since Hudson's work in completing the defect correction begun by the Government was in discharge of its existing contract obligation, it is not entitled to additional compensation therefor.

Claim for Costs of Extended Performance Period

Findings of Fact

119. No evidence was produced in support of Hudson's claim for the costs of two added months of performance. There is nothing in the record showing that any occurrence for which claim is made caused any increase in the time required for completion of the contract.

Decision

The claim is denied for lack of proof.

Conclusion

Hudson is entitled to recover to the extent indicated above and those claims are referred to the parties for negotiation of equitable adjustments to the contract price. The appeal is sustained to that extent. In all other respects, the appeal is denied.

[¶ 26,467] Nucleus Corporation

ASBCA No. 39612, October 22, 1993. Contract No. DAAA09-87-C-1313.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Injector Nozzles.—Under a contract to provide fuel injection test stands and adapter kits for diesel fuel pumps, a contractor's interpretation of the contract as permitting the use of engine nozzles for the pumps was not reasonable, because the use of engine nozzles would not meet the contract requirement that the nozzles be part of the adapter kit. It was shown that when engine nozzles were used, they were provided with the pump and then returned with the pump. Consequently, the contractor was not entitled to recover the additional costs incurred as a result of supplying matched flow nozzles.

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Interpretation of Contracts—Trade Usage—Pre-Formed Fuel Lines.—Under a contract to provide fuel injection test stands and adapter kits for diesel fuel pumps, the government's interpretation that the contract allowed the use of pre-formed high-pressure fuel lines to connect to the pumps rather than straight high-pressure fuel lines was unreasonable, because such interpretation was too strained and was contrary to industry practice. High-pressure fuel lines are used to connect diesel fuel pumps. The standard industry practice is to provide straight high-pressure fuel lines that are then bent in the field to fit the pumps in question. If pre-formed lines are required, industry practice calls for the customer to specify this requirement in the contract. In this case, the contract did not specify pre-formed high-pressure fuel lines. In keeping with industry practice, the government could have specified it wanted the fuel lines pre-formed, but it did not do so. The fact that the contractor had supplied pre-formed fuel lines in the prior procurement was no indication that this was a requirement.

Interpretation of Contracts—Reasonableness—Calibration Tools.—Under a contract to provide fuel injection test stands and adapter kits for diesel fuel pumps, the government's interpretation of the contract as requiring that the adapter kits contain specialized tools for calibrating the various pumps was strained at best and was not a reasonable interpretation of the contract. Both parties agreed that the contract did not specifically require the contractor to provide calibration tools. The government asserted that such a requirement was inherent in the requirement that the diesel pumps be tested in accordance with the manufacturers' specifications. The board, however, refused to read into this language a requirement to provide calibrated tools. In the board's view, the contractor's interpretation that the personnel who mounted the diesel pumps would have the necessary tools to calibrate the pumps was a reasonable interpretation of the contract.

For the appellant: Dykema Gossett, Washington, D.C., by Timothy Sullivan and Martin Fischer. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Harold F. Clary, JAGC, Trial Attorney.

Before BURG, SPECTOR, and RUBERRY, Administrative Judges.

BURG, Administrative Judge: Appellant filed a timely appeal from the final decision by the contracting officer denying its claim for additional costs incurred in performance of this contract to provide fuel injection test stands and adapter kits for a variety of diesel fuel pumps. Appellant seeks additional costs for providing items in the adapter kits which it considers were beyond contractual requirements. Only entitlement is before the Board.

FINDINGS OF FACT

Background

1. On 11 September 1987 appellant was awarded this firm fixed price contract in the amount of $1,824,000 to supply 30 fuel injection test stands (FITS) and adapter kits to mount various specified fuel pumps to the stands. It contained the standard Changes and Disputes clauses.

2. The Government wanted the 30 FITS obtained under this contract to be compatible with the approximately 15 different adapter kits supplied under a prior procurement of 160 FITS and adapter kits from Bacharach, Inc., one of the three leading commercial producers of test stands. It had issued a solicitation which incorporated Description for Purchase (DFP) 227 (for the FITS) and DFP 213 (for the adapter kit) with the intention of supplying prospective bidders with approximately 15 different adapter kits supplied under the prior procurement. DFP 227 and DFP 213 were newly prepared DFP's which contained slight modifications from those in the earlier procurement. Subsequent to issuance of the solicitation it was realized that it would be a "monumental logistic problem" to supply all these kits to each prospective bidder and would also raise potential problems about proprietary data since the prior contract had been under a performance specification. The solicitation was, therefore, withdrawn.

3. The responsible Government engineer, under a "crash project," prepared two new DFP's which incorporated various dimensions of the previously provided adapter kits. Both DFP's contained performance and design elements. The Government expert who had revised the specifications intentionally omitted certain design information because of his concern that he might divulge proprietary information from the prior contractor. He did not acquaint the responsible Government procurement personnel with

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these omissions. A new solicitation was issued on 22 April 1987 which contained DFP 243 (for the FITS) and DFP 244 (for the adapter kits). The three bidders in response to this solicitation were appellant, Bacharach and another of the leading producers. References in the solicitation remained DFP 227 and DFP 213 although DFP 243 and DFP 244 were attached. By unilateral Amendment P00001 to the contract dated 23 November 1987 all references to DFP 227 and DFP 213 were deleted and DFP 243 and DFP 244 substituted.

4. DFP 243, entitled "Fuel Injection Pump Test Stand" recited as its scope the following:

> 1.1 This Description for Purchase covers a Fuel Injection Pump Test Stand designed and constructed to facilitate the testing and calibration of diesel engine fuel pumps in accordance with manufacturer's specifications.

(R4, tab 1) Section 3.2.1 of DFP 243 required that the FITS "be designed to allow for testing of the following pumps with the appropriate adapter kit, in accordance with pump manufacturer's specifications" and then listed a series of pumps including AMBAC International pumps, listed as UTDS (American Bosch) in the DFP. After describing certain requirements for the FITS, the paragraph further provided that the "adapter kits shall be complete with all hardware required to successfully operate the related pump in accordance with the pump manufacturers [sic] instructions." Section 3.2.2 of DFP 243 required the contractor to provide certain adapter kits as specified by identified sections of DFP 244.

5. DFP 244, entitled "Adapter Kits for Fuel Injection Pump Test Stand" recited as its scope the following:

> 1.1 This specification covers the adapter kits for use in testing and calibrating diesel engine pumps on the Fuel Injection Pump Test Stand (FITS). The kits shall consist of the hardware required, in conjunction with the master accessories furnished with the FITS, for mounting and mating each of the pumps listed herein to the FITS to allow for testing the pump in accordance with manufacturer's specifications.

(R4, tab 1)

6. Appellant was the low bidder for this contract. The Government asked it to verify its bid on two separate occasions because of a concern that the bid was too low. In each instance, appellant reviewed its bid and, since it felt secure that the bid was sufficient, notified the Government such was the case. A pre-award survey was performed by several Government employees, including the technical expert who had prepared the DFP's. They could find no reason to conclude that appellant was not capable of performing the contract. The technical expert's supervisor was quite skeptical about appellant's ability to perform the contract so he was concerned that no basis to exclude appellant had been found. His misgivings increased after contract award when appellant requested a FITS manufactured under the prior contract to allow compatibility. No prior FITS was made available but arrangements were made for appellant to examine one at an Army location. Since it was a different model than the FITS manufactured under the Bacharach contract this did not prove very helpful to appellant.

7. Appellant's chief of engineering was responsible for preparing the bid for this contract. Since appellant had successfully built a number of test stands prior to this contract, he was experienced in preparing bids for test stands although he was not acquainted with the pumps for which this test stand was to be designed and used. In preparing the bid, he primarily focused on the high price items. Appellant could not prepare an exact estimate for the adapter kits since it was not aware of the specific items which would be included and viewed it as somewhat of a mystery, a "black box," at the time it prepared its bid. While appellant had a basic idea of what would be included in the kits, it was unable to establish all of the hardware which would be included without a detailed design of the equipment—a step which, because of cost and time constraints, appellant did not perform until after contract award. None of the pump manufacturers were contacted prior to bid to obtain information concerning available information on items which it would have to include in the adapter kits.

8. Appellant intended to prepare the kits itself. However, after learning the name of the prior contractor, appellant's chief engineer obtained the price that Bacharach was charging for the adapter kits and concluded that, since the Bacharach price included some profit, the actual cost would be less. He did consider the price that Bacharach charged for the kits in arriving at the $4,020 for the kits which was included in appellant's bid but could not explain how he had arrived at that figure.

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9. A post award conference was held on 3 November 1987. At the conclusion of that conference, the Government technical expert gave appellant a copy of Bacharach's sales brochure which listed information about the Bacharach FITS and the adapter kits. The brochure indicated that the kits contained, *inter alia,* calibration nozzles and pre-formed lines. It also gave the Bacharach and National Stock Numbers for about 20 kits. The technical expert felt he could not be more specific since he considered it morally wrong to supply appellant with information which had been developed by a bidding competitor who was selling the kits commercially. In addition to supplying the brochure, the Government expert informed appellant of a meeting then taking place of the Association of Diesel Specialists and suggested appellant attend. Appellant's chief engineer did so. It proved helpful. However, Bacharach was very coy about divulging any information about the contents of the adapter kits.

10. Appellant's minutes of the post-award conference held 3 November 1987 were forwarded to the Government on 20 November 1987. They provided the following concerning the adapter kits:

> 3. Adapter kit contents remain unclear. It is our understanding of the contract, that Nucleus is to provide only components required to operate the pumps specified.
>
> Nozzle types, quantities and any calibration equipment for the pumps has not been specified within DFP-243 or DFP-244.
>
> An itemized list describing all components that we intend to supply with each adapter kit will be submitted to AMCCOM by year-end. Discrepancies will be addressed at that time.

(R4, tab 15 p. 7)

11. Shortly after contract award appellant had hired an expert in the types of pumps specified for the FITS as a consultant. With his assistance, on 1 February 1988, appellant forwarded a list of components it intended to include in the adapter kits. It stated the following:

> H. Adapter Kit contents
>
> The subject of the Adapter Kit contents was discussed during the Post Award and appeared unclear. In the interest of clarification, please find enclosed our Technical Memo "Accessory and Adapter Kits with Pump Installation and Drawings" for the Nucleus Model 8800 FITS. The enclosed document describes the Adapter Kit as quoted per the Statement of Work in the contract. Specific points include:
>
> 1. The type of nozzles supplied in the adapter kit for American Bosch pumps are engine production nozzles.
>
> 2. There are six nozzles supplied in the adapter kit for American Bosch pump PSB6A and twelve nozzles supplied for American Bosch pump PSB12BT.
>
> 3. Pump calibration tools are not supplied in the adapter kits.
>
> 4. Straight high pressure fuel lines are supplied in both adapter kits for the Stanadyne pumps, as well as the adapter kit for American Bosch pumps.

(R4, tab 17 p. 3)

12. By letter dated 12 February 1988, AMCCOM replied to the four items raised by appellant indicating objections to each of them. These will be discussed in detail below. In an effort to resolve the matter, a meeting was held between appellant and Government personnel on 25 February 1988. With a partial exception, each party retained its position. The parties are in disagreement whether at the conclusion of the meeting appellant was informed that, if it supplied adapter kits according to its view, it would not pass the first article submission. The Government denies that this was its position maintaining that appellant had to meet certain requirements and tests and, if appellant was confident that it could pass the requisite requirements and tests, it could have proceeded according to its plan. Since the Government had already made it clear that it concluded that appellant's proposals about the adapter kits in the 1 February 1988 letter did not meet the contract requirements and the 25 February meeting did not change that conclusion, the Government's position is a meaningless one. Even if the Government did not inform appellant in specific terms that it would not pass the first article, the Government's admitted position certainly led to that conclusion.

13. On 8 March 1988 appellant notified the Government that it would include the items in the adapter kits in conformance with the Government's 12 February 1988 letter but that it considered that the four items specified in the letter constituted changes in its contract. It sought an equitable adjustment of $5,834.99 per FITS, a total of $175,049.70. The Government responded by letter dated 1 April 1988 indicating that it did not consider its letter of 12 February 1988 contained modifications to appellant's contract, but considered that letter a clarifi-

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cation of existing contract requirements. There was additional correspondence between the parties about this matter in which each reiterated its position.

14. Appellant successfully performed the contract and delivered the 30 FITS and the required adapter kits. Following satisfactory delivery of the items required under the contract, appellant filed a certified claim seeking an equitable adjustment in the amount of $236,380 for additional costs for providing certain equipment in various adapter kits which appellant maintains the contract did not require. Each item in dispute was denied by contracting officer decision issued 17 July 1988.

Injector Nozzles

15. DFP 244 required the contractor to provide adapter kits and a master accessory kit to be used in testing and calibrating various specified diesel fuel pumps on the FITS in accordance with manufacturer's specifications (finding 5). Nozzles and holders (sometimes referred to as injectors) are essential to provide a measured flow of fuel to the fuel pump while the pump is mounted and running on the FITS. The contract required the FITS to have 12 cavities which could hold a maximum of 12 injectors. The maximum number of cylinders associated with any of the pumps listed in the contract was 12. Calibration nozzles are used in testing and calibrating pumps. Engine nozzles are those used with the pump in its engine application. Calibration nozzles are calibrated and remain with the test equipment. At times, engine nozzles are used during testing and calibrating a pump. In those instances the nozzles are those actually used during engine operation and are forwarded and returned with the pump.

16. At issue in this appeal are the nozzles required by DFP 244 for AMBAC pumps, referred to in DFP 244 by their prior name, UTDS (American Bosch). Section 3.2.6.1 stated that the contractor should furnish nozzles for "PSB12BT and PSB6A90EH" AMBAC pumps. These designations were incomplete parts numbers and actually referred to a series of 12 cylinder and 6 cylinder AMBAC pumps. PSB12BT pumps all have 12 cylinders and require 12 injectors for testing. PSB6A pumps all have 6 cylinders and require 6 injectors for testing. For all pumps (28 in number) other than the AMBAC pumps, the contract specifically required calibration injectors. The contract did not explicitly reference the need for calibration nozzles for the AMBAC pumps. In addition to calibration nozzles required for 28 pumps, the contract required 6 specified calibration nozzles and holders be provided (DFP 244 Sec. 3.2.9).

17. Appellant's concept layout of the FITS indicates the location for mounting of calibration nozzles but does not mention engine nozzles. In its concept drawing of the manufacturing plan appellant stated that "purchased components" would include adapter kits, "cal." nozzles, flow meters, CRT, and computer sub-assembly. Its "Manufacturers Equipment List" lists Bacharach as the source for the contract adapter kits, listing the two AMBAC pumps here in dispute although indicating that no formal quote had been received. As previously indicated, appellant used the Bacharach kit for pricing purposes and intended to provide in-house kits to avoid the profit Bacharach would charge a competitor for its kits.

18. In its letter of 1 February 1988 (finding 11) appellant stated it would provide engine production nozzles for the AMBAC pumps. In its 12 February 1988 response, the Government stated:

> d. Adapter Kit Contents:
>
> (1) Engine production nozzles are *not* acceptable. Test nozzles for the PSB6A are AMBAC International (American Bosch) part number KT-7830 (Set of 8) and test nozzles for the PSB12BT are AMBAC International part number KT-7831 (Set of 16). Test nozzles are matching sets which have a smaller flow band than engine production nozzles. Requirements for these matching sets are based on testing injection pumps in accordance with manufacture's [sic] specifications stated in para 1.1 of DFP 244. [See finding 5]
>
> (2) Quantity of test nozzles in the adapter kit for American Bosch PSB6A pump will be eight and for American Bosch PSB12BT will be sixteen (See para (1) above.)

19. The Bacharach sales brochure for its FITS and adapter kits gave its part number for the AMBAC injector kit. Bacharach sold the AMBAC adapter kit for $11,400. Appellant's consultant (finding 11) contacted AMBAC concerning the injectors required for the AMBAC pumps. The AMBAC salesman informed him of the specific pumps in the 6 and 12 cylinder families which were used by the military. He further informed him that the injectors were flow matched and gave him the numbers of the AMBAC injector kits for those injectors. Flow matched nozzles are not actually calibration

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nozzles. They consist of a group of engine nozzles which have been matched for a tighter flow tolerance than would be experienced just using unmatched engine nozzles. They are sold as a group. The injector kit for the 6 cylinder pump, KT-7830, contains 8 nozzles; the injector kit for the 12 cylinder pump, KT-7831, contains 16 nozzles. AMBAC would not provide appellant with anything but these injector kits. It would not supply 6 and 12 flow matched nozzles for the 6 and 12 cylinder pumps. In the event more than 2 or 4 of the injectors became unusable (depending on whether for the 6 or 12 cylinder pump), the user could not obtain additional injectors from AMBAC. The AMBAC injector kit could be returned for reconditioning (which generally meant supplying another reconditioned kit) at a reduced price or a new injector kit could be purchased. AMBAC would not sell appellant only the 6 or 12 injectors. The contract did not explicitly reference AMBAC KT-7830 and KT-7831 injector kits.

20. Appellant supplied the KT-7830 and KT-7831 injector kits for use with the AMBAC pumps and thereafter filed a claim for supplying 2 additional nozzles (8 vs. 6) for the AMBAC PSB6A90EH pump and 4 (16 vs. 12) additional nozzles for the AMBAC PSB12BT fuel pump. It also sought costs for supplying the flow matched injectors supplied in the AMBAC KT-7830 and KT-7831 injector kits. The contracting officer denied these claims in the decision which is the subject of this appeal.

Pre-formed Fuel Line Dispute

21. In its 12 February 1988 response (finding 12) to appellant's 1 February 1988 letter (finding 11), the Government stated:

> (4) Straight high pressure fuel lines are not acceptable. High pressure fuel lines will be preformed to preclude being kinked in the field. Requirement for preformed high pressure fuel lines is based on para 3.1 DFP 244 starting with the sixth sentence.
>
> "Each kit shall be placed in its own metal container with hinged lid. Each container shall be partitioned with foam material conforming to PPP-G-1752 to prevent movement of the contents during transportation. Each component of the kit shall be separately identified. The exterior of the container shall be marked with the applicable pump(s) supported. There shall be attached to the lid interior a list of contents and its location within the container. Each kit shall include pump mounting diagrams, fuel line connection diagrams and other information required to attach and properly use the adapter kit. Tubing connections shall conform to ISO Standard 2974. Tubing shall conform to SAE J529."
>
> Straight fuel lines, once bent, would not fit the same location in the container. In addition, the fuel lines would no longer be identical, but would not be separately identified. Without separately identified fuel lines, the fuel line connection diagrams required in para 3.1 would be meaningless. This would cause excessive set up time, especially for the PSB12BT pump.

22. High pressure fuel lines are used to connect diesel fuel pumps to a test stand. Standard industry practice is to provide straight high pressure fuel lines which are then bent in the field by the customer. If pre-formed lines are required this is specified by the customer. Once the straight fuel lines are bent it is not recommended that they be re-bent. The commercial practice is to hang the fuel lines on the wall near the test stand once they are bent.

23. Bacharach had supplied pre-formed lines with the previous FITS procurement and the Government wanted pre-formed high pressure lines under this contract. However, in no place in the contract or specifications is it specified that high pressure fuel lines be pre-formed. Nor is there a specific notification that the metal container which was required for packaging the adapter kit items was other than for initial shipping purposes or that the FITS and adapter kits were not to remain in a permanent location. Appellant planned to identify each fuel line so that there would be no confusion where the line went.

Calibration Tools Dispute

24. The contract did not reference any requirement for specific tools used to calibrate the specified diesel fuel pumps. In drafting DFP 243 and DFP 244, the Government technical expert intended the adapter kits to contain hardware necessary for calibrating as well as mounting and mating the various pumps specified in the contract. At times the witnesses for both appellant and the Government used the term "calibrating" or "calibration" in a broad sense of including all the processes involved in placing a pump on the test stand and testing and adjusting it. The instant contract distinguished between "mounting and mating" and "calibrating" in various sections.

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25. In its letter of 1 February 1988 (finding 11) appellant indicated that under its interpretation of the contract calibration tools were not required. In its 12 February 1988 reply (finding 12) the Government noted its disagreement, stating:

> (3) Tools peculiar to testing and calibrating diesel engine pumps will be included in the kits. Common tools such as end wrenches, screwdriver, pliers, etc., and specialty tools required to repair/rebuild diesel engine pumps will not be included. Requirement for tools peculiar to testing and calibrating diesel engine pumps is based on the statement "The kits shall consist of the hardware required", in para 1.1 of DFP 244.

(R4, tab 18) (See finding 5 for para. 1.1 referenced above)

26. Sections 4.4 of DFP 243 ad DFP 244 contain various tests to which the adapter kits would be subjected at first article testing. Because of their length they are not all set forth in these findings. The relevant requirements concerned mounting of the pumps with appropriate stability and testing of the pumps in accordance with manufacturer's specifications. Section 4.4.2 of DFP 244 provided:

> 4.4.2 *Functional test.* Each type of adapter kit specified in the contract shall be used to mount one of each type of injection pump to which it applies on a Fuel Injection Pump Test Stand conforming to Description for Purchase DFP-227 [sic. See finding 3]. While mounted on the FITS, each pump shall be tested in accordance with the pump manufacturer's test specifications. Failure of the adapter kit to provide all necessary hardware for mounting and mating each type of pump to the FITS, failure or leakage of any part of the adapter kit, or damage to the injection pump shall be cause for rejection.

DECISION

Injector Nozzles

The parties introduced substantially more oral testimony and exhibits on the number and type of injectors required by the contract for the AMBAC pumps than we have included in our findings and have requested a number of additional findings on this issue. This all has been considered but, because of our view of these questions, we have not considered it necessary to recite all of that material in this opinion.

In our view, by appropriate inquiry appellant could have ascertained prior to its bid that the only nozzles which it could obtain from AMBAC for the adapter kits for the two AMBAC pumps were by purchase of the AMBAC KT-7830 and KT-7831 injector kits. The information supplied by the AMBAC sales representative could have been obtained prior to bid as well as after. That appellant failed to do so and included an amount for a "black box" with contents unknown does not relieve it of the risk which is assumed as a result of its failure to do so.

We conclude that the appellant's interpretation that the contract permitted the use of engine nozzles for the AMBAC pumps was not reasonable. The evidence indicates that when engine nozzles were used they were provided with the pump and then returned with the pump (finding 15). This would not meet the contract requirement that the nozzles be part of the adapter kit. We further conclude that had appellant made the appropriate pre-bid inquiries it would have also learned that it had to purchase 8 and 16 nozzles rather than the 6 and 12 supplied for other pumps and could have bid accordingly. Its requests for equitable adjustment for any additional costs incurred as a result of supplying the matched flow nozzles and the additional 2 and 4 nozzles are denied.

Pre-formed Fuel Line Dispute

The Government agrees that the contract did not specify pre-formed lines. It further agrees that the usual industry practice was to supply straight high pressure lines unless there was a specific requirement that the lines be pre-formed. It argues that other provisions of the contract make its interpretation reasonable, thus creating an ambiguity. We do not agree. It relies on (1) a foam padded requirement for the adapter kits, (2) inability to maintain the integrity of the adapter kit if the high pressure lines could not be repacked after they were bent, and (3) how one would repack the lines for transportation to the field. We consider these arguments too strained and nebulous to consider the Government's interpretation a reasonable one so that an ambiguity arose. There is no indication in the contract that the FITS and the adapter kits had to maintain mobility. In keeping with industry practice the Government could have specified it wanted the line pre-formed. It did not do so. The fact that Bacharach had supplied them is no indication that this was a requirement. It could have done so because of its contract requirements or gratuitously. This did not mean appellant was required to do so.

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We conclude that the Government's interpretation that the contract, read as a whole, required pre-formed lines is unreasonable. Appellant is entitled to an equitable adjustment for additional costs incurred in providing pre-formed lines.

Calibration Tools Dispute

The parties agree that the contract did not specifically provide that appellant provide calibration tools in just those words. The Government argues that such requirement, that appellant provide calibration as well as mounting and mating tools, was inherent in the requirement that the pumps be tested in accordance with manufacturer specifications. Section 1.1 of DFP 244 (finding 5) required that the adapter kits contain hardware required "for mounting and mating each of the pumps . . . to allow for testing the pump in accordance with the manufacturer's specifications." The fact that the section also indicated that the specification "covers the adapter kits for use in testing and calibrating diesel engine pumps" on the FITS does not, in our view, indicate that appellant was to include tools required for such calibration in the adapter kits. Nor do any of the other various provisions.

It would have been a simple matter to have clearly spelled out the necessity for including special calibrating equipment in the adapter kits. We cannot read such requirement from the subjective intent of the drafter of the specifications. Nor do we consider the fact that various testimony used the term "calibration" to cover the entire procedure to be proof that this is understood throughout the industry.

We conclude that appellant's interpretation that the contract required it to include tools in the adapter kit for mounting the pump to the FITS and that the individual who mounted the pump (someone other than appellant's personnel) would have any necessary tools to calibrate the pump was a reasonable interpretation of the contract. We also conclude that the Government's interpretation that the specifications required that the adapter kits contain specialized calibration tools was strained at best and not a reasonable interpretation of the contract. Under such circumstances there was no ambiguity concerning this issue.

Appellant is entitled to an equitable adjustment for costs incurred in providing calibration tools not required for mounting or mating the pumps to the FITS.

SUMMARY

Appellant's request for an equitable adjustment for costs incurred in providing the AMBAC KT-7830 and KT-7831 injector kits is denied. Its requests for equitable adjustments for supplying pre-formed high pressure fuel lines and calibration tools are granted.

The appeal is sustained in part and denied in part as indicated.

[¶ 26,468] BH Services, Inc.

ASBCA No. 39460, October 26, 1993. Contract No. N68836-88-C-0198.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Apportionment.—In determining the amount of recovery under a contractor's claim for attorney fees and costs under the Equal Access to Justice Act, the board apportioned fees and expenses on the basis of the percentage of claims in which the government's position was substantially justified. The government was either the prevailing party or its position was substantially justified on 12 of the contractor's 28 claims. The government did not prove that its position was substantially justified in the remaining 16 claims. The contractor, therefore, was entitled to fees and expenses on 16 of its 28 claims, or 57 percent.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Accountant's Fees.—Accountant fees incurred by a contractor in successfully prosecuting its appeal were recoverable under its application for fees and expenses because the contractor demonstrated that the hours claimed and the rate charged were reasonable.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Travel.—Travel costs incurred by a contractor in successfully prosecuting its appeal were reimbursable under its Equal Access to Justice Act application, despite the government's objection that the costs were too high, because the contractor's explanation for

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the travel as necessary to the litigation was persuasive. Travel costs for nonemployee witnesses and counsel to the hearings are not subsumed in hourly rates.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Copy Rate.—Although the government insisted that the $.20 copy rate paid by the contractor was higher than the $.15 copy rate charged by the government, the board concluded that the rate paid by the contractor was proper for purposes of calculating copy expenses under its EAJA application for fees and expenses, because the contractor established that the rates were reasonable and customary in the area where the costs were incurred.

For the appellant: Whyte Hirschboek Dudek, S.C., Milwaukee, Wisconsin, by William E. Hughes III. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and L. James Gardner, Counsel, Navy Supply Center, Jacksonville, Florida.

Before DICUS, SHEPERS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: As a result of the Board's decision in *BH Services, Inc.*, ASBCA No. 39460, 7 May 1993, appellant filed an Application Under the Equal Access to Justice Act (EAJA). In its Answer, respondent concedes that appellant was the prevailing party and is otherwise qualified under the EAJA. Answer at 3. The Application, received by the Board 4 June 1993, is timely. The issue before the Board is whether respondent's position was substantially justified.

DISCUSSION

The burden to establish that the Government's position was substantially justified rests on the Government. *Trundel v. Bowen,* 830 F.2d 807 (8th Cir. 1987) *(citing Campbell v. Bowen,* 800 F.2d 1247, 1249 (4th Cir. 1986)). In view of the law and facts, the Government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood,* 487 U.S. 552, 576 (1988), *affirming in part, vacating in part, and remanding* 761 F.2d 1342 (9th Cir. 1985) and 802 F.2d 1107 (9th Cir. 1986).

The statutory standard applies both to the position asserted by the Government in the adversary adjudication and to the action or inaction upon which the adversary adjudication was based. 5 U.S.C. § 504(b)(1)(D); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali & Enzo Pizzi, Inc. v. United States,* 837 F.2d 465 (Fed. Cir. 1988).

In deciding whether the position of the contracting agency was substantially justified, the EAJA instructs that the decision "shall be determined on the basis of the administrative record, as a whole ... made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1). Where the Board decides the merits of a CDA dispute, the administrative record available for use in determining whether the Government's position was substantially justified consists of those documents filed in the underlying appeal together with the hearing record, the so-called Rule 13 record, and such arguments, as opposed to facts, as may be found in the parties' EAJA filings.

The underlying decision addressed 28 claims. Of that number 8 were rejected outright. The parties stipulated reduced G&A and labor rates at the hearing, and the Board disallowed profit. Fifteen claims were reduced by additional amounts, several substantially.

Appellant has submitted, in addition to arguments in support of its application, invoices from Charles Redel, Esq., who tried the appeal on the merits, from the accounting firm of Boldon & Valiquette, affidavits in support thereof, and invoices from Mr. Hughes for preparation of the EAJA Application. Appellant also submitted an affidavit from appellant's vice president, Robert Heitzman, asserting *inter alia* that respondent made no settlement offers. Appellant's Reply to respondent's answer was received 21 July 1993. By letter of 25 August 1993 respondent filed a motion seeking permission to file a response, asserting generally that appellant had misrepresented facts. The request was denied by the presiding judge, mindful of the admonition that EAJA applications should not result in "a second major litigation." *Hensley v. Eckerhart,* 461 U.S. 424 (1983).

Thereafter, respondent's counsel prevailed on appellant's counsel to clarify the record with respect to the alleged misrepresentations. Appellant's counsel did so by filing affidavits documenting a settlement offer of $26,671.81 made by respondent. As the EAJA requires determinations of substantial justification to be made from the

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administrative record where the Board decides the merits of a dispute, we cannot consider evidence not previously before the Board on that issue. We can, however, consider such evidence with respect to the reasonableness of attorney's fees and other expenses incurred after the applicant has declined an offer of settlement. *Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049. Accordingly, the affidavits are retained in the record for that purpose.

DECISION

Substantial Justification

Both parties argue first that this application should be decided on an all or none basis, while effecting opposing fallback positions on apportionment of the fees and expenses. Appellant first argues that where "excellent results" are obtained, a fully compensatory fee should be awarded, citing *JEM Development Corporation,* ASBCA No. 42645, 92-1 BCA ¶ 24,749. That case involves alternate theories, however. Where separate claims are involved they should be treated as separate lawsuits, and no fee should be awarded for services on unsuccessful claims. *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). Respondent argues that as appellant prevailed on only 40 percent of the dollar value of the claims, the Board should find respondent's position in the litigation was substantially justified and totally deny appellant's application. Respondent relies on *Hedstrom Lumber Co. v. United States* [32 CCF ¶ 73,271], 7 Cl. Ct. 510 (1985). As that case does not involve multiple claims, we find it inapposite. Therefore, we shall proceed to treat the claims individually and apportion the fees and expenses. *Hensley v. Eckerhart, supra.; Community Heating & Plumbing Company, Inc. v. Garrett,* No. 92-1362 (Fed. Cir. Aug. 20, 1993).

Respondent argues that apportionment should be on the basis of the monetary value of recovery. We have previously rejected that approach. *T.H. Taylor, Inc.*, ASBCA No. 26494-0(R), 86-3 BCA ¶ 19,257. While there is no precise formula or rule to be followed, *Hoyer Construction Co., Inc.*, ASBCA No. 32178, 88-3 BCA ¶ 21,036, we believe the best approach here is to apportion based on the percentage of claims in which respondent's position was substantially justified. *Esprit Corporation v. United States,* 15 Cl. Ct. 491 (1988). On that basis, we conclude that respondent was the prevailing party on the 8 claims that were denied and on claims 19 and 22, on which only profit (which was denied) was at issue.

With respect to the remaining claims, we treat them as individual lawsuits in addressing them. *Hensley v. Eckerhart, supra.* In so doing, we are mindful that appellant should not be penalized for failing to prevail on every contention where the claim presentation is essentially successful. *Id.* at 435. However, on claim 24, which dealt with leaking sinks, appellant did not present the proper location of the only leaking sink until the hearing. We find respondent's position in disputing this claim was substantially justified. Similarly, on claim 25 appellant alleged cleanup costs from a leaking roof on days when rainfall charts did not support the claim. We limited recovery to the amount respondent conceded. Respondent was also substantially justified on claim 25. Accordingly, we find respondent was either the prevailing party or its position was substantially justified on 12 of 28 claims. Respondent has not proved that its position in the remaining 16 claims was substantially justified. Therefore, appellant is entitled to fees and expenses on 16 of 28, or 57 percent. That apportionment applies to both the appeal on the merits and this EAJA application. *United Construction Company, Inc. v. United States* [33 CCF ¶ 75,073], 11 Cl. Ct. 597 (1987).

Attorney's Fees and Other Expenses

As appellant recovered more than 2.5 times the offer of settlement made by respondent, the continued legal expenses were justified. *Kos Kam, Inc., supra.* The application seeks attorney's fees at the statutory ceiling rate of $75.00 an hour. Respondent contests this rate, but appellant's submissions satisfactorily establish that both of appellant's attorneys regularly bill at or above that rate.

Respondent also contests the accountants' hours and the $60.00 an hour rate. We are satisfied by appellant's submissions that the rates and total hours are within reason.

The fee of Dr. Ries, an expert witness, is contested based, apparently, on respondent's perception that the Board found his testimony harmful to appellant. We find that appellant is entitled to recover for his fee. However, if the amount claimed exceeds the highest hourly rate paid by respondent, it shall be reduced accordingly. *Benjamin S. Notkin & Associates,* ASBCA No. 29336, 87-1 BCA ¶ 19,483.

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Respondent objects to travel costs as too high. Appellant's explanation for the travel as necessary to the litigation is persuasive. Travel costs for non-employee witnesses and counsel to the hearings in Puerto Rico and LaCrosse, Wisconsin, and for consultations are not subsumed in hourly rates. *Shipco General, Inc.*, ASBCA No. 29206, 29942, 87-2 BCA ¶ 19,877. However, appellant's submissions are lacking in documentation on travel costs, so it is not possible for the Board to ascertain if elements such as lodging costs are reasonable.

Respondent questions the $.20 per copy rate paid by appellant which is higher than the $.15 per copy rate charged by the Government under Freedom of Information Act requests. However, appellant has established the cost is reasonable and customary in the area where the costs were incurred. We find it reasonable. Telephone and mail expenses are explained as the actual costs incurred in connection with the appeal. As such, they are allowable. *Building Services Unlimited, Inc.*, ASBCA No. 33283, 88-2 BCA ¶ 20,611.

The determination of the amount of attorneys' fees and expenses is remanded to the parties for their negotiation in accordance with the foregoing. Should the parties fail to agree within 60 days from receipt of this opinion, the Board will determine the allowability and amount of the fees and expenses still in dispute.

[¶ 26,469] CCI Construction, Inc.

ENG BCA No. 6065, October 29, 1993. Contract No. DACW63-92-C-0091.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Specific Prohibition.—Under a contract for the construction of recreational buildings, a contractor's interpretation that it could install polyvinyl chloride pipes rather than cast iron pipes under concrete floor slabs was not reasonable, because the contract specifically prohibited the installation of plastic pipes under concrete floor slabs. There was no general prohibition of the use of the polyvinyl chloride pipe underground, only the specific prohibition of such plastic piping under concrete floor slabs. When the contract was read as a whole, the prohibition was entirely clear.

For the appellant: Kerry R. Lee, President. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Howard E. Strackbein, Government Trial Attorney, Fort Worth, Texas.

Before SHERIDAN and SOLIBAKKE, Administrative Judges.

SHERIDAN, Administrative Judge: The Appellant seeks $20,993, including its markups, on a claim by a subcontractor for additional costs of installing cast iron piping under concrete building slabs instead of the PVC piping that it asserts was allowable under the contract. The Appellant has elected to pursue this appeal under the Optional Accelerated Procedure of the Contract Disputes Act of 1978 and Rule 12.3. Both parties have elected to present this appeal on the written record under Board Rule 11.

FINDINGS OF FACT

1. Pursuant to competitive (sealed) bidding, the United States of America (the Government or Respondent), acting through a Contracting Officer of the U.S. Army Engineer District, Fort Worth, Texas, awarded Contract No. DACW63-92-C-0091 on July 20, 1992, to CCI Construction, Inc. (CCI, the Contractor, or the Appellant) of Fort Worth, Texas. This was a Standard Form 1442 construction contract which provided for construction of recreation buildings at Johnson Branch Park, Ray Roberts Lake, Texas. The initial contract price was $894,640. (R.4, Tab 3).

2. Notice to Proceed was issued on August 19, 1992 and was acknowledged on August 26, 1992. A pre-construction meeting was held on September 4, 1992. A few days before that meeting, Mr. Andrew Pipkin, CCI's Quality Control Chief, pointed out to the Government inspector that the specifications prohibited the use of plastic pipe under concrete floor slabs. At the September 4 meeting, Mr. Pipkin reiterated that observation. Mr. Pipkin's notes of that meeting reveal that Capri Mechanical, Inc. (Capri), CCI's subcontractor, had intended to use Polyvinyl Chloride (PVC) pipe under concrete floor slabs, and that Mr. Pipkin "ruled that per 15400-21 Para 3.1 PVC was prohib-

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ited under concrete." Mr. Pipkin noted that Capri had then elected, from the non-plastic pipe he considered allowable, to use cast iron hub pipe. (Tabs 2, 3, 6, 6A; Exh. R-1).

3. Paragraph 2.1 of Section 15400 of the specifications states in part: "Materials for various services shall be in accordance with TABLES I and II." Table II is inapplicable to this appeal. Table I covers "Pipe and Fitting Materials for Drainage, Waste, and Vent Piping Systems." Table I identifies six types of "Service." Type A is "Underground Building Soil, Waste and Storm Drain." Six items of "Pipe and Fitting Materials" are designated as acceptable for type A service. These items are numbered 1, 12, 13, 14, 15, and 16. Item 1 is identified as "Cast iron soil pipe and fittings, hub and spigot," and is the type actually installed. Items 12, 13, and 14 are identified as "copper." Items 15 (ABS) and 16 (PVC) are identified as "plastic." (R.4, Tabs 2, 4, 7).

4. Paragraph 3.1 of Section 15400 states in part:

> Neither hubless cast-iron soil pipe nor plastic pipe shall be installed under concrete floor slabs. . . .

(R.4, Tab 4).

5. On October 6, 1992, after the cast iron pipe had been installed, Capri wrote to CCI and requested a modification to its subcontract to allow $17,732.00 for installing cast iron pipe instead of the PVC pipe that it asserted had been the basis of its quotation to CCI. The letter stated: "It is our position that if PVC-DWV pipe and fittings are not approved for installation under concrete floor slabs it should not have been listed in Table I." (R.4, Tab 7).

6. On October 12, 1992, CCI forwarded Capri's letter to the Government. CCI's letter stated in part:

> We consider the disallowance of the ABS and PVC Plastic Pipes Item No's. 15 & 16 Table I for service A as indicated in Contract Specifications Page 15400-37, a change, and respectfully request a modification be issued in the additional amount of *$20,993.00.*

(R.4, Tab 7).

7. There is no evidence in the record that the Government ordered or required CCI or Capri to install cast iron pipe instead of PVC pipe. The Board finds that CCI ordered Capri not to install PVC or other plastic pipe under concrete floor slabs and that, under protest to CCI, Capri chose cast iron pipe as an alternative. The Government inspector was aware of CCI's position as to the unacceptability of PVC pipe for that application but did not insert himself into the dispute between CCI and Capri. There was no dispute between CCI and the Government as to this matter until after the installation had been completed. There is no evidence that the choice of cast iron pipe was the least costly alternative to PVC pipe, but, on the other hand, the Government has raised no issue in this regard. (R.4, Tabs 6A, 7; Exh. R-1).

8. Although there is discussion in the Contracting Officer's decision and in the Government's Brief of an argument seemingly made by CCI about the effect of Government approval of a CCI transmittal of information on PVC pipe, the Board can find in the record no actual exposition by CCI or Capri of this argument. In any event, the Board finds that there was no transmittal proposing use of PVC pipe under concrete floor slabs and no Government approval or disapproval of any such use. (R.4, Tabs 2, 10; Exh. R-1).

DECISION

CCI has not filed a brief or otherwise explained its position, other than by filing this appeal. The principal argument to be gleaned from the Rule 4 appeal file seems to be that the mere designation of PVC pipe as acceptable for "Underground Building Soil, Waste and Storm Drain" made it contractually acceptable for use under concrete floor slabs. Whatever force this argument might have if this designation were the only applicable provision of the contract, it is of no avail in the face of the specific provision of paragraph 3.1: "Neither hubless cast-iron soil pipe nor plastic pipe shall be installed under concrete floor slabs." There was no general prohibition of the use of PVC pipe underground, only this specific prohibition under concrete floor slabs. When the contract is read as a whole, this prohibition is entirely clear. There is no other reasonable reading to support the claim.

Besides the above fundamental infirmity of the claim, there is no evidence that CCI relied in bidding on an interpretation permitting the use of PVC pipe under concrete floor slabs, and, in fact, before there was any dispute between CCI and the Government, CCI had read the contract exactly as the Government argues, and the Board holds, it should be read. Furthermore, it was CCI (quite properly), not the Government, that prohibited Capri, CCI's own subcontractor, from using PVC pipe in this application.

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The Board has considered all of the material submitted by the parties, whether mentioned or not, and finds the underlying claim to be totally without merit. This appeal is DENIED.

[¶ 26,470] Illinois Constructors Corporation

ENG BCA No. 5827, October 29, 1993. Contract No. DACW25-86-C-0056.

Pricing of Adjustments—Methods of Calculation—Estimates.—The calculation of the adjustment due a dam repair contractor in connection with a differing site condition was not based on the total cost method, as alleged by the government, because the contractor's presentation was a micro-level, detailed analysis by well-qualified witnesses of estimates, actual expenditures, and causation related to the site condition. Although the contractor used subcontractor estimates, it also corrected underestimates, eliminated some cost accounts from consideration, modified cost accounts to eliminate concurrent causes of increased costs, offered a detailed cost-code-by-cost-code presentation, and demonstrated that the claimed costs pertained to a discrete time period. The contractor showed that under the circumstances, the use of in-house estimates rather than estimates by outside consultants was as accurate a method of calculation as was reasonably possible. Moreover, the board concluded that the contractor showed what the reasonable costs of performance would have been but for the differing site condition and that the contractor's evidence was more probative than the government's.

Pricing of Adjustments—Causation—Management.—Under a dam repair contract, a contractor was entitled to an equitable adjustment for the increased costs incurred in connection with a differing site condition regarding concrete removal, despite the government's contention that the contractor's poor supervision, management, coordination, cooperation, and quality control caused the increased costs, because the preponderance of the evidence supported the contractor's position that management-related problems stemmed from the differing site condition. The contractor also showed that the increased costs resulted from an influx of unplanned resources and changes in the planned concrete removal methods to overcome the differing site condition under accelerated conditions.

Pricing of Adjustments—Methods of Calculation—Would-Have Cost.—A dam repair contractor was entitled to use scheduled costs as the basis for determining what the contract would have cost without a differing site condition regarding concrete removal, despite the government's contention that the contractor could not have timely completed the work according to its estimates and schedule, because the contractor's estimates included sufficient resources for completion of the work within the allotted time but for the differing site condition. The government's scheduling arguments were based on preliminary schedules that were prepared by subcontractors before the discovery of the differing site condition. The alternative schedules prepared by the government's claim consultant relied on the same preliminary schedules and amounted to little more than an academic indictment of the contractor's ability to complete the work scheduled during the outage period. Moreover, the government's schedules lacked any credible factual foundation for any of its key scheduling assumptions. The board concluded that the contractor's estimates were the best indicator of what timely completion would have cost had there been no differing site condition.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Look-Back Interest Claims.—Under the Contract Disputes Act, a board of contract appeals lacked jurisdiction to resolve a dam repair contractor's claim for look-back interest in the calculation of an equitable adjustment for increased costs incurred in connection with a differing site condition regarding concrete removal, because possible payment of such look-back interest is for resolution under pertinent provisions of statutes and regulations of the Internal Revenue Service. Whether such interest, if paid, would constitute a valid contract claim or an allowable cost under the Federal Acquisition Regulations was a matter not yet ripe for consideration.

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For the appellant: Faegre and Benson, Washington, D.C., by Charles D. Ablard, and Perkins, Smith & Cohen, Boston, Massachusetts, by William M. Simmons. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Charles M. Laycock and Rian W. Hancks, Government Trial Attorneys, Chicago, Illinois.

Before PEACOCK, SOLIBAKKE, and SHERIDAN, Administrative Judges.

PEACOCK, Administrative Judge: In the Appeal of *Illinois Constructors Corp.*, ENG BCA No. 5678, 91-2 BCA ¶ 23,728, the Board held that Appellant was entitled to relief under the above captioned contract (the "Contract") to carry out repairs to the structure, machinery and equipment of Lock and Dam 20, located in the Mississippi River at Canton, Missouri, because the Lock's "remarkably sound, undeteriorated and undamaged" concrete constituted a Type II differing site condition (or DSC). The Board remanded the matter to the Contracting Officer for determination of the equitable adjustment due Appellant. *Id.* at 118,849.

After unsuccessful negotiations, Appellant filed an application for a hearing on quantum. The matter was docketed as ENG BCA No. 5827. Appellant claims $5,761,410.[1] The Government contends that the proper recovery is $629,935.

I. *ENTITLEMENT FINDINGS RELEVANT TO QUANTUM.*

A. *Background:*

1. Lock and Dam 20 serves as a unit of the Inland Waterways Navigation System of the Upper Mississippi River Basin. It is one of the 29 locks and dams on the Mississippi River, which operate as a system to provide 9 feet of navigational depth from St. Louis to Minneapolis. The Lock was constructed by the Corps starting in 1932. It is located on the Missouri side of the River about a mile above Canton, Missouri. The Lock is 600 feet long and 110 feet wide. During its construction, a system of approximately 55,000 linear feet of conduit for the wiring of the operating system and the lights was installed in the lock walls (Finding 1).[2]

2. The IFB required, *inter alia*, the removal and replacement of 21,750 cubic feet of "vertical" concrete and 2,260 square yards "for horizontal resurfacing," as estimated by the Corps. Removal and replacement of concrete on the walls within the Lock chamber and two monoliths below the Lock gates was to be done during the 60-day period between the shutdown and de-watering of the Lock starting January 5, 1987 and the Lock's reopening to traffic at 6 a.m. on March 6, 1987. This period was referred to as the "outage period" and/or closure period. Any work necessitating restrictions on the Lock traffic after the outage period required advance notice, approval of the Contracting Officer, provision of a boat and crew and compliance with other requirements. (Finding 18).

3. The drawings provided that concrete, with some exceptions, be removed to a depth of four inches in the specified "horizontal" or "overlay" areas. The concrete in the "vertical" areas generally was to be removed to a depth of 9 to 18 inches depending on the monolith section. (Finding 19).

4. Blasting was not permitted for concrete removal of substantial portions of the vertical surfaces of numerous monoliths. (Finding 21).

5. The Corps' "Reasonable Contract (Without Profit) Estimate" was $18.80 per cubic foot for removal of vertical concrete and $91.95 per square yard for the removal of "horizontal" concrete. The Corps' Cost Estimator for the Lock 20 rehabilitation work chose to estimate on the basis of using hand tools, *i.e.*, jackhammers, chipping hammers and hoe rams to perform the work. (Finding 30-31).

B. Subcontracting of Concrete Work

6. ICC was the low bidder and was awarded the contract on August 22, 1986. It bid all line items of work, including removing and reinstalling lock machinery, removing and replacing concrete and a major electrical rehabilitation. It bid $37.00 per cubic foot for the "vertical" concrete removal and $85.00 per square yard for the "horizontal" concrete removal, *i.e.* twice the Corps estimate for vertical removal and 92% of the Corps estimate for horizontal re-

[1] A portion of this amount pertains to attorney's fees and expenses. No application for such fees and expenses has been filed by Appellant pursuant to the Equal Access to Justice Act. Appellant concedes that this portion of the claim is not ripe for resolution, in this appeal.

[2] Finding numbers refer to those in the entitlement decision, ENG BCA No. 5678. Citations to the voluminous record, where given, are generally only for illustration and are not necessarily exhaustive. The Findings of Fact and Decision are based on the record as a whole.

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moval. Notice to Proceed was issued on September 9, 1986. (Finding 41).

7. After receiving the award, and in late August or early September 1986, ICC solicited a subcontract quotation from Calumet Construction Corporation ("Calumet or CCC").

8. Calumet's proposal to ICC was based on employing hand held hydraulic breaking tools plus hydraulic hoe rams mounted on back hoes wherever they could reach the Lock surfaces. Calumet and ICC entered into a subcontract on October 10, 1986. Calumet's price for vertical ("other") removal was $32.00 per cubic foot, or 170% of the Corps $18.80 estimate. Its price for the horizontal removal was $73.00 per square yard, or 79% of the Corps $91.95 estimate. Generally, ICC passed down the bulk of concrete removal work, plus most concrete replacement work. ICC retained work in the Lock protective cell and concrete work related to the electrical rehabilitation. (Findings 51).

C. The Differing Site Condition Requires a Switch To Blasting Where Permitted:

9. In mid-October, 1986, after Calumet had entered into its subcontract with ICC, Appellant and Calumet learned that Dyer Construction Co. ("Dyer") in the summer/fall of 1986 was grinding out 22,000 cubic feet of old concrete successfully at a Corps project referred to as the "the Joliet Walls" on the Illinois River. CCC asked Mr. Harold Maupin, Dyer's estimator, to review the drawings and submit a quote to CCC. Dyer made a proposal based on use of its grinder which CCC accepted. Dyer priced the outage vertical concrete removal—which is all it proposed to do—at $12.50 per cubic foot. (Finding 52).

10. Mr. Maupin increased the actual Joliet removal rate of 411 cubic feet per day to 425 cubic feet per day for his proposal to Calumet. This proposal assumed a ten-hour day, eight hours for grinding and two for maintenance. (Finding 66). Dyer's proposal was accepted by CCC and a second tier subcontract was executed.

11. Calumet's Superintendent William R. Simmons moved to the site on December 8, 1986. Grinding out the old concrete was originally scheduled to start with the grinder sitting on the lock floor about the middle of January, 1987, after the lock was dewatered. The grinder was originally scheduled to start at the lower end of the land wall, grind to the upper end, cross to the intermediate wall, and grind downstream. (Finding 68).

12. However, Simmons pressed for an early start on concrete removal. He first obtained Corps permission to start grinding January 7, before de-watering, by putting the 50-ton grinder on a barge and floating it into the Lock. The grinder would settle to the bottom as the de-watering proceeded. The Corps conditioned its permission on the grinder's staying away from the gate areas, where the Corps would be removing the gates and doing other work, plus Simmon's promise to watch out for the embedded electrical conduit. Simmons therefore agreed to start grinding out concrete on January 7 in the middle the Lock at Monolith 30A, near the Lock Master's building. (Finding 69).

13. It became clear by December, 1986, that no one knew precisely where the electrical conduits were embedded in the Lock walls. The Corps could not have the electricity shut off as a result of contractor operations while the Lock was still in operation. However, Corps Supervisory Inspector Lane Mathena finally told Simmons on December 29 that there appeared to be no more barges scheduled to go through the Lock; hence, the grinding could begin on that date. (Finding 70).

14. The grinder could not efficiently chip off concrete because of the differing site condition. On New Year's weekend, both Dyer and CCC contacted line-drillers and blasters, in preparation for a decision to change removal methods. (Finding 72-73).

15. On January 5, 1987, after further investigation, CCC decided to drill immediately, then blast off the concrete where permitted by the specifications. Calumet and Dyer went to three shifts on January 5, with supervision working two 12-hour shifts and the crafts working three 8-hour shifts. Line drilling for blasting began on January 7. (Finding 76).

16. Test blasting was done on January 17. Blasting was completed by the end of January, 1987. (Finding 77).

D. The Differing Site Condition's Impact On Performance:

17. The plan had been for Dyer to use one-man, hand-held saws to sawcut the three inches around the removal areas as required by the contract. Although some use of seven inch saw cuts was indicated in the drawings, seven inch saw cuts in fact were required throughout the vertical removal areas to define the areas for blasting. Because of the DSC, heavier, two-man wall mounted saws

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were also necessary. In addition, Simmons had a metal plate fabricated and installed in the sawcuts to help control the blast. (Finding 78).

18. It was necessary for Calumet and Dyer to obtain and employ larger equipment—and more of it, *e.g.,* 90 lb. jackhammers and heavy backhoes with concrete breakers attached, in addition to the two-man saws. At one point, nine so-called combination backhoes were in use, plus an even larger Bantam backhoe. (Finding 79).

19. In addition, the hardness and size of the aggregate in the old concrete posed problems. It was not always practical to pull the drill bit out of the hole when it ran into a piece of the hard aggregate and start drilling another hole someplace else. Bolt holes had already been installed in the prefabricated concrete forms. Pieces of aggregate also could not always be seen before drilling. (Finding 80).

20. Instead of the approximately 60 people Simmons originally estimated as peak employment, Calumet employed 280, including 14 supervisors from the Hammond home office, plus seven or eight carpenter foremen and seven or eight general and labor foremen hired locally. (Finding 82).

21. The Dyer grinder was kept on the job site during a portion of the outage and utilized for some clean-up work even after the contractors commenced blasting as their primary removal method. (Finding 83; G R.4, Tab 51).

22. On January 16, 1987, Calumet notified ICC of its claim. ICC forwarded this claim to the Corps. The Corps denied the existence of a differing site condition in a letter from the Authorized Representative of the Contracting Officer dated January 27, 1987. (Finding 86-87).

23. Faced with this denial, Appellant accelerated its efforts to insure the Lock would open on time. Most significantly, CCC assisted Dyer. (Finding 88).

24. In the post-outage period, Calumet (Dyer was not involved) still could not return to its concrete removal method anticipated at time of quote. It continued to line drill vertical surfaces to make removal easier. Sawing, drilling and the hand work was as difficult as in the outage period, although costs could be better controlled because of the absence of outage-related schedule constraints. The concrete that Calumet removed during the post-outage period between March and the end of 1986 was the same as encountered during the outage and contained the same large, hard aggregate. Though the post-outage work required a less intensive effort, the tools experienced the same problems. The post-outage work involved primarily hand tools and hoe rams, rather than grinding or blasting.

25. Either blasting or grinding requires the use of hand tools and jackhammers to "clean up" the wall and to remove concrete in areas where the primary removal tools could not be used. Both required sawcuts to outline the area of removal and, in the case of blasting, to control the blast. These tools would have encountered the same problems using a blasting plan as using a grinding plan. The contractors ended up using many more tools and heavier tools (the hoe rams and bantam backhoe) than originally planned, and greatly increased manpower (at peak, 280 people instead of the expected 60, or more than four times the planned manpower) working around-the-clock.

26. The blasting plan, once put into effect, also was hampered by the differing site condition. In particular, the drills and saws labored with difficulty through the concrete.

II. *Quantum Details*

A. *Calumet's Cost Code Claims:*

1. *Calumet's Concrete Removal Estimate and Subcontract Proposal:*

27. Calumet's claim is set forth by its cost code numbers, which it assigns to every major contract. The prime and subcontracts were awarded on a unit-price basis with respect to the quantities of concrete removed and restored. Calumet's take-off of the job produced estimated quantities that were somewhat different from those estimated by the Corps in the solicitation. Labor hours and material required for the job were estimated on the Company's "yellow sheet" forms. Unit prices were computed at both the Corps and Calumet's estimated quantities. "Other Direct Cost" factors and profit were added to each basic unit price. The Corps quantities were used for the unit prices which were proposed to ICC, CCC then negotiated with ICC, including transferring certain work and material items from one unit price to another and from ICC to Calumet and vice-versa. (Tr. 483, 516,; Ex A-5; R.4, Tab 5).

28. Following subcontract signing, and in accordance with its standard unit price contract procedures, Calumet transferred the "yellow sheet" estimate to its standard cost codes on what the Company calls its "green sheet" forms for use by Calumet's account-

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ing department in tracking progress via computerized reports. However, there were major changes in the subcontract facts after signing, including the decision to subcontract with Dyer for grinding off concrete rather than using standard tools, Calumet's decision to make rather than buy the cofferdams, and its decision to use a different forming system than planned in its proposal which, though more expensive, was expected to enhance performance. For these and other reasons, adjustments to the "yellow sheet" estimates were made. The "green sheets" were entered into the Company's cost control computer programs, so progress could be measured on each element of work as it progressed. The work was encoded approximately January 1, 1987, before the differing site condition became known, and costs were already being reported against the codes by the week ending January 11, 1986. (Tr. 31-40, 518, 529, 530, 534; Ex. A-1, Tab 26; Ex. A-10s).

2. *Development of Calumet's Claim:*

29. Mr. James P. Casey, Calumet's Secretary-Treasurer and Vice President of Finance, was placed in charge of claim preparation. Mr. Casey established a group to review the cost codes to determine whether the total estimated costs were correct, to break them down into outage and post-outage periods and to compare them to the actual costs where the group determined that the codes had been impacted by the differing site condition. They eliminated codes that were considered not to have been impacted by the differing site condition. Where estimated costs were found by them to be incorrect, they were changed. "The attempt was to get a correct estimated cost for what the project should have cost absent the (DSC) and determine the additional costs caused by it." (Tr. 16-18, 25, 28, 40, 47). The vast majority of these changes increased the amount of the estimate.

3. *Post-Outage Increase Generally*

30. ICC work on an electrical duct bank pursuant to a contract modification required it to dig a trench in the middle of the Intermediate Wall, place electrical conduit in the trench and fill the trench with concrete to an elevation four inches below the top of the horizontal surface of the lock. (GR4 Tab 112). The four-inch difference was the clearance CCC needed to place the sidewalk on the horizontal surface of the lock. (Tr. 1248-1249, 1253-1255). ICC performed this electrical duct bank work from about May to late September 1987. During this period, CCC removed and replaced the horizontal concrete from the same area. Because both contractors were attempting to perform work in the same area at the same time, the work of ICC interfered with the work of CCC. Among other things, the electrical duct bank work resulted in more concrete pours and smaller concrete pours than planned. (Tr. 334-335, 397-398). Appellant was paid for this work but failed to include costs related to the interference. Both parties agree that the bilateral modification, however, constituted an accord and satisfaction and each has attempted to price and exclude the increased costs resulting from the amounts claimed by CCC for the post-outage work.

31. The Government challenges Appellant's entitlement to virtually any recovery for the post-outage period. The Government contends that any increased costs were not caused by the differing site condition. According to the Government, they were instead caused by a lack of cooperation and coordination between ICC and CCC related to interference caused by ICC's concurrent construction of the electrical duct bank. The Government alleges that the lack of cooperation/coordination between Appellant and its subcontractor was compounded by the failure to resequence the intermediate wall and landwall work. According to the Government, Appellant should have performed the landwall work first and then moved to the intermediate wall "when presumably ICC would either be complete or would be a lot further along."

32. Appellant contends that the electrical work interference was relatively minor and has made deletions from its increased labor costs to reflect the impact of the interference as distinguished from the DSC. In addition, it has deducted $36,815 from CCC's total claim to allow for the increased costs attributable to the intermediate wall electrical work. The Government estimates that increased costs resulting from the electrical duct bank totaled $579,552, *i.e.*, 35% of CCC's actual non-material post-outage costs incurred ($1,655,863).

33. We find that the impact of the electrical modification was much less than that estimated by the Government. First, only the intermediate wall work was impacted by the electrical work. Post-outage concrete overlay work was also performed on the land and river walls, albeit the intermediate wall rehabilitation was more extensive. Second, portions of the intermediate wall work were not impacted by the duct bank construction.

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On the other hand, we also find that more than simply selected labor costs were increased by the interference as argued by the Government. Weighing all the evidence on this issue, we find that the electrical duct bank interference increased Appellant's costs an additional $70,000 over and above the amounts already deducted by Appellant. Including the $36,815, we deduct a total of $106,815 from the amount allowed Appellant for the post-outage period.

34. Resequencing the work was problematic, at best. It would have entailed obtaining the permission of the Lockmaster to work on both the land and intermediate walls concurrently. Such concurrent work on both locks was not permitted under the contract. During performance, no representative of either party considered resequencing to be a viable alternative and there is no evidence that the Lockmaster would have granted permission in any event. A series of other potential construction problems, schedule adjustments and approvals that are not necessary to detail also would have been presented by resequencing the work. It is sufficient to conclude that performance of both the electrical work and concrete work on the intermediate wall was a reasonable method of performance when the decision was made, given the information then at hand. Although a deduction for the increased costs attributable to the resulting interference and inefficiency is necessary, other costs as awarded herein were reasonably incurred and did not result from any failure to mitigate damages. We consider that the vast majority of Appellant's increased costs during the post-outage work were caused by the DSC.

4. *Claim Submission*

35. While post-outage work was underway, Calumet filed its claim for the outage period with ICC, which filed it, together with its own markups, with the Corps. The Corps received it on August 24, 1987. However, the ICC certification of the claim submitted in the letter dated August 24, 1987 was only for *its* portion of the claim and not for the portions of its subcontractor, CCC, and CCC's subcontractor, Dyer, which make up the vast bulk of the Appellant's claim. ICC's August 24, 1987 letter forwarding its certification stated, "Attached is a certificate of Illinois Constructors Corporation *regarding its portion of the above claim.*" (Emphasis added) (GR4 Tab 112, pp. 1-2 and Exs. 1 and 2). ICC did not submit an unqualified certification of all portions of the claim until February 14, 1989. (GR4 Tab 112, Exs. 10 and 11).

5. *Calumet's Claims by Cost Code:*

Findings concerning each of Calumet's cost codes are made below. In reaching our determinations, we have fully considered all evidence and contentions of the parties. Various adjustments to both the outage and post-outage totals also have been computed, *infra.* Appellant's allocations of CCC's costs, as between the outage and post-outage periods, have not been challenged by the Government except as indicated.

Code 1002—Supervision

36. The differing site condition required the hiring of approximately four times as many workers as had been planned, so as to assure meeting the March 6, 1987, deadline for re-opening the Mississippi River to barge traffic. As a result, additional supervision also was required. Calumet moved supervisors from other locations to Canton, Missouri. In the post-outage period, Calumet was able to place greater reliance on its general foremen and on local hires with lower pay rates than its originally-planned superintendents. (Tr. 538, 542). Calumet's estimated labor costs for supervision (without markups) was $45,800, of which Calumet allotted $15,246 to the outage and $30,554 to the post-outage period. Calumet's incurred costs for those periods exceeded its estimates by $18,353 and $447, respectively. (Ex. A-1, Tab 2, Schedule A, p. 1; *Id.*, Tab 16, p. 1; *Id.*, Tab 18, p. 1). We find the entire amount to be compensable.

Code 1003—Engineering

37. Calumet's outage estimate covered drawing control, handling changes and layout of work. Running many more work crews than planned during the outage period, as required by the differing site condition, and having to work in many more places at one time, was a greater effort than estimated. To mitigate its post-outage loss, Calumet employed a local engineer, rather than send engineers from its home office in Hammond, Indiana to Canton, Missouri. The confusion was less and there were fewer workers during the post-outage period. (Tr. 551-553). Calumet's total labor estimate was $37,440 for engineering. Calumet allotted $12,474 to the outage and, after review, $7,564, the amount of its actual costs, to the post-outage period, because it was able to replace its full-time engineer with a part-time apprentice resulting in no claim for the post-outage period. Calumet's outage period

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overrun was $13,696. (Ex. A-1, Tab 2, Schedule A, p. 1; *Id.* Tab 16, p. 1; *Id.* Tab 18, p.1). The Government contention that Appellant's savings from the post-outage period should reduce its recovery for the outage period is not supported by any evidence. There is no proof, *inter alia,* that the outage period estimate was unreasonably low nor any indication that the increased outage period costs benefitted the later post-outage work. We find that Appellant is entitled to the full amount claimed for the outage period.

Code 1004—Temporary Offices

38. The construction and/or addition of more temporary facilities than planned, such as offices and trailers, was made necessary by the differing site condition's requirement for increased personnel during the outage period. (Tr. 553-554). Calumet's labor estimate was $2,500 for temporary offices, of which it allotted $1,667 to the outage and $833 to the post-outage period. Calumet's outage labor overrun was $2,879, but it underran $508 in the post-outage period. Calumet's material estimate was $2,350, of which it allotted $1,567 to the outage and $783 to the post-outage period. The material overruns were $3,747 in the outage and $642 in the post-outage period. However, Calumet found that the post-outage material overrun was unrelated to the differing site condition and withdrew that claim. (Ex. A-1, Tab 16 at p. 1.; *Id.,* Tab 18, p. 3; Ex. A-1, Tab 2, Schedule A. p.1). We allow the amounts claimed.

Code 1006/1008—Temporary Utilities

39. Because Calumet's labor force was increased, its use of utilities also increased, including the phones over which the workers' time sheet data for their payroll compensation were transmitted from computers at the site to Hammond. (This element includes the phone calls, not the computers themselves). To mitigate this cost, Calumet had a program written for its computer at Canton to calculate the time sheets so the information could be transferred directly into the home office computer via phone, rather than have the Canton clerk type all the data into the Hammond computer real time via phone lines. Under this newly devised system, the field clerk could obtain the data for payroll checks by dialing into the home office computer, which would already have made all necessary calculations, thereby avoiding the cost of telephone line usage during those calculations. (Tr. 99-100, 188-191; Ex. A-1, Tab 18 at p. 3). Calumet's total estimate was $5,000, of which it allotted $1,655 to the outage and $3,345 to the post-outage period. Calumet's overruns were $7,576 and $8,406, respectively. (Ex. A-1, Tab 2, Schedule A, p. 1: Ex. A-1, Tab 16, p. 1; *Id.,* Tab 18, p.3). The Government contends, *inter alia,* that the post-outage costs were increased largely by lack of cooperation and coordination between ICC and Calumet. As explained *supra,* we have made a separate overall deduction for the post-outage period. We allow the amount claimed.

Code 1019—Clean-Up

40. The differing site condition requirement for more people created more clean-up and safety activity to comply with the contract. During the post-outage period, the clean-up costs continued to be high, given that Calumet employed a second shift for concrete removal. Clean up was required on each shift. (Tr. 578-580). Calumet's estimated "clean-up" cost was $9,600, of which it allotted $6,400 to the outage and $3,200 to the post outage work. Calumet, during its review of the claim, admitted that its original estimate was inadequate, and allotted $6,400 (an additional $3,200) to the post-outage work (raising its total estimate to $12,800). The audit found that Calumet's actual costs were overstated by $865. Calumet agreed and made this adjustment to its outage costs at the trial. In sum, Calumet claims an outage period labor overrun of $42,056 and a post-outage labor overrun of $8,593. There was no dispute over its incurrence of a $516 material overrun in the outage and a $25 overrun in the post-outage period. (Tr. 42-44, 59-60; Ex. A-1, Tab 2, Schedule A, p. 1; *Id.,* Schedule A, Notes at N.3 at p. 8-9, N.33 at p. 23; *Id.,* Exh. A-1, Tab 18, p. 4; Ex. A-2 at Tab 13; Ex. G-106, Tab 12 p. 108; Exh. A-1 at Tab 13, p. 4). The Government contends that CCC's clean-up estimate was too low, that some of these costs should have been coded as "hauling" costs under cost code 1011 which was excluded from the claim and that Dyer's costs were understated. It has introduced no probative evidence to support these arguments except with respect to the Dyer underestimate discussed elsewhere in this opinion. We disallow only 10% of the claimed outage-period labor increase and allow:

Outage labor	$37,850
Post-outage labor	8,593
Outage material	516
Post-outage material	25

Cost Code 1023—Consumables (Small Tools)

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41. Calumet's estimates for the outage and post-outage work were $6,223 and $12,447, respectively. Its actuals were stated correctly for this material/ODC cost, except for a difference of $870 for extras. Calumet agreed that it had been paid $34 for extras 101 ($7) and 102 ($27) in the outage. Thus, Calumet claims an outage overrun of $49,411, and a post-outage overrun of $19,480. (Ex. A-1, Tab 2, Schedule A, p. 1; *Id.*, Schedule A, Notes at N. 4 at p. 9; *Id.*, Tab 18, p. 5; Ex. A-2, Tab 13, p. 4.; Ex. G-106, Tab 12, pp. 11-19). These small tools and consumables are normally carried in overhead expense, and recovered in the overhead markup. Appellant has failed to prove that criteria for removal of these items from overhead and direct charging them to this contract have been satisfied in a manner that avoids "double counting." Among other things, it has failed to prove that *all* costs related to small tools/consumables were removed from Calumet's overhead accounts in computing the percentage rate. Because we deny this claim element in its entirety, we need not address numerous other Government contentions concerning the propriety of the small tools/consumables claim item, including whether Appellant may recover amounts greatly exceeding (often by 1000% or more) any acquisition cost incurred with respect to the items.

Cost Code 1026—Job Clerk

42. Additional job clerks were necessary to handle the additional people and clerking responsibilities caused by the differing site condition. (Tr. 582, 583). CCC's labor overrun was $2,278 in the outage and $98 in the post-outage period. (Ex. A-1 Tab 2, Schedule A, p. 1; *Id.*, Schedule A, Notes at N.5, at p. 9; *Id.*, Tab 4, p. 1; *Id.*, Tab 16, p. 1; *Id.*, Tab 18; Tr. 581-582). We find the costs to be recoverable.

Cost Code 1028 (1099)—Premium (overtime) Labor

43. Calumet also had to use premium time labor to meet the outage schedule. (Tr. 584). Post-outage work had been estimated on a straight-time basis, since Calumet considered it would have ample time to accomplish the tasks. But, the differing site condition required overtime work, since the width restriction dates[3] established in accordance with the contract operated as intermediate milestones that had to be met, and overtime was necessary to do so. During the period of the width restriction for the intermediate wall, June 11, 1987—July 25, 1987, Calumet had to replace some of the concrete on Monoliths 2, 3 and 24 on the Lock side of that wall, which could not be done during the outage period because of the effects of the differing site condition and for which cofferdams were necessary. Overtime was also required for some of the concrete pouring, since Calumet poured concrete whenever it could. Substantially more work was required during the later land Wall width restriction—September 24, 1987—October 16, 1987, this work included cofferdam work on Monolith 60 at the upper end of the upper guide wall, Monolith 41 in the bulkhead recess and Monolith 19 where outage work had been prevented by the effects of the differing site condition. In addition, the work originally assigned to the post-outage period but actually performed during the width restriction required some overtime. Given the differing site condition, Calumet could not accomplish the work timely on a straight-time labor basis. (Tr. 591-595, 662-663, 740-741, 744, 751-754, 756-758; Ex. A-1, Tab 18, p. 7, Attachment 7A; Ex. A-9; Ex. A-12; Ex. A-13). Calumet estimated $34,800 for premium labor. However, Calumet admitted that its estimate was too low. Hence, it revised that estimate upwards from $34,800 for the outage (it estimated no overtime for the post-outage period) to $60,988. Calumet reduced its outage actual cost by $178 for Code 1099 (overtime) costs for Extra 303 to agree with the Auditor. Calumet's incurred labor overrun was $84,311 in the outage and $44,702 in the post-outage period. (Tr. 44-46, 583-584; Ex. A-1, Tab 2, Schedule A, p. 2; *Id.*, Schedule A, Notes at N. 6, p. 10; *Id.*, Tab 5, p. 7 of cost codes; *Id.*, Tab 16, p. 1: *Id.*, Tab 18, p.7). We find that the revised amounts claimed are recoverable subject to the overall post-outage reduction.

[3] The contract provided that Appellant could negotiate width restriction periods with the Corps. During a width restriction, the shipping industry would be directed to send barges through the Lock only two, instead of three abreast, *i.e.*, 70 foot wide tows instead of 105 foot wide. This would permit the contractor to get some men and equipment inside the Lock for work. (Tr. 585, 586, 588, 743; Ex. A-9).

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Cost Code 1033—R.W.G.[4] Rentals

44. The contract contained the following provision:

SC-24. EQUIPMENT OWNERSHIP AND OPERATION EXPENSE SCHEDULE. (1985 JAN HQ USACE)

(a) Allowable cost for construction and marine plant and equipment in sound workable condition owned or controlled and furnished by a contractor or subcontractor at any tier shall be based on actual cost data when the Government can determine both ownership and operating costs for each piece of equipment or equipment groups of similar serial and series from the contractor's accounting records. When both ownership and operating costs cannot be determined from the contractor's accounting records, equipment costs shall be based upon the applicable provisions of EP 1110-1-8, "Construction Equipment Ownership and Operating Expense Schedule," Region V. Working conditions shall be considered to be average for determining equipment rates using the schedule unless specified otherwise by the contracting officer. For equipment not included in the schedule, rates for comparable pieces of equipment may be used or a rate may be developed using the formula provided in the schedule. For forward pricing, the schedule in effect at the time of negotiations shall apply. For retrospective pricing, the schedule in effect at the time the work was performed shall apply.

(R.4, Tab 3 at p. SC-19. See R.4, Tab 5 Article 15.5 (Incorporation)).

45. The auditor initially questioned Calumet's claim for increased rentals from its affiliated company. He told Calumet to use Corps Manual rates. Calumet revised its claim using the Corps rates. (Ex. A-1, Tab 2, Schedule A, Attachment (before schedule 2A); *Id.* Tab 5, p. 8; *Id.*, Tab 18, p. 8). The 1990 audit report agreed that Calumet's revised rates had been computed properly but questioned most significantly the hours of usage based on a Corps "technical analysis." Calumet agreed with certain other questioned items in the audit report. The "technical analysis" of equipment usage referred to in the audit report was an oral analysis provided to the auditor by Mr. Mathena. Mr. Mathena testified at the hearing, but Respondent's counsel did not ask him to present or explain this analysis. (Tr. 136, 146; Ex. A-1, Tab 2, Schedule A, p. 2; *Id.*, Schedule A, Notes at N. 32., p. 23; *Id.*, Schedules B, C, D, & E; Ex. A-1, Tab 4, p. 3; *Id.*, Tabs 8, 9, & 14; *Id.*, Tab 16, p. 1; *Id.*, Tab 18, p. 8., Ex. A-2, Tab 13. The Auditor was present at the hearing but never testified. We consider that Calumet's calculation of equipment hours is adequately supported.

46. In computing its overrun attributable to the differing site condition, Appellant failed to adjust upward its estimated costs for this equipment to the higher Corps' rates. If the estimated costs properly had been adjusted upward for valid comparison with the Corps rates, its claimed overrun would have been proportionately reduced. Considering all the adjustments to the accounts and evidence bearing on the amount of the proper adjustment, we find that the claimed amounts for both the outage and post-outage periods must be reduced by 50%. Using Appellant's hours, and the 50% reduction we allow $24,504 ($49,007 × .5) for the outage and $30,750 ($61,501 × .5) for the post-outage work.

Cost Code 1038—Outside Equipment

47. Appellant's estimate of $48,000 for this account, covered all equipment rental not from R.W.G. The Audit questioned $11,047 of the actual costs incurred. Calumet agreed to deduct $1,053 for the outage and $9,030 in the post-outage period for certain Extras. With these deductions, the audit verified that CCC incurred all but $964 of Calumet's total claimed overrun of $260,971, of which $100,006 was incurred in the outage and $160,965 in the post-outage period. The Government has established that the Calumet failed to include all required equipment in its estimate. Evaluating all evidence on this issue, we deduct 10% from the amount claimed for both the outage and post-outage work. (Ex. A-1, Tab 2, Schedule A, p. 2; *Id.*, Schedule A Notes at N. 7 at p. 10; Ex. A-1 Tab 4 at p. 2, p. 3, N. 1; Exh. A-1, Tab 13, p. 1; Ex. A-1, Tab 16, p. 1; Ex. A-1, Tab 18, p. 8; Ex. A-2, Tabs 2, 13). We allow Appellant $90,005 for the outage ($100,006 × . 9) and $144,869 (160,965 × . 9) for the post-outage work.

Code 1035—Sales and Use Tax

48. The differing site condition increased the material requirements. The blasting caused over-break concrete that resulted in the need for more concrete, which in turn meant additional sales tax payments. The differing site condition also made more concrete placement forms necessary. Calumet's

[4] R.W.G. is an affiliate of CCC.

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plan had been to purchase enough forms for half the Lock, then use the forms twice. But, the differing site condition made it necessary for Calumet to purchase additional forming systems in order to meet the schedule, which increased the sales taxes payable. (Tr. 588). A large quantity of additional equipment was also required, as described with respect to cost codes 1033 and 1038. Calumet had estimated only $3,000 for sales and use taxes because Mr. Short thought that Lock 20, as a Government project, would be exempt from Missouri taxes, except for expendables or consumable materials. This view proved incorrect. In updating the claim submissions, he added $25,000 to Calumet's estimate. Thus, the claim is reduced to $1,373 for the outage and $14,461 for the post-outage period. (Tr. 74-75, 535, 556, 558; Ex. A-1, Tab 2, Schedule A, p. 1; Id., Schedule A, Notes, N. 2 at p. 1; *Id.,* Tab 13, p. 1: *Id.,* Tab 18, p. 3). We conclude based on all evidence of record and, in particular that related to over excavation discussed *infra,* that 20% of these costs during the outage period and 50% during the post-outage period were not caused by the differing site condition. We reduce the taxes claimed by these same ratios, awarding Appellant $1,098 ($1,373 × .8) for the outage increase and $7,231 ($14,461 × .5) for the post-outage increase.

Cost Code 1039—Equipment Operating Engineers

49. Calumet switched to blasting in the outage period. Once blasting was completed on a monolith, it was still necessary to scale it, clean it, and face it to remove any loose concrete or concrete that was not removed back to full depth. This required many additional equipment operators. Calumet used as many as ten hoe rams on the job. Calumet used Dyer's grinder as a secondary removal tool. With the exception of Dyer's grinder, the post-outage work required the same equipment, plus another type of grinder rented for surface removal that operated somewhat like a milling machine. Calumet's estimate was $30,700, of which it applied $10,233 to the outage and $20,467 to the post-outage periods. The audit deducted $481 for certain Extras not in the cost codes but paid by ICC. Calumet agreed with these deductions. Calumet incurred a labor overrun in the outage period of $52,136 ($52,419 − $283) and in the post-outage period of $56,909 ($57,107 − $198), for a total of $109,045. (Ex. A-1, Tab 2, Schedule A, p. 2; *Id.,* Schedule A, Notes at N. 8 at p. 11; *Id.,* A-1, Tab 4 at pp. 1, 2, 3; *Id.,* Tab 13, p. 4; *Id.,* Tab 16, p. 1; *Id.,* Tab 18, p. 8. Ex. A-2, Tab 13). As found above, Appellant underestimated the required amount of equipment that would have been required to perform the work even had no differing site condition been encountered. We found that 10% of the excess equipment costs were caused by the initial underestimate. We also find that 10% of the operating engineering overrun was not caused by the differing site condition and allow Appellant $46,922 ($52,136 × .9) for the outage and $51,218 ($56,909 × . 9) for the post-outage portion.

Cost Code 1050—Carpenter General Foreman

50. The differing site condition created the need for more carpenters, who required more supervision. The original plan had been to start in December with one foreman, then add a second for the second and third shifts after the "deteriorated" concrete was removed. The differing site condition condensed the outage carpenter schedule (for installation and removal of scaffolding and forms for concrete placement), requiring more men, which resulted in having two foremen for each shift. (Tr. 601; Ex. A-1, Tab 18 at p. 9). Calumet's estimate for Carpenter General Foreman was $39,600. It incurred an overrun of $8,528 over its outage estimate of $17,640, and of $6,886 over its post-outage estimate of $21,960. (Ex. A-1, Tab 2, Schedule A, p. 2; *Id.,* Tab 16, p. 1; *Id.,* Tab 18, p. 9). We allow Appellant the amount claimed. We reject the Government's contention that this account, as well as cost codes 1051 and 1053, were underestimated.

Code 1051 Labor—General Foreman

51. CCC's Labor General Foreman estimate was $43,600. Calumet now claims an underage ($13,344) in the outage period and an overage of $15,451 for the post-outage period. (Tr. 607; Ex. A-1, Tab 2, Schedule A, p. 2; *Id.,* Schedule A Notes at N. 9, p. 11; *Id.,* Tab 16, p. 1: *Id.,* Tab 18, p. 9). CCC used labor foremen, not general foremen, for additional supervisors during the outage. Calumet costs its labor foremen to the line item of work under that direct operational code. (Tr. 607-608). Thus, while its post-outage overrun was $15,541, the outage underrun reduces its overall General Foreman labor claim to $2,107. We allow Appellant the amount claimed for the post-outage period, subject to the overall post-outage deduction and deduct the amount credited to

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the Government by Appellant ($13,344) for the outage.

Cost Code 1053—Subsistence

52. During the outage, Calumet sent added supervisors from its home office to Lock 20. These supervisors required subsistence reimbursement as part of their employment compensation package. (Tr. 603). The audit confirmed that Calumet estimated $78,100 for this item, of which it assigned $23,501 to the outage and the remainder to the post-outage period, but found that Calumet had overstated its actuals by $300. Calumet agreed with this reduction. During the post-outage period Calumet was able to rely more on the local labor force than it had planned and makes no subsistence claim for the post-outage work. Calumet claims $5,583 for its outage period overrun and we allow that amount. (Ex. A-1, Tab 2, Schedule A, p. 2; *Id.*, Schedule A Notes at N. 10, p. 12; *Id.*, Tab 4 at p. 3; *Id.*, Tab 16, p. 1; *Id.*, Tab 18, p. 10).

Code 91207—Temporary Railing

53. The specifications required Calumet to remove the handrail around the Lock perimeter when it was removing concrete at a given monolith. Temporary railing was then required to be installed for the workmen's safety. As finally revised, Calumet claims a $9,817 labor and a $1,603 material overrun in the outage and a labor overrun of $3,082 for the post-outage period. (Exh. A-1, Tab 2, Schedule A, p. 2, Schedule A Notes at p. 12; Tab 4 at p. 1; Tab 16, p. 3; Tab. 18, p. 11; Exh. A-2, Tab 13). Appellant has failed to prove that these costs were increased as a result of the differing site condition. Although Appellant was required to work in many areas of the lock at the same time during the outage, it has not proved how the total labor and material quantity requirements for the erection of the temporary railing increased during either the outage or post-outage period. This portion of the claim is denied.

The 91300 Cost Code Series: Concrete Overlay Removal (Post-Outage)/4-inch Resurfacing

54. The 91300 series accounts relate to the 4-inch horizontal concrete removal work on top of the lock (*i.e.*, the land, intermediate and river walls), which work was made more difficult as a result of the differing site condition.

55. *91301: Sawcutting:* Calumet's labor estimate for 4 inch saw cutting was $5,100 and its estimate for material was $200. Calumet's labor underrun was $1,323 and its material underrun was $200. (Ex. A-1, Tab 2, Schedule A, p. 3; *Id.*, Tab 4, p. 1; *Id.*, Tab 16, p. 3; *Id.*, Tab 18, p. 12). Appellant credits these underrun amounts against its post-outage claim.

56. *91302: Landwall:* Calumet's labor estimate was $28,830 for the landwall removal work. Calumet's claimed labor overrun is $17,449 (Ex. A-1 Tab 2, Schedule A, p. 3; *Id.*, Schedule A, Notes at N. 12, p. 3; *Id.*, Tab 13 at p. 5: *Id.*, Tab 16, p. 3: *Id.*, Tab 17, Doc. 1001; *Id.* Tab 18, p. 12). We allow Appellant the claimed amount.

57. *91303: Intermediate and River Walls:* Calumet's labor estimate was $40,920. Calumet claims a $56,900 overrun. (Ex. A-1, Tab 2, Schedule A, p. 3; *Id.* Tab 4 at p. 1; *Id.* Tab 16, p. 3; *Id.*, Tab 18, p. 12; Ex. A-2 at Tabs 1, 3, 13). The resurfacing work included in these accounts was on River Wall Monoliths 1 through 6 or 7 and on Intermediate Wall Monoliths 1 through 26. Some of the center area was covered with grass, which did not need to be replaced. CCC admits some interference on the Intermediate Wall resulted from the cable trench and the temporary cable tray work, as discussed infra. Appellant estimated the impact would only be on fifty percent of the area to be resurfaced. It also concluded that a twenty percent inefficiency factor with respect to that affected 50%. (Tr. 608-614, 748-750, 752-755). Following adjustments to account for certain "Extras," CCC calculates that cost code 91303 should be reduced by $17,761, resulting in a $39,139 (instead of a $56,900) claim for that cost code. We allow Appellant the revised claim amount, subject to our additional overall reduction for the post-outage period.

58. *91304: Disposal:* Calumet's labor estimate for disposal was $2,350 and its estimate for material was $0. It claims a labor overrun of $2,950 and its material overrun was $250. (Ex. A-1, Tab 2, Schedule A, p. 3; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 3; *Id.*, Tab 18, p. 12). No explanatory evidence was offered concerning this account and how any increased cost was related to the differing site condition. This portion of the claim is denied.

Cost Code Series 91400—Vertical Concrete Removal (Outage and Post-Outage Periods)

59. The 91400 cost code series involved vertical concrete removal work principally on the land, intermediate and river walls during both the outage and post-outage. All vertical removal work during the post-out-

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age period was performed by Calumet. This removal work was directly impacted and we consider that Appellant generally has proved the reasonableness of its estimates and the recoverability of its excess incurred costs. The Government argues that Appellant reduced the estimated cost of cost code 91404 by $29,630, thus increasing the excess costs claimed by the same amount. This reduction reflects Calumet's decision to subcontract most of the outage period removal work to Dyer. This subcontract previously had not been fully reflected in Appellant's estimated costs and particularly in cost code 91404. The Government has not challenged the specific amount of the reduction in the estimate and we consider it to be supported by the unrebutted evidence. However, there is insufficient evidence to establish why or how the differing site condition increased Appellant's waterblasting costs to remove dust and dirt from the concrete following removal operations. Therefore, no recovery with respect to cost code 91411 is warranted. Although the cost code 91406 "trash racks" work was impacted by the differing site condition, Appellant has failed to explain or prove how its claimed costs ($28,912) for the outage exceeded its estimated costs ($4700) by over 600% solely as a result of the DSC. We allow $10,000 for the 91405 cost code for the outage period. We have considered and rejected all other Government contentions related to the 91400 cost series. We conclude that the Appellant is entitled to recover the following claim amounts by cost code for the outage and post-outage periods.

Cost Code/Category	Outage	Post-Outage
91401: 3" sawcut	($654)*	10,048
91402: 7" sawcut		(2,348)*
91043: Land Labor Land ODC	8,142	13,004 2118‡
91404: Intermed. & River Wall	5,111	(19,735)‡
91405: L & U Grd Wall		26,136
91406: Trash Racks	10,000	48
91407: Disposal		(9110)+ * ‡
91408: Check Post	(600)*	
91409: Chip MH Frame		(200)*
91410: Racks/Frames	(1002)*	
91411: Waterblasting	0	0
Total Labor ODC	20,997 0	26,953 (6992)‡

* underrun offered as credit
‡ ODC = Other direct costs, not burdened with labor markups
\+ Net credit offered after offsetting increased cost of work performed by others.

The 91500 Cost Code Series—Install Anchors

60. The 91500 cost code series is for the drilling and installation of form anchors on the monoliths. The drilling was excessively difficult and drilling time was substantially greater than anticipated as a consequence of the DSC. (Tr. 630 Ex. A-17 Tab "Equipment," Simmons [Entitlement]; Tr. 502-504).

61. *91501 Drill:* Calumet's labor estimate for drilling the anchor holes was $9,350, of which Calumet estimated $4,080 for the outage and $5,270 for the post-outage period. Calumet incurred an outage overrun of $21,212 and a post-outage bare labor underrun of $181 offered as a credit. (Ex. A-1, Tab

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2, Schedule A, p. 4; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 5; *Id.*, Tab 18, p. 14). We allow the amount claimed.

62. *91502 Grout:* The Calumet's labor estimate was $3,100 of which Calumet estimated $1,378 for the outage and $1,722 for the post-outage period. Calumet incurred on outage underrun of $458 and a post-outage underrun of $1,393. Calumet also had $1,565 underrun in material cost. (Ex. A-1, Tab 2, Schedule A, pp. 4, 5; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, p. 14). Appellant indicates that these amounts should be credited against the claim.

63. *91503 Install:* The Calumet's labor estimate was $1,550, of which it allotted $677 to the outage and $873 to post-outage period. The Calumet claims a $10,177 overrun in the outage and a $1997 overrun in the post-outage period. (Ex. A-1, Tab 2, Schedule A, p. 4; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 4; *Id.*, Tab 18. p. 14. Although the Government admits that the hard concrete and aggregate made it harder to drill the holes for the anchors it argues that there is no reason why the hardness of the concrete impacted the costs of installing the anchors. Reviewing the meager evidence relative to the installation costs, we consider that installation costs were impacted by the DSC. However, Appellant has failed to prove how an increase of 1500% over its estimated costs during the outage was caused solely by the DSC. We allow Appellant the amount claimed for the post-outage period and $4,000 for the outage period.

The 91600 Cost Code Series—Install Rebar

64. The major increases in this series were due to the outage period inefficiencies caused by the DSC. It was necessary for the ironworkers, who install the rebar, to have personnel present at all time to react to any item of work that was required. If Calumet completed removal and water blasting on any monolith, morning or night, the ironworkers had to install the rebar so the entire process could continue. In addition, the rebar had to be drilled to a minimum of 18 inches and drilling was made more difficult by the differing site condition. The Government's generalized contentions that "poor management" increased these costs are rejected, as discussed in our decision below.

65. *91601 Install:* Calumet's labor estimate was $15,400, of which it allotted $5,714 to the outage and $9,686 to the post-outage period. Calumet claims an outage overrun of $20,441 and a post-outage overrun of $3,866. (Ex. A-1, Tab 2, Schedule A, pp. 4, 5; *Id.*, Tab 2 at Schedule A, Notes, N. 17 at p. 16; *Id.*, Tab 4, p. 1; *Id.*, Tab 13 at p. 4; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, p. 14; Exh. A-2, Tab 13). We allow the amounts claimed.

66. *91602 and 91603: Accessories/Mesh:* The amounts involved for these costs codes are *de minimis* ($112) and there is no proof as to how these material costs were impacted, if at all, by the differing site condition. As best we can tell, no claim has been asserted by Appellant for any increased costs related thereto.

The 91700 Cost Code Series—Vertical Concrete Installation

(Outage and Post-Outage)

67. Calumet originally planned to assemble all the scaffolding, make up the visqueen panels to cover it, fabricate the rebar mats and assemble the gang forms before start of concrete removal, so these items could be swung by crane into the lock when the time came to install rebar and then the replacement concrete. The scaffolding is six feet high, five feet across and seven feet long when assembled. So, the panels were built up to 14 feet long and 18 feet high to reach across two sections of scaffolding. Superintendent Simmons started his program to assemble enough scaffolding to cover half the Lock on December 9, 1986. As a result of the DSC it was necessary for Calumet to scaffold the entire Lock at one time, since people were working in almost all areas. Moreover, the scaffolds had to be covered with the visqueen panels with propane heaters installed throughout the lock area. (Tr. 649, 651; Ex. A-17, Tab "Background," [Entitlement]; Tr. 452, 498, 505).

68. Calumet had intended to use the forms twice. They were to be assembled before concrete removal, so the forms could be swung into the Lock when the time came for installing replacement concrete. CCC's original purchase order was for enough forms for two uses. As a result of the differing site condition, Calumet procured additional forms, doubling the cost. The anchoring system for attaching the forms consisted of she-bolts for which it was necessary to drill into the remaining concrete in the monolith to anchor the form. This was made more difficult by the differing site condition. In addition, the she-bolt locations were set in the prefabricated, pre-assembled form, so the location of the hole to be drilled could not be moved to avoid large aggregate. Drilling for the anchoring system continued to be a problem in the post-outage period, but the overrun costs dropped substantially because the

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deadline for completion of the work was not so severe, and the situation was more controlled. In addition, during the outage the workers' skill level declined as more were hired because of the depletion of the labor force around Canton, Missouri thus increasing costs due to lowered productivity and the lack of a learning improvement curve. This problem was reduced in the post-outage. (Tr. 634, 637; Ex. A-17, Tab "Background," [Entitlement]; Tr. 452, 455, 498, 505, 932, 933).

69. The differing site condition caused most of the overrun of concrete. However, Appellant also increased the amount of concrete removed and replaced through overdepth excavation of concrete, excavation of concrete in areas of the lock walls where no excavation of concrete was required, and other construction errors that were not related to the differing site condition. (Ex. G-106, Vol. I, Sec. 1, pp. 14-18, 30-34, 36, 37, 40-42; GR4 Tabs 59, 112, pp. 541-542).

70. With respect to the vertical concrete requirements, we consider that a large portion of the "overexcavation" was caused by the differing site condition and need to accelerate removal operations during the outage period. To remove the concrete in sufficient time to accommodate the outage deadline it was not practicable first to remove the armor cover for the concrete that was present in many sections of the lock. To save time (and expenses) Appellant directed its blasting subcontractor to drill its blasting holes behind the armor, significantly overexcavating the specified quantity of concrete blasted from the walls and damaging the armor. In addition, because of the acceleration of the work, Appellant poured concrete whenever possible regardless of the size of the area. The smaller, less optimal, and more frequent pours increased the rate of wastage and rejection of the concrete. Appellant, as a result of the differing site condition, also was unable efficiently and expeditiously to sawcut all concrete areas so as to outline the removal depths and areas. Had it been able to sawcut more effectively, blasting would have been better controlled.

71. We have carefully considered all the conflicting evidence concerning the various reasons for "over excavation" of both horizontal and vertical concrete. Based on our review of the record as a whole, we conclude that approximately 20% of extra costs incurred for removal and replacement of 205.7 cubic yards of excess vertical concrete and 30% of the 977.3 square yards of excess horizontal concrete (*i.e.*, the 91800 series *infra*) were *not* caused by the differing site condition. We apply these percentage reductions to the overruns claimed and otherwise proved and allowable for the 91700 series in equitably *approximating* the extra costs that were not caused by the differing site condition, although we recognize that other installation accounts may also be involved. The 30% reduction (related to horizontal concrete installation) for the post-outage period is taken in addition to the general overall reduction for ICC interference. We also give the Government the full amount of credits offered by Appellant.

72. *91701 Scaffolding:* Calumet's labor estimate was $12,270, which Calumet increased during its claim review as inadequate, allotting $29,275 to the outage and $1,150 to the post-outage period. Calumet claims $29,493 and $9,186 overruns for the outage and post-outage periods, respectively. (Ex. A-1, Tab 2, Schedule A, p. 5; Ex. A-1, Tab 2 at Schedule A, Notes, N. 20, p. 17; *Id.*, Tab 4 at p. 1 & N. A at p. 3; *Id.*, Tab 13, p. 6; *Id.*, Tab 16, p.4; *Id.*, Tab 18, p. 15 & 15A, N. (1); Exh. A-2, Tab 13). We find Appellant entitled to recover 80% of its outage ($23,594) and 70% of its post-outage ($6,430) claim.

73. *91702-05 Forming Wall:* Calumet's labor estimate was $101,660, of which it allotted $58,691 to the outage and $42,969 to the post-outage period. It claims outage and post-outage labor overruns of $177,696 and $55,038, respectively. With respect to material cost, Calumet's total estimate was $50,700, of which it allotted $28,940 to the outage and $21,760 to the post-outage period. Calumet claims an outage overrun of $33,419 but withdrew a $6,040 post-outage claim as unrelated to the differing site condition. (Ex. A-1 Tab 2, Schedule A, pp. 5, 6; *Id.*, Schedule A, Notes at N., NN. 21, pp. 17-18, 20, 24; *Id.*, Tab 4 at p. 1. & Note E at p. 3; *Id.*, Tab 13, p. 6; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, p. 15, 15A; Ex. A-2, Tab 13). A deduction for form anchor failures not caused by the differing site condition, as contended for by the Government, is made *infra*. We allow Appellant 80% of the outage and 70% of its post-outage claims as follows:

	Outage	Post Outage
Labor	142,157	38,527
Material	26,735	0

74. *91706 concrete wall:* Calumet's labor estimate was $29,600, of which it allotted $10,549 to the outage and $19,051 to the post-outage period. It claims a $18,716 out-

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age period overrun and a $2,050 post-outage overrun. Calumet had a $23,859 outage material overrun and a $9,780 post-outage underrun offered as a credit. (Ex. A-1, Tab 2, Schedule A, pp. 5, 6; *Id.*, Schedule A, Notes at NN. 22, pp. 18, 19, 20, 25; *Id.*, Tab 4 at p. 2, 3 N. 4; *Id.*, Tab 13, p. 6; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, p. 15, 15A; Ex. A-2, Tab 13). We allow the following:

Outage:	
Labor	15,013
Material	19,087
Post-outage:	
Labor	1,435
Material	(9,780)

75. *91707 Trash racks:* Calumet's labor estimate was $1,150, which it allotted to the outage when the work was to be done. Calumet claims a $1,985 overrun. Calumet estimated $400 for material and incurred a $71 overrun. (Ex. A-1, Tab 2, Schedule A, p. 5; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, pp. 15, 15A). A portion of the increase was attributable to an initial mislocation of the trash racks for which we deduct $500 from the outage labor overrun, in lieu of the 80% reduction and allow $1485. No extra material costs have been proven to have been caused by the differing site condition.

76. *91708 Finish:* Calumet's labor estimate was $4,000 for this post-outage task. Calumet claims an overrun of $1395. CCC's material estimate was $60 for the post-outage work. It incurred and claims an overrun of $283 during the outage and a $60 underrun in the post-outage period. (Ex. A-1, Tab 2, Schedule A, p. 5; *Id.*, Schedule A Notes at N. 23, p. 19; *Id.*, Tab 4 at p. 2 & N. 4, p. 3; *Id.*, Tab 13, Supplement p. 6; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, pp. 15, 15A). No evidence explaining and supporting any award for the material overrun has been offered. We allow only 80% of the post-outage labor overrun, *i.e.* $1,116.

77. *91709 Patch-Rub:* Calumet's labor estimate was $7,200, of which it allotted $4,102 to the outage and $3,098 to the post-outage period. Calumet incurred a $7,493 overrun in the outage and a $8,371 overrun in the post-outage work. Calumet also estimated $700 for material, of which it allotted $398 to the outage and $302 to the post-outage work. It incurred and claims an overrun of $308 in the outage and an underrun of $202 in the post-outage work. (Ex. A-1, Tab 2, Schedule A, p. 5; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, pp. 15, 15A). We award 80% of the amounts claimed for the outage (labor—$5,994; materials—$246) and 70% for the post-outage labor, *i.e.*, $5,860. The entire amount of the $202 post-outage material underrun is credited to the Government.

78. *91710 Tile Gage:* Calumet estimated $100 for material for this outage work and spent none, hence Calumet credited the Corps with a $100 outage material underrun. (Ex. A-1, Tab 2, Schedule A, p. 6; *Id.*, Tab 16, p. 4; *Id.*, Tab 18, p. 15A). We include the credit offered to the Government in our claim computation.

The 91800 Cost Code Series—Overlay/Horizontal Concrete Installation

79. The differing site condition created post-outage concrete installation problems. Calumet had planned to use a Ramset gun, which uses an explosive charge to set the fastener to attach a plate to the form. The Lock 20 concrete was too hard to accept this method. Although the Government speculates that the Ramset gun would not have been effective regardless of the differing site condition, there is no probative evidence supporting this speculation. In addition, the unpredictability and difficulty of the removal resulted in additional pours of replacement concrete, increasing the costs of both pours and finishing. Finishing work was performed by a separate craft; hence, no matter how small the pour, a member of that craft was required on site. However, there was no need for additional forms in the post-outage period as there had been in the outage period.

80. Calumet reduced its 91800 series costs to reflect inefficiencies caused by the intermediate wall electrical modification, the elimination of certain extras, and certain adjustments to reflect the actual concrete quantities. We have previously concluded that 30% of the concrete overrun during the post-outage period was not caused by the differing site condition and therefore allow 70% of the remaining cost overruns claimed by Appellant to the extent otherwise proved and recoverable.

81. *91801 Handgrade:* CCC claims a material overrun of $608. We allow 70% of this amount, *i.e.*, $426.

82. *91802 Grout surface:* Calumet's labor estimate was $5,780 and its material estimate was $1,250. Calumet incurred a bare labor underrun of $3,764 and a material underrun of $528. (Ex. A-1, Tab 2, Schedule A, pp. 6-7; *Id.*, Tab 4 at p. 1; *Id.*, Tab 16, p. 5; *Id.*, Tab 18, p. 16). We include the credits offered

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to the Government in computing our allowances.

83. *91803 Forms:* Calumet's labor estimate was $7,220 and its material estimate was $1,400. Calumet claims a labor overrun of $31,610 and a material overrun of $706. (Exh. A-1, Tab 2, Schedule A, pp. 6-7; *Id.,* Schedule A Notes at N. 28, pp. 20-21; *Id.,* Tab 4 at p. 1; *Id.,* Tab 13 Supplement, p. 6; *Id.,* Tab 16, p. 5; *Id.* Tab 18, pp. 16, 16A; Ex. A-2, Tab 13). We allow Appellant 70% of the amount claimed, labor—$22,127, materials $494.

84. *91804 Sealt.—Forms:* Calumet's labor estimate was $3,200 and its material estimate was $1,200. Calumet's labor overrun was $2,702 and its material underrun was $895. (Ex. A-1, Tab 2, Schedule A, pp. 6-7; *Id.,* Tab 4 at p. 1; *Id.,* Tab 16, p. 5; *Id.,* Tab 18, pp. 16, 16A). We allow 70% of the overrun claimed, *i.e.,* labor $2,240, and include the $895 credit.

85. *91805 Sealt.—Caulk:* Calumet's labor estimate was $640, which Calumet increased to $7,240 because its original estimate was inadequate. Calumet's material estimate was $2,000. Calumet and the auditor agree that the labor overrun was $2,421. Calumet incurred a $682 material overrun, but Calumet increased its estimate to actual, withdrawing this material claim. (Ex. A-1, Tab 2, Schedule A, pp. 6-7; *Id.,* Tab 4, p. 1; *Id.,* Tab 16, p. 5; *Id.,* Tab 18, pp. 16, 16A). At 70% of the amount claimed, we allow $1695—labor and $477—materials.

86. *91806 Landwall:* Calumet's labor estimate was $3,530 and its material estimate was $6,210. Calumet's labor overrun was $4,205 and its material overrun was $7,829. (Ex. A-1, Tab 2, Schedule A, p. 7; *Id.,* Tab 4, p. 1; *Id.,* Tab 16, p. 5; *Id.,* Tab 18, pp. 16, 16A. We allow 70% of the claimed amount: labor—$2,944; materials—$5,480.

87. *91807 Intermediate and River Walls:* Calumet's labor estimate was $11,550 and its material estimate of $10,140. Calumet claims a $3,308 labor overrun and a material overrun of $13,270. (Ex. A-1, Tab 1, Schedule A, p. 7; *Id.,* Schedule A, Notes at N. 29, pp. 21-22; *Id.* Tab 4 at p. 1 *Id.,* Tab 13, Supplement p. 7; *Id.,* Tab 16, p. 5; *Id.,* Tab 18, pp. 16, and 16A. We allow 70% of these amounts: Labor—$2,316; materials—$9,289.

88. *91808 Concrete Finish:* Calumet's labor estimate was $7,700 and its material estimate was $2,500. Calumet claims a labor overrun of $9,189. It also reported a material underrun of $1,637. We allow Appellant 70% of the labor overrun, $6,432, and include the material credit offered in our computations.

Cost Code 1014—Concrete Test/Inspect

89. Calumet's "Other Direct Cost" estimate was $6,000, of which it allotted $1,740 to the outage and $4,260 to the post-outage period. Calumet's ODC overrun was $15,383 in the outage and $20,380 in the post-outage period. Calumet agrees that its total claim for overruns in this cost code must be reduced by $7,500, representing the cost value of additional concrete pours caused by the Corps' electrical modification, for which ICC received payment. Thus, at the hearing Calumet claimed $12,880 ($20,380 – $7,500) for the post-outage period. (Ex. A-1, Tab 2, Schedule A, p. 6; *Id.,* Schedule A, Notes at N. 26, p. 20; *Id.,* Tab 14; *Id.,* Tab 16, p. 4; *Id.* Tab 18, p. 15A; *Id.* Tab 19 p. 1, Item 2). Although the number of concrete pours (and tests) increased significantly, the percentage increase was proportionately far less than the percentage increase in testing costs for the outage (884%) or post-outage (478%) periods. Considering this and other evidence that the concrete testing costs were underestimated, we agree with the Government that Appellant failed to include all required testing costs in its bid. Based on the entire record on this issue and the conflicting estimates of the reasonable cost of the required testing that would have been incurred but for the DSC, we allow $5,000 for the outage and $5,000 for the post-outage work.

Other Related Claims

90. Calumet also billed ICC for work done during the outage period. The audit questioned these costs on grounds of duplication with costs in the company's cost codes allocability to the claim. Calumet reduced this claim to $3,617, removing duplicated costs and one invoice that had been paid by ICC. (Tr. 151; Ex. A-1, Tab 2, Schedule G; *Id.,* Tab 12). There is insufficient probative evidence describing the remaining claimed costs and linking them to the differing site condition. They are disallowed in their entirety.

B. *Concurrent Causes of Cost Increases*

91. The Government contends that Appellant's actual costs during the outage period were increased by poor management, supervision, and coordination. In support of those contentions, the Government introduced daily reports, other documentation and related cost estimates for the alleged inefficiencies. These include "workers standing around" ($28,000) and "workmen walking

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around ... doing nothing" ($49,280) on certain days. There is also extensive inter-contractor correspondence detailing major and minor squabbles between the parties. We have fully considered the evidence presented by the Government on the generalized "poor management" issue. However, the more probative evidence in the record, as well as our findings in the prior entitlement decision, support a conclusion that the DSC caused the considerable majority of these inefficiencies, except in the case of specific instances of poor workmanship detailed elsewhere in our findings. In general, we also consider that Appellant reasonably managed and controlled its costs under the circumstances present here.

92. Miscellaneous construction problems and errors occurred during performance of the outage work that were not caused by the differing site condition. The Government has detailed and priced these problems and errors and we find that the following amounts for the items listed below properly are deductible from the increased costs otherwise due Appellant (Ex. G-106).

i.	Delays to Blasters	$4,676
ii.	Improper Water Blasting	$3,438
iii.	Forms/Anchor Failures & Problems	$7,222
iv.	Tile gage rework	$1,096
		$16,432

Fully burdened with taxes, insurance, fringe benefits profit and bond costs, we deduct a total of $23,500 from Calumet's total for the outage period.

C. *The Dyer Claim*

1. *Claim Format and Issues*

93. As corrected and revised, Dyer's claim now seeks:

Labor, Fringes & Benefits	$280,087
Less:	−28,929
	$251,158
Miscellaneous Expenses	33,927
Subcontracts & rentals	121,489
Dyer equipment	63,093
	$469,667
Less: Anticipated at Bid	−93,761
	$375,906
Overhead at 7.987%	30,024
Sub total	$405,930
Profits at 10%	40,593
TOTAL	$446,523

94. The Government raises five primary arguments with respect to the Dyer portion of Appellant's claim: (1) Dyer underbid its subcontract and the grinder would have been required to work considerably more hours than the eight hour shift anticipated in its bid; (2) the Dyer equipment rate for the grinder/backhoe should be $97 rather than the $115 claimed; (3) no mobilization costs are due Appellant; (4) the "Labor, Fringes & Benefits" account should be reduced to prevent double recovery for hours spent by Dyer equipment operators repairing Dyer equipment, since repair costs are included in the equipment rates; (5) numerous problems, unrelated to the differing site condition, also increased Appellant's actual costs; and (6) Dyer underestimated its sawcutting and chipping costs.

2. *Scheduling*

95. The first issue raised by the Government addresses the timely scheduling of the project during the outage period. The Government has proposed numerous findings critiquing virtually every "schedule" prepared by Appellant, CCC and Dyer. Most of these "schedules" were prepared by Calumet or Dyer before the differing site condition was discovered and/or before its full impact could be gauged. As such, they are irrelevant except to the extent that they reflect the reasonableness of Appellant's initial cost estimates. The reasonableness of the cost estimates is discussed by category elsewhere in this opinion, and the estimates are adjusted as appropriate. Accordingly, it is unnecessary to deal in detail with the Government's proposed findings concerning Appellant's early schedules.

96. The Government places primary reliance on CPM schedules prepared by its claims consultant, Hudson Construction Consultants (Hudson) to prove that Appellant could not have timely completed the outage period work by March 6, 1987. Although numerous schedules are in evidence, the latest and most pertinent Hudson CPM schedule was first presented at trial. (Ex. G-106). It is unnecessary to address in detail the logic and validity of the built-in constraints inherent in this schedule for reasons discussed elsewhere in this opinion. Hudson's conclusion, as expressed in the schedule, was that Appellant would not complete the outage period work until March 13, 1987, or perhaps "a couple of days" earlier. (Ex. G-106; Tr. 1028)

97. The Dyer estimate includes the use of the Dyer grinder with a 425 cubic feet per shift production rate for a single shift of eight hours per day plus two hours for maintenance. (Tr. 709-713, 717-718, 1418-1419d; Ex. G-106, Vol. III, Sec. 21, pp. 1-2; Ex. A).

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98. Mr. James Schneider, Appellant's scheduling expert considered that use of the Dyer grinder for a single shift of eight hours per day plus two hours for maintenance, *i.e.* one ten-hour shift, would have been inadequate to complete the required outage period work on time and that two ten-hour shifts would have been necessary for timely completion even had the differing site condition not been present. (Tr. 1416-1419; Ex. A-19)

99. Mr. Schneider used the Primavera "Finest Hour" CPM program, to analyze the Hudson-imposed contraints. Mr. Schneider developed a more detailed, resource-loaded hour-by-hour analysis of the required construction activities, based on Calumet's estimated resources. He concluded that Calumet and Dyer would finish the outage concrete removal on time with the grinder as the primary removal resource, had the DSC not been present. He emphasized that the Hudson-type, day-by-day, scheduling program constrained follow-on-activities a full day even where the prior activity was completed in anything less than a day. The more sophisticated "Finest Hour" program allows for reflecting follow-on work commencing the same day earlier work is completed. (Tr. 1009, 1013, 1026, 1032, Tr. 1287, 1288, 1416; 1453, 1459). Mr. Schneider, in addition to "resource loading" the "Finest Hour" analysis with Calumet's estimated costs, used two ten-hour Dyer shifts per day, seven days per week (as did Hudson), whereas Dyer only estimated one ten-hour shift of grinding per day. (Tr. 1417-19). The Schneider analysis was never materially challenged by specific and precise impeachment of its scheduling assumptions, except to the extent that Calumet's estimated costs for the various work categories have been adjusted, *supra.* With those adjustments, we consider that Appellant could have completed the outage period work prior to expiration of the outage period on March 6, 1987. However, inasmuch as meeting this schedule required twice as much time for the grinder shifts (20 hours vs. 10 hours), we double Dyer's "Anticipated at Bid" amount to $187,522 ($93,761 × 2) for purposes of deducting it from the amount claimed before overhead and profit. Without this upward adjustment, the Dyer quote was unreasonably low, at least given Appellant's scheduling methodology and the nature of the resources that Appellant chose to add to those quoted by Calumet and Dyer.

3. *Backhoe/grinder rate*

100. The audit proposed $80 per hour charge for Dyer's backhoe, but only $17 for the grinder, although Dyer's quote contemplated $115 for the two taken together. Dyer accepted the audit's backhoe rate. Dyer at trial claimed a $35 per hour grinder rate supported by unrebutted testimony that the equipment is specialized and does not operate the 1,550 hours per year applicable to the audit-suggested rate, and that the $115 rate was what Dyer included in its original estimate. On this record, we consider the $115 rate to be better supported and make no adjustment.

4. *Mobilization*

101. Dyer claims $4,318 for mobilization based on the 109.5 truck tractor hours (at $23.28 per hour) that the truck was used to transport the equipment to Canton, Missouri. There is no proof that mobilization costs were impacted by the differing site condition. We deduct $4,318 from the equipment amount claimed.

5. *Repairs*

102. The costs of equipment repairs are built into the Corps equipment rental rates. Appellant admitted that Dyer mechanics did perform some limited repair work on Dyer-owned equipment. We deduct $7,500 from the claim "Labor, Fringes & Benefits" amount to preclude double recovery of repair costs.

6. *Other Causes of Increased Costs*

103. The Government contends that the Dyer grinder experienced numerous mechanical problems, inefficiencies, and breakdowns that were not caused by the differing site condition and that the associated costs should be deducted from any recovery. The Government argues that the grinder was "useless" for a total of 30 days during the outage period and proposes a $41,040 deduction as follows:

2 men × $28.00 per hour × 8 hours × 30 days	=	$13,440.00
1 grinder 115.00 per hour × 8 hours × 30 days	=	$27,600.00
Direct Costs	=	$41,040.00

(Ex. G-106, Vol. I, Sec. 1, p. 55; Tr. 1303-1306, 1212-1213).

104. In general, these Government allegations are based on cryptic, incomplete notations in daily reports. Except to the extent that there is convincing, specific evidence as to other non-DSC causes, based on our review of the entire record, we consider that

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the generalized "mechanical breakdowns," and "inefficiencies," etc. noted in the daily reports concerning the grinder were attributable to the differing site condition. However, the record does support some deductions for increased actual costs that were not caused by the DSC. These include downtime related to the delayed dewatering and debris removal of the lock and several incidents where the grinder lost a track. ICC was responsible for dewatering the lock chamber and clearing debris at the start of the outage period. Numerous documents and daily reports indicate that Dyer's work inside the chamber was adversely impacted and made inefficient by delays in the dewatering process and, to a lesser extent, by use of an undersized bulldozer to clear debris. We conclude that non-DSC causes rendered the grinder unproductive for a total of seven days during the outage period. Thus, Dyer's actual direct costs must be reduced by $9,576, as follows:

2 men × $28.00 per hour × 8 hours × 7 days	=	$3,136
1 grinder × $115.00 per hour × 8 hours × 7 days	=	$6,440
		9,576

7. *Chipping/Sawcutting*

105. Dyer failed to consider and include in its estimate all non-grinder work including some chipping and sawcutting activities that were required. An overly optimistic sawcutting rate was also used for part of the work. We deduct $3,000 from its actual costs to reflect the approximate cost of this work.

8. *Dyer Claim Summary*

106. We conclude that Appellant is entitled to recover $306,172 with respect to the Dyer claim as follows:

Labor, Fringes & Benefits	$280,087
Less (original claim)	(28,929)
Less: (Repairs)	(7,500)
Less (Other Causes)	(9,576)
Miscellaneous Expenses	33,927
Subcontracts & rentals	121,489
Dyer equipment	63,093
Less (Mobilization)	(4,318)
Less (Chipping/Sawcutting)	(3,000)
Subtotal	445,273
Less: Adjusted Bid	(187,522)
Subtotal	257,751
Overhead @ 7.987%	20,587
Subtotal	278,338
Profit @ 10%	27,834
Total	306,172

D. *Calumet Markups/Profit*

107. The Government auditor determined a Tax, Insurance & Fringe ("TIF") rate of 32.2% to be applied to all claimed labor, except overtime premium, to which he applied a 9.85% rate. Subsequently, after re-computing these rates to answer Corps criticism that its approach did not apply Indiana unemployment compensation tax rates to consider men who worked at Lock 20, Calumet arrived at 34.63% for all labor costs except overtime premium, for which it computed a 10.09% rate. It introduced its computations at the hearing, where they were undisputed. (Tr. 146-148, 166-169; Ex. A-1, Tab 2 at Schedule A, Notes, N. 1, N. 6 pp. 8, 10 *passim;* Ex. A-2, Tabs 4, 6). Absent any testimony from a Government auditor explaining the Government position and rebutting the revised rates as calculated by Appellant, the board finds that the proper TIF rates are 34.63% (regular) and 10.09% (overtime).

108. CCC's estimate included a combined 10% mark up for home office overhead and profit. CCC's actual incurred overhead rate was 5.85%. We use the combined 10% rate estimated as the overhead/profit rate in calculating the adjustment. (Tr. 149, 182; Exh. A-2, G-106, G-107).

109. *Bond:* Calumet's bond cost is $5.00 per $1,000 (.5%) of contract value, including overhead and profit. Calumet will be required to pay at that rate on any sums received as a result of this proceeding. (Tr. 162-163; Ex. A-1, Tab 25; Ex. A-2, Tab 25).

E. *Calumet Work for Dyer*

110. Calumet assisted Dyer in its concrete removal efforts and charged Dyer for this assistance for the following:

Description	Amount Claimed
Labor with Payroll Taxes & Insurance	$141,130
G & A Overhead on Above Labor	15,549
Profit on Above Labor & Overhead	6,045
Charges for RWG Equipment	3,067
Charges for Outside Equipment Rental	63,580
Material & G & A Overhead	206
Subcontractors & G & A Overhead	4,608
Vendor Invoices & Overhead	4,049
Total	$238,234

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111. The audit questioned $25,546 of the claimed amount for various reasons and Appellant agreed to reducing this portion of the claim to $212,687. Except to the extent reflected in the questioned costs above, there is no evidence in the audit or otherwise that the remaining costs sought by CCC in this portion of the claim duplicate other costs found to be due either CCC or Dyer above. However, the Government contends, and we agree, that there is no specific proof that all of these costs were caused by the differing site condition. Nevertheless, the only Dyer work pertained to the concrete removal process during the outage period. This work and this time frame were the most directly impacted by the differing site condition. The descriptions of the invoiced work generally support this conclusion. For these reasons, we find that a percentage of these costs are compensable. The best evidence of that percentage is the approximate ratio (70%) of costs claimed by CCC during the outage period to the same costs found due for that period. Thus, we allow $148,881 (.7 × $212,687). However, because markups and profit were included in Calumet invoices, they are not computed again with respect to this work in our allowance.

F. *Extras*

112. CCC included numerous costs that were isolated as "extras" in CCC's accounting system at the time in the CCC claim. (Tr. 64; Ex. A-1, Sec. 13).

113. Appellant admitted that many of the "extra" items it had originally included in its claim had been paid for or covered by contract modifications and reduced the amount for them included in the claim. It however, left $13,920 for various "extras" in its claim. (Ex. A-2, Sec. 13). There is insufficient probative evidence either describing these costs or proving that any of the remaining "extras" were caused in whole or in part by the differing site condition. The brief descriptions in the record of many of those costs indicate that they are unrelated to the DSC. We deduct $13,920 from CCC labor cost outage total.

G. *Quantity Reductions*

114. Appellant has deducted $60,244 from the total CCC portion of the claim to reflect the difference between CCC's estimated costs using the higher estimated subcontract quantities and what its estimated cost would have been using the actual, reduced quantities. The Government has failed to rebut Appellant's evidence that the final $60,244 total deducted by Appellant from the CCC portion of the claim is the proper figure. We deduct only that amount from the post-outage totals for CCC.

H. *ICC Markups*

115. The best evidence of ICC's overhead rate is the audited rate of 9.18%, which we apply. An ICC profit rate of 6% was negotiated by the parties for subcontractor work in contract modifications during performance. We apply that profit rate, as well as the ICC bond rate of .00576.

I. *Illinois Work for Calumet*

116. Once the outage period ended, ICC reviewed all the invoices for work it had done and materials it had provided to Calumet. Appellant claims that invoices in the amount of $48,596 are concerned with concrete removal work; $64,487 with the concrete replacement work; and $14,514 with additional dewatering work. These ICC costs, totaling $127,597, are not adequately justified or explained. ICC did not subcontract all concrete work to CCC. Calumet also contemporaneously and vigorously objected to many of these costs, contending that they were not incurred or were not chargeable to Calumet. This contemporaneous evidence remains largely unrefuted. Among other things, there is also no probative evidence to establish that most of the costs were caused by the differing site condition. Some of the invoiced work clearly is unrelated to the differing site condition, such as costs relating to dewatering and clearing debris from the lock at the start of the outage. The best estimate in this record of the actual increased costs to ICC caused by the differing site condition is $18,510, as estimated by the Government. (Ex. G-106, Vol. III, § 22). Appellant also has not proved that the invoiced amounts did not include all applicable markups and profit. Therefore, we allow $18,510 without further mark ups.

J. *"Look-Back" Interest*

117. Both Calumet and Illinois claim additional unquantified damages in the form of the obligation of each to pay "look back" interest pursuant to Section 460 of the Internal Revenue Code of 1986, as amended, with respect to amounts recovered from the Government in this action. Section 460 addresses the reporting of income from certain long-term contracts under the percentage of completion method. Both Calumet and Illinois have so reported the income from this contract. (Tr. 183-184, 303-304). A taxpayer, in reporting gross income from a covered

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long-term contract for taxable years prior to the year of completion of the contract, generally determines the percentage of completion by comparing costs allocated to the contract (determined under Section 460(c)) and incurred before the close of the taxable year with the total estimated contract costs. Section 460(b)(1)(A). The gross income includable for the year is such percentage of completion for the year times the estimated total contract price reduced by amounts of gross income from the contract included by the contractor for prior years.

118. In the year of contract completion, the contractor, for the purpose of determining "look back interest," recomputes the income allocable to each year of the contract on the basis of the actual contract price and actual costs, and determines the hypothetical underpayment (or overpayment) of the tax which results solely from such reallocation of income. Section 460(b)(2). The contractor is required to pay for the year of contract completion so-called "look back interest" on the amount of the hypothetical underpayment of tax for each year of the contract. Such interest is paid at the rate provided for tax overpayments under Section 6621, Internal Revenue Code of 1986, as amended, and compounded daily to the date of payment. Section 460(b)(2)(C). "Look back" interest is in addition to, and not in lieu of, the income tax on contract income. Contract income, to the extent it has not been included in gross income in prior years, is included by the contractor in the year of contract completion. Section 460(b)(1). No amount has been included in the Quantum Statement for the "look back interest" damages, since any amount depends upon final determinations, among other things, of the contract price, contract costs, the year to which the costs are allocable, the year of contract completion, and the look back interest rate, a taxpayer may approximate and include in taxable income the amount of a potential claim recovery, thus paying tax thereon. The taxpayer may also recover interest from the Government under the Internal Revenue Code where an overpayment results. For reasons discussed in the Decision, we need not further detail the tax statutes, regulations and conflicting contentions of the parties with respect to "look back" interest.

119. Section 6(a) of the Contract Disputes Act, 41 USC § 601, 605(a) provides:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine.

120. FAR 31.205-15 states in part:

> 31.205-15 Fines, penalties, and mischarging costs.
>
> (a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign law and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

121. The following chart summarizes our determination of $2,084,249 as the total equitable adjustment due.

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SUMMARY ‡

Cost Code/ Category	Outage Claimed	Outage Allowed	Post-Outage Claimed	Post-Outage Allowed
1002/Supervision	18,353	18,353	447	447
1003/Engineering	13,696	13,696	---	---
1004/Temporary office labor	2,879	2,879	(508)	(508)
1004 Materials	3,747*	3,747*	---	---
1006/1008-Temporary Utilities	7,576*	7,576*	8406*	8406*
1019/Clean Up Labor	42,056	37,850	8593	8593
1019/Material	516*	516*	25*	25*
1023/Consumables	49,411*	0	19,480*	0
1026/Job Clerk	2,278	2,278	98	98
1028/Premium Time	84,311	84,311	44,702	44,702
1033/R.W.G. Equipment	49,007*	24,504*	61,501*	30,750
1038 Outside Equipment	100,006	90,005*	160,965*	144,869*
1035 Sales Tax	1,373*	1,098*	14,461*	7,231*
1039/Operating Engineer	52,136	46,922	56,909	51,218
1050/Carpenter General Foreman	8,528	8,528	6,886	6,886
1051/Labor General Foremen	(13,344)	(13,344)	15,451	15,451
1053/ Subsistence	5,583*	5,583*	---	---
91207/Temporary Railing Labor Materials	9,817 1,603*	0 0	3,082 0	0 0
91301/ Sawcutting Labor Materials	--- ---	--- ---	(1,323) (200)*	(1,323) (200)*

* These non-labor cost items are not marked up for labor-related overhead (taxes, insurance and fringe benefits)

‡ This chart summarizes only the elements of our allowances here-in. It is not intended to reconcile completely each item/amount set forth in Appellant's claims with our determinations.

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SUMMARY

Cost Code/ Category	Outage Claimed	Outage Allowed	Post-Outage Claimed	Post-Outage Allowed
91302/Landwall	---	---	17,449	17,449
91303/Intermed. and River Walls	---	---	39,139	39,139
91304/Disposal Labor Materials	 --- ---	 --- ---	 2,950 250*	 0 0
91400/series (Finding 56) Labor ODC	 45,305	 20,997	 32,743 (6,992)*	 26,953 (6,992)*
91501/Anchors Drill	 21,212	 21,212	 (181)	 (181)
91502/Grout Labor Materials	 (458) ---	 (458) ---	 (1,393) (1,565)*	 (1,393) (1,565)*
91503/ Install/Anchors	 10,177	 4,000	 1,977	 1,500
91601/ Install/Rebar	 20,441	 20,441	 3,866	 3,866
91701/ Scaffolding	 29,493	 23,594	 9,186	 6,430
91702/Forming Labor	 177,696	 142,157	 55,038	 38,527
91702/Forming Material	 33,419*	 26,735*	 ---	 ---
91703: Concrete Wall Labor Material	 18,716 23,859*	 15,013 19,086*	 2,050 (9,780)*	 1,435 (9,780)*
91707/ Trash Racks Labor Material	 1,985 71*	 1,485 0	 --- ---	 --- ---
91708/Finish	---	---	1,395	1,116

* These non-labor cost items are not marked up for labor-related overhead (taxes, insurance and fringe benefits)

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SUMMARY

Cost Code/ Category	Outage Claimed	Outage Allowed	Post-Outage Claimed	Post-Outage Allowed
91709/ Patch-Rub				
Labor	7,493	5,994	8,371	5,860
Materials	308*	246*	(202)*	(202)*
91710/ Tile Gage				
Materials	(100)*	(100)*	---	---
91801/ Handgrade				
Materials	---	---	682*	426*
91802/ Grout Surface				
Labor	---	---	(3,764)	(3,764)
Materials	---	---	(528)*	(528)*
91803/Forms				
Labor	---	---	31,610	22,127
Materials	---	---	706*	494*
91804/ Sealt. Forms				
Labor			2,702	1,891
Materials	---	---	(895)*	(895)*
91805/ Sealt. Caulk				
Labor	---	---	2,421	1,695
Materials	---	---	682*	477*
91806/ Landwall				
Labor	---	---	4,205	2,944
Material	---	---	7,829*	5,480*
91807/ Interned River Walls				
Labor	---	---	3,308	2,316
Material	---	---	13,270*	9,289*
91808/ Concrete Finish				
Labor	---	---	9,189	6,342
Material	---	---	(1,637)*	(1,637)*

* These non-labor cost items are not marked up for labor-related overhead (taxes, insurance and fringe benefits)

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SUMMARY

	Outage		Post-Outage	
Cost Code/ Category	Claimed	Allowed	Claimed	Allowed
1014/Concrete Test/Inspect	15,383	5,000	12,880	5,000
Other Related Costs	3,617*	0	---	---
Miscellaneous Deductions	---	(23,500)	---	---
Totals without TIF				
Labor	483,842	353,097	324,776	260,114
Overtime Labor	84,311	84,311	44,702	44,702
Materials/ODC/ Equipment	279,592	178,996	266,458	185,648
TIF/Labor @ 34.63%	167,554	122,277	92,274	64,290
TIF/OT Labor @ 10.09%	8,507	8,507	4,510	4,510
Subtotal	1,015,299	747,188	737,720	559,264
Extras Deducted	---	(13,920)	---	---
Subtotal	1,015,299	733,268	737,710	559,264
Dyer Subcontract	446,523	306,172	---	---
Subtotal	1,461,822	1,039,440	737,720	559,264
CCC Overhead/ Profit Rate @ 10%	146,182	103,944	73,772	55,926
Subtotal	1,608,004	1,143,384	811,492	615,190
Subtotal with Bond @ .005	1,616,044	1,149,101	815,549	618,266
Post Outage Overall Deduction	---	---	---	(106,815)
Quantity Reductions	---	---	---	(60,244)

* These non-labor cost items are not marked up for labor-related overhead (taxes, insurance and fringe benefits)

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SUMMARY

Cost Code/ Category	Outage Claimed	Outage Allowed	Post-Outage Claimed	Post-Outage Allowed
Calumet Work for Dyer (ff.102)	238,233	148,881	---	---
Subtotal	1,854,277	1,297,982	815,549	451,207
ICC Overhead @ 9.18%	170,223	119,155	74,867	41,421
Subtotal	2,024,500	1,417,137	890,416	492,628
ICC Profit @ 6%	121,470	85,028	53,425	29,558
Subtotal	2,145,970	1,502,165	943,841	551,744
ICC Bond @ .00576	12,361	8,652	5,437	3,178
ICC Work for CCC	127,597	18,510	---	---
Totals	2,285,928	1,529,327	949,278	554,922

Total Claim	Total Allowed
3,235,206	2,084,249

DECISION

The issues in this appeal have largely been resolved by our factual findings. In addition to certain general comments, four topics require further discussion. These topics are: 1. The inapplicability of rules pertaining to "total cost" claims; 2. Alleged mismanagement; 3. Scheduling; and 4."Look Back" interest.

A. *General Comments—Positions, Proof*

The parties' positions on many of the issues in this appeal have been uncompromising, often at opposite extremes. Although there is some truth in each of their respective contentions on many issues, they have suggested no middle ground to assist the Board in developing reasonable solutions and results.

For the most part the Government has presented and tried this case on broad, general factual and legal arguments, in particular challenging what in its view is a "total cost" approach and emphasizing mismanagement as the factual basis for Appellant's problems. It also insisted on emphasizing certain dubious and speculative alternative estimates and theories of recovery by claims consultants at the trial rather than meeting the Appellant's presentation "head on" with detailed rebuttal testimony by jobsite and qualified technical personnel possessing working familiarity with the history of performance of the contract. Moreover, to the extent accounting issues were involved, the Government failed to call any audit witness to support its case in this multi-million dollar appeal.

For its part, the Appellant has seemingly assumed with respect to some of the cost categories claimed that an auditor's verification of actual costs incurred is somehow a substitute for proof of causation. However, its burden of proof is not satisfied without establishing that the costs claimed were caused by the claim event. The audit in this case is not competent evidence of causation.

As a result of these and other problems, our resolution of many issues has been made particularly difficult and time consuming. We have often been left to make our best judgment on voluminous facts, and a record aggregating approximately 12 linear feet.

B. *Total Cost Claim*

The Government maintains that Appellant has submitted a "total cost" claim which should be denied on the basis of a long line of case law disfavoring the "total cost" approach. See *e.g., WRB Corp. et. al. v. United States* [12 CCF ¶ 81,781], 183 Ct. Cl. 409 (1968); *Wunderlich Contracting Co. v.*

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United States [11 CCF ¶ 80,069], 173 Ct. Cl. 180, 351 Fed 956 (1965); *J.D. Hedin Constr. Co., Inc. v. United States* [10 CCF ¶ 73,076], 347 F.2d 235 (Ct. Cl. 1965). In recent years, the outcry of "total cost" claim sadly has become a knee jerk response stereotyping any claim that happens to be based on contractor estimates and actual costs. The claim in this case is not a "total cost" claim and the precedents cited are inapposite.

Appellant did not simply subtract the estimated or bid costs of it and its subcontractors from their actual costs incurred. Although Appellant generally used the estimated costs of Dyer and CCC as a baseline, it also: 1. adjusted estimated costs upward to correct underestimates and reflect actual quantities; 2. eliminated numerous other cost accounts from consideration because they were not impacted by the DSC; 3. modified actual cost accounts and the claim to eliminate concurrent causes of its increased costs; 4. offered a detailed cost-code-by-cost-code presentation and explanation by highly credible technical witnesses of the nature of the claimed costs and how they were increased by the DSC; 5 demonstrated that the estimates/actual costs presented pertained to a discrete time period and portion of the work, not the entire contract; 6 proved that the nature of the claim event, i.e., the differing site condition, necessarily had a broad impact on the entire concrete removal/replacement process making it particularly difficult to isolate and estimate discrete incremental impacts; and, 7 showed convincingly that Appellant and its subcontractors had substantial experience with concrete removal and replacement.

As is obvious from our decision, further adjustments, modifications, revisions, deductions and/or proof of causation were required for various categories of costs. Nevertheless, the presentation here is not classifiable as a total cost claim simply, as the Government further argues, because it was based in part on subcontractor estimates for the concrete removal/replacement work rather than on estimates prepared by an outside estimator. Appellant's presentation in this case, for the most part is a *micro-level,* detailed analysis by well-qualified witnesses of estimates, actual expenditures and causation related to a pervasive DSC. It is not a broad, simplistic *macro-level* approach properly classifiable as a "total cost" claim.

Someone must estimate a baseline for computing damages, i.e., what the work would have cost had the DSC not been encountered. Ultimately, it is the quality, logic and probativeness of the estimate that is determinative, whether it is prepared by an "outsider" or an "insider." In this case, Appellant generally has established the reasonableness of its own estimates as modified and adjusted herein. The fact that most subcontract accounts were impacted is simply a logical consequence of the nature of the subcontracted work and the scope of the DSC. We have considered the fact that the estimates were internally prepared (with modifications, deductions, etc.) as an evidentiary matter in assigning weight. However, under the circumstances, it is as accurate a method as was reasonably possible to present. Evidence from knowledgeable, careful, analytical "in-house" estimators is in no way to be considered inferior to or degraded when compared with that from "outside" professional consultants. Sometimes the opposite is true. Individual circumstances stand alone.

Many of the Government's contentions are based on admitted inadequacies in the CCC'S initial "yellow sheet" bid estimates. The problem with these arguments is that they are generally irrelevant. The CCC portion of Appellant's claim is based primarily on the later "green sheet" revisions which addressed and corrected deficiencies in the "yellow sheets." By virtue of these revisions, Appellant has convincingly shown, except as noted elsewhere in this opinion, what the reasonable costs of performance would have been "but for" the differing site condition. This is one reason that Appellant's presentation generally is not classifiable as a total cost claim. ICC has made significant upward adjustments to cost codes that, upon reflection, were earlier underestimated. The Government has never adequately refocused and coherently concentrated its arguments on the baseline for the vast majority of the claim items, *i.e.,* the "green sheets." More cogent are the Government contentions that specific cost codes remain unreasonably low even following their upward adjustment in the "green sheets." We have carefully considered these specific contentions in developing our findings. However, the Government has failed to explain through trial testimony its alterna-

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tive positions and rebut the testimony of Appellant's witnesses on individual cost items. In general, we consider Appellant's evidence to be the more probative.

C. *Management and Supervision Problems*

The Government contends that Appellant's actual outage period costs were increased in large part because of poor supervision, management, coordination and cooperation, and quality control. It cites voluminous references in the documentary record containing general, conclusory statements to that effect. The Government position is without merit. Not even a "chicken or egg" conundrum is presented by this record. Here, the clear preponderance of the probative evidence supports the Appellant's position that management-related problems stemmed from the differing site condition and the large influx of additional unplanned resources and changes in the planned methods of removing the concrete as necessary to overcome the DSC under accelerated conditions. We have detailed the adverse effects of the DSC in our findings as well as in our entitlement decision.

D. *Scheduling*

The Government's primary scheduling contentions revolve around the testimony of its claims consultants. They assert that: 1. Appellant could not have timely completed the work using the grinder as the sole removal resource for most of outage period removal areas as allegedly planned by Appellant even had there been no differing site condition; 2. therefore, Appellant's cost estimates and its planned schedule were insufficient to complete the work within the time permitted, according to the Government; and 3. using a reasonable schedule and the resources required to meet that schedule, assuming no differing site condition existed, the contractor reasonably would have incurred far greater baseline costs than it anticipated.

For the most part, the Government's arguments relative to scheduling are based on preliminary, rough, abbreviated non-CPM "schedules" prepared by subcontractors well in advance of discovery of the differing site condition. Although the Government has proposed numerous findings dissecting the intricacies and inadequacies of these "schedules" that found their way into the record, we need not address them or their related arguments. Regardless of their adequacy, the preliminary schedules were rendered moot and largely irrelevant when the conditions were encountered.

The alternative schedules prepared by the Government's claim consultant overly criticize and rely on the same preliminary, schedules. These critiques amount to little more than an academic indictment, rather than a convincing impeachment of Appellant's actual ability to complete the work scheduled during the outage period. For example, the Hudson schedules purport to be based on an Appellant plan that indicated that grinding would not commence until January 14, 1987. In fact, initial grinding commenced in late December, 1986, and, before January 1, Appellant had determined that the grinder would be ineffectual and had shifted to other removal methods.

A further fundamental problem with the Government's schedules is that there is no credible factual foundation, documentary or otherwise, for key scheduling assumptions made by its claims consultant. The consultant's scheduling "understandings" were significantly based on hearsay discussions with often unidentified Corps officials. Whether these understandings are accurate or not, they are generally not adequately explained or supported by documentary or testimonial evidence *in the record.*

In any event, Hudson's own alternative CPM analysis, as finally revised, conceded that the Appellant could have completed the project within one week after the end of the outage period, perhaps a "couple of days less." The ultimate differences in the parties' final schedules are relatively insignificant, considering Appellant's use of the more precise Primavera "finest hour" program.

For purposes of quantum, the essential question is whether the Appellant's estimates included sufficient resources reasonably to complete the outage work within the allotted time but for the differing site condition. In general and with the adjustments discussed herein we consider that Appellant's cost estimates were adequate and the best indicator in this record of what timely completion of the work would have cost had no differing site condition been encountered. It follows that Appellant's CPM analysis presented at the hearing, that is based on those estimates, more logically establishes that the work could have been completed by March 6, 1987 with the planned resources as adjusted in this decision. The Government has failed materially to impeach or rebut the logic of Appellant's schedules as presented at the hearing. On this record, it is the generally convincing presentation of Appellant's witnesses, unrebutted by other testimony at the hearing, that is the most

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credible and persuasive on most of the quantum issues before us, including those related to scheduling.

On the other hand, Appellant seems to argue that the Board's entitlement decision implicitly supported the efficacy of Dyer's schedule for completion of the removal work with the grinder during the outage period. Our prior decision said nothing concerning the adequacy of the Dyer schedule, impliedly or otherwise. It held only that the Dyer grinder would efficiently have removed concrete had the differing site condition not been encountered. Appellant's ability to complete, according to its own schedule offered at trial, required two ten-hour Dyer shifts per day, rather than one. Only with those resources added, and as its estimates have been adjusted and modified in our findings, have we concluded that Appellant would have timely completed the outage work.

E. *Internal Revenue Code "Look Back" Interest*

The Government argues that no "look back" interest has been incurred or will be incurred, and even if incurred, such a penalty would be the direct result of Appellant's negligent failure to approximate, recognize, and include in its taxable income for the appropriate years the amount of any recovery eventually due it as a result of the claim in dispute. It also asserts that Appellant has failed to present to the Board the relevant, governing versions of the Internal Revenue Code and regulations.

We do not address issues related to "look back" interest. Under the Contract Disputes Act, we would have no jurisdiction to resolve "a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine." 41 U.S.C. s. 605(a). Possible or eventual payment of "look back" interest claimed is for resolution under the pertinent provisions of the Federal tax statues and regulations of the Internal Revenue Service. Such payment has not occurred.

We note that the Government, in this appeal, argues that no such interest penalty ultimately will be assessed. The issue is far from clear. Whether such interest is ever paid; and whether, if it is, it would constitute a valid contract claim and or be an allowable cost under FAR (see 31.205-15) are not matters now ripe for consideration.

CONCLUSION

The Appeal is SUSTAINED in the amount of $2,084,249. It is otherwise denied. Appellant is also entitled to interest pursuant to the Contract Disputes Act commencing February 14, 1989.

[¶ 26,471] Gulf Construction Group, Inc.

ENG BCA No. 5961, October 13, 1993. Contract No. DACW64-90-C-0013.

Site Conditions—Contract Indications, Category I—Material Difference.—Differences between hinge pin keys shown on contract drawings and those the contractor actually removed in rehabilitating a river lock gate did not entitle the contractor to additional compensation, because the differences were not material. The contractor failed to prove that the removal of the differing keys increased its costs or time for the work or that it had relied on a reasonable expectation of different conditions in formulating its bid. The contractor's interpretation that it would not have to remove bolts was unreasonable in view of the fact that three of the four types of pin keepers shown in the drawings were fastened to the hinge apparatus by bolts, and the fourth type consisted of two parts bolted together.

Property—Government-Furnished Material—Installation of Defective Items.—A contractor was not entitled to additional compensation for the costs of attempting to install defective hinge pin keys supplied by the government under a contract to rehabilitate a river lock gate, because it failed to show that the time spent by its crew exceeded that which it should have expected. The government completed installation work using its own resources. None of the work completed after the contractor's attempts to install the improper hinge keys was dependent on that installation.

Delays—Causation—Feasibility of Completion.—A contractor was not entitled to compensation for delay during a period in which the government took over responsibility for completing one of the last operations, because the contractor concurrently caused delay. The

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contractor contended that it could have completed work earlier, but that once the government-caused problem that led the government to take over a piece of the work had been identified, there was no justification to hurry to complete other work. However, reasonable and prudent business practice dictate that if the contractor could have finished, it would have. Furthermore, a subcontractor needed for part of the work was not present. Thus, although the government takeover created a government-caused delay barring assessment of liquidated damages, the concurrent contractor-caused delay precluded recovery of damages by the contractor.

For the appellant: Smith, Gunn & Kaster, Baton Rouge, Louisiana, by Steven E. Sanders. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Daniel Keys III, Government Trial Attorney, Galveston, Texas.

Before SOLIBAKKE, PEACOCK, and SHERIDAN, Administrative Judges.

SOLIBAKKE [1], Administrative Judge: The Appellant seeks additional compensation in the amount of $27,248.79, and a two-day time extension, as relief for differing site conditions encountered when components of waterway gate sectors were removed and for defective Government-furnished components to be installed by the Appellant. The claimed equitable adjustment is based on the alleged actual costs to perform difficult work to overcome the differing site conditions and extra work, delay costs, and return of liquidated damages on account of attempted installation of defective Government-furnished items.

The Respondent denies the existence of differing site conditions and, in any event, denies that any additional work was required. While there is no dispute that the Government-furnished parts could not be installed without alteration, the Respondent argues that no additional work was required of the Appellant before it was relieved by the Government of the necessity to perform the particular task involving the defective materials. Instead, the Respondent altered the components and completed their installation using Government resources.

The Appellant filed a pre-hearing memorandum. Following a one day hearing in Houston, Texas, each party filed a post-hearing brief.

FINDINGS OF FACT

The Contract

1. Contract No. DACW64-90-C-0013 (the contract) was awarded by the U.S. Army Engineer District, Galveston, Texas (the Respondent or Corps) to Gulf Construction Group, Inc. (the Appellant or GCG) on January 14, 1990. The contract work, to be performed on the Gulf Intracoastal Waterway, consisted of rehabilitation of the Brazos River Floodgates (BRF) near Freeport, Texas, and the east gate of the east lock of the Colorado River Locks (CRL) near Matagorda, Texas. (Consolidated Board Rule 4 Appeal File and Hearing Exhibits, Respondent's Exhibit 3 (R.4, Exh. R-3)).

2. As awarded, the contract price was $1,249,360.00 (increased by contract modifications to $1,405,269.78), the total estimated sum of 29 estimated quantity, unit priced and fixed price, lump sum payment items. The contract work included, *inter alia*, hinge revisions at both gate sectors of the east gate of the east lock of the CRL. Payment Item No. 19 of the contract listed an estimated quantity of two such revisions at a unit price of $2,500.00 each, yielding an estimated price of $5,000.00. (R.4, Exhs. R-3, R-3a).

3. The Corps' notice to proceed was received by GCG on March 22, 1990. The contract specified 428 days for completion after receipt of the notice to proceed. Therefore, the original contract completion date was May 24, 1991. The performance period was extended a total of 51 days by modifications to the contract. The modified contract completion date was July 14, 1991. According to GCG, the work was substantially complete on Friday, August 23, 1991. The Corps has determined that substantial completion was achieved by GCG on Monday, August 26, 1991. Pursuant to a Construction Special Provision of the contract which specified a rate of $648.00 per day for each day of delay as liquidated damages, such damages were assessed by the Corps through the latter date. (ENG BCA No. 5850, Finding 4;[2] R.4, Exhs. A-7, A-8, R-3a, R-4; Tr. 572, 598-99).

4. The contract included standard Contract Clauses typically found in Corps of En-

[1] The Board adopts the opinion of its Hearing Examiner, Steven L. Reed, Esq., who presided at the hearing of the appeal.

[2] *Gulf Constr. Group, Inc.*, ENG BCA No. 5850, 93-1 BCA ¶ 25,229 at p. 125,663.

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gineers construction contracts. The following are pertinent to resolution of the appeal:

a. Disputes (APR 1984) FAR 52.233-1.

b. Differing Site Conditions (APR 1984) FAR 52.236-2.

c. Changes (AUG 1987) FAR 52.243-4.

d. Government-Furnished Property (Short Form) (APR 1984) FAR 52.245-4.

e. Default (Fixed-Price Construction) (APR 1984) FAR 52.249-10.

(R.4, Exh. R-3).

5. Certain paragraphs of section 2A of the Technical Provisions of the contract are relevant, in part, as quoted below.

1. Scope. The provisions of this section consist of furnishing all plant, labor, equipment and materials for performing the following work on the two (2) sectors of the East Gate of the East Lock at the Colorado River . . . .

* * * *

(9) Fabricate and install necessary hinge replacement parts.

* * * *

2.10 *Government-Furnished Items.* [No permanent hinge component replacement items are listed].

* * * *

7. REMOVAL AND REINSTALLATION OF SECTORS.

* * * *

7.2.1 *Removing Sector.*

(1) . . . Disconnect grease lines to pins and remove pin keepers and lower pin plug. . . .

* * * *

7.2.3 *Hinge Revisions.*

7.2.3.1 . . . The Contractor shall not proceed with the fabrication of replacement components until the sector has been removed and the existing components inspected by the Contracting Officer. . . . The contract drawings are believed to be accurate, although existing components may differ from that shown on the plans. Where the contract drawings indicate existing components to be replaced with identical components, and the existing component differs substantially from that shown, the new component shall be fabricated to match the existing.

* * * *

7.2.7 *Reinstalling Sector.* . . .

(1) . . . After removal of the undersized lower pin the permanent lower pin shall be reinstalled. . . .

(2) Reinstall the lower pin plug, top and bottom pin keepers and grease lines.

(R.4, Exh. R-3).

6. The lower hinge and the lower hinge pin of the gate sectors to be repaired under the contract were fastened together by one of two devices which functioned as "pin keepers": a "keeper plate" or a "hinge pin key." (R.4, Exh. R-4; Tr. 581-85).

7. Contract drawing No. M-3, entitled "Existing Lower Hinge Details—CRL," among other things, shows details of a keeper plate at the CRL. The keeper plate is similar to a manhole cover. It is fastened atop the lower hinge and hinge pin by 16 bolts. A grease line leading to the top of the pin connects through a hole in the keeper plate. The drawing also includes Note 3, which provides as follows: "Keeper plate may be different from that shown on this drawing. Hinge pin keys such as those shown in the drawings for [the BRF] have been found at CRL. Contractor to verify in the field." (R.4, Exh. R-4; Tr. 620-23).

8. Drawing No. M-9, "Existing Hinge Assembly & Removal—B.R.F.," includes details of the BRF lower hinge and keeper plate. A detail note indicates that the BRF west gate (both sectors) and east gate south sector lower hinges and pins are connected by hinge pin keys, not a keeper plate. Absent a keeper plate, the pin key does not preclude connection of the lower hinge grease line as it leads directly to the top of the lower pin. The keeper plate detail, in two separate notes, specifically indicates that the keeper plate shown is existing at the BRF east gate north sector. The keeper plate shown is similar to that shown for the CRL on Drawing No. M-3, except that only eight bolts fasten the plate to the hinge. (R.4, Exh. R-4).

9. Drawing No. M-10, "Pins, Bushings and Thrust Washers—B.R.F.," includes details of a lower hinge pin key. The key is a nearly two-foot long inverted-T-shaped steel bar, consisting of two connecting parts bolted together, when installed, near one end of the bar by a single bolt and nut. The hinge pin key also has a vertical plate and horizontal flange on each end to be installed flush against and into a slot in the outer diameter of the lower hinge. The key is mounted across the top of the hinge and hinge pin between "keeper lugs" (shown on Drawing Nos. M-11 and M-12) and across and

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through a "key slot" in the top of the pin. (R.4, Exh. R-4; Tr. 521-25).

10. Drawing No. M-11, "Lower Hinge Details BRF," includes a detail showing an "Alternate Hinge Pin Key." The alternate key is nearly identical to the key shown on Drawing No. M-10; however the alternate key differs in that it is a one-piece item rather than two and it connects to the hinge through the key's vertical plate on each end of the key by way of two bolts rather than a horizontal flange secured in a slot on the hinge. A note adjacent to the drawing detail provides: "This type hinge pin key was found at gates on the [CRL] and may exist at [the BRF] in lieu of the key shown on other drawings." A separate note provides: "Existing lower hinge at CRL similar." (*Id.*).

Lower Hinge Pin Key Removal

11. On May 10-13, 1991, in conjunction with other work to remove the gate sector, GCG removed a portion of the lower hinge pin key at the CRL east gate north sector. The key was broken into pieces. Portions at each end of the key, on opposite sides of the hinge, were missing. One piece remained in the key slot. It was difficult to remove. (R.4, Exhs. A-1, R-8, R-9; Tr. 515, 527, 547-54, 607, 626-27, 653-54).

12. On those same dates, GCG also removed the lower hinge pin key at the south sector of the same gate. The key was similar to that shown on Drawing No. M-10, except that it lacked a horizontal flange but was fastened to the hinge by four bolts. It was similar to that shown on Drawing No. M-11, in that it was bolted by four bolts through a vertical plate at each end of the key to the outer surface of the hinge, but differed as it was a two-piece item. In other words, the key was a combination of and similar to the lower hinge pin keys shown on Drawing Nos. M-10 and M-11, but not identical to either. (R.4, Exhs. A-1, A-12, R-4, R-8, R-9; Tr. 514-26, 543-48, 569, 585-87).

13. GCG claims that removal of the CRL lower hinge pin keys, in particular the broken piece remaining at the north sector, required a full day's work, amounting to performance of $4\frac{1}{2}$ extra hours of labor (overtime) and equipment use on May 12-13, 1991. No GCG daily report for May 12, 1991, is in the record. The Corps daily report for May 12, 1991, notes no problem with removal of lower hinge pin keys. The GCG daily report for May 13, 1991, notes "considerable time" lost removing the broken north sector lower hinge pin key, but also includes two report entries concerning delay on account of difficulties in removing the north sector lower hinge pin. The report shows that the north sector lower hinge pin was removed at 11:25 a.m. The Corps daily report for May 13, 1991, indicates that the north sector lacked a hinge pin key; it gives no hint of any delay attributable to removal of the hinge pin key. (R.4, Exhs. A-3, R-8; Tr. 528-36, 549-50, 606-08).

14. GCG's President testified that GCG did not expect to remove bolts or broken parts, that removal of the lower hinge pin keys at the CRL should have taken only one day, and that removal of the lower hinge pin keys at the CRL required about 2-3 hours longer than removal of comparable items at the BRF. No contemporaneous documentation records that information. At the time of his testimony concerning the hours expended in removing the lower hinge pin keys, GCG's President mistakenly was referring to a GCG daily report for August 1991, when new lower hinge pin keys were being installed. He admitted some uncertainty about particular dates and the sequence of events, relying instead on GCG's written reports. (R.4, Exhs. A-1, A-3, R-8; Tr. 528-41, 551-54, 562-68, 609-17, 630-32).

15. Removal of lower hinge components and bolts was difficult on account of corrosion, because the work occurred underwater in "zero visibility," because "it was impossible to know what you had until you got down there," and "because [the bolts and hinge castings were] covered up with a foot or two of oyster shells." (ENG BCA No. 5850, Finding 22 [3]; Tr. 627).

16. At the time of removal in May 1991, the Corps' site personnel observed the CRL lower hinge pin keys. By daily report dated May 13, 1991, and by letter dated June 11, 1991, GCG described the lower hinge pin keys that had been removed at the CRL and notified the Corps that the items differed from those shown on the contract drawings. The one intact lower hinge pin key was preserved. The GCG letter dated June 11, 1991, also gave notice of an intent by GCG to seek additional compensation from the Corps on account of alleged differing site conditions. The Corps did not respond to GCG's letter. (R.4, Exhs. A-1, A-7, A-12, R-8).

Lower Hinge Pin Key Installation

17. In an effort to standardize the parts for all gate sectors at the BRF and the CRL, the

[3] N.2, *supra* at p. 125,665.

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Corps furnished new lower hinge pin keys to be installed at the CRL. The items furnished were identical to those shown on contract Drawing No. M-10, *i.e.*, two-piece lower hinge pin keys with a horizontal flange but no bolt holes through the vertical plate on each end for fastening to the lower hinge. (R.4, Exh. A-11; Tr. 594).

18. On August 21, 1991, GCG commenced reinstallation of the CRL north sector. The gate sector, the upper and lower pins, and other related items were installed. GCG's diver then proceeded to attempt to install the new Government-furnished lower hinge pin key. After over two hours of effort, GCG's diver was unable to install the pin key, attributing (mistakenly, it was later learned) that consequence to an existing broken bolt shaft found on the hinge. A temporary pin key was installed. (R.4, Exhs. A-3, A-4; Tr. 533, 564, 655-69).

19. On August 22, 1991, GCG commenced reinstallation of the south sector. After the lower hinge pin was in place, GCG's diver attempted to install the new Government-furnished lower hinge pin key. After about one hour, GCG's diver partially had installed the pin key. (R.4, Exhs. A-4, R-6; Tr. 533, 564, 680).

20. On August 23, 1991, GCG attempted to complete installation of both CRL sectors. Other work to complete both sectors, in addition to attempting to complete the installation of both lower hinge pin keys, was accomplished. Complete installation of the lower hinge pin keys on both sectors proved problematic. It was discovered that the keys' horizontal flange was thicker than the slot in the hinge casting. Therefore, proper, complete seating of the pin key was blocked. A GCG diver confirmed the slot measurements, which were then reported to Corps personnel. The GCG diver, his tender, and a laborer worked on the problem, as well as other gate sector installation tasks, for over four hours. (R.4, Exhs. A-2, A-3, R-8; Tr. 517-22, 532, 557-65, 657).

21. When it was determined by the Corps that the horizontal flanges would not fit, the flanges were removed. As modified, the pin keys could not be securely fastened to the hinge because the vertical plate on each end of the keys lacked bolt holes. At that time, on Friday, August 23, 1991, the Corps' Administrative Contracting Officer (ACO) relieved GCG of any further responsibility to install the pin keys. Corps officials decided to install the keys, using Corps divers, starting on Monday, August 26, 1991. (R.4, Exhs. A-2, A-7, A-11, R-8; Tr. 522-23, 532-38, 571, 590, 639).

22. GCG claims that installation of the CRL lower hinge pin keys required performance of 13 extra hours of labor (including 11 hours of overtime) and equipment use on August 21-23, 1991. GCG also claims ten extra hours of services by its marine equipment and construction subcontractor on August 21-22, 1991. GCG's President testified, based on his experience at other projects, that installation of the new lower hinge pin keys should have required no more than two hours each. He also testified that, when the true cause of the problem with the pin keys was discovered on August 23, 1991, GCG could have been substantially complete with all other work on the CRL gate sectors within one-half day, *i.e.*, during the balance of that same day, but for the pin keys problem. (R.4, Exh. A-3; Tr. 539-41, 568-71, 639-42).

23. Nothing in the record indicates what work, if any, was accomplished by GCG on the project during Saturday and Sunday, August 24-25, 1991. (R.4, Exhs. A-3, A-7).

24. On August 26, 1991, GCG completed installation of the top hinge pin and connected the lower hinge grease line at the CRL south sector. GCG's electrical subcontractor, which had not worked on August 23, 1991, completed its work at the CRL south sector. Punchlist and demobilization work at the BRF and the CRL was accomplished by GCG. Concurrently, Corps divers were attempting to install the modified lower hinge pin keys. The Corps' ACO considered the contract substantially complete. (R.4, Exhs. A-2, A-5, A-7, A-13; Tr. 534-35, 571-78, 595, 644, 659, 686-89).

25. GCG's President testified that work to install the CRL south sector top pin was not completed until August 26, 1991, because "[t]here wasn't any hurry until" all lower hinge work was completed. Once it was clear to him that installation of the lower hinge pin keys was a problem and would not be completed by the Corps until Monday, August 26, 1991, he determined that GCG should not "work night and day around the clock to get that top pin in." (Tr. 642-44).

26. GCG continued to perform punchlist and demobilization work through August 28, 1991, and beyond. The Corps further modified the CRL lower hinge pin keys. Corps divers completed installation of the keys on August 28, 1991. (R.4, Exhs. A-2, A-5, A-7, A-13, A-14, A-15; Tr. 575-76, 590, 687-93).

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GCG's Bid

27. No direct evidence was provided by GCG to explain how its bid price for hinge revisions, Payment Item No. 19, $2,500.00 per revision, was formulated. The other five bids for Payment Item No. 19 ranged from $10,715.00 per revision to $40,000.00 per revision. The pre-bid Government Estimate for Payment Item No. 19 was $55,479.00 per revision. GCG prepared its bid for the entire contract as a lump sum. For example, certain equipment was to be used throughout the life of the project; therefore, the cost of its use was calculated for the entire performance period. After all costs were similarly calculated, unit prices were entered on the bidding schedule solely for the purposes of receiving estimated payments as the work progressed. Costs were not allocated to specific bid item prices based on the projected cost of the work required by that bid item. (ENG BCA No. 5944, Tr. 275-82; ENG BCA No. 5945, Exh. A-8 [4]).

The Claim and Appeal

28. In a letter dated June 11, 1991, GCG notified the Corps' ACO that removal of the CRL lower hinge pin keys involved differing site conditions and resulted in increased costs and performance time. No specific dollar amount was requested. (R.4, Exh. A-1).

29. In separate written daily reports dated August 23, 1991, GCG's superintendent and the Corps' quality assurance representative disagreed over whether any extra time and expense had been experienced by GCG while attempting to install the new pin keys. (R.4, Exhs. A-3, R-8).

30. In a letter dated September 4, 1991, GCG again notified the Corps' ACO that removal of the CRL lower hinge pin keys involved differing site conditions, that installation of the new pin keys was complicated by the initial discovery of differing site conditions, and that the Corps had furnished new pin keys that did not fit and could not be installed until modified. GCG suggested that pin key installation had also resulted in increased costs and performance time. However, no specific dollar amount was requested. (R.4, Exh. A-2).

31. In a letter to the Contracting Officer dated September 12, 1991, GCG claimed $27,248.79, for extra costs caused by the differing site conditions, the extra effort and time expended in attempts to install the new lower hinge pin keys, and for relief from liquidated damages. The letter referred to GCG's letters dated June 11 and September 4, 1991, GCG's daily reports, and spoken communications with Corps representatives. The letter noted problems with resolving earlier "changes orders and modifications," requested a Contracting Officer decision, and included detailed cost breakdowns for labor, equipment, time-related costs, and markups. It was received by the Corps on September 18, 1991. (R.4, Exh. A-3).

32. A Contracting Officer decision dated November 18, 1991, considered and denied only that portion of the claim related to removal of the CRL lower hinge pin keys in May 1991. The decision did not address GCG's claim as it related to the attempts to install new pin keys in August 1991. (R.4, Exh. A-8).

33. In a letter to the Contracting Officer dated January 10, 1992, GCG's counsel requested reconsideration of GCG's claim, particularly as it related to installation of new pin keys. (R.4, Exh. A-9).

34. In a second Contracting Officer decision dated March 18, 1992, the claim was again considered and denied. (R.4, Exh. A-11).

35. GCG timely appealed by counsel's letter mailed to the Board on April 9, 1992. (R.4, Exh. R-1; Board Correspondence File).

DECISION

The Parties' Positions

Concerning removal of lower hinge pin keys, GCG argues that the items removed differ from those shown on the drawings and that one item was broken and more difficult to remove, causing extra costs and time for performance. The Corps responds that GCG, in its bid, should have anticipated various types of lower hinge pin keepers, including keeper plates and/or pin keys. Thus, the Corps argues, GCG should have expected to remove a keeper plate fastened by as many as 16 bolts. Since GCG removed one pin key with no bolts (a broken piece of a key) and another held by only four bolts, the degree of difficulty was less than reasonably should have been expected.

Regarding installation of new lower hinge pin keys, the contract required GCG to supply those items. Instead, the Corps obtained new pin keys which proved to be defective in

[4] The parties agreed that evidence from all appeals under the contract may be considered in any of the appeals. (ENG BCA No. 6015, Tr. 26-27).

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that they could not be installed without alteration. After abortive attempts to install the defective items, the Corps relieved GCG of any further responsibility for that item of work. GCG contends that extra costs and time were expended in attempting to install the new keys and GCG was delayed in its completion of the contract work by the Corps' completion of the work to install the new keys. The Corps contends that GCG spent no extra time unsuccessfully attempting to install the new pin keys before the Corps relieved GCG.

Jurisdiction

The contract is subject to the Contract Disputes Act, 41 U.S.C. §§ 601-13 (1988, Supp. II 1990, & Supp. III 1991). As the contract work completion drew near in August 1991, the parties generally had a disputatious relationship. (Finding 31). One appeal under the contract had already been filed with the Board. *Gulf Constr. Group, Inc.*, ENG BCA No. 5850, 93-1 BCA ¶ 25,229 at p. 125,665 (Finding 26).

As GCG unsuccessfully attempted to install the new lower hinge pin keys on August 21-23, 1991, a dispute arose between the parties. By August 23, 1991, the parties were documenting the specifics of their disagreement and their respective positions. A few days later, in a letter dated September 4, 1991, GCG bolstered its contentions by relating back to the perceived problems with removal of the lower hinge pin keys and the fact that GCG had notified the Corps, in May 1991, of the differences between the items removed and those shown on the drawings. (Findings 16, 28-30).

GCG filed its claim letter with the Contracting Officer on September 12, 1991. The claim events which underly the appeal were, by that date, disputed. In that letter, GCG submitted a written claim for a sum certain and demanded a Contracting Officer decision. In two decisions, the Contracting Officer denied the claim. GCG timely appealed to the Board. (Findings 4a, 31-35). The Board has proper subject matter jurisdiction.

Lower Hinge Pin Key Removal—Differing Site Conditions

The contract provides that an equitable adjustment shall be made under the Differing Site Conditions provision when "... subsurface or latent physical conditions at the site ... differ materially from those indicated in [the] contract ... and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work ...." (Finding 4b). In addition, among other things, the claimant must prove the reasonableness of its interpretation of the contract indications and its reliance on that interpretation. *Weeks Dredging & Contracting, Inc. v. United States* [38 CCF ¶ 75,356], 13 Cl.Ct. 193 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988); *Shumate Constructors, Inc.*, VABCA No. 2772, 90-3 BCA ¶ 22,946.

For several reasons, GCG's claim of differing site conditions in connection with removal of the CRL lower hinge pin keys fails. First, the Board concludes that the lower hinge pin keys removed by GCG did not *materially* differ from the contract indications. Two similar types of pin keys were shown on the contract drawings. The differences between the two, in form and function, are not significant. The hinge pin keys removed by GCG were not identical to either of those shown on the drawings; however, they were a combination of and similar to both. There is no material difference among the two types of pin keys shown on the drawings and the type actually removed. (Findings 9-10, 12).

Second, GCG failed to prove that removal of the pin keys increased its cost of, or the time required for, performance of the contract work. The Board is convinced that the work involved in removing the keys was difficult; however, that is not remarkable or unforseeable given the environment in which the work was performed. (Findings 11, 13, 15). Difficult work, without more, does not entitle a contractor to an equitable adjustment under the differing site conditions provision of the contract. *Gulf Constr. Group, Inc.*, ENG BCA No. 5850, *supra* at p. 125,667-68 (Difficult Bolt Removal).

GCG claims that extra time in the form of overtime on May 12-13, 1991, was incurred during removal of the keys, in particular the broken key. At best, the claim of overtime is a naked assertion without support; at worst, it is contradicted by the facts. GCG's contemporaneous record of performance for May 12, 1991, is missing from the record. GCG's report for May 13, 1991, does indicate a problem with removal of the broken pin key; however, other problems are also noted on that date. More to the point, removal of the lower hinge pin, which *must* follow removal of the lower hinge pin key, occurred at 11:25 a.m. The record clearly shows that no overtime on May 13, 1991, was directly caused by pin key removal. (Findings 11, 13).

Overall, the time spent on removal of the CRL lower hinge pin keys is not well estab-

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lished in the record. (Findings 11, 13-15). If the Board accepts the overtime alleged by GCG as factual, that alone does not prove that GCG necessarily incurred extra costs on account of differing site conditions. Stated another way, proof of entitlement does not necessarily follow from proof of performance of overtime work. GCG's President testified that removal of pin keys at the CRL took longer than the comparable operation at the BRF. The Board is unable to give full credit to that assertion; however, even if true, it does not prove differing site conditions and tells the Board nothing about GCG's pre-bid expectations.

Third, GCG failed to prove reliance. It omitted any specific proof of its bid formulation. The Board concludes from this scant record that GCG assigned too few resources, at least in the specific line item bid price, for lower hinge revision work. (Findings 27).

Fourth, GCG's interpretation of contract indications was not reasonable. GCG established that it did not expect to remove bolts. Assuming that such was its pre-bid interpretation of the contract indications, the Board rejects that interpretation as well outside the zone of reasonableness. Four possible types of pin keepers (keeper plates or pin keys) were depicted in the drawings. Three of four were fastened to the hinge apparatus by bolts. The remaining pin key type consisted of two parts bolted together. No reasonable contractor could have determined that removal of bolts would not be required as a part of the removal of pin keepers. (Findings 5-10, 14).

Lower Hinge Pin Key Reinstallation

The contract did not require the Corps to provide new lower hinge pin keys for the CRL. GCG was obliged to supply the items. However, the Corps chose to furnish the items. (Findings 5, 17).

When the Corps undertook to supply Government-furnished property to be used on the project, it assumed the duty to supply items suitable for the intended use. *S.S. Mullen, Inc. v. United States* [12 CCF ¶ 81,590], 182 Ct.Cl. 1, 389 F.2d 390 (1968).

The Corps was on notice that the old lower hinge pin keys removed by GCG in May 1991, differed from those shown in the drawings. The new Corps-furnished items proved to be unsuitable. Given these facts, the contract provides for an equitable adjustment under the Government-furnished Property and Changes provisions. (Findings 4c, 4d, 16, 21, 26).

On August 21-22, 1991, during a total of three hours, GCG's dive crew unsuccessfully attempted to install the defective lower hinge pin keys supplied by the Corps. The major work feature being performed by GCG on those dates was to reinstall both CRL gate sectors and all components. On August 23, 1991, GCG attempted to complete reinstallation of both sectors, including installation of both pin keys. On that date, GCG's dive crew worked on various tasks, including attempted installation of the pin keys, for four hours. The record does not show how much dive crew time was devoted exclusively to the pin keys or to other work. GCG neither completed installation of the pin keys nor all other work to reinstall the gate sectors. Remaining work, finalized on August 26, 1991, included completion of the reinstallation of the upper hinge pin, certain electrical components, and a lower hinge grease line at the south sector. None of the work completed on August 26, 1991, is dependent on installation of the lower hinge pin key. (Findings 5, 8, 18-20, 24).

There is insufficient proof that the time spent by GCG's dive crew in attempting to install the pin keys exceeded that which should have been expected. First, the actual time spent has not been definitely proved; it was less than seven and more than four hours. Second, GCG did not prove a reliable base for comparison, *e.g.* a pre-bid or other reasonable estimate. GCG's President testified that comparable work, in his experience, took no more than four hours. No specific details, description, or other determining factors on which that judgment was based were offered. Without more, the Board is unable to assign sufficient weight to the testimony to allow any recovery. (Findings 18-20, 22, 27).

Lacking convincing clear proof of injury, the Board leaves the parties where it found them. GCG failed to prove that it had incurred any extra costs as of the time and date when the Corps decided to complete the pin key installation work using its own resources. Failure to prove extra costs defeats that aspect of the claim. "The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of [extra costs] will be more than mere speculation." *Willems Indus., Inc. v. United States* [8 CCF ¶ 71,693], 155 Ct.Cl. 360, 376, 295 F.2d 822, 831 (1961), *cert. denied*, 370 U.S. 903 (1962).

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Delay

GCG claims time-related costs for remaining on the job after Friday, August 23, 1991, through Monday, August 26, 1991. GCG also seeks return of liquidated damages withheld by the Corps during that same time period. When the Government delays a contractor's performance such that overall completion is delayed, the Government is liable for time-related extra costs incurred by the contractor on account of the delay. *L.L. Hall Constr. Co. v. United States* [11 CCF ¶ 80,791], 177 Ct.Cl. 870, 379 F.2d 559 (1966). However, if the Government-caused delay is concurrent and intertwined with other delays for which it is not responsible, there is no recovery by the contractor for time-related extra costs. *Commerce Int'l Co. v. United States* [9 CCF ¶ 72,781], 167 Ct.Cl. 529, 338 F.2d 81 (1964). Finally, if any Government-caused delays, or other unforseeable causes of delay beyond the control and without the fault or negligence of the contractor, even if concurrent with contractor delay, are established, such delays may serve as a defense for the contractor against an assessment by the Government of liquidated damages. (Finding 4e). "[W]here a contractor is prevented from executing [its] contract according to its terms, [the contractor] is relieved from the obligations of the contract (as to time of completion) and from paying liquidated damages." *Levering & Garrigues Co. v. United States*, 73 Ct.Cl. 566, 578 (1932).

The modified contract completion date was July 14, 1991. There is no dispute that the work was substantially complete on August 26, 1991. On that date, GCG completed all work for which it was responsible and which was necessary to allow unlimited operation of the CRL. GCG's President testified that GCG could have finished all work on August 23, 1991, but did not on account of the pin keys problem. He reasoned that once the source of the problem with the pin keys was identified, there was no "hurry" and no justification to "work night and day" to complete all other work. (Findings 3, 24-25, 33).

The Board concludes that GCG delayed completion of the work from the modified contract completion date to August 26, 1991.[5] For two reasons, the Board is unable to agree with GCG that it could have finished all work on August 23, 1991. First, it did not do so. Reason and prudent business practice dictate that if GCG could have finished, it would have. Second and more specific, electrical work remained and was completed on August 26, 1991. The electrical subcontractor did not work on August 23, 1991; therefore, the electrical work could not have been finished. As for the intervening weekend, GCG apparently chose not to complete the work for which it remained responsible. Lacking any explanation other than that provided by GCG's President, as set forth above, the Board concludes that such work would not have been cost effective. (Findings 23-25).

There is no dispute that the Corps relieved GCG of the responsibility for performing installation of the CRL lower hinge pin keys on August 23, 1991. (Finding 21). At that point, the Board concludes, a Corps-caused delay ensued and ran concurrently with GCG's delay in completion. The Board holds that no liquidated damages may be assessed against GCG after August 22, 1991.

Liquidated damages at a daily rate of $648.00, were withheld by the Corps through and including August 26, 1991. GCG is entitled to return of four days' liquidated damages, $2,592.00, for the period August 23-26, 1991, inclusive.

CONCLUSION

The appeal is SUSTAINED IN PART. GCG is entitled to $2,592.00, plus interest in accordance with the Contract Disputes Act, from September 18, 1991 (Finding 32), until paid. *Ruhnau-Evans-Ruhnau Assoc. v. United States*, 3 Cl.Ct. 217 (1983); *JEM Dev. Corp.*, ASBCA No. 42872, 92-1 BCA ¶ 24,709. In all other respects, the appeal is DENIED.

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[5] The conclusion as to the start date of GCG's delay, that is, the modified contract completion date, is limited and applicable to the Board's discussion of liquidated damages in this appeal only. Neither party purported to prove anything in this appeal concerning delays which may have been experienced prior to August 23, 1991.

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[¶ 26,472] Soletanche Rodio Nicholson (JV)

ENG BCA Nos. 5796, 5891, October 29, 1993. Contract No. DACW03-89-C-0041.

Site Conditions—Unusual Conditions, Category II—Ground Stresses.—Rock that was unexpectedly difficult to excavate from a project site constituted a Category II differing site condition because the rock had been subjected to unusual and unforeseeable ground stresses. The compressive ground forces at the project site differed significantly from the norm and were not generally recognized as inherent in the contractor's work. Moreover, the contractor could not have anticipated the rock's compressive strength from the contract specifications or drawings or from its own prebid testing of rock samples taken from the site. The rock reacted differently in out-of-ground testing than it did on the site.

Site Conditions—Inspection—Subsurface Rock.—A contractor evaluated an excavation site appropriately, even though its method of testing the strength of subsurface rock did not take compressive ground stresses into account, because the contractor's methodology reflected trade custom and a reasonable appraisal of conditions at the site. The contractor conducted laboratory tests on a sample of rock quarried from the site. The rock reacted differently in out-of-ground testing than it did on the site, where it was subjected to unusual ground stresses. However, the contracting parties had no reason to believe that unusual stresses existed on the site. In the absence of any indication of unusual stresses, the normal trade practice is to measure the unconfined strength of rock.

Defaults, Excuses—Equipment Problems Caused by Site Conditions—Impossibility of Performance.—A contractor's failure to complete its excavation contract was excusable because the extremely low production rate caused by a differing site condition made it legally, commercially, and practically impossible to continue performance. On the basis of a reasonable assumption that normal ground stresses would be encountered at the site, the contractor had proposed and the government had accepted the use of a rock mill as a performance method. However, because of unusual ground stresses on the site, the rock exhibited great compressive strength, and the excavation could not be performed with a rock mill.

For the appellant: Smith, Pachter, McWhorter & D'Ambrosio, Vienna, Virginia, by Val S. McWhorter and Mark E. Hanson. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and James R. Daugherty, Government Trial Attorney, Little Rock, Arkansas.

Before JOCKISCH, SOLIBAKKE, and SHERIDAN, Administrative Judges.

JOCKISCH, Administrative Judge: In these timely appeals under the Contract Disputes Act of 1978, Appellant seeks to overturn Respondent's termination for default and to recover $3,137,622 for encountering a differing site condition at the project site. The appeals have been consolidated, as the essential facts and issues of each appeal are the same and as a decision in one of the appeals is tantamount to a decision of the other appeal. The issue of entitlement is to be decided at this time, with quantum reserved. Following lengthy negotiations and discovery efforts engaged in by the parties after the appeals were filed, a two week hearing was held in November, 1992, and the parties completed briefing of the appeals during June, 1993.

FINDINGS OF FACT

As most of the *general* facts pertaining to these appeals are not in dispute, the Board incorporated much of the parties' joint stipulation of facts into its findings.

1. Shortly after completion of the Beaver Dam located on the White River, Carrol County, Arkansas, in the 1960's, a seepage problem was discovered at Dike No. 1 of the dam. (Tr. 5-55). In May 1984, a reconnaissance report prepared under the dam safety program recommended that alternatives be considered for correcting the seepage problem. Mr. Charles Deaver, chief of the Little Rock District's geology section, was essentially responsible for considering the "cut-off" wall alternative. (Tr. 5-60). Mr. Deaver reviewed other cut-off wall projects including those performed by the Bureau of Reclamation and other Corps districts. (Tr. 5-61). Further, Mr. Deaver contacted construction

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contractors with experience relating to cut-off walls and rock cutting. (Tr. 5-65, 78). This led Mr. Deaver eventually to contact Soletanche, Inc., which specialized in the construction of slurry walls, trench excavation, and concrete walls. (Tr. 3-11-16). Soletanche had performed 94 projects using both the "4000" and "12000" model hydrofraises. (Tr. 2-72-89). The hydrofraise "4000" excavation capability was through limestone of 14,000 p.s.i. unconfined compressive strength. (Tr. 2-89, 90). A hydrofraise is a rock cutting machine, crane mounted with rotating wheel cutting pics (teeth). (Tr. 1-43-46).

2. Mr. Deaver provided geologic data, including the results of unconfined compressive strength tests on rock in the area of Beaver Dam, to Soletanche and other contractors. (Tr. 5-91, 109). Soletanche responded to Mr. Beaver that, based on the geologic information, including rock strength, Respondent had provided, it believed the hydrofraise could perform the rock excavation for the cut-off wall at Beaver Dam. (R.4, Tab O; Tr. 5-66, 75, 116, 120, 121). Experts for both parties agreed that unconfined compressive strength of rock is the main criterion used by the industry to determine the strength of rock and its cuttability. (Tr. 1-171; 4-21; 5-110; 8-216). Both Appellant and Respondent believed the hydrofraise could perform the project work at the time of the early discussions between the parties, which belief continued until the commencement of the actual excavation. (Tr. 1-56; 5-73, 74).

3. On April 19, 1988, the Government published a notice in the *Commerce Business Daily* that a Request For Proposals (RFP) would be issued for work to construct a concrete cutoff wall at Dike No. 1, Beaver Dam. (R.4, Tab D). The notice stated that a firm fixed price contract would result and that offerors would be required to submit separate technical and cost proposals, from which the Government reserved the right to award the contract without further negotiations. Soletanche, Inc., G. Rodio & Co., and Nicholson Construction Company, formed a joint venture titled Soletanche Rodio Nicholson Joint Venture for the purpose of bidding on and performing the contract for the Beaver Dam cut-off-wall. The Joint Venture agreement stated that Soletanche would serve as the sponsoring firm of the joint venture, with full responsibility for all technical and contractual matters. (Tr. 1-40).

4. In November 1987, Appellant, as well as other potential contractors, had suggested to Respondent that a full scale test with a rock-mill machine be performed at the site. Respondent would not allow a test at the site but suggested that Appellant make a test at a nearby quarry which it asserted had rock of the same formation as the rock at the project site. (Tr. 3-191, 192; 5-104; App. Exh. 78).

5. In December 1987, Appellant visited the site and selected seven samples of rock for testing (four from the quarry and three from Corps core boxes of Dike No. 1 material). Appellant sent these samples to Dr. Russell Miller at the Earth Mechanics Institute, Colorado School of Mines, for testing cuttability using a hydrofraise 12,000 pic (cutting tooth) and equivalent force. (Tr. 3-195, 198; 5-54, 55). Dr. Miller concluded from the linear cutting tests the following:

> Comparing the average physical properties, it can be concluded that the two sources of Rock are fairly similar. An exception is the tensile strength for the Samples is almost twice that for the Core. Abrasivity is also higher for the Samples from the quarry. *Using only the physical properties as a guide, it might be concluded that the Rock on site would be easier to cut than the Rock from the quarry.* [Emphasis Added] (App. Exh. A-32).

He also concluded that, based on the penetration rate per revolution achieved in the linear test, an instantaneous production rate of 10 square meters per hour should be expected. He also stated the following: (Tr. 4-60, 83, 84).

> 1) The estimated maximum normal load available per pic (2 tonnes) is sufficient to attain 0.20 inch penetration per revolution of the cutterhead....
>
> 2) Considering inefficiencies and losses, the actual performance will probably be between 0.10 and 0.20 inch per revolution of the cutterhead....
>
> 3) Good chipping action in the four samples as compared to the sandstones....
>
> (App. Exh. A-32).

6. In March, 1988, Respondent provided Appellant an information paper "to provide general information or data on the dam and proposed cutoff wall" and to inform that "of the alternatives studied to control seepage, a concrete cutoff wall has been recommended as the most advantageous and cost effective method." Respondent included as a part of the "Information Paper" a description of the geology of the site and rock strength distribution data "derived from over 200 rock core samples selected from both random and

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continuous (contiguous) zones (depths) in drilled borings at Dike 1." Respondent included the test data and a table of rock strength versus percentage of samples tested which showed the following:

Strength (psi)	*Percent of Samples*
1,000 to 6,000	23
7,000 to 11,000	45
12,000 to 16,000	23
17,000 to 21,000	7
over 21,000	2

(Tr. 2-98; App. Exh. A-41).

7. Appellant reviewed the information paper and concluded that since the vast majority of rock was below 26,000 psi for which the hydrofraise 1200 was designed and built to excavate, it would submit a proposal for the Beaver Dam cutoff wall when the request for proposals was issued by Respondent. (Tr. 2-98-103).

8. Figure 1, of Appendix A of the specifications indicated that the "Boone Formation" present in the foundation of "Dike 1" was to be found in the "Kirk Mountain Quarry" which was in close proximity to the excavation site. (Stip. 29; R.4, Tab E). Respondent had performed "Los Angeles" abrasion tests on rock samples from the Kirk Mountain quarry, which it included in the information provided prospective bidders. (Tr. 5-154). Further, Paragraph 2.1.4 of Appendix A encouraged offerors to obtain their own samples and perform their own tests to determine cuttability and excavatability of the rock expected at the project site. (R.4, Tab C). On August 25, 1988, Soletanche was given access to the Kirk Mountain quarry located near Beaver Dam. It selected and transported a large block of rock from the quarry offsite for full scale testing in Montereau, France. Also, core samples of the project area were obtained by it and submitted for cuttability testing to the Colorado School of Mines, which used the test methods described in Finding No. 5. These samples also were tested for compressive strength, tensile strength, acoustic velocities, and anchor abrasion. Based on the test results from France and the Colorado School of Mines, Appellant determined that a "hydrofraise" could excavate the cut-off wall even with "minor areas of high strength rock" present and that the excavation rates in the field could be estimated with a relative degree of confidence for bidding purposes.

9. Though Respondent later questioned the suitability of the rock sample taken from the Kirk Mountain rock quarry, which it had indicated to bidders to be representative of the rock formation to be found at the project site, Respondent's representatives, at the time, believed the rock sample to be representative of the rock to be excavated at Dike 1 and, at the time, offered no objection to the sample taken by Appellant. (Tr. 5-132-134).

10. The tests at Montereau, France, by the Paris School of Mines, established that the rock sample block, 5 feet 7 inches by 4 feet 3 inches weighing approximately 30,000 pounds, had an unconfined compressive strength of 25,000 PSI, which was higher than all but 2% of the test sample results provided potential bidders by Respondent in the request for proposals. (Stip. 23; Tr. 1-201, 202; 2-98, 130, 131).

11. The Paris School of Mines and the Colorado School of Mines tests on the rock and the cores produced unconfined compressive strength test results which were very similar. (Tr. 1-203; 2-120-121). Respondent raises one issue concerning another velocity test on the "Montereau rock" performed by Appellant's employees which appears to indicate a rock strength less than the other test results. Because of the manner in which that test was taken, very haphazardly, and because of the subsequent tests taken which provided confirming results of the earlier tests by the Colorado School of Mines and the Paris School of Mines, the Board considers the one non-conforming test to be an anomaly to be given little weight. (See Tr. 2-135, 135, 138, 190, 193; 4-56). The test of the rock sample at Montereau, France cost Appellant approximately $200,000. (Tr. 2-182-183).

12. Appellant used the same hydrofraise it used on projects at Monaco and at Mud Mountain, Seattle District Corps of Engineers, to excavate through the test block at Montereau, France. (Stips. 24, 62; Tr. 137-139). The project at Monaco required the hydrofraise 12000 to excavate rock with an unconfined compression strength of up to 30,000 PSI. (Tr. 1-72; 2-212). The instantaneous excavation rate at Montereau was similar to the excavation rate determined by the tests at the Colorado School of Mines. (Tr. 1-194). Appellant used these tests to determine an anticipated production excavation rate and, along with the abrasiveness tests, the pic consumption rate for the hydrofraise 12,000. (Stip. 41; Tr. 2-78-79, 87-88).

13. Request for Proposals No. DACW03-88-R-0005 was issued by the Government on September 22, 1988. (Stip. 21). Offerors were required to submit separate

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technical and cost proposals by November 17, 1988. This date was eventually changed by amendment to December 2, 1988. (R.4, Tab E).

14. The work was described in the RFP for the 1,475 long cutoff wall as,

> . . . constructing a concrete cut-off wall and associated work items to include design, construction, quality control and inspection of approximately 200,000 square feet of cutoff wall to depths ranging from 80 to 185 feet through an embankment and/or overburden, and a hard permeable zone of limestone foundation rock with compressive strength up to 27,000 psi . . . (R.4, Tab C).

15. Appendix A of the specifications indicated that 90% of the test samples had an unconfined compressive strength of 15,000 psi or less and that approximately 2% of the test samples registered an unconfined compressive strength of over 21,000 psi.

16. The Feature Design Memorandum (FDM) referenced in Appendix A of the RFP contained information about the material to be excavated for the cut-off-wall. The Appellant used the information referenced or provided in the specifications, along with its own confirming test results, in determining that a hydrofraise, a rock-mill excavating machine, could perform the excavation. Particularly, Appellant relied on the following technical information in the FDM:

> Based upon both the detailed analysis of subsurface conditions/materials (6a(2)) and extensive studies of designs and/or case histories of cutoff wall installations done by the Corps and Bureau of Reclamation, the method chosen to excavate the cutoff wall must be classed as "specialty" type work which cannot be designed, procured, or constructed by "standard" methods (plans/specifications, and IFB). Recommendations are to request proposals for design and construction of the wall because of the width limitations, large amount of rock, and depth, which will require specialized methods and equipment . . . Equipment for excavating the wall may include clamshell, rock mill (Hydrofraise), rotary-drill, power chisels, draglines, or any combination thereof. *A major part of the excavation can be performed with a rock-mill (Hydrofraise)* which is a hydraulically powered milling machine (see Figure 7). . . . unconfined compressive strengths to 15,000 p.s.i. (Priority rock exceeding 15,000 p.s.i.). Supplemental methods (equipment) may be required for minor areas of rock which exceed 15,000 p.s.i. or new techniques/developments may be required to improve the rock-mill. (Emphasis added). (R.4, Tab C; Stip. 31).

Appellant asserts that Respondent independently concluded and represented to bidders that the cut-off wall could be excavated with a hydrofraise, based upon its discussions and analysis with other Government agencies, other Corps of Engineers districts, and six separate companies experienced in excavation of the magnitude contemplated for this project. (Tr. 5-11, 107-116). However, Respondent asserts the statement in the Feature Design Memorandum that a major part of the excavation could be performed with the "rock-mill (hydrofraise)" was based upon industry representations, including representation from Appellant that a hydrofraise could perform efficiently in the subject material up to 15,000 psi.

17. On October 12, 1988, a pre-proposal conference was held at Beaver Dam. Seven representatives from the Joint Venture were in attendance. During the conference, the following questions were asked by potential bidders and responded to by the Government:

> Question: Can we get any further information on the composition and nature of the overburden material?
>
> Response: Additional information, including lab tests results, on overburden samples from boring BE-4, will be furnished by Amendment No. 0002.
>
> Question: Plans indicate that the upper part of Boone formation was not recoverable. Why?
>
> Response: Poor recovery of the Upper Boone was due mainly to the intensely weathered characteristics of this zone. Besides jar samples and lab results of the undisturbed samples from this zone, a new boring, BE-313, was recently drilled using a $4\frac{1}{2}'' \times 5''$ core barrel through the overburden. The log of this boring will be included in a future amendment. Also, the core recovered from this boring is stored at the site and available for inspection. (R.4, Tab F).

18. On November 9, 1988, Amendment No. 0002 was issued incorporating the technical data referenced in the preceding paragraph as well as minutes of the pre-proposal conference. (R.4, Tab G).

19. On November 11, 1988, a site visit was made by representatives from Soletanche and Rodio in the company of Patrick Jordan, geologist from the Corps of Engineers Little Rock District. They visited the

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quarry and the storage area where the core borings were kept by the Government. According to the report of the visit by Mr. Jordan, the primary interest of Appellant in the quarry was the potential abrasiveness of various materials at the site on the hydrofraise teeth (PICS). Several small samples were taken by Appellant of the upper weathered portion of the siliceous Boone chert which had a coarse grained texture. At the storage facility, they looked at cores from bore holes 31, 31A, 31B and 32 and from some other older core borings. (R.4, Tab H).

20. By letter dated December 1, 1988, the Joint Venture submitted both a technical and a cost proposal in the amount of $23,125,650, based upon an estimated production rate in overburden and weathered rock of 80-120 sq. feet per hour and in unweathered rock of 25 to 45 sq. feet per hour and upon an estimated consumption pic rate of 0.7 per sq. meter in overburden and weathered rock and of 4 per sq. meter in unweathered rock. (R.4, Tab I; Tr. 1-65, 66). Statements made in the proposal revealed that the Joint Venture viewed this as an exceptional project due, in part, to the hardness of the material to be excavated. The Joint Venture stated:

> A large proportion of the total cutoff wall area will be in rock with compressive strength ranging up to 27,000 psi. This is about twice the strength of any rock which has been encountered on dam rehabilitation projects in recent years. ... In view of the exceptional nature of this project, i.e., very large area of excavation through very hard rock, our Joint Venture considered that the exposure, or risk for the Government and the contractor in the case of error in estimating machine capability or output rates was unacceptable without additional data upon which to base cost estimates.
>
> Therefore, it was decided to invest in a full scale excavation test, using the Hydrofraise 12000 and a representative sample of Boone Limestone. For the test, a large block of rock was taken from Kirk Mountain Quarry, transported to Soletanche's testing ground at Montereau, France ...
>
> The confidence resulting from the test enables us to affirm that on-site production will be compatible with the sensitive nature of the project.... there is no place for uncertain performance, constant breakdowns or time spent in improving or adapting unsuitable equipment.
>
> ... this will remain a Hydrofraise job, with all the guarantees that this brings. ...

21. The Joint Venture proposed constructing the concrete cutoff wall to the depth and thickness prescribed in the specifications with the hydrofraise machine it had successfully used at the Mud Mountain Dam project. It asserted that this piece of equipment was the most powerful type of hydrofraise in existence. Appellant felt that, since the solicitation expressly prohibited, at Section 2E-1.1.2.1, the use of explosives, it clearly indicated that this project could be performed by the method contemplated in Appellant's proposal. (Tr. 1-60, 61). Also, it considered that it would be constrained to perform the cut-off wall under the concept in its response to the RFP, as specification, 1.1.2.1 stated the work was to be performed "as proposed." (Tr. 1-61). Further, at section 4.4(i)(b) of its technical proposal, the Joint Venture stated that it contemplated excavation of the wall at its estimated excavation rates within the required contract period using the hydrofraise 12000 as the primary excavation equipment, but that it planned to mobilize a drilling tool (the "Superdrill") for the purpose of aiding the hydrofraise excavation in the "minor areas" of unexpectedly difficult rock described in the Design Memorandum as being present at the site. By letter of December 12, 1988, the Joint Venture was requested to furnish a breakdown of its cost proposal (R.4, Tab J), which it provided on December 20, 1988. (R.4, Tab K).

22. By letter dated January 19, 1989, the Joint Venture was provided with the Government's evaluation comments on its proposal. (R.4, Tab L; Stip. 43; Tr. 1-68, 70). The Joint Venture submitted a revised proposal by letter of February 9, 1989. (R.4, Tab N). The revised cost proposal was in the amount of $19,410,650. In a letter of February 16, 1989, the Joint Venture explained its cost reduction and stated that it had been able to reduce its cost proposal without altering the technical level of its initial proposal. (R.4, Tab O). The cost reduction was based upon: (1) use of the hydrofraise used at Mud Mountain rather than manufacturing and mobilizing another one, (2) lower costs on pics, (3) a favorable exchange rate, (4) lower subcontractor cost for construction of work platform, (5) adjustments in insurance rates, and (6) reduction in margin. (Stip. 45, 46; Tr. 1-70-72; 5-18-21). Further negotiations between the parties were held on March 2, 1989.

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23. The Government requested that by March 16, 1989, best and final offers be submitted, and the Joint Venture submitted its best and final offer in the amount of $16,920,000. (R.4, Tab P; Stip. 52; Tr. 1-78). It stated that the reduced price was made possible by: (1) recent tests and improvements in the hydrofraise which allowed the down-the-hole hammer to be eliminated as a excavation aid, (2) an additional savings on the work platform, and (3) a further cut in their margin. No cost breakdown was provided with the best and final offer. (Stips. 52, 53; Tr. 1-79). The Appellant's workpapers indicated that it had increased the time of job performance from 32 to 40 weeks because of its elimination of the down-the-hole hammer from its final proposal. (Tr. 5-11, 20; App. Exh. 115, 116).

24. Respondent received only two offers to its RFP, both of which proposed using rock mills to perform the project. (Tr. 4-13; 5-146). By letter dated June 14, 1989, Contract No. DACW03-89-C-0041 was awarded by the Government to the Joint Venture of Soletanche Rodio Nicholson in the amount of $16,920,000, which accepted Appellant's proposal to perform the project excavation by use of the hydrofraise 12000. (R.4, Tab C; Stip. 55). The contract contained the following clauses pertinent to this appeal:

a. *General Provisions*

(1) G.P. 45, Disputes

(2) G.P. 48, Differing Site Conditions

(3) G.P. 49, Site Investigation and Conditions Affecting the Work

(4) G.P. 61, Changes

(5) G.P. 68, Termination For Convenience of the Government

(6) G.P. 69, Default

b. *Special Requirements*

(1.) COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK

The Contractor shall be required to (a) commence work under this contract within *10* calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than *760* days after the date the Contractor receives the Notice to Proceed. The time stated for completion shall include final cleanup of the premises.

(14.) PHYSICAL DATA

Data and information furnished or referred to below is for the Contractor's information. The Government shall not be responsible for any interpretation or any conclusion drawn from the data or information by the Contractor.

(a) The indications of physical conditions on the drawings and in the specifications are the result of site investigations by surveys....

c. *General Requirements*

(1) *Section 2E-Cutoff Wall*, particularly,

1.1.2.1 The cutoff wall shall be constructed of interconnected panels, columns, or a combination thereof. Excavation shall be performed by cutting, grinding, drilling, or pounding methods *as* proposed. The use of explosives or similar materials/methods will not be allowed. [Emphasis added].

2.1 General: The Contractor is responsible for maintaining stability of the excavations for the cutoff wall....

2.2 Panels: If the cutoff wall is to be constructed of panels, guide walls shall be constructed prior to excavating any portion of the cutoff wall.... The Contractor shall excavate a trench in panel segments in which the excavated length shall not exceed 30 feet nor be less than 5 feet.

2.2.1 The requirements for trench excavation quality are as follows:

2.2.1.1 Alignment: The cutoff wall alignment in the plan view shall be as shown on the drawings....

2.2.1.3 Width: At any depth and at any cutoff wall station, the trench excavation shall result in a continuous cutoff wall having a *minimum width of 24 inches.* [Emphasis added].

2.2.1.4 Joint Contact: At any depth along a panel joint, the minimum width of contact between adjacent panels shall be 18 inches....

2.2.1.6 If, in the opinion of the Contracting Officer, the trench quality is unacceptable, the Contractor shall be responsible for providing a solution satisfactory to the Contracting Officer. An unacceptable trench is defined as an excavation which would not provide for an 18-inch overlap between panels after concrete placement.

(2) *Appendix A—Geotechnical Data*, particularly,

2.1 General: The geologic description, drawings, water-level data, and test data in these specifications include information and records of geologic investigations for the work and are the final geologic data upon which design of the work is based....

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2.1.1 The following reports and/or design documents have been issued, some of which contain geologic data/information from previous studies (all were produced by the U.S. Army, Corps of Engineers, Little Rock District):

2.1.1.1 *Feature Design Memorandum*, Project Modification for the Major Rehabilitation Program, Beaver Dam, Arkansas, September 1987 (Revised December 1987).... [Emphasis added].

2.1.2 These documents contain information which may be valuable to offerors, and arrangements can be made to review the documents at the District Office....

2.1.3, which stated in part, that the samples and cores recovered by the Corps during its investigation were available for inspection by offerors.

2.1.4, which encouraged contractors, "to obtain their own samples and perform tests on the soil and rock materials to evaluate properties which the offeror believes to be significant in arriving at a proper bid."

2.1.5.5, which stated that, the borings had identified zones in the foundation rock of "extremely hard, random-depthed cherty (silica) zones in nodular, columnar, or lenticular shapes, and with compressive strengths (tested to date) up to 27,000 pounds-per-square-inch."

2.7, which stated that, the Corps had performed unconfined compressive strength tests on selected core samples from the Boone Formation, the results of which were presented in Table 1 to the solicitation.

2.7.1, which stated that,

"The Boone Formation (limestone and chert) appeared to exhibit the greatest strength. The high compressive strengths may be due to the chert nodules and lenses present in the formation. Approximately 10% of all cores tested were rated at 15,000 psi or higher...."

(3) *Feature Design Memorandum*, Project Modification for the Major Rehabilitation Program, Beaver Dam, Arkansas, September 1987 (revised December 1987), which stated on page 39,

"*Based on both* the *detailed analysis of subsurface conditions/materials* (6a(2)) and *extensive studies of designs and/or case histories of cutoff wall installations* done by the Corps and the Bureau of Reclamation, ...", the Corps had determined that: [Emphasis added]

Equipment for excavating the wall may include clam shell, rock-mill (hydrofraise), rotary-drill, power-chisels, drag lines, or any combination thereof. *A major part of the excavation can be performed with a rock-mill (hydrofraise). which is a hydraulically lowered milling machine (see Figure 7).* It consists of a large, weighted, metal frame, at the bottom of which are two rotating drums with hardened cutting teeth, all supported and controlled by a large crane.... *Supplemental methods (equipment) may be required for the minor areas of rock which exceed 15,000 psi* or new techniques/developments may be required to improve the capability of the rock-mill. [Emphasis added].

25. Following resolution of a protest, during which time the Respondent indicated to the Comptroller General of the United States that Appellant had submitted the best technical proposal, notice to proceed with the work was acknowledged by the Joint Venture on October 14, 1989. (R.4, Tab R). The completion date was established as November 13, 1991, which was 760 days following receipt of notice to proceed. (Stip. 57, 58).

26. The Contractor started mobilizing in November 1989 and began site work including platform construction on February 19, 1990. (R.4, Tab S1; Stip. 60; Tr. 3-5). Preparatory work, including the platform, was completed, and excavation for the cutoff wall was started on July 12, 1990. Based on the production rate used in preparing its estimate (see Finding 9), Appellant projected completion of the project in approximately 40 weeks. (R.4, Tabs D, C).

27. The initial excavation was started on Panel No. 67 on July 12, 1990, but the records do not show the depth of excavation obtained for that day. On July 13, 1990, the records show that the hydrofraise was able to excavate 54 feet in a working time of 2 hours and 26 minutes, for a production rate of 21.6 feet/hour. Eighty-seven pics (teeth) were replaced on the hydrofraise during the day. (R.4, Tab S). This overburden production rate was within the rate anticipated by Appellant in its bid estimate. (R.4, Tabs BC, DC).

28. No excavation was scheduled or performed on July 14-15, 1990.

29. On July 16, 1990, records show that, when the hydrofraise encountered unweathered rock, it was able to excavate 2.7 feet in Panel No. 67 during 3 hours, for an overall production rate of 0.89 feet/hour.

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The record indicated that 277 pics were replaced during that day. (R.4, Tab S). This was a production rate of approximately 10% of that used in preparing Appellant's estimate and a pic replacement rate approximately 3000% above that which it had estimated. (R.4, Tab DC; Stip. 65; Tr. 3-23-37).

30. On July 17, 1990, excavation continued on Panel No. 67 until a total depth of 68.47 feet had been achieved. The day's excavation amounted to 1.64 feet in 2 hours and 25 minutes for a production rate of 0.68 feet/hour, with a pic replacement total of 144. That afternoon, the hydrofraise was moved to Panel No. 1 to test initiation of excavation without digging a 10 foot pretrench for the hydrofraise. This proved to be unsuccessful. Later in the afternoon, the hydrofraise was moved to Panel No. 11c and achieved a depth of 29.5 feet (including the 10 foot pre-trench). The production rate was computed as 35.54 feet/hour. (R.4, Tab S).

31. On July 18, 1990, excavation on Panel No. 11c continued to a depth of 37.57 feet using a chisel in conjunction with the hydrofraise. The production rate was less than 3 feet/hour. (Tr. 3-38-43).

32. On July 19, 1990, excavation with the use of the chisel continued on Panel No. 11c to a depth of 41.63 feet achieving a production rate of approximately 2 feet/hour. (R.4, Tab S).

33. Production records through July 30, 1990, show the continuing patterns of high production in the early stages of excavation through overburden and weathered rock and of low production once the unweathered rock was encountered at a depth between 28 to 30 feet. (R.4, Tab S).

34. On July 31, 1990, the Joint Venture conducted tests using different types of pics on the hydrofraise in Panel No. 67. The Quality Assurance (QA) report shows that 5.5 inches of excavation was achieved in 1 hour and 42 minutes of production time. (R.4, Tab S; Tr. 1-212; 3-25-27).

35. By letter dated August 1, 1990, the Joint Venture gave written notice to the Administrative Contracting Officer (ACO) that the encountering of substantial problems in cutting through rock "may be the source of the differing site condition" and requested site conditions be investigated promptly by the Government. (R.4, Tabs T, AQ).

36. On August 1, 1990, the Joint Venture started drilling holes in the *in situ* material at Panel No. 11a in order to test whether this would have any effect on the production rate of the hydrofraise. This drilling continued on August 2, 1990. (R.4, Tab S; Stip. 73; Tr. 3-58, 59).

37. On August 3, 1990, following the predrilling to a depth of approximately 40 feet, the Appellant commenced excavation of Panel No. 11a. A depth of 34.9 feet was reached with a production time of 2 hours and 15 minutes, which was considerably below the estimated production rate used by Appellant in preparing its bid.

38. On August 6, 1990, excavation continued on Panel No. 11a using various types of pics. Excavation went from 34.9 feet to 38.65 feet in a production time of 2 hours and 5 minutes. Noted on the quality control (QC) report was the statement that it is "impossible for the hydrofraise to excavate the nonweathered rock even when more than 50% of the volume to excavate is predrilled with a Down-the-Hole Hammer."

39. When preparing its bid for excavating unweathered rock, Appellant had used an industrial production rate of *43 square feet per hour* and a pic consumption rate of *0.372 per square foot* based upon the tests performed at the Colorado School of Mines and Montereau, France and the unconfined compressive strengths stated in Respondent's documents. However, as detailed in the above findings (Findings 23-37), the industrial production rate achieved in unweathered rock was only *1.65 square feet her hour* and the pic consumption rate was *9 per square foot.* (Stip. 54, 78, 80, 94; App. Exh. 123; Tr. 3-58, 59).

40. By letter of August 7, 1990, the ACO acknowledged receipt of the August 1, 1990, letter and noted that the material at the site was the same as portrayed in the contract documents and that the Joint Venture had offered nothing to support its allegation of a differing site condition other than the low production rates. (R.4, Tab U; Tr. 3-64).

41. Geologists from the Little Rock District visited the site during the period of August 8-10, 1990, to investigate the site conditions. Their conclusion was that the material being excavated was as described in the contract.

42. In mid-August, 1990, Appellant substituted roller bits for the pics on the hydrofraise, without any significant increase in rock-excavation production. (R.4, Tab W). While the roller cutter system did result in an improved excavation rate, that rate was still less than half the anticipated rate, with pic consumption at more than six times the estimated rate. (Tr. 2-167; 3-67; App. Exh.

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120). The cutting wheels suffered from internal wear, necessitating overhaul or replacement, and the system for guiding the hydrofraise perpendicular to the wall was damaged to such an extent that it would have had to be redesigned or replaced for continued excavation. Furthermore, the hydrofraise had to be raised regularly to permit tightening of all bolts loosened by the significant vibration.

43. During this time, Respondent continued to remind Appellant that it was contractually obligated to continue work and complete the project in a timely manner. (App. Exh. 65).

44. On August 29, 1990, representatives of the Joint Venture met with the Contracting Officer to discuss the problems encountered. The Appellant stated that cutting the rock with the hydrofraise was commercially impractical. It proposed three options. The first was research and development of modifications to the hydrofraise based upon the on-site experience to date, at the Government's expense. The second was blasting, which was prohibited by the contract. The final involved addressing the leakage problem at the dam by means other than the concrete cutoff wall called for by the contract. In response to a question by the Government as to why the hydrofraise would not work, Appellant answered that it did not know, since its extensive pre-bid testing indicated it would work at the site. The Contracting Officer directed the Joint Venture to continue performance and rejected Appellant's proposed alternatives. (R.4, Tab X).

45. By letter dated October 1, 1990, the Appellant advised the Government's ACO that its study "makes it clear that the rock cannot be cut in an acceptable manner with the method contemplated by the contract, confirming the existence of a differing site condition." Included with the letter was a report prepared by Dr. Russell Miller, Colorado School of Mines, which stated that there is "an apparent difference in cuttability of the rock from the cutoff wall section and rock blocks of similar material and of the same formation obtained from a quarry nearby the site.... The rock in the cutoff wall section at Beaver Dam cannot be excavated in commercially practicable manner with the existing hydrofraise...." (R.4, Tabs Y, BT; Tr. 4-65). Appellant estimated that it would cost $400,000,000 and take 17 years to complete the project at the rate the hydrofraise had been able to cut the rock to date. (Tr. 3-109-113; App. Exh. 123).

46. On October 5, 1990, a meeting was held between representatives from the Contracting Officer's technical staff and the Joint Venture. The discussions centered around the hydrofraise's inability to cut efficiently the rock and the issue of a differing site condition.

47. By letter dated October 9, 1990, the Contracting Officer advised the Appellant that an analysis of the contract documents and recent studies and observation of the rock had been conducted in response to the Joint Venture's allegation of a differing site condition, that no differing site condition had been found, and that the Joint Venture had been unable to offer evidence of a DSC except the conclusion that one existed based upon production rates. (App. Exh. 18).

48. On October 14-16, 1990, representatives from the Corps of Engineers Waterways Experiment Station (WES) in Vicksburg, Mississippi, visited the project site for the purpose of investigating the site conditions and offering the Contracting Officer their opinions concerning the existence of a differing site condition. Their report concluded that there was no differing site condition but "strongly recommended" that Respondent retain a consultant recognized as an authority on rock mechanics. Respondent did not retain a rock mechanic consultant prior to the issuance of the termination for default but did retain one for the processing of this appeal. (R.4, Tab AB; Tr. 6-70, 71).

49. By letter dated October 13, 1990, Appellant informed Respondent that it could not proceed without a change order. (Tr. 1-97; App. Exh. 19). By letter dated October 29, 1990, the Government responded to the Contractor that it was considering terminating the contract for default because of the Joint Venture's failure to proceed with the work and its statements that it was unable to perform the excavation. The Government directed the Joint Venture to cure the deficiencies within ten days by resuming work such that it could complete the work within the contract time, or by submitting a written plan and schedule for completing the project.

50. On November 13, 1990, a meeting was held between representatives of the Joint Venture and the Contracting Officer. At the meeting, the Joint Venture offered for consideration other options for addressing the leakage problem at Beaver Dam, which did not include the concrete cutoff wall required by the contract. In attendance were representatives of Appellant's consulting firm,

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Woodward-Clyde, who stated for the first time that, though they could not then pinpoint any basis for a differing site condition, the hydrofraise's excavation difficulties could be accounted for by lateral stresses within the *in situ* material. (R.4, Tab AC; Tr. 4-94, 96, 174).

51. Respondent held an in-house meeting on November 20, 1990, in order to come to a "final decision with regard to this contract." (Tr. 7-72). The following conclusions were expressed in the memorandum of the meeting signed by Lt. Colonel Eaton, Deputy District Engineer:

* * *

> 9. After careful analysis of all the options available to us and all the discussions, we are convinced that the contractor does not have the capability to excavate the wall as required by the contract. We additionally believe that the contractor has made a good faith effort to live up to the terms of the contract and that his expertise in this field which led us to believe that the equipment he owns was capable of doing the job is the same expertise that now leads us to believe that the equipment he has is not advanced enough to complete this project.
>
> * * *
>
> As a result, the final decision was to terminate this contract for convenience.
>
> * * *
>
> We are making our decision on having seen the hydrofraise operate and acknowledging the fact that this is the most technologically developed machine of its type, yet it is not advanced enough to complete this project as specified.

(App. Exh. 131).

52. However, in a letter dated December 5, 1990, the Contracting Officer again requested the Joint Venture to show cause in writing why it should not be terminated for default, as he had found no excusable cause for the Joint Venture's failure to perform the contract. Referring to the November 13, 1990, meeting, the Contracting Officer wrote: "You also presented several alternative methods for dealing with the seepage problems at Beaver Dam. I appreciate your efforts in that regard, but must remind you that your contract is for construction of cutoff wall and not necessarily for correction of the seepage." (Stip. 89; App. Exh. 25; Tr. 1-101).

53. By letter dated December 12, 1990, the Joint Venture responded that the contract should not be terminated for default because the conditions the Joint Venture encountered differed materially from those indicated in the contract and were unusual in concrete diaphragm wall construction work. Further, the Joint Venture stated that it believed performance of the contract was commercially impracticable, and that the excavation and cutter pic consumption rates actually experienced would increase dramatically the cost of completing the wall and the time necessary for construction many times over that contemplated at the time the parties agreed to a contract price of $16,920,000 and a contract duration of 720 calendar days. It indicated that the cost to complete the excavation and construction of the cutoff wall alone, using the hydrofraise method of construction the parties contemplated when entering the contract, would exceed $400,000,000 and that the time for completion would exceed 17 years. (App. Exh. 26).

54. On December 14, 1990, Colonel McCluskey, Contracting Officer, terminated for default the Joint Venture's right to proceed with the contract. (R. 4, Tab AD). During the hearing on this appeal, Colonel McCluskey stated he "acted" on the advice of his staff. Appellant appealed on January 29, 1991. (R.4, Tab A; Stips. 90, 92; Tr. 7-101). This appeal was docketed as ENG BCA No. 5796.

55. A certified differing site condition claim in the amount of $3,127,209 was submitted to the Government, by the Joint Venture's letter of April 8, 1991. (R.4, Tab AE). Later, the Appellant requested permission to conduct on-site borings and tests, and Respondent granted permission. (R.4, Tab AF). These test activities were initiated by Appellant on April 14, 1991, and lasted through May 2, 1991. (Tr. 4-97-100).

56. By letter dated June 17, 1991, the Appellant revised its claimed amount upward slightly to $3,137,622. (R.4, Tab AG).

57. On June 18, 1991, the Appellant furnished Respondent a copy of the report prepared by its consultant, Woodward & Clyde, entitled, "Evaluation of Rock Conditions Influencing Hydrofraise Performance at Beaver Dam, Arkansas." (R.4, Tab AH; Tr. 4-97; App. Exh. 29). Conclusions reached by Woodward-Clyde in its report were:

> (1) The rock mass in the quarry from which the contractor extracted its prebid test samples is similar both geologically and mineralogically to the cherty limestone underlying the dike and was a repre-

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sentative source of rock for the large scale Hydrofraise and linear cutting testing.

(2) The quarry rock block sample used by the Contractor was of a strength which was comparable to the uppermost range of strengths reported by the Corps of Engineers in its Feature Design Memorandum.

(3) In reporting the results of compressive strength tests on the rock taken from borings drilled in the vicinity of the dike, the Corps of Engineers did not report the presence of unusual horizontal stress in the foundation rock nor its influence on the strength of the foundation rock mass. To the contrary, the Corps description of rock strengths indicated much lower strengths than actually experienced in the field under in situ conditions.

(4) ... in conducting its full scale excavation tests and in preparing its bid, the Joint Venture was not aware of, nor did it take into account the presence of high horizontal stresses and the possibility that they could significantly increase the strength of the rock mass in which the cutoff wall would be constructed....

(5) The results of the field testing program indicate that the horizontal stresses present in the rock mass are unusually high compared to the vertical stresses at the given testing intervals.... Such conditions are very unusual and may have a very significant impact on the strength of the in situ rock mass.

(6) The results of triaxial compressive strength laboratory tests (for determination of the confined strength of the rock) conducted in the stress ranges from the field tests confirm the results of the field tests and reveal that the confined strength of the stronger, cherty limestone could be as much as 40% to 75% greater than the unconfined compressive strength of the rock. Such strength increases in excess of 27,000 psi to an approximate maximum of 47,000 psi would adversely affect the cuttability and excavation production of the Hydrofraise.

58. Respondent provided the Woodward-Clyde report to WES for review. WES's review did not support the conclusion that unusually high *in situ* horizontal stresses were present or were the basis for the hydrofraise being unable to excavate productively the material. The WES report questioned the applicability of one type of test employed to determine confined compressive strengths and the ability of Woodward-Clyde to draw conclusion from one test result while ignoring a contrary test result. (R.4, Tab AI).

59. The parties presented voluminous contradictory evidence of experts on the issue of whether significant "lateral stresses" existed at the project site and, if they did exist, what effect, if any, those stresses would have on the strength of the rock and on its cuttability. (Tr. 4-67, 68, 114, 115, 133, 164-173, 183, 184, 200-202; 6-108, 134-136; 8-60, 112, 114, 116, 240-261). Issues among the experts ranged from appropriateness of testing procedure, validity of test results, effect of any lateral stress on strength or cuttability, what was known or should have known about lateral stresses in the region of the project, etc.

60. The experts agree that *unconfined* compression strength of the material is the factor used by the industry to determine cuttability and excavatability and that expected minor lateral stresses (*e.g.*, 3 to 3.5 horizontal over vertical) have limited, if any, impact on cuttability of rock and would not be considered by prospective bidders in the evaluation process for determining cuttability. However, the experts diverge on the issues of the effect of high lateral stresses (*e.g.*, 7-20 horizontal over vertical) on cuttability and of the existence of high lateral stresses at the project site. The Board notes the only test evidence presented in the record of lateral stresses at the site is Appellant's tests, which Respondent attempted to refute without providing any alternative substantive test results.

61. Though the issue of the experts' opinions in the appeal is a close question, the Board finds the preponderance of the evidence to support Appellant's experts' positions that unexpected significant lateral stress existed at the project site, that the lateral stress increased the *in situ* compressive strength of the unweathered rock to be excavated, and that the high lateral stress made the excavation of the rock significantly more difficult than could have been assumed from information in the RFP or from Appellant's preproposal testing of unconfined material.

62. By decision dated October 10, 1991, the Contracting Officer denied Appellant's DSC claim of April 8, 1991, and Appellant appealed on October 22, 1991. (Stip. 93, 94, 95). This appeal was docketed as ENG BCA No. 5891.

63. Respondent entered into a reprocurement contract with the joint venture of Rodio Nicholson, two of the three members

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of the original joint venture. (Tr. 7-150). In the reprocurement contract Respondent changed the minimum width of the cut-off wall to 18 inches rather than the original established 24 inches and allowed a different method of excavation and construction rather than the required excavation by the use of a rock milling hydrofraise in Appellant's contract. (Tr. 7-148-154). Respondent contends the reprocurement contractor is constructing the wall on schedule, but Appellant asserts the reprocurement contractor is already behind schedule. (Tr. 7-140, 142). The Board finds that neither party has presented clear evidence of the timeliness/effectiveness of the reprocurement contractor's excavation/construction at the time of the hearing.

POSITION OF THE PARTIES

Appellant asserts that its termination for default should be converted to a termination for convenience as it encountered differing site conditions which made the project practically impossible to perform and that it should receive an equitable adjustment for its attempt to overcome the differing site conditions it encountered at the project site for the following reasons:

a. The specifications included in the Government's request for proposals reasonably led Appellant to conclude it could rely on the Respondent's stated assertion that the excavation could be performed with a hydrofraise;

b. The specifications specifically stated that a hydrofraise excavation procedure could perform most of the excavation;

c. The geological information provided in the specifications informed bidders that only minor areas of the excavation would be difficult for a hydrofraise method of excavation;

d. The significant pre-bid tests made by Appellant, which tests Respondent encouraged bidders to make, of material similar to material to be excavated showed that the excavation could be performed by the use of a hydrofraise;

e. The significant reduction in expected production rates upon its encountering unweathered rock demonstrated the existence of a differing site condition and the commercial impossibility of performing under the original concept of the project;

f. The Government knew of Appellant's proposed procedure for excavating the cut-off wall with the hydrofraise and, not only concurred in its use, but evaluated the technical proposal as the best concept submittal;

g. The Appellant's experts' evaluation of the excavation difficulties showed that unusual lateral pressures were being applied to the *in situ* material to be excavated which increased some of the unweathered rock to a hardness of 47,000 psi and caused the material to perform in an unusual manner *in situ* as opposed to when tested for unconfined compressive strength in the laboratory.

h. The Contracting Officer acted arbitrarily and abused his discretion in issuing the termination for default.

Respondent counters that the termination for default was proper and that Appellant presented no evidence of defective specifications or a differing site condition creating a commercially impossible project for the following reasons:

a. The material to be excavated by Appellant was the same as described in the specifications;

b. The Appellant has presented no evidence of a differing site condition other than extrapolating the theory of a differing site condition from the lack of production it encountered when excavating unweathered rock;

c. The specifications did not guarantee that a hydrofraise could perform the entire cut-off wall excavation, as only the Appellant stated so in its final technical proposal;

d. The Appellant, not the Government, had the responsibility for devising a system to excavate the cut-off wall, which is why this request for proposals was in two steps;

e. The specifications warned bidders of material up to 27,000 psi approximately 10% of the time, which Appellant recognized as a difficult project;

f. The Appellant's technical expert's report of lateral stress causing the material to act as if it was 47,000 psi in strength and making the material react differently from what usually would be expected *in situ* is not convincing and is based on inaccurate and selective test results;

g. The Appellant has not provided any supporting evidence of commercial impossibility in excavating the cut-off wall;

h. The Respondent did not concur in Appellant's proposed method of excavation but relied upon Appellant's expertise when it accepted Appellant's proposal for

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the excavation of the cut-off wall, and Appellant relied upon its own studies and tests to develop its proposed method of excavation.

i. The Contracting Officer was fully justified and exercised reasonable discretion in terminating for default Appellant's right to proceed with the contract.

DECISION

In these consolidated appeals, Appellant has asserted that it encountered either or both Type I and II differing site conditions (DSC) and/or that the specifications provided by Respondent were defective. For the following reasons, the Board concludes that Appellant encountered a Type II differing site condition which made it practicably impossible for it to continue to perform the excavation of the cut-off wall with the hydrofraise as contractually required.

The Board stated the generally recognized criteria for proving a Type II differing site condition in *Guy F. Atkinson,* ENG BCA No. 4693, 87-3 BCA ¶ 19,971, as follows:

> When asserting a type II, differing site condition claim, the Appellant has a relatively heavy burden of proving the encountering of conditions "of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of [this] character...." To prevail, the Appellant's evidence must demonstrate what is normally to be expected and what was encountered was materially different from the norm.

The Government indicated in the contract the classification of material to be encountered from the core borings, the compressive strength of the material, and the methods for potentially successful excavation. As to the classification of the material to be encountered, the parties have little, if any, disagreement and the evidence supports the conclusion that the material at the project site was essentially of the same classification as indicated in the contract specifications. As to the statement of *unconfined compressive strength* which indicated *some* material between 15,000 PSI and 27,000 PSI, the evidence supports no material difference between the indicated and the actual. As to the method of excavation, the Government stated and Appellant concurred that "a major part of the excavation can be performed with a rock mill (hydrofraise) which is a hydraulically powered milling machine..."

The Feature Design Memorandum (FDM) prepared by the Government specifically stated that a cut-off wall was the best method to control seepage and that the cut-off wall could be excavated using rock-milling (cutting) machinery (hydrofraise). The record is replete with the evidence of Respondent's history of extensive investigation of the problem and solution for the seepage, including contacting Appellant and others in the industry, other Corps districts, and its own experts to come to its independent judgment and decision that a rock-mill machine could perform the project excavation.

Appellant, also, took added actions to confirm the cuttability of the rock by the hydrofraise 12000. Appellant considered in great detail the plans and specifications, reviewed the Government's core borings and test results, brought in experts to evaluate Government test results and to make on-site tests, and, most significantly, quarried a large rock sample of material indicated to be similar to the material specified in the contract, found at the site, and reflective of the high side (26,469-27,220 PSI) of PSI scale, which it sent to France for testing with the hydrofraise excavation procedure. All of these efforts by SRN, along with the Respondent's indications in the specifications of the unconfined compressive material strength and of this being a hydrofraise project, led Appellant to the reasonable conclusion that the hydrofraise could satisfactorily perform the project.

Neither the Appellant nor the Government recognized the adverse conditions existing in the *in situ* material or any significant difficulty to be expected in the *in situ* material as compared to cutting the same material in a controlled laboratory situation. The Contractor had no way of anticipating from the specifications or its own tests the increased difficulty in cutting the rock it encountered when it was in its *in situ* position.

The Appellant has not solely relied on the lack of production for its proof of a differing site condition. Appellant utilized the drastic reduction it experienced in excavation from what it expected when it bid the project as a make-weight argument of encountering something different from expected, but it also went further in its proof. Its experts showed that the *in situ* material reacted differently when subjected to the lateral stresses applied to it as it lay in the ground than when it was quarried and tested without the external pressures to which it was subjected *in situ.*

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Respondent agreed with Appellant that, unless a significant concern with lateral stress was known to exist at a project area, which would not be the norm, designers use the determined "unconfined compressive strength" as their basis for evaluating rock strength, cuttability of the rock, and excavation rates. Respondent's designers/estimators based all of their decisions and estimates on the "unconfined compressive strength" of the rock to be excavated without consideration or concern for the existence of extreme lateral stresses. Respondent agreed with Appellant that the trade practice is to use the unconfined compressive strength test results in formulating project excavation procedures. Neither the Government nor Appellant was concerned that the laboratory tests would not reflect the actual condition of the *in situ* material. Neither party considered the existence of lateral stresses to be significant.

Both parties expected the tested and calculated "unconfined compressive strengths" of the rock to be excavated to be reflective of the cuttability and excavatability of the rock. As minor confining stresses normally have either limited or no impact on the cuttability of rock, neither party expected that significant lateral stresses would exist at the project site which would significantly increase the strength of the *in situ* rock and decrease its cuttability and excavatability.

Though the experts presented to the Board differed greatly on what was to be expected at the project site and on the adequacy and reliability of Appellant's post-termination "stress" testing, the preponderance of the evidence indicates that the hydrofraise 12000 should have been able to excavate rock with the unconfined compressive strengths stated in the contract specifications and that the rock did not behave *in situ* as was to be expected. The most credible evidence presented to the Board was by Appellant and its experts which indicated that the *in situ* rock behaved materially differently from the norm because of significant lateral stresses (7-20 horizontal to vertical stress actual as compared to 3-3.5 horizontal to vertical stress expected) exerted upon it which increased its strength and reduced its cuttability.

Though Respondent urges that Appellant's tests allegedly indicating the existence of high unexpected lateral stresses at the project site were not accurate, performed properly or accepted in the industry as appropriate, the record indicates the Appellant's various and different tests corroborate one another in result. Though the experts in the field of rock mechanics are divided on the reliability of the tests and results, Respondent made no effort of its own to determine the existence or magnitude of lateral stresses at the project site. The best evidence before the Board, upon which the Board must rely, was that presented by Appellant.

From the record as detailed above, the Board concludes Appellant encountered material different from that normally to be expected from rock with the unconfined compressive strengths listed in the contract. The impact of significant lateral stresses on the rock strength and cuttability was not ordinarily encountered or generally recognized as inhering in work of this character. Because of these unusual conditions at the site, the "unconfined compressive strength" measurements used by the industry and included in the contract specifications were not an accurate indication of the cuttability of the rock, as the rock behaved *in situ* differently from what reasonably should be expected.

Summarizing,

a. The Request for Proposals allowed for the use of a hydrofraise method of excavation;

b. The Appellant's reasonable tests showed that a hydrofraise would excavate the cut-off wall material;

c. Appellant used the most-powerful hydrofraise then in existence;

d. Respondent did not take issue with Appellant's machine or workmanship;

e. Respondent recognized that some of the unweathered rock encountered reached an *in situ* confined compressive strength of 42,000 PSI, significantly above the upper limit of the unconfined compressive strength of 27,000 PSI stated in the RFP;

f. Appellant tried various other excavation procedures by utilizing different bits on the hydrofraise and by drilling with a super-drill, with little or no increase in production.

Why, then, did the hydrofraise not work in the unweathered rock when both parties believed it would, tests indicated it would, and the unweathered rock tested was essentially of the same composition and unconfined compressive strengths as that found at the project site? The only reasonable conclusion is that the unweathered rock *in situ* acted materially differently from the norm and from what was expected by the parties from the results of the tests of the rock prior to actual excavation. Thus, the Board con-

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cludes that Appellant encountered material which behaved differently from what a reasonable contractor would have normally expected at the project site and, therefore, it encountered a Type II differing site condition. *See Kinetic Builders, Inc., supra; J Lawson Jones Construction Co., Inc.,* ENG BCA No. 4363, 86-1 BCA ¶ 18,719; *R.A. Heintz Construction Co.,* ENG BCA No. 3380, 74-1 BCA ¶ 10,562.

Appellant has met its heavy burden in proving by the preponderance of the evidence that a Type II differing site condition existed at the project site. Having found the existence of a Type II differing site condition, discussion of Appellant's Type I DSC and defective specifications allegations are unnecessary.

Having found the existence of a Type II differing site condition, we now focus on the issue of the termination for default, as relates to Appellant's failure to continue performance of the contract. The existence of "practical impossibility" is alleged by Appellant to excuse its not continuing to perform the contract, which would include overcoming the differing site condition. In *Guy F. Atkinson Co.,* ENG BCA No. 4771, 88-2 BCA ¶ 20,714, we stated the general concept of legal impossibility as follows:

> Legal impossibility may be established without showing actual or literal impossibility. Thus, a finding of legal impossibility may be based on "commercial impracticability." *Hol-Gar Mfg. Corp. v. United States* [11 CCF ¶ 80,438], 175 Ct.Cl. 518; *United States v. Wagematic Corp.* [11 CCF ¶ 80,417], 360 F.2d 674 (2d. Cir. 1966).
>
> The principle of practical impossibility consists of the theory that the object of the contract could not be accomplished without commercially unacceptable costs and time input far beyond that contemplated in the contract. *Foster Wheeler Corporation v. United States* [20 CCF ¶ 83,110], 206 Ct.Cl. 533 (1975). Absolute impossibility is not required, if the specifications are so time consuming as to be outside the basic objectives contemplated by the parties. *Tombigbee Constructors, et al. v. United States* [14 CCF 83,360], 190 Ct.Cl. 615 (1970); *Johnson Electronics, Inc.,* ASBCA No. 9366, 65-1 BCA ¶ 4628; *Natus Corp. v. United States* [11 CCF ¶ 80,882], 178 Ct.Cl. 1, 371 F.2d 450 (1967); *Clark Grave Vault Co. v. United States,* 178 Ct.Cl. 52, 371 F.2d 459 (1967). The principle that practical impossibility may exist when the work cannot be completed until much later than the time set forth in the contract is well established. *Appeal of Schurr and Finlay, Inc.,* IBCA No. 644-5-67, 68-2 BCA ¶ 7200; *Appeal of Ace Electronics Associates, Inc.,* ASBCA No. 10711, 66-2 BCA ¶ 5750; *Tombigbee Constructors v. United States, supra.*
>
> As noted before, practical impossibility need not be actual impossibility. It can be such that it is economically infeasible or it is not possible to construct within either the allotted or a reasonable construction time. As best expressed, practical impossibility means that the result asked for is not possible within the basic objectives contemplated by the parties so as to amount to commercial senselessness.

The preponderance of the evidence in this appeal establishes the classic case for legal, practical, commercial impossibility. Respondent has admitted that a rock mill (hydrofraise 12000) as stated in Appellant's proposal and as accepted by Respondent in the contract *could not* perform the excavation. Further, Appellant's evidence, which has not been refuted by Respondent, suggests that it might have taken up to 17 years and cost up to $400,000,000 (rather than 760 days and $16,920,000) to complete the project using the contract-required method of excavation. These projections may be influenced by some degree of hyperbole. However, the actual production rates experienced by Appellant during its performance show not merely a more expensive effort to perform the contract but clearly a projected commercially unacceptable cost and a time far beyond that contemplated in the contract.

Respondent urges that the contract was not practically impossible because of the alleged successful effort of the reprocurement contractor. However, the reprocurement contract is not based upon the same specifications under which Appellant was performing, and the reprocurement contractor has not progressed sufficiently to determine whether it is proceeding satisfactorily or not. In fact, there is evidence in the record indicating the reprocurement contractor is behind schedule. Thus, Respondent's effort to demonstrate commercial practicability of the Appellant's contract is unconvincing and not supported by the record.

Since the extremely low production rate caused by the differing site condition made it legally, commercially, and practically impossible to continue performance, Appellant was justified in not continuing to attempt to "slug" through the excavation, its non-per-

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formance was excusable, and Respondent's termination for default was improper. The default termination is, hereby, converted to a termination for the convenience of the Government.

CONCLUSION

The consolidated Appeals of SRN are SUSTAINED. The appeals are remanded to the Contracting Officer for further action as provided in the clause, "Termination For Convenience of the Government."

[¶ 26,473] Maitland Brothers Co.

ENG BCA No. 5782, October 13, 1993. Contract No. DACW17-87-C-0059.

Labor—Contract Work Hours Act—Overtime.—The government's failure to inform a breakwater construction contractor of the applicability of the local double-time overtime requirement did not constitute a breach of a duty to cooperate, despite the contractor's submission of a forward pricing proposal for a change in the stone placement method that specified overtime at the federal time-and-a-half rate, because the contractor failed to show that the government knew that the contractor underpriced overtime work. The implementation of the local double-time rate was compatible with the minimum set by the Contract Work Hours and Safety Standards Act, which mandated that contractors on federal projects pay for overtime work at a rate of "not less than one and a half times" the basic pay rate. The record did not show that the government required the contractor to incur the overtime costs to achieve timely completion.

Performance—Duty to Disclose Superior Knowledge—Readily Available Information.—The government's failure to inform a breakwater construction contractor of the applicability of the Puerto Rico double-time overtime requirement did not constitute a breach of a duty to disclose superior knowledge regarding the local overtime law, because access to the Puerto Rico overtime requirement was available equally to all parties. The contractor did not make a reasonable and diligent investigation of information that was generally available.

Performance—Specifications—Defects.—A contract for the construction of a breakwater in Puerto Rico was not defective, despite its failure to refer to Puerto Rico's labor law requiring double-time payments for overtime work, because the contract mandated overtime payments at a rate not less than time and a half, and the Permits and Responsibilities clause advised the contractor to investigate the effect of local laws. If the contractor had observed the contract's requirements and had inquired, it would have discovered that Puerto Rico mandates double-time payments for overtime work.

Mistakes—Mutual Mistakes—Mistake of Law.—Under a contract for the construction of a breakwater in Puerto Rico, the parties' failure to consider local overtime requirements at the time of contract award and execution of a modification changing the stone placement method was not a mutual mistake of fact that entitled the contractor to recover the additional overtime costs it was required to pay, because the contract did not mandate overtime work, and the contractor's decision to use overtime work was a business judgment intended to facilitate early completion rather than the result of any confusion regarding the scope and nature of the work in the contract formation or in the ensuing modification. Moreover, the Permits and Responsibilities clause required the contractor to comply with local law, and any mistake would be one of law rather than of fact. The risk flowing from ignorance of or inattention to local laws and work conditions rested with the contractor.

For the appellant: McCormick & Maitland, Norfolk, Massachusetts, by Edward J. McCormick III. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., William A. Baxter, Government Trial Attorney, Jacksonville, Florida, and Noel Acevedo-Mendex, Government Trial Attorney, San Juan, Puerto Rico.

Before SOLIBAKKE, SHERIDAN, and JOCKISCH, Administrative Judges.

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SOLIBAKKE [1], Administrative Judge: In this timely appeal, Maitland Brothers Co., seeks $219,383.31 in additional compensation for overtime costs it incurred in connection with the construction of a protective breakwater at the historic El Morro fort in San Juan, Puerto Rico. A hearing was held and the parties have filed briefs. Only entitlement is before the Board at this time. This appeal is processed under the Contract Disputes Act of 1978, 41 U.S.C. § § 601 *et seq.*

FINDINGS OF FACT

1. Contract No. DACW17-87-C-0059 was awarded to Maitland Brothers Co. (Maitland or Appellant) by the Jacksonville District, U. S. Army Corps of Engineers (Corps or Government), on September 25, 1987, in the amount of $7,888,101.10. Under the terms of the contract, Appellant was required to construct a stone breakwater and revetment, along with various other barrier measures designed to protect the historic El Morro fort at the entrance to San Juan harbor, in San Juan, Puerto Rico, from the effect of ocean-driven erosion. By its terms, the contract required Appellant to complete the work in 1,095 calendar days. (R.4, Tab 14; Tr. 1-14).

2. In addition to the "Changes (1984 APR)," "Site Investigation and Conditions Affecting the Work (1984 APR)," "Permits and Responsibilities (1984 APR)" and other clauses customarily included in Corps of Engineers construction contracts, the contract contained the following General Provision germane to this appeal:

> 19. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION (1986 MAR)
>
> (a) Overtime requirements. No Contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborers or mechanics ... in any workweek in which the individual is employed on such work to work in excess of 40 hours in such workweek unless such laborer or mechanic receives compensation at a rate *not less than 1-1/2 times* the basic rate of pay for all hours worked in excess of 40 hours in such workweek.

(Emphasis supplied). (R.4, Tab 14).

3. Notice to Proceed was received and acknowledged by Appellant on October 29, 1987. (R.4, Tab 12).

4. In its bid, Appellant included a significant allowance for overtime work—generally about two hours per day per employee—with the expectation of completing the job ahead of schedule. According to Appellant's President, Mr. John Maitland, it was Appellant's practice to try to finish projects ahead of schedule, since early completion produced the "best economic position" for Appellant. Overtime work was one means of attaining early completion. (Maitland Deposition, at 7). In addition to the cost savings attendant to early completion, Appellant's estimator, Mr. Gary Maitland, observed that certain efficiencies can be achieved in marine construction by working ten-hour days. Among other things, a full eight-hour work day could be achieved, because transit time to and from the work site was not "lost." In the bid, Mr. Gary Maitland priced overtime work at time and one-half. (Tr. 1-122-27, 130-32).

5. The breakwater was to be constructed, in part, using Government-furnished stone. The stones, ranging in size up to 45 tons, were furnished with imbedded wire cables in the form of a loop, which was supposed to aid in lifting and placement. However, Maitland immediately experienced problems in handling the stones, because the wire loops tended to break easily. Because of the failure of the cables and the attendant safety factor, Maitland notified the Government of the problem in early May, 1988. (Tr. 1-17, 65-67, 96; App. Supp. R.4).

6. In July, 1988, following discussions between the parties, Maitland proposed using cranes equipped with grapples for rock handling and placement, and forwarded a cost proposal to the Government seeking $5,622,808.42 in additional costs arising from the proposed change in stone placement method. Included in the calculations supporting the proposed change were labor cost estimates showing overtime work priced at time and one-half. (App. Supp. R.4).

7. Maitland began placing stone using grapples, but its overtime usage increased because stone placement using grapples was slower than it had anticipated, and the use of grapples increased its maintenance time, at the expense of operating time. Mr. Gary

[1] The Board adopts the opinion of its Hearing Examiner, Thomas H. Gourlay, Jr., who presided at the hearing of the appeal.

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Maitland estimated that overtime utilization per job category doubled following the adoption of the grapple placement method. Maitland's efficiency also was impaired because it had difficulty recruiting local skilled operators. (Tr. 1-69-75, 86, 97-98, 102).

8. Bilateral Modification P00001, dated December 22, 1988, provided a $1.5 million increase to the contract price for changing the method of stone placement from wire hooks to the grapple method. The modification effected no change to the contract term. No time extension was granted. The instrument also contained the following language:

> It is understood and agreed that this adjustment constitutes an accord and satisfaction between the Government and contractor with respect to any and all added costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, for performance of the change within the time stated.

(Exh. G-1; App. Supp. R.4; Tr. 1-17; Maitland Deposition, at 13).

9. Appellant followed a work regimen that included seven-day work weeks, multiple shifts and overtime work, which enabled it to complete the project almost one year ahead of schedule. While the Government was aware of Maitland's unilateral plan to speed up performance, it did not order early completion or otherwise dictate Maitland's work schedule. (Tr. 1-18-19, 33, 37, 83; 2-7, 12, 43; App. Supp. R.4).

10. On April 12, 1989, Appellant received a letter from Ivan Garau Diaz, Esq., asserting a claim on behalf of several Maitland employees for unpaid overtime salaries on the El Morro project. Relying on "Mandatory Decree #44," issued by the Minimum Salary Board of Puerto Rico, Mr. Diaz indicated that applicable Puerto Rico labor law required that employers pay employees double time ("tiempo doble") for work in excess of 8 hours per day. (R.4, Tab 4).

11. Puerto Rico labor law with respect to overtime payments and eligibility reads as follows:

> Section 4—Extra hours of work are:
>
> (a) The hours that an employee works for his employer in excess of eight hours during any period of twenty-four consecutive hours;
>
> (b) The hours that an employee works for [his] employer in excess of forty-eight hours during any week, unless the hours worked daily in excess of eight are paid at double rates....
>
> Section 5.—Every employer who employs or permits an employee to work during extra hours shall be obliged to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours; *Provided, however*, That every employer in any industry in Puerto Rico covered by the provisions of the Fair Labor Standards Act enacted by the Congress of the United States of America on June 25, 1938, as heretofore or hereafter amended, shall be under obligation to pay only for each hour of work in excess of the legal eight-hour working day, or in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon for regular hours, save when by a decree of the Minimum Wage Board or by a collective labor agreement, other working and or compensation standard is heretofore or hereafter fixed....

The statute also provided for a one-hour meal period, and if an employer did not provide such a period, it was obligated to pay double time for the affected period or fraction thereof. (R.4, Tab 8).

12. Appellant's personnel alleged that they were unaware of the double time requirement during performance, since the contract was silent, the Corps did not indicate that overtime was to be paid at the higher rate, and they did not receive any contemporaneous employee complaints. (Tr. 1-54, 107-08). The United States Department of Labor "Job Site Poster" (WH Publication 1321) that was displayed at the site merely stated that employees were to "be paid not less than one and one-half times (your) basic rate of pay for all hours worked over 40 a week. There are some exceptions." However, Mr. Gary Maitland acknowledged that the term "not less than" reasonably connotes only a minimum rate to be paid for overtime work; a higher rate might, in fact, apply. (R.4, Tab 7; Tr. 1-50-51, 137-38).

13. Appellant was aware that certain local costs often vary from the "average" costs encountered by contractors. In this regard, Maitland's estimators made specific inquiry regarding local sales taxes in Puerto Rico, as well as other matters. However, they assumed that overtime in Puerto Rico would be paid at the "standard" time and one-half rate, and made no separate inquiry concerning these rates. (Tr. 1-87-89, 100-01, 126, 133, 135; Maitland Deposition, at 8).

14. Mr. Antonio Rivera, the Chief of Construction Operations and Acting Resident Engineer, reviewed Maitland's cost proposal for the change to grapple placement, but he

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did not verify the labor rates supplied by Appellant. Mr. Rivera was unaware of the double time requirement, and he did not notice that Maitland priced overtime work at time and one-half. Instead, he focussed primarily on the overall reasonableness of Maitland's overall proposal, rather than individual cost elements, and analyzed it from the perspective of whether the work could be performed at an acceptable total cost to the Government. Dr. Emilio Colon, the Area Engineer, was generally aware of the double time requirement, but did not convey this information to Maitland. The record is not clear whether in analyzing Appellant's cost proposal Dr. Colon reviewed the projected overtime rates. (App. Supp. R.4; Tr. 1-35-36, 53, 68; 2-4, 21-28, 48).

15. In a letter to Dr. Colon dated May 2, 1989, Mr. Robert W. Hall, Appellant's Executive Vice President, referred to the letter from Mr. Diaz, and opined that, if Mandatory Decree #44 obligated Maitland to pay double time for hours worked in excess of 40 hours per week, the decree would operate to supercede GP-19, and would constitute a change to the contract. He further indicated that a claim would be filed. (R.4, Tab 5).

16. Dr. Colon rejected Appellant's argument, and stated that any increased overtime costs were a result of Appellant's unilateral acceleration of the work, and that the Government was not responsible for the increased costs incurred by Appellant as a result of its unilateral business decision. Dr. Colon also addressed the interrelationship between the Puerto Rico labor provisions and the Federal provisions, observing that the Contract Work Hours and Safety Standards Act ("CWHSSA or Act") merely required employers to pay *at least* time and one-half for overtime work; there was nothing in Federal law precluding a higher overtime rate. He further noted that, under the provisions of the "Permits and Responsibilities" clause, Appellant was required to comply with all local laws, and concluded that Maitland was required to pay the higher overtime rate prescribed by Puerto Rico law. (R.4, Tab 6).

17. Appellant requested a Contracting Officer's final decision on May 26, 1989, and expressed its disagreement with Dr. Colon's position as follows:

> We disagree with your findings that [the "Permits and Responsibilities" clause] makes this overtime the Contractor's responsibility. [The clause] does not address payroll information. Overtime requirements are addressed in Clause 19 and are quite clear. The Contract Clauses are titled "Construction-Puerto Rico" and any special payroll requirements must be included in Clause 19. We have a right to rely on the specifications, as included in the bid package to base our costs on. You have an obligation to include all areas that affect costs so bidders can include these costs in their respective bids.

(R.4, Tab 9).

18. On February 14, 1990, Appellant forwarded an uncertified claim in the amount of $143,970.94 for additional overtime costs incurred on the El Morro project. The claim included attorney's fees and mark-ups. (R.4, Tab 10).

19. In a letter to Appellant dated April 23, 1990, Dr. Colon reiterated that the language in GP-19 requiring payments for overtime at "not less than" time and one-half was merely a minimum responsibility, and that "nothing precluded paying at a higher rate." He again opined that the "Permits and Responsibilities" clause obligated Maitland to comply with local laws, specifically the overtime requirements. Dr. Colon concluded by stating that the decision to use overtime was a contractor decision, and the Government would not assume responsibility for Maitland's managerial decisions and the financial impacts these decisions had on the work. (App. Supp. R.4).

20. In a letter dated April 30, 1990, Mr. Hall again asserted Maitland's entitlement to the claimed costs as follows:

> Clause 19 of the [Contract] clearly states that time and one half is acceptable for this project. A review of the contract clauses for this project will reveal that the index calls the "CONTRACT CLAUSES CONSTRUCTION—PUERTO RICO." It will also reveal each page of the contract clauses has at the bottom "25 FEB 87" and "CONST—PUERTO RICO." The Corps of Engineers made it quite clear to bidding contractors that it took into consideration that these contract clauses addressed construction in Puerto Rico. This would lead any prudent contractor to believe "time and one half" was the requirement for workers in Puerto Rico.... The Government ... was certainly aware of the double time requirement [in Puerto Rico], but chose to remain silent on the matter and yet included Clause 19 in the bid documents which says time and one half is acceptable.... [t]hat statement also leads

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a prudent contractor to believe time and one half is acceptable.

The catch-all wording in [the "Permits and Responsibilities" clause], in my opinion, is clearly not sufficient for the Government to hide behind on such an important and cost intensive matter, especially in light of Clause 19 being made a part of the contract documents. The ... "Permits and Responsibilities" [clause] would lead any prudent contractor to believe that [it] deals with permits and responsibility of looking into the requirement for permits and licenses.

(R.4, Tab 11).

21. On August 27, 1990, Appellant filed a certified claim seeking the following additional costs attributable to its increased overtime expenses:

Additional double time	$ 81,815.39
Audited Payroll Taxes 22.1%...	18,081.20
Attorney Fees	46,031.85
Audited Field Overhead 18.7%	27,288.62
Audited Office Overhead 14% ..	24,250.39
Profit 10%	19,746.75
Bond 1%	2,172.11
Total	$219,383.31

(R.4, Tab 3).

22. On October 12, 1990, the Contracting Officer issued his final decision denying the claim. He observed that Appellant incurred the overtime costs as a result of its voluntary management decision to accelerate the work. The Contracting Officer concluded that GP-19, which incorporates the provisions of CWHSSA into the contract, merely required that overtime shall be paid at a rate not less than $1\frac{1}{2}$ times the basic rate of pay for all hours worked in excess of 40 hours per week, and did not relieve Maitland from the responsibility to comply with local laws that might require a higher rate. He further indicated that the "Permits and Responsibilities" clause charged Appellant with the responsibility to investigate the effect of Puerto Rico labor laws which, he opined, could have been discovered easily either upon consultation with counsel or the Commonwealth. (R.4, Tab 2). A timely appeal followed. (R.4, Tab 1).

DECISION

The salient facts in this appeal are undisputed. Maitland was required to construct the breakwater for El Morro using Government-furnished stone embedded with wire loops to enable placement. As things turned out, the loops failed, prompting the parties to investigate another placement method. The parties ultimately agreed upon placement by use of grapples and a contract modification was executed incorporating the changed method, with a $1.5 million increase in the contract price.

While Maitland had planned overtime work under the wire loop method, it apparently utilized more overtime work than it had projected for the wire loop method when it adopted the grapple method. Maitland's reliance on overtime work resulted in its completion of a three-year project in about two years. After the work was completed, Appellant was required to pay for overtime the difference between the double time compensation mandated by Puerto Rico, and the time and one-half that it already had paid to its employees. It now seeks to recover these costs. The decision to incur overtime charges was made solely by Maitland. The Government neither ordered acceleration of the work, nor mandated overtime. There is nothing in this record to suggest that Appellant "had to" incur the claimed overtime costs after the change to the grapple method in order to achieve timely completion.

Appellant does not directly challenge the application of the Puerto Rico double time overtime provision. The Contract Work Hours and Safety Standards Act mandates that contractors on Federal projects (including those performed in Puerto Rico) shall pay for all overtime work at a rate of *not less than* $1\frac{1}{2}$ times the basic rate of pay. This raises a question of whether the Puerto Rico provision is superseded by the Federal provision.

The Act's legislative history is silent regarding Congressional intent to preempt local regulation of overtime compensation. When no Congressional intent to supersede local statutes is expressed, state statutes must be upheld unless an actual conflict is found between the state and Federal schemes, such that both cannot stand in the same area. See *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430, 83 S.Ct. 1759, 10 L.Ed. 2d 983 (1963).

When used in Federal labor legislation (*e.g.*, the Davis Bacon Act, 40 U.S.C. § 276a), "not less than" has been recognized as creating only a minimum; higher rates may be prescribed by local authorities. The purpose of CWHSSA was to ensure that workers would be paid at a rate not less than time and one-half for qualifying overtime work. See *United States v. Binghampton Construction Co., Inc.*, 347 U.S. 171, 74 S.Ct. 438, 98

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L.Ed. 594, *reh. den.* 347 U.S. 940, 74 S.Ct. 625, 98 L.Ed. 1089 (1954). We find that Puerto Rico's expansion of the compensation framework for overtime work to require double time is not inconsistent with this Congressional expression. As a consequence, we conclude that CWHSSA and the relevant provisions of Puerto Rico's labor law are compatible, and the implementation of the double time requirement does not frustrate the intent of the Federal statute. See *Dyad Construction, Inc. v. City of Portland*, 765 F.Supp. 653 (D. Oregon 1991); *Firelands Sewer & Water Construction Co., Inc. v. Valentine*, 404 F.Supp. 1231 (W.D.N.Y. 1975); see also *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L.Ed.2d 248, *reh. den.* 374 U.S. 158, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 722, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1962).

Appellant argues that the Government breached its duty of cooperation and communication by not informing Maitland of the double time requirement. (App. Br., at 7-12). The first element of this argument is that the Government, cognizant of the double time requirement and aware of Maitland's proposal to pay overtime only at time and one-half, nevertheless failed to alert Maitland, and let Maitland proceed at its peril. The second, implicit, aspect of this argument is that the double time requirement was a type of information within the Government's possession ("superior knowledge") that it was obliged to disclose.

The record clearly indicates that the Government never informed Maitland about the double time requirement imposed in Puerto Rico, and Maitland did not make an independent effort to ascertain this fact. The forward pricing proposal Maitland submitted for the change in stone placement method reflected overtime rates at time and one-half. It was reviewed generally by Dr. Colon and Mr. Rivera. While Dr. Colon was aware of the double time requirement, the record does not indicate whether he noticed the proposed overtime rate when he studied the proposal. Likewise, Mr. Rivera, who was unaware of the double time requirement, reviewed the cost proposal in greater detail, but he also did not scrutinize the particular labor rates contained in the document. Rather, his main concern was with the "bottom line." We find this explanation credible. Estimating is more of an art than the seeming precision of some calculations would imply. In a forward-pricing situation, the estimator's eye of necessity is focussed more on the bottom line, since cost elements can be "moved around" or offset in the actual performance of the work.

Based upon this record, Appellant has not established the basic factual predicate underlying its argument that the Government breached its duty of cooperation and communication; namely, that the Government "knew" that Maitland was underpricing overtime work and did not advise Appellant of the double time requirement.

As an adjunct to its breach of duty to communicate argument, Appellant implicitly contends that the Government possessed "superior knowledge" vis-a-vis the Puerto Rico overtime law, and that its failure to disclose this information provides a ground for relief.

In order to prevail under the doctrine of "superior knowledge," the proponent must demonstrate that: (1) the Government failed to disclose a "vital fact" in its possession that was not known by or reasonably available to the contractor; (2) the Government knew or should have known of the contractor's ignorance, and; (3) the nondisclosure materially affected performance of the contract. See *Helene Curtis Industries, Inc. v. United States* [9 CCF ¶ 71,992], 160 Ct. Cl. 437, 312 F.2d 774 (1963); *Petrofsky v. United States*, 222 Ct.Cl. 450, 616 F.2d 494 (1980), *cert. den.* 450 U.S. 968, 101 S.Ct. 1288, 67 L.Ed.2d 618 (1981). Critical to determining whether the Government in fact possesses superior knowledge is whether the information is held exclusively by the Government or is subject to very limited access. See *Bermite Division of Whittaker Corporation*, ASBCA No. 19211, 77-2 BCA ¶ 12,675. The corollary to this doctrine is that the Government is under no duty to highlight information in its possession if the contractor reasonably can be expected to seek and be able to obtain the facts elsewhere. See *H.N. Bailey & Associates v. United States* [16 CCF ¶ 80,782], 196 Ct.Cl. 166, 177-78, 449 F.2d 376, 382 (1971); *Ambrose-Augusterfer Corporation v. United States* [12 CCF ¶ 81,820], 184 Ct.Cl. 18, 38, 394 F.2d 536, 547 (1968); *T.F. Scholes, Inc. v. United States* [11 CCF ¶ 80,333], 174 Ct.Cl. 1215, 1226, 357 F.2d 963, 970 (1966); *National Concrete and Foundation Co. v. United States* [10 CCF ¶ 72,982], 170 Ct.Cl. 470, 476 (1965); *Leal v. United States*, 149 Ct.Cl. 451, 460, 276 F.2d 378, 380 (1960).

Access to the Puerto Rico overtime requirement in question was available equally to all parties; it was not some esoteric matter

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exclusively in the Government's possession or otherwise hard to find. It was part of a codified statute, part of the public domain. Where information is publicly recorded and equally available to the contracting parties, courts and boards uniformly hold that it will not constitute superior knowledge. See *Edwards v. United States* [36 CCF ¶ 75,822], 19 Cl.Ct. 663, 671 (1990); *T.L. James and Company, Inc.*, ENG BCA No. 5328, 89-2 BCA ¶ 21,643; *Instalaciones Aire Frio, S.A.*, ENG BCA No. PCC-44, 85-2 BCA ¶ 18,015; *Hobbs Construction & Development, Inc.*, ASBCA No. 34890, 91-2 BCA ¶ 23,755; *Max Jordan Bauunternehmung*, ASBCA No. 23055, 82-1 BCA ¶ 15,685; *cf. Emerald Maintenance, Inc.*, ASBCA Nos. 36628, 36632, 37026, 90-2 BCA ¶ 22,719, *aff'd on other grounds*, 925 F.2d 1425 (Fed. Cir. 1991). The doctrine of "superior knowledge" was not developed to remedy informational asymmetries caused by a contractor's failure to make a reasonable and diligent investigation of information generally available. Appellant's failure here to research local labor laws, which would have revealed the required overtime rates, when it otherwise made specific inquiries regarding local sales taxes, speaks volumes. Appellant's ignorance was not caused by any act of the Government; rather, it resulted from Maitland's failure to make a simple inquiry which should have revealed the double time requirement. Accordingly, we conclude that the double time provision is not within the reach of the "superior knowledge" doctrine.

Appellant next argues that the contract was defective because it failed to contain a reference to the double time requirement imposed in Puerto Rico. (App. Br., at 12-17). Appellant correctly observes that the contract was silent regarding Puerto Rico labor law. However, the contract contained a matrix formed by GP-19, which mandated overtime payments at a rate not less than time and one-half, and the "Permits and Responsibilities" clause, which obliged the contractor to investigate the effect of local laws. Through the operation of these two clauses, the contractor was informed that it must pay at least time and one-half for overtime, but was advised that it must investigate local conditions to insure, *inter alia*, that payments it made for overtime work complied with local law.

The essence of a defective specification is that the work cannot be performed successfully in accordance with its requirements or, at the very least, is more expensive or inefficient. The reverse applies here. Had Appellant observed the dictates of these two clauses and made inquiry, it would have discovered that Puerto Rico mandates double time payments for overtime work. Armed with this knowledge, Maitland could have prepared a cost proposal for the change to grapple placement that would have predicted its costs of performance more accurately.

The clauses contained in the contract are not all-inclusive vis-a-vis extrinsic legal requirements, and are not intended to function as a comprehensive legal education for the contractor. Indeed, the "Permits and Responsibilities" clause places the burden of local inquiry on the contractor, and we certainly are not persuaded by this record to attempt to shift the responsibility for contractor unawareness of a codified local statute to the Government. The failure to include a reference to the double time requirement does not render the specifications defective. We reject this argument.

Appellant finally contends that the parties' failure to consider the unique overtime requirements in Puerto Rico law, both at the time of contract award and of the execution of Modification P00001, constitutes a mutual mistake of fact entitling Maitland to recover the additional overtime costs it was required to pay. We note that this postulate is intellectually dissonant with the preceding "failure to warn" and superior knowledge averments, since the crux of those contentions necessitates Government knowledge of the double time requirement.

The test for relief under a mutual mistake of fact has been announced in *Flippen Materials Company v. United States*, 160 Ct.Cl. 357, 312 F.2d 408 (1963). In order to recover under this theory: (1) there must in fact be a mistake which is mutual; (2) the risk of the mistake must not be one which was to be borne, under the terms of the contract, by the contractor, and; (3) the party from whom relief is sought, if it had been aware of the correct facts at the time of entering into the proposed contract, would have agreed to the proposed relief having been embodied in the instrument.

Appellant relies on *Security Associates International, Inc.*, DOTCAB Nos. 1340, 1432, 84-2 BCA ¶ 17,444, for the proposition that the parties' failure to consider relevant local law gives rise to a mutual mistake of fact, entitling the contractor to relief. In *Security Associates*, the Immigration and Naturalization Service (INS) entered into a contract for security and guard services in connection with the detention of refugees entering Pu-

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erto Rico. Owing to the urgency of the situation, the contract was negotiated in haste, and the parties "forgot" about the Puerto Rico labor requirement for double time if employees were not permitted one-hour meal periods. The Department of Transportation Board held that the parties' inadvertent omission of an allowance for the double time payment requirement, where the contract required levels of work that effectively prohibited one-hour meal periods and "triggered" the double time requirement, constituted a mutual mistake of fact entitling the contractor to relief.

The facts of this appeal are distinguishable from those in *Security Associates.* This contract was not a contract for round-the-clock work that would, by necessity, run afoul of Puerto Rico's overtime and meal period requirements. There was nothing in the performance provisions of the contract or Modification P00001 that mandated or necessitated overtime work. Furthermore, the events leading up to contract award and the execution of Modification P00001 hardly can be called "urgent." Indeed, several months elapsed between the discovery of the frailties of the wire loops and Appellant's proposal to use grapples, and several more months passed before the modification was executed. Had Appellant examined Puerto Rico labor law during that period, it would have discovered the double time provision. The decision to undertake overtime work was made exclusively by Maitland as part of a set of business judgments intended to facilitate the early completion; it was not caused by any confusion regarding the scope and nature of the work in the formation of the contract or the ensuing modification.

While we believe that Appellant and the Government personnel who reviewed Maitland's forward-priced cost proposal for Modification P00001 were either ignorant of, or inattentive to, the double time requirements mandated by Puerto Rico, this mutuality does not alter the responsibility placed on Maitland under the "Permits and Responsibilities" clause to comply with local laws. Any mistake here, mutual or otherwise, was not one of fact, but one of law. When the parties negotiated Modification P00001, they did not misapprehend the scope or nature of the work to be performed. Instead, they proceeded unmindful of a particular facet of Puerto Rico law that effected an increase in Maitland's performance cost only when Maitland unilaterally decided to perform overtime work. Persons are charged with knowledge of the law. See *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 385, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); *see also Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63, 104 S.Ct. 2218, 2225, 81 L.Ed.2d 42 (1984); *Sanders-Midwest, Inc. v. United States* [35 CCF ¶ 75,548], 15 Cl.Ct. 345, 350 (1988); *Mayer v. United States*, 201 Ct.Cl. 105, 113-14 (1973); *Mills v. United States*, 187 Ct.Cl. 696, 699-700, 410 F.2d 1255, 1257-58 (1969).

The "Permits and Responsibilities" and "Site Investigation and Conditions Affecting the Work" General Provisions included in this contract required Maitland to ascertain the local conditions affecting the cost of the work, and charged Maitland with the responsibility for compliance with all local laws. As such, the risk flowing from ignorance or inattention to local laws and work conditions generally rests with Appellant. Appellant made no inquiry, and there was no evidence that the Government either promoted or suffered Maitland's apparent ignorance of the local overtime requirements, thereby relieving Maitland of this responsibility. *Cf. La Font v. United States*, 17 Cl.Ct. 837 (1989). In view of the foregoing, we reject Appellant's mutual mistake argument.

We note that bilateral Modification P00001 contained standard "release" language. The Government has not raised any potential defense associated with this issue and, in view of the foregoing, we do not address it.

Conclusion

Having reviewed the record and arguments, we conclude that Appellant's claim for additional costs as a result of its underpayment for overtime work in Puerto Rico is without merit. Accordingly, the appeal is DENIED.

[¶ 26,474] Aoki Corporation

ENG BCA No. PCC-95, October 22, 1993. Contract No. CC-2-917.

Delays—Sequence and Scheduling—Access to Work Site.—Under a contract that included transporting equipment across a United States Army bridge to the project site,

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a contractor was not entitled to recover from the Panama Canal Commission any increased costs stemming from a delayed bridge crossing, because any delay in transporting equipment across the bridge was caused by the contractor's failure to coordinate with the Army and not by an action or inaction of the PCC. The contractor failed to prove its allegation that the Army and the PCC were one legal entity, that is, "the government," or that the action of one was tantamount to the action of the other. The Army's action was that of a third party in the context of the contract between the contractor and the PCC. The PCC had no control over or knowledge of the Army's action at the bridge, and the contractor's delay in crossing the bridge did not result from the PCC's fault or negligence. The contractor was responsible for coordinating the bridge crossing with the Army, which had jurisdiction over the bridge at the time of the contractor's intended crossing.

For the appellant: Mitsuo Saka, General Manager. For the government: Theodore G. Lucas, Office of General Counsel, Panama Canal Commission, Balboa, Republic of Panama.

Before JOCKISCH and SOLIBAKKE, Administrative Judges.

JOCKISCH, Administrative Judge: This is an appeal from the failure of the Contracting Officer timely to consider Aoki Corporation's (Aoki) request for a Contracting Officer's decision (COD) on its claim for increased costs because of alleged interference by the "Government" (United States Army) in the Contractor's performance of the project. Following a conference call on February 26, 1993, between the Board and representatives of the parties, the appeal was dismissed without prejudice at the parties' request, as they indicated a settlement was likely. On April 12, 1993, Aoki initiated reinstatement of the appeal as the parties had failed in settlement negotiations. Aoki requested that the Board process the appeal under Board Rules 12.3, Accelerated Procedure, and 11, Submission Without a Hearing. Briefing of the appeal was completed by the parties in October, 1993. The parties requested the decision of the Board be limited to entitlement, with quantum reserved.

FINDINGS OF FACT

1. On December 12, 1991, Invitation For Bids (IFB) No. 92-19, Cut Widening Program, Project No. 1 Mandinga, was issued by the Panama Canal Commission (PCC). Included in the IFB was Special Condition No. 6, which stated the following:

SC-6 *SPECIAL REQUIREMENTS:*

* * *

(b) *Mandinga Bridge:* The Mandinga Bridge has a maximum allowable vehicle load of 20 Tons and shall not be exceeded by the Contractor's equipment. Tracked vehicles cannot crawl on bridge surface unless a protective action to the concrete surface is made. Surface shall be kept clean from rocks to prevent damage to the concrete surface by trucks running over.

(c) *Alternative Transportation of Equipment That Cannot Cross the Mandinga Bridge:*

(1) *Transportation:* The Commission will provide transportation services to Contractor's equipment that cannot safely cross the Mandinga Bridge. Suitable Commission equipment will pick up the Contractor's equipment at a location to be coordinated with the Commission, at Gamboa on the East bank, and carry it to the West bank, at a location just north of the Project area. Unloading ramp(s) shall be the Contractor's responsibility.

(2) *Scheduling:* The Commission will provide this service as follows: transportation of Contractor's equipment at the beginning of the contract and a return trip at the end of the contract, i.e., one round trip. Transportation of equipment will take one day and shall be coordinated with Dredging Division through the Contracting Officer.

By amendment No. 1 to the IFB, dated January 3, 1992, subparagraph SC-6(c)(2) was amended as follows:

Subparagraph SC-6(c)(2): At the end of this subparagraph, add: "The Contractor shall notify the Contracting Officer, in writing, at least 14 calendar days in advance, of proposed dates for transportation of equipment."

2. Prior to bid, Appellant visited the site to determine how it would transport its equipment to the project area. It decided to use the alternative transportation provided for under the invitation for bids special condition 6(c). Appellant determined that one of two bridges could be used to get its equipment to the Tres Pesos area from which the PCC would then transport it to the project site. Only one of the two bridges could handle the larger equipment required for the

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project. The PCC concurred in Appellant's evaluation and proposed procedure.

3. On January 10, 1992, Aoki was the low bidder in the amount of $1,175,000; and, on January 28, 1992, it was awarded the contract for cut widening project No. 1 at Mandinga.

4. The following contract provisions are pertinent to this appeal:

A. General Conditions

(1) GC-16, Scope of Work

The Contractor shall furnish all plant, materials, equipment, supplies, labor and transportation, including, fuel, power, water (except any materials, equipment, utility or service, if any, specified herein to be furnished by the Commission), as required to accomplish all work under the contract, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof, and including such detail drawings as may be furnished by the Contracting Officer from time to time during the prosecution of the work in explanation of said drawings.

(2) GC-27, Permits and Responsibilities

(3) GC-49, Disputes

(4) GC-54, Suspension of Work

(5) GC-55, Changes

B. Special Condition-6, Special Requirements, particularly SC-6(b) and (c), as amended. [*See* Finding No. 1].

5. Prior to the incident which gave rise to this appeal, Appellant used the procedure described in Finding No. 2 to transport equipment from Tres Pesos to the project site. By letter dated February 14, 1992, Aoki had requested transport of 6 specifically listed pieces of equipment, which were transported by the PCC to the project site as scheduled and without incident. (R.4, Tab 3).

6. On March 24, 1992, Appellant orally notified the PCC that it would require transportation of additional equipment, a Komatsu 300 excavator, on March 30, 1992, from the Tres Pesos area to the project site. Though the request was oral, the PCC concurred and sent the work boat *Goliath* to transport the equipment. (R.4, Tabs 5, 6). Aoki had not specified any other equipment, such as a D-8 bulldozer, to be transported. Aoki actually intended to transport an excavator and a bulldozer. On March 27, 1992, the PCC inspector for the project telephoned Appellant to assure that the "excavator" would be at the pick-up site on the morning of March 30, 1992. During this call, Appellant did not inform the PCC of its intent to transport a D-8 bulldozer.

7. The excavator crossed the large bridge and arrived at the Tres Pesos area on March 24, 1992. However, the bulldozer, which was leased equipment, did not reach the large bridge until the morning of March 30, 1992. At this time, the United States Army was utilizing the bridge. This use delayed movement of the bulldozer over the large bridge for approximately 2 hours. The large bridge is located in an area of operations dedicated and reserved for the exclusive use and control of the armed forces of the United States by the Panama Canal treaty of 1977.

8. On the morning of March 30, 1992, the *Goliath* loaded the excavator at Tres Pesos. No one from Aoki had informed the PCC personnel that additional equipment was to be transported along with the excavator. By the time the bulldozer finally arrived at the transportation site, the "Goliath" had already departed.

9. Aoki's leased bulldozer remained at the Tres Pesos area for 17 days before being returned to the lessor. Appellant paid the lessor the required fee for the 17 days.

10. On April 6, 1992, Appellant notified the PCC, for the first time, of the incident concerning the bulldozer and of its intent to have had the bulldozer transported on March 30, 1992. By letter dated April 10, 1992, Aoki specifically requested the transportation of another two pieces of equipment, a Komatsu PC-400 excavator and a Caterpillar D-8 bulldozer, which the PCC transported to the project site on April 16, 1992. (R.4, Tabs 8, 9).

11. On December 14, 1992, Appellant filed a claim for costs associated with the leased bulldozer being at the Tres Pesos area for 17 days. By letter dated February 15, 1993, Appellant filed an appeal based on the Contracting Officer's failure to issue a Contracting Officer's decision.

12. During a conference call between the Board and the parties on February 26, 1993, the PCC indicated that it intended to enter into settlement negotiations with Aoki. However, at the negotiations meeting on March 4, 1993, the PCC raised defenses to Appellant's claim of: (1) lack of appropriate notice, (2) delay caused by a third party, not the PCC, (3) Aoki's responsibilities under the contract to provide all equipment to the site, and (4) the obligations of Appellant under the Permits and Responsibilities clause in the contract.

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13. On April 6, 1993, Respondent issued a final Contracting Officer's decision denying the claim; and on April 7, 1993, Appellant requested reinstatement of its previous appeal.

DECISION

Though Respondent has raised a number of defenses, such as lack of notice, Appellant's contract responsibilities to provide the equipment to the site, and Aoki's obligations under the Permits and Responsibilities clause, the gravamen of this appeal is the PCC's relationship to the United States Army (Army) as pertains to the Army's action which delayed Appellant's crossing of the bridge on the morning of March 30, 1992.

Even though Appellant urges that the PCC and the United States Army are one, "the Government," it has not proved this allegation or established that the action of one is tantamount to an action by the other. The action of the United States Army was, in contractual contemplation, that of a third party, not the PCC. The PCC had no control over, or knowledge of, the Army's action at the "Bridge" on the morning of March 30, 1992, and, thus, it was not through its fault or negligence that Appellant was delayed. As Appellant noted in its reply brief, "the Army's action was unannounced and uncontemplated by both parties when it occurred ... on said date." It was Appellant's responsibility to coordinate with the Army its crossing of the bridge over which the Army, not the PCC, had jurisdiction and which was being utilized by the Army, almost certainly acting for "the Government" in its sovereign capacity, at the time of Appellant's intended crossing.

Further, Respondent was given no opportunity by Appellant possibly to alleviate the situation, which was unknown to the PCC at that time. Appellant did not call or inform the PCC of the difficulties it was encountering in getting the bulldozer to the rendezvous point on time. If it had, the PCC possibly could have attempted to alleviate Appellant's problems or could have delayed the *Goliath's* leaving until the bulldozer arrived.

In this instance, Respondent had no information from which it could have performed its duty to cooperate with Appellant. It did not know of the incident at the bridge. It did not know that a bulldozer was to be part of the equipment to be taken to the project site. All it knew was that Appellant would have a Komatsu PC-300 excavator at the Tres Pesos area to be transported to the Mandinga project site. Aoki's Komatsu PC-300 excavator was there and was transported to the project site without any Aoki personnel informing the PCC that other equipment it wanted transported had not yet arrived.

As the PCC and Army are not one legal entity, as the delay to Appellant was thus caused almost by a third party and not by the fault or negligence of the PCC, and as the PCC met both its contractual requirement to transport Appellant's equipment as to which it was notified from designated area to the job site and its implied duty to cooperate and not hinder the Contractor, Appellant cannot recover from the PCC its costs stemming from this unfortunate incident of timing, the Appeal is DENIED.

[¶ 26,475] Universal Automation Labs, Inc. v. Department of Transportation; Diversified International Sciences Corporation and Galaxy Scientific Corporation, Intervenors

GSBCA No. 12370-P-R, October 1, 1993. (The text below is the redacted version issued to the public on October 25, 1993.)

Protests, GSBCA—Reconsideration—Evidence Newly Discovered.—Upon reconsideration, a board of contract appeals affirmed its previous decision denying a protest against a procurement, despite the protester's allegation that new evidence supported the protester's contention that a technical evaluator violated statutory ethical standards, because the protester did not show that the evaluator's actions diminished the protester's ability to compete in the procurement. The record, as enhanced by additional discovery, did not support the protester's contentions regarding the evaluator's dishonesty or that the evaluator's alleged dishonesty tainted the entire procurement. The protester failed to develop a factual record that went beyond suspicion or innuendo.

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For the protester: Winston & Strawn, Washington, D.C., by Michael R. Lemov, Michael L. Sibarium, Mark J. Hedien, and Robert A. Berger, and Manatt, Phelps & Phillips, Washington, D.C., by James H. Roberts III. For the government: John R. McCaw, Jr., and Sybil Horowitz, Office of the Chief Counsel, Federal Aviation Administration, Washington, D.C., and Thomas E. Flatley, Jr., Patricia A. McNall, and William R. Sheehan, Office of the Assistant Chief Counsel, Federal Aviation Administration, Atlantic City Airport, New Jersey. For the intervenor, Diversified International Sciences Corporation: Smith, Pachter, McWhorter & D'Ambrosio, Vienna, Virginia, by Arthur I. Leaderman and Carl T. Hahn. For the intervenor, Galaxy Scientific Corporation: Saul, Ewing, Remick & Saul, Philadelphia, Pennsylvania, by Robert G. Fryling and John W. Fowler, Jr.

Before NEILL, HYATT, and VERGILIO, Administrative Judges.

Reconsideration of 93-3 BCA ¶ 26,142.

NEILL, Administrative Judge: By decision dated July 29, 1993, we granted in part the request of Universal Automation Labs, Inc. (UAL), protester in this case, for reconsideration of our earlier decision denying its protest. Specifically, we authorized UAL to engage in discovery regarding contacts during the CADSS procurement between an employee of the Federal Aviation Administration (FAA), Dr. Mark Smolensky, and any agent or representative of the Center for Applied Human Factors in Aviation (CAHFA) or Embry-Riddle Aeronautical University (ERAU) concerning the employment of Dr. Smolensky by either CAHFA or Embry-Riddle. Protester was also authorized to engage in discovery regarding any investigation of these contacts by the FAA. The parties were authorized to supplement the record with additional evidence and argumentation concerning these contacts. *Universal Automation Labs, Inc. v. Department of Transportation*, GSBCA 12370-P-R, 93-3 BCA ¶ 26,142 (July 29, 1993).

In a separate order issued immediately prior to this decision, we have ruled on the objections posed to the additional record submissions by the parties and once more closed the record for this case. Having reviewed the new evidence as well as the argument presented by counsel for the parties, we are not convinced that a basis exists for altering our original decision denying this protest. For the reasons set out below, therefore, we reaffirm our decision denying this protest.

Supplemental Findings of Fact [1]

Details Regarding Dr. Smolensky's Negotiations for a Position at the Center for Aviation/Aerospace Research (CAAR)

64. In Finding of Fact number 57, we recounted a series of facts set out in a letter written by counsel for respondent, dated June 28, 1993, and received by the Board on June 29. *See* Supplemental Protest File, Exhibit NN. The letter advised that a member of the Technical Evaluation Team (TET) for the protested procurement, namely Dr. Mark Smolensky, while attending a conference in Orlando, Florida, in late January 1993, received an offer of employment from a representative of CAHFA. At the time, Dr. Smolensky was said to have informed the CAHFA representative that he was not interested.

65. Further discovery into the facts recounted in the aforesaid letter of June 28 has revealed that the meeting in question took place not in late January 1993, but in early February of the same year. The meeting in question did take place under CAHFA management. Supplemental Protest File, Exhibit II at 54. The record, however, now shows that the individual who approached Dr. Smolensky was not only the Associate Director of CAHFA but also the Director of the Center for Aviation/Aerospace Research (CAAR) at Embry-Riddle Aeronautical University (ERAU). *Id.* at 11.

66. The Director of CAAR was professionally acquainted with Dr. Smolensky from occasional contacts with him at FAA's Technical Center at Atlantic City. He had personally heard Dr. Smolensky complain on occasion about the frustrations of Government gridlock. He had also heard from third parties within his professional circle that

[1] These findings are supplemental to those found in the Board's original decision denying this protest, namely, *Universal Automation Labs, Inc. v. Department of Transportation*, GSBCA 12370-P, 93-3 BCA ¶ 26,142 1993 BPD ¶ 211 (July 7, 1993).

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Dr. Smolensky was interested in moving into a university environment and might want to consider ERAU. Supplemental Protest File, Exhibit II at 60-62. This individual has described his conversation with Dr. Smolensky during the February meeting as "a feeler to see whether he would really be interested." *Id.* at 56.

67. The FAA letter of June 28 to the Board also stated that, at the time Dr. Smolensky was first approached at the Orlando meeting, he indicated he was not interested. The Director of CAAR has stated that Dr. Smolensky replied he would consider the matter and get back to him if there was an "interest worth pursuing." Supplemental Protest File, Exhibit II at 57. Dr. Smolensky did in fact reply almost immediately. In a letter dated February 9, 1993, he outlined in detail what it would take for him to "set up shop" at CAAR. *Id.*, Exhibit S. Dr. Smolensky has testified that his change of mind was somehow prompted by discussions with his parents, who by then had found a place to settle in Florida. *Id.*, Exhibit JJ at 84-85.

68. Shortly after receipt of Dr. Smolensky's letter of February 9, the Director of CAAR responded to him with a phone call. Supplemental Protest File, Exhibit II at 66. He has testified that during this period, the possibility of Dr. Smolensky working for CAAR was conjectural since he would not yet know what the Center budget would be until May 1. *Id.* at 71. He has explained that he conveyed this fact to Dr. Smolensky. *Id.* Dr. Smolensky has testified that during this same period he reached "soft agreements" with the Director of CAAR regarding most of the conditions set out in his letter of February 9. *Id.*, Exhibit JJ at 91. The matter of Dr. Smolensky's accepting a position with CAAR appears to have languished thereafter or, at the most, gone on hold.

69. In Finding 58, we noted that Dr. Smolensky's parents moved to central Florida in April 1993 and asked him to join them. At that time, Dr. Smolensky explored with his supervisor[2] the possibility of being detailed to Florida. He found, however, that the maximum detail available was for only one year. Supplemental Protest File, Exhibit B, ¶ 5. During this period, however, the Director of CAAR again approached Dr. Smolensky and advised him that the offer to come to CAAR was still open should he want it. *Id.*, Exhibit A. Dr. Smolensky then asked his supervisor if he believed accepting a position with CAAR would lead to resentment on the part of FAA. *Id.*, Exhibits U, JJ at 91-94.

70. By letter dated May 3, Dr. Smolensky again wrote to the Director of CAAR in what appears to be an effort to push matters further along toward his being hired for a post at CAAR. Supplemental Protest File, Exhibit U. The Director contacted him by phone shortly thereafter. He later spoke to Dr. Smolensky personally in late May during a visit to the Technical Center. *Id.*, Exhibit II at 77-78. Negotiations between the two of them concluded shortly thereafter when Dr. Smolensky accepted a firm offer made to him in writing and dated June 10. *See* Finding 58.

71. Dr. Smolensky has stated that he received a firm oral offer from the Director of CAAR on June 10. Supplemental Protest File, Exhibit B, ¶ 8. This was followed by a written offer dated June 10 and set out on ERAU stationery. It offers Dr. Smolensky the position of "Senior Research Associate in the University's Center for Aviation/Aerospace Research." The letter is signed by Lee Hays, Director, Human Resources. It requests Dr. Smolensky to sign the letter and return it to Mr. Hays if he agrees with the terms and conditions offered. A copy of this letter is contained in the file. It bears the signature of Dr. Smolensky. His signature line is dated "6/25/93." *Id.*, Exhibit Y. The Director of CAAR has testified that this countersigned letter was faxed to him by Dr. Smolensky on June 25. *Id.*, Exhibit II at 86-87.

72. The record also contains a formal acceptance letter signed by Dr. Smolensky also dated June 25, 1993. It is addressed as follows:

Richard Gibson, PhD
Associate Director/Center for Human Factors in Aviation
Center for Aviation Aerospace Research
Embry-Riddle Aeronautical University
600 S Clyde Morris Blvd.
Daytona Beach, FL 32114-3900

Supplemental Protest File, Exhibit I. This acceptance letter begins with the statement:

[2] Dr. Smolensky's supervisor referred to here and elsewhere in this opinion was not his immediate supervisor. Dr. Smolensky has explained that his immediate supervisor was serving at the time only as an "acting supervisor." He preferred to deal, therefore, with a supervisor further up the chain of command with whom he had discussed his career development. Supplemental Protest File, Exhibit JJ at 105-06.

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> It is with pleasure that I accept your offer of Senior Rescarch [sic] Associate in the Center for Human Factors in Aviation (CAHFA).

Id. Dr. Smolensky has since recognized that he is employed by ERAU. *Id.*, Exhibit JJ at 50.

73. Dr. Smolensky has stated, under oath, that he has not discussed the CADSS procurement or any information related to it with ERAU, CAHFA or anyone else not on the TET. He has also stated that at the time he evaluated proposals in response to the CADSS solicitation, he did not seek employment from ERAU, CAHFA or any competing contractor, nor was any offer of employment made to him by any of these. Supplemental Protest File, Exhibit B, ¶ 11.

74. Dr. Smolensky has also stated, under oath, that his last involvement in the CADSS procurement was January 7, 1993, when he completed his revised technical evaluation after examining the offerors' responses to possible weaknesses and deficiencies. Supplemental Protest File, Exhibit B, ¶ 1. In his deposition, Dr. Smolensky has acknowledged that this date marked his last involvement "in an official way" with the evaluation team. He has explained, however, that his personal interaction with scoring concluded in the summer of 1992 after the "second go-around" [3] when he turned in the key he had previously been issued to the cabinet in which the proposals were contained. Following that time, he claims to have had no further substantive discussions regarding the CADSS procurement with members of the TET. *Id.*, Exhibit JJ at 17, 43, 120.

75. Protester has submitted for the record evaluation score sheets signed by Dr. Smolensky and dated "10/22/92." Supplemental Protest File, Exhibit MM. These are revised score-sheets for Factor 4, issued to correct an error detected after the TET had finished its earlier evaluation. *See* Finding 33.

The Status of CAHFA, ERAU, and CAAR

76. In Finding 58, we found that the TET member in question, namely Dr. Smolensky, had stated in his affidavit that in April he began to negotiate in earnest with CAHFA for a position and eventually in June accepted a formal offer from CAHFA. While it is correct that Dr. Smolensky so stated in his affidavit, further discovery has revealed that his statement was wrong. His employer is not CAHFA but ERAU.

77. Documentation in the file indicates Dr. Smolensky clearly understood that the position offered to him was that of a researcher at CAAR. *E.g.*, Supplemental Protest File, Exhibits S, U. The source of the confusion over the identity of his new employer stemmed from Dr. Smolensky's belief that CAAR is part of CAHFA rather than ERAU. This is incorrect. CAAR is part of ERAU. *Id.*, Exhibits W, X, II at 87-88. In his deposition Dr. Smolensky has explained that he believed that CAAR, although situated at ERAU, was, nonetheless, a part of CAHFA. *Id.*, Exhibit 4 at 63, 81. Similarly, in his affidavit he stated:

> I saw no problem in negotiating employment with CAHFA. I believed it to be a separate entity from Embry-Riddle University. In addition, I was not aware that CAHFA or Embry-Riddle are active competing contractors. I am still not aware of CAHFA's status or the status of Embry-Riddle.

Id., Exhibit B, ¶ 10.

78. Notwithstanding Dr. Smolensky's misunderstanding as to the specific identity of his new employer, FAA was very much aware of the presence of ERAU in the equation of things when it reported to the Board and opposing counsel in its letter of June 28 that Dr. Smolensky had accepted a new position. FAA counsel, by that date, had already secured a copy of CAHFA's Bylaws and was able to explain the role of CAHFA *vis a vis* its two sponsoring charter members, ERAU and the University of Central Florida (UCF). *See* Finding 59. FAA counsel also knew and reported at that time that ERAU would be paying Dr. Smolensky's salary and that ERAU was mentioned as an "available resource" in a proposal submitted . *See* Findings 59-60.

The FAA's Investigation of Matters Relating to Dr. Smolensky's Negotiations for a Position with CAAR

79. In Finding 60, we noted that a memorandum from the contracting officer to the Director of the Technical Center advised him of "possible integrity violations" and reported that a TET member had accepted employment with CAHFA but that his salary would be paid by ERAU. We also found that this same memorandum spoke of a "thorough investigation" which led the contracting officer to conclude that any possible

[3] *See* Findings 31-34.

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violation had no impact on the pending award or selection of a source for the CADSS procurement.

80. At the time our original decision was issued, we had no details regarding the investigation mentioned by the contracting officer in the aforesaid memorandum to the Director of the Technical Center. Counsel for the parties have since supplemented the record in this regard. On June 28, the contracting officer for the CADSS procurement directed a contract specialist on her staff to investigate whether Dr. Smolensky's employment discussions violated Federal Acquisition Regulation (FAR) 3.104, 48 CFR 3.104 (1992). The investigation ran from June 28 to July 21. With the release of the Board's decision on July 7 and the resulting expiration of the suspension order in place during the protest, the contract specialist expanded her investigation to include a representative of . Supplemental Protest File, Exhibit GG at 7, 10-12.

81. As part of her investigation, the contract specialist interviewed Dr. Smolensky and the supervisor with whom Dr. Smolensky had discussed his decision to accept the position at CAAR. She also interviewed a representative of

In addition, she discussed the investigation with the contracting officer for the CADSS procurement and with FAA counsel. Supplemental Protest File, Exhibit GG at 13.

82. FAA's office of counsel at the Technical Center also conducted its own investigation.

Supplemental Protest File, Exhibit JJ at 102-03. An affidavit was obtained from Dr. Smolensky explaining in detail his negotiations for a position at CAAR. Copies of the CAHFA Charter and Bylaws, some promotional materials concerning CAHFA, and the State University System of Florida Standard Practice for Classification of Institutes and Centers in the State University System were secured for review by the Technical Center's Office of Counsel. In addition, an FAA attorney questioned officials at UCF and ERAU regarding the relationship of their institutions to CAHFA and CAAR, the source of CAHFA's funding, and the source of Dr. Smolensky's salary. *Id.*, Exhibit EE.

83. The focus of the investigation undertaken by the contract specialist was to determine if Dr. Smolensky's employment discussions violated the Procurement Integrity Act, 41 U.S.C. § 423, and, if so, whether there had been any impact on the procurement as a result. Supplemental Protest File, Exhibit GG at 48. Her conclusion was that there was no violation and, therefore, no impact on the CADSS procurement. *Id.* at 49, 80. Specifically she determined that ERAU was not a "competing contractor" within the meaning of FAR 3.104-4(b)(1) because it was not likely to become the recipient of a contract or subcontract under the CADSS procurement. Her conclusion was based in part on the fact that

Id., Exhibits C, GG at 49, 53, 80.

. *Id.*, Exhibits H, GG at 56, 64.

84. In the course of her investigation, the contract specialist prepared a fact-sheet regarding

Supplemental Protest File, Exhibit E. She also prepared a fact-sheet explaining the interrelationship of UCF, ERAU, CAAR, CAHFA and the Airway Science Simulation Laboratory at ERAU. *Id.* Also in the record now is a memorandum for file prepared by the contract specialist which describes her contacts with

Id., Exhibit D. One question asked by the contract specialist was[4]

Id. at 3.

Id., Exhibit H.

85. In conducting her investigation, the contract specialist incorrectly assumed that Dr. Smolensky would be working for CAHFA. Supplemental Protest File, Exhibit GG at 29, 44. However, she recognized that his salary would be paid by ERAU. She also concluded that neither CAHFA nor ERAU was a "competing contractor," as defined in FAR 3.104-4(b), for the CADSS procurement. *Id.*, Exhibit C.

86. Based on the contract specialist's investigation, the contracting officer determined that Dr. Smolensky's employment discussions had no impact on the CADSS

[4] In her memorandum the contract specialist refers to "ERAC" rather than "ERAU." In the same memorandum, however, she identifies "ERAC" as "Embry-Riddle Aeronautical Center" which we take to be the equivalent of "ERAU." We note that makes the same assumption. *See* Supplemental Protest File, Exhibit H.

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procurement. Supplemental Protest File, Exhibits F, HH at 43-44. She has testified that in arriving at this conclusion she relied upon Dr. Smolensky's affidavit (*id.*, Exhibit B), the contract specialist's report (*id.*, Exhibit C), the contract specialist's notes regarding contacts with (*id.*, Exhibit D), and her own memorandum drafted by the contract specialist and addressed to the Director of the Technical Center (*id.*, Exhibit E). *Id.*, Exhibit HH at 13-15. The contracting officer has further testified that, in accordance with FAR 3.104-11, she forwarded the determination to the Director of the Technical Center as Head of the Contracting Activity. *Id.*, Exhibit F. The Director concurred in the finding and advised the contracting officer to proceed with the CADSS procurement. *Id.*, Exhibit KK.

Status of the CADSS Procurement

87. As of July 7, 1993, when this protest was denied, the CADSS procurement was still far from complete. Amendment 0006 was an extensive amendment to the solicitation. Revised proposals submitted in response to it had not been processed except for the auditing of revised cost proposals. At the hearing on the merits, respondent advised the Board that if the protest were to be denied, FAA planned to hold face-to-face discussions with offerors. Following this, there would, of course, be a call for best and final offers and a final evaluation leading to contract award. Transcript at 281-82.

88. Because Dr. Smolensky has left the FAA and is now employed by ERAU (Finding 72), he is no longer a member of the TET and will obviously not participate in any subsequent evaluations of revised offers. As to the earlier technical evaluations in which he participated, it is the plan of FAA to delete his scores from these evaluations. Respondent's Reconsideration Brief at 24; Respondent's Reply Brief to Protester's Supplemental Brief Regarding Conflict of Interest/Procurement Integrity Issues at 25.

Discussion

Protester's Basis for Relief

The additional evidence provided by the parties in conjunction with our reconsideration of this case has permitted us to refine and, where necessary, correct our earlier findings relating to Dr. Smolensky's negotiations with CAAR. These refinements and corrections are set out in the supplemental findings included in this decision. Protester believes that new evidence added to the record should lead us to reverse our original decision denying its protest. Counsel writes:

> Indeed, there is now ample evidence of the "hard facts" of both the appearance and probability of impropriety resulting in a violation of 48 C.F.R. § 301-1, 5 C.F.R. § 2635 and 49 C.F.R. Part 99. Therefore, the procurement must be cancelled.

Protester's Supplemental Brief Regarding Conflict of Interest/ Procurement Integrity Issues at 30.

We disagree not only with protester's ultimate conclusion but also with the manner in which it reaches this conclusion. A protester is not automatically entitled to relief if it demonstrates to us that a law or regulation has been violated. Such an approach would be in direct conflict with the express wording of the statute from which the Board derives its jurisdiction to resolve protests. That statute provides:

> If the Board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board *may* suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

40 U.S.C. § 759(f)(5)(B) (1988) (emphasis added). The Board's authority to grant relief is, therefore, discretionary. As we have previously observed:

> Relief does not automatically flow from the demonstration of a violation of statute or regulation; it is a matter left to the discretion of the Board and turns, among other things, on matters such as whether the harm alleged actually occurred, whether it was a result of the violation alleged, and whether the relief serves the goals of economic and efficient procurement.

Computer Systems & Resources, Inc., GSBCA 9971-P-R, 89-3 BCA ¶ 22,217 at 111,732, 1989 BPD ¶ 261 at 2-3.[5]

Both protester and respondent have expended considerable effort on the issue of whether the conduct of Dr. Smolensky vio-

[5] We note that in dealing with whether relief is appropriate in situations where a protester demonstrates the existence of a *de minimis* violation, our appellate authority has recognized and upheld the discretion granted to the Board by statute in matters relating to relief in bid protests. *See Andersen Consulting v. United States* [37 CCF ¶ 76,284], 959 F.2d 929, 932-33 (Fed. Cir. 1992).

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lated the Procurement Integrity Act and conflict of interest regulations. We choose to begin our analysis elsewhere by seeking to determine first if protester has, in any way, been actually harmed by the alleged violations.

In this case, we can find no harm. The entire record, even as refined and corrected, still does not convince us that Dr. Smolensky's negotiations with CAAR have, in any significant way, harmed UAL. Whether Dr. Smolensky's actions constituted a violation of ethical standards is not of primary concern here—serious as the matter may be.[6] What we are concerned with here is whether UAL's ability to compete in this procurement has been diminished or compromised as a result of Dr. Smolensky's activities during the CADSS procurement.

Protester in briefing this case does not explicitly discuss the harm which it may have suffered or may suffer as a result of the allegedly improper conduct of Dr. Smolensky. Counsel for UAL does, however, discuss the adverse impact which this conduct is said to have had on the CADSS procurement as a whole and, presumably, on UAL's interests as well.

UAL contends that Dr. Smolensky's conduct has had a widespread impact on the procurement. Three examples are given. Protester points to , to FAA's offer to remove Dr. Smolensky's scores from the evaluation, and to an overall contamination of the integrity of the procurement process. Protester's Supplemental Brief Regarding Conflict of Interest/Procurement Integrity Issues at 24-25. We obviously find no actual harm to UAL from the first two examples.

The alleged overall contamination of the integrity of the procurement process could, however, be a source of real harm to UAL if it did in fact occur. In the mind of protester, this "contamination" springs from the dishonesty of Dr. Smolensky. Protester writes:

> Although Smolensky claims that he never discussed CADSS with any offeror, he has repeatedly lied and cannot be trusted. Smolensky lied about the dates of his employment negotiations, he lied about the identity of his future employer, he lied about his last involvement in the CADSS procurement, he lied in his affidavit, and he lied in his deposition.... This impact can never be corrected no matter what *post hoc* remedies FAA proposes....

Id. at 25.

We do not find that the record supports protester's harsh assessment of Dr. Smolensky. We have found that the dates and time frames provided by him in his original affidavit have remained substantially intact even after the completion of the additional discovery we authorized in this case. The overture made to him in early February now appears to have been a highly tentative one or, as the Director of CAAR states, "conjectural." Finding 68. In the affidavit provided for the record by Dr. Smolensky prior to our deciding this protest, he described the negotiations for his new position as having begun in earnest in mid-April 1993. *See* Finding 58. The record, as enhanced by additional discovery, only confirms this fact. Findings 68, 70-71. Earlier discussions appear to have languished or, at most, been put on hold—to the point that Dr. Smolensky, in April, was exploring with his supervisor the possibility of an extensive detail to the Florida area. Findings 68-69. The evidence, as further developed, now confirms that Dr. Smolensky certainly did not get a firm offer, in the strict sense of the term, until June of 1993. Findings 66, 71.

As to Dr. Smolensky's alleged lies about the identity of his future employer, we are not at all convinced that this was as deliberate as protester would have us believe. The record confirms that there has been a good deal of confusion regarding the identity and interrelationship of CAHFA, CAAR, and ERAU. *See* Findings 76-78, 82, 85. Any experienced lawyer knows that the operative distinctions regarding corporate entities, so often used in law, are frequently misunderstood or simply missed by laymen—even those who are well educated in their own respective fields. Protester has not convinced us that Dr. Smolensky's confusion as to the identity of his new employer was not genuine. Dr. Smolensky's erroneous assumption that CAAR was part of CAHFA is also understandable when one recalls that he was first approached regarding a position with CAAR during a CAHFA meeting and by the

[6] Nothing we say herein should be interpreted as a finding that such violations have or have not occurred. Because there is no need to make any finding in this regard in order to arrive at a reasoned decision for this protest, we do not consider that it is even within our jurisdiction to make one. *See SMS Data Products Group, Inc. v. United States* [34 CCF ¶ 75,531], 853 F.2d 1547, 1555 n. (Fed. Cir. 1988).

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Director of CAAR, who is also Associate Director of CAHFA. *See* Finding 65.[7]

The case made by protester for the assertion that Dr. Smolensky lied about his involvement in the CADSS procurement is the least convincing of all. We do not see the clarifications provided by him during his deposition as being in fundamental contradiction with the statement made in his affidavit that his last involvement in the CADSS procurement was January 1993. The distinction being made is obviously between involvement in a technical or "an official way" and substantive, personal involvement. The turning-in of the key to the cabinet containing the proposals in the summer of 1992 is certainly a credible indication that his substantive, personal involvement was, practically speaking, complete. Finding 74. As to the signature of revised sheets in October, we already know from the testimony of the TET chairman that this involved a technical correction and not a substantive revision of the previously completed evaluation. *See* Findings 33, 75.

Even assuming a substantive involvement of Dr. Smolensky in the CADSS procurement during the fall of 1992, the facts, as now developed, show that prior to his February meeting in Orlando, Dr. Smolensky did nothing more during that period than indicate to professional colleagues in the private sector that he was entrenched in Government gridlock and possibly interested in leaving his post at FAA for a position outside of the Government. Finding 66. Protester has provided us with no convincing evidence that this frustrated attitude on the part of Dr. Smolensky somehow influenced the objectivity or impartiality of his judgment in the evaluation process. Furthermore, it is clear that discussions regarding a position at CAAR did not begin until after a point in time in which all parties agree that Dr. Smolensky had completed any work he may have done on the CADSS evaluation. Findings 67, 74.

In short, for the reasons stated, we remain unconvinced that Dr. Smolensky's alleged dishonesty is a wellspring of contamination tainting the entire CADSS procurement and somehow harming or threatening real harm to the interests of UAL. Protester has failed to develop a factual record which goes beyond suspicion or innuendo. We simply find no such contamination and, therefore, no such harm.

UAL's Demand that the Procurement Be Canceled

In urging us to cancel this procurement because of alleged improprieties on the part of Dr. Smolensky, UAL relies heavily on the decision of the Court of Appeals for the Federal Circuit in the case of *NKF Engineering v. United States* [33 CCF ¶ 74,691], 809 F.2d 372 (Fed. Cir. 1986), and on a decision of the Court of Federal Claims which was recently affirmed by that Court of Appeals, namely *Compliance Corp. v. United States* [36 CCF ¶ 75,991], 22 Cl.Ct. 193 (1990), *aff'd*, 960 F.2d 157 (Fed. Cir. 1992).

We find UAL's reliance on these cases to be misplaced. First, UAL errs in stating that the Court in *NKF* "expressly rejected the reasoning" of an earlier decision, *CACI, Inc.-Federal v. United States* [31 CCF ¶ 71,709], 719 F.2d 1567 (Fed. Cir. 1983). Protester's Supplemental Brief Regarding Conflict of Interest/Procurement Integrity Issues at 27. The *NKF* decision rejects what it considers an incorrect interpretation of *CACI, Inc.-Federal*, but it certainly does not reject the decision itself. On the contrary, in deciding *NKF*, the Court specifically noted that the position it was taking was consistent with the decision in *CACI, Inc.-Federal*. It wrote:

> Indeed, our vacating the Claims Court order in this case is consistent with the reversal in *CACI, Inc.-Federal*. In both cases, the Court finds the agency award to be based on a rational ground and the Claims Court interference with the normal procurement process to be error.

NKF at 376. Protester fails to recognize the continuous thread running through *CACI, Inc.-Federal, NKF*, and *Compliance*. All three cases stand for the simple proposition that a contracting officer's decision to take or not to take corrective action in the face of an appearance of impropriety will not be interfered with by the Court if that decision rests upon a rational and reasonable basis. This proposition most assuredly applies to

[7] Protester attaches special significance to the fact that Dr. Smolensky accepted a firm offer of employment by countersigning the letter sent him by the Director of Human Resources for ERAU but then sent a letter of acceptance to the Director of CAAR in his capacity as Associate Director of CAHFA. *See* Findings 71-72. This, according to protester, is evidence of a concerted effort on the part of Dr. Smolensky to cover up his employment discussions with ERAU. The record does not shed any light on what Dr. Smolensky's actual intentions were in writing this letter and protester has simply not convinced us that the letter is not just more evidence of Dr. Smolensky's mistaken belief that CAAR was part of CAHFA.

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the facts in this case, but not in the manner which protester intends. These cases do not justify the Board's cancellation of the CADSS procurement, based merely on the appearance of impropriety, without further recourse to the position of the contracting officer. Rather, these cases remind us of the need to examine first the reasonableness of the contracting officer's decision to act or not act.

The contracting officer is by now in possession of the pertinent facts relating to Dr. Smolensky's negotiations for a position with CAAR. She disagrees with protester over whether there has even been a Procurement Integrity Act violation. Having concluded that there is no violation, she likewise concludes that Dr. Smolensky's negotiations have had no adverse impact on the procurement. *See* Finding 86. Consequently, she has not canceled the CADSS procurement.

Protester demands that we overrule the contracting officer and tells us that, based on *NKF* and *Compliance*, we are required to do so since there is at least the appearance of an impropriety—if not any actual one. Precisely because of these cases—and *CACI, Inc.-Federal* as well—we decline to do so. Having made our own *de novo* review of the facts in this case and quite apart from any considerations of whether there has or has not been a Procurement Integrity Act violation, we conclude that the contracting officer's decision not to cancel the CADSS procurement is entirely reasonable.

This CADSS procurement has already been the victim of extraordinary delay. Findings 61-62. Protester itself complains of this fact. Initial and revised proposals have been evaluated. Findings 25-28, 33-34. Following the second evaluation, however, amendment 0006 to the CADSS solicitation made extensive changes and afforded offerors the opportunity to revise their cost and technical proposals. Findings 36-41. This protest has delayed the evaluation of these revised proposals. Our order of April 20, 1993, granting UAL's request that we suspend respondent's delegation of procurement authority, precluded respondent from carrying out the further processing of these revised offers other than to audit updated cost proposals. In the absence of any demonstrable harm to UAL from the alleged improper conduct of Dr. Smolensky, a further delay of this procurement by cancellation makes no sense.

Furthermore, even if UAL were able to demonstrate that it had suffered or would suffer harm as a result of Dr. Smolensky's conduct either during the earlier evaluations or subsequent to January 7, 1993, the demand that this procurement be cancelled is excessive in the extreme and, given the circumstances of this case, contrary to the goals of economic and efficient procurement as well. *See* 40 U.S.C. § 759(f)(5)(A). Any effect of the allegedly injurious conduct should be eliminated by the deletion of Dr. Smolensky's scoring from the results of the two earlier evaluations and by his absence from the future evaluation of revised proposals before and after oral negotiations. *See* Findings 87-88. Similarly, even if the contracting officer had concluded that a violation of the Procurement Integrity Act did occur, a decision not to cancel would still have been reasonable, given the facts in this case, and permissible as well. *Federal Data Corporation v. United States* [36 CCF ¶ 75,991], 911 F.2d 699 (Fed. Cir. 1990).

Accordingly, we see no reason why the contracting officer's decision not to cancel the CADSS procurement should not be permitted to stand. For the reasons stated, we consider it a preeminently reasonable one. We, therefore, deny protester's demand that we overturn that decision.

Decision

Upon reconsideration, the protest is again DENIED.

[¶ 26,476] Tek Pro's v. General Services Administration

GSBCA No. 12355, October 18, 1993.

Labor—Price Adjustments for Changes in Wage Determinations—Jurisdiction.—The board dismissed an appeal concerning the calculation of a price adjustment for a change in a Department of Labor wage determination because it lacked jurisdiction over a preliminary matter in the appeal. The wage determination affected an employee who had been working under two labor classifications. It was necessary to resolve this employee's classification before the price adjustment could be calculated, and resolution of employee classification matters is reserved to the Department of Labor's exclusive jurisdiction.

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For the appellant: James E. Hampshire, President. For the government: Jerry Ann Foster, Office of Regional Counsel, General Services Administration, Fort Worth, Texas.

Before GOODMAN, Administrative Judge.

GOODMAN, Administrative Judge: On March 31, 1993, appellant, TEK PRO'S, filed this appeal of a contracting officer's decision dated December 29, 1992. The decision denied in part appellant's claim for a price adjustment to its contract as the result of increased minimum wages contained in a new Department of Labor wage determination applicable to appellant's contract with respondent. According to a price adjustment clause in the contract, appellant alleged it was entitled to an increase in the contract price. Appellant elected to have its case resolved under the Board's accelerated procedure. Rule 14.[1]

The claim involved appellant's designation of an employee as both a motor vehicle mechanic and a working supervisor. Appellant asserts that for purposes of calculating the price adjustment, the employee should be classified as a motor vehicle mechanic, and only that portion of his wages deemed by appellant as payment for mechanic's wages should be considered in the calculation of the price adjustment. Respondent asserts that the employee's total compensation, and not just that portion of wages designated by appellant as mechanic's wages, should be considered in calculating the price adjustment. Thus, the contracting officer granted a price increase, but not in the amount requested by appellant. Appellant sought its total claim on this issue in its appeal to this Board.

During a conference on September 28, 1993, the Board informed the parties that it believed a resolution was necessary as to the proper classification of the individual employee in question before a price adjustment could be determined, as appellant was asserting a dual function for the individual. The issue of the proper classification of the individual is a dispute concerning labor standard requirements. Pursuant to Federal Acquisition Regulation (FAR) 52.222-41(t), set forth in full at 48-51 of the contract, all disputes concerning labor standard requirements are to be resolved by procedures established and conducted by the Department of Labor, and not pursuant to the Disputes clause of the contract. Thus, the Board, *sua sponte,* raised the issue of its possible lack of jurisdiction to resolve a preliminary issue necessary for determination of the price adjustment. *See, e.g., Emerald Maintenance, Inc. v. United States* [36 CCF ¶ 76,018], 925 F.2d 1425 (Fed. Cir. 1991); *JL Associates, Inc. v. General Services Administration,* GSBCA 11922, 93-3 BCA ¶ 25,939.

During a second conference on October 6, 1993, counsel for respondent stated its position that after reviewing the situation further, respondent had determined that the contracting officer's decision of December 29, 1992, incorrectly stated appeal rights to this Board under the Contract Disputes Act, and that the proper forum for resolution of the dispute as to the classification of appellant's employee was the Department of Labor. Accordingly, respondent stated its intent to reissue the contracting officer's decision with the appropriate appeal rights and to file a motion to dismiss the instant appeal for lack of jurisdiction. Mr. Hampshire stated on behalf of appellant that he would not object to respondent's motion to dismiss the appeal for lack of jurisdiction.

By letter dated October 6, 1993, to appellant, the contracting officer stated that the previous decision of December 29, 1992, should have included appeal rights to the U.S. Department of Labor rather than to this Board. On October 7, 1993, respondent filed a motion to dismiss the instant appeal for lack of jurisdiction, on the grounds stated above, to which appellant had previously stated it would not object.

Accordingly, respondent's motion is granted. The appeal is **DISMISSED WITHOUT PREJUDICE.**

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[1] 48 CFR 6101.14 (1992).

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[¶ 26,477] PAE GmbH

ASBCA No. 46163, November 10, 1993. Contract No. DAJA37-87-C-0262.

Cost Types—Employee Morale, Health, and Welfare—Work Clothing.—A contractor's unilateral decision to provide work clothing to its employees did not warrant an equitable adjustment of the estimated costs in a cost-plus-award-fee contract, because the contractor submitted mere self-serving argument about the health, safety, security, and employee morale benefits of the work clothing in lieu of actual evidence that any benefits had resulted. Moreover, the contract contained no provision authorizing the contractor to unilaterally change the contract terms and the government's contracting costs. The contract required advance government approval of allowable costs, and the government had refused the contractor's request for reimbursement for uniforms.

For the appellant: Heinz D. Bertram, CPCM, Frankfurt, Germany. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. E. Michael Chiaparas, JAGC, Trial Attorney.

Before ELMORE and STEMPLER, Administrative Judges.

ELMORE, Administrative Judge: PAE GmbH (PAE or appellant) has appealed the contracting officer's (CO) adverse decision denying its claim for reimbursement of the alleged cost of work clothing provided to its European Redistribution Facility (ERF) employees during the contract period extending from 1 December 1991 through 30 September 1992. Appellant has elected the accelerated procedure under Board Rule 12.3.

The parties have elected to submit the matter on the record in accordance with Board Rule 11. The record consists of the appeal (R4) file; appellant's complaint (complaint) and attached exhibit (exh. A); sworn declaration of Glenn Tolbert (exh. G-1); and Government's answer (answer) and enclosures (encl.). Both parties submitted briefs. Only entitlement is decided.

SUMMARY FINDINGS OF FACT

PAE was awarded Cost-Plus-Award-Fee option contract DAJA37-87-C-0262 (C-0262) on 15 June 1987 to provide "Non-personal services for the operation/management services for the European Redistribution Facility [ERF], Nahbollenbach" for the phase-in period, 15 June through 30 September 1987, and the base contract year, 1 October 1987 through 30 September 1988, at a total estimated cost (excluding base fee of DM 119,657 and award fee of DM 167,519) of DM 5,200,082. The Government subsequently elected to execute four one-year options extending the contract four additional years, 1 October 1988 through 30 September 1992. (R4, tabs 1, 11, 21, 34, 49)

Contract Section B, "SUPPLIES OR SERVICES AND PRICES/COSTS" (R4, tab 1), provided for PAE to be paid a fixed amount "Base Fee" and additionally, an "Award fee" based upon contract performance, the amount of which was not subject to the Disputes clause. The contractor was authorized to submit twice each month properly executed invoices or vouchers for reimbursable costs and fees, equal to the total allowable expenditures made for accomplishing the required services, to the Defense Contract Audit Agency through the Administrative Contracting Officer (ACO) for review and approval.

"SPECIAL CONTRACT REQUIREMENTS", Section H-3, *"ALLOWABLE COSTS"*, provided for advance agreements on allowability of costs, deviation to which required the approval of the CO. Allowable costs were, in pertinent part, as follows (R4, tab 1):

> a. Costs for labor when they do not exceed the rates established by valid wage and salary tariffs in line with German Labor Law, or are otherwise approved by the Contracting Officer.
>
> b. Cost for personnel, where salaries are not established by valid tariffs. Increases of these salaries shall be in line with tariff increases for tariff-bound personnel (see a. above). In no event shall such salaries be increased to amounts higher then the amount of salaries paid to holders of comparable positions.
>
> c. Voluntary social contributions, in the amounts which have been agreed upon between the contractor and the contractor's employees.

"SPECIAL CONTRACT REQUIREMENTS", Section H-12, *"SECURITY PROTECTION PLAN,"* provided that the contractor shall establish and implement a security protection plan; that its employees

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shall not be allowed to enter ERF facilities without an identification badge, which was provided by the Government and obtained prior to start of work; and that all contractor employees, their vehicles and property entering, leaving and while within the confines of the Nahbollenbach Storage Activity, were subject to search/inspection.

"SPECIAL CONTRACT REQUIREMENTS," Section H-13, *"AUTHORITY OF GOVERNMENT REPRESENTATIVES"*, informed prospective bidders that the Procurement Contracting Officer (PCO) of the USAREUR Contracting Center Frankfurt, Germany, was the Government representative authorized to execute this contract, and any modification or change order thereto and take such action as set forth in this contract; the Administrative Contracting Officer (ACO) at the ERF or Center was the Government Representative authorized and responsible to take all actions issued by the Procuring Contracting Officer; the Contracting Officer's Representative (COR) was the Government Representative authorized and responsible to take all actions as set forth in the letter of assignment issued by the PCO or ACO; and that personnel authorized by the PCO may contact and discuss with the contractor contractual matters; however, they can neither (1) bind the Government or authorize purchases, (2) direct changes of work, (3) direct any other actions to be taken by the contractor which may change contractual provisions, nor (4) amend approved procedures. The contractor was advised not to accept any directives or perform any work directed from other Government agencies, officers and personnel other than the PCO or his designated representatives acting within their delegated authority and to immediately notify the PCO of any directives or work request issued by an unauthorized party.

The contract incorporated by reference the following Federal Acquisition Regulation (FAR) clauses (R4, tab 1); 52.233-1, Disputes (APR 84); 52.232-17, Interest (APR 1984); 52.216-7, Allowable Costs and Payments (APR 84); 52-242-1, Notice Of Intent To Disallow Costs (APR 84).

FAR clause 52.216-7, Allowable Costs and Payments (APR 84) provided in pertinent part (R4, tab 1):

> *Reimbursing costs.* (1) For purpose of reimbursing allowable costs ... the term "costs" includes only—
>
> (i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;
>
> (ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, cost incurred, but not necessarily paid, for—
>
> (A) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;
>
> (B) Direct labor;
>
> (C) Direct travel;
>
> (D) Other direct in-house costs, and;
>
> (E) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for the purpose of obtaining reimbursement under Government contracts; and
>
> (iii) The amount of progress payments that have been paid to the Contractor's subcontractors under similar cost standards.

PAE's employees were issued identification badges in compliance with the Security Protection Plan. On 19 July 1988, during the contract base year, PAE requested the COR's approval for a yearly expenditure of DM 24,960 to provide work clothing for ERF employees contending they "[are] recommended by our Safety Inspector as well as local Works Counsel for uniformity, security and work morale." The COR, in a 14 September 1988 memorandum to PAE, acknowledged the Government's agreement to provide safety equipment for the ERF employees and stated there was no contractual requirement or responsibility for the Government to provide work clothing and that normal clothing was suitable for wear in the warehouse environment. Unless PAE could cite a contract paragraph authorizing the expenditure the requested authorization was "declined." PAE did not provide its ERF employees uniforms at this time. (R4, tab 79; complaint, ¶ 4d(1))

In "the fall" of 1991 the COR was approached by PAE's project manager, Mr. Renk, who requested that the Government reimburse the cost of uniforms for the ERF employees, alleging uniforms were required under German law. The COR, after investigating the allegation, determined, and informed Mr. Renk, that the only uniforms required by German law were protective clothing and accordingly, the request was disapproved. (R4, tab 80; exh. G-1; complaint, ¶ 4d(1)) PAE did not then provide its ERF employees with uniforms.

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In December 1991, with the contract in its final option year, PAE, for the first time, provided work clothing to the ERF employees. In a "SHOP AGREEMENT", executed 22 September 1992, between the "Works Council", represented by Armin Spinner, and PAE, represented by H. D. Renk, the works council and PAE "ratified" an August 1991 agreement to "provide work clothing to ERF employees" as well as "provisions for storage in appropriate lockers ... at no cost to the employees." The agreement stated "[b]oth parties agree that the issuance of work clothing was necessary to adhere to safety rules and regulations, as well as to facilitate better control (identification) of employees. The Government was not party to the agreement and the parties' execution of the agreement on 22 September 1992 was eight days prior to the 30 September 1992 expiration of the contract. (Exh. A-7; complaint, ¶ 4c(2); answer, encl. 2) PAE did not provide any evidence, such as an affidavit or sworn declaration from Mr. Renk or Mr. Spinner, regarding the circumstances surrounding the signing of the agreement.

On 21 January 1993 PAE submitted to the CO a claim for an equitable adjustment in the amount of DM 78,980.35, its alleged costs for providing work uniforms to its ERF employees (R4, tabs 78, 81). PAE, in support of its claim, argued in pertinent part:

> Although ... cited contractual requirements or environmental deficiencies individually and directly prescribed the issuance and wear [sic] of distinctive and protective work clothing, the synergistic effect of the principles involved in these Sections i.e Legal Compliance, Safety and Security was one which compelled PAE's management to conclude that the issuance and prescribed wear [sic] of work clothes by all its ERF Depot employees was in their own best interest as well as that of the US Government and PAE GmbH. It provided for:
>
> Improved safety through industrial grade and type of clothing which protects employees from dust, dirt, fluid and other outside influences found in the depot.
>
> Improved security through easy recognition of authorized personnel ... and unauthorized/visiting personnel.
>
> Improved health and morale through clean and functional work clothing.
>
> Improved welfare and morale through individual safe storage space for personal items.
>
> Improved working conditions and productivity through team spirit and cohesiveness generated through the wear [sic] of professional looking work clothing.
>
> When PAE GmbH approached the Government with its management decision, the COR chose to disagree with it and refused to allow PAE GmbH to include the monthly costs for uniform rental in its reimbursement vouchers. COR sentiments notwithstanding, PAE GmbH exercised its management prerogative over its own employees and provided each one with his/her own set of work clothing without billing the Government at the time. This management decision and the works council demands are memorialized in a BETRIEBSVEREINBARUNG between the works council and PAE GmbH management.
>
> Contract [C-0262] is a cost-plus-award-fee contract. It falls under the provisions of FAR 31 which sets forth cost reimbursement principles....
>
> PAE GmbH believes the claimed costs are reasonable since they represent commercial prices charged by the uniform supplier to his other industrial customers. Copies of all bills through September 1992 are attached.
>
> PAE GmbH believes the claimed costs are allocable to the contract since the uniforms were rented for the sole benefit of this Government contract and not used by PAE or its employees for any other purpose.
>
> PAE GmbH believes the claimed costs to have been accumulated and charged in compliance with its own, as well as generally accepted accounting principles.
>
> PAE GmbH believes the claimed costs to be in compliance with the implied terms of the contract charged PAE GmbH to provide for the safety and security of its personnel.
>
> PAE GmbH does not believe that the reimbursement is limited by any section of FAR 31; in fact, FAR 31.205-13 provides for reimbursement of employee morale, health and welfare costs incurred to improve working conditions, employee morale and employee performance.
>
> REQUESTED REMEDY
>
> Based on the above discussion, PAE GmbH requests an equitable adjustment to the estimated cost of the contract incident to the rental of work uniforms for its employees through 30 September 1992, in the following amounts:

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Increase in estimated cost: ..	DM 71,533.69	
G&A of 10.41% on Costs	DM 7,446.66	
Fixed Fee:	0.00	
Total Amount of Claim:	DM 78,980.35	($49,363 @1.60)

plus interest on the total claimed amount as provided by law.

In an undated letter, acknowledged by PAE as received on 6 May 1993, the CO denied PAE's 21 January 1993 claim stating in pertinent part (R4, tab 88):

> Your claim concerning rental of uniforms is denied, based on the following:
>
> (i) The contract required PAE to develop and maintain a security system. The issuance of Identification Cards to employees and subsequent proper display and control/enforcement by PAE management satisfied contract security requirements.
>
> (ii) The only "protective clothing" justified for this contract are the safety items and clothing such as safety shoes, eye protection, welders aprons, gloves, etc. We have reimbursed you for these items.
>
> (iii) The contract does not require PAE employees to wear uniforms.
>
> (iv) In 1988, you requested reimbursement for the cost of uniforms. The contract files contain a written disapproval, memorandum, SDSNC-ERF-NAH, 14 Sep 88, Subject: Work Clothes, from Mr. Dorcus, Contracting Officer's Representative, to Mr. Ucur, PAE GmbH. Subsequent to that time, there were also several verbal disapprovals from Mr. Tolbert, Contracting Officer's Representative. There is no evidence that circumstances varied significantly in the interim period to now justify the rental of uniforms.

By letter dated 3 June 1993 PAE appealed the CO's undated final decision and filed its complaint with the Armed Services Board of Contract Appeals (Board's Correspondence file).

DECISION

Appellant proffers the following arguments as support for providing its workers with uniforms: (1) improved safety by protecting the employees from dust, dirt, corrosive fluid and other outside influences found in the depot; (2) improved security through easy recognition of authorized personnel; (3) improved health and morale through clean and functional work clothing; (4) improved welfare and morale through individual safe storage space for personal items; and (5) improved working conditions and productivity through team spirit and cohesiveness generated through the wearing of professional looking work clothing.

In the instant matter it is undisputed that appellant was informed that uniforms were not contractually required and requests for payment for same would be disallowed; that PAE unilaterally determined to provide uniforms to its ERF workers; and, eight days before the contract was to expire, PAE executed a shop agreement with the Works Council ratifying an alleged August 1991 verbal agreement to provide work clothing at no cost to the employees.

We see no reason to address each of the alleged benefits PAE attributes to its issuance of work clothing to the ERF employees, for it is clear to us they are solely unsupported assertions. Except to allege the stated benefits are attributable to the issuance of work clothing, PAE has not provided one scintilla of evidence showing the wearing of work clothing actually resulted in the alleged benefits or that the benefits it contends are attributable to the work clothing, were not already existing.

It is black letter law that an appellant, to prevail, has the burden of proving its affirmative claim and establishing its entitlement to an equitable adjustment by a preponderance of the evidence. *Planning and Human Systems, Inc.*, ASBCA No. 29725, 90-2 BCA ¶ 22,821, *recon. den.*, 90-3 BCA ¶ 23,098. Allegations advanced in a brief are not converted into facts by their vigorous assertion. *Harvex Trading Company*, ASBCA Nos. 38279, 41611, 41699, 92-3 BCA ¶ 25,027 at 124,756, citing, *Southern California Engineering Co., Inc.*, ASBCA No. 43329, 92-2 BCA ¶ 24,957. PAE has failed to meet its burden of proof, having failed to provide even one concrete instance where its generalized, conclusory and unsupported opinions/assertions are something more than self serving statements which, we have held, are unpersuasive and will not be considered as evidence. *See, AGH Industries, Inc.*, ASBCA Nos. 27960, 31150, 89-2 BCA ¶ 21,637.

Assuming, *arguendo*, we were to accept PAE's contention that benefits were derived from employees wearing the work clothing, we would still find the claim lacking. Neither PAE, nor our review of the contract, has identified a contract provision which would allow the unilateral increase of the contract's base or award fees. To allow PAE to unilaterally change the terms of the

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contract would be tantamount to giving it carte blanche authority to do whatever it cared to regardless of the Government's position. We are unaware of, and PAE has not cited, any legal theory or case citation permitting or condoning the unilateral addition of contract requirements that increase the other party's contract cost.

The appeal is denied.

[¶ 26,478] American Scientific Corporation

ASBCA No. 46037, October 27, 1993. Contract No. F42620-92-C-0377.

First Article Testing—Default Termination—Government-Supplied Samples.—The government's failure to furnish a sample coupler did not excuse a contractor's delay in failing to deliver a first article on time, because the contract did not contain a Government-Furnished Property clause or any other clause requiring it to loan the contractor an acceptably produced sample. After the termination for default of a contract for the supply of directional couplers to be used in certain aircraft, the contractor had the burden of proving the existence of an excusable cause for the nondelivery. Although the contractor alleged that the government refused to furnish a sample coupler to verify specifications, the contract required the contractor to manufacture and test the item with the data provided, and no clause required the loan of a sample part.

For the appellant: Louis Gerkin, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, Capt. Mark Alexander, USAF, and David H. Doro, Trial Attorneys.

Before YOUNGER and SPECTOR, Administrative Judges.

YOUNGER, Administrative Judge: In this appeal of a default termination, a contractor contends that it was excusably delayed in the production of a first article principally because respondent failed to loan it a sample of the part called for by the contract and failed to respond to inquiries. Appellant elected Rule 12.3 disposition and both parties have submitted under Rule 11. We deny the appeal.

FINDINGS OF FACT

1. By date of 16 November 1992, respondent awarded appellant fixed price contract no. F42620-92-C-0377 for the supply of directional couplers to be used in F-16 aircraft. The delivery schedule required appellant to deliver an acceptable first article "90 DAYS ARO [after receipt of order]." We find that the delivery date under the schedule was 25 February 1993.

2. The contract contained various standard clauses, including "First Article Approval-Government Testing (SEP 1989)," as prescribed in FAR 52.209-4, and "Default (Fixed Price Supply and Service) (APR 1984)," as prescribed in FAR 52.249-8. We find that the contract contained no Government-Furnished Property clause (*see, e.g.*, FAR 52.245-2), or other clause, requiring respondent to loan appellant an acceptably-produced sample of the coupler.

3. The contract also contained Attachment A, "Engineering Data Requirements," which referred to the coupler, set forth two revisions to the data package, and provided that "[a] new contractor must be able to manufacture and test the Item with the data provided."

4. We find that respondent did not fail to respond to appellant's letters and telephone calls, thereby impeding progress on the contract. By date of 16 February 1993, appellant sent the procuring contracting officer three letters. The first was a 19 November 1992 letter to the contract administrator stating that "[p]er our telecon today, request bailment (loan) of 1 each of the directional couplers.... The loan of this item will facilitate production validation under the contract." The second was a 29 December 1992 letter to the administrative contracting officer seeking a response to the first letter. The third was a 16 February 1993 letter to the procuring contracting officer complaining of the lack of response to previous inquiries, posing a technical question and requesting both loan of a coupler and a 60-day extension of delivery dates. Accepting the affidavits of both the administrative and procuring contracting officers, we find that, if the first two letters were sent, they were not received. We further find no persuasive evidence that respondent failed to respond to appellant's telephone calls.

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5. Crediting the procuring contracting officer's affidavit, we find that he did not tell appellant's president in February 1993 that appellant should be given an extension of time because post-award contract personnel had not been responsive to appellant's inquiries and requests.

6. We find that respondent's assigned industrial specialist did not unfairly or erroneously characterize appellant's progress after visiting appellant's facility on 4 March 1993. We find no credible evidence to controvert the industrial specialist's statements in his affidavit that he "found that [appellant] had not [then] produced a first article" and that it was his "opinion that [appellant] had not made significant progress on the contract and that [appellant] was not likely to be able to deliver an acceptable first article in the near future."

7. We find that the administrative contracting officer did not mislead appellant regarding the availability of a coupler from a Florida surplus dealer. We find that, as stated in her affidavit, she told appellant's president on 16 February 1993 that he "might possibly obtain" a coupler from the dealer.

8. Appellant failed to deliver a first article by 25 February 1993. (*See* finding 1) By letter dated 16 March 1993, the terminating contracting officer advised appellant that "a termination for default is being considered." As an alternative, he offered appellant a no-cost termination, requested appellant's response within ten days, and advised that failure to respond within that time would be deemed rejection. Thereafter, by modification PH0001 dated 7 April 1993, the terminating contracting officer terminated the contract for default.

9. Appellant subsequently brought this timely appeal, and elected Rule 12.3 disposition. Both parties thereafter elected to submit under Rule 11.

DECISION

Familiar principles govern appellant's allegations that its failure to tender a first article within the delivery schedule (*see* finding 1) resulted from respondent's refusal to furnish a sample coupler to "verify USAF specifications," and by respondent's lack of response to technical inquiries. "[W]here a contractor fails to comply with contract delivery schedules the contract may be terminated, pursuant to the default clause." *Churchill Chemical Corp. v. United States* [26 CCF ¶ 83,573], 602 F.2d 358, 362 (Ct. Cl. 1979). The contractor must demonstrate "[t]he existence of 'excusable' causes for ... nondelivery." *Franklin E. Penny Co. v. United States* [21 CCF ¶ 83,912], 524 F.2d 668, 674 (Ct. Cl. 1975). The standard First Article clause (*see* finding 2) provided that if the contractor failed to deliver "any first article on time," then the contractor "shall be deemed to have failed to make delivery within the meaning of the Default clause." *See AeroParts*, ASBCA No. 37822, 90-1 BCA ¶ 22,510 at 112,984.

In applying these principles here, we can only conclude that appellant has not established excusable delay. We have made findings regarding each of the components of excusable' delay that appellant has alleged in its complaint. Thus, with respect to respondent's alleged failure to furnish a coupler, we cannot say that it was obligated to do so. The contract required appellant "to manufacture and test the Item with the data provided," and no clause required loan of a sample part. (Findings 2, 3) In any event, respondent did attempt to direct appellant to a third party source for the part. (Finding 7) With respect to the alleged failure to respond to inquiries, we have found against appellant. (Finding 4) We have also found that the evidence does not support the further allegations that the procuring contracting officer conceded that appellant was entitled to a time extension; that the industrial specialist wrongly characterized appellant's progress; and that the administrative contracting officer misled appellant regarding the availability of a coupler from a third party. (Findings 5, 6, 7)

CONCLUSION

The appeal is denied.

[¶ 26,479] Oriental Gasket and Packing Company, Inc.

ASBCA No. 45895, November 9, 1993. Contract No. DLA500-91-C-FA42.

First Article Testing—Default Termination—Test Report.—A contract was properly terminated for default, even though the contractor was misled by its supplier regarding the existence of an acceptable first article test report, because the government was

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not required to accept the supplier's report. The contractor requested a waiver of the report requirement on the ground that its material supplier had previously provided a report to the government for the same material. However, the government rejected the report because it was more than three years old and had been filed with another agency.

For the appellant: James L. Swanson, President. For the government: Judith R. Robbins, Trial Attorney, Defense Industrial Supply Center (DLA), Philadelphia, Pennsylvania.

Before FREEMAN and STEMPLER, Administrative Judges.

FREEMAN, Administrative Judge: Oriental Casket and Packing Company, Inc. (Oriental) appeals a termination for default. The parties have submitted the appeal for decision under Rule 11 without oral hearing. Oriental has elected the Rule 12.3 accelerated procedure. We find that Oriental, without legal excuse, failed to deliver a first article test report (FATR) within the required time. The default termination was proper.

FINDINGS OF FACT

1. On 5 July 1991, Oriental and the Government entered into a contract for 25 rubber sheets to be manufactured in accordance with specification MIL-R-25988B. The contract also required a FATR as a separate deliverable line item in accordance with a clause entitled "FIRST ARTICLE APPROVAL—CONTRACTOR TESTING (APR 1984) ALTERNATE I (APR 1984)". This clause stated in relevant part:

> (a) The Contractor shall test Batch* unit(s) of Lot/Item I as specified in this contract. At least 10 calendar days before the beginning of first article tests, the Contractor shall notify the Contracting Officer in writing of the time and location of the testing so that the Government may witness the tests.
>
> (b) The Contractor shall submit the first article test report within 180 calendar days from the date of this contract to DISC-QRB ... Within 60 calendar days after the Government receives the test report, the Contracting Officer shall notify the Contractor, in writing, of the conditional approval, approval or disapproval of the first article.... A notice of disapproval shall cite reasons for the disapproval.
>
> * * *
>
> *I/A/W paragraphs 3.2, 3.2.1, 4.3.1, 4.3.2, 4.3.3, 4.4 and all other pertinent paragraphs referenced in MIL-R-25988B

2. By letter dated 25 July 1991, Oriental requested a waiver of the FATR requirement on the ground that its material supplier, SFS Industries, Inc. (SFS) had previously provided a FATR to the Government for the same material. On 29 October 1991, the Government rejected the waiver request. The SFS FATR was more than three years old, and had been filed with a different procurement agency.

3. On or about 20 February 1992, Oriental submitted a FATR purportedly based on a test conducted by SFS on 10 January 1992. The Government had not been notified ten days in advance of this test as required by the First Article Approval—Contractor Testing clause, and did not witness the test. On 27 May 1992, the FATR was disapproved for that reason and because the report did not include a required material certification. On 26 August 1992, Oriental requested a no-cost cancellation of the contract on the ground that the cost of a new first article test would cause a loss on the contract. The contracting officer denied this request.

4. The originally specified delivery date for the FATR was 1 January 1992. By unilateral Modification P00001, dated 3 September 1992, the contracting officer extended the FATR delivery date to 3 October 1992. By letter dated 9 September 1992, Oriental complained that the Government quality assurance representative responsible for witnessing tests at SFS (the "Santa Ana QAR") had not told SFS what tests she wanted to witness and had not arranged a time for the tests. The required tests were specified in the contract specification, MIL-R-25988B. Moreover, the First Article Approval—Contractor Testing clause stated that the contractor, not the Government, was responsible for setting the time and place for the tests.

5. By letter to SFS dated 14 September 1992, the Santa Ana QAR listed the first article tests required by MIL-R-25988B, and requested SFS's schedule for conducting those tests. There is no record of any SFS response to this letter. On 30 September 1992, Oriental notified the Government that SFS was demanding $3,361 for performing the first article tests, and requested the Government either to pay for the tests or terminate the contract for convenience.

6. On 7 October 1992, the Government issued a "show cause" letter for Oriental's fail-

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ure to deliver the FATR by the date specified in Modification P00001. Oriental replied with the following excuses: (i) that it had relied in bidding on SFS's representation that it had "a current first article approval ... that we could use to have the entire first article [requirement] waived;" (ii) that the Government QAR at Oriental's plant (the "Dallas QAR") had refused to sign the "paperwork" for the initial FATR; (iii) that the Dallas QAR had directed that the first article test be performed at the SFS plant; (iv) that the Santa Ana QAR had delayed telling SFS the tests she wanted to witness; and (v) that the additional charges demanded by SFS were the result of "the extensive testing the [Santa Ana] QAR was requiring."

7. There is no evidence that either the Dallas QAR or the Santa Ana QAR directed Oriental to have the first article tests performed by SFS or at the SFS plant, or that such direction if given was confirmed by a contracting officer. There is no evidence that the Santa Ana QAR directed SFS to perform any tests that were not required by the contract specification, MIL-R-25988B.

8. On 8 January 1993, the contracting officer terminated the contract for default, purporting to act under the FAR 52.249-8 clause entitled "DEFAULT (FIND-PRICE SUPPLY AND SERVICE)." The contract documents provided by the Government for the appeal (Rule 4) file do not show that the cited Default clause was in fact a part of this contract. The cited clause is not mandatory in contracts which do not exceed the small purchase limitation ($25,000). See FAR 49-504(a)(1). The price of the contract at issue ($6,239) did not exceed the small purchase limitation.

DECISION

It is not disputed that Oriental failed to deliver a FATR within the time specified or otherwise as required by the contract. This failure was a default under the terms of the cited Default clause, or a material breach under common law principles if the Default clause was not a part of the contract. Oriental has not proven any facts legally excusing the default or breach.

The fact that Oriental was misled by its supplier, SFS, as to the existence of an acceptable FATR does not excuse Oriental's failure to provide a report. Oriental has not cited any contract provision requiring the Government to accept the SFS FATR. The Dallas QAR properly refused to sign the report of the purported 10 January 1992 test because he had not witnessed that test. Oriental alleges that it was directed to perform the first article test at SFS. If true, such direction might entitle Oriental to recover any resulting increased cost, but it does not excuse a failure to perform the tests as directed, with advance notification to the Government and otherwise in accordance with the contract. The alleged delay by the Santa Ana QAR in telling SFS what tests she wanted to witness is irrelevant. The tests to be performed were specified in the contract specification. It was Oriental's obligation to have all of the specified tests performed, and to notify the Government of the location and time ten calendar days in advance. It did not do so. There is also no evidence that SFS was directed to perform any tests that were not specified by the contract.

On these facts, the termination was proper either for default under the cited Default clause, or for common law material breach. The appeal is denied.

[¶ 26,480] Techno Engineering & Construction, Ltd.

ASBCA No. 45809, November 5, 1993. Contract No. F64605-86-C-0116.

Modifications—Bar to Claims—Oral Reservations.—A claim for legal expenses that a contractor alleged were orally reserved was denied because any such claim for additional legal fees was barred by the express releases in the modification. The parties negotiated a settlement agreement resulting from a termination for the convenience of the government. Subsequently, the contracting officer denied a claim for legal expenses associated with the settlement of subcontractor claims that the contractor alleged were to have been reserved for payment at a later date. However, the meaning of the releases was undisputedly clear. The allegation that there was an oral agreement reserving certain legal fees was inconsistent with the releases.

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For the appellant: Michael A. Georgopapadakos, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Robert C. Allen, Trial Attorney.

Before GROSSBAUM and SPECTOR, Administrative Judges. Separate concurring opinion by Administrative Judge SPECTOR.

GROSSBAUM, Administrative Judge: This dispute arose after the parties negotiated a termination for convenience settlement under a construction contract. The appeal was taken from a contracting officer's decision denying the contractor's claim for legal expenses associated with the settlement of subcontractor claims. According to the contractor, such expenses had not been incurred at the time the termination settlement was negotiated and were understood to have been reserved for payment at a later date.

The amount claimed is $822.64 and appellant has elected to proceed under the accelerated procedure provided by Rule 12.3. Both parties have elected to submit the case for decision on the record, pursuant to Rule 11. Only liability (entitlement) is before us for decision.

SUMMARY FINDINGS OF FACT

In September 1986 the Government awarded the instant contract to appellant, Techno Engineering & Construction, Ltd. (Techno), to install water meters at Hickam Air Force Base, Hawaii, for the price of $248,178. The contract was terminated for default in May 1987. However, during proceedings on Techno's appeal from the default termination, in March 1989 the termination was converted into a termination for convenience.

In October 1989 Techno submitted a termination for convenience cost proposal for $260,144.30. Among the termination costs Techno sought to recover was an amount of $17,313.80 categorized as "Legal Fees" and a separate amount of $5,000.00 for "Legal Fees" subsumed in the total amount of $30,624.92 under the category styled "Settlement Costs." (R4, tab 21)

The parties could not agree on the termination settlement amount and, in early 1991, Techno certified and resubmitted its proposal to the contracting officer as a claim in the amount of $259,349.54. The total claimed for "Settlement Costs" remained at $30,624.92, and the elements under that category were unchanged. However, the amount claimed for the separate category "Legal Fees" increased to $17,625.79. (R4, tab 23)

Techno's termination claim also alleged, *inter alia*, the following amounts owing to certain subcontractors and vendors: Wisdom Industries—$12,681.21 ($8,071.51 + 4,609.70); Fluid Systems—$5,444.58; and A & E Painting—$2,000.00. With respect to the subcontractor Wisdom Industries, Techno's claim also indicated unspecified additional amounts for "interest," "attorney's fees," and "costs incurred in . . . collection of this claim." (R4, tab 23)

In July 1991 Techno took an appeal from the contracting officer's failure to issue a decision on its termination claim. The appeal was docketed as ASBCA No. 43288.

The prayer for relief in Techno's 23 August 1991 complaint in ASBCA No. 43288 omitted reference to any additional unspecified amounts (such as "attorney's fees") associated with settlement of the Wisdom Industries subcontract, but did include a amount of $18,159.61 claimed for the separate category "Legal Fees." The total amount prayed for in the complaint was $213,697.23. Among other things the 'Settlement Costs" category had been reduced to $21,624.92 and no longer included a subcategory styled "Legal Fees." (R4, tab 24)

In January 1992 Techno and the Government agreed to settle the pending convenience termination claim. Settlement negotiations were conducted by Techno's president, Michael A. Georgopapadakos, and Major Terry N. Petrie, USAF, the Government trial attorney in ASBCA No. 43288, and agreement was reached between them on 29 January 1992. The basic terms of the settlement agreement were recited in a 30 January 1992 letter signed by both parties and the complete agreement was later memorialized in bilateral modification P00004, effective 29 January 1992. (R4, tabs 3, 5)

According to its express terms, modification P00004 had been "written to definitize all costs associated with the settlement of Techno Engineering & Construction, Ltd.'s [termination for convenience] claim," which was the subject of ASBCA No. 43288. Paragraph 2 of the modification set forth the following terms:

> Subject [to] the availability of funds, Techno Engineering & Construction, Ltd. (Techno), is to be paid an additional $90,001.31 to the monies already received plus any interest that accrues after 14 March 1992 if payment is not made by

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that date. Beginning 15 March 1992, interest accrues until payment is made at the rate provided for claims under the Contract Disputes Act of 1978.

The parties agree that any interest that the Government was, is, or may be liable for on any of Techno's claims arising out of the subject matter of ASBCA No. 43288 is included in the amount set forth in this agreement. No additional interest beyond what is provided for in this agreement will be paid on said claims for any reason.

Within 30 days of receipt of payment [from] the Government, Techno will pay $10,748.86 to Wisdom Industries, $2,000.00 to A & E Painting, and $5,444.58 to Fluid Systems. Techno further agrees within 30 days of payment to each of the aforementioned companies to provide written documentation of the release of claim by each of these companies against Techno or to refund the amount of monies due each company for which payment was not made to [the contracting officer].

That this agreement constitutes a full discharge, accord and satisfaction, and release of any and all claims, demands, or causes of action, actual or constructive, legal, equitable, contractual or administrative, known or unknown which Techno or the Government has against the other, arising out of the actions of the parties and subject matter of the appeal before the Armed Services Board of Contract Appeals docketed as No. 43288.

In consideration of the foregoing, the parties mutually release and forever discharge each other, without reservation, of and from all ma[nn]er of actions, causes of action, suits[,] proceedings, debts, dues, judgments, damages, claims and demands whatsoever, in law or equity, or under administrative procedures which either of them ever had, now has, or may have for or by reason of any matter, cause or thing, whatsoever arising out of the actions of the parties encompassed in ASBCA No. 43288.

Techno, as part of the consideration for this settlement, agrees to withdraw with prejudice its appeal ASBCA No. 43288.

That this agreement also stands as full accord and satisfaction for any legal fees or litigation costs to which Techno may be entitled to [sic] under the Equal Access to Justice Act.

The modification did not expressly reserve any claims or state any specific exceptions to the mutual releases indicated therein. (R4, tab 3)

On 30 January 1992 Techno submitted to the Government's finance and accounting officer an invoice, styled "Final Billing," in the amount of $90,001.31. The Government paid the full amount of this invoice by check, which was received by Techno on 6 March 1992. In accordance with the parties settlement agreement, ASBCA No. 43288 was dismissed with prejudice. (R4, tabs 4, 7)

In mid-March 1992 Techno paid $10,748.86 to Wisdom Industries and $5,444.58 to Fluid Systems, as stipulated in modification P00004, and obtained releases from these suppliers. The release from Wisdom Industries was transmitted to the Government on 17 March 1992. However, the release from Fluid Systems was not sent to the Government until 7 July 1992. (R4, tabs 8, 10)

By letter dated 2 July 1992 the contracting officer reminded Techno of its agreement to submit releases from the vendors mentioned in modification P00004 or, alternatively, "to refund the amount of monies due each company ...." A Government contract specialist telephoned Techno on 13 July to inquire about the status of the release expected from A & E Painting. By reply letter dated 13 July 1992, Techno advised the contracting officer, *inter alia*, that, since reaching its settlement with the Government, it had incurred several hundred dollars in "expenses associated with legal fees for settlement of all claims with Wisdom Industries." (R4, tabs 9, 11, 12)

In a 12 August 1992 letter to the contracting officer, Techno suggested that the issue of legal fees associated with settling vendors' claims, entitlement to which would not be subject to the Equal Access to Justice Act, "was left to be addressed if and when it might arise." Alternatively, "since A&E painting is no longer in business" and Techno could not obtain a release from them, Techno offered to "defray the legal fees towards the amount of [A & E's] claim" in order to "close out the contract." (R4, tab 14)

Techno's president describes his understanding of the settlement agreement reached on 29 January 1992 in a "Declaration" dated 30 November 1992, as follows:

> Both parties were aware of the possibility of incurring additional costs in the area of legal fees associated with settlement costs of vendors but were unable to determine their magnitude. ... It was mutually

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agreed that the amount that could possibly arise was minor in comparison with the overall settlement; as such the issue was decided to be left out of the agreement syllabus to be addressed if and when it might arise in the future.

It was my understanding, at the time I signed the settlement on behalf of Techno ... that all future legal expenses associated with settlements of subcontractors and thus not subject to the Equal Access to Justice Act would be paid by the Government in addition to the settlement.

(R4, tab 18) Techno's president elaborates on this understanding in a further "Declaration" dated 10 August 1993, as follows:

5. Since we already had ongoing litigation with subcontract[or]s and supplie[r]s we were unable to determine the total costs associated with category (1) legal fees [*i.e.*, "fees associated with defense and/or settlement of claims with subcontractors and suppliers"]; while since we were settling with the Air Force we could control the legal fees under category (2) [*i.e.*, "fees associated with defense and/or settlement of our claim with the government"] associated with ASBCA No. 45809 [sic—43288] under the Equal Access to Justice Act.

6. Accordingly, we agreed to settle on the legal fees under the Equal Access to Justice Act, but not on the legal fees associated with the settlement of claims between the vendors and ourselves.

7. These residual legal fees together with our overhead and profit were to be submitted to ABW Contracting Center, 15 ABW/LGCC, Hickam AFB, Hawaii 96854-6430, for payment upon completion at a later date.

8. The costs under category (1) included in our January 30, 1992 settlement were limited to the ones supported by invoices by our attorneys. Accordingly, invoices received subsequently to the January 30, 1992 date were not included in the settlement.

The above-quoted statements are contradicted in an affidavit by Major Petrie, who asserts, *inter alia*, that:

In the negotiations we discussed every entry in Appellant's termination for convenience cost proposal. The discussions covered each party's view of the merits of the individual entry and the documentation available to substantiate the claimed cost. After trading views on the individual entries, we engaged in several rounds of offers and counteroffers until the figure reached in the settlement was agreed upon by both of us. The offers and counteroffers were discussed in terms of dollar amounts without commenting how the proffered figures related to the specific merits of a given claimed cost entry.

As it has at each stage of the litigation involving this contract, Appellant claimed legal fees and expenses in ASBCA No. 43288....

Like every other claimed cost, Appellant's entry for legal fees and expenses was discussed and negotiated by Mr. Georgopapadakos and myself....

* * *

... at no time was an agreement reached that any settlement figure reached would later be supplemented by additional legal fees incurred after settlement. If it had been then it would have been a stated, written provision of the settlement agreement, just like the provision governing payments to the supply vendors was described in writing. Rather, the expressed goal, which was openly stated by each of us during negotiations, was to wrap-up the litigation with a one-time settlement that disposed of Appellant's claim against the Air Force.

(R4, tab 26) This statement is consistent with facts disclosed by the record before us and is entitled to credence.

By contrast, we find Techno's president's declarations regarding understandings reached during negotiation of the termination settlement in January 1992 to be inherently implausible. We make this finding without considering evidence, admissible under Fed. R. Evid. 609(a)(2), submitted by the Government to impeach the credibility of Techno's president (R4, tab 25). Such evidence would simply reinforce our finding herein.

By letter to Techno dated 25 November 1992, the contracting officer rejected Techno's request for additional legal fees and noted that $2,000 may be "owed to the government by you since A&E Painting was never paid according to the terms of modification P00004" (R4, tab 17).

Under letter to the contracting officer dated 30 November 1992, Techno submitted a claim in the amount of $822.64 for additional legal fees, allegedly billed from January through June 1992, and associated contractor markups. By letter to Techno dated 23 February 1993, the contracting officer issued a decision denying the claim. Techno took a timely appeal from this deci-

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sion. The contracting officer's 23 February 1993 letter also "remind[ed]" Techno that it owed the Government $2,000.00 for the settlement amount "unpaid to your subcontractor[,] A&E Painting, but did not assert a claim for this money. (R4, tabs 18, 19)

DECISION

Techno's claim for additional legal fees and related markups associated with the settlement of subcontractor claims is devoid of merit.

Appellant argues that "the intent of the parties rather than the language of the settlement [agreement is] of paramount importance" and refers us to its president's declarations to adduce that "intent during the January 30, 1992 settlement." (App. ltr. 10 Aug 1993) However, even if we were to give credence to appellant's professed subjective intent that "all future legal expenses associated with settlements of subcontractors ... would be paid by the Government in addition to the [termination] settlement," which we do not, it could not alone overcome the unequivocal terms of the parties' termination settlement agreement. These terms are memorialized in modification P00004 and are recited in our summary findings.

Modification P0004 was a binding integrated agreement, "written to definitize all costs associated with the settlement of Techno['s] ... [convenience termination] claim" under ASBCA No. 43286. In addition to stating that the settlement agreement represented a "full accord and satisfaction for any legal fees or litigation costs to which Techno may be entitled ... under the Equal Access to Justice Act," two separate subparagraphs in paragraph 2 of modification P00004 expressly set forth sweeping mutual releases. In one subparagraph the parties mutually released "any and all claims ..., known or unknown[,] ... arising out of the actions of the parties and subject matter of" ASBCA No. 43288. In the other subparagraph the parties mutually released and discharged each other, "without reservation, ... from all ma[nn]er of actions ..., claims and demands whatsoever ... which either of them ever had, now has, or may have ..., whatsoever arising out of the actions ... encompassed in ASBCA No. 43288."

Techno executed modification P00004 without stating any specific exceptions to the mutual releases therein and without expressly reserving any rights concerning further claims to legal fees or anything else. The meaning to be attached to these releases is clear and is not disputed. However, Techno's president's declarations purport to show that, during negotiations, the parties made an oral agreement about reserving certain legal fees that is inconsistent with the releases. We hold that such prior agreement is discharged, and Techno's claim for additional legal fees is barred, by the express releases in modification P00004. *Eslin Co.*, ASBCA No. 34029, 87-2 BCA ¶ 19,854 at 100,455-56; *see* RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

Accordingly, the appeal is denied.

SEPARATE OPINION BY ADMINISTRATIVE JUDGE SPECTOR

I concur in result on the basis that I am not persuaded that the Government agreed, as contended by appellant, to address in the future the additional legal fees at issue.

[¶ 26,481] Emerald Maintenance, Inc.

ASBCA No. 45287, November 8, 1993. Contract No. DACA83-88-C-0141.

Interpretation of Contracts—Contract as a Whole—Omissions.—The omission of a symbol requiring the installation of resilient flooring from the plans for a laundry room in one type unit did not relieve the contractor of the responsibility of installing the flooring, because the note beneath specifically advised that the information pertained to both type units. To interpret the note to eliminate, rather than to add, the symbol on one type unit would render the symbol meaningless and would violate the principles of contract interpretation. In a contract for the renewal of family housing, a contractor alleged that the contract did not require it to place resilient flooring over newly placed concrete in the laundry rooms of certain type units. However, a symbol on a drawing to prepare existing concrete surfaces for new flooring did not preclude a requirement, shown elsewhere, to cover concrete surfaces that later came into being as a result of pouring a new concrete slab. The first floor plans indicated that new concrete floors were to have resilient flooring.

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Interpretation of Contracts—Contract as a Whole—Zone of Reasonableness.—A contractor's interpretation was not within the zone of reasonableness, because the contractor did not establish that it relied on its interpretation in bidding on the contract. In order to obtain a recovery based on its interpretation of an ambiguous contract, a contractor must show that it relied on this interpretation in submitting its bid. The contractor did not supply any evidence in support of its burden.

For the appellant: Dan Deshon, President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, Gayle B. Chesnut and Robyn U. Au, Engineer Trial Attorneys, U.S. Army Engineer Division, Pacific Ocean, Fort Shafter, Hawaii.

Before LUSSIER and SPECTOR, Administrative Judges.

LUSSIER, Administrative Judge: This appeal is taken from a deemed denial of a claim by Emerald Maintenance, Inc. (appellant) seeking an equitable adjustment in price of $32,507.50 for installation of resilient flooring over new concrete areas in the laundry rooms of buildings being renovated under the subject contract. After the filing of the appeal, the contracting officer issued a decision denying the claim and stating his reasons in detail for the denial. The parties have submitted the appeal for decision on the record under Board Rule 11, with appellant further electing the accelerated procedure in Board Rule 12.3. In accordance with a schedule established by the Board for supplementing the record with documentary evidence and a brief, the Government submitted one document to supplement the Rule 4 file which had previously been submitted by it. It also submitted a brief. The appellant did not take advantage of submitting either additional evidence or a brief.

SUMMARY FINDINGS OF FACT

1. Contract No. DACA83-88-C-0141 was awarded to appellant on 30 September 1988. The contract was for the renewal of family housing quarters at Pearl Harbor. Appellant's bid of $1,815,322 was over 30% below the Government's estimate and it was notified of that disparity and asked to review its bid and verify it, which it did.

2. The record indicates that in January 1989, a disagreement arose as to whether the contract required appellant to place resilient flooring over newly placed concrete in the laundry rooms. The Government then directed appellant to do so.

3. In July 1991, over two years later, appellant filed the claim which is the subject of this appeal. There is no documentation, or allegation by the Government that the claim was untimely filed for any reason. Other than asserting that the appellant had been directed to do the work and that the work was beyond the scope of the contract, the letter made only the following points:

1.) Detail 1/1/6, Ring 7 denotes that the flooring of the new laundry room should be finished concrete.

2.) Detail 40 of the Demolition drawings states "Prepare existing concrete surface for new flooring."

3.) No other contract specifications require the installation of resilient flooring over new concrete surfaces.

4. There is no evidence, or allegation, that appellant held the interpretation that it did not have to place resilient flooring over new concrete, at the time it bid the contract, or that it relied upon a flooring subcontractor who held that interpretation.

5. The contract contains the standard *Disputes* (APR 1984), *Changes* (AUG 1984), and *Contract Drawings, Maps and Specifications* (SEP 1987) clauses. The last clause provides in pertinent part:

* * *

(b) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

6. The drawing referred to as "Ring 7," in the above quoted paragraph 1 of appellant's claim letter, is the first floor plan. Detail 1/1 reflects concrete floors, by the use of speckled markings, in the laundry rooms in "Unit Type A." Detail 1/2, directly adjacent, shows "Unit Type A-R" and, while also depicting the laundry rooms with concrete floors, this depiction has a box in the middle of the laundry rooms with the letters "RF" written in it. (See attachment A hereto) [Attachment A not reproduced.—CCH] Those letters are indicated elsewhere to mean resilient flooring. Further, there is a note directly underneath, and between

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these two depictions, which states that "notes, dimensions, etc." shown for the A unit pertain to the reverse type A-R unit, and that "information shown" for the A-R unit pertains to the A unit.

7. "Detail 40" referred to in the above quoted paragraph 2 of appellant's claim letter, is actually R/C (removal code) note 40 on the "Removal/Repair Code Schedule" of the site demolition drawing. It is correctly quoted by appellant as stating "Prepare existing concrete surface for new flooring." It must be added however, that there is a further note at R/C 43 of that same schedule, which states "sawcut and remove existing concrete slab as necessary for new mechanical work. Pour new concrete slab after completion of new work to match existing adjacent slab." Other contract drawings make it clear that the laundry rooms would contain R/C 40 existing concrete, R/C 43 removed and replaced concrete, and new concrete (R4, tabs E-3, E-4 and E-19). Only one corner of the room contained existing concrete. An adjacent larger section contained what was to be removed and replaced concrete and the largest section contained new concrete.

8. With reference to paragraph 3 of appellant's claim letter, the Government has not referred us to any contract "specification" which specifically mentions applying resilient flooring to new concrete surfaces, and we have found none. The Government has however, referred to the contract drawings as a basis for its position that resilient flooring was to be installed throughout the laundry rooms.

DECISION

The issue before us is one of contract interpretation. We begin with the well recognized rule of law that "an interpretation which gives reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶ 72,885], 351 F.2d 972, 979 (1965). Viewing the contract as a whole with that principle in mind, we conclude that it required installation of resilient flooring over the concrete in the laundry rooms.

The R/C note on the demolition drawing to prepare "existing" concrete surfaces for new flooring does not preclude a requirement, shown elsewhere, to cover with resilient flooring concrete surfaces that later came into being as a result of pouring new concrete slab. R/C 43 on that same demolition drawing directs the contractor to cut and remove the existing slab as necessary for the new mechanical work and to pour the new concrete slab to "match the existing slab." We agree with the Government that it is clear that the intent was for the new slab to form a continuous floor with the existing slab. To interpret the contract to require resilient flooring only on the "existing" concrete and not on the "removed and replaced" concrete and the "new" concrete areas would leave only one small corner of the laundry rooms with resilient flooring. Also, as indicated in our findings, "Ring 7," the first floor plan, indicates, by the symbol "RF," that new concrete floors were to have resilient flooring. Even though that symbol appeared only on the laundry rooms depicted in the "A-R" type unit, and not the "A" unit, the note beneath specifically advised that the "notes dimensions, etc." and "information" pertained to both units. To interpret the note to eliminate the "RF" symbol on the "A-R" type unit and thus render it meaningless, rather than to be applicable to the "A" unit, would violate the principles set forth in *Hol-Gar, supra.*

While we conclude that the contract read in its entirely required resilient flooring throughout the laundry rooms, were we to conclude that appellant's asserted interpretation was within the "zone of reasonableness" described in *WPC Enterprises, Inc. v. United States* [9 CCF ¶ 72,289], 323 F.2d 874, 876 (Ct. Cl. 1963), we would still have to deny the appeal. To prevail on its interpretation, appellant would have to establish that it relied on that interpretation in bidding the contract. As the Court noted in *Fruin-Colnon Corp. v. United States* [36 CCF ¶ 75,923], 912 F.2d 1426, at 1430, 1432 (Fed. Cir. 1990):

> The general rule is that "where a contractor seeks recovery based on his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid." [Citations omitted] This rule of law is well settled. [Citations omitted] The burden of proving reliance on the claimed interpretation thus falls on the contractor.

* * *

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Evidence at the time of bidding is thus crucial to proving reliance.

Appellant has not supplied one iota of evidence in support of this burden.

The appeal is denied.

[¶ 26,482] **Chamac, Inc.**

ASBCA No. 44905, November 8, 1993. Contract No. N62474-84-C-4789.

Interpretation of Contracts—Reasonableness—Intent of Contract.—A contractor's contention that a contract to provide a target range for tanks required concrete-encased cable only under paved roads was not reasonable, because a logical interpretation of the intent of the contract would require concrete-encased cable wherever cable crossed under roads that were subject to tank traffic. Under a contract for the construction of additions to a tank moving-target range, a contractor sought an equitable adjustment for installing concrete encasement for cable under trails, alleging that the word "trail" did not appear in underground electrical work applications. The contractor alleged that the ordinary meaning of the word "trail" was different from that of the words describing roads and that the requirement for concrete encasement under roads did not apply to trails. However, the contractor should have understood "trails" to be included within the term "roads" because the intent of the contract was to provide a target range for tanks. Moreover, a note on one drawing stating the requirement for concrete-encased cable at road crossings depicted a tank trail.

Interpretation of Contracts—Ambiguity—Duty to Seek Clarification.—A contractor was precluded from recovering on a claim for the costs of encasing cable that ran under unpaved trails, because the omission of "trails" from a contract for the installation of concrete-encased cable under roads subject to tank traffic would have been an obvious and significant omission that imposed a duty on the contractor to seek clarification of the requirements before bidding. The differing views of the parties could be considered sufficient to find an ambiguity in the contract; however, any ambiguity was patent, and the contractor did not attempt to clarify its obligations before bidding.

For the appellant: Kent B. Scott, Salt Lake City, Utah. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Wayne O. Hadland, Trial Attorney, Naval Facilities Engineering Command, San Bruno, California.

Before TODD, RUBERRY, and RIISMANDEL, Administrative Judges.

TODD, Administrative Judge: This appeal is from the denial of a constructive change claim for extra work installing concrete-encased electrical cables under road crossings. Pursuant to Board Rule 11, the parties agreed to submit the appeal for decision on the record. Only entitlement is before us.

FINDINGS OF FACT

1. On 16 November 1987, the Department of the Navy Western Division, Naval Facilities Engineering Command, San Diego Branch issued Solicitation No. N62474-84-B-4789 for the construction of additions to the Tank Moving Target Range at the Marine Corps Base in Camp Pendleton, California. The specifications, plans and drawings prepared by the Government and furnished for the bidding contractors became part of the contract documents (R4, tab 1).

2. On 12 February 1988, award of the contract was made to appellant Chamac, Inc. (Chamac) in the amount of $2,310,258 (R4, tab 1). The intention of the contract was to provide and secure a Moving Target Range complete and ready for use (*id.*, § 01010, ¶ 1.1). The contract included the following description of work:

> 1.2 GENERAL DESCRIPTION: The work includes earth berms and emplacements for moving vehicle armor targets, stationary vehicle armor targets, moving and stationary infantry targets, *service roads and tank trails,* hull downs, subdrainage and above ground drainage, control tower, on-site and off-site electrical and support structures identified as addi-

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tive bid items, as well as incidental related work.

(*Id.*, § 01010, ¶ 1.2, emphasis added.) The contract specifications included the following instructions:

3.6 SPECIAL EARTHWORK INSTALLATION REQUIREMENTS: ... For installation requirements for buried electrical and data cable systems refer to SECTION 16301, UNDERGROUND ELECTRICAL WORK, and SECTION 16741 TARGET CONTROL AND DATA SYSTEMS.

(*Id.*, § 02202, ¶ 3.6) The specifications for the underground electrical work provided in pertinent part:

3.4 DIRECT BURIAL SYSTEM: The cables shall be buried directly in earth, except that under *paved areas and roadways* the cables shall be installed in PVC coated RGS conduit encased in concrete.

3.5 UNDERGROUND DUCT WITHOUT CONCRETE ENCASEMENT:

3.5.1. Types of Conduit and Duct: Conduits shall be polyvinyl chloride, Schedule 40 or PVC coated rigid galvanized steel. PVC shall be used only in areas closed to vehicular traffic.

* * *

3.5.3 Roads and Paved Areas: *Under roads and paved areas,* ducts shall be encased in concrete and installed as specified for underground duct lines encased in concrete. The concrete encasement shall extend at least 5 feet beyond the edges of *paved areas and roads.*

3.6 UNDERGROUND DUCT WITH CONCRETE ENCASEMENT: Construct underground duct lines of individual RGS conduits encased in concrete. ... [T]he top of the concrete envelope shall not be less than 18 inches below grade except that under *roads and pavement* it shall be not less than 24 inches below grade.

(*Id.*, § 16301, ¶¶ 3.4, 3.5.1, 3.5.3, 3.6, emphasis added.)

3. The contract drawings included separate legends for existing tank trails, new tank trails, new service/support area roads, and new pavement (concrete) (R4, tab 2). The location of the underground cable was shown on the electrical site plan contract drawings. Trails were identified on the electrical drawings, but there were no roads similarly marked. (Exh. G-7) Drawing No. 6315400 (E-2) showed a cable crossing under a tank trail with a reference to the following drawing note:

All underground cables crossing under a road shall be installed in RGS conduit encased in concrete. Conduit to extend 5 ft beyond the ditch-line on both sides of the road.

(Exh. A-1; G-5, ¶ 14; G-7) This note did not distinguish between paved and unpaved roads. Two contract drawings, entitled "Plan Profile Hull Down Access Road," showed profiles of trails and not roads. Another drawing, entitled "Typical Road Sections and Concrete Turn Pad Sections," showed cross sections labeled, "Typical Tank Trail Section," "Typical Service Road Section," "Typical Support Area Road Section," "Concrete Turn Pad Section," and "Typical Aggregate Parking Area." The section details for the tank trail and the support area road were identical. (Exh. G-6)

4. The contract included the standard clauses, "Specifications and Drawings for Construction (APR 1984)" (FAR 52.236-21), "Changes (AUG 1987)" (FAR 52.243-4), and "Disputes (APR 1984)" (FAR 52.233-1).

5. There was no pavement on the project except for concrete tank turnaround areas which were unassociated with cable crossings (exh. G-5, ¶¶ 15, 16). Of the six miles of roads and trails associated with the project, ninety percent were tank trails. (R4, tab 13)

6. Chamac entered into a subcontract, dated 25 February 1988, with Rocky Mountain Electrical (Rocky Mountain) in the amount of $799,920 for the supply, installation, and test of the entire electrical system specified in the contract (Supp. R4, tab 5). Appellant relied on this subcontractor's bid in preparing its bid to the Government (R4, tab 15).

7. On 29 March 1988, approximately six weeks after award of the contract, representatives of appellant and the Government attended a progress meeting. No one from Rocky Mountain was there. One item discussed was Chamac's request for clarification of the word "roadways" in paragraph 3.4 of the specifications. Minutes of the meeting state that it was "agreed that the requirements for roadway crossings applied to all roads and trails on the contract plans." (Exh. G-3) The minutes were prepared by Jerry Renich, Chamac's Project Manager (R4, tab 13; exh. G-5, ¶ 35).

8. After Rocky Mountain received information about the discussion at the meeting, it sent a letter, dated 4 April 1988, to appellant stating its position that putting the conduit in concrete at every roadway including trails was not required by the term "paved

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areas and roadways" in paragraph 3.4 of the specifications. They had not considered trails to be paved areas or roadways and had not asked any questions about the installation before bidding. They intended to do the crossings under trails without concrete encasement. (R4, tab 4) Rocky Mountain stated that approximately three locations would require concrete encasement depending on the cable routing (*id.*, exh. G-5, ¶ 17). Appellant sent this letter to the Government with a request for review and direction on how to proceed (R4, tab 4).

9. The Government's response, dated 14 April 1988, did not approve Rocky Mountain's interpretation, but stated:

> The nature of the traffic planned for tank trails fully defines the word "roadway", and justifies the RGS conduit encased in concrete requirement. "Roadway" applies to all tank trails.

(R4, tab 5) The Government directed use of the concrete encasement for cable crossing some, but not all, roadways (Supp. R4, tab 10).

10. The reason for requiring concrete-encased cable crossings under the tank trails and other roads subject to tank traffic was to protect the electrical cables, which were encased in steel conduit, from being damaged by the heavy crushing weight and severe abrading lateral forces imposed on the road surface by the tracked vehicles, which are 60-ton tanks (R4, tab 13; exh. G-4).

11. By letter dated 4 May 1988, Rocky Mountain submitted a change order request with an estimate for change order costs of $6,298 for each of the underground conduits at trail and roadway crossings. It was explained that the term "paved areas and roadways" was understood to imply "paved roadways." There were only paved vehicle turnarounds shown on the general drawings that would not be crossed, and no paved roadways were shown on the electrical drawings. No money had been allowed in the bid for this work. The letter further stated that in bidding, "we did not think twice about concrete encased PVC coated rigid at trails because there are only trails that show up on our drawings." Appellant added overhead, profit, and bond premium and submitted the change order request in an amount of $11,086 each and for an estimated time extension of five calendar days to the Government. (R4, tab 6)

12. On 19 May 1988, the Government acknowledged appellant's letter, but did not agree that concrete-encased conduit was required under pavement only. Appellant was "instructed to place concrete encased PVC rigid conduit when it is necessary to cross service roads and tank trails in accordance with Specification Section 16301 Paragraph 3.4." In the event of disagreement with the Government's position, instructions were provided for filing a claim. (R4, tab 7)

13. Appellant's claim, dated 15 July 1988, of $81,874 consisting of subcontractor costs only was received by the Government on 25 July 1988, but it was not certified by the prime contractor (R4, tab 9). Chamac was advised that its demand for a contracting officer's final decision did not constitute a claim by letter, dated 1 August 1988 (R4, tab 10). By letter dated 22 August 1988, Chamac submitted a certified revised claim in the amount of $91,791 with no request for a time extension (R4, tab 11). The Contracting Officer's final decision denying the claim was issued 22 February 1989 (R4, tab 14). Appellant's appeal filed in the United States Claims Court was dismissed without prejudice due to improper certification of the claim, and leave was granted to file a properly certified claim. Appellant's subsequent claim, dated 10 February 1992, was denied by the Contracting Officer on 23 April 1992 (R4, tabs 15 and 17). Appellant filed this timely appeal to the Board.

14. The parties agree that the total number of concrete-encased cable crossings was 13, but disagree on the location of some of the crossings (exh. G-5; Gov't. br. at 3; app. br. at 27-29).

DECISION

Appellant claims that its interpretation of the specifications and plans to require concrete encasement only under sidewalks, roads, or other paved areas was the proper interpretation of the contract requirements, or if the contract language is susceptible of more than one meaning, it should be construed against the drafter. Appellant maintains that the Government's direction to encase the cables in concrete under 13 tank trails was a contract change primarily because the word "trails" did not appear in the applicable specifications. The Government maintains that appellant's interpretation is a strained reading that would render useless portions of the contract language and that the only reasonable interpretation of the language consistent with the intent of the contract is the inclusion of tank trails and unpaved roads in the term "paved areas and roads" used in the specifications.

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Appellant argues that a proper interpretation of the contract documents would lead a reasonable bidder to conclude that it would be required to provide concrete encased cable under crossings involving paved areas or roads, but not unpaved trails, both new and existing, or unpaved service roads. The rules of contract interpretation require us to determine the intention of the parties at the time of contracting. The language of a contract must be given the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances. *Firestone Tire and Rubber Co. v. United States* [16 CCF ¶ 80,450], 195 Ct. Cl. 21, 444 F. 2d 475 (1971). In looking at the circumstances, we consider that contractors will estimate their bids on the basis of costs that will be incurred for the performance the Government can require under the contract terms. In *Blount Bros. Constr. Co. v. United States* [10 CCF ¶ 73,058], 171 Ct. Cl. 478, 496, 346 F. 2d 962 (Ct. Cl. 1965), the Court stated:

> [C]ontractors are businessmen, and in the business of bidding on Government contracts, they are usually pressed for time and are consciously seeking to underbid a number of competitors. Consequently they estimate only on those costs which they feel the contract terms will permit the Government to insist upon in the way of performance.

Appellant's subcontractor reviewed the specifications and plans in bidding and found no provision requiring the concrete encasement of cables under trails or unpaved service roads. Appellant read the word "paved" in paragraph 3.4 to imply "paved roadways." The word "trail" did not appear in underground elerical work specifications, although it was in the description of the work. In reading the specifications, appellant considered that the ordinary meaning of the word "trail" was different from that of the words "road" and "roadway" and requirements for concrete encasement under roads did not apply to trails.

We are to consider the contract in its entirety and interpret it in a way that will harmonize and give meaning to the various words and provisions. Terms in a contract are to be given their ordinary and commonly accepted meaning without a twisted or strained out of context analysis. *Andersen Consulting v. United States* [37 CCF ¶ 76,284], 959 F.2d 929, 934-35 (Fed. Cir. 1992); *Brunswick Corp. v. United States*, 951 F.2d 334 (Fed. Cir. 1991). In judging the import of words in a contract, "the context in which the contractual terms are used and the intentions of the parties are more meaningful than dictionary definitions." *Tri-O, Inc. v. United States* [38 CCF ¶ 76,521], 28 Fed. Cl. 463, 468 (1993); *Corman v. United States* [38 CCF ¶ 76,407], 26 Cl. Ct. 1011 (1992). Where the meaning of a word is doubtful, it will take its coloring from, and be limited by, the words with which it is associated. *C.W. Roberts Construction Co.*, ASBCA No. 12348, 68-1 BCA ¶ 6819. We have looked to the dictionary which defines "trail" as "a track made by passage" or "a beaten path," and "road" as an "open way or public passage for vehicles" which may be "one that is unpaved." A definition of "roadway" is "the part of a road over which the vehicular traffic travels." Webster's Third New International Dictionary, Unabridged 1963, 2423 (1971).

Considering these definitions in context, we find appellant's interpretation unreasonable. The Government argues that appellant should have understood "trails" to be included within the term "roads" or "roadways," because the intent of the contract was to provide a target range for tanks. According to the Government, it is logical that concrete-encased cable crossings will be required wherever cable crosses under roads that are subject to tank traffic (finding 10). In support of its position, the Government notes that section 3.4 of the specifications refers to "paved areas and roadways," not "paved areas and paved roadways," and the other sections 3.5.3 and 3.6 use reverse wording, "roads and paved areas." The Government believes the words were used synonymously and refers to the drawings as further basis of its position. Contract drawings use the word "road" in their title and show details of tank trails. A note on one drawing states the requirement for concrete-encased cable crossings at "road" crossings with the depiction of a tank trail.

In the context of this contract, we agree with the Government that appellant had reason to consider the term "trails" included within the designation of roads where concrete encasement would be required. Although the Government did not apply the requirement for concrete encasement consistently to all cable crossings, that fact does not make its interpretation strained or otherwise unreasonable.

When interpreting the language of a contract, the Board must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless. *Gould, Inc. v. United States* [37 CCF

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¶ 76,108], 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Fortec Constructors v. United States* [32 CCF ¶ 73,474], 760 F.2d 1288, 1292 (Fed. Cir. 1985). Under appellant's interpretation, the provisions in the specifications for concrete encasement would be rendered superfluous since there were no paved roads on the project that would involve crossings of the electrical cable. This is further reason for rejecting appellant's interpretation.

The differing views of appellant's subcontractor and the Government of the specification requirements could be considered sufficient to find an ambiguity in the contract. *Edward R. Marden Corp. v. United States* [33 CCF ¶ 74,642], 803 F. 2d 701, 705 (Fed. Cir. 1986). Any apparent omission of tank trails from the specification provisions would, however, be an obvious and significant omission that imposes a duty on the contractor to seek clarification of the requirements before bidding. *Community Heating & Plumbing Co. v. Kelso* [38 CCF ¶ 76,488], 987 F.2d 1575 (Fed. Cir. 1993); *Interstate General Government Contractors, Inc. v. Stone* [38 CCF ¶ 76,446], 980 F.2d 1433 (1992); *Advance Contractors, Inc.*, ASBCA No. 39150, 90-1 BCA ¶ 22,591. The question that was raised for clarification in the early progress meeting with the Government should have been addressed earlier, but neither appellant nor its subcontractor made any inquiry before bidding.

We have found the Government's interpretation gave the proper meaning to the contract requirements. An ambiguity, if any, was patent and since appellant did not attempt to clarify its obligations before bidding, it is precluded from recovery on its claim.

The appeal is denied.

[¶ 26,483] TECOM, Inc.

ASBCA Nos. 44122, 44123, 44516, 44959, 45158, 45555, 45800, October 27, 1993. Contract No. F05604-88-C-0030.

Indefinite Delivery Contracts—Price Adjustments for Variation—Unit Prices v. Costs.—For excess orders under a fixed-price contract to provide vehicle maintenance services, a contractor was not entitled to an equitable adjustment based on unit prices for the extra work but, rather, upon its actual extra costs. The Variation in Workload clause specifically provided that increases or decreases in the contract price would be calculated on the basis of changes in the contractor's costs, as did the government's formal answer to the contractor's prebid query seeking clarification of the Variation in Workload clause.

Interpretation of Contracts—Prior Contracts—Subsequent Contracts.—Under a fixed-price contract containing a Variations in Work clause, it was irrelevant that the government had based similar adjustments in other contracts on unit prices rather than on actual costs, because the other contracts were awarded after the contract at issue here. The contractor could not have relied on the government's actions in the other contracts in bidding the present contract.

Procedure, Boards—Summary Judgment—Relevant Fact Issues.—Whether the cost figures accepted by the Defense Contract Audit Agency were a contractor's actual costs incurred in doing work in excess of the estimated quantities was an issue of fact that precluded summary judgment. The contractor had available records of its actual costs for each vehicle, whereas the DCAA's auditors treated each vehicle as having received the same amount of maintenance under the contract. The question of what the costs actually were could not be determined in summary proceedings.

For the appellant: Bastianelli, Brown & Touhey, Washington, D.C., by Ronald H. Uscher and Bradley A. Rush. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Robert C. Allen and John Case, Trial Attorneys.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: These appeals involve seven claims for price adjustment for variations in quantity under a service contract. Each claim covers a distinct period of contract performance, but the issue in all seven claims is the same. TECOM moves for partial summary judgment. We deny the motion.

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STATEMENT OF FACTS

1. The contract was awarded on 11 March 1988 for operation and maintenance of Government vehicles and related equipment at Peterson Air Force Base (AFB), Colorado. The basic services specified in the Performance Work Statement (PWS) were priced on a fixed lump sum per month basis. This monthly lump sum fixed price varied slightly in each of the four option years after the base period of three months. With a phase-in period, exercise of the options, and an extension of the fourth option year, the total period of performance was 1 June 1988 through 31 December 1992.

2. The PWS at section 5.2 required TECOM to maintain the vehicles and related equipment listed in Technical Exhibits 5a through 5e. Technical Exhibit 5a was a "PCN 23" master list of vehicles by serial number dated 27 February 1987. The PCN 23 list changed weekly as vehicles were added or dropped from the fleet. Each vehicle on the PCN 23 list had a "vehicle equivalent" (VE) number based on its maintenance complexity in comparison to a passenger sedan. A passenger sedan had a VE of 1.0. The 27 February 1987 PCN list had 941.0 VE's.

3. Section 5.2 of the PWS also stated that: "Twelve month work load estimates are in Technical Exhibit 2." One of the workload estimates at Technical Exhibit 2h was "Number of vehicle equivalents assigned—941.0 (as of 27 Feb 1987 from PCN 23)." Technical Exhibit 2 also included the following provision:

> *VARIATION IN WORKLOAD.* The quantities of output to be furnished by the contractor as stated herein are estimates and as such are subject to variations. The prices of Section B, supplies/services and prices, are firm within a net variation of plus or minus 15 percent from the estimates stated in Technical Exhibit 2. If at the end of each three-month period (quarter) the total work, considering complexity, difficulty, and cost of the various outputs in Technical Exhibit 2 varies above or below 15 percent from the total estimated contract workload, negotiations for an equitable price adjustment may be initiated by either party. Any increase or decrease in price shall be based on the net of all increase [sic] or decreases in this workload. Adjustment to the contract price shall be made only for that portion of the total net increase or decrease in excess of 15 percent.

4. The contract special requirements also included at Clause 40 a variation in workload provision which stated:

> 40. *VARIATION IN WORKLOAD:*
>
> The estimated workloads contained in Technical Exhibit 2 of the Performance Work Statement are subject to variations. When the accumulated increases or decreases exceed 15% of the original total estimated workload specified in Technical Exhibits 2a through 2i, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based solely upon that portion of the total net increase or decrease in excess of 15% of the original total estimated workload.

5. Six months before award of the contract and three months before the submission of offers, the Government provided TECOM with written questions and answers clarifying various provisions of the solicitation. Question 7 addressed the workload variation provisions. Parts a and b of this question and their related answers stated in relevant part:

> 7. Q. Technical Exhibit 2 Workload Estimates. The Variation in Workload Clause is somewhat confusing. Please provide clarification for the following:
>
> a. Please explain how *complexity, difficulty,* and *cost* will be computed. . . .
>
> b. If the transportation requests (workload) listed in Technical Exhibit 2 exceed 15 percent from the estimates listed are we eligible to enter into negotiations for a price adjustment . . . .
>
> 7. A. Technical Exhibit 2—Workload Estimates
>
> a. Complexity, difficulty and cost shall be computed by the Contractor based upon the amount of change and the level of effort expended to meet the requirements of the change. Once computed, the contractor shall submit his/her proposed cost for the change to the Contracting Officer for consideration. The Government will review the proposed costs and will negotiate an equitable adjustment, if merited.
>
> b. It must be understood the figures contained in Technical Exhibit 2 are estimates . . . The Government recognizes, however, that unforeseen requirements beyond these original projections are a possibility. These requirements as they occur, will be considered for an equitable adjustment. The Contractor shall be required to submit his/her projected costs for the change at the time the change occurs. . . .

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6. In bilateral Modification P00002, dated 30 June 1988, the parties substituted the 30 March 1988 PCN 23 vehicle list for the 27 February 1987 list in Technical Exhibit 5a. The 30 March 1988 list had a total of 971.0 VE's. Modification P00002, however, did not expressly change the VE workload estimate (941.0) in Technical Exhibit 2h.

7. During the base period and first option year of the contract (1 July 1988—30 September 1989), taxi, bus and U-Drive requests exceeded 115 percent of the workload estimates for those services in Technical Exhibit 2. Pursuant to bilateral Modifications P00019, P00040 and P00042, the contract price was increased an aggregate $114,693 for the excess requests.

8. TECOM alleges that the price increases in Modifications P00019, P00040 and P00042 were based on pricing factors derived from the original bid lump sum monthly prices, and not on actual or estimated costs incurred for the excess requests. The Government alleges that these price increases were based on estimated incurred costs for the excess requests. (See Pavlik affidavit, 20 October 1993, and attachments thereto; Gov't supp. R4, tab 1). We find a genuine issue of material fact as to the manner in which the price increases in the three modifications were determined.

9. During the first two quarters of the second option year (1 October 1989—31 March 1990), taxi, bus and U-Drive requests again exceeded 115 percent of the estimates in Technical Exhibit 2. TECOM again claimed a price increase, but did not present evidence of actual or estimated increased cost caused by the excess requests. On 21 August 1990, the contracting officer denied this claim on the ground that an adjustment under the Variation in Workload clause "is determined by the increased cost of performance which is caused by the change in workload." This decision was appealed, but the appeal was withdrawn before hearing and dismissed with prejudice (ASBCA No. 41697). No equitable adjustment was provided by the Government in connection with this claim or with the withdrawal of the appeal. (Pavlik affidavit; Gov't supp. R4, tab 1)

10. On 12 February 1991, TECOM submitted a claim for VE's exceeding 115 percent of the estimate in Technical Exhibit 2h in each of the months July, August and September 1990. This claim was computed for each month by (i) dividing the "maintenance portion" of the monthly lump sum fixed price by the VE estimate in Technical Exhibit 2h (941.0), and then (ii) multiplying that amount times the number of VE's in PCN 23 list for the month in excess of 1,082.15 (115% of 941.0). The "maintenance portion" of the monthly lump sum fixed price (48.23 percent) was derived from TECOM's contract price proposal.

11. By letter dated 8 July 1991, the Government proposed an equitable adjustment for increases in VE's based on increased costs. TECOM answered this proposal on 31 July 1991 with a revised claim which increased the previous claim for the period July—September 1990, and added claims for monthly increases in VE's for the period 1 October 1990—30 June 1991. The aggregate amount of the revised claim was $106,892.22 and was computed in the same manner as the 12 February 1991 claim.

12. On 2 December 1991, the Government requested cost data supporting the revised claim. This request was denied by TECOM's counsel on 23 December 1991. By final decision dated 13 January 1991, the contracting officer denied the revised claim for lack of "showing actual impact of the added vehicle maintenance upon its accounting records." This decision was appealed. The appeal is docketed as ASBCA No. 44122.

13. TECOM has submitted six additional claims, for monthly VE's in excess of 1,082.15 for the period 1 July 1991 through 31 December 1992. All six claims used the same pricing method used in TECOM's prior VE claims. All six claims were denied by the contracting officer for failing to show increased costs traceable to the excess VE's. All six claims were appealed. Those appeals are docketed as ASBCA Nos. 44123, 44516, 44959, 45158, 45555, and 45800.

14. In addition to the contract at Peterson AFB, TECOM also performed similar contracts with similar workload variation provisions at Tinker AFB and Wright-Patterson AFB. TECOM has provided evidence of price adjustments for VE workload variations on the Tinker and Wright-Patterson contracts. One of those adjustments was a price reduction. All of the adjustments for which evidence is submitted used the same pricing method which TECOM used in its VE claims on its Peterson contract. The Tinker and Wright-Patterson contract adjustments were made after award of the Peterson contract. TECOM did not rely on the Government practice under the Tinker and Wright-Patterson contracts when it bid the Peterson contract.

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15. A Defense Contract Audit Agency (DCAA) report dated 3 December 1992 shows Tecom's total vehicle maintenance costs incurred on the Peterson contract by month from 1 July 1990 to 31 March 1992. By allocating the total maintenance costs in each month equally to all VE's shown on the PCN 23 list for the month, the report determines the cost of the excess VE's for each month. The aggregate cost for excess VE's for the audited period determined by DCAA in this manner was $184,942. The assumption in the DCAA allocation of maintenance costs, that all vehicles received maintenance services proportional to their VE rating, is disputed by credible affidavits of Government personnel involved in monitoring contract performance.

16. The contract required, and TECOM did in fact maintain, individual maintenance cost records showing direct labor hours and material cost for each vehicle (the "OLVIMS" reports). It is possible to determine the actual maintenance cost incurred on the added vehicles which caused the excess VE's from the OLVIM's reports and from TECOM's payrolls and other cost accounting records. No attempt was made either in TECOM's claims, or in the DCAA audit, to determine the actual maintenance costs on the added vehicles. Moreover, some maintenance on the added vehicles was reimbursed by separate contract modification, but nevertheless may have been included in the DCAA determination of VE unit cost.

DECISION

TECOM moves for partial summary judgment for $184,942, contending that the DCAA audit establishes that amount as the minimum due for excess VE's during the period 1 July 1990—31 March 1992. We disagree with that contention, and with TECOM's basic claim that it is entitled to adjustments based on a VE unit price derived from the maintenance portion of the lump sum monthly price.

The Government is correct in requiring that any equitable price adjustment for workload variation be based on the additional costs caused by the excess in variations. The Variation in Workload clause in Technical Exhibit 2 expressly referred to "the cost of the various outputs" in stating the conditions under which an equitable price adjustment will be negotiated. See Finding 3 above. Moreover, the questions and answers provided prior to bidding expressly stated that workload variation adjustments would be based on costs. Answer 7.a. stated: "... *cost shall be computed* by the Contractor based upon the amount of change and *the level of effort expended* to meet the requirements of the change." (Emphasis added). Answer 7.b. stated "... The Contractor shall be required to submit his/her *projected costs* for the change [in workload estimates] at the time the change occurs." (Emphasis added). See Finding 5 above.

TECOM contends that the Government agreed to unit price type adjustments for the excess taxi, bus and U-Drive services in Modifications P00019, P00040 and P00042, and that these agreements represent a contemporaneous interpretation of ambiguous provisions. The Government contends that those adjustments were based on actual or estimated costs, and not on unit prices. There is a genuine issue of material fact here, but even if we were to accept TECOM's contention as to the basis for the adjustments in the cited modifications, the contemporaneous interpretation rule would not apply because there is no ambiguity to be interpreted.

TECOM cites price adjustments under similar contracts at Tinker AFB and Wright-Patterson AFB in which the unit price method was followed, including one adjustment reducing the contract price. Those adjustments, however, were all made after the Peterson contract was bid and awarded. TECOM cannot claim that it relied on the Government's course of dealing on the Tinker and Wright-Patterson contracts when it entered into the Peterson contract.

At this stage of the appeal, the undisputed facts do not establish that additional costs in the amount allocated by the DCAA audit were caused by the excess of VE's. The DCAA audit's allocation of total maintenance costs equally to all VE's is valid only if all VE's received substantially the same amount of maintenance. That assumption is contested by the credible affidavits of Government personnel responsible for monitoring performance of the contract.

The excess VE's were the result of added vehicles. Records were kept of the actual direct maintenance cost (labor hours and material) for each vehicle. TECOM's failure to support its claims with evidence of the maintenance costs actually incurred on the added vehicles suggests that such costs were not in fact incurred in the amounts claimed by TECOM's unit price analysis, or in the amounts allocated in the DCAA audit.

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Since there is a genuine issue of material fact as to the actual unreimbursed costs for the added vehicles which caused the excess VE's, the motion for partial summary judgment is denied.

[¶ 26,484] **Henry Angelo & Company**

ASBCA No. 43669, October 27, 1993. Contract No. DABT39-86-D-1047.

Indefinite Delivery Contracts—Price Adjustments for Variation—Unabsorbed Overhead.—After the government ordered only 31 percent of the estimated quantity under a requirements contract for housing maintenance, a contractor was entitled to recover unabsorbed overhead under the standard Variations in Estimated Quantities clause because unabsorbed overhead is an increased cost. The clause provides for recovery of increased costs resulting from variations exceeding 15 percent of the estimates, whether those costs are direct or indirect. Fixed overhead costs that are not absorbed because the government orders less than the estimated quantity come within the type of costs contemplated by the Variations clause.

Indefinite Delivery Contracts—Price Adjustments for Variation—Unabsorbed Overhead Calculation.—Under a requirements contract, an adjustment for unabsorbed overhead under the Variations in Estimated Quantities clause was calculated by using the ratio between the quantity actually ordered by the government and the quantity it was required to order under the Variations clause. The government ordered 31 percent instead of 85 percent of the estimated quantity. Thus, it failed to order 63.7 percent of what it was required to order, and the contractor was entitled to 63.7 percent of both its actual direct field office overhead and that portion of its indirect home office overhead costs chargeable to the contract, as well as profit computed using the contractor's historical profit rate for similar contracts.

Indefinite Delivery Contracts—Price Adjustments for Variation—Computation Using Price.—The original contract price was not a proper basis for computing an adjustment for unabsorbed overhead under the Variation in Estimated Quantities clause, because the clause allows recovery only of increased costs. The contractor's method of computing an expected price on the basis of 85 percent of the estimated quantity, then using that price in conjunction with a historical home office overhead percentage, did not measure increased costs resulting from the variation from the estimate. Because of the extent of the government's failure to order the guaranteed amount, however, it was appropriate to use a jury verdict method to arrive at a fair and reasonable approximation of increased costs.

For the appellant: Carey, Dwyer, Eckhart, Mason & Spring, P.A., Miami, Florida, by Michael C. Spring. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Robert A. Duecaster, JAGC, Trial Attorney.

Before LIPMAN, RUBERRY, and SPECTOR, Administrative Judges.

LIPMAN, Administrative Judge: This is an appeal from a contracting officer's denial of appellant's claim to recover unabsorbed overhead allegedly incurred due to the Government's issuance of less orders than it was obligated to issue under the provisions of this requirements type contract. The parties presented documentary evidence and testimony at a hearing. We are to decide both entitlement and quantum.

FINDINGS OF FACT

In February 1986, the Government issued an Invitation for Bids (IFB) for a requirements contract to perform interior and exterior surface preparation and painting on family housing units at Fort Sill, Oklahoma. The IFB contained a schedule setting forth estimated quantities of the various work items to be performed under the contract.

Appellant's bid reflected unit prices for the individual work items along with the estimated total price for each work item. Appellant's estimated total bid price for all work items was $619,235 and it was awarded the contract on 5 June 1986.

Appellant was to provide the services or supplies under the contract upon receipt of delivery orders from the Government. The

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contract performance period was from the award date through 28 February 1987. The contract contained the FAR 52.212-11 clause entitled "Variation in Estimated Quantities (APR 1984)," which provided, in pertinent part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

Appellant is located in Miami, Florida. In order to perform the contract work, appellant sent a superintendent to the contract site in Oklahoma to open an office and secure storage space.

During the contract period, the Government issued 92 delivery orders totalling approximately $192,000, which was 31 percent of the dollar value of the $619,000 price of the estimated quantity of work under the contract. The Government issued no delivery orders with respect to 31 of the 52 items in the bid schedule and it ordered less than 85 percent of all but one of the 52 items. Delivery orders were issued at the rate of about one every 10 days. While appellant was prepared to have as many as 15 employees working on the contract, it was generally down to as low as three or four. In addition, the limited amount of work caused worker inefficiency. Appellant was unable to close down the Oklahoma office because the Government continued to issue delivery orders, albeit at the substantially reduced rate. Appellant's workers at the Oklahoma site could not be used on other contracts during periods in which they were not gainfully occupied in performing this contract.

Appellant twice submitted claims to recover unabsorbed overhead allegedly resulting from the low number of delivery orders, and both times appeals to this Board based on the claims were dismissed without prejudice due to inadequate claim certifications. Finally, on 1 July 1991, appellant submitted a properly certified claim in the amount of $51,611. The Government received the claim on 8 July 1991. The claimed amount was quantified, as follows:

Original Contract Price $619,235 × 85%	$526,350
Home Office overhead which should have been absorbed (historical average of contract prices 9.45%)	49,740
Direct costs (actual)	177.116
	$226,856
Profit (historical average 9.42%) of actual direct cost	16,684
New Contract Price	$243,540
Less amount Paid	191,929
Amount claimed	$ 51,611

The contracting officer denied the claim in its entirety, based upon an audit report from the Defense Contract Audit Agency (DCAA). DCAA questioned appellant's quantum methodology and, in DCAA's opinion, appellant's inability to demonstrate that incurred costs increased solely as a result of the variation in quantity below 85 percent of the estimated quantity in the contract. DCAA took specific exception to appellant's use of the original contract price as the starting point of its calculation because that price included home office overhead and profit, and its position that the application of overhead to overhead and profit is not a generally accepted accounting practice. The DCAA report continued:

> It is also noted that the overhead rate of 9.45 percent and profit factor of 9.42 percent were computed [by appellant] using the average historical data for the years ended 30 June 1981 through 30 June 1987. Since the contract performance was during fiscal year 1987, only FY 1987 data should be used to compute these rates. We requested from the contractor a break-down by cost element of the bid proposal that originated the contract in order to delete the proposed home office overhead and profit from the original contract price. The contractor was unable or unwilling to furnish the requested data.
>
> * * *

The DCAA audit confirmed that appellant's direct costs on the contract totalled $177,116. It also arrived at an 11.85 percent home office overhead rate for appellant's Fiscal Year 1987. DCAA further determined that appellant incurred a loss of $6,175 (three percent) on the contract.

Appellant timely appealed the contracting officer's decision denying its claim.

Based upon the uncontested testimony of appellant's independent accountant, we find that, during the course of contract perform-

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ance, appellant incurred direct field overhead costs of $37,981.49 in connection with its Oklahoma site. Those costs were comprised of supervision, equipment and office rental, telephones, utilities, gas and oil, maintenance, travel, and bonds. The costs were fixed overhead costs but were incurred for this contract only, were charged directly to the contract, and were included in the total direct costs of $177,116.

DECISION

This requirements contract provided that appellant is entitled to a equitable adjustment in contract price for increased costs due solely to the variation of unit-priced items actually ordered by the Government below 85 percent of the quantities of the unit-priced items estimated to be ordered under the contract. There is no dispute that, during performance, the total dollar value of the Government's delivery orders was 31 percent of the dollar value of the estimated quantity of work under the contract.

Appellant has the burden of demonstrating that it incurred increased costs due to the quantity variation. The Government contends that appellant's claim, seeking to recover for unabsorbed overhead on the basis of a mathematical formula, is essentially a claim similar to that allowed in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, aff'd 61-1 BCA ¶ 2894, where unabsorbed overhead costs resulting from a compensable delay were recovered. Here, the Government's argument continues, the claim is not recoverable because no delay is being claimed.

We do not agree. To the extent that appellant can demonstrate that increased costs resulted from a variation in estimated quantities, it is entitled to recover both direct and indirect costs. *Les Killgore's Excavating*, ASBCA No. 32261, 86-3 BCA ¶ 19,117. There is no reason why the costs recoverable should not include overhead which would have been absorbed had the estimated quantities been ordered, but were left unabsorbed by the order shortfall. Those costs are real, whether they result from delay or some other cause, and the absence of delay allegations does not prevent their recovery.

We turn to the method used by appellant in computing its claim. Its claim computation is based upon the contract price. To that price it applies the 85 percent from the clause to allow for permissible quantity variation to arrive at, in effect, an expected price. That expected price is then used as a basis of computation in conjunction with an historical home office overhead percentage. Based on our discussion below, we conclude that the method used by appellant to compute its claim is faulty.

It is clear from the Variation in Estimated Quantities clause itself that appellant's measure of recovery is an increase in costs and the calculation should not be based on the contract price. In *Les Killgore's Excavating, supra.*, we were presented with a similar claim under a contract with a similar clause. We concluded, there, that the contractor, whose guaranteed dollar amount of orders had not been met, was entitled to recover increases in both direct and indirect costs, plus a reasonable profit on those costs, resulting from the Government's failure to issue sufficient orders. In arriving at that conclusion, we stated:

> There can be no doubt that the clause in question does not allow recovery of the contract price (presumably the contractor's anticipated cost plus profit) for work not ordered. Rather, the clause requires that recovery be based upon actual increased costs caused by the underrun of actual work ordered below the . . . guaranteed minimum. To allow recovery of the contract price for the underrun quantity would be to pay appellant for work not done, which is manifestly not the intent of the clause . . . . [Supra. at 96,629-2]

In *Clement-Mtarri Companies*, ASBCA No. 38170, 92-3 BCA ¶ 25,192, the Board was faced with the identical "Variation in Estimated Quantities" clause and what was effectively the mirror image of the instant appeal. There, the Government sought to limit appellant's recovery under the clause where the contractor's effort in disposing of contaminated water exceeded 115 percent of the contract's estimated quantity. The unit price in the original contract was $360 and the issue was whether, if at all, that unit price should be adjusted for the quantities in excess of 115 percent of the estimate. The Government took the position that a standard equitable adjustment analysis be applied providing appellant with its actual reasonable costs plus a reasonable profit, and its unilateral modification established a new unit price of $15.09 for the quantities in excess of 115 percent of the estimated quantity. The contractor contended that the clause required that it be paid the original unit price of $360 less any savings "due solely" to the quantity increase. The Board decided in the contractor's favor based, in part, upon the "administrative history" of the clause. That history clearly reflected an

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intent to preserve the integrity and importance of the unit prices arrived at by competitive bidding and not to permit an overrun to result in the repricing of the entire contract.

In the instant appeal, we are faced with a quantity "underrun" rather than an overrun, but our task is the same—to permit recovery to the extent that the underrun of the unit-priced items resulted in increased costs.

Appellant's method of computation, based on the contract price, does not produce that result. Because of the extent to which the quantities ordered here fell short of the estimated quantities, however, we are reluctant to deny the appeal in its entirety simply because appellant's method of computation is unsatisfactory. The use of a "jury verdict" technique is appropriate where we have sufficient evidence to permit us to arrive at a fair and reasonable approximation of the damages. *Schuster Engineering, Inc.*, ASBCA Nos. 28760, 29306, 30683, 87-3 BCA ¶ 20,105. We believe this to be such a case.

Appellant seeks relief in the nature of unabsorbed overhead—that is, the underrun in orders on this contract left a corresponding portion of its direct field overhead and indirect home office overhead unabsorbed on this contract requiring their absorption by other contract work. In order to calculate that portion of the indirect costs which were unabsorbed, we look to the 31 percent ($191,000) of the estimated quantities ordered as compared to the 85 percent ($526,000) required to be ordered. The math indicates that the Government ordered 36.3 percent of what it was required to order or, stated another way, it failed to order 63.7 percent of what it was required to order. Appellant is, therefore, entitled to recover the 63.7 percent of the direct field overhead costs and the indirect home office overhead costs.

In the calculations which follow, we reduce the total incurred cost of $177,116 by the $37,981.49 in direct field overhead, we apply the 11.85 percent home office overhead rate determined by DCAA to the adjusted total costs incurred, and we allow appellant's claimed historical average profit of 9.42 percent:

$37,981.49 × 63.7% = $24,194.21 (compensable field overhead)
$177,116 − $37,981.49 = $139,134.51 × 11.85% = $16,487.44
$16,487.44 × 63.7% = $10,502.50 (compensable home office overhead)

We add compensable field overhead and home office overhead and complete the computation, as follows:

$24,194.21	(compensable field overhead)
10,502.50	(compensable home office overhead)
$34,696.71	
3,268.43	(9.42% profit)
$37,965.14	

We conclude that appellant is entitled to recover $37,965.14, plus interest under the Contract Disputes Act of 1978 calculated from 8 July 1991. The appeal is sustained to the extent reflected above.

[¶ 26,485] Teltara, Inc.

ASBCA Nos. 42256, 44917, November 8, 1993. Contract No. DAKF36-90-D-0013.

Interpretation of Documents—Contract Documents—Incorporation by Reference.—The mention in a contract of a table found in a particular military specification did not incorporate that specification into the contract, because there was no expression of intent to incorporate the specification. The contract provided that random inspection of janitorial services was to be conducted in accordance with sampling tables provided in the military specification. Because no other mention of the specification was made, it was not reasonable to conclude that the specification in its entirety had been incorporated into the contract.

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Quality—Inspection Methods—Random Sampling.—The government's inspection of janitorial work by random sampling was not unreasonable, because the contract specifically provided for such sampling and established a method for calculating contract price reductions on the basis of such sampling.

Acceptance of Performance—Price Reduction for Defects—All-or-None Deductions.—The government's use of random sampling of janitorial services to determine price reductions for inadequate cleaning was not a prohibited "all-or-none" price deduction, because the sampling involved the separate tasks to be done under the contract. In all-or-none sampling, all tasks done in a particular area could fail for the day if one task was performed inadequately. Here, each task was treated separately.

Acceptance of Performance—Price Reduction for Defects—Random Sampling Methodology.—Under a contract for janitorial services, price reductions for inadequate work, which were calculated by dividing the square footage of defective work by the square footage of sampled buildings, were reasonable because the methodology reflected the reduced value of the services performed. The sample size was determined by a table incorporated in the contract, and no deductions were made for any buildings in which fewer than 5 percent of the tasks performed were defective.

For the appellant: Patton, Boggs & Blow, Washington, D.C., by Dean M. Dilley and Curtis V. Gomez. For the government: Col. Riggs L. Wilks, Chief Trial Attorney, and Capt. Randall J. Vance, Trial Attorney.

Before DICUS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: These appeals arise from a contract for cleaning services at Fort Drum, New York. In dispute is the method used by respondent in calculating deductions for unsatisfactory service. Only entitlement is at issue.

FINDINGS OF FACT

1. Contract DAKF36-90-D-0013 between appellant Teltara, Inc. and respondent U.S. Army was awarded 16 July 1990. The contract was a requirements contract with a performance period of 1 August 1990 to 31 July 1991, and included the Changes—Fixed Price (AUG 1987), Disputes (APR 1984), and Inspection of Services—Fixed Price (APR 1984) clauses. In the event of defective service, the latter clause allows the Government to "reduce the contract price to reflect the reduced value of the services performed." Also included was Order of Preference—Sealed Bidding (JAN 1986):

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

(42256 R4 (R4), tab 1)

2. Section B listed the various services to be performed (e.g. sweep and vacuum all areas), which were priced separately on a per square footage basis. These services were referred to as "tasks" in the Statement of Work and Technical Exhibit #1. Section C, the Statement of Work, defined in detail the services or tasks which, under Section F, were to be performed in accordance with monthly delivery orders, and defined Acceptable Quality Level (AQL) as "The maximum percent of defective work allowable before work is considered unsatisfactory . . . As long as unsatisfactory work does not exceed the AQL, the service will not be subject to payment reduction." Technical Exhibit #1 established the maximum allowable deviation from requirements as 5 percent and random sampling as the primary method of monitoring contract performance. We find the 5 percent AQL reasonable and consistent with levels established in MIL-STD 105D (exh. G-3). Buildings receiving five to seven day service were exempt from random sampling. Paragraph 3.1 provided:

> For areas monitored by Random Sampling, the Quality Assurance Evaluator (QAE) will use the Lot Size, Sample Size and Acceptable Quality Level to determine the maximum number of defects that can be identified before a Contractor's performance is considered to be unsatisfactory. The contractor will not be paid for the portion of work deemed to be unsatisfactory. Procedures for the deduction of payment to the contractor are out-

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lined in para (sic) 4 of this Performance Requirements Summary.

(R4, tab 1)

3. Paragraph 4 of Technical Exhibit #1 provided an example of the method to be used in random sampling, as follows:

4. Monthly payment to the Contractor will be reduced for unsatisfactory performance using the following method:

4.1 Random Sampling—If random sampling is used, the contractor shall not be allowed to reperform. The deductions will be taken automatically.

4.1.1 Example.

4.1.1.1 Given:

Task: Sweeping of floors, etc., (TE-1.4, page TE 1.4, Task #1).

AQL: 5% defective (TE-1, page TE 1.4, Column C).

Number of buildings being swept for that day: 60 (assumed).

Total Square Footage of Buildings: 300,000 SF (assumed).

Bid Price for Sweeping: $.005/SF (assumed).

4.1.1.2 Sampling Methodology:

Sample Size Code Letter: E (from MIL-STD-105D, Table 1).

Sample Size: 13 (from MIL-STD-105D, Table II-AO.

13 buildings will be randomly selected for inspection of sweeping.

4.1.1.3 Deductions:

Three buildings found to be more than 5% defective (assumed) for sweeping.

Square Footage of Sampled Buildings: 65,000 SF (assumed).

Square Footage of Defective Buildings: 12,000 SF (assumed).

SF defective divided by SF sampled = % deduction.

12,000 divided by 65,000 = 18%

Total square footage × bid price × % deduction = total deduction

300,000 × .005 × 18% = $270.00

(R4, tab 1)

4. Technical Exhibit #1 also established Validated Customer Complaint and 100 Percent Inspection as means of contract monitoring. Unlike random sampling, both provided for reperformance by the contractor except in buildings using five or seven day service. No deductions were to be made unless reperformance was unsatisfactory. Technical Exhibit #1 also included charts showing the required service, standard therefor (which referred back to the Statement of Work), AQL, and method of surveillance or monitoring (R4, tab 1).

5. Technical Exhibit #2 consisted of a Task and Frequency Chart describing the tasks, assigning a number to the task, and establishing the frequency of performance as daily, weekly, monthly, semi-annually, annually, and when ordered. Technical Exhibit #4 provided a sample schedule for tasks to be performed two days per week, and Technical Exhibit #5 provided a sample schedule for services to be performed one day per week. Floor plans were included as attachment B. While Technical Exhibit #1 referenced Tables 1 and II-A from MIL-STD-105D, the contract documents did not otherwise include MIL-STD-105D, either physically or by reference. Copies of the MIL-STD-105D charts referenced in Technical Exhibit #1 were not physically included in the contract documents (R4, tab 1).

6. Delivery Orders issued under the contract coordinated daily and weekly tasks with specific buildings. Thus, sweeping and vacuuming, trash removal, and restroom cleaning, were ordered for the same day and building. Similarly, weekly tasks due to be performed in a particular building on a particular day were coordinated (e.g., R4, tab 3; tr. 35-37, 98-99). From review of the Delivery Order, the buildings to be cleaned on a particular day were ascertainable, and from that the process of random sampling was initiated (tr. 32).

7. After discerning the number of buildings scheduled for a specific cleaning service (e.g., 6), which constituted the lot size, the sample size for inspection purposes was obtained by reference to MIL-STD-105D, Table 1, which provided a sample size code letter (e.g., 6 = A). Further reference to MIL-STD-105D, Table II A, provided the sample size (e.g., A = 2). The specific buildings to be cleaned were assigned a number (e.g., 1 through 6) and the sample size (e.g., 2) was put into a computer, using the Lotus 1-2-3 program, which selected 2 numbers between 1 and 6 (e.g., 1 and 6). Those buildings were then scheduled for inspection on the day in question to determine if the AQL had been met (R4, tabs 3, 10; exh. G-3; exh. G-4, at 14; tr. 31 -38).

8. Inspectors would proceed to the sample buildings to make their inspections. They were provided with the Statement of Work, inspection sheet, and discrepancy sheet, on which discrepancies were noted. At least one inspector also carried floor plans (tr. 38,

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125). To ascertain whether the AQL had been met, inspectors identified work that had not been performed in accordance with contract standards using primarily visual inspection techniques (tr. 134-38). If deficiencies were found representing more than 5 percent of the scheduled cleaning service task, they were noted on the discrepancy sheet (tr. 126, 134). Inspectors did not note deficiencies when less than 5 percent of the work did not meet contract standards (tr. 81-83, 134; *but see* exh. G-4, at 23-24).

9. The inspection reports were reviewed by a supervisor who, if he did not find adequate justification, would overrule the inspector and would not consider the deficiency (tr. 42-43). Working with the reports for which he considered justification to be adequate, the supervisor would determine whether the 5 percent AQL was exceeded for the buildings sampled. If so, he divided the square footage of the defective buildings by the square footage of the sample buildings to obtain the percentage of the buildings that exceeded the AQL. The percentage derived was employed to determine the deduction by using it to multiply the square footage of the buildings for which the task was ordered that day by the bid price for the service task item (tr. 44-45, 48-52; exh. G-1, -2). We find the procedure was not an "all-or-none" deduction system.

10. Copies of the resultant discrepancy sheets were made available to appellant's project manager on a daily basis (tr. 41). The project manager employed by appellant for the first three months of the contract, who had been designated by appellant to confirm deficiencies, agreed with 75 percent of the deficiencies identified by respondent's inspectors (R4, tab 2; exh. G-4, at 4, 20-21). We find the inspection procedure employed in practice by respondent (findings 6-10) was consistent with that prescribed In Technical Exhibit #1 (findings 2-4).

11. The discrepancy sheets show the date of the inspection but do not have a place for designating the time of inspection (R4, tab 10). Appellant's project manager for the first three months was aware of the circumstances under which the inspections were made, and generally accompanied an inspector each day. As noted, he agreed with 75 percent of the deficiencies (exh. G-4, at 21-22). There is no probative evidence appellant did not know when or how the inspections were being conducted. There is no probative evidence of contemporaneous complaints about the timing of the inspections. Inspectors generally were at the first buildings to be inspected between 7:45 and 8:00 a.m. (tr. 38, 129-30). When they were an hour or more later getting to the buildings they gave appellant the benefit of the doubt and, while deficiencies may have been noted, the building would be found to meet the AQL (tr. 130-32). There is no probative evidence that respondent's inspections were untimely and resulted in deficiencies being ascribed to appellant that were due to causes other than inadequate cleaning. We conclude respondent's inspections were timely.

12. Appellant had bid on the contract believing that MIL-STD-105D was incorporated (tr. 164). When appellant saw random sampling referred to in the bid documents, appellant expected MIL-STD-105D to apply (tr. 183-84). Appellant expressed concern over the lot size at the preperformance conference (tr. 26). There was an expression of dissatisfaction with the random sampling process by appellant for the first six months of the contract (tr. 160-62).

13. About halfway through the contract random sampling was eliminated by modification (tr. 141, 145). The standard method of monitoring became validated customer complaint, and reperformance was allowed as a result (tr. 146). Thereafter, few deductions were taken (tr. 144).

14. By letter of 16 October 1990 appellant filed a claim in the amount of $12,559.93 based on respondent's failure to adhere to MIL-STD-105D in monitoring contract performance (R4, tab 16). The claim was denied in a final decision of 20 December 1990 (R4, tab 19). An appeal was taken therefrom and docketed as ASBCA No. 42256.

15. A second claim in the amount of $30,872.86 was filed by letter of 23 March 1991 (44917 R4, tab 35). The claim was denied in a final decision dated 21 May 1992 (44917 R4, tab 36). An appeal was taken and docketed as ASBCA No. 44917.

DECISION

Appellant argues that respondent's inspection plan was invalid because it produced unreasonable, statistically flawed results, and used "all-or-none," untimely, inspections. Respondent argues that the contract's random sampling plan was reasonable, unambiguous, and consistently applied.

We have not found that MIL-STD-105D can reasonably be read into the contract. The references to the two tabies from that source do not reasonably lead to the conclusion that the MIL-STD is otherwise included (*see* finding 3), and it is not

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mentioned elsewhere in the contract (finding 5). Moreover, the inspection system described in Technical Exhibit #1 is not ambiguous as to how deductions were to be calculated *(finding 3)*. Thus, to the extent appellant's arguments are based on inclusion of MIL-STD-105D in the contract, they are rejected. Moreover, we have found respondent's inspections to be timely and consistent with contract requirements (findings 10, 11).

Appellant cites *Clarkies, Inc.*, ASBCA No. 22784, 81-2 BCA ¶ 15,313; *Contract Maintenance, Inc.*, ASBCA Nos. 19409, 19509, 75-1 BCA ¶ 11,207; and *Environmental Aseptic Services Administration and Larson Building Care, Inc.*, Comp. Gen. Dec. B-207771, *et al.*, 83-1 CPD ¶ 194, in support of its argument that inspection methodology must not violate the prohibition against "all-or-none" deduction plans. We have found that the inspection procedure was not on an "all-or-none" basis (finding 9). Moreover, *Environmental Aseptic Services*, wherein the provision at issue was found to constitute a penalty, dealt with a methodology in which all tasks performed in a room could fail for the day because of the failure of only one task. Here, each task was accepted or rejected individually. Thus, the methodologies are distinguishable.

However, the contract provides in the Inspection of Services—Fixed Price clause that price reductions must reflect the reduced value of performance (finding 1). Under the Order of Precedence clause, that provision takes priority over Technical Exhibit #1. We have held the Government "must show that its method of calculating the deductions reasonably reflected the reduced value of the services performed ...." *Capital Services, Inc.*, ASBCA No. 40510, 91-1 BCA ¶ 23,310 at 116,908. As respondent points out, the random sampling methodology found to be reasonable in *Capital Services* is similar to the methodology used here. The formula employed in that case was (total square footage × daily contract unit price × price deduction percentage) × (defective buildings divided by total sample buildings) = daily deduction. The specific example given in the decision is (100,000 sq. ft. × $.0027 × .10) × (10 divided by 20) = $13.50. *Id.* at 116,909. In the instant appeal, the contract does not employ the price deduction percentage (finding 3) used in *Captial Services* because tasks are individually priced (finding 2). In *Capital Services*, the contract was priced using a unit price per square foot for all custodial tasks and assigning a percentage value to each task so as to limit the deduction to the scope of the task which was rejected. *Id.* at 116,903, 116,906. Here, the same effect is achieved by the individual pricing of each task (finding 2). Although the AQL in *Capital Services* differed with the task, *id.* at 116,906, and information on specific AQLs is not provided therein, we have found the 5 percent AQL in appellant's contract to be reasonable. Given the similarity between the methodology in the instant appeal and that found to be reasonable in *Capital Services*, we find that the system used in the contract here reasonably reflects the reduced value of the services performed as set out in the Inspection of Services—Fixed Price clause.

Finally, we have found the contract to be unambiguous with respect to calculation of deductions, and the record is devoid of complaints or questions about the sampling/deduction process prior to award. If, as appellant argues, the system was unreasonable and thus in conflict with the Inspection of Services—Fixed Price clause, it should have been apparent prior to award. The duty to seek clarification in such matters is upon appellant. *J. A. Jones Construction Co. v. United States* [12 CCF ¶ 81,823], 395 P.2d 783, 790 (Ct. Cl. 1968). Accordingly, the appeals are denied.

[¶ 26,486] South Georgia Cleaning Services, Inc.

ASBCA Nos. 40972, 41219, November 2, 1993. Contract No. F09607-87-D-7006.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Merits v. Damages.—Even though the government thought that a contractor's lack of a prepared budget weakened the case for an equitable adjustment, the government was not substantially justified in refusing to admit liability for negligent preparation of contract estimates, because it had an obligation to prepare estimates based on all information available to it. The government believed that the contractor's lack of a budget would prevent the contractor from demonstrating its damages on appeal. That belief did not

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justify the government's refusal to admit liability, and the contractor was entitled to recover its attorneys fees and costs.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Sampling Methods.—The government was not substantially justified in denying a contractor's claim, because the government's position relied on sampling methods that had no statistical validity. Random samples taken at unknown places by unknown operators provided no basis for determining proper contract payments, and the government was not justified in maintaining a position in reliance on such samples.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Lay Witness Fees.—A contractor's claim for witness fees and expenses under the Equal Access to Justice Act was denied because the Act does not provide for reimbursement for lay witnesses, as the board has consistently held.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Thomas E. Abernathy IV and E. Alan Arnold. For the government: Col. James C. Babin, Chief Trial Attorney, and Richard C. Phillips, Trial Attorney.

Before WATKINS, SPECTOR, and RUBERRY, Administrative Judges.

WATKINS, Administrative Judge: South Georgia Cleaning Services, Inc., seeks attorney's fees and expenses incurred in connection with three appeals under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. Familiarity with our decision sustaining the appeals in ASBCA Nos. 38546 and 40972 (93-2 BCA ¶ 25,800) is presumed. The appeal in ASBCA No. 41219 was settled by the parties. Appellant meets the EAJA eligibility requirements. We are issuing a separate decision in ASBCA No. 38546. We decide entitlement only.

In ASBCA No. 40972 the Board sustained the appeal. The parties have agreed on the sum of $42,664.08 for this appeal, utilizing the Board determined unit adjustment of $2.02 per acre. Appellant was the prevailing party in this appeal.

In ASBCA No. 41219, the parties settled the claim after a continuance was granted during the hearing on the other two appeals. Appellant had claimed that the Government knew or should have known that the estimated quantities provided for Exhibits 1 (Pavement work) and 2 (Grounds maintenance work) did not reasonably reflect the Government's actual requirements for the contract performance periods. The Government generally denied liability, asserting that its estimates were reasonable.

On settlement, the Government conceded liability of $98,542.00 on appellants claim of $112,856.75 and a modification to the contract was executed. It is well settled that a party may be deemed a prevailing party where an appeal is resolved by settlement. *Technical Communication Electronic Consultants, Ltd.*, ASBCA Nos. 29143, 39395, 93-1 BCA ¶ 25,311. Likewise, appellant need not obtain all the relief sought to be the prevailing party. *Hart's Food Services dba Delta Food Service*, ASBCA Nos. 30756R, 30757R, 40280R, 40281R, 93-1 BCA ¶ 25,524, *citing Sterner v. Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983); *Crown Laundry & Dry Cleaners, Inc.* ASBCA Nos. 28889, 31900, 87-3 BCA ¶ 20,034, *Mot. for recon. dismissed*, 88-1 BCA ¶ 29,345, Accordingly, appellant is the prevailing party in this appeal.

Substantial Justification

The EAJA provides for payment of attorneys' fees and lenses by the Government to the prevailing party unless the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1). The substantial justification standard in the Act was defined by the United States Supreme Court as " 'justified in substance or in the main,' " a meaning "no different from the 'reasonable basis in both law and fact' formulation adopted by the . . . vast majority of . . . Courts of Appeals. . . ." *Pierce v. Underwood*, 487 U.S. 522, 565 (1988), *Hart's Food Services, Inc., dba Delta Food Service, supra, citing Pierce v. Underwood, supra.* The standard is applied to the agency's position in litigating the appeal and to its actions leading to the appeal. 5 U.S.C. § 504(b)(1)(C), (E).

The Government has the burden of proving that its position was substantially justified. *J.J. Seifert Machine Co., Inc.*, ASBCA No. 41398, 92-1 BCA ¶ 24,608. As noted, it must establish this in the context of the litigation as well as in the administrative action or inaction upon which the adversary adjudication was based.

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With respect to ASBCA No. 40972, the Government asserts that it was not unreasonable in its reliance on the engineering, or "building block," approach in computing quantum. We found that the random samples taken in unknown locations of unknown operators were invalid and inexact as statistical samples and were entitled to no weight. The Government's position in this appeal is not substantially justified.

With respect to ASBCA No. 41219, the Government denied liability up to, and through, the scheduled hearing dates for the appeal. The Government asserts it denied liability because appellant did not have a budget and could not demonstrate how the underordering of hours had resulted in damage to appellant. The Government has provided no evidence concerning this assertion.

We have held that the Government can be liable to a contractor where the Government fails to prepare estimates that are based upon all information available to the Government. See *Integrity Management International Inc.*, ASBCA No. 18289, 75-1 BCA ¶ 11,235 at 53,481, *citing Womack v. United States* [12 CCF ¶ 81,795], 389 F.2d 793, 182 Ct. Cl. 399 (1968); and *Machlett Laboratories, Inc.* ASBCA No. 16194, 73-1 BCA ¶ 9929. Appellant had to to labor within the disputes process before the Government ultimately paid appellant substantially all of the damages that appellant claimed. The Government has not shown that its position in this appeal was substantially justified.

Fees and Expenses

Appellant is awarded reasonable attorney's fees at the rate of $75.00 per hour. We note that this is the rate claimed by appellant. Appellant is also entitled to reasonable expenses. However, the Government objects, and rightly so, to award of the expenses of lay witnesses. This Board has consistently held that such expenses are not recoverable. *Roberts Construction Co.*, ASBCA No. 31033, 86-2 BCA ¶ 18,846; *Shipco General, Inc.*, ASBCA Nos. 29206, 29942, 87-2 BCA ¶ 19,877.

The matter is remanded to the parties for settlement in accordance with this decision. In the event the parties are not able to settle the amount of fees and expenses, to which appellant is entitled, within 60 days from the date of this decision, they shall seek reinstatement of these applications for further proceedings as the Board may direct and for Board determination of the fees and expenses due appellant.

[¶ 26,487] Southwest Marine, Inc.

ASBCA No. 39472, October 27, 1993. Contract No. N00024-85-H-8221.

Attorney Fees Under Equal Access to Justice Act—Propriety of Charges—Discovery.—A contractor could not recover its attorney fees and costs associated with the government's failure to respond to certain requests for admissions, because neither the Equal Access to Justice Act nor the board's own procedures provide for such a remedy. The contractor relied upon authority that concerned court rules and specifically permitted the recovery of costs for failure to properly reply to discovery requests. However, those rules had no application to proceedings before the board under the Contract Disputes Act, despite the Act's language to the effect that the board may grant the same relief as the U.S. Court of Federal Claims.

For the appellant: Foster, Jones & Donovan, Irvine, California, by Peter B. Jones. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Evadne Sanichas, Trial Attorney, Western Division, Naval Facilities Engineering Command, San Bruno, California.

Before DELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

DELMAN, Administrative Judge: In *Southwest Marine, Inc.*, ASBCA No. 39472, 93-2 BCA ¶ 25,682, the Board held that appellant was entitled to an equitable adjustment under the Changes clause for the extended use of its dry dock. Thereafter, appellant filed an application for attorney's fees and other expenses allegedly incurred as a result of the Government's "failure to admit" in response to certain requests for admissions propounded during discovery. Our rules do not expressly provide for such an award. However, appellant invites our attention to Rule 37(c) of the United States Court of Fed-

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eral Claims which does provide for same,[1] and it argues, based upon case law and statute, that we should adopt this remedy here. The Government opposes appellant's application. For reasons stated, we deny the application.

As for the case law cited by appellant, we believe that appellant's reliance on *Essex Electro Engineers, Inc. v. United States* [32 CCF ¶ 73,263], 757 F.2d 247 (Fed. Cir. 1985), is misplaced. In *Essex*, the court affirmed that while the United States Claims Court (predecessor to the United States Court of Federal Claims), had authority to award fees and expenses to a prevailing party under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), no such award was appropriate under the circumstances because the position of the United States was substantially justified. We fail to see any connection between the facts in *Essex* and those before us. Appellant does not seek an award under 28 U.S.C. § 2412(d); it seeks expenses for the Government's "refusal to admit" in discovery. Moreover, *Essex* did not even involve an action brought under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, under which we take jurisdiction here; the underlying dispute in *Essex* was a protest action seeking injunctive relief of a contract award. Clearly, *Essex* does not provide any persuasive authority in support of appellant's position in this case.

Nor are we persuaded by *M.A. Mortenson Company v. United States*, 12 FPD ¶ 54 (Fed. Cir. 1993). In *Mortenson*, the court held that the United States Claims Court, under its rules, may properly impose the sanction of reasonable fees and expenses against the Government for discovery abuse, and that the Government's sovereign immunity from such a sanction was waived by 28 U.S.C. 2412(b). However, this statutory provision gives *courts* the authority to award fees and expenses.[2] An agency board of contract appeals is not a court. *E.M.I. Corporation*, ASBCA No. 30661, 85-3 BCA ¶ 18,313. See *Fidelity Construction Company v. United States* [30 CCF ¶ 70,827], 700 F.2d 1379 (Fed. Cir. 1983). See also *Blue Cross Association and Blue Shield Association*, ASBCA 25778, 89-2 BCA ¶ 21,840, at 109,900. We have held that we do not have the authority to award attorney fees as a sanction against the Government. *LTV Aerospace and Defense Company*, ASBCA No. 37571, 89-3 BCA ¶ 22,249; *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756.

Next, appellant points to the CDA, 41 U.S.C. § 607(d), in support of its position. This section provides that an agency board "is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." According to appellant, since this court has the power to grant fees and expenses for a refusal to admit, RCFC 37(c), this Board must also have this power pursuant to the above statutory provision.

This argument is not a new one. It was rejected in *Fidelity Construction Company, supra*. In *Fidelity*, the court held that the boards of contract appeals did not have the authority to award attorney's fees and expenses under the EAJA (prior to statutory amendments allowing for same), even though courts were given that authority under 28 U.S.C. § 2412. The court stated that the intent and purpose of 41 U.S.C. § 607(d) of the CDA was to provide boards with authority to grant relief on certain claims which previously they did not have,

[1] Rule 37(c) provides as follows:

(c) Expenses on Failure To Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, such party may apply to the court for an order requiring the other party to pay such party the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

This rule corresponds to Rule 37(c) of the Federal Rules of Civil Procedure.

[2] Insofar as pertinent, 28 U.S.C. § 2412 provides:

* * *

(b) Unless expressly prohibited by statute, a *court* may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. [Emphasis added]

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i.e., breach of contract claims. This provision had no bearing on the authority of a tribunal to grant fees and expenses against the Government, which raised issues of sovereign immunity and required express waiver.

We find the court's reasoning in *Fidelity* persuasive and equally applicable here. We also find nothing in the CDA, or in the legislative history, which reflects a Congressional intent to establish uniform procedures between court and board for handling discovery disputes, sanctions, or the management of CDA proceedings in general. The Congress did not seek to remake the boards into courts and vice-versa. Rather, it recognized that each dispute-resolution forum was unique, and justice would best be served by providing contractors with a choice of forum to hear their contract disputes:

> Justice and efficient operation of the contract disputes-resolving system can be obtained best with a flexible system that provides alternative forums for resolution of particular kinds of disputes. The claimant should be able to choose a forum according to the needs of his particular case; that is, one where the degree of due process desired can be balanced by the time and expense considered appropriate for the case. To this end, *alternate forums, each with special characteristics*, should be maintained for initial resolution of disputes above the contracting officer and informal agency review level. [Emphasis added]

(S. Rep. No. 95-1118, 95th Cong., 2d. Sess., *reprinted in* 1978 U.S. Code Cong. & Adm. News 5235 at 5247)

We believe that the "special characteristics" of each forum alluded to above relate to the respective rules of the tribunals. That the United States Court of Federal Claims and the Armed Services Board have different rules serves to promote their uniqueness, which the Congress found to be healthy and deserving of recognition and confirmation. If we were to accede to appellant's request here, we would go far to undo this healthy diversity. Contractors should appreciate that their rights and responsibilities, in some respects, are different in each forum. An evaluation of these differences, prior to appeal, should make for a more efficacious election.

In conclusion, the rules of the ASBCA do not provide for an award of attorney's fees and expenses for a party's "failure to admit." That such a provision exists under Rule 37(c) of the United States Court of Federal Claims does not compel its inclusion here.

The appellant's application is denied.

[¶ 26,488] South Georgia Cleaning Services, Inc.

ASBCA No. 38546, November 2, 1993. Contract No. F09607-87-D-7006.

Attorney Fees Under Equal Access to Justice Act—Substantial Justification—Close Question.—The government was justified in litigating an issue of whether the parties had reached accord and satisfaction, because the issue was a close question. That the contractor ultimately prevailed in the appeal did not affect the reasonableness of the government's position. The board noted that the government's belief that accord and satisfaction had been reached was based on specific facts that were open to that interpretation. The board noted further that the eventual settlement of the appeal involved only about 20 percent more than the contract modification upon which the government's litigation position rested. The contractor's claim for attorney fees and expenses was denied.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Thomas E. Abernathy IV and E. Alan Arnold. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Richard C. Phillips, Trial Attorney.

Before RUBERRY, SPECTOR, and WATKINS, Administrative Judges. Separate dissenting opinion by Administrative Judge WATKINS.

RUBERRY, Administrative Judge: In our decision on the merits of this appeal (which was issued in conjunction with ASBCA No. 40972—93-2 BCA ¶ 25,800), we held that Modification P0008 to the contract did not constitute an accord and satisfaction and sustained the appeal. Following our remand, the parties have agreed on the sum of $14,349.51 for this appeal. Therefore, appellant was the prevailing party.

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Substantial Justification

The criteria for determining whether the Government's position was substantially justified, and the Government's burden in this regard, are set forth in our decision of this date in ASBCA Nos. 40972 and 41219.

It is well-settled that the Government's position may be substantially justified even though an appeal was decided against it. *Zinger Construction Company, Inc.*, ASBCA No. 31858, 88-2 BCA ¶ 20,661, aff'd on reconsid., 88-3 BCA ¶ 20,978.

Here, we found that there was no meeting of the minds with respect to Modification P0008 inasmuch as the Government intended the $11,859.95 increase provided for therein to be a one-time, lump-sum settlement, whereas appellant intended to effect a unit price increase (findings 14-16 at 128,389). The increase was to compensate for unabsorbed overhead resulting from a partial termination for convenience. (*Id.*) The modification described the $11,859.95 increase as a "sum certain" (finding 18, at 128,389). However, we further found that the Government contract administrator advised appellant's project manager that he "assumed" the increased unit prices calculated by appellant would be reflected on the first delivery order, and that, on that basis, appellant's project manager signed the modification (finding 22, at 128,390).

We held that no accord and satisfaction was effected by the modification inasmuch as there was no meeting of the minds and the "sum certain" language could "encompass a one-time, lump-sum payment as well as payment by increased unit prices." (at 128,390) We did not decide "whether a one-time, lump-sum payment or the unit price increases spread over successive years is the proper form of payment for the termination of the golf course maintenance work." (*Id.*)

Our decision involved an extremely close question. There is no evidence that the Government contract administrator said anything abou exceeding the $11,859.95 amount, and the $11,859.95 figure certainly was a specific amount more consistent with a lump-sum agreement than a unit price increase over a uncertain period of time. We hold that the Government's belief that there had been an agreement on a total amount of $11,859.95 was reasonable under the formulation adopted in *Pierce v. Underwood*, 487 U.S. 522, 565 (1988).

We also note that the $14,349.51 settlement agreed to by the parties on remand apparently does not encompass the full four-year option period—through September 1991 (finding 2 at 128,387)—and is only about 20 per cent more than the amount provided by Modification P0008.

We conclude that the Government's position was substantially justified. Accordingly, appellant's application is denied.

DISSENTING OPINION BY ADMINISTRATIVE JUDGE WATKINS

I dissent.

With respect to ASBCA No. 38546, we held a modification to the contract invalid since there was no meeting of the minds. Mr. Pike, appellant's project manager, testified that the Government's contract administrator, Mr. Kirby, "assured me over and over as we received our delivery order that it would reflect the cost we had previously agreed upon ..." (tr. 34). Mr. Kirby did not deny Mr. Pike's testimony; accordingly, I find that Mr. Kirby did assure Mr. Pike that the delivery order would reflect the agreed-on cost. Mr. Pike asked the secretary to prepare a breakdown from the negotiations to prove back the totals of the two modifications that were to be signed (tr. 34, 50). It was the normal practice not to have the unit prices attached to the modifications that exercised the options (tr. 88). There would be a lump-sum modification and unit prices would be shown on subsequent delivery orders.

I find that Mr. Pike signed the modification relying on these assurances. It was not reasonable of the Government to renege on the contract administrator's assurance. The Government does not deny that the contract administrator was authorized to give such assurance. The Government settled this claim by awarding appellant approximately 21 per cent more than the original amount shown in the modification which was set aside by the Board. Appellant was compelled to litigate to recover this sum.

I find that the Government's position in this appeal is not substantially justified.

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[¶ 26,489] Ogden-HCI Services

ASBCA No. 32169, October 28, 1993. Contract No. N00406-84-C-2236.

Procedure, Boards—Reconsideration—Accuracy of Findings.—A government motion for reconsideration on the ground that the board's findings of fact did not support the board's conclusions was denied because, upon review, the board could find no reason to disturb its decision. The government's assertions on reconsideration were contradicted by the evidence in the record.

For the appellant: Dickstein, Shapiro & Morin, Washington, D.C., by David M. Nadler. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Douglas P. Hinds, Associate Chief Attorney, Litigation Office, Western Division Trial Team, San Bruno, California.

Before REITER, RUBERRY, and SPECTOR, Administrative Judges.

REITER, Administrative Judge: The Government in its motion to reconsider our 4 June 1993 decision argues that the facts as we have found them, do not support our conclusion that: (1) the Government had "superior knowledge" which it failed to share with appellant; and, (2) the Government's control over the previous contractor was so lax that facilities which appellant took over under the follow on contract had been degraded in violation of the Government's duty to cooperate with offerors.

We have reviewed the Government's ample motion, the appellant's response and our own findings of fact and conclusions of law but find no reason to disturb our previous decision in this matter.

The Government's failure to share its up-to-date financial information, which only it and the one other bidder possessed, fits squarely into the category of superior knowledge as defined by the courts and the Boards. It must be remembered that this financial data was critical to the bidding process and that the appellant's requests were repeated, oral and in writing. Most poignant is the appellant's understated call for help when it wrote "... we are uncomfortable with this task which requires all but the incumbent [contractor] to place a speculative monetary cushion in the proposal."

The Government's argument that the incumbent contractor's performance was satisfactory flies into the face of such unbiased reports as the one from Naval Hospital Branch Clinic which advised that there existed on the part of the incumbent contractor a "complacent attitude toward sanitation where a real urgency exists." Further the measuring stick which the Government sets forth in its motion for determining what is satisfactory performance is foreign to the integrated contract which spells out with precision the standard for food service sanitation and the care of Government-furnished property. (See findings of fact 35, 36)

In light of the above, our prior decision is reconsidered and affirmed.

[¶ 26,490] Dutra Construction Co., Inc.

ENG BCA Nos. 5939, 6045, November 12, 1993. Contract No. DACW07-90-C-0017.

Payments—Measurement for Payment—Dredging.—A dredging contractor's claim that the government's method of measuring for payment was inaccurate did not entitle the contractor to additional payment, because the contractor offered no credible evidence that the government's method adversely affected the contractor. Payment was measured by conducting hydrographic surveys before and after the dredging operation to determine the amount of material removed. The contractor's expert witness criticized the methodology used by the government, stating that it could result in an inaccurate measurement but offering no evidence that such inaccuracy had actually occurred. Moreover, the contractor's suggested alternate method of counting the number of scows loaded during the operation gave no indication of whether the material removed came from the "pay prism," the area and depth delineated by the contract for dredging. Only material removed from the pay prism was to be measured for payment.

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For the appellant: Kelly, Cox, Wootton, Welch, Gill & Sherburne, San Francisco, California, by Timothy M. Gill. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and James D. Stout, Government Trial Attorney, San Francisco, California.

Before PEACOCK, SOLIBAKKE, and SHERIDAN, Administrative Judges.

PEACOCK, Administrative Judge: These appeals involve a claim by Dutra Construction Co., Inc. (Dutra or Appellant) in the amount of $452,231 under the referenced contract for the maintenance dredging of the Suisun Bay Channel and New York Slough, in Solano and Contra Costa Counties, California. Dutra contends that 319,200 cubic yards of material were taken from the pay prism. The Government contends that only 91,395 cubic yards of material were removed from the pay prism, with the remainder resulting from excessive dredging. At the hearing in ENG BCA No. 5939 on October 20-23, 1992, problems pertaining to the scope and certification of the claim were discussed. As a result of those discussions, Appellant filed a certified claim for an overrun with the contracting officer.[1] The Contracting Officer denied the claim by final decision dated December 15, 1992. Appellant timely appealed that decision and the appeal was docketed as ENG BCA No. 6045. In its Notice of Appeal, dated February 23, 1993, Appellant moved "that the record made in ... ENG BCA No. 5939 [including all pleadings, documentary evidence admitted and hearing testimony] be incorporated" into ENG BCA No. 6045. The Government joined in this motion and both parties have requested that ENG BCA No. 6045 be decided on the record made in ENG BCA No. 5939. As a consequence of these motions, and the Board's granting thereof, ENG BCA No. 5939 has been rendered moot and will be dismissed. We proceed to decide ENG BCA No. 6045.

FINDINGS OF FACT

1. On July 31, 1990, the U.S. Army Corps of Engineers (hereinafter referred to as the Government or "Corps") awarded Dutra Construction Co, Inc. ("Dutra") the referenced contract to perform maintenance dredging in Suisun Bay and New York Slough, Solano and Contra Costa Counties, California. (Ex. 7). The channel areas were to be dredged to a depth of −35 feet with allowable overdepth payable to a depth of −36 feet. In addition to a lump-sum item for mobilization/demobilization, the contract provided for payment of $1.60 per cubic yard of material removed from the pay prism. (Ex. 6). The Corps estimated, based upon its pre-dredge survey of the area, that 85,000 cubic yards were to be removed from the required dredging prism, with an additional estimated 40,000 cubic yards of payable overdepth.

2. The "Division 2-site work" portion of the technical provisions included the following pertinent clauses:

> 7. OVERDEPTH AND EXCESSIVE DREDGING.
>
> 7.1 *Overdepth.* The two (2) foot overdepth shown on the drawings is being allowed only to assure removal of a sufficient amount of material to reach project depth(s) and width(s). One (1) foot of the overdepth is included in the maximum payline as shown on the drawings. No overdepth dredging will be allowed where dredging to achieve required project depth is not performed and no overdepth will be allowed under side slopes.
>
> 7.2 *Excessive Dredging.* Payment will not be made for material taken from beyond the maximum payline.
>
> * * *
>
> 9. PREDREDGE AND FINAL SURVEYS.
>
> The Government will perform the predredge survey. For the postdredge survey, the Contractor shall notify the Contracting Officer at least 72 hours prior to completion of the entire work or any section thereof (up to 4 acceptance sections as approved by the Contracting Officer) and the Government will perform the final survey no later than 14 days after completion of the work at no cost to the Contractor. The Contractor or his authorized representative will be notified when soundings and/or sweepings are to be made, and will be permitted to accompany the survey party. All area found to be in compliance with the contract require-

[1] The Appellant also included an alternative contention, contingent on the Board ultimately finding that only 91,395 cy were removed from the pay prism, that an equitable adjustment would then be due for an underrun below 85% of the estimated quantity. Although the Appellant estimated that adjustment as $59,000, the total additional payment at the contract unit price would have been only $23,768 even if the full 85% had been removed. In any event, the alternative contention is not before the Board in this appeal.

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ments will be accepted finally and be measured for payment as stated in Paragraph "MEASUREMENT AND PAYMENT", subparagraph "Measurement" hereinafter.

* * *

10. MEASUREMENT AND PAYMENT.

* * *

10.2 *Dredging.*

10.2.1 *Measurement for Payment.* The total amount of material removed and disposed of will be measured by the cubic-yard, by computing the volume between the bottom surface shown by soundings of the survey taken before dredging and the bottom surface shown by soundings of the final survey, and shall include excavation performed within the one (1) foot payable overdepth within the maximum payline as shown on the drawings. No payment will be made for materials removed below the maximum payline shown on the drawings.

10.2.2 The contract drawings represent conditions existing on the date of the survey shown on the drawings and are for information purposes only. Soundings taken from the predredging survey performed by the Government after award of contract and prior to commencement of dredging will be used in determining quantity of material removed for payment. Determination of quantities removed and the deductions made therefrom to determine quantities by in-place measurement to paid in the area specified, after having once been made, will not be reopened, except on evidence of collusion, fraud or obvious error.

3. Section 01330 "HYDROGRAPHIC SURVEYS" of the technical provisions stated in pertinent part:

1. GENERAL.

The Government will perform the pre- and post-dredge surveys for payment. The Contractor shall perform interim surveys for progress payments and quality control surveys. The Contractor shall make computations to determine the quantities of material removed during interim periods for which progress payments are to be made.

* * *

2.11 *Daily Quality Control Surveys.* For every day of dredging, the Contractor shall perform surveys in the dredging area and/or behind the dredge. These surveys shall verify that all contract channel dimensions are being obtained as specified. Field records for these surveys shall consist of a hard copy "x", "y" or "z" position plot. The plot shall have left and right edge of channel, centerline, time date, tide, tide correction and project control line stationing for each line surveyed. This record shall be included with the daily quality control report for submission to and review by the Contracting Officer.

* *

3. *PAYMENT.*

No separate payment will be made for the work performed under this section. Payment for performing the progress payment surveys and daily quality control surveys, including furnishing data, quantity computations and drawings, will be included in the contract unit price for "Dredging and Disposal".

4. The predredge survey was performed during the period of 28 June through 6 July 1990. It reflected payable quantities of available material as follows (Exh. A-9):

	C.Y. in Standard Depth	*C.Y. in Over Depth*	*Totals*
SUISUN BAY CHANNEL.....	47,056	28,427	75,483
NEW YORK SLOUGH.....	27,754	13,008	40,762
TOTALS	74,810	41,435	116,245

5. A preconstruction conference was held on August 2, 1990, and the Notice to Proceed was issued on August 10, 1990. (R.4, Tabs 9, 10).

6. Dutra began dredging operations in the Suisun Bay Channel on August 16, 1990, using the dredge *Paula Lee.* The *Paula Lee* was joined by the dredge *Super Scoop* on August 29, 1990. On September 13, 1990, the *Paula Lee* moved and commenced dredging in the New York Slough. The *Super Scoop* remained in the Suisun Bay Channel, and both dredges completed dredging on September 21, 1990.

7. Dutra did not perform any of the daily, required hydrographic surveys for quality control. Mr. Thomas McDonnell, the Government's inspector, "constantly" reminded the contractor that he needed hydrographic surveys to establish that the dredge was digging in the proper place and at the proper depth. Mr. McDonnell was promised surveys by Dutra but none was ever provided. (Tr. 684, 700-701).

8. No "out of position" dredging or excessive overdepth dredging (referred to herein collectively as excessive dredging) was observed by the Government or Dutra dredg-

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ing personnel during performance. Mr. McDonnell visited the dredges four times during performance. Blaine Delvaux, another Corps inspector, also visited the dredges on a less frequent basis.

9. Dutra regularly checked the depth of its dredging using "lead line" measurements. Only an incomplete record of Appellant's measurements was available and placed in evidence. The remaining "lead line" data were lost by Appellant. The available records establish a consistent pattern of excessive overdepth dredging and an average dredging depth greater than -37 feet for the areas measured, as adjusted for tides. (Exh. G-11). Appellant also dredged an additional 20 feet outside the contract area. (Tr. 283; R.4, Tab 17).

10. Dutra measured the volume of material removed during dredging by the number of scows or barges it filled. Pursuant to these calculations (or "slow counts"), it ultimately determined that it had dredged a bulk quantity of 399,000 cubic yards. Using an 80% "rule of thumb" for a "swell factor" it claims that a pay quantity of 319,200 *in situ* cubic yards (399,000 × .8) of material were dredged. The "scow count" method of determining pay quantities does not consider the source of the materials measured or whether the material was from within the pay prism.

11. During performance of a contract awarded by the Corps Portland District at Coos Bay, Oregon, the Corps and Dutra agreed that the hydrographic surveys taken on that job were inaccurate, and that Dutra should be paid 80% of the scow quantities. (Tr. 208, 242). The contract is not in the record. There are no further details, *inter alia*, as to the nature of the survey errors. There is no evidence that Appellant relied on using "scow counts" in bidding the contract in dispute. The final pay estimate for the Coos Bay contract, dated March 6, 1992, indicates a 24% overrun of pay quantities over estimated quantities. (Exh. G-49).

12. The post-dredge survey was conducted by the Corps during the period of September 6, through September 26, 1990. The same personnel and equipment were used for the post-dredge survey as had been used for the pre-dredge survey. The post-dredge survey was conducted with survey lines at 100-foot intervals and it reflected removal of pay quantity materials as follows:

SUISUN BAY CHANNEL	70,255 cubic yards
NEW YORK SLOUGH	20,154 cubic yards
TOTAL	90,409 cubic yards

13. The Government's pre-dredge survey was performed using 200 foot intervals between survey lines. Hydrographic surveys using intervals of 100 feet between survey lines are more accurate, provide greater confidence in their results, and are preferable to surveys using wider 200-foot intervals. Internal corps guidance now prescribes 100-foot intervals between lines for pay surveys. This internal guidance was in the draft stage at the time the pre-dredge survey was conducted in connection with this contract. However, 200-foot interval surveys are sufficiently accurate for pay purposes, particularly where the channel is regularly dredged. Such surveys are also accurate and preferable to the "scow count" method of computing pay quantities. (Tr. 585, 588-9, 743-45, 808-815, 912-13, 915-16). There is no specific or comprehensive evidence that the use of 200-foot intervals for pay purposes resulted in a material understatement of the actual pay quantities in this case.

14. After performing the post-dredge survey, the Corps calculated the quantity of material for which Dutra should be paid. That calculation was done by comparing the pre- and post-dredge survey condition at 200 foot intervals, since the pre-dredge survey was done on 200 foot intervals. The Corps calculated that Dutra should be paid for 91,395 cubic yards of material. Appellant did not accompany the Government survey party or request that the survey be reaccomplished.

15. The post-dredge survey also disclosed extensive overdredging outside the pay prism.

16. Both parties presented expert testimony concerning hydrographic surveying. Mr. John Langan testified as an expert for Appellant. Mr. Langan, among other things, identified what he referred to as "scalloping" on the post-dredge survey plan plot where one of the two types of Corps' surveying equipment had been used. He attributed the cause to a delay in the computer's matching of "x", "y" data with "z" data—that is matching location with depth readings. And he described the result as a shifting of the plotted position of depth readings from the appropriate position—with the direction of shift being alternately one direction across the channel on one survey line and the opposite direction on the adjacent survey line. He also expressed the opinion that there was a problem in determining the quantity of material removed from the area of survey lines 153 through 181 because of scalloping. In the area defined by survey

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lines 153 through 181, the resulting apparent shift in plotted position was toward the north side of the channel on lines ending with ".00" and toward the south side of the channel on lines ending with ".50". (Exhibit G-15; Tr. 456-488). Mr. Langan also identified, more generally, other surveying problems. He did not, however, quantify the comprehensive effect (up and/or down) on quantity computations of the various problems he identified with the surveys in this case. Appellant offered no detailed analysis by survey interval as to how any surveying error increased or decreased the *pay quantities* dredged by Appellant. Although Mr. Langan considered that Dutra's laser positioning system provided adequate horizontal control for controlling dredging on the sides of the channel, he was unable adequately to explain or rebut the survey evidence that substantial overdepth dredging occurred below the pay limits (−36 feet) in areas clearly within the channel. There is no probative and specific evidence impeaching the accuracy of the vast majority of the survey lines showing substantial excessive dredging, in particular the accuracy of the survey lines showing dredging below −36 feet. We cannot determine the adverse cumulative effect, if any, that any survey errors had on the ultimate question of the number of cubic yards for which Appellant is entitled to be paid under the contract.

17. Mr. Max Blodgett, the Corps' Resident Engineer, testified as an expert for the Government. Although agreeing with Mr. Langan that there were some errors in the surveys, Mr. Blodgett considered and we find that they were generally minor and isolated and they tended to have an offsetting or negligible effect insofar as calculating the pay quantities in this case. Problems with surveys do not necessarily reduce the pay quantities dredged; the problems instead may produce an increase in the pay quantity. Mr. Blodgett emphasized that there is a small amount of scalloping and/or other minor errors in virtually any hydrographic survey and that, at most, any conceivable survey errors in this case would have had a *de minimis* effect on the calculation of pay quantities. (Tr. 779-80, 785-86, 796-803, 914-915). The Board found Mr. Blodgett's testimony to be highly credible.

18. Based on our review of the Government surveys and the related evidence and testimony, including the highly credible testimony of Mr. Blodgett, we consider that the surveys are adequate for determining the pay quantity dredged and provide the best evidence of that quantity.

19. Appellant vigorously objected to the receipt into evidence of Exhibit G-16, an historical record of certain facts relating to prior contracts for the dredging of the Suisun Bay Channel (including the New York Slough). Those records are subject to several varying and conflicting interpretations. In view of our decision, it has been unnecessary to address the historical dredging records of the channel and they have not been considered in reaching our conclusions in this appeal.

DECISION

Appellant has presented its claim under the "Variation in Estimated Quantity" clause. The issues under the "Variation" clause ordinarily pertain to the propriety and/or amount of any adjustment of the price of the portion of the overrun or underrun quantities that are subject to adjustment. Here, however, whether the overrun quantities dredged were pay quantities is in dispute. Fundamentally, to recover in this case, whether at the contract unit price or an adjusted unit price pursuant to the "Variation" clause, Appellant must first prove that the materials dredged came from within the pay prism established in the contract.

Appellant's proof fits within two primary evidentiary themes. First, it contends that its dredging personnel were highly qualified and that they observed no excessive dredging during performance. Second, it emphasizes that these were problems with the surveys both pre- and post-dredge. Therefore, it follows, according to Appellant, that the channel areas and depths to be dredged must not have been as represented in the pre-dredge survey and the "scow count" measurements of dredged materials provide the best evidence of the pay quantities.

We begin our analysis of Dutra's contentions with the contract. The contract specified that pay quantities would be determined by comparison of the Government's pre- and post-dredge surveys. The final surveys indicate that substantial excessive dredging occurred. The contract also required that Appellant perform daily quality control surveys of the areas dredged. It failed to do so.

The paramount cause of Appellant's plight in this appeal is that it failed to comply with the contractual quality control survey requirements. Despite repeated requests by

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the Government and promises of compliance by Appellant, these interim surveys were not conducted nor submitted to the Corps. During performance, Dutra failed to resolve what to it must have been incredible variances between the pre-dredge survey and actual condition of the areas being dredged. These failures prevented the Government from timely checking the accuracy of its pre-dredge survey when the nature and source of any problem could have been identified and resolved.

Appellant also did not ask to accompany the final survey party. Nor did it request that the final survey be reaccomplished as was its right under the contract. If it had availed itself of these contractual rights, Appellant either could have assured itself that the final survey/resurvey was accomplished to its satisfaction or provided probative, contemporaneous evidence of any improprieties. The evidence of record offered by Appellant is neither qualitatively nor quantatively sufficient to sustain its burden of proof that actual quantities dredged greatly exceeded quantities calculated from comparison of the pre- and post-dredge surveys by the Government.

Appellant primarily offers an academic critique of perceived problems with the surveys in this case. As the Government's highly credible expert Mr. Blodgett pointed out, many of these problems do not necessarily have a material or an adverse effect on Appellant. They may cancel each other over the course of an entire survey and/or accrue to Appellant's benefit, *i.e.*, result in a higher pay quantity than if the errors had not been present. Simply pointing out general problems with a particular survey (or portions thereof) does not lead to the conclusion that the conditions were materially different from indicated. Nor does it justify throwing out the survey. This is particularly true when the surveys were not timely and contemporaneously rebutted by Appellant's own surveys. It is even more imperative when the alternative suggested here by Appellant, *i.e.*, the use of "scow counts," is far more problematic. Moreover, notwithstanding the expertise of Dutra's dredging personnel, there is contemporaneous, objective, non-survey evidence that substantial excessive dredging occurred. Among other things, the limited lead line data available indicates that the areas sounded were dredged to a depth in excess of one foot below the pay prism.

Dutra has made no comprehensive attempt to quantify the significance of the alleged problems with the pre-dredge survey other than to suggest that its "scow counts" are an accurate, composite reflection of these problems. Because of the general and unquantified nature of the evidence offered, it is unnecessary to detail more precisely the results of the Government's pre- and post-dredge surveys or point out the areas of excessive dredging. We consider that Dutra's case on the adequacy of the Government's surveys simply is not persuasive without offering its own detailed analysis of the cumulative and prejudicial effect of the alleged errors and/or the contractor's own contemporaneous survey evidence of the conditions encountered. The best evidence in this record of the actual pay quantities dredged is the Government surveys, occasional warts and all.

We conclude that Appellant has failed to prove any basis for discarding the contractually-specified basis for determining pay quantities, *i.e.* the government surveys. Accordingly, we further conclude that Appellant is entitled to payment for 91,395 cubic yards as determined by the Contracting Officer. The appeal docketed as ENG BCA 6045 is DENIED.[2] ENG BCA 5939 is DISMISSED.

[¶ 26,491] Hemphill Contracting Company, Inc.

ENG BCA Nos. 5698, 5776, 5840, November 12, 1993. Contract No. DACW43-88-C-0017.

Acceleration Claims—Government Pressure—Actual Acceleration.—Although a tree clearing contractor was entitled to the costs incurred in connection with a government-ordered change in the debris disposal method from open-air burning to air-

[2] The denial of this appeal does not prevent the pursuit of Dutra's alternative contention to the Contracting Officer for an equitable adjustment under the "Variation" clause on the basis of an underrun. That contention was contingent on the ultimate denial of the present appeal. See footnote 2, *supra*.

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curtain burning, it was not entitled to acceleration costs, because the record did not show that acceleration resulted from government action. The contractor contended that a 21-day suspension of burning work during a no-burn period without any time extension constituted an excusable delay that forced the contractor to accelerate its subsequent burning efforts to complete the project on time. However, the record did not show that the contractor enlarged its labor force, worked overtime, or performed weekend and holiday work in connection with the delayed burning. Although the contractor alleged that it brought rental equipment on site to speed up performance, the record showed that much of the work could have been accomplished with contractor-owned equipment. Moreover, the contractor did not show that its labor and equipment usage exceeded its original plan.

Performance—Directions by Government—Methods of Performance.—A tree burning contractor was entitled to recover the extra costs incurred in connection with the government-ordered change in the disposal method from open-air burning to air-curtain burning, as required by the state's air pollution law, despite the government's contention that the Permits and Responsibilities clause already required the contractor to comply with applicable state laws, because the contractor priced the contract in accordance with the government negotiator's suggestion to use open-air burning. The government's alteration of the performance method resulted in a compensable contract change.

Site Conditions—Notice——Lack of Timely Notice.—Under a tree clearing contract, a contractor was not entitled to an equitable adjustment for an alleged differing site condition, despite its contention that the acreage and mix of clearing work differed materially from the government's estimates, because it failed to provide notice of the alleged discrepancy between the estimated or indicated site conditions and the actual conditions until after the condition was removed. By providing notice months after contract completion, at which time the site was reduced to ashes, the contractor deprived the government of an opportunity to correct its estimates. Moreover, the differing site conditions argument failed not only from the lack of evidence of the alleged material difference but also from the inability to detect the alleged variation through a reasonably thorough site inspection.

Site Conditions—Contract Indications, Category I—Materiality of Difference.—A tree clearing contractor was not entitled to compensation for a differing site condition, because it failed to show that the conditions encountered differed materially from those indicated in the contract and that the conditions could not have been anticipated by a site investigation. The contractor's failure to preserve the site precluded any determination of the acreage and mix of debris actually encountered by the contractor.

Interpretation of Contracts—Parol Evidence—Integrated Agreement.—Under a tree clearing contractor's claim for an equitable adjustment for additional snag removal work, the parol evidence rule did not bar the use of information conveyed to the contractor during the preaward negotiation phase concerning the number of snags requiring removal, because the prior and contemporaneous oral and written agreements were offered to explain or supplement the contract terms or to evince consistent additional terms, rather than to establish matters that contradicted the terms of an integrated agreement. The contract did not indicate the number of snags to be removed. Thus, the information contained in the government's preaward estimate did not alter a term of the contract, and the estimate served to demonstrate what the parties expected to encounter.

Mistakes—Relief After Award—Reformation.—Reformation of a tree removal contract to reflect the parties' intended agreement was proper because the parties entered into the contract under a mutual mistake of fact with regard to the quantity of snags that had to be removed from the project. The parties had believed that the contract's requirement to remove all snags would require the removal of about 1,100 snags, but in fact over 3,300 snags had to be removed from the site. The parties would have altered their agreement if they had known the correct information at the time of contract formation. The contractor did not assume the risk of an overrun of snags, and it would have been unjust to place the burden of an overrun on the contractor under the contract, which did not provide for relief for a variation in estimated quantities.

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Pricing of Adjustments—Jury Verdict Technique—Lack of Precise Evidence.—A tree clearing contractor was not entitled to additional recovery under the jury verdict method for a change to an air-curtain burning disposal method, because the claim, which was prepared by a claims consultant who was retained after contract completion and was not present at the work site, was based on unverifiable assumptions and contained numerous mathematical errors. The contractor failed to show that it was entitled to an adjustment in addition to that already granted by the contracting officer. Moreover, the record did not provide any persuasive evidence in support of a departure from the contracting officer's original allowance regarding the contractor's claim for additional snag removal costs.

For the appellant: Edward L. Welch, Edwardsville, Illinois. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., Rozann M. Heininger and William P. Levins, Government Trial Attorneys, St. Louis, Missouri.

Before KETCHEN, SOLIBAKKE, and SHERIDAN, Administrative Judges.

KETCHEN, Administrative Judge: In these timely appeals, Hemphill Contracting Company, Inc. (Hemphill or Appellant) seeks additional compensation in a total amount of $507,332 for increased costs on a clearing contract attendant to the change in disposal method (ENG BCA No. 5698) and for a differing site condition (ENG BCA No. 5776). In ENG BCA No. 5840, Respondent seeks a refund in the amount of $152,000, representing an overpayment on a unilateral modification. A hearing was held and the parties have filed briefs. Both entitlement and quantum are before the Board for decision. The Contract Disputes Act of 1978, 41 U.S.C. § § 601, *et seq.*, applies.

PRELIMINARY MATTERS

The Board's opinion will be presented in two phases. "Phase I" will focus on issues surrounding Appellant's entitlement to an equitable adjustment under ENG BCA Nos. 5698 and 5776. "Phase II" of this opinion will address quantum issues arising under these two appeals, as well as the Government's refund claim in ENG BCA No. 5840.

FINDINGS OF FACT: PHASE I

Pre-Award Activities

1. Solicitation No. DACW43-87-R-0045 was issued by the St. Louis District, U.S. Army Corps of Engineers, on March 16, 1987. The solicitation, for a contract negotiated pursuant to Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), called for the clearing and removal of all trees and brush from Ellis Island on the Missouri side of Lock and Dam No. 26 (Replacement) on the Mississippi River in St. Charles County, Missouri. Removal of timber and debris was necessary because Ellis Island would be inundated once Lock and Dam No. 26 was operational, and the timber and debris could pose a navigational threat in the resulting reservoir. Work was to be completed within 180 days of receipt of Notice to Proceed. (R.4, ENG BCA No. 5698, Tab AA; Exh. G-1; Tr. 40-41, 721-29, 993-94, 1000).

2. In addition to the "Changes (1984 APR)," "Differing Site Conditions (1984 APR)," "Site Investigation and Conditions Affecting the Work (1984 APR)," and other general provisions customarily included in solicitations for Corps of Engineers clearing contracts, the solicitation contained the following provisions germane to this appeal:

SPECIAL CLAUSES

SC-34. EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE (1985 JAN)

(a) Allowable cost for construction and marine plant and equipment in sound workable condition owned or controlled and furnished by a Contractor or Subcontractor at any tier shall be based on actual cost data when the Government can determine both ownership and operating costs for each piece of equipment or equipment groups of similar serial and series from the Contractor's accounting records. When both ownership and operating costs cannot be determined from the Contractor's accounting records, equipment costs shall be based upon the applicable provisions of EP 1110-1-8, "Construction Equipment Ownership and Operating Expense Schedule Region V." *Working conditions shall be considered to be average for determining equipment rates using the schedule unless specified otherwise by the Contracting Officer....*

(b) Equipment rental costs are allowable, subject to the provisions of FAR 31.105(d)(ii) and FAR 31.205-36 substantiated by certified copies of paid invoices. Rates for equipment rented from an or-

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ganization under common control, lease-purchase or sale-leaseback arrangements will be determined using the schedule except that rental costs [sic—of equipment?] leased from an organization under common control that has an established practice of leasing the same or similar equipment to unaffiliated lessees are allowable. Costs for major repairs and overhaul are unallowable.

* * *

SC-36. ORDER AND COORDINATION OF WORK. The Contractor may start and complete the work in such order and sequence as he may desire.

a. The Contractor's first order of work shall be to clear all items required under this contract located in the area shown on the drawings in the vicinity of the existing disposal area on Ellis Island. All work in this area must be completed 60 days after Notice to Proceed....

* * *

TECHNICAL PROVISIONS

SECTION 2B—CLEARING

1. SCOPE. The work covered by this section consists of furnishing all plant, labor, equipment, and materials, and performing all operations necessary for the clearing of the areas specified herein or indicated on the drawings, and for the removal and disposal of all cleared materials.

* * *

3. CLEARING.

3.1 *General.* Clearing, unless otherwise specified, shall consist of the complete removal of all trees, stumps, down timber, snags, and brush from within the boundaries shown on the drawings including the complete cleanup of the area by the removal and disposal of all debris and rubbish resulting from clearing operations....

* * *

3.5 *Areas to be Cleared.* The timber limits shown on the drawings are approximate and may vary somewhat and there may be areas of timber and brush and scattered single trees that are not shown on the drawings. Any timber within the area to be cleared that is not shown on the drawings shall be cleared as specified.... Notwithstanding any difference between the drawings and the present condition at the work site, the Contractor will be required to clear all timber encountered within the overall limits shown on the drawings and as specified hereinafter.

4. DISPOSAL OF MATERIAL

4.1 *General.* The material cleared from the areas shall be completely removed by transporting from the area or disposed of by chipping or burning within the cleared areas....

4.2 *Burning.* The Contractor shall comply with all applicable State and local air pollution restrictions. Subject to such restrictions and obtaining any permit which may be required by said State, the Contractor may burn material within the contract area, and at any time within the contract period, provided such burning does not cause the above standards to be exceeded or does not interfere with inhabitants of the area by drastic changes in their accustomed environment, such as addition to air pollution or danger of fire. However, the specific time, location, and manner of burning shall be subject to the approval of the Contracting Officer from the view points of air pollution, governing fire laws and safety.... All burning shall be so thorough that the materials will be reduced to ashes, except that occasional charred pieces of logs or branches not exceeding 4 inches in diameter and 8 feet in length will be permitted to remain if covered with earth as hereinafter specified.

5. *Payment.* Payment for clearing and grubbing will be made at the contract sum job price for "Clearing and Grubbing," which price and payment shall constitute full compensation for providing all plant, labor, material, and equipment and performing all operations necessary to complete the work specified herein and shown on the drawings.

(Emphasis supplied). (R.4, ENG BCA No. 5698, Tab AA).

3. The drawings accompanying the solicitation generally delineated the clearing limits, but did not state the exact acreage to be cleared, and did not identify the level of effort in the areas to be cleared, in terms of "heavy," "medium," "light" or "brush hog" clearing. (Exh. G-1; Tr. 691, 734).

4. The terms "heavy," "medium," "light," and "brush hog" clearing are not defined in the contract. In addition, guide specifications prepared by the Corps of Engineers for clearing and grubbing also do not create parameters for the specific clearing categories. These terms commonly are used in the debris-clearing industry to denote the relative difficulty of the work. Depending on the classification, *e.g.*, heavy versus medium, a higher degree of clearing difficulty generally

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will require a correspondingly higher investment in terms of labor, equipment and time in order to clear an area of vegetation. The determination as to whether an area will require heavy, medium or light clearing depends on the density, size and diameter of trees, terrain, the type of equipment that will be required, and such other factors as may affect the work. Such determinations are subjective in nature. (R.4, ENG BCA Nos. 5776 & 5840, Tabs S, T, U; Exhs. G-24, G-29).

5. The initial Government contract estimate was prepared by Mr. Chuck Rhoads on June 17, 1987. Mr. Rhoads, an estimator in the St. Louis District's Cost Engineering Branch, had previously visited the job site and determined that the clearing area included approximately 12 acres of heavy clearing, 84 acres of medium clearing, 64 acres of light clearing and 60 acres of brush hog clearing. He estimated that the work would cost $217,000. (R.4, ENG BCA Nos. 5776 & 5840, Tab G; Tr. 840, 847).

6. Following preparation of the Government estimate, Mr. Lenard Ross, a civil engineer in the Contract Administration Branch responsible for coordinating 8(a) contracts, commenced negotiations with Appellant on August 3, 1987. In his "Negotiation Report," Mr. Ross indicated that Hemphill's original proposal was $998,999.33, and:

> It became immediately obvious at the start of negotiations that there was no mutual understanding of the contract scope of work. The meeting was devoted to going over the Government's breakdown of the total clearing area into heavy, medium, light and brush hog areas. The contractor had not made any attempt to breakdown the total area. The contractor requested a meeting in the field to inspect the work area.

(R.4, ENG BCA Nos. 5776 & 5840, Tab J).

7. Shortly thereafter, representatives of the Corps and Hemphill conducted a site visit so that Appellant could become familiar with the work site. During the visit, the parties discussed generally the number of acres and types of trees that were to be cleared. Appellant's representatives (including its President) made only a cursory investigation of the site and did not determine independently the size and types of trees that were to be cleared. Mr. Dennis Foss, the Park Manager for the Corps' Mark Twain Lake Project and Mr. Jimmy Bissell, the Contracting Officer's Representative (COR), opined that since the classification method for materials in a removal contract is subject to a considerable degree of discretion and numerous topographical variables, a prudent contractor should inspect the site before bidding and make his own evaluation of the types and concentration of materials to be removed. (Tr. 895, 1046-47; Exh. G-29). The parties did discover, however, that the Government's estimate made no provision for the removal of snags that were located in watery areas at the site. A snag is a tree or branch embedded in a lake or stream bed that constitutes a hazard to navigation. Thereafter, the Corps issued an amendment to the solicitation adding a provision for snag removal. (R.4, ENG BCA Nos. 5776 & 5840, Tab J; Tr. 588-89, 693-95, 982-83; Exh. G-35).

8. Mr. Rhoads made a second visit to the site and performed new acreage calculations in order to prepare an updated contract estimate. His revision yielded the following "mix": 12 acres of heavy clearing, 84 acres of medium clearing, 99 acres of light clearing, and 129 acres of brush hog clearing. He also determined that 1,100 snags required removal. The estimate was based on his physical observation of the site, terrain features, and the size and density of the trees. He also consulted commercial literature to ascertain the types of equipment and sizes of work crews that would be necessary to perform the clearing work. The Government's revised contract estimate, in the amount of $315,000, was prepared on October 6, 1987. (R.4, ENG BCA Nos. 5776 & 5840, Tab H; Tr. 849-52).

9. On October 13, 1987, Mr. Ross spoke with Appellant's Construction Coordinator, Mr. Bernard Simington. He discussed the Corps "mix," in terms of "heavy," "medium," "light," and "brush hog" work, and provided the Corps acreage figures from the revised contract estimate. At that time, Mr. Simington referred to the provision in the specifications directing the contractor to comply with local environmental requirements, and asked Mr. Ross whether Hemphill should burn the debris in the open—"open air burning" or in a pit with air injection—"air curtain burning." Mr. Ross replied that Hemphill should plan on open air burning, and that the local Missouri laws would not apply since this was a "government project." (Tr. 591, 594; R.4, ENG BCA Nos. 5776 & 5840, Tab J; Exh. G-35).

10. The parties held another negotiation meeting on October 30, 1987. Hemphill presented a revised proposal totalling $516,189.66, in which it adopted the "mix" of clearing categories contained in the re-

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vised Government estimate. Following further analysis and review by the Corps, Mr. Ross offered $359,563 in a meeting on November 9, 1987, and the parties reached agreement on a contract price of $360,400 on the following day. (R.4, ENG BCA Nos. 5766 & 5840, Tab J; Exh. G-35; Tr. 601, 658-60).

11. Appellant's "Contract Price Proposal," dated December 13, 1987, included prices for clearing 12 acres of "heavy" material, 84 acres of "medium" material, 99 acres of "light" material, and removal of 1,100 snags. The proposal did not contain an entry for brush hog work. (App. Exh. G).

Contract Award and Performance

12. On January 12, 1988, the Corps of Engineers and the Small Business Administration (SBA) entered into a firm-fixed price negotiated contract in the amount of $360,400. The bid schedule contained one lump-sum item, "Clearing and Grubbing." The SBA thereafter awarded Contract No. DACW43-88-C-0017 to Hemphill. (R.4, ENG BCA No. 5698, Tab AA). The contract did not contain any information regarding the total acreage to be cleared or the relative proportions of heavy, medium, light, or brush hog clearing work to be performed. (Tr. 691, 1047). The contract did not indicate the number of snags to be removed. The contract also was silent on the burning method to be employed for disposal of material.

13. Notice to Proceed was acknowledged by Appellant on February 16, 1988. Appellant began mobilizing at the site on that date, and clearing operations commenced two days later. (R.4, ENG BCA Nos. 5776 & 5840, Tab K; Exh. J-1, Report Nos. 1, 3).

14. On February 19, 1988, Appellant submitted its Construction Progress Chart. The chart depicted the various aspects of the contract work as follows:

Work Element	*Start*	*End*
Clearing	February 17, 1988	July 17, 1988
Burning	March 17, 1988	July 17, 1988
Burning and Clean-Up	March 17, 1988	August 15, 1988
Snag Removal	May 17, 1988	July 17, 1988

(Exh. J-3). The record does not indicate whether Appellant planned to work on weekends.

15. On or about February 22, 1988, the parties learned that the Missouri Department of Natural Resources would not issue a permit for open air burning and, instead, required the use of air curtain burning. (Exh. J-1, Report No. 7; Tr. 43; Exh. G-35). As a consequence, the Corps directed Appellant to suspend burning operations until an acceptable disposal method was found. However, while burning was suspended, Appellant was not precluded from clearing trees, and it continued to knock down trees and stack them for later burning. (Tr. 43-46).

16. Air curtain burning requires the use of a burning machine which injects air into a pit. The burning process involves placement of debris into a previously-excavated pit, where it is ignited. Injection of air into the pit by the air curtain burner results in a higher burn temperature, creating a blast furnace effect. By contrast, open air burning merely involves placing trees and brush into piles on the ground surface and igniting them. Air curtain burning accelerates the burning process and is more efficient than open air burning. (Tr. 760-61, 788-89).

17. On February 24, 1988, the Contracting Officer requested a cost proposal from Appellant for a change to the contract's debris disposal process from open air burning to air curtain burning. (R.4, ENG BCA No. 5698, Tab B). Between March 1 and March 18, 1988, Appellant submitted four separate cost proposals ranging from $372,929.32 to $692,529.05. (R.4, ENG BCA No. 5698, Tabs C, D, E, F).

18. Appellant's progress schedule indicated the commencement of burning activities on March 17, 1988, but burning work did not begin on that date. (Tr. 1177).

19. The parties met to discuss the cost of air curtain burning on March 24 and 25, 1988. They recognized that Appellant would need "additional resources" in order to complete the work on time. The Corps had developed a revised estimate for the change in the amount of $45,855, but it was "obvious that the Contractor was not going to settle for the Government's price." At the conclusion of the meetings, the parties concluded that they could not agree on a price, whereupon the Contracting Officer determined to issue a unilateral modification in the amount of $150,000. Appellant was advised that if it intended to challenge the amount of the change order, it would have to maintain detailed records to support any claim for additional compensation. (R.4, ENG BCA Nos. 5776 & 5840, Tab L; Tr. 31-33, 47, 54-55, 527; Exh. G-35).

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20. By unilateral Modification P00002, dated March 31, 1988, the Contracting Officer directed Appellant to use air curtain burners in the performance of disposal operations, and increased the contract price by $150,000 under the provisions of the "Changes" clause. No time extension was granted. (R.4, ENG BCA No. 5698, Tab G). The Government described the increase in the contract price as providing payments to the contractor for use of two air curtain burners as opposed to one, because the parties determined that two burners would be required to complete the burning work within the contract term. (R.4, ENG BCA Nos. 5776 & 5840, Tab V; R.4, ENG BCA No. 5698, Tab I; Tr. 1053, 1149-51). Appellant's President did not sign the modification, intending to reserve Hemphill's right to seek a higher adjustment for the change to air curtain burning. (R.4, ENG BCA No. 5698, Tab M).

21. During the period when Appellant was unable to burn as planned, from March 17 to April 7, 1988—the "no burn" period—it continued to clear the site, generally employing an eight or nine member work crew, working eight to ten hour days. During the 21 calendar days between the planned "start" date and actual commencement of burning, Hemphill worked on only nine days. Rain or wet conditions prevented work on seven days, but the record does not indicate whether this inclemency was abnormal. Appellant only worked on one weekend day, Saturday, March 19, 1988, and chose not to work on the remaining five weekend days. (Exh. J-1, Report Nos. 31-51). There is no evidence demonstrating whether any work was delayed exclusively by the delayed burning, or otherwise detailing the precise effect on Hemphill's overall progress.

22. On April 7, 1988, Appellant began making preparations for air curtain burning. Up to that point, Appellant's activities had been devoted to clearing brush and timber and "decking" it in piles for open air burning. Because of the change to air curtain burning, Appellant had to "undeck" the piles of debris and move the materials into the pits excavated for air curtain burning. (Tr. 360).

23. From April 7, 1988, to May 16, 1988, Appellant's efforts generally were devoted to burning materials that had been cleared when burning was suspended—the "burn only" period. During this period, Appellant's crew ranged from 12 to 25 workers, averaging 22 workers per day, and normally recorded only 8-hour workdays. The record does not reflect a meaningful amount of overtime. In the early stages of the "burn only" period, Hemphill's workers also performed clearing and decking in addition to burning, but the crew size did not change appreciably once Appellant began burning exclusively. (Exh. J-1, Report Nos. 52-89). On April 27, 1988, the Corps Quality Assurance Inspector noted that "Contractor has stopped clearing until burning can catch up. No problem with schedule." (Exh. J-1, Report No. 70).

24. There is no evidence as to what crew size Appellant would have employed if burning had begun as scheduled on March 17, 1988.

25. Beginning on May 16, 1988, Appellant began full-scale operations, performing both clearing and burning. Its crew size remained unchanged from the "burn only" period. On July 13, 1988, the Corps Quality Assurance Inspector noted that "Contractor bringing in more equipment to speed up progress." Up to this point, the Inspector had continually observed that Appellant's work was "on schedule." On July 15, 1988, Appellant's clearing efforts at the site were complete. (Exh. G-36; Tr. 1084; Exh. J-1, Report Nos. 89-149).

26. With the completion of clearing operations on July 15, 1988, Appellant again devoted all of its efforts to burning collected material. Burning was completed on August 10, 1988, and Appellant began final clean-up work. All work was complete on August 16, 1988. During performance, Hemphill removed a total of 3,317 snags and recorded this information in the daily reports it provided to the Corps Quality Assurance Inspector.[1] (Tr. 401, 1084-85; Exhs. J-1, G-36).

27. In the 132 days from the commencement of burning activity until contract completion, Appellant worked at the site for 90 days. No work was performed on 38 weekend days (at Hemphill's option), two "rain" days, and two national holidays. (Exh. J-1).

28. Hemphill brought the following seven pieces of its own equipment to the site during the mobilization phase:

[1] Appellant reported these quantities in Contractor Quality Control Report Nos. 86, 89, 110, 112-13, 125, 132-34, 141, 145, 147-49, 153, 155-56, 159-61, 163, 166, 170, and 173. On other occasions, the reports refer to snag removal, but do not supply a number. The parties used varying figures to describe the number of snags on the site; there is no support for these differing figures in the daily records.

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Equipment	*Dates on Site*
D-8 Dozer	February 6 to April 13, 1988
D-7 Dozer	February 16 to August 11, 1988
977-L Endloader	February 17 to July 21, 1988
245 Backhoe	February 17 to August 15, 1988
399 Crane	February 22 to July 26, 1988
235 Backhoe	February 22 to July 29, 1988
977-K Endloader	February 23 to July 1, 1988

During performance, Appellant employed the following rental machinery at the site:

Equipment	*Dates on Site*
D-4 Dozer	April 7 to July 11, 1988
D-4 Dozer	July 12-15, 1988
977-H Endloader	May 4 to July 12, 1988
D-3 Dozer	May 19 to August 16, 1988
6620 Backhoe	June 10-14, 1988
6620 Backhoe	July 7 to August 15, 1988
963 Endloader	July 1 to August 10, 1988
D-8 Dozer	April 15 to July 1, 1988
D-8 Dozer	July 14 to August 14, 1988
D-6 Dozer	July 12 to August 16, 1988

(Exhs. J-1, G-42).

29. During the period from April 7, 1988, when Hemphill instituted air curtain burning, until contract completion, it recorded the following "work" and "idle" hours for its owned and rented equipment:

Owned Equipment	*Work Hours*	*Idle Hours*
D-7 Dozer	499	157
D-8 Dozer	236	84
235 Backhoe	344	48
245 Backhoe	224	176
399 Crane	244	348
977-K Endloader	154	324
977-L Endloader	302	258
Totals (3,398)	2,003	1,395

Rented Equipment	*Work Hours*	*Idle Hours*
D-8 Dozer (2)	152	0
D-3 Dozer	246	10
D-4 Dozer	259	29
D-6 Dozer	172	4
963 Endloader	136	0
6620 Backhoe	165	19
977-H Endloader	350	34
Totals (1,576)	1,480	96

(Exhs. G-6, G-9; Tr. 249-62). Stated as a whole, Appellant utilized 4,974 hours for owned and rented equipment (3,398 + 1,576). Rented equipment constituted about 32 percent of this total. While contractor-owned equipment was idle for about 41 percent of the time, rented equipment was idle for only about six percent of the time. As can be seen generally, rented equipment "work" hours are roughly comparable to contractor-owned equipment "idle" hours.

30. Hemphill did not bring additional rental equipment onto the site solely to supplement owned equipment. On one occasion, Hemphill withdrew its Caterpillar D-8 Dozer and replaced it with a leased machine. In another instance, Appellant rented a Caterpillar 977-H Endloader to replace a contractor-owned Caterpillar 977-K Endloader that had broken down. The Hemphill 977-K Endloader later was removed from the site. Hemphill rented the 977-H Endloader from Mr. Frank Powell, a frequent Hemphill employee, and the Superintendent on this project. Mr. Powell is not in the business of regularly renting construction machinery. While Appellant recorded a $30,000 rental obligation to Mr. Powell for the three month rental of the machine, no payment was ever made. (Tr. 807-811, 1006; Exhs. G-41, G-42, G-43, J-1). There is no explanation in the record for Appellant's actions in replacing owned machinery with rental equipment, or whether rental equipment brought to the site to supplant disabled Hemphill equipment was removed when the owned machinery was repaired.

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31. Mr. Arnold Hardwick was the superintendent of another small business contractor that contemporaneously performed a clearing contract in connection with the Lock and Dam 26 project. He had extensive experience in clearing contracts of this type, and opined that Hemphill brought an excessive amount of owned and rented equipment to the site. In calculating equipment costs for his contract, Mr. Hardwick determined that the conditions prevailing at his site were "average," and thus used the "average conditions" rates contained in Corps publication EP 1110-1-8. Similarly, the COR observed that the conditions at Ellis Island were "average." (Tr. 1050; Exh. G-31).

Post-Performance Events

32. On September 19, 1988, Appellant submitted a properly certified claim in the amount of $754,785.75, including $13,891.75 in interest, for alleged increased costs from the change in burning method to air curtain burning. This amount had been reduced from $917,369 by deductive credits for "open burning" in the amount of $26,475, and "unilateral modification (P00002]" in the amount of $150,000. (R.4, ENG BCA No. 5698, Tab I). The record does not disclose the methodology by which Hemphill derived the credit for deletion of open air burning.

33. An audit of Appellant's claim was performed by the Resident Audit Office of the St. Louis District. In the ensuing report, the auditor considered the initial claim of $917,369 and determined that $618,519.71 of the proposed costs were "questioned," and an additional $66,671.23 in costs were "unsupported or unresolved." The audit incorporated a technical analysis provided by the Construction Division of the St. Louis District, which included an analysis of Hemphill's equipment operating versus standby hours, and labor costs for the period from April through August, 1988. (R.4, ENG BCA Nos. 5776 & 5840, Tabs M, Z).

34. On March 8, 1989, Mr. Ross performed a cost analysis of Hemphill's "burning change" claim in preparation for negotiations with Appellant. He considered, among other things, Appellant's equipment and labor use, relying on the field records prepared by Appellant and the Corps. He divided the scope of work into seven elements: (1) suspend open burning; (2) delete open burning; (3) suspend all original operations and perform "catch-up" burning; (4) undeck, rehandle and burn downed timber; (5) air curtain burning; (6) accelerate basic contract; (7) remove 2,206 snags.[2] Mr. Ross determined that $185,702 of direct costs in Hemphill's claim were supported by the audit and, based on undisclosed "technical considerations," Appellant was entitled to an additional $177,558 of the questioned and unsupported costs identified in the audit, for a total amount of $363,260. Mr. Ross then deducted the $213,702 in costs allowed in Modification P00002.[3] The resultant amount, plus mark-ups, yielded a pre-negotiation objective of $188,518. (R.4, ENG BCA Nos. 5776 & 5840, Tab N; Exh. G-35; Tr. 1153, 1225).

35. Mr. Ross reduced the Government's pre-negotiation proposal to $96,802 on March 10, 1989, in response to the Contracting Officer's determination that $91,716 of costs identified with dozer ("push cat") usage, representing 100 percent of dozer hours, were allocable to the clearing operations, rather than the burning work. (Exh. G-35; R.4, ENG BCA Nos. 5776 & 5840, Tab N).

36. Following meetings between the parties on March 10 and 15, 1989, when Appellant first articulated arguments of acceleration, defective specifications, breach of warranty, additional clearing, heavier clearing, and additional snag removal, the Contracting Officer agreed to increase the Government's offer for the burning change to $140,000. In addition, he offered $30,000 for acceleration of the basic contract and $30,024 for "additional snag removal." The Contracting Officer then apparently "rounded up" the figures and made a total offer of $205,000 in order to achieve bilateral agreement. (Exh. G-35; R.4, ENG BCA Nos. 5776 & 5840, Tab O).

37. At a meeting between the parties on April 13, 1989, Hemphill again presented arguments for acceleration, heavy clearing, and additional snag removal. In addition, Appellant contended that the acreages and "mix" contained in the Government estimate were incorrect, and specifically denom-

[2] We assume that this figure represents Mr. Ross' independent determination of the number of snags Appellant removed in excess of the Government estimate of 1,100 snags. The total number of snags estimated by Mr. Ross varies from the data contained in the daily logs. See Footnote 1, *supra*.

[3] Modification P00002 was executed in the amount of $150,000. The record does not disclose the source of the $213,702 figure cited by Mr. Ross.

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inated this claim as a differing site condition. (R.4, ENG BCA No. 5698, Tab N).

38. Following the meeting, Mr. Ross recorded the following "prenegotiation objectives":

The Government will again make the Contractor two offers, one for burning only and one for complete settlement. It is assumed that a burning only mod will be issued unilaterally and that a complete settlement agreement would be bilateral and result in complete accord and satisfaction ....

Burning Only Offer

Burning	$ 96,716
Push Cats	43,284
Acceleration	30,000
	170,000

From 10 Mar. Prenegotiation Objectives

* * *

The Mod that added the burner did not include a contract time extension. The Contractor shut down all basic contract work for 6 weeks to get caught up with the burning and then spent 13 weeks performing the remaining clearing and burning. ... The Contractor was able to finish on time by accelerating the basic contract clearing and by adding personnel and equipment to the burning operation. The full cost of the personnel and equipment involved in burning are included in the $96,716 allowance for burning and the $43,284 allowance for push cats. The acceleration allowance of $30,000 is determined by allowing approximately six nineteenths of the cost of push cats plus markups, in recognition of additional resources spent on clearing. This brings the total allowance for push cats to ... $73,284 or 80% of dollars identified in the 10 Mar. prenegotiation objectives, as being partially or totally allowable.

Complete Settlement Offer

The Contractor has persistently argued that the basic contract was defective because the Government Estimate was based on erroneous determinations of the amount of clearing and breakdown of the clearing area into light, medium, and heavy clearing.... The Government finds no merit in the argument and has determined that the contract is a lump sum contract; the contract makes no representations as to the exact quantity or breakdown of quantity of clearing to be performed and, accordingly, will not include any money in its offer for what the Government feels is contract reformation.

The Government's final offer ... will include an allowance for additional snag removal. This allowance is considered reasonable because the Government Estimate was based on 1100 snags when 3306 snags were actually removed. Allowance for snag removal will be at the original contract Government Estimate amount of $13.61 each.

The final settlement offer is based on the following elements: a. the Government's acceptance of 100% of the costs expended during the 6 week period when burning was the only operation performed, b. an allowance for only the burning cost during the 13 week period when both clearing and burning were allowed, c. snags as discussed above, d. acceleration of the basic contract work as discussed, e. a credit for the $150,000 paid to date under P00002.

Summary:

Operations from 7 Apr—13 May 88 per audit:		
Undecking	$116,080	
Cutting and Burning	24,300	
		$140,380
Operations 13 May—16 August 88		
Burning 13 weeks @ $4,050		52,650
Acceleration of basic contract $^{6}/_{19}$ of Push Cats × $72,618		22,932
Snags 2206 × $13.61 ea		30,024
		$245,986
Markups, 12% G&A, 7% Profit, 2$^{1}/_{2}$% Bond		$302,159

An independent Government Estimate has been prepared. The estimate totals $305,434. The final objective of $302,159 is less than the estimate and is considered a fair and reasonable price.

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(R.4, ENG BCA Nos. 5776 & 5840, Tab O). Mr. Ross observed that the Government "went to the limit of reasonableness" in calculating the proposed $305,000 increase in the contract price. (Exh. G-35). The Contracting Officer endorsed the calculations made by Mr. Ross, and tacitly included them in the proposed modification. (R.4, ENG BCA Nos. 5776 & 5840, Tab P).

39. In preparing the cost analysis for the proposed modification, Mr. Ross reviewed the parties' field records, certified cost and pricing data submitted by Appellant, actual cost records submitted by Appellant, the Government audit, his own prior cost analysis, and the pre-award Government estimate. (Exh. G-35).

Modification P00005 and its Aftermath

40. On April 20, 1989, the Corps prepared a final estimate for Modification P00005 in the amount of $305,000. On May 10, 1989, the Government negotiator and Appellant reached an oral agreement to settle the claim in that amount, and on May 16, 1989, Hemphill executed a Certificate of Current Cost and Pricing Data. (R.4, ENG BCA Nos. 5776 & 5840, Tab P).

41. On May 19, 1989, the Corps sent an unexecuted Standard Form 30 to Appellant, on which was inscribed proposed Modification P00005, in the amount of $305,000, for "all costs and mark-ups directly or indirectly attributable to the substitution of air curtain burning for open air burning, and for all impacts, delays, and/or acceleration directly or indirectly related thereto." The instrument did not include a detailed price breakdown of the components of the amount paid. The proposed modification also included "release" language. (R.4, ENG BCA No. 5698, Tab Q).

42. Appellant's President, Mr. John Hemphill, signed the instrument on May 30, 1989, and the document was executed by the SBA on June 2, 1989. However, before the Contracting Officer was able to execute the modification, Mr. Hemphill orally informed Mr. Ross that he wished to withdraw his assent to the modification. The Contracting Officer signed the instrument on June 8, 1989. Mr. Hemphill restated his intention to withdraw from the agreement in a letter dated June 9, 1989. (R.4, ENG BCA No. 5698, Tabs Q, R, AA; Tr. 701-04; Exh. G-35). Notwithstanding Appellant's oral notice and letter of withdrawal, the Corps treated Modification P00005 as a bilateral instrument and issued payment to Hemphill on or about June 13, 1989, in the amount of $305,000. (R.4, ENG BCA No. 5698, Tab S).

43. By letter dated September 8, 1989, then-counsel for Appellant filed a properly certified, revised claim that was computed as follows:

Description	*Amount*
Equipment:	
Owned	$213,828.63
Leased	76,775.00
Purchased	18,785.00
Fuel & Oil, Repairs & Maintenance	60,667.50
Sub Total	$370,056.13
Materials	6,930.00
Direct Labor	296,678.06
Field Overhead	44,368.88
Sub Total (Direct Costs)	$718,033.07
G & A Expenses (12% of Direct Costs)	87,038.77
Bond (2 1/2%)	22,374.85
Insurance	10,100.00
	$837,546.69
Profit (10%) of Direct Costs	72,532.31
	$910,079.00
Less: Credit for open burning ($26,475) and credit for unilateral modification ($150,000)	176,475.00
TOTAL	$733,604.00

The claim also sought $69,034.15 in Contract Disputes Act interest, computed from September 19, 1988, through September 15, 1989. (R.4, ENG BCA No. 5698, Tab W).

44. The Contracting Officer declined to entertain the revised claim. He referred to Modification P00005, asserting that it was bilateral and binding, and, as such, Appellant had no valid and extant certified claim. Further correspondence between the parties did not result in a change of position by the Government. (R.4, ENG BCA No. 5698, Tabs X, Y, Z). By letter dated November 22, 1989, Appellant filed an appeal from the Contracting Officer's refusal to issue a final decision. (R.4, ENG BCA No. 5698, Tab A). The appeal was docketed as ENG BCA No. 5698.[4]

[4] Appellant subsequently filed a motion for partial summary judgment challenging the effectiveness of Modification P00005. The Board ruled that the modification was not enforceable because, prior to execution by the Government, the Contracting Officer was aware that Appellant had withdrawn from the agreement; there was no

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Differing Site Conditions Claim

45. On August 16, 1990, Hemphill submitted a second certified claim in the net amount of $428,604 for additional costs it incurred because of an alleged differing site condition with respect to the acreage and mix of clearing categories on the job site. Although the contract did not contain specific acreage and "mix" figures for the various types of clearing to be performed, or the number of snags to be removed at the site, Appellant alleged that:

> The Government's original specifications called for 129 acres of brushhogging, 99 acres of light clearing, 84 acres of medium clearing, and 12 acres heavy clearing. Contrary to the government's specifications upon which Hemphill relied when submitting its initial bid and proposal, 3 acres needed brushhogging, 146 acres needed light clearing, 75 acres needed medium clearing, and 100 acres needed heavy clearing. The government's specifications further erroneously provided that 1,100 snags needed to be cleared when actually 3,600 snags had to be cleared. Hemphill incurred additional costs and expenses due to the errors in the government's specifications.

According to Appellant, the costs associated with its differing site conditions claim were included in its September 8, 1989, "burning" claim and the new "net" claim amount reflected the reduction of the principal amount of $733,604 by the earlier payment of $305,000 through Modification P00005. (R.4, ENG BCA Nos. 5776 & 5840, Tab A).

46. Shortly after clearing began, Appellant retained the Lundan Corporation (Lundan), an engineering and land survey firm, to perform closed traverse measurements around the areas to be cleared in order to determine the exact acreage of heavy, medium, and light clearing. In conducting its survey, Lundan used criteria provided by Hemphill on the size of trees to be included in the three clearing categories. When the Lundan crew arrived at the site on April 5, 1988, about 100 acres already had been cleared by Appellant and the material placed in piles, but Hemphill provided no information to Lundan on these materials. In an attempt to ascertain the "mix" of clearing categories in the areas already cleared by Hemphill, Lundan performed random surveys of the debris piles. However, even in the case of areas in which trees remained standing, Lundan did not measure all standing trees in order to develop its acreage estimate; rather, it made only random surveys of those areas, as well. Upon the conclusion of its survey, Lundan estimated that there were about 50 acres of heavy clearing, 75 acres of medium clearing and 107 acres of light clearing at the site, in a total area of 232 acres. The Lundan estimate made no allowance for brush hog work or snag removal. (SR. 4, Tab F; Exhs. G-10, G-18, G-19; Tr. 434, 636-39, 643, 656-57, 662-65)

47. Appellant never lodged a protest with the Government or otherwise remarked about the clearing acreages or mix during performance. (Tr. 1051; Exh. J-1). The first time Appellant raised this issue was during the negotiations surrounding Modification P00005 in March, 1989. (Tr. 1075).

48. As part of its trial presentation, Appellant presented acreage estimates prepared by its claims consultant, Mr. Edward Hick, who was retained after the contract was completed. Mr. Hick prepared his analysis in an attempt to resolve the discrepancy between the acreages alleged in Appellant's claim and the data presented in the Lundan report. He determined that 175 acres of heavy clearing, 75 acres of medium clearing, 54 acres of light clearing and zero acres of brush hog work were performed. However, Mr. Hick was not present at the job site during performance and had no personal knowledge of the actual conditions and the materials removed; his estimate was based entirely on information he obtained at a pretrial consultation with Hemphill personnel. (Tr. 292-95, 433-49; Exh. G-10). Aside from the conclusory statements in Mr. Hick's report, there is no substantive evidence to substantiate his acreage and mix estimates.

49. On November 2, 1990, Hemphill filed an appeal based on its differing site conditions claim, citing a letter from the COR (dated October 3, 1990) denying the claim on the ground that it was barred by accord and satisfaction through Modification P00005, as well as the Contracting Officer's failure to act on the claim within 60 days of submission, as set forth in 41 U.S.C. § 605. (R.4, ENG BCA Nos. 5776 & 5840, Tab B). The appeal was docketed as ENG BCA No. 5776.

(Footnote Continued)

meeting of the minds. See *Hemphill Contracting, Inc.*, ENG BCA No.5698, 91-2 ¶ 23,761.

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The Government Affirmative Refund Claim

50. Following the Board's decision setting aside Modification P00005, the Successor Contracting Officer (SCO) issued his final decision on March 12, 1991. He determined that the action of his predecessor in issuing unilateral Modification P00002 was "contrary to the provisions" of the contract and, since Modification P00005 was a successor modification, demanded refund of the entire $455,000 disbursed to Appellant through Modification P00002 and Modification P00005. He based his decision on the "Permits and Responsibilities" clause, which charged Appellant with the responsibility for obtaining permits, as well as the provisions of TP 2B-4.2 requiring the contractor to "comply with all applicable State and local air pollution restrictions." According to the SCO, irrespective of his predecessor's characterization of the directive to employ air curtain burning, Appellant remained obligated to comply with Missouri environmental requirements and, as such, was not entitled to an adjustment to the contract price for the change in burning method. (R.4, ENG BCA Nos. 5776 & 5840, Tab C). Hemphill took a timely appeal, which was docketed as ENG BCA No. 5840. (R.4, ENG BCA Nos. 5776 & 5840, Tab D).

51. At the hearing, Respondent's auditor, Mr. Nicholas Katashuk, concluded that Hemphill was overpaid through Modification P00005 in the approximate amount of $152,000. He opined that the Government was entitled to a refund of $30,000 paid for snag removal, because the cost and pricing data supplied by Appellant was incomplete. He similarly determined that the Government was entitled to return of $22,000 paid through the modification for acceleration, since the contract was not accelerated. Finally, he argued that the Government was entitled to a refund of "not less than" $100,000 for overstated equipment costs. (Tr. 1229-30; Exh. G-41).

DECISION: PHASE I

ENG BCA No. 5698—Entitlement

In this appeal, Hemphill seeks the additional costs of performance it incurred when the method of debris disposal was changed from open air burning to air curtain burning. Appellant also seeks costs for acceleration which, it claims, resulted from the change in burning method.

Respondent does not dispute Hemphill's assertion that the change in burning method resulted in additional, compensable performance costs, but rejects the contention that Hemphill also incurred legally-recognizable acceleration costs in connection with the change in burning method.

The solicitation expressed no preference for the method of debris disposal. In response to Appellant's query with regard to the particular burning method to employ, the Government negotiator advised Hemphill to use open air burning and allayed the contractor's concerns about the impact of local environmental laws, stating that this contract was a "government project" not subject thereto. Appellant accordingly structured its proposal to include open air burning, and the parties contractually expected to dispose of debris by open air burning.

Shortly after work began, the parties discovered that the State of Missouri would not permit open air burning, and required air curtain burning. At that point, the Contracting Officer ordered Hemphill to suspend burning operations until an acceptable disposal method was approved. While Appellant was unable to begin burning as planned, it continued to clear and stack debris for later disposal. When air curtain burning began, Hemphill "undecked" the collected debris and moved it to the pits for burning. Ultimately, the Contracting Officer issued unilateral Modification P00002, directing a change in burning method to air curtain burning, with a concomitant $150,000 increase in the contract price, but no time extension. Subsequently, the Government issued unilateral Modification P00005, further increasing the contract price by $305,000.

When Hemphill submitted its claim for additional costs attendant to the change to air curtain burning, the Successor Contracting Officer rejected its arguments on the basis of the "Permits and Responsibilities" clause.

Among the obligations placed on the contractor by the "Permits and Responsibilities" clause is the responsibility for compliance with all applicable laws. Additionally, Technical Provision 2B-4.2 of this contract specifically required the contractor to comply with "all applicable State and local air pollution laws." In its brief, Respondent acknowledges the applicability of the "Permits and Responsibilities" clause to this situation, but expressly abandons this defense.

In an advertised procurement, performance methods (such as burning in this case) frequently are left to the discretion of the

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bidder/contractor. However, in this negotiated procurement, open air burning essentially was suggested by the Government's negotiator, Hemphill priced the contract in accordance with his suggestion, and this method was impliedly incorporated into the contract. The "Permits and Responsibilities" clause normally places the risk of added costs flowing from compliance with local laws on the contractor. However, because of the unique nature of this procurement, the fact that the *parties* agreed to dispose of debris through open air burning, and the fact that the Corps specifically directed Appellant to change to the air curtain burning method, the "Permits and Responsibilities" clause is not a defense in this instance.

The contract the parties executed incorporated disposal of debris through open air burning. When the Corps directed Hemphill to utilize air curtain burning, it injected a new manner of performance into the contract. This alteration of the performance method gave rise to a compensable change to the contract. As such, Hemphill is entitled to an equitable adjustment to the contract price for the additional costs of performance associated with the Government-ordered change in burning method.

Acceleration

In determining whether a constructive acceleration has occurred, the following factors must be addressed:

1. Existence of one or more excusable delays;

2. Notice by the contractor to the Government of the excusable delay, and a request for a time extension;

3. Failure or refusal by the Government to grant the requested extension;

4. An express or implied order by the Government to accelerate; and

5. Reasonable efforts by the contractor to accelerate resulting in increased costs.

McNutt Construction Co., Inc., ENG BCA No. 4724, 85-3 BCA ¶ 18,397; *Fermont Division, Dynamics Corporation of America*, ASBCA No. 15806, 75-1 BCA ¶ 11,139, and cases cited.

The essence of Appellant's argument is that the 21-day suspension of burning work during the "no burn" period, from Appellant's March 17 "start" date to April 6, 1988, without any contract time extension, constituted an excusable delay that had the effect of forcing Hemphill to accelerate its subsequent burning efforts in order to complete the project on time.

The test for establishing an excusable delay that underpins an acceleration claim is whether the delay flows from causes "beyond the control and without the fault or negligence of the contractor." During the 21-day period when Hemphill was unable to burn, it otherwise performed work on only nine days (including one weekend day). Seven days were lost to rain or wet conditions, but the record does not disclose whether the conditions on those days constituted "unusually severe weather," and there is no indication whether or not burning or any other work could have been accomplished on those days. On five weekend days, Hemphill simply decided not to work—a policy that continued throughout the contract term.

When a contractor's performance is delayed by multiple causes acting concurrently, and only one cause is excusable, *i.e.*, where other causes lie with the contractor, courts and boards have adopted the approach that neither party will benefit from the delay. Consequently, in a "Changes" clause analysis, a contractor cannot recover acceleration costs flowing from a concurrent delay, unless the record supports a clear apportionment of the delay and expense attributable to each party. See, *e.g., Blinderman Construction Co., Inc. v. United States* [30 CCF ¶ 70,619], 695 F.2d 552 (Fed. Cir. 1982); *John McShain, Inc. v. United States* [17 CCF ¶ 80,906], 199 Ct.Cl. 364, 412 F.2d 1281 (1969); *Paragon Energy Corporation*, ENG BCA Nos. 4997, 4998, 4999, 87-2 BCA ¶ 19,934; *Rivera General Contracting*, ASBCA No. 25888, 85-2 BCA ¶ 18,095; *Hardeman-Monier-Hutcherson, A Joint Venture*, ASBCA No. 11869, 67-2 BCA ¶ 6522.

From our review of the record, we are not convinced that any delay to Hemphill's work was occasioned solely by the Government's restriction on burning during the "no burn" period, or other excusable causes. Hemphill's failure to work during the majority of that period either was attributed to rain or wet conditions that did not rise to the level of "unusually severe weather," or was part of Hemphill's consistent pattern of no weekend work. Furthermore, there is nothing in this record by which we can apportion any segment of the delay exclusively to the Government. For these reasons, we conclude that Appellant's partial idleness during the "no burn" period was not exclusively the result of an excusable delay.

Looking to the second and third factors of acceleration, namely, a contractor request for and a Government denial of, a time ex-

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tension, the record clearly indicates that Hemphill never gave notice of delay to the Corps nor sought a time extension. Furthermore, there is no evidence of exhortatory conduct on the part of the Government that induced Appellant to accelerate.

However, of paramount importance in an analysis of an acceleration claim is whether, in fact, the contractor actually accelerated. It is beyond cavil that Hemphill was precluded from beginning burning operations for 21 days and, once it was permitted to burn, this 21-day lacuna was not rectified through a contract time extension. When Hemphill was restricted to clearing and decking during the "no burn" period, it employed eight or nine-member crews working eight to ten-hour days. Following the onset of burning on April 7, 1988, Hemphill's work crew averaged 22 workers per day, working eight-hour days. While most of Appellant's efforts during the "burn only" phase were devoted to "catch-up" burning, when full-scale operations began on May 16, 1988, its crew size did not change appreciably. Throughout the remainder of the contract term, no significant overtime, weekend or holiday work was performed, and two days were lost to rain or wet conditions.

Appellant employed basically the same size work force during both the "burn only" and full operation phases of the job. We determine from this record that Hemphill did not enlarge its labor force solely because of the delayed onset of burning.

Hemphill's equipment usage pattern similarly does not support its claim of acceleration. Hemphill performed the work with a combination of owned and rental equipment. Starting on April 7, 1988, when Hemphill began air curtain burning at the site, until contract completion, its rental equipment comprised about 32 percent of the total equipment hours it recorded for the work. Rental equipment was idle only about six percent of the time, while contractor-owned equipment was idle 41 percent of the time. In some cases, the work time of rental equipment was virtually equivalent to the idle times recorded for identical contractor-owned equipment. On at least one occasion, contractor-owned equipment was removed from the site and replaced with rental equipment, without explanation. On another occasion, malfunctioning contractor-owned equipment was supplanted with rental equipment; Appellant does not explain why the rental equipment was not removed after the owned machine was restored to work.

The mere fact that Appellant brought rental equipment onto the site does not establish acceleration. From this record, we determine that some, if not all, of the work performed by rental equipment reasonably could have been accomplished using contractor-owned equipment. While we are not privy to Hemphill's decisional matrix in employing equipment, there is nothing in this record to suggest that the introduction of rental equipment was necessary, or supports a Hemphill effort to accelerate, inasmuch as contractor-owned equipment lay idle for almost the same amount of time as rental equipment was operating. While there are fleeting references in the record to the fact that Appellant brought rental equipment onto the site in order to "speed up" performance, there is no demonstrable nexus between this action and accelerated performance.

Much as with "early completion" claims (where contractors claim that completion would have occurred earlier, "but for" Government interference), a determination of whether a contractor was accelerated is aided by a "base line" finding of what level of effort the contractor would have expended "but for" the delay factor. See generally, *Skyline Painting, Inc.*, ENG BCA No. 5810, 93-3 BCA ¶ 26,041; *Bell Coatings, Inc.*, ENG BCA No. 5787, 93-2 BCA ¶ 25,805; see also *J.M.T. Machine Company, Inc.*, ASBCA Nos. 23928, 24298, 24536, 85-1 BCA ¶ 17,820. Part of the problem in analyzing this claim is that we have no evidence of the crew size and spread of equipment Hemphill intended to employ had burning proceeded according to its original schedule. On this record, Hemphill has not established the extent (if any) to which its use of labor and equipment exceeded its original plan. When we add to this uncertainty the absence of some of the traditional indicia of acceleration, *i.e.*, overtime hours, weekend and holiday work, we find the record to be insufficient to support Appellant's claim. Both parties have alluded to acceleration, but we have received no credible demonstration of that effect. Mere allegations do not constitute proof. See, *e.g.*, *Inversiones Aransu, S.A.*, ENG BCA No. PCC-77, 92-1 BCA ¶ 24,584. While we do not doubt that the 21-day burning suspension disrupted Appellant's operation, we are not persuaded that Hemphill accelerated its performance as a consequence of that interruption.

Based on the foregoing, we determine that Appellant has failed to establish entitlement to additional costs for acceleration.

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Conclusion

The appeal is SUSTAINED IN PART, to the extent that Hemphill is entitled to the additional costs of performance entailed by the change from open air burning to air curtain burning, but not to include costs associated with acceleration.

ENG BCA No. 5776—Entitlement

Hemphill contends that the physical conditions it encountered at the site varied materially from what the Government conveyed to it during the negotiation process. Specifically, Appellant argues that the acreage and "mix" of trees and other materials to be removed was misrepresented by the Government and, when combined with the change to air curtain burning, dramatically increased the cost of performance. While Appellant does not denominate its differing site conditions claim, we assume it is advancing a "Type I" claim. Hemphill also alleges that the significantly greater number of snags (than the parties anticipated) that it encountered and removed from the site constituted a differing site condition.

Acreage and Mix

In a clearing contract, the size of the clearing area as well as the "mix" of clearing work are critical elements affecting the level of effort required to perform the work and, hence, the cost of performance. While the terms "heavy," "medium," and "light" clearing are used commonly in the clearing industry, they have no precise meaning. Determination and gradation of materials to be removed are, by necessity, subjective processes that are affected by the bidder's analysis of the size of the trees and other materials, terrain features, and intended equipment usage.

The specifications accompanying the solicitation were silent with regard to the size and composition of trees and other materials within the job limits. However, during the negotiations between the parties, the Corps disclosed its initial estimates to Hemphill. Following the disclosure of the Corps' first estimate, the parties made a site visit, but Appellant did not make a thorough study. Thereafter, the Corps revised its estimate to 12 acres of heavy clearing, 84 acres of medium clearing, 99 acres of light clearing, and 129 acres of brush hog work. All of this information was provided to Hemphill.

After clearing work began, Appellant retained Lundan to perform a survey and determine the acreage and mix of clearing work to be done. Lundan determined that the area to be cleared was approximately 232 acres, comprised of 50 acres of heavy clearing, 75 acres of medium clearing and 107 acres of light clearing. However, the reliability of the Lundan survey was compromised by a number of factors. Prior to the survey, Hemphill already had cleared 100 acres at the site and collected the debris in piles, but provided no guidance to Lundan concerning the character of the collected materials. As a result, Lundan was forced to rummage through the piles in an attempt to determine the relative mix of the collected materials, and was able to make only random estimates of the mix of the collected materials. However, even in areas where trees were still standing, Lundan performed only random surveys.

At trial, Appellant presented Mr. Hick's estimate that the work consisted of 175 acres of heavy clearing, 75 acres of medium clearing, 54 acres of light clearing and zero acres of brush hog work. This estimate was wholly the product of collaboration between unidentified contractor personnel and Mr. Hick, who was never present at the job site during the contract term, and had no personal knowledge regarding the work.

In order to establish the existence of a "Type I" differing site condition, the proponent must demonstrate:

1. The conditions encountered differed materially from those indicated in the contract;
2. The different conditions could not have been reasonably anticipated by either a site investigation or a study of the contract drawings and specifications;
3. The contractor reasonably relied upon his interpretation of the contract; and
4. The contractor was damaged because of the difference between the expected and actually-encountered conditions.

Guy F. Atkinson Company, ENG BCA No. 4693, 87-3 BCA ¶ 19,971; see also *John Collins v. United States*, 200 Ct.Cl. 642, 26 CCF ¶ 83,110 (1972).

Before proceeding to an analysis of the merits of this portion of the appeal, we must address the issue of notice. Under the terms of the "Differing Site Conditions" clause, the contractor is obliged to notify the Government of an alleged differing site condition promptly and before the condition is disturbed, in order to afford the Government an opportunity to investigate the condition.

Hemphill never raised the issue of the accuracy of the Government estimate during

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performance. In fact, it was not until a meeting on March 10, 1989, nearly seven months following the completion of the job, that Hemphill first filed a recognizable notice with the Corps.

Prejudice flowing from a lack of timely notice is recognized as a bar to recovery on a differing site conditions claim. See *Tompkins & Company*, ENG BCA No. 4484, 85-1 BCA ¶ 17,853; *Jo-Bar Manufacturing Corp. v. United States* [22 CCF ¶ 80,291], 210 Ct.Cl. 149, 535 F.2d 62 (1976). The test of the prejudice attendant to lack of timely notice is the disability imposed on the Government either to take remedial action to mitigate the effect of the differing site condition, or to prepare its defense against the claim. Cf. *Wayne L. Grist, Inc.*, ENG BCA No. 5503, 90-2 BCA ¶ 22,915; *Bohemia, Inc.*, ENG BCA No. 4305, 84-3 BCA ¶ 17,650; *Troup Brothers, Inc.*, ENG BCA No. 3030, 72-2 BCA ¶ 9491. The prejudice here is direct and palpable. When Hemphill gave notice of the alleged discrepancy between the Corps estimate of acreage and mix and the actual conditions, months after contract completion, the trees and other materials were, at best, little more than ashes. Obviously, at that stage, the Government's ability to correct its estimates was academic. Likewise, we are hard-pressed to envision how the Corps could make *any* kind of intelligent analysis of the site conditions, in order to prepare a defense to Appellant's claim. Indeed, even when Lundan performed its survey of the site, *when trees were still standing*, it was unable to ascertain the mix of materials in the areas already cleared, and had to resort to rough estimates for the cleared areas.

For the foregoing reasons, Appellant's differing site conditions claim with regard to the acreage and mix of materials to be removed fails for the lack of timely notice. Even if we were, for the sake of argument, to ignore our determination to deny this appeal based on the absence of timely notice, we nonetheless would deny entitlement on substantive grounds.

The contract was silent with regard to acreage and mix, but the Corps disclosed its estimates for these two factors to Appellant during the negotiation phase. Even if we were to imbue these figures with the status of contract indications, the effect would be largely irrelevant. Considerations of latency notwithstanding, the first criterion in a "Type I" analysis is a demonstration that the actual site conditions differed materially from those indicated in the contract documents. However, there is no way from this record by which we can determine the actual site conditions Hemphill encountered. Much as with the preceding notice analysis, the ability to establish the actual site conditions with any degree of confidence suffers from Appellant's failure to preserve the site in a manner whereby the acreage and mix of trees and debris could be ascertained. Since Appellant is unable to present credible evidence of the discrepancy between the "indicated" and actual site conditions, we conclude that this aspect of the claim would fail because the materiality of the difference between the indicated and alleged conditions is not susceptible to proof.

This differing site conditions argument also would fail because there is nothing in the record to suggest that the variation alleged by Appellant between the Government estimate and the site conditions could not have been detected through a reasonably thorough site inspection.

Snags

The preaward Government estimate indicated that 1,100 snags were present at the site and required removal. The record contains several different quantities for snags removed. Our review of the record, in particular, a thorough review of the daily reports, persuades us that the removal of 3,317 snags recorded in the daily reports is the best evidence of the work performed by Hemphill. There is no suggestion that Hemphill mischaracterized the materials it described as snags in the daily reports, thereby inflating the number of "snags."

This contract was awarded as a one item, lump sum fixed-price contract. There is no way to distill the contract price for any one element of the work (here, snag removal) from the instrument. It is undisputed that Hemphill removed triple the number of snags estimated by the Corps. At issue is whether this additional work is compensable, and by what vehicle.

The Government opposes this facet of the appeal on two grounds. It first argues that, through operation of the parol evidence rule, information conveyed to Appellant during the negotiation phase preceding award, *i.e.*, the Corps estimate of 1,100 snags, cannot be offered to vary the terms of the contract, in order to establish a differing site condition.

The Government correctly recites the parol evidence rule when it states that evidence of negotiations prior to execution of a written contract is not admissible where the

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language of the contract is clear and unambiguous. While the parol evidence rule rejects evidence of prior oral or written agreements or contemporaneous oral agreements offered for the purpose of establishing matters that contradict or are otherwise inconsistent with the terms of an integrated agreement, it does not preclude the use of such evidence to explain or supplement the contract terms or to evince "consistent additional terms." *Restatement (Second) of Contracts*, § 213(1); see *Sylvania Electric Products, Inc. v. United States* [17 CCF ¶ 81,287], 198 Ct.Cl. 106, 458 F.2d 994 (1972); *J.A. Jones Construction Company*, ENG BCA No. 4635, 85-2 BCA ¶ 17,952; *Unicom Systems, Inc.*, ASBCA No. 29468, 84-3 BCA ¶ 17,675; *Environmental Tectonics Corporation*, ASBCA No. 21657, 79-1 BCA ¶ 13,796, *aff'd. on reconsid.*, 79-1 BCA ¶ 13,876. Previous and contemporaneous discussions properly may be considered in order to ascertain the subject matter of the contract or the sense in which the parties may have used particular terms. In such cases, the evidence is not offered for the purpose of making a contract for the parties, but to aid in understanding precisely what contract the parties actually made.

This contract contained no reference to the number of snags to be removed. As such, the information contained in the Government's preaward estimate does not, *per se*, alter a term of the contract. Rather, the estimate here serves to demonstrate what the *parties expected* to encounter. For Hemphill, these numbers imparted a notion of how much work was required, while this same information created a framework under which the Government could evaluate Hemphill's proposal. Since the estimate was used by both sides in negotiating this contract and it does not contradict any provision of that instrument, we find, for purposes of this analysis, that the parties entered into a clearing contract contemplating removal of approximately 1,100 snags.

The parties entered into the contract believing that the scope of work included removal of about 1,100 snags. Their belief proved to be erroneous. We determine that their jointly-shared belief that about 1,100 snags were present on the site and had to be removed, when, in fact, about three times that many snags were present and were removed by Hemphill, constitutes a mutual mistake of fact for which relief is warranted.

In order to reform a contract because of a mutual mistake of fact, it must be shown that both parties entered into the contract unaware of a fact material to the successful performance of that contract or that both parties entertained an erroneous belief as to the present existence of a matter material to the contract. *Restatement (Second) of Contracts* § 152 (1981); 13 *Williston on Contracts* § 1545 (3d. Ed. 1970); *Shear v. National Rifle Association of America*, 606 F.2d 1251, 1260 (D.C. Cir. 1979); *Leasco v. Taussig*, 473 F.2d 777, 781 (2d. Cir. 1972); *Bowen-McLaughlin-York Company v. United States*, 10 Cl.Ct. 223 (1986); *Elias Brothers, Inc.*, ENG BCA No. 5321, 88-3 BCA ¶ 21,091; *Quality Electric Service*, ASBCA No. 25811, 81-2 BCA ¶ 15,380.

A major part of this contract required the contractor to remove "all" snags from the project. The mutually understood quantity of 1,100 (based on the Government estimate) was used by both sides in forming this contract. Since a major purpose underlying this contract was the removal of potential hazards to navigation (snags being one type), we determine that the parties would have altered their agreement had they known the correct information at the time of formation.

Appellant did not assume the risk of an "overrun" of snags. While the Government estimated that there were about 1,100 snags to be removed, it is abundantly clear from this record that the Government wanted all snags removed, whatever their number. In light of the foregoing, it would be unjust to place the burden of the overrun on Appellant in this lump-sum contract where there was no contractual remedy available for relief in the face of such an occurrence (*e.g.*, the "Variation in Estimated Quantities" clause).

Based on this record, we conclude that the parties entered into this contract under a mutual mistake of fact with regard to a basic assumption respecting the quantity of snags that had to be removed from the project. The traditional remedy for mutual mistake of fact is to reform the contract to reflect the agreement the parties intended.

Conclusion

The appeal is SUSTAINED IN PART, to the extent that Appellant is entitled to compensation for its removal of all of the snags on the project. As to all other matters, the appeal is DENIED.

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FINDINGS OF FACT: PHASE II

52. On December 12, 1990, the Board issued an "Order On Proof Of Costs," requiring Hemphill to furnish a statement to Respondent detailing the costs it sought and the verifying source of those costs, *e.g.*, "books and records." Respondent was obligated to respond to Appellant's statement and to file a cross-statement of its own if it sought a reduction in costs payable to Appellant. (Board Correspondence File).

53. In early-March, 1991, a meeting was held between Hemphill personnel, Mr. Hick, and Hemphill's predecessor counsel (Mr. Mark Zellmer) in order to establish an operational framework for the preparation of Appellant's cost proposal. At that meeting, Hemphill personnel did not provide technical assistance or other input (in terms of on-the-job experience) to Mr. Hick for his use in making judgmental analyses of the cost data. Instead, most judgmental decisions were left to Messrs. Hick and Zellmer, neither of whom was present at the job. (Tr. 86-90, 102-15, 435, 472-73, 691-92).

54. Mr. Hick acknowledged that he was not an accountant, and admitted that he did not know whether his reports conformed to generally-accepted accounting principles. (Tr. 83, 102).

55. In preparing his reports, Mr. Hick reviewed Hemphill's Quality Control Reports, equipment time sheets appended to the Government's Quality Assurance Reports, official payrolls, and various invoices and receipts. He observed at the hearing that his efforts were handicapped by the poor quality of Hemphill's records. (Tr. 87-90. 97-98, 115, 119, 398, 460).

56. Mr. Hick highlighted the problems he faced in using Hemphill's records. In the case of labor costs, the records did not present detailed information as to where, when and how long employees worked. Sometimes, the records indicated labor time for equipment operators, yet no equipment time was recorded. (Tr. 149, 153, 170, 413). Equipment records were equally uninformative. Mr. Hick's review of Appellant's records did not reveal why machinery was idle (*e.g.*, stand-by or inoperative), the reasons underlying the use of additional equipment at the job site, and the time that was devoted on a given day to a particular item of work. (Tr. 137-39, 261, 272-73, 369, 1199). The problems confronting Mr. Hick were best illustrated by his attempt to separate costs attributable to the change to air curtain burning from those chargeable to the alleged differing site condition. The daily quality control and quality assurance documents recorded labor and equipment hours under a heading "Clearing, Burning, and Snagging." Mr. Hick testified that, when he was analyzing the field records, he had "no idea" where clearing (*i.e.*, work associated with the alleged differing site condition) "stopped" and burning (the work associated with the change in disposal method) "began." (Tr. 280; Exh. J-1).

57. Many aspects of Hemphill's claims overlapped and, in an attempt to isolate costs associated with particular claims, Mr. Hick made numerous allocations of labor and equipment costs that he admitted were judgmental. He recognized that, under this approach, a change in his allocation formulas would effect corresponding changes in the dollar values attached to the other claims. (Tr. 108, 175, 195, 233, 278-82, 307, 375-76).

58. Mr. Hick used "severe conditions" rates in calculating equipment costs for owned equipment. In calculating the cost of rental equipment, he used the "severe conditions" operating rate for owned equipment plus the actual rental cost, minus ownership costs. However, the equipment rates utilized by Mr. Hick often varied inexplicably from the "severe conditions" rates listed in EP 1110-1-8, "Construction Equipment Ownership and Operating Expense Schedule, Region V," which was identified in the contract as the pricing schedule for equipment costs. (Exhs. G-4, G-6, G-7; App. Exh. C).

Appellant's Proof of Costs Statement[5]

I. Mr. Hick's May 19, 1991, Cost Report

59. On May 19, 1991, Mr. Hick prepared his first cost report ("Hick 1"), which presented additive and deductive items for the following cost elements:

[5] In response to the Board's Order, Appellant presented four separate proof of cost statements prepared by Mr. Hick, which we shall examine *seriatim*. While we have found no entitlement to additional costs for acceleration or a differing site condition, we present the factual materials underlying these claims in the context of Mr. Hick's proposals, because of the interrelated nature of the claims in his analysis, and the requirement that we decide related quantum issues regarding Appellant's entitlement to additional compensation for its "burning change" and snag removal claims.

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DESCRIPTION	TOTAL COST
1. Acceleration	$ 138,116
2. Credit for Open Air Burning	(23,255)
3. Air Curtain Burning (Net)	237,714
4. Differing Site Conditions	208,886
5. Delay	99,358
6. Snags	17,713
7. Credit for Brush Clearing	(9,962 [6]
Total Individual Items	$ 668,570
Less P00005	−305,000
Additional Amount Due	$ 363,570

(Exh. G-4). The "Additional Amount Due" represented costs in excess of the $815,400 already disbursed to Appellant under the original contract ($360,400) and Modifications P00002 ($150,000) and P00005 ($305,000).

General

60. In preparing his "acceleration" analysis, Mr. Hick was unable to determine which costs were attributable to original contract work once burning began. As a consequence, he made a judgmental determination that 50 percent of the rental equipment and labor costs during the burning period were devoted to "productive work," *i.e.*, original contract work. He offered no justification for this mathematical apportionment. Based on this assumption, the "Hick 1" acceleration cost component was presented as follows:

	Hours	Rate	Cost
1. Additional Rental Equipment			
D-3 Tractor	442	25.59	$ 11,310.78
D-4 Tractor	483	29.26	14,132.58
D-8 Tractor	152	120.22	18,273.44
963 with operator	JOB		17,066.74
6620	205	47.39	9,714.95
977H	382	121.28	46,328.96
Subtotal	1664		$116,827.45
Less—Amount Allocated Productive Work (50%)			58,413.73
2. Labor—Operator (1320 Hrs × 50% × 16.95)			11,187.00
—Laborer (1320 Hrs × 50% × 16.77)			11,068.20
3. Subtotal Acceleration/Loss Efficiency			80,668.93
4. Overtime Premium–Labor			3,297.39
5. Other Direct Costs			
A. Payroll Taxes	40.97%	$10,468.90	
B. Union Fringes			
Operators	5.35%	729.90	
Laborers	2.68%	319.97	
C. Small Tools	2.00%	511.05	
D. Field Costs (15 Days)	$566	8,485.20	20,514.21
6. Additional Supervision			4,892.00
Total Direct Cost			$109,372.53
7. G & A Overhead	12.00%		13,124.70
Subtotal			$122,497.23
8. Profit	10.00%		12,249.72
Subtotal			$134,746.96
9. Bond	2.5%		3,368.67
Total Acceleration & Loss of Efficiency Costs			$138,115.63

(Exhs. G-4, at 3; Tr. 173, 304).

61. Mr. Hick calculated Hemphill's "Field Costs" by adding all of the miscellaneous costs that were not attributable to any particular phase of the work (*e.g.*, Mr. Frank Powell's salary as project superintendent, job trailer, sanitary toilets, signs, utilities, job truck, teamster [presumably the driver of the job truck], "ice and other misc.," and payroll tax and insurance) and dividing them by the total number of days on the project. The actual computation amounted to $565.68 daily. (Exh. G-4, at 25). However, the 40.97 percent "payroll taxes" mark-up factor used by Mr. Hick in calculating daily field costs also was applied as a separate line item in the "Other Direct Costs" or "Labor

[6] Mr. Hick calculated a "credit" to the Government for the removal by Hemphill of less brush than originally estimated by the Government. There is no persuasive evidence in the record to explain his rationale or methodology for this action.

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Overhead Expenses" categories[7] in every portion of the cost proposal, effectively duplicating this cost entry. When Mr. Hick applied his field cost to the various elements of his cost proposal, he sometimes used the precise figure, and other times apparently "rounded" the amount to $566.

Credit for Open Air Burning

62. Mr. Hick calculated the reduction in costs Hemphill experienced because open air burning was deleted. Based on undisclosed judgmental factors, he determined that a credit of $23,255 was due. His calculation is as follows:

1.	Equipment		$ 8,276
2.	Laborer		11,950
	Total Direct Cost		20,226
4.	G & A Overhead	12.00%	2,427
	Subtotal		22,653
5.	Profit	10.00%	2,265
	Subtotal		24,918
6.	Bond	2.50%	623
7.	Subtotal		25,541
8.	Other Costs		933
9.	Original Estimated Cost		26,474
	Less Expended Costs		
	Share of Mobilization Costs	$435	
	G & A Overhead	2,427	
	Profit	286	
	Bond	72	
			-3,220
Net Credit for Open Air Burning			$ 23,255

(Exh. G-4, at 4; Tr. 278-79).

63. This credit differed from the $26,475 net credit proposed in Appellant's certified claim. Mr. Hick indicated that he achieved the reduction by reducing the mobilization cost share for open air burning, G & A overhead expenses, profit and bond mark-ups. He did not elaborate on the methodology by which he achieved this reduction. (Tr. 278-80, 396).

Air Curtain Burning

64. In his attempt to determine the net increase in costs attributable to the change to air curtain burning, Mr. Hick separated owned equipment cost information into clearing and burning categories, and assigned the clearing costs to the differing site conditions claim. Owned equipment costs for burning were represented to be $150,505. Appellant had recorded equipment rental costs on the project of $116,827, and Mr. Hick allocated 50 percent of these costs ($58,414) to the acceleration claim. From this, he subtracted $1,404, which he attributed to the delay claim. He then arbitrarily made the judgment that 50 percent of the "remaining" rental costs of $57,010 ($28,505) were attributable to the change to air curtain burning. (Exh. G-4, at 6). Mr. Hick did not describe the judgmental process by which he decided to allocate equipment rental costs.

65. Appellant recorded labor costs of $115,285.42 for equipment operators and $60,975.72 for laborers during the job. Mr. Hick allocated 50 percent of equipment operator costs to clearing and burning, respectively. He arbitrarily allocated about 76 percent of incurred laborer costs to burning, while the remainder of the costs were allocated to clearing. Mr. Hick associated "burning" costs with the change to air curtain burning claim, while he identified "clearing" costs with the differing site conditions claim. Based on his allocation, Mr. Hick charged $57,643 in equipment operator costs and $46,353 in laborer costs to the "burning" work. There is no independent evidence in this record either to corroborate or contradict these allocations.

66. Applying his assumptions, Mr. Hick calculated the net cost of the change to air curtain burning as follows:

[7] Mr. Hick used the categories "Other Direct Costs" and "Labor Overhead Expenses" interchangeably through his various cost proposals, but the components of the categories remained basically the same.

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1.	Equipment—Owned		$150,505	
	—Rented		28,505	$ 179,010
2.	Labor			
	Operators		57,643	
	Laborers		46,353	103,996
3.	Labor Overhead Expenses			
	A. Payroll Taxes	40.97%	$42,607	
	B. Union Fringes			
	Operators	5.35%	3,084	
	Laborers	2.68%	1,242	
	C. Small Tools	2.00%	2,080	
	D. Field Cost Per Day	$283	6,509	55,522
	Diesel for Fire (1600 Gal)	$1.02		1,632
	Total Direct Cost			340,160
4.	G & A Overhead	12.00%		40,819
	Subtotal			380,979
5.	Profit	10.00%		38,098
	Subtotal			378,258
6.	Bond	2.50%		9,456
7.	Total Cost for Air Curtain Burning			387,714
8.	Less Unilateral Modification [P00002]—Payment			−150,000
9.	Additional Amount Claimed			$ 237,714

(Exh. G-4, at 5). Mr. Hick applied only one-half of the $566 daily "Field Cost" factor to the air curtain burning claim. He determined that, when burning and clearing proceeded simultaneously, only one-half of the field cost properly was allocable to each work element. (Tr. 282-83).

67. When Mr. Hick calculated the amount claimed for air curtain burning, he did not include the $40,819 cost for G & A overhead. Properly added, the total additional amount claimed for air curtain burning would be $279,554.

Differing Site Condition

68. In determining the costs allegedly flowing from the differing site condition, Mr. Hick reduced Appellant's total clearing costs by his judgmental estimate of the original clearing costs. The labor component of this claim was based on the allocation method between burning and clearing work that Mr. Hick adopted in the "change to air curtain burning" element of the cost statement. (See Finding 65). He computed this element as follows:

1.	Equipment—Owned		$127,218	
	—Rented		28,505	$155,723
2.	Labor			
	A. Operators		57,642	
	B. Laborers		14,623	72,265
3.	Labor Overhead Expenses			
	A. Payroll Taxes	40.97%	29,607	
	B. Union Fringes			
	Operators	5.35%	3,084	
	Laborers	2.68%	392	
	C. Small Tools	2.00%	1,445	
	D. Field Cost Per Day	$283	6,509	41,037
	Total Direct Cost			$269,025
4.	G & A Overhead	12.00%		32,283
	Subtotal			$301,308
5.	Profit	10.00%		30,131
	Subtotal			299,156
6.	Bond	2.50%		7,479
7.	Total Cost for Clearing			306,635
8.	Less Cost Allocated to Original Contract Work			105,074
	Additional Clearing Cost			201,561
9.	Cost Attributed to Differing Site Condition—(Survey)			5,800
	Mark-Up			1,525
	Total Cost Differing Site Condition			$208,886

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(Exhs. G-2, G-4). Like the "Air Curtain Burning" calculation, Mr. Hick applied only a $283 daily field cost, one-half of the previously calculated amount, because he made the judgment that clearing work only consumed one-half of the available work time when burning and clearing were proceeding simultaneously.

69. In calculating the "original" clearing cost (reflected in Item 8), Mr. Hick determined the cost per acre by category, in terms of heavy, medium and light, for the actual work performed (based on his determination of 175 acres of heavy clearing, 75 acres of medium clearing and 54 acres of light clearing work) and then multiplied these costs times the Government estimate of 12 heavy, 84 medium and 99 light acres of clearing work. The calculation contained no allowance for brush hog work. As we noted earlier, the acreage coefficient to his calculation was not factually supported. (Finding 48).

70. There is no explanation in the record for the "mark-up" on the survey listed in Item 9 of the above calculation. (See Finding 68).

71. As with the air curtain burning costs, Mr. Hick did not include the G & A overhead cost component in his calculations. Properly added, the cost proposal for the differing site conditions item would amount to $241,976.

Delay

72. Mr. Hick characterized the delay portion of the air curtain burning claim as incorporating the costs incurred in the initial start-up, stacking of debris until burning began, and the ensuing undecking. He surveyed the record for the period February 24 to April 6, 1988, and included all costs of idle equipment, other than for machines that were identified as inoperable. He also made the judgment that 50 percent of equipment operating hours were used inefficiently as a result of the delay, and allocated one-half of the "working" equipment costs to the delay claim. He allocated the entire standby equipment cost component to the delay claim. With regard to labor costs, Mr. Nick reviewed the payrolls and unilaterally determined that equipment operators were inefficiently employed for 1,146 hours and laborers were similarly inefficient for 182.5 hours during the period. His calculation included costs incurred in "undecking" debris that was collected during the "no burn" period in anticipation of open air burning, reduced by the costs for both job categories devoted to mobilization and equipment maintenance. He then arbitrarily allocated 50 percent of the total equipment and labor costs incurred in undecking work to the delay claim. There is nothing in the record to confirm or contradict these assumptions. (Tr. 299, 307, 316-18). As calculated, this portion of the proposal is as follows:

Loss of Efficiency	*Total*	*50% Allocation*	
1. Equipment Stand-By	$8,017	$8,017[8]	
Inefficient Use Equip.	43,136	21,568	
2. Labor			
A. Operators	13,391	6,696	
B. Laborers	2,725	1,363	
UNDECKING			
3. A. Equipment	31,136	15,568	
B. Operators	11,390	5,595	
Laborers	11,088	5,544	
4. Subtotal			
A. Equipment			$45,153
B. Labor—Operators		12,391	
—Laborers		6,907	19,297
5. Other Direct Costs			
A. Payroll Tax	40.97%	7,906	
B. Union Fringes			
Operators	5.35%	663	
Laborers	2.68%	185	
C. Small Tools	2.00%	386	9,140
6. Field Cost Per Day	$565.68		5,091
7. Total Direct Cost			78,681

[8] Mr. Hick allocated 100 percent of standby equipment costs to the delay.

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Loss of Efficiency	*Total*	*50% Allocation*	
8. G & A Overhead	12.00%		9,442
9. Subtotal			88,123
10. Profit	10.00%		8,812
11. Subtotal			96,935
12. Bond	2.50%		2,423
13. Total Cost Due to Initial Delay			$99,358

(Exhs. G-2, G-4).

Snags

73. Mr. Hick surveyed the daily reports and identified the labor and equipment hours associated with snag removal. He then calculated the cost of removing snags in addition to the 1,100 estimated by the Government as follows:

1. Equipment			$ 1,526
2. Labor			
A. Operators		$339	
B. Laborers		8,142	8,481
3. Labor Overhead Expenses			
A. Payroll Taxes	40.97%	3,475	
B. Union Fringes			
Operators	5.35%	18	
Laborers	2.68%	218	
C. Small Tools	2.00%	170	
D. Field Cost Per Day	$566	8,490	12,371
Total Direct Cost			22,378
4. G & A Overhead	12.00%		2,685
Subtotal			25,063
5. Profit	10.00%		2,506
Subtotal			24,884
6. Bond	2.50%		622
7. Total Snag Cost			25,506
8. Cost Per Snag	3,600		$ 7.09
9. Additional Cost for Snag Overrun; Actual 3600 Less Original 1100	2,500		$17,713

(Exh. G-4).

74. Like the other sections of "Hick 1," this calculation fails to include the calculated component for G & A overhead costs. The corrected total amount for the snag item is $19,625.

II. Mr. Hick's May 25, 1991, Cost Report

75. In response to questions about "Hick 1" that were raised by the Government, Mr. Hick prepared a revised cost proposal ("Hick 2") on May 25, 1991, which was computed as follows:

Description	*Total Cost*
1. Acceleration	$ 131,938
2. Credit for Open Air Burning	(23,255)
3. Air Curtain Burning (Net)	344,728
4. Differing Site Conditions	157,187
5. Delay	99,360
6. Snags	17,713
7. Credit Brush Clearing	(9,962)
Total Individual Items	$ 717,709
Less P00005	−305,000
Additional Amount Due	$ 412,709

(Exh. G-7). The entries for the "credit for open air burning," "delay," "snags" and "credit brush clearing" were essentially unchanged from their iteration in "Hick 1." Appellant's acceleration costs as represented are $6,178 lower than in "Hick 1," but there is no explanation in the record for this change.

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76. Unlike his approach in "Hick 1," (see Findings 66, 68) Mr. Hick applied the entire daily "Field Cost" mark-up to both the Air Curtain Burning and the Differing Site Conditions claims. Also unlike "Hick 1," he applied the daily field cost mark-up on the Air Curtain Burning claim for a 42 day period, while the mark-up was applied for a 25 day period in the case of the Differing Site Conditions claim. The record does not explain these differing approaches.

Air Curtain Burning

77. In his second attempt to identify the costs incurred by Hemphill as a result of the change to air curtain burning, Mr. Hick re-evaluated reported equipment usage on the site. He altered his earlier judgment that owned equipment costs were allocable equally between clearing and burning work and, instead, posited that 80 percent of owned equipment time was dedicated to air curtain burning work, while the remaining 20 percent was devoted to clearing work. (Exh. G-7, at 4). There is nothing in the record to explain this new approach to equipment cost allocation that Mr. Hick adopted in "Hick 2." Mr. Hick also adopted a new allocation method vis-a-vis the equipment operator component of the labor cost, but we are unable to determine, from this record, the source of the new allocation.

78. Mr. Hick depicted this portion of the cost proposal as follows:

1. Equipment—Owned		$192,945	
—Rented		28,505	$221,450
2. Labor			
A. Operators		80,700	
B. Laborers		46,353	127,053
3. Labor Overhead Expenses			
A. Payroll taxes	40.97%	52,054	
B. Union Fringes			
Operator	5.35%	4,317	
Laborer	2.68%	1,242	
C. Small Tools	2.00%	2,541	
D. Field Cost Per Day	$565.68	23,759	83,913
4. Diesel for Fire (1600 Gal)	$1.02		1,632
Total Direct Cost			434,048
5. G & A Overhead	12.00%		52,086
Subtotal			486,133
6. Profit	10.00%		48,613
Subtotal			482,661
7. Bond	2.50%		12,067
8. Total Cost for Curtain Burning			494,728
9. Less Unilateral Modification—Payment			−150,000
10. Additional Amount Claimed			$344,728

(Exh. G-7, at 3)

79. Much as with the calculations in "Hick 1," Mr. Hick did not include the G & A overhead cost component in the "Air Curtain Burning" cost. So included, the total "additional amount claimed" calculation for air curtain burning should result in a figure of $398,116.

Differing Site Conditions

80. Mr. Hick computed this aspect of the cost proposal as follows:

1. Equipment - Owned		$84,778	
- Rented		28,505	113,283
2. Labor			
A. Operators		34,586	
B. Laborers		14,623	47,209
3. Labor Overhead Expenses			
A. Payroll Taxes	40.97%	20,161	
B. Union Fringes			
Operators	5.35%	1,850	
Laborers	2.68%	392	
C. Small Tools	2.00%	984	
D. Field Cost Per Day	$565.68	14,142	37,529

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Total Direct Cost		200,021
4. G & A Overhead	12.00%	24,003
Subtotal		224,024
5. Profit	10.00%	22,402
Subtotal		222,424
6. Bond	2.50%	5,561
7. Total Cost for Clearing		227,985
8. Less Cost Allocated to Original Contract Work		-78,123
Additional Clearing Cost		149,862
9. Cost Attributed to Differing Site Condition (Survey)		5,800
Mark-Up		1,525
Total Cost Differing Site Condition		$157,187

(Exh. G-7, at 2)

81. Mr. Hick's new calculation resulted, among other things, from the new judgmental approaches he adopted for the "owned equipment" and "labor-operators" components. Mr. Hick again failed to include the G & A overhead cost factor in the calculation, producing an understated total amount. Including this factor, the corrected amount would be $181,789.

III. Mr. Hick's June 12, 1991, Cost Proposal

82. On June 12, 1991, following further Government comments, Mr. Hick prepared his second revised cost proposal ("Hick 3") which he summarized as follows:

Description	*Total Cost*
1. Acceleration	$ 140,014
2. Credit for Open Air Burning	(23,255)
3. Air Curtain Burning (Net)	425,538
4. Differing Site Condition	150,298
5. Delay	96,537
6. Snags	12,198
7. Credit Brush Clearing	(9,962)
Total Individual Items	$ 791,368
Less P00005	-305,000
Additional Amount Due	$ 486,368

(Exh. G-6). The credits for deletion of open air burning and brush clearing were unchanged from his previous versions.

83. In computing equipment rates for "Hick 3," Mr. Hick erroneously applied a 1.138 adjustment factor to depreciation costs and costs of facilities capital for owned equipment, which had the effect of increasing the computed hourly operating cost of owned equipment by about five percent. (Exh. G-6; Tr. 1147-49).

84. Mr. Hick also utilized a recomputed "Field Cost" charge of $500 per day. This is compared with the $565.68 and $566 daily rates charged in his two previous cost proposals. The reduction in the daily field cost was the result of Mr. Hick's adoption of the equipment rates for the "job truck" set forth in EP 1110-1-8. As he did in "Hick 2," Mr. Hick applied the entire daily "Field Cost" mark-up to the "Air Curtain Burning" and "Differing Site Conditions" claims. In a departure from "Hick 2," he applied this factor for a period of 49 days in the "Air Curtain Burning" claim, and a period of 32 days in the "Differing Site Conditions" claim, without explanation. (Exh. G-6, at 21).

Acceleration

85. The change in the total amount for this item resulted from Mr. Hicks' adoption of different hourly rates for rental equipment than he had used in the two earlier cost statements. He calculated the hourly rates using the following factors: (1) "rent," calculated by dividing Hemphill's total reported rental cost by the hours the machine was used on the job; plus (2) "fuel" and "FOG" factors at the "severe conditions" rate established in EP 1110-1-8; plus (3) the "repair" (minus overhaul) factor for "severe conditions" operations included in EP 1110-1-8. In reducing the "repair" factor, Mr. Hick determined that the major overhaul component of "repair" properly was not chargeable to rental equipment, so he judgmentally allocated 75 percent of the "repair" factor to major overhaul, and reduced the factor accordingly. (Exh. G-6, at 30-35).

86. Mr. Hick's computation also included a larger charge for labor costs, which was

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based on his allocation of a greater number of operator and laborer hours chargeable to the acceleration. There is no explanation in the record for this increase.

Air Curtain Burning

87. In this portion of the proposal, Mr. Hick used owned equipment rates that differed from those he had applied in his earlier proposals, and which were not consistent with the rates contained in EP 1110-1-8. Costs for rental equipment similarly differed from the previous iterations of this claim item, and the record does not indicate the reason for the change. The work hours attributed to air curtain burning were not changed.

88. Mr. Hick also adopted a new judgmental method for the allocation of labor costs between clearing and burning work, assuming that about 77 percent of operator time and 88 percent of laborer time were devoted to burning. There is nothing in this record either to validate or invalidate this assumption. This change in allocation method effected a corresponding reduction in the labor component of the differing site conditions claim, which was based on estimated labor costs for clearing.

Differing Site Conditions

89. In this iteration of the claim, Mr. Hick adopted new figures for owned and rented equipment costs, as well as for labor costs for equipment operators and laborers. The record is silent as to the source of his new data.

Delay

90. Mr. Hick continued to apply his judgment that one-half of equipment and labor costs were the result of inefficiency during the "no burn" period caused by the delay and undecking that occurred when the change to air curtain burning was made.

91. As part of the claimed delay costs, Mr. Hick included "inefficient use of equipment" costs of $21,047, reflecting his judgment that 50 percent of equipment operating hours were inefficiently used because of the delay caused by the change to air curtain burning. However, he incorrectly computed the costs for equipment operation during the "delay" period. According to his table of costs, which ostensibly was prepared from the daily logs, the incurred operating costs during the delay period actually were $46,661. Using Mr. Hick's allocation method, the equipment costs attributed to the delay should have been $23,330. (Exh. G-6, at 14-15).

Snags

92. Mr. Hick computed this portion of the cost proposal as follows:

1. Equipment			$ 1,481
2. Labor			
A. Operators		$ 339	
B. Laborers		$8,142	8,481
3. Labor Overhead Expenses			
A. Payroll Taxes	40.97%	$3,475	
B. Union Fringes			
Operators	5.35%	18	
Laborers	2.68%	218	
C. Small Tools	2.00%	170	
D. Field Cost Per Day	$ 500	1,000	4,881
Total Direct cost			$14,843
4. G & A Overhead	12.00%		1,781
Subtotal			$16,624
5. Profit	10.00%		1,662
Subtotal			$18,286
6. Bond	2.50%		457
7. Total Snag Cost			$18,743
8. Cost Per Snag	3,150		$ 5.95
9. Additional Cost for Snag Overrun Original 1100 Less Actual 3150	2,050		$12,198

93. The reduction in this portion of the cost proposal from "Hick 2" is the result of several factors. Initially, the equipment cost factor is $145 lower than in the previous Hick reports, but there is no explanation in the record for this change. Second, Mr. Hick only included costs for two days of "field costs," (which computed to $1,000 at the new rate of $500 per day), whereas his previous versions had included field costs for 15

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days. In addition, his calculations were based on a smaller number of snags—3,150—2,050 more than the Government's estimate. There is no explanation in the record for his use of a smaller number of snags in this calculation, or for his reduced field cost computations. Mr. Hick included the G & A overhead cost component in "Hick 3."

IV. Mr. Hick's October 29, 1991, Cost Report

94. On October 29, 1991, Mr. Hick presented his fourth and final cost report, which indicated that Hemphill was entitled to additional compensation in the amount of $507,332 beyond that already paid under the contract and the two modifications ("Hick 4"). Mr. Hick summarized the claimed costs as follows:

DESCRIPTION	*TOTAL COST*
1. Acceleration	$146,832
2. Credit for Open Air Burning	(23,255)
3. Air Curtain Burning (Net)	399,025
4. Differing Site Condition	181,876
5. Delay	104,698
6. Snags	13,118
7. Credit Brush Clearing	(9,962)
Total Individual Items	$812,332
Less P00005	−305,000
Additional Amount Due	$507,332

(App. Exh. C). The cost elements for the open air burning and brush clearing credits were unchanged from the previous iterations prepared by Mr. Hick.

95. Mr. Hick used the daily field cost of $500 he had developed for "Hick 3" when calculating overhead expenses. He also continued to apply this factor for a 49 day period on the "Air Curtain Burning" claim and for a 32 day period on the "Differing Site Conditions" claim.

Acceleration

96. Mr. Hick's analysis of the costs attributable to acceleration was largely unchanged. However, with regard to the "Labor Overhead Expenses" item, he discovered that he had incorrectly applied the "union fringes" component. In his previous cost submissions, he had applied a 5.35 percent mark-up on operator salaries and a 2.68 percent mark-up on laborer salaries. He learned that the proper mark-up application was based on a dollar per hour burden factor whereby operator labor was burdened with a $5.35 per hour "union fringe" mark-up, and laborer salaries were burdened with a $2.68 per hour mark-up. Application of these two factors effected the total change in the acceleration costs in "Hick 4." (App. Exh. C; Exh. G-42).

Air Curtain Burning

97. Mr. Hick's allocation of owned and rental equipment expenses was unchanged in "Hick 4." However, he adopted a new allocation for labor costs, determining that 66 percent of the total operator hours and 82 percent of the total laborer hours recorded in Hemphill's payrolls were chargeable to the change to air curtain burning. Mr. Hick offered no specific explanation for this third change in allocation method. The new allocation method had the effect of reducing the labor costs charged to air curtain burning in "Hick 4" from the corresponding costs in "Hick 3."

98. Mr. Hick's calculations also were altered by his adoption of a different dollar per hour mark-up on operator and laborer salaries for "union fringes" than he had used in connection with the acceleration claim. Unlike the $5.35 per hour mark-up for operators and the $2.68 per hour laborer mark-up he adopted for that claim, Mr. Hick used a $5.43 per hour mark-up for operators and a $2.57 per hour mark-up for laborers. (App. Exh. C, at 4). There is nothing in the record to explain why Mr. Hick utilized different mark-up factors for the acceleration and air curtain burning claims.

Differing Site Conditions

99. Mr. Hick's adoption of the new labor allocation in the air curtain burning claim had the corresponding effect of increasing operator and laborer hours allocated to clearing work, thereby increasing the cost of the differing site conditions claim. Under this new allocation method, 34 percent of operator hours and 18 percent of laborer hours were identified as being devoted to clearing work.

100. The costs attributed to the differing site conditions claim also were affected by Mr. Hick's adoption of the hourly burden for "union fringes," stated in terms of dollars per hour, rather than the percentage factor that he had applied in his previous cost proposals. However, as with the air curtain burning claim, he adopted hourly mark-ups that differed from the mark-up factors he used in the acceleration claim. Again, there is no explanation in the record for his differing approach.

Delay

101. In his computation of the delay portion of the air curtain burning claim, Mr. Hick corrected the arithmetic error contained in his "inefficient use of equipment" factor in "Hick 3." (See Finding 92).

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102. The only other change to the delay cost computation in "Hick 4" involved Mr. Hicks' adoption of the different "union fringe" mark-ups that he used in connection with the air curtain burning and differing site conditions claims. Again, there is no explanation in the record why Mr. Hick applied the differing mark-up factors presented throughout "Hick 4."

103. Mr. Hick continued to charge 100 percent of the standby equipment costs to the delay. While the dollar value attached to this component was reduced (it declined from $8,017 in "Hick 1" to $4,561 in "Hick 4"), this reduction resulted from Mr. Hick's adoption of lower hourly equipment rates. One component of the standby costs included $1,396.80 for a 399 Crane that was allegedly idled by the delay during the "no burn" period. However, the daily logs reveal that the crane was not employed by Hemphill until June 6, 1988, some two months after the expiration of the "no burn" period, and then it was only used to remove snags. Similarly, Mr. Hick also charged $770 in standby costs incurred for an idled 977-L Endloader during the "no burn" period, but the record indicates that the machine was inoperable during the period. (Tr. 263-71, 1006, 1131-34; App. Exh. C, at 11; Exh. J-1, Report No. 110; Exh. G-41).

Snags

104. Mr. Hick computed the cost for snag removal as follows:

1. Equipment			$ 1,481
2. Labor			
A. Operators		$ 339	
B. Laborers		$8,142	8,481
3. Labor Overhead Expenses			
A. Payroll Taxes	40.97%	$3,475	
B. Union Fringes			
Operators	5.43%	109	
Laborers	2.57%	1,248	
C. Small Tools	2.00%	170	
D. Field Cost Per Day	$ 500	1,000	6,001
Total Direct cost			$15,963
4. G & A Overhead	12.00%		1,916
Subtotal			$17,878
5. Profit	10.00%		1,788
Subtotal			$19,666
6. Bond	2.50%		492
7. Total Snag Cost			$20,158
8. Cost Per Snag	3,150		$ 6.40
9. Additional Cost for Snag Overrun; Original 1100 Less Actual 3150	2,050		$13,118

105. Mr. Hick's snag proposal was unchanged from "Hick 3," except that he adopted the $5.43 per hour operator and $2.57 per hour laborer mark-ups for "union fringes." The use of these new figures, burdened by mark-ups for overhead, profit and bond, produced the $920 increase in the claim. (App. Exh. C).

Allocation of Labor to Equipment

106. Mr. Hick also employed judgmental allocations of equipment hours to labor hours. Throughout his four cost proposals, he used various allocation methods, without explanation. In many instances, he could not determine the number of workers assigned to a particular machine. In "Hick 4," he provided the following allocation of labor to equipment:

Cost Item	*Machine Hours*	*Labor Hours*
Acceleration	832.0	832.0
Delay	303.0	395.0
Undecking	240.0	336.0
Snags	10.0	21.0
Clearing	1,335.0	2,390.6
Burning	3,673.0	4,625.4
Total	6,393.0	8,599.0
Chain Saws	3,606.0	2,664.5

(App. Exh. C; Exhs. G-8, G-42; Tr. 114-19, 124-27, 139, 169, 213, 287, 359, 373-83, 459-60). As can be seen, Mr. Hick reported significantly less labor time for chain saws than the recorded equipment hours.

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The Government's Proof of Costs Statement

107. Mr. Katashuk, the Corps auditor and a Certified Public Accountant, reviewed "Hick 4" in December, 1991, and prepared the Government's "Proof of Cost Response." As a result of his study, he questioned all labor and equipment costs that were based on Mr. Hicks' judgmental allocations, inasmuch as they were simply unverifiable allegations. He opined that every erroneous allocation had a ripple effect throughout the report and distorted relevant direct and indirect costs. According to Mr. Katashuk, an audit cannot address technical judgments regarding equipment and labor allocations in construction contracts. (Tr. 1258-61, 1270-78; Exhs. G-41, G-42, G-43).

108. Among the various components of Mr. Hick's cost proposals, Mr. Katashuk first challenged the $23,255 credit computed by Mr. Hick for the deletion of open air burning. Mr. Hick had acknowledged that his proposed credit was judgmental in origin, and he did not supply factual data to support his allocations of labor and equipment costs. (Tr. 278-79).

109. In his review, Mr. Katashuk determined that the Government was entitled to a credit of $144,697. He established this figure by subtracting from the original contract price of $360,400: (1) the costs in the differing site conditions claim that Mr. Hick assigned to the original contract work ($90,491); (2) Hemphill's delay claim ($104,687); (3) the cost of removing the contract-estimated 1,100 snags at Appellant's calculated price of $6.40 per snag ($7,040); and (4) Hemphill's proposed credit for decreased brush clearing, before reduction for lower actual direct costs and unrecovered mark-ups ($12,981). Properly added, this credit amount should be $145,201. In his report, Mr. Katashuk made the following statement:

> The $144,697 is subject to analysis by technical personnel. Also the data as presented by the Contractor is unreliable and not valid since it is based on estimates and not factual data.

(Exhs. G-41, G-42).

Snags

110. In reviewing the previous payment for added snag removal in Modification P00005, Mr. Katashuk initially questioned the entire amount claimed in "Hick 4" ($13,118) because the field records contradicted the equipment and labor hour components in Mr. Hicks' proposals. He also questioned the "Field Cost" component of the calculations. In "Hick 1," 15 days were allocated to snag removal, while in "Hick 4," only two days were allocated to this work. According to Mr. Katashuk, the judgmental allocations contained in the various Hick reports were not based on verifiable factors. (Exh. G-41).

Equipment Costs

111. Mr. Ross, the Corps 8(a) contract negotiator, observed that "Hick 4" overstated equipment costs by miscalculating rates and using "severe conditions" operating rates even though the contract mandated "average conditions" rates. He also indicated that the Hick reports overstated Hemphill's actual ownership and operating expense costs for equipment on the site. (Exh. G-35).

112. The Hick reports uniformly used the "severe conditions" rates contained in EP 1110-1-8 when formulating the equipment cost factors in the cost proposals, although in many instances, the numbers did not "match up." Mr. Katashuk utilized the equipment hours reported in the Hick cost proposals and computed equipment rates using both the "severe conditions" and "average conditions" rates. As a result of his review, he made the following comparisons:

BURNING COSTS—OWNED EQUIPMENT

Equipment	*Hours*	*Severe Rate*	*Average Rate*	*Severe "Cost"*	*Average "Cost"*
D-7	499	$ 60.06	$46.56	$ 29,970	$ 23,233
D-8	236	87.92	67.96	20,749	16,039
235	344	77.99	60.50	26,829	20,812
245	224	117.26	90.60	26,266	20,294
399	122	41.53	35.47	5,067	4,327
977-K	151	67.50	53.32	10,193	8,051
977-L	302	67.50	53.32	20,385	16,103
D-6	172	47.72	37.11	8,208	6,383
Saws	3606	1.19	1.19	4,291	4,291
Burner (JD)	674	16.72	15.09	11,269	10,171

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Equipment	Hours	Severe Rate	Average Rate	Severe "Cost"	Average "Cost"
Burner-Ford	557	18.06	16.70	10,059	9,302
TOTALS	6887			$173,286	$139,006

CLEARING COSTS—OWNED EQUIPMENT

Equipment	Hours	Severe Rate	Average Rate	Severe "Cost"	Average "Cost"
D-7	228	$ 60.06	$46.56	$ 13,694	$ 10,616
D-8	375	87.92	67.96	32,970	25,485
235	369.5	77.99	60.50	28,817	22,355
245	512	117.26	90.60	60,037	46,387
399	12	41.53	35.47	498	426
977-K	134	67.50	53.32	9,045	7,145
977-H	28	67.50	53.32	1,890	1,493
D-6	40	47.72	37.11	1,909	1,484
TOTALS	570			$148,860	$115,391

BURNING COSTS—RENTAL EQUIPMENT

Equipment	Hours	Severe Rate	Average Rate	Severe "Cost"	Average "Cost"
D-3	134	$23.61	$22.22	$ 3,163.74	$ 2,977.48
D-4	290	29.23	27.43	8,476.70	7,954.70
963 (w/op.)	139	84.71	84.71	11,774.69	11,774.69
6620 Backhoe	96	56.14	53.68	5,389.44	5,153.28
TOTALS	659			$28,804.67	$27,860.15

CLEARING COSTS—RENTAL EQUIPMENT

Equipment	Hours	Severe Rate	Average Rate	Severe "Cost"	Average "Cost"
D-3	308	$23.61	$22.22	$ 7,271.88	$ 6,843.76
D-4	193	29.23	27.43	5,641.39	5,293.99
963 (w/op.)	64	84.71	84.71	5,421.44	5,421.44
6620 Backhoe	109	56.14	53.68	6,119.26	5,851.12
TOTALS	674			$24,453.97	$23,410.31

Mr. Katashuk summarized his calculations as follows:

Owned Burning Equipment:	
Severe Cost Total	$173,286.00
Average Cost Total	$139,006.00
Difference	$ 34,280.00
Owned Clearing Equipment	
Severe Cost Total	$148,860.00
Average Cost Total	$115,391.00
Difference	$ 33,469.00
Rental Equipment (Clearing and Burning)	
Severe Cost Total	$ 53,258.64
Average Cost Total	$ 51,270.46
Difference	$ 1,988.18

Adding the three sums, Mr. Katashuk determined that "Hick 4" overstated Hemphill's equipment rate costs in the amount of $69,737.18 ($34,280.00 + $33,469.00 + $1,988.18), as a result of Mr. Hick's unsupported use of "severe conditions" rates in calculating equipment costs, and that the Government was entitled to a credit in that amount. (Exh. G-42).

113. Messrs. Ross and Katashuk next argued that payments to Hemphill were excessive because Hemphill had presented

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inflated equipment ownership costs. According to Mr. Ross, the Government audit revealed that Hemphill's actual ownership and operation expenses were less than one-half of the price presented in the Hick reports, which were based on the equipment rates found in EP 1110-1-8. He also alleged that Appellant's judgmental allocation of labor and equipment costs to the various claims resulted in an overstated claim. (Exh. G-35; Tr. 1230-34).

114. In the four Hick reports, Appellant's ownership and operating costs varied from $270,831 to $277,723. Mr. Ross noted that in its claim, Hemphill reported "fuel and oil" and "repairs and maintenance" costs (operation costs) of $80,890 for owned equipment. (R.4, ENG BCA No. 5698, Tab I, Exhibit I). To this Mr. Ross added a $39,995 cost for depreciation "based on corporate depreciation schedule, FY ending August 31, 1988," for a total ownership and operation cost of $120,885. We received no evidence to suggest the genesis of the alleged depreciation cost. Mr. Ross then off-set this amount against Appellant's claimed ownership and operating cost of $270,831 and argued that the Government was entitled to a refund of $149,946 ($270,831—$120,885).

115. Mr. Ross also asserted that the Government was entitled to a refund for overpayment on equipment costs, because of Appellant's adoption of an erroneous mark-up factor for cost of facilities capital. (See Finding 83). However, Mr. Ross was unable to supply a figure for this alleged overpayment, stating that he could not "remember how much it was." (Tr. 1147-50). In its post-hearing brief, the Government alleges that this amount computes to $12,944. There is no evidence detailing the underlying calculation.

DECISION: PHASE II

Preliminary Matters

In ENG BCA No. 5698, we are faced with Appellant's request for an equitable adjustment for its burning change claim. In ENG BCA No. 5776, we must address Hemphill's claim for additional compensation flowing from the removal of a larger number of snags from the project than anticipated by the parties. ENG BCA No. 5840 finds its origin in the Government's demand for return of alleged overpayments, and affects elements of the equitable adjustment that apply in both of the other appeals. We shall discuss all of the appeals together.

It is clear in these appeals that Hemphill performed additional, compensable work when the debris disposal method was changed from open air burning to air curtain burning, and when it removed about three times as many snags from the site as the parties had anticipated. In addition to the contract price of $360,400, Appellant has received an additional $455,000 through two unilateral modifications in connection with this work. The issue now is whether Hemphill is entitled to any additional funds, whether it must return some of the amounts already paid, or whether we leave the *status quo* undisturbed.

Additions to the Equitable Adjustment

In response to the Board's Order of Proof of Costs, Hemphill commissioned Mr. Hick to prepare a cost proposal supporting its claim for additional compensation. At the conclusion of this process, he had prepared four separate proposals seeking additional funds progressively increasing from $363,590 to the final version of $507,332.

Hemphill's cost proposals for its "burning change" claim (ENG BCA No. 5698) appear to be based on a hybrid of the "modified total cost" and "jury verdict" methodologies. Unlike the disfavored total cost approach, which assumes that all costs incurred by a contractor in excess of the reasonable bid price were caused by the change, the modified total cost approach reflects an attempt analytically to identify the causation underlying specific incurred costs and then to assign those costs to separate incidents or claims. Under this approach, a contractor must demonstrate:

1. The nature of the losses makes it impossible or highly impractical to determine the actual losses directly with a reasonable degree of accuracy;

2. The contractor's bid was reasonable;

3. The actual costs incurred were reasonable; and

4. The contractor was not responsible for the increased costs.

Servidone Construction Corporation v. United States [36 CCF ¶ 75,797], 19 Cl.Ct. 346, 384 (1990), *aff'd.*, 931 F.2d 860 (Fed. Cir. 1991), citing *WRB Corporation v. United States* [12 CCF ¶ 81,781], 183 Ct.Cl. 409 (1968).

When damages cannot be calculated through use of actual cost data, courts and boards may resort to a "jury verdict" methodology when: (1) clear proof of injury exists; (2) there is no more reliable method for com-

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puting damages; and (3) the record is sufficient for the construction of a fair and reasonable approximation of the damages. *Dawco Construction, Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 880 (Fed. Cir. 1991); *Assurance Co. v. United States* [33 CCF ¶ 75,181], 813 F.2d 1202, 1205 (Fed. Cir. 1987); *JCD Wrecking & Salvage Company*, ENG BCA No. 4598, 90-2 BCA ¶ 22,731; *Servidone Construction Corporation*, ENG BCA No. 4736, 88-1 BCA ¶ 20,390, and cases cited. However, the evidence mustered to support such an approach must have a demonstrable nexus to actual costs incurred and should be founded upon reasonable statistical methods or estimating techniques, not unsubstantiated and conclusory assertions. The court or board must not be placed in a position where it must estimate for itself or guess the amount of extra expense to which the contractor is entitled. See *Eagle Paving*, AGBCA No. 75-156, 78-1 BCA ¶ 13,107, and cases cited.

Courts and boards have permitted proof of damages through estimates where such estimates are prepared by individuals with personal knowledge of the claim events and costs, or where the estimates can be substantiated through resort either to detailed and reliable performance data, or where the estimates are reasonably based on verifiable experience. Use of estimates is permissible, with the proponent bearing the burden of demonstrating the basis for and accuracy of the estimates. See *Delco Electronics Corporation v. United States* [35 CCF ¶ 75,679], 17 Cl.Ct. 302 (1989), *aff'd.*, 909 F.2d 1495 (Fed. Cir. 1990); *International Equipment Services, Inc.*, ASBCA Nos. 21104, 23170, 83-2 BCA ¶ 16,675, *aff'd. on reconsid.*, 84-1 BCA ¶ 17,025; *Pathman Construction Company*, ASBCA No. 22393, 81-1 BCA ¶ 15,010.

Since the record did not divulge the cost and scope of the additional work attendant to the change to air curtain burning, Mr. Hick embarked on a series of changing assumptions in his four cost proposals in an attempt to isolate the costs attributable to the changed versus original work. In the section of his cost statements quantifying the change to air curtain burning, for example, he adopted three different allocation formulas for equipment operator and laborer costs in an effort to identify the increased costs attributable to the change. There was nothing in the record against which his judgments could be measured. Similarly, he adopted different proportions of owned and rented equipment costs associated with the change that also were not verifiable. These unexplained variations in labor and equipment allocations were mirrored in the delay and differing site conditions cost statements. In short, Mr. Hick adopted numerous judgmental positions in pricing the various claims that are not susceptible to independent verification.

When he attempted to supply a price for additional equipment costs, Mr. Hick used hourly operating costs that, as often as not, were at variance with the equipment rates contained in EP 1110-1-8, the "Construction Equipment Ownership and Operating Expense Schedule" listed in the contract. The source of the rates Mr. Hick used frequently could not be identified. In addition, he priced the equipment operation using "severe conditions" rates, while the contract directed the use of the "average conditions" rates. The conditions at the site did not warrant use of the enhanced rates.

Mr. Hick's proposals also were afflicted with numerous obvious arithmetic errors, such as his repeated failure to include the G&A overhead component in the calculations. In addition, he apparently duplicated the 40.97 percent payroll tax on labor, including this cost as a component in the daily "Field Cost" calculus. He also included this factor as a separate labor mark-up for cost categories that he alternatively designated as "Other Direct Costs" and "Labor Overhead Expenses." He also utilized differing "Field Cost" amounts in his proposals, as well as the number of days of "Field Costs" charged to the change to air curtain burning.

The Hick reports also were characterized by the use of differing "union fringe" burden factors on labor. While Mr. Hick used an erroneous mark-up predicated on a percentage of salary calculation in his first three proposals, in "Hick 4" he adopted the accepted dollar-per-hour basis for computing the mark-up. However, even when he adopted the correct union fringe mark-up approach, he used conflicting mark-up rates in the separate elements of his cost proposal, without explanation.

Mr. Hick readily acknowledged that his efforts were an after-the-fact operation unaided by personal knowledge of the events underlying the claims. Through a review of the sterile, and not particularly informative, documentary record, he attempted to recreate the job events in an attempt to price the various aspects of Hemphill's claims. His difficulties are perhaps best illustrated in his attempt to allocate labor to equipment hours. He remarked generally on the sparseness of the records regarding the allocation

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of labor to equipment. The daily reports failed to disclose the relationship between labor and equipment and no clarification was available elsewhere in the record. Perhaps the most prominent example of the effect that the paucity of information had in this regard can be found in his attempts to allocate labor hours to chain saw operating hours. His calculation of chain saw costs produced the anomalous result of chain saws being "operated" for about 1,000 hours without operators.

In short, the proof underlying Hemphill's damage claim was based almost exclusively on the testimony and estimates prepared by Mr. Hick. In most instances, we received no corroborative evidence to substantiate his judgments and assumptions, and Mr. Hick also failed to demonstrate the various processes through which he developed the allocations he used. We have not recited the full litany of erroneous, contradictory and confusing determinations contained in Mr. Hick's four cost statements, but the quantity, continuing nature and profusion of unexplained judgments and arithmetic errors contained in these determinations leaves us with little confidence in his proposals. While we appreciate the great difficulty he faced in attempting to reconstruct Hemphill's incurrence of added costs, this overriding pattern of shifting and unverifiable assumptions, overlain by judgmental calls equally not susceptible to verification, potential duplication of costs, arithmetic errors and unexplained changes in accounting and allocation approaches leaves us no choice but to reject his conclusions.

Ordinarily, failure of proof connotes a proponent's inability to marshal sufficient persuasive evidence and argument in support of its position. This appeal does not suffer from a shortage of allegations. Rather, we are faced with an interwoven mass of unverifiable and conflicting postulates. In the absence of corroboration from the record, we are not persuaded that the myriad proposals by Mr. Hick have established that Hemphill is entitled to compensation in excess of that already allowed by the Contracting Officer. Furthermore, this record does not permit us *sua sponte* to make any independent assessment of the cost framework that would itself be anything more than mere surmise. Cf. *Diso Corporation*, ENG BCA No. 4945, 87-1 BCA ¶ 19,462, *aff'd sub nom. Diso Corp. v. United States*, No. 87-1250 (Fed. Cir. 1987), 6 FPD ¶ 153; *Groves-Black (A Joint Venture)*, ENG BCA No. 4557, 85-3 BCA ¶ 18,398.

Based on the foregoing, we determine that Appellant has failed to establish entitlement to compensation for the change to air curtain burning in excess of that already allowed by the Contracting Officer. ENG BCA No. 5698 is accordingly SUSTAINED to the extent that Hemphill has recovered the amounts already allowed by the Contracting Officer.

Neither party raised an issue of whether Contract Disputes Act interest has been paid. In the absence of any contradictory indication from the record, we treat the Contracting Officer's unilateral adjustments in both Modifications P00002 and P00005 as representing the entire equitable adjustment with Contract Disputes Act interest thereon subsumed in the increased contract price. See *ReCon Paving, Inc. v. United States*, 745 F.2d 34 (Fed. Cir. 1984); *Paragon Energy Corporation*, ENG BCA No. 5302, 93-1 BCA ¶ 24,349; *Harry Claterbos Co., JV*, ENG BCA No. 5226, 92-2 BCA ¶ 25,010; *Massman Construction Company*, ENG BCA No. 4966, 86-3 BCA ¶ 19,325.

We have denied Appellant's differing site conditions claim with respect to the acreage and mix components of the contract. However, we have found that Hemphill is entitled to relief for the removal of "excess" snags.

In Modification P00005, the Contracting Officer recognized additional costs of performance occasioned by the removal of the "excess" snags. He used the Government estimate as a basis for computing the increased cost of performance, and paid Hemphill $30,042, plus mark-ups. While the Contracting Officer made this payment under the "Changes" clause, we have determined that any increased costs of performance flow from a mutual mistake of fact.

The Government now seeks a refund of a minimum of $30,000 for overpayment for snag removal. According to the Government, the original contract price included $14,969 for snag removal, and adding this to the allowance in Modification P00005, yields a total snag removal payment in excess of $44,000. The Government then goes on to cite the $13,118 snag removal element in "Hick 4" and contends that it is entitled to a refund of the difference (about $44,000 – $13,118). (Gov't Br., at 41).

The Government's claim fails to comprehend the extent of the alleged overpayment. The "Hick 4" computation of snag removal referred to costs for the "excess" snag removal; thus any overpayment for snag re-

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moval could be determined only through comparison of the allowance under Modification P00005 and the Hick proposal. All of the data contained in the Government's refund claim is based on the cost proposals developed by the parties; as with all of the Hick proposals, we have no confidence in his snag removal calculations. The cost presentation by the Government adopts this unreliable data and fails to account for the fact that the Hick presentation on snags only relates to the removal of snags in "excess" of the Government estimate.

Both parties' presentations on the quantum element of the snag claim are fraught with mistakes and unexplained and unsubstantiated assumptions. In light of this record, we find no persuasive basis to depart from the Contracting Officer's original allowance. Accordingly, we decline to disturb it.

The adjustment in Modification P00005 represented an effort by the Contracting Officer to make the contract price reflect the actual work that the parties included in the contract but underpriced because they mutually underestimated its scope. Based on the foregoing, ENG BCA No. 5776 is SUSTAINED; Appellant is entitled to the increase in the contract price already recognized by the Contracting Officer.

Proposed Deductions from the Equitable Adjustment

In its refund claim of March 12, 1991, the Government alleged that it overpaid Hemphill in unilateral Modification P00005, and has offered a variety of calculations with the intent to demonstrate that the overpayment is in the magnitude of $152,000. The Government's refund claim is generally founded in the three following categories: $30,000 for snag removal (which we already have discussed), $22,000 paid for acceleration costs, and "not less than" $100,000 for overstated equipment costs.

At the outset, we note that the Government's (specifically, Mr. Ross') early calculations in the process culminating in Modification P00005 justified a payment of about $190,000. In an apparent attempt to settle all claims, this calculation was "adjusted" to achieve the $305,000 quantum reflected in the modification. When Hemphill withdrew from the tentative settlement agreement and insisted on pursuing additional funds, the Corps went ahead and paid the full amount, anyway.

Acceleration

The Government seeks return of $22,932 paid under Modification P00005 for acceleration, arguing that these costs properly are not payable to Hemphill, since the contract was not accelerated. While we have found that the record in these appeals does not support Hemphill's claim that it suffered a "legally recognized" acceleration, we are equally convinced that the work was disrupted by the 21-day delayed start of burning. Since the parties made no effort to differentiate between costs attributable to disruption and claimed costs of acceleration, we decline to disturb this element of the Contracting Officer's allowance, viewing it as an adjustment for disruption to the work, and have accepted it as part of the equitable adjustment due for the compensable events involved in these appeals.

Credit for Deletion of Open Air Burning

Mr. Hick consistently proposed that a credit of $23,255 was due the Government for the deletion of open air burning. Our review of the entire record persuades us that his proposed "credit" is merely a part of the overall calculus behind his proposal for an enhanced equitable adjustment, rather than a specific determination of cost savings occasioned by the change to air curtain burning. The Government's auditor alleged that the Government was entitled to a credit of approximately $145,000. However, his calculation was based on contractor data that he characterized as invalid and unreliable. We conclude that the record is insufficient to support any of the proposed credits for the deletion of open air burning.

Equipment Costs

The Government also seeks return of "not less than" $100,000, representing inflated equipment costs that were paid through Modification P00005.

The Government's refund claim as a whole is stated in less-than-precise terms, but it made a clear calculation of an inflation in equipment costs allegedly flowing from Appellant's use of "severe conditions" operating rates, as opposed to the "average conditions" rates required by the contract.

Mr. Hick uniformly applied the "severe conditions" rates in computing equipment costs, yet the conditions at the site did not warrant this application. Furthermore, use of this enhanced pricing structure was not authorized by the Contracting Officer, and Appellant offered no evidence otherwise in support of its pricing approach. While it is

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clear to us that application of the "severe conditions" equipment rates mathematically produces the increased cost factor, the record does not indicate whether any previous payments to Hemphill included costs derived from use of the higher rate structure. Indeed, in the absence of contradictory evidence, we would assume that in calculating the equipment cost component for the two unilateral modifications, the Government used the contractually-required "average conditions" rates. In view of the failure of the record to demonstrate that payments were made based on the "severe conditions" rates, we decline to credit to the Government any adjustment for costs flowing from alleged overstated equipment costs.

The Government also has sought a refund for overstated ownership costs (in the amount of $149,946) and inflated costs ($12,944) for misapplication of a cost of facilities capital mark-up on equipment.

We find this record insufficient to evaluate and support the quantum alleged by the Government for these two cost elements. The claimed refund for overstated ownership costs is an amalgam of unvarnished figures whose genesis is unknown. Likewise, the mathematics underlying the claimed refund for overstated cost of facilities capital mark-up are unascertainable. In view of the frailties of the record on these two matters, we decline to apply the alleged credit against the amounts already paid. Based on the totality of the facts before us, we decline to disturb the Contracting Officer's decision by directing a refund representing these two calculated costs.

CONCLUSION

Appellant has been paid $455,000, inclusive of interest, for the costs attendant to the change to air curtain burning and the removal of "excess" snags from the site. Appellant is not entitled to a further equitable adjustment. The Government is not entitled to any credit for overpayment. Accordingly, we decline to disturb the allowances already made by the Contracting Officer.

ENG BCA Nos. 5698 and 5776 are SUSTAINED IN PART. ENG BCA No. 5840 is SUSTAINED.

[¶ 26,492] Citicorp v. General Services Administration; American Express Travel Related Services Co., Inc., Intervenor

GSBCA No. 12631-P, October 22, 1993. Proposal No. FCXS-F1-930002-N.

Automatic Data Processing Procurement—Brooks Act Applicability—Financial Services.—The General Services Administration Board of Contract Appeals lacked jurisdiction over a protest against an award under a solicitation for travel-related financial services, because the procurement was not for the purchase, lease, or maintenance of automatic data processing equipment, as required by provisions of the Brooks Act. Although the solicitation required the delivery of data on line, on diskettes, on magnetic tape, and in hard copy, the acceptance of the awardee's credit cards by automatic teller machines, and the provision of credit card readers, these requirements did not call for the delivery of a system or a system of equipment to the government for its use. Although the tasks called for by the solicitation depended upon the use of ADPE, they were incidental to performance in that they did not restrict the contractor's discretion in the acquisition and management of ADPE resources. The solicitation did not specify any particular software, personnel, equipment, or systems of equipment, and it did not establish any requirements for the compilation or maintenance of databases.

For the protester: Diantha McJilton, Arnold & Porter, Washington, D.C., by David B. Apatoff and Steven S. Diamond, and Howrey & Simon, Washington, D.C., by Michael R. Charness and William A. Roberts III. For the government: George Barclay, Michael J. Ettner, Janet L. Harney, Michelle A. Harrell, Seth P. Binstock, and Pamela J. Reiner, Office of General Counsel, General Services Administration, Washington, D.C. For the intervenor, American Express Travel Related Services Co., Inc.: Paul, Hastings, Janofsky & Walker, Washington, D.C., by Hamilton Loeb, Bruce D. Ryan, Scott M. Flicker, John M. Oseth, and Randall M. Stone.

Before DEGRAFF, LABELLA, and HENDLEY, Administrative Judges.

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DEGRAFF, Administrative Judge: Citicorp protests the award by the General Services Administration (GSA) of a contract to American Express Travel Related Services Co., Inc. (AmEx). GSA and AmEx filed motions to dismiss the protest, asserting that the Board lacks jurisdiction because the procurement is not for the purchase, lease, or maintenance of automatic data processing equipment. Because the procurement is for travel-related financial services and not for the purchase, lease, or maintenance of automatic data processing equipment, we dismiss the protest for lack of jurisdiction.

Findings of Fact

On May 13, 1993, the General Services Administration (GSA) issued request for proposals FCXS-F1-930002-N (the solicitation), for the Travel and Transportation Payment and Expense Control System (TTPECS). Complaint ¶ 8. The TTPECS is a system that permits government employees to utilize credit cards and travelers checks when they make work-related travel arrangements and when they pay their travel expenses. The TTPECS contractor will be required (1) to establish individually billed credit card accounts, (2) to establish centrally billed credit card accounts, (3) to provide travelers checks to agency personnel, and (4) to prepare a variety of reports for the Government. Respondent's Motion to Dismiss, Attachment 1.

Section CA.6 of the solicitation explains the requirements associated with establishing individually billed credit card accounts. The contractor is required to provide employees credit cards with no pre-set spending limits. The cards must be accepted by common carriers, car rental agencies, lodging establishments, restaurants, gas stations, and automated teller machine (ATM) networks and banks. The Government is not liable for any of the charges incurred by employees. The contractor is required to replace lost and stolen cards and to provide each individual cardholder with an itemized monthly statement. The contractor must be able to accept payment electronically. The contractor is required to develop a cardholder agreement and enter into such an agreement with each individual cardholder. The solicitation explains how the contractor is required to issue cards, deliver cards, verify that cards are received, and renew cards. The solicitation also explains how the contractor can suspend and cancel individually billed credit card accounts. From 1989 through 1992, there were nearly 900,000 individually billed credit card accounts and the total card volume exceeded $3.5 billion. The solicitation projects that from 1994 through 1998, there will be approximately 1.8 million individually billed credit card accounts and that the total card volume will exceed $7.9 billion. Respondent's Motion to Dismiss, Attachment 1.

Section CA.7 of the solicitation explains the requirements associated with establishing centrally billed accounts. These accounts are used primarily to meet the needs of an agency for common carrier transportation purchases and for emergency lodging associated with mass personnel movements and other special functions. The contractor is required to provide credit cards with no preset spending limits. The cards must be accepted by common carriers and lodging establishments. The Government is liable for charges incurred in accordance with government travel regulations. The contractor is required to replace lost and stolen cards and to provide the government agencies with itemized monthly statements and summary statements. Agencies may make payments electronically. The solicitation explains how the contractor can suspend and cancel centrally billed credit card accounts. The solicitation also explains how payment will be made and how billing discrepancies will be identified and resolved. From 1989 through 1992, there were nearly 4,000 centrally billed credit card accounts, and the total card volume exceeded $2.6 billion. The solicitation projects that, from 1994 through 1998, the total card volume for centrally billed accounts will exceed $5.7 billion. Respondent's Motion to Dismiss, Attachment 1.

Section CA.5 of the solicitation contains general requirements for both individually billed and centrally billed credit card accounts. The contractor is required to work with agencies to implement the credit card program within certain time limits. The contractor is required to provide dedicated customer service personnel twenty-four hours per day, 365 days per year. The solicitation also requires that the contractor provide a quarterly newsletter to all cardholders containing information concerning the TTPECS. The solicitation requires that the cards be designed and embossed in a particular fashion. The contractor is required to establish unique account numbers, to retain records of purchases, to provide training necessary to implement the system, and to fulfill certain quality assurance and security requirements. The solicitation pro-

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hibits the contractor from releasing cardholder information to any third party. The contractor is required to provide a full-time dedicated staff to manage the project. Respondent's Motion to Dismiss, Attachment 1.

Section CA.8 of the solicitation explains the requirements associated with establishing the travelers checks program. The contractor is required to work with agencies to establish their travelers checks programs. The solicitation requires the contractor to provide credit card readers at no cost to the Government, so that employees may use their cards to purchase travelers checks. The checks are required to be accepted by merchants and financial institutions. The solicitation explains how the contractor must make refunds for lost and stolen checks, the denominations of checks that the contractor must make available, how inventories of checks will be replenished, and payment terms. From 1989 through 1992, approximately $455 million of travelers checks were purchased. The solicitation projects that from 1994 through 1998, approximately $738 million of checks will be purchased. Respondent's Motion to Dismiss, Attachment 1.

Section CA.9 of the solicitation explains the reporting requirements of the TTPECS program. Reports are required to be made available to agencies in a variety of media, including hard copy, magnetic tape, or electronic. Electronic access to electronic reports is to be available twenty-four hours per day, 365 days per year. A variety of reports are required, including account activity reports, suspension reports, cancellation reports, airline credit reports, ATM reports, and travelers check transaction reports. There are also some management reports that must be provided to GSA. Respondent's Motion to Dismiss, Attachment 1.

Section L of the solicitation contains instructions for preparing offerors' technical proposals. The section explains that proposals must contain material to establish the range, scope, and extent that the offeror's credit card, travelers checks, and ATM product are accepted. An offeror's "ATM product" is the ability to use the offeror's credit card to withdraw cash from generally available ATMs or at bank counters. The section also explains that proposals must demonstrate the offeror's corporate experience in supporting charge card and travelers check programs on a scale similar to that required by the Government. Section L provides that proposals must demonstrate an offeror's quality and extent of customer service and support programs, including an offeror's support for providing reports. Section L also provides that proposals must demonstrate an offeror's support for centrally billed accounts, and an offeror's ability to bring agencies into the credit card and travelers checks programs and to manage the project. Respondent's Motion to Dismiss, Attachment 1.

Section M of the solicitation explains the factors that GSA would utilize to evaluate offerors' proposals. There are five equally weighted factors: Acceptance, Corporate/Past Experience, Customer Service, Centrally Billed Account Support, and Program Implementation Plan. Respondent's Motion to Dismiss, Attachment 1.

The solicitation expects that offerors will utilize computers in order to keep track of account information, to provide security to maintain the integrity and function of all databases and systems, and to generate monthly statements and reports. Given the number of accounts and the dollar volume of transactions, it is difficult to imagine how an offeror could perform this contract without utilizing computers. The solicitation contains several specific requirements for the use of an automated system:

Section CA.5.5 requires the contractor to provide dial-up electronic access to account and transaction data. If any software is required to accomplish this, the contractor shall provide it at no cost to the government. This electronic access shall consist of two parts. First, the government must have on-line access to account information. Second, account information must be available in ASCII file format that can be downloaded via electronic means.

Section CA.7.1.12 provides that the contractor shall provide a monthly invoice for centrally billed accounts in the medium requested by the agency, such as hard copy, floppy disk, and/or magnetic tape.

Section CA.8.7 provides that the contractor shall provide dial-up access or software packages to enable the agencies to automate their travelers check systems, so that the systems can track, add, tally, report, and reorder checks.

Section CA.9 provides that reports are required to be made available to agencies in a variety of media, including hard copy, magnetic tape, or electronic. Electronic access to electronic reports is to be available twenty-four hours per day, 365 days per

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year. Section CA.9.8 provides that agencies may request customized reports, to be generated from existing data and produced in ASCII format if requested.

Respondent's Motion to Dismiss, Attachment 1. GSA required offerors to demonstrate that they could provide on-line access to data. Protester's Opposition Brief, Attachment A.

Citicorp and AmEx submitted proposals in response to the solicitation. GSA awarded the contract to AmEx on September 30, 1993. Complaint ¶¶ 1, 4. This protest was filed on October 8, 1993.

Discussion

The Brooks Act provides us with jurisdiction to entertain a protest "in connection with any procurement conducted which is subject to [the Act]." 40 U.S.C. § 759(f)(1)(1988). A procurement is subject to the Brooks Act if is for the "purchase, lease, [or] maintenance of automatic data processing equipment." 40 U.S.C. § 759(a). For purposes of 40 U.S.C. § 759:

> [T]he term "automatic data processing equipment" means any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, or data or information—
>
> (i) by a Federal agency, or
>
> (ii) under a contract with a Federal agency which—
>
> (I) requires the use of such equipment, or
>
> (II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

40 U.S.C. § 759(a)(2)(A). The term "automatic data processing equipment" (ADPE) includes computers; ancillary equipment; software, firmware, and similar procedures; services, including support services; and related resources as defined by regulations issued by the Administrator for General Services. 40 U.S.C. § 759(a)(2)(B). The Brooks Act does not apply to ADPE which is acquired by a contractor and which is "incidental" to the performance of a contract. 40 U.S.C. § 759(a)(3)(A).

Pursuant to the Brooks Act, GSA issued the Federal Information Resources Management Regulation (FIRMR), which applies to the acquisition, use, and management of federal information processing (FIP) resources by federal agencies.[1] 41 CFR ch. 201 (1992). GSA also issues FIRMR bulletins which contain nonregulatory guidance to agencies concerning FIP resources. The FIRMR and its bulletins provide valuable assistance for interpreting the provisions of the Brooks Act. For example, the Brooks Act provides that the procurement of a "system" of equipment to be used by the Government is subject to the Act's terms. The FIRMR defines a "system" of equipment as "any organized combination of FIP equipment, software, services, support services, or related supplies." 41 CFR 201-4.001. The FIRMR also explains that use of FIP resources is "incidental" to performance if a contract does not substantially restrict the contractor's discretion in the acquisition and management of FIP resources. 41 CFR 201-1.002-1(b)(2)(ii).

Consistent with these regulatory provisions, FIRMR Bulletin A-1 provides two examples of "incidental" use. In one example, an agency initiated a procurement for the completion of a study of the agency's organization and personnel distribution and the delivery of a hardcopy report. The solicitation required the contractor to develop software, gather information, and utilize a computer to process information and generate the report. Because the agency stated a general requirement for software and use of a computer and did not place any restrictions upon the contractor's acquisition or management of FIP resources, Bulletin A-1 explains that the use of FIP resources is incidental to performing the contract. In the other example, an agency initiated a procurement for identifying and enrolling more than one million people in a benefit program. The solicitation required the contractor to provide a means of maintaining current and immediately verifiable information concerning each person's benefits. Although the solicitation did not specifically require the use of FIP resources, it was reasonable to expect that the contractor must use such resources, given the magnitude of the contract tasks. Because the agency did not state its requirements in a manner which would have restricted the contractor's discretion in the acquisition and management of FIP resources, Bulletin A-1 explains that the use of FIP resources is inci-

[1] Instead of referring to ADPE resources, the FIRMR refers to FIP (federal information processing) resources. The FIRMR's definition of FIP resources mirrors the Brooks Act's definition of ADPE.

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dental to performing the contract. Bulletin A-1, Attachment C at 1-3.

Bulletin A-1 suggests that an agency consider a series of several questions when deciding whether a procurement is subject to the FIRMR. Bulletin A-1 recommends deciding whether the solicitation requires the delivery of FIP resources for use by a federal agency. If not, the bulletin advises that we should look to see whether a principal task of the solicitation depends directly upon the use of FIP resources. If so, the bulletin suggests that we then examine the requirements of the solicitation in order to determine whether they have the effect of substantially restricting the contractor's discretion in the acquisition and management of the FIP resources. If not, the FIRMR does not apply, because the FIP resources are incidental to the performance of the contract. Bulletin A-1, Attachment C at 1-3. The analytical framework provided by Bulletin A-1 is consistent with the provisions of the Brooks Act and the FIRMR, and we will use this framework in deciding whether the procurement at issue in this protest is one for the purchase, lease, or maintenance of ADPE.

The solicitation is not for the purchase of ADPE resources which will be delivered to a federal agency for its use. 40 U.S.C. § 759(a)(1), (a)(2)(A)(i).

According to the Brooks Act and the FIRMR, ADPE resources consist of either equipment (including software and other items) or an organized combination of equipment, software, services, support services, or related supplies. This solicitation does not require that the awardee deliver any such resources to the Government for its use. The solicitation does require that the awardee deliver data electronically on-line, on floppy disk, on magnetic tape, and in hard copy. But, no matter what delivery format is utilized, the fact remains that data—not equipment and not a system of equipment—is being delivered to the Government for its use.

Although the solicitation also requires that the awardee's credit cards must be accepted by ATMs, the solicitation does not require that the awardee purchase ATMs, deliver ATMs, or establish a network of ATMs. If the Government is procuring anything, it is procuring ready access to cash, which is a financial service. Consequently, requiring that the awardee's credit card be accepted by ATMs does not amount to requiring that the awardee supply the Government with equipment or a system of equipment for the Government's use.

Finally, the solicitation requires that the awardee supply credit card "readers" so that employees may use their credit cards to purchase travelers checks. According to Citicorp, this requirement is for the delivery of ADPE because the solicitation requires the awardee to supply readers which electronically read the information contained in a credit card's magnetic strip. The solicitation, however, does not require that these readers be electronic readers, and there are mechanical readers. Section CA.8.2, which contains the requirement for the readers, provides, in full: "The contractor shall provide card readers (point of sale machines) at no cost to the Government, to agencies/organizations issuing travelers checks, if requested by the participating agency/organization." Respondent's Motion to Dismiss, Attachment 1. It may be that Citicorp intended to provide electronic readers or that it believed only electronic readers would be accepted by GSA. However, Citicorp's beliefs and intentions do not establish that the solicitation requires an electronic card reader. Instead, the terms of the solicitation establish what is being procured. *Best Power Technology Sales Corp. v. Austin* [38 CCF ¶ 76,468], 984 F.2d 1172 (Fed. Cir. 1993). The requirement that the awardee supply credit card readers does not amount to a requirement that the awardee deliver ADPE to the Government for its use.[2]

Even though many of the tasks required by the solicitation depend upon the use of ADPE, the requirements of the solicitation do not substantially restrict the contractor's discretion in the acquisition and management of ADPE resources. 41 U.S.C. § 759(a)(2)(A)(ii), (a)(3)(A).

There is no doubt that the solicitation anticipates that the awardee will make extensive use of ADPE. Any offeror capable of providing widely accepted credit cards and travelers checks, adequate customer service, and accurate billing would have to depend heavily upon ADPE. As we have noted previously, the use of ADPE is ubiquitous, and the Government procures many products

[2] Citicorp suggests that it is important that AmEx's proposal emphasizes its ADPE capabilities. As *Best Power* establishes, what AmEx proposed is not material to determining whether the procurement is for ADPE.

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and services which could not be produced or provided without extensive use of ADPE. *National Loan Servicenter Inc. v. Department of Housing and Urban Development,* GSBCA 12193-P, 93-2 BCA ¶ 25,853, 1993 BPD ¶ 64. The Brooks Act takes into account the pervasiveness of ADPE when it provides that a procurement is not subject to the Act if the contractor's use of ADPE is "incidental" to performance of the contract. 40 U.S.C. § 759(a)(3)(A).

The FIRMR sets forth the test for determining whether the use of ADPE is incidental to performance, when it directs us to determine whether the requirements of the solicitation substantially restrict a contractor's discretion in the acquisition and management of ADPE resources. The FIRMR's test is based upon the fact that, when the Government wishes to procure any ADPE product or service, it specifies what it wants to obtain. ADPE specifications place a substantial restriction upon contractors, because contractors are required to submit proposals which state that they will fulfill all of the requirements set forth in the specifications, and they are required to perform in accordance with the terms of the specifications. If a solicitation anticipates that ADPE will be utilized during a contractor's performance, but does not contain any specifications for ADPE equipment or services, then a contractor's discretion is not substantially restricted by the terms of a solicitation. The lack of a substantial restriction upon a contractor's discretion is a reliable indication that the contractor's acquisition and management of ADPE are immaterial to the Government, and that the use of ADPE is incidental to performance. The FIRMR's provisions are reasonable and must be respected. *Blum v. Bacon,* 457 U.S. 132 (1982).

The use of ADPE is incidental to performing the contract being awarded by GSA, because the solicitation does not place any substantial restrictions upon a contractor's discretion in the acquisition and management of its ADPE resources. The facts of this case are similar to those contained in the two FIRMR Bulletin A-1 examples discussed above. The solicitation permits offerors to utilize whatever equipment or system of equipment they wish. The solicitation does not explain how the awardee should compile or maintain its databases. It does not require any particular type of computers or ancillary equipment, any specific operating speed, any certain amount of storage capacity or memory, any particular operating software, or the use of any specified computer language or word processing program. The awardee is free to use whatever software it has available or is able to develop in order to provide the services that GSA is procuring. The solicitation does not require that persons with computer science backgrounds be assigned to the contract. The solicitation does not set out ADPE as a separate task or deliverable or evaluation factor. In summary, the solicitation permits offerors to meet the Government's needs by utilizing a wide variety of alternatives, and does not restrict a contractor's acquisition or management of its ADPE resources.

If requiring data to be made available on diskettes, electronically on-line, on magnetic tape, or in ASCII file format are restrictions at all, they are not substantial. The contractor's choice of how to provide these media is not limited or restrained by the terms of the solicitation. *Childress & Associates v. ACTION,* GSBCA 11768-P, 92-2 BCA ¶ 24,997, 1992 BPD ¶ 103; *CSC Credit Services, Inc. v. Department of Veterans Affairs,* GSBCA 11414-C (11350-P), 92-2 BCA ¶ 24,778, 1992 BPD ¶ 47.

The solicitation requires the contractor to provide reports which contain certain information presented in a particular order. It also requires the contractor to set aside a block of account numbers for government users. In addition, the solicitation requires that the contractor be able to identify and track payments by a cardholder's social security number. Citicorp states that these requirements are unique to the Government and are not required of its non-government accounts. Citicorp asserts that it will have to modify or develop software in order to fulfill these requirements and so, Citicorp concludes, these requirements place a substantial restriction upon its acquisition and management of ADPE resources. We disagree. The fact that some software might have to be modified or developed places virtually no restriction upon Citicorp's acquisition or management of its ADPE resources. It is free to choose a programming language, a computer, software, an operating system, and whatever other ADPE components it believes to be necessary in order to provide the Government with the data it requests.

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The decision in *National Loan Servicenter* is persuasive precedent.[3] The solicitation in our case requires the use of ADPE. But, the use is merely incidental to the contractor's obligation to provide customer service and widely accepted credit cards and travelers checks; to implement and manage the program; to send bills and invoices; to process payments; and to provide data to the Government concerning use of the contractor's financial services. The primary item being procured is not ADPE. Instead, the primary item being procured is travel-related financial services. The system that the Government wishes to acquire is not a system of ADPE. Rather, the Government wishes to acquire a system that permits the Government and its employees to utilize common commercial practices when traveling. The ADPE that will be utilized by the contractor who provides this system is truly incidental to the contractor's performance.

Decision

The protest is **DISMISSED FOR LACK OF JURISDICTION.**

[¶ 26,493] Information & Telecommunications Strategies, Joint Venture v. Department of the Navy; Computer Data Systems, Inc., Intervenor

GSBCA No. 12605-P, October 19, 1993. Solicitation No. N66032-90-R-0003.

Automatic Data Processing Procurement—Authority to Procure—Suspension Pending Protest.—The government's procurement authority was not suspended pending a protest, even though the protester alleged that it was not debriefed as soon as possible after award of the contract, because the timing of the briefing did not prevent the protester from becoming aware of and exercising its statutory right to suspension by filing a protest within 10 calendar days of award. The protester received prompt notice of contract award by telefax on or about the date of award and therefore knew or should have known that its right to a statutory suspension would expire within 10 calendar days. Even though the debriefing might have revealed circumstances upon which other grounds of protest could be based, the contractor was not prevented from filing a protest to exercise its right to a statutory suspension.

For the protester: Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., by Kenneth S. Kramer, Douglas W. Baruch, and Pamela A. Roth. For the government: Ellen D. Washington and M. Elizabeth Hancock, Information Technology Acquisition Center, Department of the Navy, Washington, D.C. For the intervenor, Computer Data Systems, Inc.: Charles B. Machion and Suzanne Ferrara.

Before GOODMAN, HENDLEY, and VERGILIO, Administrative Judges.

GOODMAN, Administrative Judge: This protest was filed by Information & Telecommunications Strategies Joint Venture (ITS or protester) on September 30, 1993, protesting the award by the Department of the Navy Information and Technology Acquisition Center (Navy or respondent) of a contract for automatic data processing software, support and services (the contract) pursuant to solicitation number N66032-91-R-0003 to Computer Data Systems, Inc. (intervenor or CDSI). CDSI has intervened in this protest as an intervenor of right. Protester alleges that the agency failed to provide a timely post-award debriefing and has requested that the Board immediately grant summary relief on this issue and suspend respondent's delegation of procurement authority until this protest is resolved. The request is made pursuant to 40 U.S.C. § 759(f)(5)(A) and (B) (1988), not 40 U.S.C. § 759(f)(3) (1988). As discussed below, we deny protester's request.

Findings of Fact

The contract was awarded to CDSI on or about August 31, 1993. ITS was informed of the award by letter dated August 31, 1993, from respondent and telefaxed on that same date. Respondent's Opposition to Protester's Request for Suspension of Procurement, Ex-

[3] Citicorp characterizes as "dicta" the discussion in the *National Loan Servicenter* opinion concerning whether ADPE was incidental to the contractor's performance. In fact, the discussion constitutes an alternate holding. In addition, we do not agree with Citicorp that *National Loan Servicenter* is distinguishable in any material respect from this case.

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hibit 1. Respondent's letter invited offerors to request a debriefing and to inform respondent by September 3, 1993, if a debriefing was desired. Respondent's letter further requested that questions to be answered at the debriefing should be submitted to respondent in writing prior to September 8, 1993. By letter dated September 2, 1993, ITS informed the Navy that it desired a debriefing. Respondent's Opposition to Protester's Request for Suspension of Procurement, Exhibit 2. By letter dated September 3, 1993, telefaxed to the Navy on September 7, 1993, ITS submitted its written questions. Respondent's Opposition to Protester's Request for Suspension of Procurement, Exhibit 3.

On or about September 14, 1993, respondent contacted protester to schedule a debriefing and protester informed respondent that it should call back. Respondent made several more attempts to contact protester to schedule a debriefing, but was unsuccessful. On or about September 16, protester informed respondent that the debriefing must be held after September 20. Respondent, therefore, held protester's debriefing on September 21.[1]

ITS filed this protest on September 30, 1993, and requested this Board to suspend the performance of the contract pending resolution of the remainder of the protest on the merits. At the prehearing conference on October 5, 1993, counsel for protester and respondent stated their belief that there were no issues of material fact in dispute with regard to the request for suspension, and the Board requested a stipulation of facts and legal memoranda.

Discussion

Statute empowers this Board to suspend an agency's procurement authority under two different circumstances. First, a statutory suspension, if a protest is filed within ten calendar days of award and a suspension order is timely requested, is mandatory unless the agency involved establishes "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board." 40 U.S.C. § 759(f)(3)(B) (1988). Under such circumstances, we "shall suspend the ... procurement authority to acquire any goods or services under the contract which are not previously delivered," and the suspension shall last until the protest is decided. *Id.* We may exercise this power only if a protest is filed within ten calendar days of contract award. This protest was filed thirty calendar days after contract award, and protester has not requested a suspension under this statutory provision.

Second, on the merits, if we determine "that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority," we "may suspend" the delegated procurement authority as a means of providing appropriate relief. *Id.* § 759(f)(5)(B). ITS seeks suspension of the procurement authority as partial affirmative relief under this statutory provision.

ITS alleges that the award of the contract did not occur until two years after receipt of proposals; the Navy has other contractual vehicles in place to provide the services in question; and the respondent has admitted that it does not have an urgent and compelling need for the performance of the contract. ITS asserts that the Board should grant a suspension as partial affirmative relief as respondent violated Federal Acquisition Regulation (FAR) 15.1003(a), 48 CFR 15.1003(a) (1992), by not debriefing ITS "as soon as possible" as required in that regulation.

As legal support, protester cites several decisions in which we have granted suspension of procurement authority as partial relief on the merits because respondent had violated procurement regulations which required respondent to notify unsuccessful offerors promptly as to contract award. *Berkshire Computer Products v. Department of the Navy*, GSBCA 11989-P, 93-1 BCA ¶ 25,538, 1992 BPD ¶ 257; *Locom Corp.*, GSBCA 8951-P, 87-2 BCA ¶ 19,940, 1987 BPD ¶ 111; *American Service Corp.*, GSBCA 8224-P, 85-3 BCA ¶ 18,517, 1985 BPD ¶ 115. We granted a suspension in these cases because the protester had not received prompt notice that the contract had been awarded, and therefore had no reason to know that its right to request a statutory suspension had arisen. The very act of failure to give prompt notice of award entitles a protester to relief because it "renders the exercise of this right [to request a suspension of the procurement by filing a protest within ten calendar days

[1] These facts were set forth in ¶¶ 1-10 of respondent's response to protester's request for suspension. During a conference call with the Board on October 7, 1993, protester's counsel stated that these facts were not in dispute.

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of award] impracticable." *Locom Corp.*, 87-2 BCA at 100,915, 1987 BPD ¶ 111, at 6.

ITS analogizes these cases to its current situation, claiming failure to debrief as soon as possible as required by FAR 15.1003(a) is a violation of regulation which entitles it to a suspension as partial relief on the merits. ITS argues that it did not have a "readily discernible ground of protest until after the conduct of the debriefing," and that "any protest filed within ten calendar days of award would have had to be based on pure speculation." Request for Suspension of Procurement at 2. Thus, it alleges that the debriefing which did not take place until twenty-one days after contract award prevented it from filing a protest until that time.

We fail to see how the timing of the debriefing prevented ITS from becoming aware of and exercising its statutory right to suspension by filing a protest within ten calendar days of award. ITS received prompt notice of contract award by telefax on or about the date of award, and therefore knew or should have known that its right to a statutory suspension would expire within ten calendar days. Once it became apparent to protester that debriefing would not take place within that period, ITS could have filed a protest requesting the statutory suspension within ten calendar days of award. Even though the debriefing may have revealed circumstances upon which other grounds of protest were based, nothing prevented ITS from filing a protest within ten calendar days of award to exercise its right to a statutory suspension.[2]

Decision

Protester's request that we find an agency violation and suspend respondent's delegation of procurement authority is DENIED.

[¶ 26,494] Cleveland Telecommunications Corporation and Metrica, Inc., Anstec, Inc., and Tri-Cor Industries, Inc. v. National Aeronautics and Space Administration; Recom Technologies, Inc., Intervenor

GSBCA Nos. 12586-P, 12599-P, 12629-P, October 18, 1993. (The text below is the redacted version issued to the public on October 22, 1993.)

Protests, GSBCA—Procedure—Attorney Disqualification.—The law firm representing the protester was disqualified because it also represented a subsidiary of a major proposed subcontractor of the intervenor, which was the proposed awardee in the case. The protest involved the challenge of a potential award to the intervenor of a contract for computational, administrative, professional, and engineering services. The subsidiary continued to be heavily involved in the intervenor's proposal team and would inevitably be involved in the litigation against the protester. The relationship between the intervenor and its subsidiary was so intertwined as to produce a strong likelihood that a problem of dual loyalty would arise from the simultaneous representation of the protester and the intervenor's subsidiary.

For the protester, Cleveland Telecommunications Corporation and Metrica, Inc.: Arter & Hadden, Cleveland, Ohio, by Carl E. Anderson, and Alexander, Gebhardt, Aponte & Marks, Washington, D.C., by David R. Smith and Bridnetta D. Edwards. For the protester, Anstec, Inc.: Crowell & Moring, Washington, D.C., by James J. Regan and Kathryn D. Kirmayer. For the protester, Tri-Cor Industries, Inc.: Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., by Kenneth S. Kramer, William A. Davis, and Shannon L. Haralson. For the government: Sumara M. Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C., and Laura Henry, Office of the General Counsel, National Aeronautics and Space Administration, Cleveland, Ohio. For the intervenor, Recom Technologies, Inc.: John J. Fausti and Kathryn Adah Stackhouse.

Before BORWICK, Administrative Judge.

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[2] Moreover, protester has failed to demonstrate how this issue of protest—failure timely to debrief—was timely raised, as it had known for approximately twenty days after receipt of notification of award that it was not yet debriefed.

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BORWICK, Administrative Judge: This protest involves a challenge, mounted by ANSTEC Inc., to the potential award by the National Aeronautics and Space Administration (NASA) of a contract for computational, administrative, professional, and engineering services (CAPES) to Recom Technologies, Inc. (Recom). Recom seeks the disqualification of ANSTEC litigation counsel, Crowell & Moring, because Crowell & Moring currently represents a sister subsidiary (Sterling Software U.S.A.) of a major proposed subcontractor on Recom's proposal team (Sterling Software U.S.).

Recom relies on District of Columbia Rule of Professional Conduct 1.7(b).[1] We grant the motion to disqualify. Sterling Software (U.S.) is heavily involved in Recom's proposal team and will inevitably be involved in the litigation against Crowell & Moring's client, ANSTEC. Sterling Software (U.S.A.), the other current client of Crowell & Moring, is in the same general business as Sterling Software (U.S.), shares l services through the parent, and shares with Sterling Software (U.S.). The relationship is so intertwined as to produce a strong likelihood of a problem of dual loyalty arising from the simultaneous representation of Sterling and ANSTEC.

Background

Recom is the sole potential awardee for the CAPES procurement. Recom is to be responsible for Sterling Software (U.S.) is proposed to handle scientific engineering Another firm is to be responsible for . Protest File, Exhibit 11, Volume 1 at 2. The proposed is an employee of Sterling Software (U.S.).[2]

Sterling Software (U.S.) will provide , comprising of Recom's proposed work force. Declaration of Russell Molari, President, Scientific Systems Division of Sterling Software (U.S.) (Molari Declaration) (Oct. 8, 1993) ¶ 2. Sterling Software (U.S.) assisted Recom in preparing the proposal. Sterling Software (U.S.) personnel contributed concepts, text, and review of the management portion of the mission suitability proposal. Sterling Software (U.S.) personnel assisted Recom in devising the *Id.* ¶¶ 4-5. Recom's was developed with recommendations of Sterling Software (U.S.) management and technical personnel based on Sterling's prior experience with NASA. *Id.* ¶ 6.[3]

Sterling Software (U.S.) is a subsidiary of Sterling Software, Inc. Declaration of Albert K. Hoover, Esq., Assistant General Counsel of Sterling Software, Inc. (Hoover Declaration) (Oct. 8, 1993) ¶ 2. Crowell & Moring has an existing client, Sterling Software (U.S.A.), formerly known as Systems Center, which is also a subsidiary of Sterling Software, Inc. Sterling Software, Inc. acquired Systems Center in July of 1993. Letter from Jeanette P. Meier, Executive Vice President and General Counsel of Sterling Software, Inc., to Crowell & Moring (Oct. 5, 1993) (Meier Letter); Hoover Declaration ¶ 5. Sterling Software (U.S.A.) has retained Crowell & Moring to advise it on

Declaration of Geno P. Tolari, President of Sterling Software (U.S.) (Tolari Declaration) (Oct. 8, 1993) ¶ 7.

Sterling Software, Inc. conducts its business operations through subsidiaries, but Sterling Software, Inc. does "business as one." For federal tax and financial purposes, Sterling Software, Inc. and its subsidiaries are consolidated. Hoover Declaration ¶¶ 2-3. for subsidiaries are performed by the parent corporation. "Sterling's General Counsel's Office provides legal advice to all subsidiaries." *Id.* ¶ 4.

Sterling Software (U.S.) manages certain Sterling Software (U.S.A.) contracts, one of which is a quasi-Government contract with . Tolari Declaration ¶ 5. The employees involved in that contract are employees of Sterling Software (U.S.A.) but report to the management of Sterling Software (U.S.). *Id.* An employee of Sterling Software (U.S.) who

[1] Recom also relies on Rule 1.9 seeking disqualification because Crowell & Moring represented a former client, Sterling Federal Systems, Inc., in an alleged substantially related matter, *Sterling Federal Systems, Inc.*, GSBCA 9835-P, 1989 BPD ¶ 78. We do not address the issues raised by this ground in view of our ruling on the current client issue.

[2] Recom also proposed from its other teaming partner. Protest File, Exhibit 11, Vol. II, Appendix A.

[3] Recom has entered into teaming agreements with Sterling Software (U.S.) and another firm prior to contract award. Protest File, Vol. II, Exhibit 11 at 107.

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participated with Recom in developing the proposal at issue in this protest has been directed to assist Sterling Software (U.S.A.) in obtaining government business and managing its present government contracts. *Id.* ¶ 7. The president of Sterling Software (U.S.) is presently on a six month assignment to Sterling Software (U.S.A.) to manage the transition of Sterling Software (U.S.A.) into the Sterling Software family of companies. Hoover Declaration ¶ 6.

In this protest, ANSTEC alleges that the Government failed to sufficiently account for Recom's . Complaint ¶ 30. In addition, ANSTEC alleges that if a cost realism analysis had been performed on the Recom proposal, the Government would have recognized that Recom cannot (and that is required by the RFP) *Id.* ¶ 39.

ANSTEC has filed interrogatories on Recom seeking information from "subcontractors" as to the identity of individuals involved in formulating and drafting any aspect of the proposal, including price and costing strategies and the proposed ANSTEC also seeks information on all oral communications held by Recom (or its subcontractors) regarding plans to and the approach to the cost proposal portion of the proposal. ANSTEC Interrogatories to Recom. ANSTEC requested Recom to produce all documents referring to those subjects. ANSTEC Document Production Request to Recom.

The executive vice president and general counsel for Sterling Software, Inc. has advised Crowell & Moring that Sterling Software, Inc. withholds consent for Crowell & Moring to represent ANSTEC in this protest. Meier Letter.

Discussion

Courts have a duty to rule on attorney disqualification issues to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain trust in the legal profession and to protect the integrity of the judicial process. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984). This is also true of boards of contract appeals, which have inherent authority to control their dockets and the attorneys appearing before them. *See Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 121 (1926). *See also Griffin & Dickson v. United States* [35 CCH ¶ 75,627], 16 Cl. Ct. 347, 351, 357 (1989) (boards of contract appeals possess inherent authority to impose sanction of dismissal without prejudice and lesser sanction of attorney discipline and assessment of litigation costs against attorney).

We are mindful of several, and countervailing, public policies in approaching disqualification motions. First, litigants are entitled to counsel of their choice, particularly in a specialized area such as Government contracts. Second, disqualification hinders the speedy resolution of lawsuits. Finally, we must be wary of motions being used purely as a litigation tactic. Thus, motions to disqualify must be viewed cautiously. *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 27-28 (D.D.C. 1984). On the other hand, the Bar has an interest in avoiding even the appearance of impropriety; consequently, when there is doubt, the doubt should be resolved in favor of disqualification. *Glueck v. Jonathan Logan Inc.*, 512 F.Supp. 223, 228 (S.D.N.Y. 1981), *aff'd*, 653 F.2d 746 (2d Cir. 1981).

In deciding disqualification matters, we apply the Rules of Professional Conduct of the District of Columbia Bar, because Crowell & Moring practices in the District of Columbia. *B.G.W. Ltd. Partnership*, GSBCA 10501, 91-3 BCA ¶ 24,336, at 121,584.

Recom relies on District of Columbia Bar Rule of Professional Conduct 1.7, which provides in pertinent part:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
>
> (1) A position to be taken by that client in that matter is adverse to a position taken or to be taken by another client with respect to the same matter;
>
> . . . .
>
> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above, if:
>
> (1) Each potentially affected client provides consent to such representation. . . .

ANSTEC argues that Rule 1.7 does not apply:

> In this case, Sterling Software (U.S.) . . . is not a party to the litigation, and cannot take any positions in the case. Thus, by its terms, Rule 1.7 does not apply. . . . The parties to whom ANSTEC is directly adverse are NASA and less directly, RECOM. Sterling Software U.S. . . . has only an indirect interest in the outcome.

ANSTEC Supplemental Opposition to Recom Motion to Disqualify at 4.

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Implicit in ANSTEC's argument is the thought that to apply in a litigation context, Rule 1.7 requires the adversity of formal parties to litigation; but the Rule is not so limited. Rule 1.7 applies when there is adversity of positions "to be taken ... with respect to a matter." The comments to the D.C. Rule of Professional Conduct make it clear that the "matter" is broader than the litigation; it encompasses the subject of the litigation:

> The concept of a "matter" is typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the position of [the] parties exists .... A lawyer may not undertake a presentation known to be adverse to the interests of another client, whether that representation is in a court proceeding, an on-the-record administrative hearing, a notice-and-comment rulemaking, or in an effort to influence policy or achieve a legislative result.

Comment 3.

ANSTEC, represented by Crowell & Moring, challenges Recom's ability to Sterling Software (U.S.), however, is one of the authors of Recom's proposal—in particular, portions of the mission suitability proposal and the proposed by Recom. The challenge to Recom is also a challenge to Sterling Software (U.S.), which undoubtedly has "taken a position" in the CAPES procurement.

Considering only the litigation, Sterling Software (U.S.) will have to "take a position," although not as a formal party. Sterling Software (U.S.) is responsible for the

Sterling Software (U.S.) is supplying the proposed work force, and will undoubtedly assist Recom personnel in justifying the reasonableness of the and mission suitability portions of the proposal. Testimony by Sterling Software (U.S.) personnel is not inconceivable.

Informed commentary rejects the notion that the client asserting the conflict must be one of parties to the litigation:

> On the other hand, adversity of position in litigation is not a *necessary* precondition for the existence of a direct conflict. If, for example, two businesses were competing for the same Government contract, and each engaged the same lawyer to prepare bids, Rule 1.7(a) [of the Model Rules of Professional Conduct] would surely be applicable. A number of cases hold that representation is directly adverse ... when a lawyer may be called upon to attack the credibility as a witness of a person the lawyer currently represents ... in a substantially related matter, even if that person is not a party in a pending matter.

Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.7:203, at 234 (2d ed., Supp. 1992).

Recom's counsel represents that Sterling Software (U.S.) personnel are now deeply involved with Recom's personnel in defending against ANSTEC's protest. Recom Supplemental Memorandum in Support of Disqualification at 9. ANSTEC, moreover, anticipates the participation of Sterling Software (U.S.) in the litigation; it has sought information by written discovery from Recom's subcontractors on responsibility for certain phases of the proposal and oral conversations regarding . As ANSTEC mounts an attack on Recom's proposal it also mounts an attack on Sterling Software (U.S.), the author of part of the proposal. If ANSTEC, through Crowell & Moring, is successful in overturning the award to Recom, both Recom and Sterling Software (U.S.) will be deprived of revenue from this contract.[4] Thus, there is a clear and direct adversity of interest between ANSTEC and Sterling Software (U.S.) with respect to the litigation over the CAPES procurement.

Crowell & Moring also argues that its other client (Sterling Software (U.S.A.)) is a separate subsidiary of the parent Sterling Software, Inc., and has an attenuated relationship with Sterling Software (U.S.):

> [U]pon information and belief, the relationship between these two legally distinct entities, which have different businesses, operate as separate profit centers, and seek and retain outside counsel independently from each other, is very attenuated.

ANSTEC Opposition to Recom Motion to Disqualify at 16.

We do not consider the relationship attenuated. To the contrary, Crowell & Moring must treat Sterling Software (U.S.) and Sterling Software (U.S.A.) as if the subsidiaries are one client.

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[4] Recom's counsel represents that Sterling Software (U.S.) will over the next five years if Recom does not retain the contract. Recom Supplemental Memorandum in Support of Disqualification at 4.

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Sterling Software, Inc. operates on a one company philosophy, providing common , to the subsidiaries. In this regard, we note that the letter refusing consent for Crowell & Moring to represent ANSTEC was written by the executive vice president and general counsel of Sterling Software, Inc. The subsidiaries do not have their own in-house counsel; legal advice is furnished through the parent's Office of General Counsel.[5] Thus, if Crowell & Moring is allowed to remain in the protest, it could very well find itself in the anomalous position of fighting Sterling Software, Inc.'s Office of General Counsel on matters related to the CAPES procurement, while assisting that same office on matters related to its other business with Sterling Software (U.S.A.).

Further, it is apparent that Sterling Software (U.S.) acts as a corporate "big sister" to Sterling Software (U.S.A.), a client of Crowell & Moring. The president of Sterling Software (U.S.) is on assignment to manage the transition and integration of Sterling Software (U.S.A.) into the Sterling Software corporate family. Sterling Software (U.S.) provides management support and other expertise to the conduct of Sterling Software (U.S.A.)'s business. The two subsidiaries are not isolated entities; they are in the same general business (providing goods and services to the Government) and there is considerable cross-fertilization of support and personnel.

As noted above, an employee of Sterling Software (U.S.) who participated with Recom in developing the proposal at issue in this protest has been directed to assist Sterling Software (U.S.A.) in obtaining Government business and managing its present Government contracts. Given Crowell & Moring's simultaneous representation of Sterling Software (U.S.A.) and ANSTEC, this person could very well be advised by Crowell & Moring (in its capacity as the lawyer for Sterling Software (U.S.A.)) and also be a hostile target of opportunity for Crowell & Moring (in its capacity as lawyer for ANSTEC).

The case of *Teradyne Inc. v. Hewlett-Packard Co.*, No. C-91-0344, 1991 WL 239949 (N.D. Cal. 1991) is instructive. There, a firm represented Teradyne against the Hewlett-Packard Co., in a patent infringement suit, while at the same time it represented Apollo Computer, a wholly-owned subsidiary of Hewlett-Packard, in trademark matters. The court disqualified the firm from representing Teradyne:

> The court finds that [Hewlett-Packard]'s control and supervision of the legal affairs of Apollo, and specifically its direct role in the retention and supervision of the work of Fish & Richardson as outside counsel, represents a significant identity of legal interest between Apollo and its parent [Hewlett-Packard]. This identity of interest is sufficient for a finding that the two should be treated as a single client for the limited purpose of determining whether there is a conflict between [the law firm's] representation of Apollo and its representation of Teradyne in the present action against [Hewlett-Packard]. See *Hartford Acc. and Indem. Co. v. RJR Nabisco, Inc.*, 721 F.Supp. at 540 (parent deemed client of subject law firm through representation of its subsidiary where parent supervised and directed course of litigation on behalf of subsidiary).
>
> . . . .
>
> The court finds that the disqualification standard for adverse simultaneous representation should apply to the facts of this case. The degree of connectedness between [Hewlett-Packard] and Apollo, particularly the fact that all of Apollo's legal work was referred to and handled by [Hewlett-Packard's] office of legal counsel, leads the court to conclude that although [Hewlett-Packard] and Apollo may be separate entities for some purposes, they are one client for the purposes of the conflict rules. [The law firm is] therefore disquali-

[5] Sterling Software (U.S.A.) retained Crowell & Moring by retainer letter dated October 4, 1993, signed by a legal administrator of Sterling Software (U.S.A.). Retainer Agreement. This appears to be a renewal of the firm's relationship with the client when the client was an independent entity called Systems Center. Declaration of Jeanette Meier (Oct. 14, 1993) ¶ 7; ANSTEC's Opposition to Recom's Motion to Disqualify, at 13. There is a question whether the legal administrator was authorized to sign this agreement in light of the particular terms and conditions in the retention letter. Crowell and Moring agrees those terms are irrelevant to the issue before the Board. Letter from Crowell & Moring to Board (Oct. 14, 1993.) What is not refuted by the retention letter is that the parent's (Sterling Software Inc.) Office of General Counsel is responsible for legal work for the subsidiaries.

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fied from further representation of plaintiff Teradyne in this matter.

Id.[6] at *5-6.

ANSTEC points to *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980) for the proposition that there is no *per se* disqualification of lawyers when simultaneously suing and representing "sister" corporations on unrelated matters. Rather, the relationship of the subsidiaries is to be examined. *Id.* at 272. The proposition is correctly stated. But there, the court noted that the law firm's withdrawal from one of the client relationships prevented a conflict sure to arise when: (1) the subsidiaries were placed in the same division of the parent; (2) the same chief executive officer of the division sat on the boards of both subsidiaries; and (3) legal work for the two subsidiaries was consolidated at headquarters. *Id.* In this case, variations on that theme are present. Here the parent provides common legal services to the subsidiaries with management personnel from Sterling Software (U.S.) guiding and directing the operations of sterling Software (U.S.A.).

Similar relationships have been found sufficiently close to warrant disqualification. In *Stratagem Development Corp. v. Heron International N.V.*, 756 F.Supp. 789 (S.D.N.Y. 1991), the court, applying Canon 5 of the New York Code of Professional Responsibility, disqualified a law firm. The firm represented a client suing a property developer for breach of a development agreement and represented a subsidiary of the same developer in an unrelated labor dispute. The court found that the duty of undivided loyalty to client, which Canon 5 promoted, extends when the client is a subsidiary of the entity to be sued. Thus the firm could not at the same time represent both a subsidiary and another party suing the parent of the subsidiary's parent. *Id.* at 792; *see also Glueck.*

Decision

Recom's motion to disqualify ANSTEC's present counsel, Crowell & Moring, is GRANTED. Crowell & Moring may, however, work with ANSTEC in securing new counsel and familiarizing new counsel with the proceedings to date. Upon application of counsel, the Board will entertain a motion to suspend proceedings for a period of no longer than five working days to allow these things to be done.

[¶ 26,495] Integrated Systems Group, Inc. v. Department of the Navy

GSBCA No. 12571-P, October 20, 1993.

Protests, GSBCA—Dismissal of Protest—Frivolousness.—A protest was dismissed as frivolous because the protester knew, prior to filing the protest, that the first count was false and knew also, after responding to the government's interrogatories, that the second count was false. The protester alleged that the government created an ambiguity in its solicitation by asking offerors to propose computers with standard connectors but, at the same time, specifying a nonstandard pin assignment for the connectors. However, the pin assignments contained in the solicitation were consistent with the standards established by the Electronic Industries Association and the Telecommunications Industry Association.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Angela J. Cosentino, Naval Air Warfare Center, Indianapolis, Indiana, and Demetria Carter, Office of Counsel, Naval Supply Systems Command, Arlington, Virginia.

Before DANIELS, HENDLEY, and NEILL, Administrative Judges.

DANIELS, Administrative Judge: Integrated Systems Group, Inc. (ISG), protests that in conducting a procurement for handheld computers, the Department of the Navy's Naval Air Warfare Center in Indianapolis, Indiana (Navy), took two actions that interfered with full and open competition. First, ISG contends that the Navy created an ambiguity in its solicitation by asking offerors to propose computers with standard RS-232 connectors, but at the same time specifying a non-standard pin assignment for

[6] The asterisk refers to the Westlaw page designation as it appears in the Westlaw printout.

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the connectors. As a result, according to protester, prospective offerors could not understand what types of connectors the agency actually sought. Second, ISG maintains that the Navy prejudiced the competition by giving some vendors, but not all, special information that clarified the intent of certain specifications contained in the solicitation. A third count of protest was abandoned early in the protest proceedings.

ISG raised these allegations in a protest it filed with the contracting officer before initial proposals were due. The contracting officer denied that protest after proposals were received. ISG has timely raised the same grounds at the Board. Rule 5(b)(3)(iii) (41 CFR 6101.5(b)(3)(iii) (1992)).

We dismiss the protest as frivolous. ISG knew, prior to filing the protest, that the first count was false. Protester also knew or should have known, prior to responding to the Navy's interrogatories—at the very latest—that the second count was false. This is a case that should never have been presented to the Board for decision.

Findings of Fact

1. On June 18, 1993, the Navy issued the solicitation in question. The solicitation required that any computer offered in response to it had to meet numerous specifications, among which were restrictions on the kind of input/output port on the computer. The port had to be "full RS-232" and have a "standard 25 pin 'D'." Assignments for pins 2 through 8 were specified. Protest File, Exhibit 8 at 9th unnumbered page.

2. The pin assignments contained in the solicitation are consistent with standards for the RS-232 "interface between data terminal equipment and data communication equipment employing serial binary data interchange" established by the Electronic Industries Association/Telecommunications Industry Association. Protest File, Exhibits 11 at 8, 12 at 15. Upon reading the solicitation, ISG's senior associate who was responsible for the firm's response to the solicitation believed that a computer with an RS-232 interface with usual pin assignments would be acceptable to the Navy. Transcript at 148.

3. Under the industry standard for the RS-232 interface, pin 11 is unassigned. Protest File, Exhibits 11 at 8, 12 at 15. In amendment one to the solicitation, the Navy added assignments for seven pins that had not been mentioned in the original solicitation. One of these was pin 11, which was given a "DSR" (data set ready) function. *Id.*, Exhibit 8 at 3d unnumbered page.

4. The Navy electronics engineer who was responsible for writing the solicitation's specifications gave this explanation for the change: The computers being purchased under the solicitation are to be linked to optical scanners, which will in turn be used to make settings on sonobuoys (devices which, when placed in the ocean, acoustically detect submarines and radio information about them to aircraft). Transcript at 64-67. The settings may have to be made under adverse conditions, such as in a rainstorm on the deck of an aircraft carrier. *Id.* at 82, 121-22. After the solicitation had been issued, the engineer gave additional thought to the agency's requirements for the computers. He realized that the likelihood of successful operation of the computers/optical scanners would be enhanced if the number of places on the computer that are open to the elements were to be minimized. He therefore determined that each computer should have only a single interface with the scanner linked to it. Each scanner is designed to be linked to a peripheral device, as well as a computer. To convey through a single interface information from the computer to both the scanner and the peripheral device, functions would have to be assigned to pins on the computer's interface other than those originally mentioned. *Id.* at 79-83, 95-98.

5. ISG's senior associate was asked whether, after having read this amendment, he believed that a computer with an RS-232 interface with usual pin assignments would be acceptable to the Navy. His complete response was:

> No. I was chagrined to note that I could not, that it would not be acceptable, because they very clearly and properly, you know, specified what they needed.

Transcript at 188; *see also id.* at 149 ("to me that's a change"). The Navy engineer also understood that the amendment caused an RS-232 interface with an unassigned pin 11 to become unacceptable. *Id.* at 135-36.

6. ISG's senior associate specifically testified that his firm is not quarreling, through this protest, with the Navy's assessment of its needs. Transcript at 151 ("we don't seek here to dispute the government's desire or need to modify the standard"). Protester's posthearing brief, at 2, confirms this position: "Protester does not challenge the wisdom of the assignment of pin 11."

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7. The Navy engineer testified that in his view, the assignment of pin 11 is not inconsistent with the words "full RS-232" in the original solicitation. He predicated his conclusion on this statement in the industry standard: "Pin assignments for circuits not specifically defined ... are to be made by mutual agreement. Preference should be given to the use of unassigned pins ...." Transcript at 83-86, 90-92, 105-10; Protest File, Exhibits 11 at 9, 12 at 15. ISG's senior associate believes that the assignment and the solicitation's words are inconsistent; he looked to the phrase at the end of the last-cited standard provision: "but in the event that additional pins are required extreme caution should be taken in their selection." Transcript at 177; Protest File, Exhibits 11 at 9, 12 at 15. In light of our resolution of the case, we need not decide who is right.

8. After the solicitation was issued, several prospective offerors contacted the contracting officer by phone and letter, asking questions about the document. The contracting officer responded to the questions in two ways. First, after consulting with the engineer who was responsible for writing the specifications, she issued amendment one. Transcript at 29-31; Protest File, Exhibit 8 at 1st-3d unnumbered pages. Second, she responded individually to the vendors who had contacted her, attempting to describe to each of them how the amendment's provisions did or did not respond to their concerns. Transcript at 29-31; Protest File, Exhibits 5E-5I. The contracting officer testified—and ISG does not contest her conclusion—that the letters conveyed no more information than is contained in the amendment. Transcript at 52-54.

9. Still later, but before the closing date for receipt of initial proposals, prospective offerors directed additional inquiries to the contracting officer. Transcript at 37-39, 54; Protest File, Exhibits 5C, 5D, 5J. One of these was a letter from Corvallis Micro Technology, Inc. (CMT), asking that the Navy modify specifications in various ways. This letter was dated August 18, less than a week before proposals were due. *Id.*, Exhibits 5J at 1st-2d unnumbered pages, 8 at 1st unnumbered page. The engineer who had written the specifications was on military reserve duty at the time; he would not return until the morning of the day on which proposals had to be submitted. Transcript at 69-70, 92-93. The contracting officer was not familiar with the technical issues raised. *Id.* at 37-38. She consequently turned for help to a Navy programmer, who admittedly did not understand the issues, either. *Id.*; Respondent's Exhibit 4. In an effort to be helpful to CMT, she responded in a tentative way, explaining that the engineer was absent and using phrases such as "[w]e do not have a definitive answer" and "would appear." Protest File, Exhibit 5J at 3d unnumbered page. The information provided to CMT was not given to any other prospective offerors. Transcript at 50. The contracting officer and the engineer now believe that much of the information in the letter is incorrect. *Id.* at 40, 42-43, 94-95.

10. On the day that proposals were due, CMT filed an agency protest regarding certain specifications. Protest File, Exhibit 5A at 1st unnumbered page. This protest was denied by the contracting officer two days later. *Id.* at 3d-4th unnumbered pages. The denial clearly states that CMT did not submit a proposal in response to the solicitation. *Id.* at 4th unnumbered page. CMT has not pursued its concerns at this Board.

11. In responding to interrogatories propounded by the Navy in the course of the instant case, ISG showed the agency that it had independently come into possession of the contracting officer's two letters to CMT which are referenced in Findings 8 and 9. Transcript at 157.

Discussion

The Brooks Act empowers the Board to dismiss a protest it determines is frivolous. 40 U.S.C. § 759(f)(4)(C) (1988). Where we find that the protester knew, before filing its complaint, that a protest ground is false, we dismiss the case pursuant to this authority. *Computer Sciences Corp. v. Department of the Air Force,* GSBCA 12299-P, 93-3 BCA ¶ 26,054, 1993 BPD ¶ 109 (Apr. 7, 1993), at 13. Taking the time of the Board and the affected agency to consider a frivolous allegation is an abuse of the protest process. It postpones the time when the agency can award a contract and receive the goods or services it needs, wastes scarce agency resources, and disrupts the business planning of the other competitors in the procurement.

In this case, ISG advances two grounds of protest. The first of these is that the Navy has represented its requirements for an interface in two ways which are inconsistent with each other: it has said that it needs a standard RS-232 interface, but has also stated specifications for the item which are not standard. Specifically, ISG alleges that amendment one's requirement that pin 11 of the interface be assigned a specific function

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conflicts with the original solicitation's demand that the interface be "full RS-232." *See* Transcript at 175. The ambiguity, according to ISG, inhibits full and open competition.

The testimony of ISG's senior associate who was responsible for the firm's response to the solicitation makes clear that this protest ground is false. By this gentleman's own admission, ISG understood immediately upon reading amendment one that an RS-232 interface with the usual assignment of pins (including a lack of assignment to pin 11) would no longer meet the Navy's requirements. Finding 5.

An "ambiguity" is "the condition of admitting of two or more meanings, or being understood in more than one way, or of referring to two or more things at the same time," or "uncertainty of meaning or significance of a position in relation to something or somebody else." *Webster's Third New International Dictionary* 66 (1986). ISG knew before it filed the protest that the solicitation's specifications regarding the interface were not ambiguous; to the contrary, they were plainly changed by amendment one from one intelligible requirement to another intelligible requirement. Whether the amendment was consistent with the solicitation's requirement that the interface be "full RS-232," as contended by the Navy, or represented a modification of that requirement, as suggested by ISG, is immaterial. *See* Finding 7. What matters is that ISG knew after receipt of the amendment exactly what it had to provide in order to be compliant with the agency's specifications. The first ground of protest is dismissed as frivolous.

We note that the protest complaint contains a subsidiary allegation regarding the RS-232 interface specification: any requirement for a non-standard interface is "unnecessary and unjustifiable and therefore in violation of statutes and regulations." ISG did not pursue this point during the development of the case, and at hearing, the firm's senior associate testified that protester is not challenging the Navy's explanation of why the agency needs an interface with pin 11 assigned. Finding 6.

ISG's second protest ground is that the Navy "failed to create a level playing field by failing to communicate to all interested parties clarifications ... orally and in writing." During discovery in this case, the Navy provided to counsel for ISG, under protective order, copies of correspondence that had been exchanged between the contracting officer and inquiring vendors, between the date that the solicitation was issued and the date on which proposals were due. *See* Board's Memorandum of Conference of Sept. 14, 1993; Findings 8, 9. ISG also had in its own possession copies of correspondence between the contracting officer and a prospective offeror, CMT. Finding 11.

At hearing, ISG was able to point in support of this allegation only to the correspondence involving CMT. *See* Finding 8. That correspondence makes clear that CMT did not submit a proposal in response to the solicitation. Finding 10. Thus, even if the information provided to CMT was highly important, the fact that it was given did not put ISG at a competitive disadvantage. As soon as ISG determined that the only foundation to the second protest ground was a letter to a firm that had chosen not to participate in the procurement, it should have abandoned this count. To have pursued the allegation through hearing was an unnecessary intrusion on the time of the Board and the agency. It caused the Navy to send counsel and two witnesses from Indianapolis to Washington to present testimony on what was clearly not a real issue.

Protester does not even address the allegation in its posthearing brief. Apparently, it has at last abandoned the count. By not informing the Navy that it would take this action, however, ISG has further wasted agency resources by causing agency counsel to spend her time addressing the allegation in her posthearing brief. *SMS Data Products Group, Inc. v. United States* [36 CCF ¶ 75,845], 900 F.2d 1553, 1557-58 (Fed. Cir. 1990).

ISG should have known prior to the hearing that this count was without basis. We dismiss this ground, like the first, as frivolous.

Decision

The protest is **DISMISSED AS FRIVOLOUS.** 40 U.S.C. § 759(f)(4)(C) (1988). Our order suspending the Navy's authority to proceed with the procurement lapses with the issuance of this decision. *Id.* § 759(f)(2).

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[¶ 26,496] CBIS Federal, Inc. v. General Services Administration

GSBCA No. 12516-C(12461-P), October 18, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulated Prevailing Party.—A protester's motion for costs was granted because the parties had stipulated that the protesters and intervenors were prevailing parties and that reasonable costs of filing and pursuing the protests should be awarded. Protests, including reasonable attorney fees, may be awarded to an appropriate interested party when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. A prevailing party has been determined to be an appropriate interested party. The government did not dispute the reasonableness of the protester's costs, and the itemized expenses were found to be reasonable and well-documented regarding attorney fees and taxable costs.

For the protester: Susan Warshaw Ebner, and Petrillo & Hordell, Washington, D.C., by Joseph J. Petrillo, Michael A. Hordell, Eric L. Lipman, and Jessica C. Abrahams. For the government: Seth Binstock, Pamela J. Reiner, and Tenley A. Carp, Office of General Counsel, General Services Administration, Washington, D.C.

Before PARKER, HENDLEY, and HYATT, Administrative Judges.

PARKER, Administrative Judge: CBIS Federal Inc. (CBIS) protested the award of a contract to OAO Corporation (OAO) by the General Services Administration (GSA) for automatic data processing technical support services. The Board consolidated CBIS's protest with a protest previously filed by Computer Data Systems, Inc. A short time later, CTA Inc. and ARC Professional Services Group, Inc., intervened in the consolidated protests on the side of the protesters. On July 17, 1993, GSA terminated the contract with OAO for convenience as a result of GSA's admitted violations of law.

By order dated June 28, 1993, the Board dismissed the consolidated protests pursuant to a stipulation agreement filed by the parties. *Computer Data Systems, Inc. v. General Services Administration*, GSBCA 12455-P et al., 1993 BPD ¶ 179 (June 30, 1993). The Joint Stipulation of Dismissal provided in part:

> The Parties jointly stipulate that GSA evaluated the offers in a manner inconsistent with the evaluation criteria during the competition for the Contract and that this constitutes a violation of the Competition in Contracting Act. In addition, GSA stipulates that it (i) failed to conduct meaningful discussions with the offerors during the competition for the Contract; and (ii) provided information which reasonably led offerors to believe that if changes were made in their rates for skill categories included in the requirement, that such changes would improve the offeror's chances for award, while in actuality, the offeror's chances for award were negatively affected as a result of making such changes.

The parties also agreed in the stipulation that the protesters and intervenors were prevailing parties and that reasonable costs of filing and pursuing the protests should be awarded. CBIS now moves the Board to award those costs.

Under Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988), the Board may award protest costs, including reasonable attorney's fees, to an "appropriate interested party" when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. An appropriate interested party has been defined as a "prevailing party" or "one that has succeeded on any significant issue in the litigation that achieves some of the benefit it sought in bringing suit." *Bedford Computer Corp.*, GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,811, 1989 BPD ¶ 121, at 3.

On July 30, 1992, CBIS filed its motion for payment of protests costs in the amount of $27,525.42. This amount represents $25,550.00 for outside attorney fees, $957.00 for in-house counsel costs, and $1,018.42 for other expenses. We agree that CBIS is an appropriate interested party entitled to recover its costs pursuant to Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988). Respondent does not dispute the reasonableness of protester's costs. We have examined the itemized expenses and find them to be reasonable and well documented as attorney fees and taxable costs.

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Decision

Protester's motion is **GRANTED.** Protester is awarded $27,525.42, to be paid in accordance with statute, 31 U.S.C. § 1304 (1988).

[¶ 26,497] Computer Data Systems, Inc. v. General Services Administration

GSBCA No. 12515-C(12455-P), October 18, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulated Prevailing Party.—A protester's motion for costs was granted because the parties had stipulated that the protesters and intervenors were prevailing parties and that reasonable costs of filing and pursuing the protests should be awarded. Protests, including reasonable attorney's fees, may be awarded to an appropriate interested party when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. A prevailing party has been determined to be an appropriate interested party. The government did not dispute the reasonableness of the protester's costs, and the itemized expenses were found to be reasonable and well-documented regarding attorney fees and taxable costs.

For the protester: Mary Ann Mayhew and Charles B. Machion, and Morgan, Lewis & Bockius, Washington, D.C., by Marcia G. Madsen, Thomas F. Williamson, Brian W. Craver, and David F. Dowd. For the government: Seth Binstock, Pamela J. Reiner, and Tenley A. Carp, Office of General Counsel, General Services Administration, Washington, D.C.

Before PARKER, HENDLEY, and HYATT, Administrative Judges.

PARKER, Administrative Judge: On June 11, 1993, Computer Data Systems, Inc. (CDSI), protested the award of a contract to OAO Corporation (OAO) by the General Services Administration (GSA) for automatic data processing support services. CBIS Federal Inc. also filed a protest of the award and the Board consolidated the two protests. A short time later, CTA Inc. and ARC Professional Services Group, Inc., intervened on the side of the protesters. On July 17, 1993, GSA terminated the contract with OAO for convenience as a result of GSA's admitted violations of law.

By order dated June 28, 1993, the Board dismissed the consolidated protests pursuant to a stipulation agreement filed by the parties. *Computer Data Systems, Inc. v. General Services Administration*, GSBCA 12455-P et al., 1993 BPD ¶ 179 (June 30, 1993). The Joint Stipulation of Dismissal provided in part:

> The Parties jointly stipulate that GSA evaluated the offers in a manner inconsistent with the evaluation criteria during the competition for the Contract and that this constitutes a violation of the Competition in Contracting Act. In addition, GSA stipulates that it (i) failed to conduct meaningful discussions with the offerors during the competition for the Contract; and (ii) provided information which reasonably led offerors to believe that if changes were made in their rates for skill categories included in the requirement, that such changes would improve the offeror's chances for award, while in actuality, the offeror's chances for award were negatively affected as a result of making such changes.

The parties also agreed in the stipulation that the protesters and intervenors were prevailing parties and that protest costs should be awarded. CDSI now moves the Board to award those costs.

Under Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988), the Board may award protest costs, including reasonable attorney's fees, to an "appropriate interested party" when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. An appropriate interested party has been defined as a "prevailing party" or "one that has succeeded on any significant issue in the litigation that achieves some of the benefit it sought in bringing suit." *Bedford Computer Corp.*, GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,811, 1989 BPD ¶ 121, at 3.

On July 30, 1993, CDSI moved for protest costs in the amount of $34,963.26. On September 12, 1993, CDSI filed a supplement to its motion which raised the total amount to $39,526.28. Of the total amount claimed,

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$39,013.57 represents attorney fees and $512.71 represents other expenses. We agree that CDSI is an appropriate interested party entitled to recover its costs pursuant to Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988). Respondent does not dispute the reasonableness of protester's costs. We have examined the itemized expenses and find them to be reasonable and well documented as attorney fees and taxable costs.

Decision

Protester's motion is **GRANTED.** Protester is awarded $39,526.28, to be paid in accordance with statute, 31 U.S.C. § 1304 (1988).

[¶ 26,498] CTA, Incorporated v. General Services Administration

GSBCA No. 12511-C(12455-P), October 18, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulated Prevailing Party.—A protester's motion for costs was granted because the parties had stipulated that the protesters and intervenors were prevailing parties and that reasonable costs of filing and pursuing the protests should be awarded. Protest costs, including reasonable attorney fees, may be awarded to an appropriate interested party when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. A prevailing party has been determined to be an appropriate interested party. The government did not dispute the reasonableness of the protester's costs, and the itemized expenses were found to be reasonable and well-documented regarding attorney fees and taxable costs.

For the intervenor: Shea & Gardner, Washington, D.C., by I. Michael Greenberger and J. Bradford Weigmann. For the government: Seth Binstock, Pamela J. Reiner, and Tenley A. Carp, Office of General Counsel, General Services Administration, Washington, D.C.

Before PARKER, HENDLEY, and HYATT, Administrative Judges.

PARKER, Administrative Judge: Computer Data Systems, Inc., and CBIS Federal Inc. protested the award of a contract to OAO Corporation (OAO) by the General Services Administration (GSA) for automatic data processing technical support services. The protests were consolidated by the Board. On June 21, 1993, CTA Inc. (CTA) intervened in the consolidated protests on the side of the protesters. On July 17, 1993, GSA terminated the contract with OAO for convenience as a result of GSA's admitted violations of law.

By order dated June 28, 1993, the Board dismissed the consolidated protests pursuant to a stipulation agreement filed by the parties. *Computer Data Systems, Inc. v. General Services Administration,* GSBCA 12455-P et al., 1993 BPD ¶ 179 (June 30, 1993). The Joint Stipulation of Dismissal provided in part:

> The Parties jointly stipulate that GSA evaluated the offers in a manner inconsistent with the evaluation criteria during the competition for the Contract and that this constitutes a violation of the Competition in Contracting Act. In addition, GSA stipulates that it (i) failed to conduct meaningful discussions with the offerors during the competition for the Contract; and (ii) provided information which reasonably led offerors to believe that if changes were made in their rates for skill categories included in the requirement, that such changes would improve the offeror's chances for award, while in actuality, the offeror's chances for award were negatively affected as a result of making such changes.

The parties also agreed in the stipulation that intervenor CTA was a prevailing party and that reasonable costs of filing and pursuing the protest should be awarded. CTA now moves the Board for award of those costs.

Under Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988), the Board may award protest costs, including reasonable attorney's fees, to an "appropriate interested party" when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. An appropriate interested party has been defined as a "prevailing party" or "one that has succeeded on any significant issue in the litigation that achieves some of the benefit it sought in bringing suit." *Bedford Computer Corp.,*

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GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,811, 1989 BPD ¶ 121, at 3.

CTA Inc. moved for an award of its protest costs in the amount of $13,745.40. Of this total amount, $13,511.25 represents attorney fees and $234.15 represents other expenses. We agree that CTA, as an intervenor on the side of the protesters, is an appropriate interested party entitled to recover its costs. *See Computer Consoles, Inc.*, GSBCA 8450-C(8134-P), 86-3 BCA ¶ 19,069, 1986 BPD ¶ 103. Respondent does not dispute the reasonableness of CTA's costs. We have examined the itemized expenses and find them to be reasonable and well documented as attorney fees and taxable costs.

Decision

Protester's motion is GRANTED. Protester is awarded $13,745.40, to be paid in accordance with statute, 31 U.S.C. § 1304 (1988).

[¶ 26,499] Security Services, Inc. v. General Services Administration

GSBCA No. 12390-C(11052), October 25, 1993.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Legal Support for Position.—The government's position that estoppel could not be used against the government was not substantially justified, because the controlling law was clear that the use of estoppel against the government was preserved under the facts of the case. In this case, the contracting officer issued a modification that increased the contractor's base year hourly price and costs to the government for the provision of guard services, in return for which the contractor agreed to pay its employees in accordance with two recently issued Department of Labor wage determinations that the modification made applicable to the contract. The government averred that the modification was in error and that it was not estopped from recovering funds it had paid to the contractor pursuant to the erroneous modification. However, the use of estoppel has been preserved against the government in cases when the representations made were within the scope of the agent's authority.

Attorney Fees and Costs Under Equal Access to Justice Act—Statutory Fee Rate—Cost of Living Adjustment.—Attorney fees that exceeded the statutory cap were reduced because there is no General Services Administration regulation that provides that an increase in the cost of living requires an award at a fee higher than the statutory cap. The contractor was a prevailing party, and the government did not prove that its position was substantially justified. However, the contractor submitted copies of billing statements for attorney fees for hourly rates that ranged from $125 per hour to $225 per hour. The Equal Access to Justice Act provides that attorney fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living justifies a higher fee. The contractor made no attempt to argue that it was entitled to an increased hourly rate and did not even acknowledge that there is a statutory cap on fees.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Change of Counsel.—Services performed after a change of legal representation was allowed were compensable because the services performed were reasonable, and the substitution did not slow the appeal process and did not result in duplicative charges. The government contended that it should not be made to pay for the contractor's business decision to substitute counsel and that the change of legal representation resulted in duplicative charges. However, the board examined whether the substitution slowed the appeal process and whether fees associated with the substitution were reasonable.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Prelitigation Charges.—Although the government alleged that the contractor included litigation costs incurred prior to the beginning of the adversary adjudication, the charges were accepted, because the invoices were dated after the contracting officer's final decision was rendered. The beginning of the adversary adjudication is the date on which the contractor receives the contracting officer's final decision. The law firm's involvement came after the contracting officer's final decision. Moreover, the law firm's affidavit represented that the fees were related to the appeal.

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Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Other Litigation Charges.—A portion of the attorney fees sought by a contractor was disallowed because the fees were not related to the appeal but, rather, were related to an agency-level protest involving another solicitation. The Equal Access to Justice Act provides that attorney fees and other expenses may be awarded to the prevailing party, other than the government, in connection with the proceeding in which it prevailed. The attorney invoices showed that only a portion of the billed hours was spent on the appeal, and the invoices were not clear on how that time was apportioned between the protest and the appeal. In light of a Supreme Court instruction that an applicant should maintain billing time records in a manner that would enable a reviewing court to identify distinct claims, the charges where entries showed time spent on both the protest and the appeal were disallowed, because it was impossible to determine how the time was apportioned for each claim.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Number of Hours.—The award of attorney fees was reduced because the board found that it did not require 17 hours to complete a one-page notice of appeal that did not include the details of the dispute or provide support for the arguments advanced. The Supreme Court has determined that hours that are excessive should be excluded from the fee request. Therefore, since the notice of appeal briefly described the nature of the dispute and the relief sought, the board allowed two hours of time, which it stated was generous given the brevity of the information required.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Proportion of Successful to Unsuccessful Claims.—The fees claimed for opposing the government's motion to dismiss a claim for lack of jurisdiction were awarded because the contractor's efforts were successful. Although the contractor, through its prior counsel, attempted to get the contracting officer to rescind the final decision, it changed counsel, and the new counsel opposed the rescission of the final decision and the motion to dismiss. The Supreme Court has stated that the most critical factor in establishing a fee award is the degree of success achieved. The second counsel was successful inasmuch as the board denied the government's motion to dismiss, and therefore, the fees were allowed.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Documentation.—Although the government contended that some of the entries by the contractor's attorney were too vague, the billing records were sufficient to support the award because they identified the task involved, the fee charges, and the attorney's billing rates. Billing records need to state the exact time spent on the case, by whom, that person's status, and the usual billing rates. The brevity of the entries was not troubling to the board, because there was enough information in each of the entries to determine the reasonableness of the fee.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Expenses.—Expenses incurred for secretarial work were not allowed, because there was no indication of why the time was necessary or how it was spent, of the billing rate of the secretaries involved, or whether the charges were for overtime or for temporary help to assist with the appeal. Not only were the invoices not specific enough, but secretarial costs are normally office overhead expenses and should be absorbed in the attorney fees charged to clients unless the demands of the case require supplemental charges.

For the appellant: Kinosky & Associates, Arlington, Virginia, by Barbara S. Kinosky. For the government: Sharon Roach, Office of General Counsel, General Services Administration, Washington, D.C.

Before LABELLA, BORWICK, and NEILL, Administrative Judges.

LABELLA, Administrative Judge: Security Services, Inc. (SSI or applicant), has filed an application for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988), incurred in its appeal of the General Services Administration's (GSA's or Government's) decision to withhold monies owing under contract GS-05P-86-GAC-0054 from final payment due to an alleged overpayment. We ruled in a decision dated November 10, 1992, that SSI was entitled to these withheld funds.

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The Government does not dispute SSI's status as a prevailing party or its eligibility to recover EAJA costs. However, GSA contends that its actions were substantially justified and disputes the quantum claimed. We find that GSA's position in withholding the funds and defending the ensuing litigation was not substantially justified and that SSI is eligible for an award of attorney fees and expenses under EAJA. The application is granted in the amount of $21,107.76.

Background

The events leading to GSA's decision to withhold monies owing to SSI from its contract to provide professional armed guard services at four Government facilities in Illinois are listed in the Board's decision in *Security Services, Inc. v. General Services Administration,* GSBCA 11052, 93-2 BCA ¶ 25,667 (1992). They are briefly summarized below.

SSI was awarded a contract to provide armed guard services. The contract contained two wage determinations from the Department of Labor (DOL) which established the minimum wage at which SSI could compensate its work force. Eight months into the first contract period, the contracting officer issued modification nine to the contract which increased SSI's base year hourly price and cost to the Government for the provision of guard services. In return, SSI agreed to pay its employees in accordance with two recently issued DOL wage determinations which the modification made applicable to the contract. Subsequently, GSA decided that SSI had been overpaid as a result of modification nine and later modifications based on the rates contained therein.

In its decision granting SSI's appeal, the Board found that the modification was a valid exercise of the contracting officer's authority supported by consideration. GSA argued that the modification was in error because the contract provided for such a modification to occur upon the exercise of the option period and it occurred prior to the option period. In making this argument, GSA argued that it was not estopped from recovering the funds and relied on the Supreme Court's decision in *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990) (hereinafter *OPM*), which limited the instances in which estoppel is available against the Government. However, the Board stated that *OPM* was inapplicable and that *Broad Avenue Laundry and Tailoring v. United States* [30 CCF ¶ 70,003], 681 F.2d 746 (Ct. Cl. 1982), was controlling. In *Broad Avenue,* the court ruled that the Government was estopped from denying the validity of a contract modification prematurely incorporating a new wage determination because the mistake was within the contracting officer's area of actual authority. GSA argued that *Broad Avenue's* vitality after *OPM* was in question and, thus, its position was substantially justified.

Discussion

Substantial justification

The EAJA provides that a prevailing party under an adjudication conducted by the Government is entitled to an award of attorney fees and expenses unless the Government's position is substantially justified or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1) (1988). The Government has the burden of proving that its litigation position and the agency actions or omissions that formed the basis of the adjudication were substantially justified. *Schuenemeyer v. United States,* 776 F.2d 329, 330 (Fed. Cir. 1985); *Warwick Holding Co.,* GSBCA 8459-C(5070) et al., 88-3 BCA ¶ 21,114, at 106,590. Substantial justification has been interpreted to mean "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988).

In determining whether the Government's position was substantially justified, we do not end our inquiry with the fact that the Government lost the case. Instead, the test is whether the Government's position was reasonable in light of the law and the facts. *Gavette v. Office of Personnel Management,* 808 F.2d 1456, 1467 (Fed. Cir. 1986) (en banc).

GSA contends that its position in recovering an overpayment to SSI was due to a contracting officer's mistake and was substantially justified because the estoppel issue was unclear. In its opposition to the application, GSA asserts that in the wake of *OPM,* it was not clear whether estoppel could be used against the Government. GSA points to the Board's decision in *Turner Construction Co. v. GSA,* GSBCA 11361, 92-3 BCA ¶ 25,115, which questioned the vitality of *Broad Avenue* and the dissent in *Security Services, Inc.,* as evidence that the issue was unsettled. Thus, GSA argues, this uncertainty in the state of the law substantially justified its decision to recover the overpayment and to oppose SSI's appeal of that action.

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SSI disputes GSA's argument that the law concerning using estoppel against the Government was unsettled. SSI contends that the law was clear and that modification nine was a valid exercise of the contracting officer's authority which was supported by consideration. SSI asserts that GSA's decision to recover the overpayment was not legally sufficient to constitute substantial justification.

After reviewing the arguments pertinent to the Government's position, we cannot find that its actions were substantially justified. Our appellate authority instructs us that "[t]he Government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.' It is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.' " *Gavette,* 808 F.2d at 1467 (quoting *Gava v. United States,* 699 F.2d 1367, 1375 (Fed. Cir. 1983)).

In making its arguments, GSA has advanced a tenuous position on the use of estoppel against the Government. The Government reasons that the issue was unclear because the Federal Circuit in *JANA Inc. v. United States,* 936 F.2d 1265 (Fed. Cir. 1991), the Board in *Turner Construction,* and the dissent in *Security Services, Inc.,* questioned whether estoppel could be used against the Government. The fact that the Government may have succeeded in convincing another tribunal that its position is correct does not mean that it was substantially justified in advancing that position in this appeal. "[T]he fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified." *Pierce,* 487 U.S. at 569; *see also Community Heating & Plumbing Co., Inc. v. Garrett,* No. 92-1362 (Fed. Cir. Aug. 20, 1993); *Schuenemeyer,* 776 F.2d at 331 (Government's position is not substantially justified merely because it prevailed before a lower tribunal).

Furthermore, while the clarity of the controlling law is one factor to examine when deciding the issue of substantial justification, *see Drillers, Inc.,* EBCA 451-10-90(E), 91-3 BCA ¶ 24,197, at 121,023, the controlling law in this case was clear. As the majority stated, the Supreme Court in *OPM* specifically preserved the use of estoppel against the Government in cases where the representations made were within the scope of the agent's authority. *See Security Services, Inc.,* 93-2 BCA at 127,687. This was the basis for the *Broad Avenue* decision and those principles controlled the outcome. Thus, even after *OPM,* the issue of estoppel against the Government was settled. GSA has not established that its position was substantially justified. Therefore, SSI is entitled to an award of reasonable fees and expenses.

Hourly rate

In support of its EAJA application, SSI submitted copies of billing statements for attorney fees which total $54,001.75. Keck, Mahin & Cate (Keck, Mahin) requested fees of $20,981.75 and Kinosky & Associates requested fees of $33,020. The fee request consists of 109.50 hours of attorney time by Keck, Mahin; 6.10 hours of paralegal time by Keck, Mahin; and approximately 177.50 hours by Kinosky & Associates. The application covers the period of October, 1990, through July, 1993. The attorney fees listed are based on hourly rates that range from $125 per hour to $225 per hour. The paralegal fees are based on hourly rates of $50 to $55 per hour.

The Government has requested the Board to reduce the attorney fees because they exceed the statutory cap. The EAJA provides that

> attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee.

5 U.S.C. § 504(b)(1)(A) (1988). We have stated that there is no GSA regulation which provides that an increase in the cost of living requires an award at a fee higher than the statutory cap. *Marty's Maid and Janitorial Service v. General Services Administration,* GSBCA 11980-C(10614) et al., 93-2 BCA ¶ 25,713, at 127,926.

SSI has made no attempt to argue that it is entitled to an increased hourly rate and, as the Government has correctly noted, has not even acknowledged that there is a statutory cap on fees. Furthermore, SSI has not broken down the claim to show exactly how many hours were staffed by each of its attorneys and by paralegals on the appeal. Counsel for applicant should have made a more diligent effort to conform to the requirements of the EAJA or at least make it appear that it completely read the statutory requirements. Accordingly, SSI is only entitled to reimbursement of discernible attorney time at the statutory rate of $75 per hour.

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Change of counsel during the proceedings

During the course of the appeal process, SSI changed legal counsel from Keck, Mahin to Kinosky & Associates. The Government argues that SSI's change of legal representation resulted in duplicative charges and that it should not be made to pay for SSI's business decision to substitute counsel. The Board does not accept the Government's argument, and instead will examine whether the substitution slowed the appeal process and whether fees associated with the substitution are reasonable. *See, e.g., White Buffalo Construction Co.,* IBCA 2918-F, et al., 91-3 BCA ¶ 24,221. The Government has not offered, and we do not find, any evidence that the fees were duplicative. Moreover, there is no indication that applicant changed counsel in order to delay the proceedings or abuse the judicial process in any way. The Board finds that the services performed by Kinosky & Associates after the change in counsel were reasonable, especially in light of the results achieved. However, we reduce a portion of the fees on other grounds.

The Government has advanced several arguments concerning the propriety of entries made by both Keck, Mahin and Kinosky & Associates. We will deal with these arguments as they relate to each firm.

Keck, Mahin

Keck, Mahin submitted invoices covering the period of October, 1990, through September, 1991. Pursuant to the EAJA, SSI cannot recover any litigation costs incurred prior to the beginning of the adversary adjudication. We have held that the beginning of the adversary adjudication is the date on which the applicant received the contracting officer's final decision. *Tele-Sentry Security, Inc. v. General Services Administration,* GSBCA 11639-C(7703), 93-2 BCA ¶ 25,816, at 128,530. In this appeal, the contracting officer's final decision was rendered on October 9, 1990. Keck, Mahin's involvement began after the contracting officer's final decision and a fair amount of the charges incurred involved actions which are appropriate to the appeal process. With regard to these entries, we will accept these charges based on the representations made in Keck, Mahin's affidavit that the fees were related to the appeal. However, we disallow some charges incurred by Keck, Mahin for the reasons discussed below.

The Government argues that a portion of the fees incurred by Keck, Mahin were not related to the appeal, but rather were related to an agency level protest involving another solicitation. SSI does not dispute this contention. The EAJA provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding. ..." 5 U.S.C. § 504(a) (1988). The proceeding underlying this fee application is the appeal of the Government's decision to withhold money due to an alleged overpayment, not the protest of an unrelated solicitation.

Keck, Mahin's invoices reveal that 25.30 hours were, either partially or wholly, spent on the protest. The hours at issue can be broken down as follows: 17.6 hours appear on invoice 94814 for October, 1990; 6 hours appear on invoice 108016 for November, 1990; 1.7 hours appear on invoice 102564 for December, 1990. On those occasions where Keck, Mahin only spent a portion of its billed hours on the protest, the invoices are not clear on how that time was apportioned between the protest and the appeal. The Supreme Court instructs us that the applicant "should maintain billing time records in a manner which will enable a reviewing court to identify distinct claims." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). It is impossible to determine how the time was apportioned for each claim from Keck, Mahin's invoices. We will disallow all the charges where entries show time spent on both the protest and appeal. Thus, we deduct 25.30 hours from the award for Keck, Mahin's fees.

The Supreme Court has determined that hours which are excessive should be excluded from the fee request. *Hensley,* 461 U.S. at 434. The Government argues that applicant's counsel expended excessive effort on the appeal and raises two examples with reference to Keck, Mahin's charges. We agree with the Government's objections to Keck, Mahin's hours and add one of our own.

GSA contends that the time spent on the notice of appeal was excessive. Keck, Mahin's invoices show that 17.55 hours were, partially or wholly, spent researching, drafting, reviewing, and revising the notice of appeal. Several of the entries associated with the notice of appeal even postdated the filing of the notice with the Board. The work occurred over a period of two months; eight hours appear on invoice 108016 for November, 1990, and 9.55 hours appear on invoice 107060 for January, 1990. Some of the entries involved show that Keck,

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Mahin's time was spent on several tasks. As with their entries involving the unrelated protest, counsel did not apportion the time between each task. Because it is impossible to determine how the time was apportioned and whether the charges are reasonable, we will assume all 17.55 hours were spent on the notice of appeal.

The notice of appeal is a one page document which states that the appellant is appealing a final decision, and briefly describes the nature of the dispute and the relief sought. The notice does not require the details of the dispute or provide support for the arguments advanced. There is no reason why three attorneys spent over seventeen hours to complete this document. We will only allow two hours of this time and that amount is generous given the brevity of the information required.

The Government contends that three attorneys from Keck, Mahin spent over fourteen hours researching and drafting a letter to the contracting officer concerning the agency level protest and the contracting officer's final decision. We have already deducted a portion of this time from the award because it was spent on the unrelated protest, not the appeal, and are left with 5.20 hours spent on the letter. Our examination of Keck, Mahin's records show that 2.5 hours appear on invoice 94814 for October, 1990, and 2.5 appear on invoice 108016 for November, 1990. Approximately half of the letter referred to the protest and the remainder was an attempt by SSI to have the contracting officer rescind the October 9, 1990, final decision.

The contracting officer ultimately did rescind the October 9 decision, and the Government moved to dismiss the case for lack of jurisdiction on that basis. However, in the meantime, SSI changed counsel and its new counsel, Kinosky & Associates, opposed the rescission of the final decision and the motion to dismiss. Kinosky & Associates was successful in its efforts, and we denied the motion to dismiss. The Supreme Court has stated that the most critical factor in establishing a fee award is the degree of success achieved. *Hensley,* 461 U.S. at 436. As to the hours spent on this letter, Keck, Mahin was entirely unsuccessful and these hours will be deducted from the fee award.

Keck, Mahin's invoices reveal that on October 23, 1990, 3.70 hours were spent researching applicable law and reviewing files. While the Government did not specifically object to this entry, we find that given Keck, Mahin's practice of bundling its charges for both matters, it is unclear whether this time was spent on the appeal or on the protest. Because we cannot identify the specific claim involved, we will deduct 3.70 hours from the fee award.

Keck, Mahin billed SSI for 6.10 hours of paralegal time. One hour of this time was billed at $55 per hour and the remainder was billed at $50 per hour. The paralegal's time was spent on the appeal and the Government has not objected to the hours. Paralegal fees can be recovered through an EAJA application. *See Spectrum Leasing Corp. v. General Services Administration,* GSBCA 10902-C(7347) et al., 93-1 BCA ¶ 25,317 (1992), at 126,513. We award SSI $310 for paralegal time.

Kinosky & Associates

Kinosky & Associates began representing SSI in August, 1991. An examination of its billing statements does not indicate that Kinosky & Associates represented SSI on any matters other than the appeal. With regard to these entries, we will accept these charges based on the representations made in Kinosky & Associates's affidavit that the fees were related to the appeal. However, we disallow some charges incurred by Kinosky & Associates for the reasons discussed below.

The Government objects to some of the charges incurred by Kinosky & Associates, alleging that the time spent was excessive. GSA argues that it is unreasonable for Kinosky & Associates to have spent thirty-one hours on its response to the motion to dismiss. The Government did not raise any specific objections as to the unreasonableness of the time spent on the motion, but only alleged that the response did not address the jurisdictional issue it raised. Because the Government has not articulated any specific objections to the time, we deny the Government's request to reduce the fee award.

The Government argues that Kinosky & Associates spent seventy-seven hours on the summary judgment motions and that this amount of time was excessive. It contends that the factual portion of SSI's motion was taken from earlier pleadings; the legal discussion was composed of lengthy recitations from cases; and that SSI failed to mention *OPM* or *Turner Construction.* The fact that counsel took the facts from an earlier pleading and quoted cases is not troublesome. Counsel still had to analyze the materials she did cite. Furthermore, there was no need to refer to *OPM* or *Turner Construction* when neither of those cases supplied the

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controlling law. Therefore, we deny the Government's request to reduce the fee award.

The Government argues that some of the entries by Kinosky & Associates are too vague upon which to base an award. Our appellate authority instructs us that billing records need to consist of the "exact time spent on the case, by whom, their status and usual billing rates. ..." *Naporano Iron and Metal Co. v. United States,* 825 F.2d 403, 404 (Fed. Cir. 1987). Kinosky & Associates has identified the task involved; the fee charges; and the attorney's billing rate in her billing statements. Where this is the case, the exact hours worked by the attorney can be computed. As we stated in *Spectrum Leasing Corp.,* "we are not troubled by the brevity of some of these entries." 93-1 BCA at 126,148. There is enough information in each of the entries to determine the reasonableness of the fee. Thus, we need not reduce the fee on this ground.

While the majority of Kinosky & Associates's billing entries satisfy the specificity requirements, we are troubled by two entries made in September, 1991, and January, 1992. The invoices show that a total of $2,157.50 was billed by Stephen Mims. While there is a notation which shows that a portion of this charge was for time spent on the Lexis on-line research system, it is unclear how much of the charge should be allocated to Lexis fees and how much to the attorney's. Furthermore, the billing entries do not indicate Mr. Mims' hourly rate or the exact hours spent on the project. Because of this dearth of information, we are unable to determine the reasonableness of the charge and disallow the entire $2,157.50 from SSI's fee award.

SSI requested a total of $54,001.75 in attorney and paralegal fees. In making our award, we have disregarded all fees incurred by Stephen Mims and have reduced the award to the EAJA's statutory ceiling. Accordingly, we find that SSI is entitled to attorney fees for 237.25 hours at the statutory rate of $75 per hour, for a total of $17,793.75, and $310 in paralegal fees.

Expenses

SSI seeks a total of $5,940.95 in disbursements: $921.84 incurred by Keck, Mahin and $5,019.11 incurred by Kinosky & Associates. While the Government has not raised any specific objections to the costs included in the fee application, we have independently examined the entries. Our appellate authority has instructed that we may award "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case was tried." *Oliveira v. United States,* 827 F.2d 735, 744 (Fed. Cir. 1987). In making our award, we are to use our discretion to determine whether an expense may be recovered. *Id.*

Examples of expenses which are recoverable include photocopying; printing and binding of briefs; telephone, postal, and overnight delivery charges; and computer-assisted research. *See American Power, Inc.,* GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766. The majority of the costs sought by SSI fall within one of those categories and will be allowed. However, some expenses fall outside those categories and will be disallowed for the reasons stated below.

Kinosky & Associates included secretarial charges of $2,637.50 among the expenses charged to SSI. There is no indication of why this time was necessary or how it was spent; the billing rate of the secretary or secretaries involved; or whether the charges were for overtime or for temporary help to assist with the appeal. We totally disallow these charges. We have reached this decision not only because the invoices are not specific enough to determine the need and reasonableness of the expenses, but because secretarial costs are normally office overhead expenses and should be absorbed in the attorney fees charged to clients unless the demands of the case require supplemental services. That does not appear to be the situation here.

Kinosky & Associates also included a disbursement of $299.44 under the heading "Legal Research" in its billing invoice for October, 1991. There is no indication that this research pertained to the appeal; that it was a fee for computer-assisted research; or that Ms. Kinosky conducted any legal research during October, 1991. The billing statement must provide enough detail for us to judge the reasonableness of the expense involved. *See Naporano Iron and Metal Co.,* 825 F.2d at 404. We will disallow expenses if an applicant does not explain how they relate to the litigation. *See, e.g., Universal Development Corp. v. General Services Administration,* GSBCA 12174-C(11251), 93-2 BCA ¶ 25,836; *American Power Inc.,* GSBCA 10558-C(8752), 91-2 BCA ¶ 23,766. Kinosky & Associates has not provided us with any detail on this expense or how it relates to the appeal, and we disallow the $299.44 claimed.

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We find that all $921.84 of the expenses incurred by Keck, Mahin are allowable and $2,082.17 of the expenses incurred by Kinosky & Associates are allowable. The total sum awarded to SSI for expenses is $3,004.01.

Decision

SSI's application under the EAJA for attorney fees and costs is **GRANTED IN PART.** We award SSI $17,793.75 in attorney fees; $310 in paralegal fees; and $3,004.01 in expenses, for a total of $21,107.76.

NEILL, Board Judge, dissenting.

I find myself unable to concur in the opinion of the majority because I believe that GSA has demonstrated that its position in this case was substantially justified. The majority concludes that GSA's concern over the possible unavailability of an estoppel argument to appellant in the wake of *OPM* was without justification. My colleagues reach this conclusion by relying upon language in the *OPM* decision which specifically preserved the use of estoppel against the Government in cases where the representations made were within the scope of the agent's authority.

This provision in the *OPM* decision is clear enough. The only difficulty in relying upon it here is that the record was never sufficiently developed to support a conclusion that the exception is applicable to the facts in this case. Indeed, as I pointed out in my dissent to the majority's decision granting appellant's motion for summary relief, the conclusion which should have been reached on this issue was that the exception preserved in *OPM* was *not* available.

I dissented from the majority's decision granting appellant's motion for summary relief precisely because I considered the issue of whether there was adequate consideration for the price adjustment made in modification nine as clearly material to the case and unquestionably in dispute. Because the case had been presented to us to decide on motion for summary relief, I considered that the Board was obliged to draw an inference on this issue which was adverse to appellant, as the movant. In short, I believed that, for purposes of deciding this motion, we should have assumed that the consideration was inadequate. Presumably, this would have rendered the contracting officer's action outside the scope of his authority. Thus, for purposes of deciding the motion for summary relief, the exception preserved by *OPM* would have been inapplicable to the facts in this case. Unfortunately, the majority drew the opposite inference and thereupon promptly concluded that the exception was available.

In deciding this case, the majority seized upon the exception language of the *OPM* decision to lever conveniently its way out of the perplexing issue of whether an estoppel argument could still be used against the Government in the wake of *OPM*. Given GSA's theory of the case, this exception was inapplicable. The agency was left, therefore, to wrestle with the question raised by the *OPM* decision. It is no secret that the *OPM* decision raised a serious question regarding the future use of estoppel by contractor claimants and received considerable attention, at the time, among those working in the public contracts arena.

If GSA acted reasonably in concluding that modification nine was outside the scope of the contracting officer's authority, then clearly its reluctance, at the time, to concede to appellant was substantially justified. Unfortunately we will never know the particulars of GSA's case on this issue. The Board drew its own inference on the issue of consideration without ever affording GSA an opportunity to present evidence and argument on it. Under these circumstances, the benefit of the doubt should go to GSA and appellant's cost application should be denied. The Board, in granting appellant's motion for summary relief, has dealt unjustly with GSA. The injustice is only compounded by now granting appellant's application for costs.

In short, the scope and application of *OPM* was not a foregone conclusion at the time GSA litigated this case. Absent clear-cut facts and applicable law, it is inappropriate to conclude that the Government's position was not substantially justified. In granting the present motion, the majority dispenses with the threshold test under EAJA. For this reason, I respectfully dissent.

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[¶ 26,500] State Street Management Corporation v. General Services Administration

GSBCA No. 12374, October 22, 1993.

Modifications—Authority of Government Agents—Estoppel Against the Government.—The government was not estopped from taking a credit pursuant to contractually provided guidelines, because the government employee who allegedly promised to modify the contract was not the contracting officer and the statement was not in writing. A lease contract required the contractor to provide interior doors in the leased space in the ratio of one door for each 100 square feet of space. The lease also provided that if the government ultimately ordered more or fewer doors than projected, payment would be adjusted accordingly. The contractor failed to establish that the government made a binding offer and that the government could reasonably foresee that it would induce reliance by the contractor.

For the appellant: David D. Terry. For the government: John C. Ringhausen and Diana M. Parks, Office of Regional Counsel, General Services Administration, Atlanta, Georgia.

Before DANIELS and DEGRAFF, Administrative Judges.

DANIELS, Administrative Judge: A lease contract between State Street Management Corporation (State Street), the lessor and the appellant here, and the General Services Administration (GSA), the lessee and respondent, required State Street to provide interior doors in the space in question. The lease established a ratio of one door for each one hundred square feet of space, and said that if GSA ultimately ordered more or less doors than projected, payment would be adjusted accordingly. State Street maintains that GSA promised to alter the ratio to the lessor's benefit and must be estopped from taking a credit pursuant to the stated ratio.

The amount in dispute is less than $50,000. State Street was therefore permitted to elect that the case be considered under our accelerated procedure. Rule 14. It did so. Consequently, the decision is being rendered by a panel of two judges and within 180 days of the date of election. The parties also asked that the case be decided on the basis of a written record, without benefit of a hearing. Rule 11.

We hold that the assertion of estoppel is unsupported for several reasons: GSA never made a promise of sufficient specificity that reliance on what was said would have been reasonable; the promise (such as it was) was made by an individual who had no authority to bind the Government, and it was never reduced to writing; and no proof of reliance has been established. We consequently deny the appeal.

Findings of Fact

1. On October 5, 1989, GSA awarded to State Street [1] a twenty-year lease for space[2] in a building to be constructed in Raleigh, North Carolina. Appeal File, Exhibits 1, 2. The building was to house a military entrance processing station. *Id.*, Exhibits 3, 4. The lease incorporated the provisions of a Solicitation for Offers (SFO) which GSA had issued and to which State Street had responded. *Id.*, Exhibit 1 at 2.

2. A key provision of the lease, with regard to this dispute, is paragraph 20 of the SFO, "Unit Costs for Adjustments." This paragraph states:

> Several paragraphs in this SFO specify means for determining quantities of materials. These are Government projections to assist the offeror in cost estimating. Actual quantities may not be determined until after the lease is awarded and the space layout completed. To enable an equitable settlement if the Government layout departs from the projection, the offeror must list a unit cost for each of these [following] materials. GSA

[1] The name of the entity to which the contract was awarded is State Street Corporation. Virtually all of the documentation in the record is also from State Street Corporation. Whether there is any distinction between State Street Corporation and the appellant, State Street Management Corporation, is not known to us and is ignored by the parties. In this opinion, we use the name "State Street" to refer to both entities.

[2] The lease originally was for 23,989 net usable square feet of space. Appeal File, Exhibit 1 at 1. The document was later amended, in accordance with mutual measurement, to reflect an increase in net usable square feet to 25,550; the parties agreed, however, that rental should be based on a figure of 24,500 net usable square feet. *Id.* at Suppl. Lease Agreement 2.

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will use each unit cost to make a lump sum payment or rental increase if the amount of material required by the layout is more than specified or take credit from rental if the amount is less than specified.

Appeal File, Exhibit 1 at page 7 of SFO.

3. Among the items for which a unit price was required by this paragraph was interior doors. Appeal File, Exhibit 1 at page 8 of SFO. The contract price for this item is $370 per door. *Id.* at 4. The lease states that interior doors "will be provided at a ratio of one door per 100 square feet of space provided." *Id.* at page 16 of SFO. At no time prior to award of the contract was the ratio of doors to space ever discussed by the parties. Declaration of Brenda S. Murray (July 15, 1993) (Murray Declaration) ¶ 7 (uncontested in "Appellant's Rebuttal Documentation" (Aug. 2, 1993)).

4. In late 1990 or early 1991—more than a year after contract award—State Street first mentioned the ratio as a problem. The firm told GSA's Brenda Murray that its construction contractor had based its bid to State Street on the assumption that the Government would order one door for each 250 square feet of space. State Street asked that GSA alter the lease ratio. Murray Declaration ¶ 8, 9 (uncontested in "Appellant's Rebuttal Documentation" (Aug. 2, 1993)). Ms. Murray was a realty specialist at the time; she was not promoted to contracting officer until January 27, 1992. *Id.* ¶ 12.

5. On March 18, 1991, the contracting officer told State Street that "GSA would look at the ratio." Declaration of A. Fred Creighton, Jr., contracting officer (July 16, 1993) ¶ 6, 7 (uncontested in "Appellant's Rebuttal Documentation" (Aug. 2, 1993)). According to GSA, the contracting officer "considered the ratio to be high and requested that Ms. Murray advise [State Street] that GSA would amend the ratio, if possible. Ms. Murray verbally advised [State Street] of this in a telephone conversation." Respondent's Brief at 2. The State Street representative who received the phone call has sworn that Ms. Murray told him "that the lease provision relating to the Unit Cost Item, Interior Doors, would be reduced." Affidavit of David D. Terry (July 13, 1993). More specifically, State Street maintains in an answer to an interrogatory posed by GSA, "Ms. Murray gave the verbal assurances to [State Street], during telephone conversations only, that GSA would grant the same relief that was granted on State Street's Jackson project." Appellant's Answer to Interrogatory 11.

6. On April 5, 1991, State Street wrote to Ms. Murray, "As we discussed on the phone, the number of doors required in the SFO is unrealistical[ly] high. Our [construction] contractor used 1 per 250 square feet for his estimating purposes, but any relief you can give on this matter [would] be greatly appreciated." Appeal File, Exhibit 5.

7. At approximately the same time that the subject lease was agreed to, GSA awarded to State Street (or an affiliate thereof) a lease for space in a building in Jackson, Mississippi. Like the subject lease, the Jackson lease contains a requirement that the lessor provide one interior door for every 100 square feet of space. Under the Jackson lease, GSA actually paid for interior doors at the ratio of one per 200 square feet of space. Respondent's Response to Request for Admissions 3, 4. GSA also awarded to State Street (or an affiliate thereof), during this period of time, a lease for space in a building in Memphis, Tennessee. The ratio of interior doors to space in the Memphis building was one per 300 square feet. *Id.* at 6; Appeal File, Exhibit 7 at 11th unnumbered page. *See, Generally,* Respondent's Brief at 4.

8. On August 8, 1991, State Street renewed its request that the ratio be changed for the subject lease. The letter says, "[W]e will adjust[] our budget quantity as authorized by GSA." State Street noted the ratios in the Jackson and Memphis leases and suggested "we split the difference and use 1 per 250." Appeal File, Exhibit 7 at 1. Appellant made this request in full knowledge that GSA's determination of costs for a particular item on one lease was "a guideline only" for other leases and "in no way obligated" GSA to accept those costs for the same item on those other leases. *Id.*, Exhibit 5.

9. According to Ms. Murray, "No specific alteration or change to the interior door ratio stated in the Lease was ever approved by me, nor do I have any knowledge of any alternate ratio for the interior door ratio stated in the Lease being conveyed by any other GSA official to any representative of State Street." Murray Declaration ¶ 10. State Street says that Ms. Murray's statement is technically correct; "the assurance was unspecific in exact amount of reduction." Appellant's Reply Brief at 3. Appellant maintains, however, that "her verbal assurance was that she would grant the same relief granted on previous contracts. At the time the reduction in the ratio was granted we believed two different reductions in interior door ratios had been granted on two

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separate projects. Our appeal requests the least amount of reduction be honored to 1 door for every 200 square feet." "Appellant's Rebuttal Documentation" (Aug. 2, 1993).

10. The contract provides that the contracting officer may make changes to the instrument, within its general scope, by written order. Appeal File, Exhibit 1 at page 3 of GSA form 3517. The document states additionally that "[n]o services or work for which an additional cost or fee will be charged by the Lessor will be furnished without the prior written authorization of the Contracting Officer or a designated representative of the Contracting Officer." *Id.* GSA's award letter to State Street states that all modifications to the contract must be made by a contracting officer in writing (or in an emergency, orally with written confirmation to follow). *Id.*, Exhibit 2.

11. State Street admits that it never received any documentation from Brenda Murray about her alleged verbal approval of the modification. Appellant's Brief at 2. State Street also admits that GSA never altered the ratio of interior doors to space in writing. *Id.*; Appellant's Response to Respondent's Request for Admission 1; Appellant's Response to Respondent's Request for Production of Documents 1.

12. On July 26, 1991, GSA informed State Street that GSA had available $215,000 to fund the cost of Government-ordered construction in the building. The agency's statement makes no reference to the cost of interior doors—or any other item within the scope of the construction. Appeal File, Exhibit 6. On September 17, 1991, State Street borrowed $294,170.14 to finance the construction. Respondent's Reply Brief, Attachments B, C.

13. On January 10, 1992, GSA informed State Street by telephone that the ratio would not be changed. Appeal File, Exhibit 8. State Street asked the contracting officer to reverse this position. The firm said that Ms. Murray had "agreed to the same settlement reached on [two other] lease contracts." Further, State Street said that it had "relied on this verbal agreement in making certain business decisions including securing loans to be repaid with these funds." *Id.*, Exhibit 9.

14. In writing a supplemental lease agreement on February 10, 1992, the parties agreed that a price adjustment relating to the number of interior doors "has not been resolved." Appeal File, Exhibit 10 at 3d unnumbered page.

15. The contracting officer issued his final decision in this matter on July 9, 1992. He determined "that the Government should not grant relief from a bargained for lease provision, especially, since all offerors relied on the door ratio contained in the SFO." Appeal File, Exhibit 11.

16. An undated supplemental agreement was apparently entered into during July of 1992.[3] It shows that the lease was amended to give GSA a credit of $51,430 relating to interior doors. This amount was calculated by subtracting the number of doors GSA actually ordered (106) from the number projected in the SFO (245), and multiplying the difference by the unit cost of the doors ($370). *Id.*, Exhibit 1 at page 3 of Suppl. Lease Agreement No. 9.

17. By letter dated July 22, 1992, State Street appealed the decision to this Board. Appeal File, Exhibit 13. This letter did not reach us, however; we were unaware of its existence until April 14, 1993, when State Street asked about the status of proceedings. The sender of the notice of appeal has provided us with an affidavit stating that the document was indeed mailed to us, and that "the [GSA] office in Atlanta, Georgia in fact received this written notice of appeal timely." Affidavit of MacAllynn J. Achee (May 3, 1993). GSA counsel has acknowledged that the assertion regarding the agency's timely receipt of the notice is correct. Board's Memorandum of Conference of May 18, 1993, at 1. GSA has subsequently not pursued the issue of whether the notice was filed sufficiently close in time to the issuance of the contracting officer's decision to vest in us jurisdiction to consider the case. *See Cosmic Construction Co. v. United States* [30 CCF ¶ 70,732], 697 F.2d 1389 (Fed. Cir. 1982); *Marci Enterprises, Inc. v. General Services Administration*, GSBCA 12197, 93-2 BCA ¶ 25,717.

[3] The preceding supplemental lease agreement is dated March 12; the succeeding one is dated September 14. Appeal File, Exhibit 1 at Suppl. Lease Agreements 8-10. The contracting officer's decision on the matter now in dispute, which was issued on July 9, states that the agreement in question, which implements the substance of that decision, is enclosed. *Id.*, Exhibit 11. A letter from State Street dated July 27 makes reference to the agreement. *Id.*, Exhibit 12.

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Discussion

The contract in question is for the lease of a building some of whose interior space was to be constructed in accordance with a design, or "layout," which was to be provided by the Government. This layout had not been devised at the time the contract was awarded. (Indeed, the building whose interior was to be constructed did not even exist at that time.) To allow prospective offerors to prepare their proposals in accordance with a common set of expectations, GSA included in the solicitation for offers projections of the amounts of certain items that would ultimately be ordered, as well as a requirement that unit prices be given for those items. The projections were stated as ratios of the numbers of the items to numbers of square or linear feet of space.

We have previously explained that the consequence of the inclusion of these definitive ratios in a lease is that when the Government orders more of an item than is projected, the Government must increase its payments in accordance with the unit price established, and when the Government orders less, it is entitled to a commensurate credit. *Rock Creek Associates K Limited Partnership v. General Services Administration*, GSBCA 11333, 93-1 BCA ¶ 25,351, at 126,270 (1992); *Plaza Maya Limited Partnership*, GSBCA 9086, 91-1 BCA ¶ 23,425, at 117,499-500 (1990). Thus, with relation to the subject lease, the lease projected that the lessor, State Street, would have to provide one interior door per 100 square feet of space, or 245 doors for the entire 24,500 square feet; GSA actually ordered 106 doors, or 139 less than projected; so under the terms of the lease, State Street owes GSA 139 times the unit cost of a door, $370, or $51,430. *See* Finding 16.

Both sides accept this view of the law and the facts. The contracting officer's analysis stops here. State Street complains, however, that there is a compelling reason for going further and reaching a different result: GSA told the firm that it would modify the ratio of doors to space, with a significant negative impact on the amount of credit due the Government, and the firm relied on this statement to its detriment in borrowing money to finance the construction. Consequently, according to State Street, GSA must be estopped from collecting the entire amount it claims. The lessor asks us to conclude that the contract was effectively modified to require that State Street provide one door for each 200 square feet of space, rather than one for each 100. The change in ratio would have resulted in a requirement that the lessor provide 123 doors, not 245. Since only 106 were actually provided, State Street says that GSA is entitled to a credit for only seventeen doors. According to appellant, the credit should have been $6,290 (17 × $370), or $45,140 less than GSA took. Appeal File, Exhibit 13.

The Court of Appeals for the Federal Circuit has questioned whether, in light of *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the defense of estoppel is still available against the Government. *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991). This Board has continued to consider assertions of estoppel, however. *Turner Construction Co. v. General Services Administration*, GSBCA 11361, 92-3 BCA ¶ 25,115, at 125,213-14; *Kosak Micro Systems, Inc.*, GSBCA 10519, 91-1 BCA ¶ 23,342 (1990), 92-2 BCA ¶ 24,853, *aff'd*, 989 F.2d 1201 (table) (Fed. Cir. 1993).

The particular assertion made by State Street, however, fails on several counts. First, an

> essential element of promissory estoppel is that the promisor has made a binding offer in the form of a promise. This promise must be definite and certain so that the promisor should reasonably foresee that it will induce reliance by the promisee or a third party. A mere expression of future intention ... does not constitute a sufficiently definite promise to justify reasonable reliance thereon.

Santoni v. Federal Deposit Insurance Corp., 677 F.2d 174, 179 (1st Cir. 1982) (citations omitted). Whatever promises GSA made to State Street do not meet this test.

The only commitments we have been able to identify are set out in Finding 5: GSA's contracting officer told State Street that the agency would "look at the ratio." The agency admits that its realty specialist, Brenda Murray, told the firm that the agency "would amend the ratio, if possible." These statements are so unspecific that the agency could not reasonably have foreseen that they would induce reliance by the lessor. Even one of State Street's versions of the commitment is nothing more than a "mere expression of future intention"; it is that Ms. Murray said that the lease provision relating to the ratio "would be reduced." State Street alleges in another version that the commitment was more particular: it was "that GSA would grant the same relief that was granted on State Street's Jackson project." The latter version is inconsistent with statements made by the

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lessor during the period of time that the parties were discussing the ratio; we consequently find this account not credible. The statements are described in the following paragraph.

State Street's correspondence manifests an understanding that no definite promise had been made. The firm first told Ms. Murray that "any relief you can give on this matter [would] be greatly appreciated." Finding 6. Later, the company suggested that the agency "split the difference" between the ratios used on two other leases. Finding 8. After the fact, State Street maintained that Ms. Murray had "grant[ed] the same relief granted on previous contracts." Findings 9, 13. This contention does not help to find a definite commitment, however, because the two leases in question involved two different ratios of doors to space, and no relief whatsoever was granted on one of them. Finding 7.[4]

There are two additional problems with State Street's theory that Ms. Murray's statements were the sort of promise on which estoppel may be based. She was not authorized to make a commitment that could bind the Government, and whatever she told the lessor was not in writing. The Supreme Court has held that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *see also Thanet Corp. v. United States* [25 CCF ¶ 82,997], 591 F.2d 629, 635 (Ct. Cl. 1979) ("To the extent that the plaintiff depends on statements made by [Government] officials, it must prove that these officials were acting within the scope of their authority."). A person dealing with the Government may not rely on advice from a "mere conduit." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 65 (1984). At all times relevant to State Street's estoppel claim, Ms. Murray was not a contracting officer. Findings 4, 12.[5] The lessor had been specifically cautioned that only a contracting officer could modify the lease. Finding 10.

Further, State Street has presented no evidence to the effect that a contracting officer ratified whatever Ms. Murray said. Appellant does address the subject of ratification in its reply brief, at 4, where it says that the contracting officer "never contested the many revisions of our Cost Differential Report which all showed a reduced ratio for interior doors" and "participated in the closing of our secondary loan," which was allegedly made after the lender had reviewed those Reports. There is nothing in the record to support this assertion. Even if there were, however, the argument is to no avail. A contracting officer's inaction might create a basis for a claim of estoppel only where it involves a knowing acceptance of benefits to the Government. *Parking Co. of America, Inc.*, GSBCA 7654, 87-2 BCA ¶ 19,823, at 100,296-98. Here, the benefits from the change in the ratio would have been for the benefit of the lessor. The general rule is that "[r]atification . . . must be based on a demonstrated acceptance of the contract," *EWG Associates, Ltd. v. United States*, 231 Ct. Cl. 1028, 1030 (1982), and should be in writing. *Drain-A-Way Systems*, GSBCA 6473, 83-1 BCA ¶ 16,202, at 80,499 (1982).

The oral nature of the statements is a problem for appellant, as well. The lease provided that all changes would be made in writing. Finding 10. State Street admits, however, that whatever GSA said about changing the ratio was never put onto paper. Finding 11. The Court has explained:

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination.

[4] We note additionally that whatever GSA did on the two other leases did not amount to the sort of pattern of performance that could bind the Government; it did not "involve[] repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other." *Universal Development Corp. v. General Services Administration*, GSBCA 11468, 93-2 BCA ¶ 25,662, at 127,675-76 (1992) (quoting U.C.C. § 2A-207(1) (1992)). State Street understood this; it acknowledged that GSA's determination of costs for a particular item on one lease was "a guideline only" for other leases and "in no way obligated" GSA to accept those costs for the same item on those other leases. Finding 8.

[5] The reliance posited by State Street occurred when the firm borrowed money to finance interior construction of the building. This took place on September 17, 1991. Finding 12. Ms. Murray did not become a contracting officer until January 27, 1992. Finding 4.

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Community Health Services, 467 U.S. at 65. Even where the Government has been found to have been estopped by a contracting officer's order that incorporated a mistake of law, a written decision was necessary to the court's conclusion. *Broad Avenue Laundry & Tailoring v. United States* [30 CCF ¶ 70,003], 681 F.2d 746 (Ct. Cl. 1982).

Lastly, even if State Street had been able to demonstrate the existence of a binding promise, its claim of estoppel would still fail. Critical to the success of such a claim is proof that the lessor actually relied to its detriment on the Government's commitment. *USA Petroleum Corp. v. United States* [34 CCF ¶ 75,312], 821 F.2d 622, 625 (Fed. Cir. 1987); *American Electronic Laboratories, Inc. v. United States* [33 CCF ¶ 73,973], 774 F.2d 1110, 1113 (Fed. Cir. 1985); *Kozak Micro Systems, Inc.*, 91-1 BCA at 117,060, 92-2 BCA at 123,986-87. State Street points to only two concrete events in attempting to show detrimental reliance. The first is a statement in a letter: "[W]e will adjust[] our budget quantity as authorized by GSA." Finding 8. This statement, standing alone, says nothing more than that the lessor will comply with whatever direction GSA makes; it hardly establishes that the agency had already authorized a particular change in the ratio of doors to space. The same letter, indeed, shows that no change had yet been agreed to; in writing to the agency, State Street was still suggesting that the lease be modified to include a certain number. *Id.*

State Street also maintains that when it borrowed money to finance construction of the building's interior to suit the Government, it did so in reliance on GSA's promise to alter the door ratio. The lessor has presented no evidence in support of this contention, and we find the proposition hard to swallow. Two months before the loan was made, GSA told State Street that it had available $215,000 to fund the cost of Government-ordered construction. Finding 12. This figure was stated without any apparent reference to the number of doors to be provided, or to any other specific construction matter. *Id.* There is no indication in the record that the agency's construction budget ever changed. Yet State Street borrowed nearly $80,000 in excess of that budget to finance the work. *Id.* Why it did this is not explained by any evidence before us. Even if the lessor had believed for some reason that an additional $45,000 would be forthcoming as a result of a change in the door ratio, that would account for little more than half of the very large disparity between what the agency said it had available to pay and what State Street actually borrowed. The maximum possible proceeds from GSA, even if supplemented in this way, would not give State Street enough funds to repay its loan.

Decision

State Street has not established that GSA should be estopped from enforcing the lease in accordance with its terms. The appeal is therefore DENIED.

[¶ 26,501] Koll Construction Company v. General Services Administration

GSBCA No. 12306, October 12, 1993.

Modifications—Reduction in Requirements or Prices—Credit.—The government was entitled to a credit after a modification that permitted the contractor to provide doors with compression seals rather than with magnetic seals, because the contractor did not have to incur the expense of installing metal strips in the doors with compression seals. The contractor alleged that the subcontractor had read the strips out of the solicitation and did not include a price for the strips in the bid. The contractor's theory was based on the application of the contract clause that stated that specifications govern when drawings and specifications vary. According to the contractor, no door could meet all the requirements listed in the solicitation, and because the strips were mentioned in the drawings but not in the specifications, they were read out of the contract. However, this theory was factually inconsistent with statements made by the contractor and subcontractor while work was progressing. If there was a patent ambiguity between the drawings and the specifications, the contractor had a duty to inquire before bidding.

Pricing of Adjustments—Price Reduction—Calculation of Credit.—The government was entitled to a credit for the deletion of metal strips and magnetic seals around doors but was required to pay an extra amount because of the addition of weatherstripping, the replacement means of sealing the door openings. The contracting officer used a figure

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that was appropriate for magnetic seals on metal doors in figuring the amount of the credit, but the magnetic seals for the wood doors required in the contract were much less expensive. The government was thus required to remit money to the contractor because it took a larger credit than it was entitled to.

For the appellant: Bishop, Payne, Williams & Werley, L.L.P., Fort Worth, Texas, by Richard Lee Brown. For the government: Thomas Y. Hawkins, Office of Regional Counsel, General Services Administration, San Francisco, California.

Before DANIELS, PARKER, and NEILL, Administrative Judges.

DANIELS, Administrative Judge: The parties to a construction contract have agreed to modify the details of part of the work, but dispute the amount by which contract payments should be adjusted as a consequence of the change. They have submitted the case to us for a decision on the basis of a written record. Rule 11.

In most regards, we hold for the Government. We agree with the contracting officer's assessment of the elements of the adjustment and with his determination of prices for two of the three factors. As to the price of the third item, we find that the appropriate amount is between the sums proposed by the two parties.

Findings of Fact

1. This case involves a contract between the General Services Administration (GSA) and Koll Construction Company (Koll). The contract provides that in exchange for payment of $40,200,000 (including options), Koll was to construct tenant improvements in the Edward F. Roybal Federal Building in Los Angeles, California. Appeal File, Exhibit 10. The instrument was awarded on February 28, 1991, with work to begin on April 2 of that year. *Id.*, Exhibits 10, 11.

2. The contract calls for the installation of various types of doors in the building; requirements are prescribed for each of them through specifications and drawings. Appeal File, Exhibits 1-9. The instrument contains a standard changes clause, FAR 52.243-4 (AUG 1987), which says that when the contracting officer alters the specifications or drawings, with an impact on the contractor's cost of performance, he shall make an equitable adjustment to the contract price. *Id.*, Exhibit 1 at page 27 of GSA form 3506. Determination of the amounts of these adjustments is governed by another standard contract clause, GSAR 552.243-71 (APR 1984), "Equitable Adjustments." *Id.* at pages 27-28 of GSA form 3506. Koll made claims under these clauses regarding five different changes that were made to the requirements during the course of construction. *Id.*, Exhibit 34. The contracting officer decided that as a result of all five changes, GSA is entitled to a credit of $53,952. *Id.*, Exhibit 35.

3. The contracting officer calculated this sum as follows. First, he determined the appropriate amount for each of the five changes (which the parties refer to as "conditions"). The total of these amounts is a credit to GSA of $32,337. To the total, he added markups in this fashion:

1.	Conditions 1-5	($32,337)
2.	Overhead costs of Koll's door subcontractor, WBH International, Inc. (WBH), 25 percent of line 1	(8,084)
3.	WBH's profit, 10 percent of line 1	(4,042)[1]
4.	Subtotal, lines 1-3	(44,463)
5.	Tax, 8.25 percent of line 4	(3,668)
6.	Subtotal, lines 4 & 5	(48,131)
7.	Bond, 0.675 percent of line 6	(325)
8.	Total subcontractor's cost, lines 6 & 7	(48,456)
9.	Koll's commission, 10 percent of line 8	(4,846)
10.	Subtotal, lines 8 & 9	(53,302)
11.	Bond, 0.55 percent of line 10	(293)
12.	Liability insurance, 0.55 percent of line 10	(293)
13.	Gross receipts tax, 0.118 percent of line 10	(64)
14.	Total, lines 10-13	($53,952)

Appeal File, Exhibit 35 at 4. GSA actually took a credit in the calculated amount via a

[1] This amount is actually 12.5 percent of the base amount for conditions 1-5 (line 1). Ten percent of the base amount for conditions one through five is $3,234. Had the contracting officer used the latter number, the total credit calculated would have been $52,970.

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unilateral modification to the contract. *Id.*, Exhibit 36.

4. Koll does not contest the contracting officer's determination regarding conditions two through five. Appeal File, Exhibit 38. For those conditions, the base amount (line 1 in Finding 3) is an increase of $7,098 in contract payments to Koll. Applying the markups in the fashion employed by the contracting officer, the total amount for these conditions is $11,627.

5. The parties' dispute concerns condition one. For this change, the contracting officer determined that the base amount should be a credit of $39,435 to the Government. Appeal File, Exhibit 35 at 2. With markups, this results in a credit of $64,597. Koll believes that the base amount should be an increase in contract payments of $1,195. Koll uses a method slightly different from the contracting officer's to determine the total amount for this condition. It calculates profit on the basis of the base cost plus overhead (using the Finding 3 scheme, line 3 is ten percent of the sum of line 1 plus line 2), and it does not include any markups for the bond, liability insurance, and gross receipts tax shown on lines 11 through 13, thus making the line 10 amount the total due. Complaint at 2. Koll consequently claims that it is owed $1,970 for the changes denoted as condition one.

6. Condition one pertains to a change which the parties agree involves doors with which are associated 2,390 linear feet of seals. Appellant's Brief at 2; Respondent's Brief at 4; *see* Appeal File, Exhibits 35 at 2, 37 at 3d unnumbered page. The contract required that these doors have certain properties. Most of the properties were delineated in the document's specifications: The doors had to be made of wood, have solid cores, and meet a stated standard for retarding transmission of sound. Appellant's Brief at 1; Respondent's Brief at 3. The doors also had to have magnetic seals. *Id.;* Appeal File, Exhibit 1 at 08710-9. In addition, the doors had to be "essentially the standard catalogued products of manufacturers regularly engaged in production of such products and . . . be the manufacturer's latest standard design that complies with the specification requirements." Appeal File, Exhibit 1 at 01632-5. The doors had to carry a manufacturer's warranty as well. *Id.* at 08210-3. One additional property that the contract required of the doors was shown on the contract drawings: metal strips had to be inlaid in the doors. Appellant's Brief at 2; Appellant's Reply Brief at 1; Respondent's Brief at 3.[2] The Government's brief asserts—in a statement not challenged by the contractor—that the strips were to be installed so that they could "marry with the specified magnetic seals." Respondent's Brief at 3; *see also* Appeal File, Exhibits 23 at 2 (Nov. 21, 1991, letter from WBH to Koll: "magnetic seals would not hold against a wood surface"), 28.

7. GSA stated in the contract that Glenmar was a manufacturer "offering [these] doors which may be incorporated in the Work." Appeal File, Exhibit 1 at 08210-4. On May 21, 1991—nearly two months after the starting date for contract performance—Koll told GSA that doors meeting all specifications were not being made by Glenmar. According to Koll, sound-retardant wood doors were available from Buell Door Company, in the form of modified Weyerhaeuser Corporation doors; however, sound-retardant wood doors were not "available with the type of seals shown on the drawings mortised into the face of the door. STC [sound-retardant] DOORS MUST BE FURNISHED WITH THE EXACT TYPE OF SEAL WITH WHICH THEY WERE TESTED; OR THE STC RATING BECOMES INVALID." *Id.*, Exhibit 12.[3]

8. A week later, GSA authorized Koll to "provide STC wood doors, frames and seals as tested by the manufacturer." Appeal File,

[2] Koll believes that the fact that some required properties of the doors were stated in the specifications and another was shown in the drawings is important. In making this argument, Koll directs our attention to the presence in the contract of a standard clause entitled "Specifications and Drawings," GSAR 552.236-77 (APR 1984), which says that "[i]n case of difference between . . . Drawings and the specifications, the specifications will govern." Appeal File, Exhibit 1 at page 7 of GSA form 3506; *see also id.* at 01090-3.

[3] This last point was made more fully in a letter dated January 30, 1992, from door subcontractor WBH to Koll: "IF WOOD DOORS HAD BEEN SUPPLIED WITH RECESSED STRIPS AS SHOWN ON THE CONTRACT DRAWINGS . . . THERE WOULD HAVE BEEN NO WARRANTY. . . . In [the contract], the only reference to available manufacturers is Glenmar solid core acoustical doors; and although Glenmar is now out of business, the only product that they produced; or the only product produced by other sources is in every single case regularly produced only with compression seals." Accompanying this letter are supporting statements from manufacturers Weyerhaeuser and Algoma Hardwoods, Inc. Appeal File, Exhibit 24.

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Exhibit 14. The agency's project manager (a commercial firm) advised Koll that as a result of this change, the contractor could provide doors with compression seals, rather than ones with magnetic seals and corresponding metal strips. The project manager said that an adjustment to the contract price would ensue. *Id.*, Exhibit 16.

9. GSA's construction manager (another commercial firm) told the agency on June 15, 1992, that although Koll had been authorized to substitute compression seals for magnetic seals on the doors in question, "[t]he doors as installed are furnished with a fibre weather-strip only." The construction manager urged that Koll be directed to install "acoustical gasketting accessories" as well, to ensure that the doors meet the prescribed sound-retardancy test. Appeal File, Exhibit 29 at 1. The GSA program manager agreed that Koll should install the additional items. *Id.*, Exhibit 30. The contracting officer believed that Koll had ultimately installed weatherstripping, not compression seals, in lieu of the magnetic seal and metal strip called for in the contract. He said that GSA had accepted the substitution. *Id.*, Exhibit 35 at 2. The record does not contain any challenge by the contractor to the agency's conclusion as to the sealing mechanism actually used, other than a letter from WBH to Koll dated February 1, 1993. This letter states that "[t]he seals actually furnished for wood doors are manufacturer's standard which have been tested with the door." *Id.*, Exhibit 37 at 2d unnumbered page.[4]

Admittedly, making determinations of credibility in cases submitted for decision on the basis of a written record is often difficult. We find here, however, that GSA's assertion of the mechanism actually used is more credible than Koll's position. The agency's contention is backed by contemporaneous memoranda written during the course of construction; the contractor did not contest this conclusion until more than two months after the contracting officer had issued his decision, and although Koll has submitted three affidavits in the course of this litigation, none of them contains any support for the contractor's position on this disputed issue. On the basis of the record before us, we conclude that the doors were actually supplied with fibre weatherstripping, not compression seals.

10. On September 9, 1992, Koll made a claim regarding conditions one through five. Appeal File, Exhibit 34. In making this claim, the contractor contended that the condition one changes should be at no cost to either party. *Id.* at 8th unnumbered page. This conclusion was apparently based on the statement by WBH's president that when the subcontractor made its bid to Koll, "wood doors were correctly figured with compression seals/approved with compression seals." (The president said that this was because the doors were not commercially available with recessed metal strips, and the strips could not have been added without invalidating the manufacturer's warranty.) *Id.* at 5th-6th unnumbered pages. While this case was before the Board, Koll submitted affidavits from WBH's president and project manager, both of which said that the president's earlier statement is incorrect; the original bid was based on the provision of magnetic seals (though not recessed metal strips) for the doors. Affidavit of Harley D. Webb (July 16, 1993) at 2; Affidavit of Roger Dugan (July 14, 1993).

11. The contracting officer rendered his decision on the claim on November 25, 1992. In this decision, he determined the base amount due the agency in three steps. First, he assumed prices, on a per linear foot basis, for each of the three sealing materials he thought were involved—the weatherstripping, magnetic seal, and metal strip. Second, he assigned a credit to the Government for the items which were deleted from contract work—the magnetic seal and the metal strip—and an offset to the contractor for the item which was added—the weatherstripping. He finally arrived at a total amount by multiplying the affected 2,390 linear feet of material by the net per linear foot price differential. He believed that the prices per linear foot were, for the weatherstripping, fifty cents; for the magnetic seal, $10.50; and for the metal strip, $6.50. Appeal File, Exhibit 35 at 2.

12. Koll has not challenged the contracting officer's determination that the type of weatherstripping he believed Koll had installed costs fifty cents per linear foot. The contractor's position is not that

[4] WBH did make an earlier statement that "the net cost of the seals AS ACTUALLY FURNISHED ON WOOD STC DOORS IS $4.00 PER LINEAR FOOT." Appeal File, Exhibit 26 at 1; *see also id.*, Exhibit 25. This sentence speaks to the seals that are regularly furnished with wood sound-retarding doors, but it does not address the sealing mechanism that is on the doors that Koll/WBH supplied to GSA in the building in question. Whether the sentence's lack of precision is an artful dodge or not, the words do not clearly support the position Koll would have us accept.

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weatherstripping has a price different from fifty cents a foot, but that the price of weatherstripping is irrelevant because a different sealing mechanism was used. On March 5, 1992, WBH maintained that "the net cost of the seals AS ACTUALLY FURNISHED ON WOOD STC DOORS IS $4.00 PER LINEAR FOOT." Appeal File, Exhibit 26 at 1; *see also id.*, Exhibit 25. After the contracting officer issued his decision, WBH changed its position: "The seals actually furnished for wood doors ... [have a] net cost [to WBH of] $2.00 per linear foot." *Id.*, Exhibit 37 at 2d unnumbered page. The record contains a facsimile transmission from Weyerhaeuser to Koll which says, "S88 Pemko door gaskets are $2.00/lineal foot." *Id.* at 8th unnumbered page. These are the seals shown in the manufacturer's catalog as being supplied with the doors. *Id.*, Exhibit 35 at 41st-44th unnumbered pages. The contractor has not demonstrated, however, that Pemko S88 seals have actually been installed on the doors. Finding 9 & n.4. The $2.00 figure is the one used in Koll's complaint and brief.

13. The contracting officer used the price of $10.50 per linear foot for a magnetic seal because this is the price claimed by Koll/WBH for magnetic seals for condition four doors. Appeal File, Exhibits 34 at 16th unnumbered page, 35 at 2. Condition four involves paneled steel doors. Koll insists, as it did while the amount of the equitable adjustment was before the contracting officer, that "[t]he seals for wood doors are entirely different from seals on hollow metal doors; and the cost is appreciably less." Appellant's Reply Brief at 2; Appeal File, Exhibits 26, 27; Affidavit of Roger Dugan (Aug. 4, 1993) (Second Dugan Affidavit). Although we find Koll's evidence as to this point to be credible, we also find the contractor's assertions as to the actual price of the magnetic seals for the wood doors involved in condition one to be inconsistent with each other. WBH has steadily maintained that the list price of the magnetic seals specified in the contract for the condition one wood doors was $4 per linear foot. Appeal File, Exhibits 26 at 1st unnumbered page, 27, 37 at 2d unnumbered page; Second Dugan Affidavit. This is indeed the catalog price for those seals. *Id.*, Exhibits 26 at 4th unnumbered page, 37 at 3d-6th unnumbered pages. WBH has provided various figures, however, for the price it was actually quoted for these seals—the per linear foot price was stated to be $1.29 on March 5, 1992; $1.62 on March 6, 1992; and $1.50 on February 1 and August 4, 1993. *Id.*, Exhibits 26 at 1st unnumbered page, 27, 37 at 2d unnumbered page; Second Dugan Affidavit. WBH said on February 1, 1993, that the figure of $1.50 "can be verified with the Pemko factory if necessary." *Id.*, Exhibit 37 at 2d unnumbered page. Koll has presented no evidence, however, regarding Pemko's discounted prices. The figure of $1.50 is the one used in Koll's complaint and brief.

14. The price of $6.50 per linear foot which was used by the contracting officer for a recessed metal strip is the same one that was proposed by WBH on March 5, 1992, with particular reference to condition one doors. Appeal File, Exhibits 26 at 2, 34 at 2.

Discussion

This contract called for the installation of wood doors with magnetic seals. Finding 6. The contractor, Koll, complained to GSA that doors with these seals could not meet other contract specifications—they could not pass a prescribed sound-retardancy test, be standard commercial products, or carry a manufacturer's warranty. Finding 7; *see also* Finding 6. Koll proposed that GSA permit it to provide doors with compression seals, as furnished by the manufacturer, rather than magnetic seals. Finding 7. GSA agreed to the proposal. Finding 8.

The parties understood that a ramification of this change in seals would be an equitable adjustment to the contract price. Findings 8, 10. They have been unable to agree about two matters, however: first, whether the Government is entitled to a credit for the deletion of a requirement that metal strips be inlaid in the doors; and second, what the appropriate price adjustments should be for each of the elements involved in the changed requirements.

The metal strips are shown in the contract drawings as being recessed in the doors, apparently to serve as the object that the magnetic seals would attract so that the doors would close. Finding 6. Once GSA eliminated the requirement for magnetic seals, the metal strips were no longer needed. The Government consequently took a credit for the cost that the contractor would have incurred if it had had to install the strips in the doors. Findings 2, 3, 11.

Koll contends that a credit is not due. The contractor's theory rests on an application of the standard contract clause which provides that "[i]n case of difference between ... Drawings and the specifications, the specifications will govern." *See* n. 2. The specifica-

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tions mandate that the doors meet a certain test and be standard commercial products which carry a manufacturer's warranty; the drawings require insertion of the metal strips into the doors. Finding 6. According to Koll, no door could meet all these requirements; the strips, being mentioned in the drawings rather than the specifications, must therefore be read out of the contract. Indeed, in the current version of Koll's protean story of its door subcontractor's bid design, the subcontractor understood this on reading the solicitation and did not include a price for the strips. Finding 10.

Koll's theory is factually inconsistent with statements made by it and its subcontractor while work was progressing. Both firms maintained that the magnetic seals, as well as the metal strips, could not be provided without special design and voiding manufacturers' warranties. Finding 7 & n. 3. The seals were mandated by specification—and without the corresponding metal strips, these seals would not work. Finding 6. Thus, to the extent there was any inconsistency in contractual requirements, it was among specifications, not between specifications and drawings. Koll (or more precisely, its subcontractor, WBH) was admittedly aware of this problem before bidding. The best spin that can be put on Koll's position is that the contract was marred by a patent ambiguity. Such a circumstance raises a duty to inquire; having failed to ask GSA about the problem before bidding, the contractor must lose on its claim for an equitable adjustment. *Interstate General Government Contractors, Inc. v. Stone*, [38 CCF ¶ 76,446], 980 F.2d 1433 (Fed. Cir. 1992); *see also Plaza Maya Limited Partnership*, GSBCA 9086, 91-1 BCA ¶ 23,425, at 117,499 (1990). This rule holds true regardless of how Koll constructed its bid. *Id.* GSA is entitled to a credit for deleting from contract work the requirements to install magnetic seals and to inlay metal strips in the doors.

We turn now to the determination of the appropriate amounts of the three elements of the price adjustment. GSA is due a credit for the deletion of the metal strips and magnetic seals; the agency must pay an extra amount for the addition of the replacement means of sealing the door openings, which we have found to be weatherstripping. *See* Finding 9. The value of two of these elements is clear: the parties agree that the cost of the metal strips is $6.50 per linear foot, and the contracting officer's price of fifty cents per linear foot for weatherstripping is not in dispute. Findings 12, 14.

The contracting officer used a figure of $10.50 per linear foot for the magnetic seals. Findings 11, 13. This number may be appropriate for magnetic seals on metal doors, but we credit the statements made by WBH executives, including through an affidavit, that magnetic seals for wood doors—the kind at issue here—are very different and much less expensive. Finding 13. The list price for the magnetic seals required by the contract for these wood doors was four dollars per linear foot. *Id.* According to subcontractor WBH, the per linear foot price that it would actually have had to pay for these seals is much less; it is $1.29, $1.62, or $1.50, depending on the date one chooses. *Id.* No proof (such as an affidavit from a supplier) has been produced for any of these discounted prices, however. In the absence of any justification for selecting a price other the one in the manufacturer's catalog, we find that the figure of four dollars per linear foot should be used for the magnetic seals.

The parties have slightly different methods of calculating the markups to be applied to the base amounts for the three elements involved in the equitable adjustment. Findings 3, 5. GSA's method is acceptable to Koll for adjusting the price for conditions two through five. Finding 4. The same markups should be applied to this adjustment as well. *Singleton Construction Co.*, GSBCA 9614, et al., 90-3 BCA ¶ 23,125, at 116,109, and cases cited therein.

We are now able to determine the appropriate amount of adjustment to the contract which should result from GSA's agreement to accept weatherstripping instead of magnetic seals and corresponding inlaid metal strips on the condition one wood doors. The base amount for this change (line 1 in Finding 3) is 2,390 linear feet times the following sum: fifty cents per linear foot for the weatherstripping, less four dollars per linear foot for the magnetic seals, less $6.50 per linear foot for the metal strips. The product (2,390 × $10) is a credit of $23,900 to GSA. With markups (lines 2-14 in Finding 3), the total credit to GSA for condition one doors is $39,150.

The parties agree that Koll was entitled to an increase of $11,627 in the contract price as a result of the changes designated conditions two through five. The net credit to GSA for conditions one through five is consequently $27,523.

GSA actually took a credit for these conditions amounting to $53,951. This credit is $26,428 larger than the one to which the agency is entitled.

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Decision

The appeal is GRANTED IN PART. GSA shall remit to Koll $26,428, plus interest from the date on which the contracting officer received the claim dated September 9, 1992, as per the Contract Disputes Act of 1978, 41 U.S.C. § 611 (1988).

[¶ 26,502] Diplomatic Painting & Building Services Co., Inc. v. General Services Administration

GSBCA No. 12031, October 19, 1993. Contract No. GS-11P-90-MJC-0071.

Interpretation of Contracts—Clear Meaning—Summary Judgment.—The government was entitled to a downward adjustment in the contract price for the full amount of a decrease in minimum wages, because the contract did not contain a limitation on downward price adjustments. Following the exercise of an option of a custodial services contract, the Department of Labor issued a new wage determination that required the contractor to pay 39 percent less than the minimum it was originally required to pay. The contract provided that upward price adjustments were limited to no more than 6 percent, but it contained no limitation upon downward price adjustment. Consequently, the government decreased the contractor's monthly price in accordance with the wage determination. The contractor contended that it was reasonable to incorporate a limitation on downward adjustments. However, given the lack of any limitation, a reasonable contractor could not have inferred that any limitation existed, and there was no reasonable reading of the contract that would permit a conclusion that it was ambiguous.

Interpretation of Contracts—Trade Usage—Other Government Agencies.—The government was not bound by another government agency's interpretation of a contract clause, because the interpretation of the clause in a particular manner on one occasion by another agency does not establish a trade practice. A custodial services contractor alleged that a contract clause had been interpreted by another agency to include a limitation to downward price adjustments even though the clause provided only an upward price adjustment limitation. However, another agency's interpretation of the clause had no influence on the outcome of this appeal, and evidence of how another agency viewed the clause did not establish that there was a course of dealing between the contractor and the instant agency.

Mistakes—Relief After Award—Reformation.—Reformation to include a 6 percent limitation on downward price adjustments was not appropriate, because there was no evidence that the government had ever agreed to a 6 percent limitation upon contract price reductions. Following the exercise of an option of a custodial services contract, the Department of Labor issued a new wage determination that required the contractor to pay 39 percent less than the minimum it was originally required to pay. The contract provided that upward price adjustments were limited to no more than 6 percent, but it contained no limitation upon downward price adjustment, and the government decreased the contractor's monthly price by 39 percent. However, the purpose of reformation is to give effect to the true agreement of the parties. The contract clause at issue anticipated that wage determination rates might decrease, and the clause expressly assigned to the contractor the risk of a decrease.

For the appellant: Enrique Balseiro, Bethesda, Maryland. For the government: Richard R. Butterworth, Jr., Office of General Counsel, General Services Administration, Washington, D.C.

Before DEGRAFF, NEILL, and HYATT, Administrative Judges.

DEGRAFF, Administrative Judge: Both parties move the Board for summary relief. Because there are no material facts in dispute and because General Services Administration (GSA) is entitled to judgment as a matter of law, GSA's motion for summary relief is granted and the motion of Diplomatic Painting & Building Services Co, Inc. (Diplomatic) is denied. The appeal is consequently denied.

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Findings of Fact

On November 9, 1990, GSA issued an invitation for bids to supply custodial services for a building located in Washington, D.C. The proposed contract was for a one-year term, with four one-year option periods. The invitation explains that the successful bidder would be required to pay its employees the minimum wages and fringe benefits incorporated in a wage determination issued by the Department of Labor, pursuant to the Service Contract Act of 1965, 41 U.S.C. § § 351-358 (1988). Appeal File, Exhibit 1.

Section B of the invitation explains that, if GSA were to exercise any of its options, GSA would adjust the contract price pursuant to clause 552.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear and Option Contracts) (June 1986). Clause 552.222-43 provides that, when an option is exercised, "[e]ighty percent of the monthly option price(s) will be adjusted upward or downward based on the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid under this contract." In order to determine the percentage increase or decrease in the minimum hourly wages and fringe benefits to be paid, the clause provides that GSA will compare the wage determination applicable to the initial contract period with the wage determination applicable to the option period. Finally, the clause provides that upward price adjustments are limited to no more than six percent. The clause does not contain any express limitation upon downward price adjustments. Appeal File, Exhibit 1.

Consistent with clause 552.222-43, section B of the invitation directs bidders not to include in their bids any allowance to cover increased costs for which contract price adjustments might be made pursuant to the price adjustment clause. Clause 552.222-43 requires bidders to certify that they have not included in their bids any allowance for increased costs for which a contract price adjustment might be made. The invitation does not prohibit bidders from including in their bids an allowance for downward contract price adjustments. Appeal File, Exhibit 1.

Diplomatic was the successful bidder and, on January 30, 1991, the parties entered into contract GS-11P-90-MJC-0071. Appeal File, Exhibit 1. During the initial year of the contract, from February 1, 1991, through January 31, 1992, wage determination 75-0098 was effective. Appeal File, Exhibits 1, 4. On September 17, 1991, the Department of Labor issued wage determination 86-1245. GSA exercised its option for one one-year period, from February 1, 1992, through January 31, 1993, and modified the contract to incorporate the new wage determination for the option period.[1] Appeal File, Exhibit 2. The new wage determination required Diplomatic to pay its employees a minimum amount for wages and fringe benefits that is thirty-nine percent less than the minimum amount that wage determination 75-0098 required Diplomatic to pay. Appeal File, Exhibits 2, 4.

On February 4, 1992, GSA notified Diplomatic that, due to the thirty-nine percent decrease in applicable minimum wages and fringe benefits, GSA was decreasing Diplomatic's monthly price in accordance with clause 552.222-43 of the contract. Appeal File, Exhibit 2. GSA decreased Diplomatic's price from $51,214.07 per month to $35,235.28 per month. Appeal File, Exhibits 2, 4.

As a result of GSA's actions, on April 30, 1992, Diplomatic submitted a certified claim to the contracting officer. Diplomatic asserted that GSA's actions were contrary to the terms of the contract which, by reasonable interpretation and by implication, contains a six percent downward adjustment limitation. Diplomatic also asserted that GSA's actions were contrary to its past dealings with the National Archives and Records Administration (Archives).[2] Diplomatic asserted that the Department of Labor's wage determination did not accurately reflect prevailing wages in the Washington, D.C. area, and requested that GSA ask the Department of Labor to revise its wage determination. Appeal File, Exhibit 3.

On June 17, 1992, the contracting officer issued a decision upon Diplomatic's claim. The decision explains that the contracting officer adjusted the contract price in accordance with contract clause 552.222-43. Attached to the decision is an explanation of the contracting officer's computations. In the decision, the contracting officer states

[1] The appeal file does not state the date that GSA exercised this option.

[2] The National Archives and Records Administration interpreted clause 552.222-43 as containing a limitation upon downward contract price adjustments equal to the clause's express limitation upon upward contract price adjustments. Supplemental Appeal File, Exhibit 1. There is no evidence to suggest that GSA was aware of this interpretation until Diplomatic submitted its claim letter.

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that the parties' contract contains no six percent downward adjustment limitation, and also states that a contract between Diplomatic and another government agency is irrelevant to the interpretation of a contract between Diplomatic and GSA. Appeal File, Exhibit 4.

On September 18, 1992, Diplomatic filed its notice of appeal with the Board. We assume that this filing was timely, given that GSA has not argued otherwise.[3]

GSA filed a motion for summary relief on April 15, 1993. Diplomatic asserted that it needed additional discovery in order to oppose GSA's motion. We denied GSA's motion on May 18, 1993, in order to provide Diplomatic with the opportunity to conduct its discovery.

On June 9, 1993, GSA filed a second motion for summary relief. In its motion, GSA asserts that this appeal presents only an issue of contract interpretation and that it is entitled to prevail. GSA argues that clause 552.222-43 is clear and that it does not include a six percent downward adjustment limitation. In addition, GSA argues that the interpretation of clause 552.222-43 by Archives is not binding upon GSA. GSA also asserts that it has consistently interpreted clause 552.222-43 as containing a limitation upon upward contract price adjustment, and not containing a limitation upon downward contract price adjustments. Attached to GSA's motion is an affidavit from the author of clause 552.222-43, who states that the clause was drafted in order to protect the Government from exorbitant wage increases during the option years of contracts. The author states that the clause has never been interpreted by GSA as limiting downward adjustments to contract price.

On June 15, 1993, Diplomatic filed a motion to compel GSA to respond to certain of Diplomatic's discovery requests. GSA agreed to provide Diplomatic with information from GSA's regional offices concerning GSA's interpretation of clause 552.222-43. On June 24, 1993, and July 14, 1993, GSA provided Diplomatic and the Board with declarations signed by persons in each region who know whether, and to what extent, GSA has made downward adjustments to contract prices, based upon clause 552.222-43. The declarations establish that, in regions where downward adjustments have occurred, GSA has *not* interpreted clause 552.222-43 as containing a limitation upon those adjustments.[4]

On August 6, 1993, Diplomatic filed its opposition to GSA's motion for summary relief and a cross-motion for summary relief. In its brief, Diplomatic contends that clause 552.222-43 is latently ambiguous, given that GSA and Archives interpret the clause differently; that Archives' interpretation is more fair than GSA's interpretation; that Diplomatic's interpretation of the clause is reasonable; that no meeting of the minds occurred concerning the meaning of the clause because GSA never considered what action it would take if wage determination rates were lowered; and that the contract should be reformed.[5]

On August 27, 1993, GSA filed its reply to Diplomatic's opposition to GSA's motion for summary relief and its opposition to Diplomatic's motion for summary judgment. GSA noted that Diplomatic's assertion that the contract should be reformed is based upon cases involving mistakes in bids. GSA also noted that Diplomatic had never before presented any argument concerning mistake in bid.

On September 16, 1993, Diplomatic filed its reply to GSA's opposition to Diplomatic's motion for summary relief. Diplomatic asserts that GSA knew or should have known that Diplomatic's bid was based upon a mistaken belief, shared by GSA, that wage determination rates would not be lowered. Diplomatic argues that, due to this mistake, GSA is reaping a windfall and that reformation of the parties' contract is appropriate.

Discussion

Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to judgment as a matter of law. Rule 8(g); *CRC Systems, Inc. v. General Services Administration*, GSBCA 11173, 93-2 BCA ¶ 25,842. We agree with GSA that the issue

[3] The appeal file contains no evidence to establish when Diplomatic received the contracting officer's decision.

[4] On July 16, 1993, GSA supplemented its motion for summary relief by submitting these eleven declarations as an exhibit to its motion.

[5] Diplomatic also asserts that, although the minimum wages and benefits that it is obligated to pay have decreased, its labor-related expenses (payroll taxes, unemployment compensation insurance, worker's compensation insurance, liability insurance) have increased, and Diplomatic claims that it is entitled to payment for these increased expenses. We do not address Diplomatic's assertion because Diplomatic has never submitted a claim to GSA requesting payment for these amounts.

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presented in this appeal is one of contract interpretation and such a question is one of law, not of fact. Further, we agree with GSA's reading of clause 552.222-43. The clause is clear and does not include a six percent downward adjustment limitation. There is simply no reasonable reading of the clause which will permit us to conclude that it is ambiguous or that it incorporates any limitation upon downward adjustments. Given the express limitation upon upward adjustments and the pointed lack of any such limitation upon downward adjustments, a reasonable contractor could not have inferred that any limitation upon downward adjustments existed. *Hills Materials Co. v. Rice* [38 CCF ¶ 76,454], 982 F.2d 514 (Fed. Cir. 1992). We also agree with GSA that, if Diplomatic takes issue with the wage determination, it must present its case to the Department of Labor. *JL Associates, Inc. v. General Services Administration*, GSBCA 11922, 93-3 BCA ¶ 25,939.

We do not find any of Diplomatic's arguments convincing. The interpretation of clause 552.222-43 by Archives does not influence the outcome of this appeal. Diplomatic had no reason to assume that GSA would interpret the clause in a manner consistent with another government agency and in a manner inconsistent with the terms of the clause itself. Similarly, Diplomatic had no reason to suppose that GSA would be bound by another government agency's interpretation of the clause. Evidence of how Archives viewed the clause at issue does not establish that there was a course of dealing between GSA and Diplomatic. The fact that Archives had, upon one occasion, interpreted the clause in a particular manner does not establish a trade practice. *Mission Van and Storage, Inc.*, GSBCA 7386, 85-1 BCA ¶ 17,814, *aff'd reconsideration*, 85-2 BCA ¶ 18,032.

We also reject Diplomatic's argument that GSA is reaping a windfall and that Archives' interpretation of clause 552.222-43 is more fair than is GSA's interpretation. Diplomatic has offered no evidence to support its allegation that GSA is reaping a windfall. As for what is fair, Diplomatic's and Archives' interpretation of the clause could easily achieve a result that is unfair to the Government: As Diplomatic reads the clause, even though it was entitled to reduce its workers' wages and fringe benefits by thirty-nine percent, GSA was entitled to reduce a portion of the contract price by only six percent. According to the Department of Labor's determination, Diplomatic could have substantially reduced wages and fringe benefits and still been able to hire workers to perform the contract. It is not unfair to require Diplomatic to pass through to GSA the benefit of the Department of Labor's determination or, if Diplomatic believes that the Department of Labor's determination is wrong, to require Diplomatic to complain to the Department of Labor.

Finally, we do not agree that the contract should be reformed to include a six percent limitation upon downward price adjustments. If both parties entered into this contract relying upon a mistaken belief as to a basic fact, the contract could be reformed in order to make its terms conform to the true state of the facts. The purpose of reformation is to give effect to the true agreement of parties, and reformation is not appropriate unless there is convincing evidence that the parties agreed to be bound in accordance with the terms that Diplomatic seeks to establish. *Atlas Corp. v. United States* [36 CCF ¶ 75,810], 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990). If, as Diplomatic asserts, there was no meeting of the minds, then reformation is definitely not appropriate. As for Diplomatic's assertion that the parties were mistaken in their belief concerning whether wage determination rates would decrease, there is no evidence that either party held any particular belief concerning what might happen to wage determination rates. There is also no evidence that GSA ever agreed to a six percent limitation upon contract price reductions. The contract clause at issue anticipated that wage determination rates might decrease and the clause expressly assigns to Diplomatic the risk of a decrease. We have no basis for reassigning the risk that Diplomatic assumed when it entered into the contract.

Decision

For the reasons stated above, GSA's motion for summary relief is GRANTED and Diplomatic's motion for summary relief is DENIED. The appeal is consequently denied.

[¶ 26,503] Calvin Harris dba Harris Electric, Linda Harris dba C&L Electric

PSBCA Nos. 3392, 3393, 3394, October 26, 1993. Contract Nos. 059990-91-B-W001, 059990-91-P-0361, 05990-91-P-1212.

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Procedure, Boards—Dismissals—Default Converted to Termination for Convenience.—An appeal involving the propriety of the default termination of a contract was dismissed as moot, because the contracting officer's voluntary conversion of the default termination to a termination for the convenience of the government rendered moot the only issue ripe for the board's consideration. The only issue before the board was the validity of the default termination. When, as in this appeal, the actions of a party or the parties to an appeal resolve all the issues properly before the board, the appeal becomes moot.

For the appellant: Gagen, McCoy, McMahon & Armstrong, Danville, California, by Patrick J. McMahon and Michael P. Candela. For the government: Robert E. O'Connell, San Bruno Field Office, United States Postal Service, San Bruno, California.

Before MENEGAT, COHEN, and FINN, Administrative Judges.

MENEGAT, Administrative Judge: Respondent has filed a Motion to Dismiss these appeals, contending that they are moot because the contracting officer has converted the three default terminations which underlie these appeals to terminations for convenience. Appellant opposes the motion, arguing that the appeals should be sustained instead of dismissed. For purposes of this motion we make the following findings of fact.

Findings of Fact

1. Calvin Harris d/b/a Harris Electric held two contracts and Linda Harris d/b/a C&L Electric one contract with the Postal Service for providing electrical maintenance, repair and alteration services to the Postal Data Center at San Mateo, California (Appeal File for PSBCA No. 3392 ("AF 3392") Tab 26; AF 3393 Tab 7; AF 3394 Tab 6).

2. By substantially identical letters dated October 19, 1992, the contracting officer terminated each contract, giving as the reason: "Failure to allow U.S. Postal Service representatives to have access to and examine pertinent records, documents, papers or other records involving transactions related to this contract as required by Clause B-14, 'Examination of Records' ...." (AF 3392 Tab 39; AF 3393 Tab 17; AF 3394 Tab 18).

3. Each termination was appealed, and Appellants' complaint, addressing all three of the contract terminations, was docketed on January 21, 1993, with separate docket numbers assigned to the appeal for each contract. In the complaint, Appellants contended the terminations for default were wrongful and sought special damages totaling $358,000, damages in excess of $100,000 for Appellants' severe emotional pain and suffering, costs and attorney fees (Complaint ¶ 13-15 and Prayer). None of Appellants' claims for monetary damages have been presented to the contracting officer.

4. On August 11, 1993, the contracting officer wrote virtually identical letters to Appellants converting each of the three October 19, 1992 terminations for default to terminations for convenience:

> "I have decided that it is in the best interest of the Postal Service to withdraw the October 19, 1992 termination for default ... and instead terminate that contract for the convenience of the Postal Service. Therefore, in accordance with the [termination for convenience clause] the Contract is terminated for convenience effective October 19, 1992...." (Exhibit A to Respondent's Motion to Dismiss)

Each letter requested that Appellants submit a claim in accordance with the termination for convenience provisions of the contract. Appellants have not filed termination for convenience claims with the contracting officer.

5. On August 20, 1993, Respondent filed its Motion to Dismiss, based on the contracting officer's conversion of the terminations for default to terminations for convenience.

Decision

Respondent argues that the contracting officer's conversion of the terminations for default to terminations for convenience affords Appellants all the relief they could have obtained in these appeals and that, therefore, the appeals are moot and should be dismissed with prejudice. Respondent relies on two of our prior decisions, *Alta Construction Co.*, PSBCA No. 1463, 90-3 BCA ¶ 22,966, and *Atterton Painting & Construction, Inc.*, PSBCA No. 2696, 90-2 BCA ¶ 22,681, to support its arguments that these appeals are moot as the terminations for default have been withdrawn.

Appellant opposes the motion to dismiss, arguing that the contracting officer's conversion of the default terminations to terminations for convenience is a concession that the original terminations for default were

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improper and that, consequently, the Board should sustain the appeals. Appellants rely on *Telimed Health Systems, Inc.*, ASBCA No. 42886, 92-1 BCA ¶ 24,401, in which the Armed Services Board of Contract Appeals followed the course urged by Appellants. Appellants also point out that we did not dismiss the appeals in either *Alta* or *Atterton*, the cases Respondent relies upon.

The only issue properly before the Board in these appeals is the validity of the terminations for default. None of the claims set forth in Appellants' complaint have been presented to the contracting officer for decision, and, therefore, the Board lacks jurisdiction to consider them. 41 U.S.C. § 605(a); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981); *Spotless Janitorial Services*, ASBCA Nos. 44365 et al., 93-2 BCA ¶ 25,873; *James H. Foster*, PSBCA No. 3152, 93-1 BCA ¶ 25,362; *Lou Faro Leasing, Inc.*, PSBCA No. 2889, 91-2 BCA ¶ 23,668; *Wayne R. Hilf*, PSBCA No. 2800, 91-1 BCA ¶ 23,628.[1]

The only remaining issue is whether the appeals as they relate solely to the terminations for default should be dismissed, as Respondent urges, or sustained, as Appellants urge, now that the contracting officer has voluntarily converted the terminations to terminations for convenience. When, as in these appeals, actions of a party or the parties to an appeal resolve all issues properly before the Board, the appeal becomes moot. *Alta Construction Co., supra; Atterton Painting & Construction, Inc., supra.* Under such circumstances, dismissal is appropriate. *Richard R. Wilson*, PSBCA No. 3409, May 7, 1993; *H.H. Christian Co.*, AGBCA No. 82-120-1, 83-1 BCA ¶ 16,335; *see Alta Construction Co., supra; Atterton Painting & Construction, Inc., supra.*[2]

In *Atterton Painting & Construction, Inc.*, we did not dismiss the appeal because although the contracting officer had withdrawn the termination for default, he had not withdrawn the Postal Service's assertion of a right to withhold the unpaid balance due under the contract. The appellant had appealed the withholding of contract funds as well as the termination for default. Therefore, we suspended proceedings on the issue that remained before the Board, the unpaid contract funds, to allow the submission and consideration of a termination for convenience claim. Likewise, in *Alta Construction Co.* there remained before the Board the appellant's monetary claim for bonds and legal fees which had been made to the contracting officer and implicitly denied in the contracting officer's final decision that the appellant had appealed. For that reason the Board did not dismiss the appeal in *Alta Construction Co.*

In these appeals, however, the only issue properly before the Board was the propriety of the terminations for default. The contracting officer's voluntary conversion of those to terminations for convenience renders moot the only issue that was ripe for our consideration. As there is nothing further for the Board to consider and, unlike in *Atterton* and *Alta*, there is no reason to retain these appeals on our docket, the appeals of the terminations for default are dismissed

[1] As we have no jurisdiction over these claims absent their prior presentation to the contracting officer, we make no finding regarding their validity. We have held in the past, however, that damages for emotional pain and suffering, damages arising from tort independent of the contract and punitive or exemplary damages are generally not recoverable in contract dispute actions before the Board. *Eg., Onice Ulmer*, PSBCA No. 2938, 91-2 BCA ¶ 23,991 *aff'd on recon.* 91-3 BCA ¶ 24,345; *Roger Dean Barrett*, PSBCA No. 2490, 89-3 BCA ¶ 22,220; *Paul A. Mason*, PSBCA No. 1473, 86-3 BCA ¶ 19,142; *Shorthaul Trucking Co.*, PSBCA No. 1046, 84-1 BCA ¶ 17,012, 1985 WL 16706, June 18, 1985. Additionally, Appellants' request concerning attorney fees is premature. *American Federal Contractors, Inc.*, PSBCA No. 1359, 87-2 BCA ¶ 19,848. Attorney fees are authorized under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504, to qualified applicants who are prevailing parties in Board proceedings. If Appellant qualifies, an application under the Act and implementing regulations (39 C.F.R. Part 960) may be filed with the Board within the statutory time period after the Board's decision becomes final. *R&W Construction Co., Inc.*, PSBCA No. 2357, 90-1 BCA ¶ 22,381.

[2] As Appellants have pointed out, the Armed Services Board of Contract Appeals in similar circumstances has sustained appeals rather than dismissed them. *See Telimed Health Systems, Inc.*, ASBCA No. 42886, 92-1 BCA ¶ 24,401; *Information Systems and Network Corp.*, ASBCA No. 41514, 92-3 BCA ¶ 25,049. We see no difference in the effect of the method of disposal, and we will follow our precedent, on which the parties are entitled to rely.

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with prejudice. *See Richard R. Wilson, supra.*

The other claims asserted in Appellants' complaint are dismissed without prejudice for lack of jurisdiction. *See supra* note 1.

[¶ 26,504] Danrenke Corporation

VABCA Nos. 3601E, 3721E, 3722E, 3736E, October 29, 1993. Contract No. V691C-1297.

Attorney Fees and Costs Under Equal Access to Justice Act—Bar to Claims—General Release by Contractor.—A general release executed by a contractor under a settlement agreement did not bar the contractor's claim for attorney fees and expenses under the Equal Access to Justice Act, because the release barred only claims arising under the contract and the claim under the EAJA derived from a statutory right independent of any rights granted either by the contract or by the Contract Disputes Act. The parties could have provided for an EAJA award in their settlement agreement or could have otherwise agreed to foreclose application for any EAJA award. In this case, however, the government failed to meet its burden of proving that the parties agreed during the settlement discussion that an EAJA application would be precluded under the executed settlement agreement.

Attorney Fees and Costs Under Equal Access to Justice Act—Prevailing Party—Settlement Agreement.—Although a contractor's appeal involving the propriety of a default termination was settled by an agreement of the parties, the contractor was nevertheless considered a prevailing party under the Equal Access to Justice Act, because it achieved the major benefit it sought. As a result of the agreement, the default termination was rescinded and converted to a no-cost termination for convenience. Likewise, the contractor prevailed on a government claim for a credit due as a result of a deductive change, because the government waived payment for the change.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Default Termination.—In an appeal settled by agreement, the board determined that the government's position in issuing a notice of default termination was not substantially justified, because the government offered no explanation of why its decision to terminate the contract for default was justified. In agreeing to settle the appeal, the government rescinded the default termination and converted it to a no-cost termination for convenience. The government contended that because the "no-cost" termination for convenience was agreed to by the parties, it was justified in taking such action. The government's contention, however, was not considered by the board to be sufficiently compelling to establish that the government's position was substantially justified.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Prelitigation Expenses.—In determining the amount of attorney fees due a contractor under its Equal Access to Justice Act claim, the board deducted fees that were incurred prior to the contracting officer's final decision, because these fees were not considered to be incurred in connection with the adversary adjudication. The efforts of a contractor or its attorney in presenting a claim that ultimately results in an appeal and subsequent litigation before the board are work performed in connection with routine claims processing, not an adversary adjudication.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Prelitigation Consultant Costs.—Consultant costs incurred prior to the contracting officer's issuance of a final decision were not recoverable by a contractor under the Equal Access to Justice Act, even though these costs were necessary to the preparation of the case, because there was no evidence to support the contractor's contention that the services were related to the adversary adjudication, as opposed to the administration of the contract. The consultant did not testify as an expert witness, and there was little proof of his services or that the services were necessary to the litigation.

Attorney Fees and Costs Under Equal Access to Justice Act—Prevailing Party—Unsuccessful Motion.—Attorney fees associated with the preparation and draft-

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ing of a motion for summary judgment, as well as the secretarial costs incurred in preparing the motion, were not recoverable by a contractor under its Equal Access to Justice Act application, because the contractor could not be considered a prevailing party with respect to the motion. The board found that the government's opposition to the motion was justified and denied the motion because of the existence of genuine issues of material fact and law.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Secretarial Costs.—Secretarial costs that were included in the hourly rate charged by an attorney when his efforts required a secretary were recoverable by a contractor under its Equal Access to Justice Act application, because the combined hourly rates did not exceed the statutory ceiling of $75 per hour. Secretarial charges are not separately recoverable under the EAJA as allowable attorney expenses, because those services are considered an office overhead expense typically subsumed in the attorney's hourly rate. Here, the attorney added a $15 secretarial charge to his normal $60 per hour fee and billed his client $75 per hour.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Miscellaneous Expenses.—Miscellaneous expenses incurred by an attorney for postage, Federal Express mailing, and binders were recoverable by a contractor under its Equal Access to Justice Act application, because there was sufficient detail in the itemized statements of costs and invoices for the board to determine the reasonableness of the costs.

Attorney Fees and Costs Under Equal Access to Justice Act—Propriety of Charges—Corporate Expenses.—Corporate expenses incurred by a corporate contractor, including telephone expenses, mailing charges, photocopying expenses, and expenses for copying drawings, were not recoverable under the Equal Access to Justice Act, because most corporate expenses are not recoverable where, as here, the contractor was represented by counsel.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Apportionment.—In determining the amount of fees due a contractor that had succeeded in one appeal in having a default termination converted to a no-cost termination for convenience but that did not prevail in another appeal relating to retained funds, the board apportioned recovery of fees on a 50-50 split because the record did not enable the board to separate the expenses associated with the two related appeals. In resolving these two appeals, both parties relinquished portions of their positions, the government, its default action, and the contractor, its termination costs and retained funds associated with the allegedly defective work on which the government based its default.

For the appellant: Harold C. Malloy, Austin, Texas. For the government: John M. Manfredonia, Trial Attorney, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas, Jr., Assistant General Counsel, Washington, D.C.

Before PULLARA, MCMICHAEL, and ROBINSON, Administrative Judges.

PULLARA, Administrative Judge: Danrenke Corporation (Danrenke or Applicant), has filed a timely Application (Appl.), pursuant to the Equal Access to Justice Act (EAJA or Act), 5 U.S.C. §504, to recover attorney fees and other expenses incurred in connection with its litigation of the above-captioned appeals which were settled without hearing. The Department of Veterans Affairs (VA or Government) filed a Reply to Applicant's EAJA Application (Gov't Rply.). Thereafter, the Applicant filed a Rebuttal (Appl. Rebuttal) and a Supplement in support of its Application (Appl. Supp.).

The Applicant has asserted that it meets the eligibility requirements of EAJA with respect to its net worth and number of employees, and has provided adequate supporting evidence in that regard. The Government has not contested that assertion and stipulates that Applicant's net-worth exhibits establish its eligibility as a "party" in accordance with 5 U.S.C. §504(b)(1)(B). The Board finds that Danrenke is an eligible Applicant with respect to its business status.

The parties are in disagreement with respect to whether the EAJA application itself is barred by the terms of the Settlement Agreement entered into by the parties and whether the Government's position was substantially justified. Also, the Government

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contests the amount of attorney fees and costs.

FINDINGS OF FACT

The underlying appeal was taken from a Contracting Officer's final decision dated March 25, 1992, which terminated for default the Contractor's right to proceed with performance of certain electrical renovations at the VA Medical Center (VAMC), in Los Angeles, California. (R4, tab 80) The Appellant, Danrenke, was awarded a fixed price subcontract by the VA through the Small Business Administration (SBA), pursuant to Section 8(a) of the Small Business Act. The Notice to Proceed was issued on February 7, 1991, and the Contract completion date was July 5, 1991. (R4, tab 19) Two time extensions were issued during the course of performance, which extended the completion date to August 14, 1991. (R4, tabs 34 and 46)

Danrenke alleged that the work was essentially completed on time, however, the VA and Danrenke engaged in numerous meetings and exchanged correspondence from August 1991 to January 1992, concerning whether certain work had been performed in accordance with the Contract specifications and National Electrical Code (NEC). (R4, tab 49-75) The parties disagreed as to whether some work needed to be replaced and whether Danrenke was entitled to final payment.

In a letter dated January 23, 1992, the VA notified Danrenke of nine conditions that the Government considered to be deficiencies in violation of the NEC, and endangering performance of the Contract. Danrenke was informed that if these conditions were not cured within 10 days after receipt of the notice the Government might terminate the Contract for default. (R4, tab 73) Danrenke responded in a letter dated January 31, 1992, that seven of the alleged deficient items were not deficient, and that as to two of the items, an on-site meeting should be arranged between the parties. Danrenke further stated that:

> [W]e have a serious disagreement as to interpreting the contract requirements. The nine citations are vague, ambiguous, and unsubstantiated with contractual references. We cannot determine from your letter precisely what it is you would have us do in order to "cure" these alleged conditions .... When we receive your direction, we will prepare our monetary claim covering your added requirements.

(R4, tab 74 at 6, ¶ 4)

On February 5, 1992, the VA met with Danrenke and SBA and was asked by the SBA to identify each of the deficiencies with a code violation. The VA electrical engineer stated that he could cite each deficiency but it would take at least a week. (R4, tabs 75-76) Thereafter, at a meeting held with Danrenke and SBA on February 27, 1992, the VA identified and discussed each violation by NEC code number and provided information regarding said violations. Three alleged deficiencies were deleted by the VA. The parties visited the site and Danrenke was shown the location of the remaining alleged deficiencies. The Contractor was "asked to correct all deficiencies and complete the job." (R4, tab 77) The Contractor disagreed that there were any outstanding deficiencies.

In a letter dated March 5, 1992, Danrenke informed the VA that there were no deficiencies, furnished a letter in support of its position from the cable manufacturer, and stated:

> Danrenke has completed the project; the installation has operated in accordance with the contract requirements since August 3, 1991; it represents a good job by the contractor under the circumstances, and we deserve to have the work accepted and our final bill paid. Danrenke strongly believes that the information contained in this letter is sufficient to bring this contract to a conclusion. It was our expressed preference to resolve our differences amicably thereby avoiding the necessity to escalate our disputes to the Veterans Administration Board of Contract Appeals. We have taken much time to research and consult with the appropriate authorities concerning the alleged deficiencies and by doing so, we have incurred costs beyond the scope of the work required for our contract. Please give this matter your immediate attention so that this contract can be concluded. Regretfully, if the Government insists on compliance with orders to complete work not required or substantiated by the contract, we will proceed to the board for the resolution of these matters.

(R4, tab 78)

On March 16, 1992, the VAMC's Chief, Engineering Service, informed the Contracting Officer by memorandum, that he did not agree with Danrenke's justifications

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provided in the above-mentioned March 5, 1992 letter, and recommended that the Contracting Officer take appropriate action to correct the deficiencies noted above. (R4, tab 79) Thereafter, in a letter dated March 25, 1992, the Contracting Officer notified Danrenke that its right to proceed with performance under the Contract was terminated for default. The default notice was considered effective immediately. The Contracting Officer further informed Danrenke that:

> [Y]ou have taken no action to correct the remaining five (5) deficiencies listed in my "CURE LETTER" dated January 23, 1992. Per your request, references of NEC Code Violations were supplied to you at our meeting on February 27, 1992. We disagree with all the justification provided as none of the responses satisfied the requirements of the contract drawings and specifications as documented. As a result the following deficiencies still exist (items b, d, e, f, and g).

(R4, tab 80)

The Contractor's Notice of Appeal of the Contracting Officer's final decision for termination for default was received by the Board on April 28, 1992, and assigned appeal number VABCA No. 3601. The Contractor alleged that the decision was erroneous for the following reasons:

> 1. The contractor is not in default and to the extent, if any, there has been any nonconformance with the terms and conditions of the subject contract, such occurred beyond the control and without the fault or negligence of the contractor;
>
> 2. Deficiencies cited by the Contracting Officer are not deficiencies but are perceived as such because the Contracting Officer has construed the contract requirements erroneously;
>
> 3. Deficiencies, if any, were the result of actions by the Government in its contractual capacity in preparing, or having prepared for it, defective specifications and drawings for the contract work;
>
> 4. The Contracting Officer breached her duty to aid the contractor in its performance by refusing to inform the contractor precisely what the Government wanted the contractor to do in order to correct the alleged deficiencies.

(Notice of Appeal at 1)

The Contractor had also previously submitted claims in the amount of $1,645.32 for an alleged change order concerning an additional 150 amp breaker (VABCA No. 3721) and $5,883.11 for final payment (VABCA No. 3722), in November 1991. (R4, tab 67) On April 1, 1992, the Contracting Officer denied Danrenke's demand for $1,645.32, stating that she had previously denied the request for a change proposal in a meeting held on July 8, 1991 and by letter dated July 10, 1991. (R4, tab 81) In so deciding, the Government reasoned that although it had instructed Danrenke that a breaker was not needed, Danrenke nevertheless purchased and installed the breaker. Therefore, Danrenke's proposal was denied. The Contracting Officer also informed Danrenke that its demand for final payment was denied because the work wasn't performed in accordance with the specifications and drawings and an inspection determined that the work was unacceptable due to many deficiencies. These appeals were docketed on July 7, 1992, and assigned docket numbers VABCA Nos. 3721 and 3722, respectively, and consolidated.

On July 9, 1992, the Appellant filed a Motion for Summary Judgment asserting that there were no genuine issues as to any material facts, that it was entitled to judgment as a matter of law, and that the termination for default should be converted to a termination for the convenience of the Government. The Contractor asserted that the Contracting Officer waived the schedule and completion date of the Contract by insisting that correction of alleged deficiencies be made by the Appellant after the Contract completion date had passed and that the Appellant relied on such waiver to its detriment. Danrenke also argued that the Contracting Officer's "cure notice" provided no specific directions as to what Danrenke should do to cure the alleged deficiencies, and that the Contracting Officer did not set a new completion date for performance. Finally, Danrenke alleged that the Contracting Officer failed to consider Federal Acquisition Regulations (FAR) pertaining to factors the Contracting Officer should consider before issuing a termination for default.

In response, the Government asserted that Danrenke did not complete the work in a professional manner and abandoned the job by refusing to take corrective action as directed by the VA. It further contended that the Contracting Officer acted within a reasonable time and did not waive the completion date. The Government also denied that its "cure notice" was deficient, or that the Contracting Officer failed to consider the FAR provisions relating to termination for default.

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Thereafter, in a letter dated August 10, 1992, Contracting Officer Helen Rivers informed the Appellant that the Government was asserting a claim against Danrenke for a credit owed under the Contract in the amount of $17,205.04 due to the Contracting Officer's "determination that as a result of a deductive change, Danrenke was no longer required to install the #500 mcm wires at Building 114." The Contractor was informed that this was the Contracting Officer's final decision and that payment should be made within 14 days. On August 12, 1992, the Appellant responded to the Contracting Officer's claim asserting *inter alia*, that Danrenke had installed the wires in Building 114, that the installation had been certified, and that the certification acknowledged that the services and articles were received and a progress payment had been made. Government counsel responded by facsimile on August 13, 1992, that the Contracting Officer's decision inadvertently mistook Building 114 as the location where the wiring was not installed rather than the actual location, Building 117. The Contractor's attorney was informed that the VA was investigating the matter and would revise the Contracting Officer's final decision to the extent necessary. However, rather than await the Government's investigation or further response to this issue, on August 18, 1992, Danrenke filed a Notice of Appeal (VABCA No. 3736).

In the meantime, on August 18, 1992, the Board issued a decision denying the Appellant's Motion for Summary Judgment. We held that there were factual issues raised as to whether the Appellant, in not proceeding, would have done so if clearly directed or had abandoned performance of the Contract. The Board also determined that although the cure notice lacked specificity, there were questions of fact as to whether Danrenke still did not understand what the VA expected to be corrected after several meetings and discussions ensued following the issuance of the cure notice. We also rejected the Appellant's argument that the failure of the Contracting Officer to set a new schedule or delivery date was a violation of FAR 49.402-3(c) since this was a construction contract rather than a supply contract. There were also questions of fact as to the extent if any that the Contracting Officer failed to comply with various FAR provisions.

On August 20, 1992, the Board received from the Government, by facsimile, a memorandum notifying us that the parties had agreed to settle the appeals. (Gov't Rply., Exh. 3) Thereafter, the parties took steps to convert their agreement into writing. The Government submitted a proposed settlement agreement to Danrenke which included in pertinent part the following language:

> 2. Respondent agrees to convert the termination for default of Contract No. V691C-1297 to a termination for convenience at no fu[r]ther cost to either party.
>
> 3. Respondent hereby releases Appellant from any and all claims, future and present, arising out of Contract No. V[691C-1297]. This includes, but is not limited to, excess reprocurement costs, deductive change order work, and all other claims.
>
> 4. Appellant hereby releases Respondent from any and all claims, future and present, arising out of Contract No. V[691C-1297]. This includes but is not limited to, change order work, reimbursement of contract retainage, and all other claims.

(Gov't Rply., Exh. 1)

On September 1, 1992, Danrenke provided its version of a proposed settlement agreement to the Government which included in pertinent part the following language:

> 2. Respondent agrees to convert the termination for default of Appellant under Contract No. V691C-1297 to a termination for convenience of the Government at no further cost to either party hereto.
>
> 3. Respondent agrees to and does hereby release Appellant from any and all claims whatsoever, present and future, arising out of or relating to Appellant's performance of Contract No. V691C-1297, including, but not limited to, claims for excess reprocurement costs and deductive change order.
>
> 4. Appellant agrees to and does hereby release Respondent from any and all claims whatsoever for loss or damages arising out of the performance of Contract No. V691C-1297, including claims for change order work and reimbursement of contract retainage.

(Gov't Rply., Exh. 2).

Further negotiations took place but ultimately the Government Counsel and Contracting Officer executed the Appellant's September 1 version of the settlement agreement, on September 2 and 8, 1992, respectively. The agreement was forwarded to the Appellant and signed by Keith Howell on September 14, 1992. (Appl., Exh. B) Where-

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upon, on September 23, 1992, Attorney Malloy forwarded to the Government *another redraft* of his proposed settlement agreement, this time reserving the Appellant's right to assert its claim "for reimbursement of contract retainage in the amount of $5,883.11." The Government refused to sign the redraft. (Gov't Rply., p. 4 and 5, Exh. 4) Ultimately, Attorney Malloy signed his September 1 draft of the settlement agreement on September 28, 1992. (Appl., Exh. B) The fully executed settlement agreement, referred to in our further discussion as the Settlement Agreement, was filed with the Board on October 6, 1992, as an attachment to the EAJA Application.

It is noted that the draft settlement agreements which were circulated among the parties, and the Settlement Agreement which was ultimately executed, did not make specific reference as to whether the Applicant was precluded from submitting an EAJA Application to this Board. Although the Government asserts that "Respondent informed Appellant that the final version of the settlement agreement precluded all claims whatsoever, including attorneys fees," (Gov't Rply. at 2) there is no documentation verifying this assertion nor is there evidence that Danrenke orally agreed to this request or intended for the settlement to include said fees and costs.

Thereafter, on November 4, 1992, Danrenke submitted an "Application for Fees and Expenses" seeking $6,635.33 in attorney fees, $2,675 for consultant fees, $393.75 for secretarial costs, and $574.24 for miscellaneous costs such as postage, telephone calls, photocopying and federal express mailings, for a total EAJA claim of $10,278.32. (Appl.) (The Application incorrectly totaled the amount of attorney fees and expenses as $9,994.57.) The Application is based, in part, on an hourly rate of $60 per hour for Attorney Malloy's legal services. The Applicant asserted that it was the prevailing party and that the Government's position was not substantially justified. The Government submitted a Reply in opposition to Danrenke's Application and asserted that said Application was barred under the terms of the Settlement Agreement and that the Applicant had not shown that the Government's position was not substantially justified. The Government also contested the amount of attorney fees and costs.

The Applicant subsequently filed a Rebuttal to the Government's Reply and a Supplement to its EAJA Application. In its Supplemental EAJA Application, the Applicant acknowledged that it did not prevail on the monetary claims pursued in VABCA Nos. 3721 and 3722. Therefore, Danrenke's counsel deleted 4.5 hours in attorney fees attributable to the drafting of its Complaint and Amended Complaint and 3.25 hours in secretarial services for typing these documents. (Appl. Rebuttal at 7, Appl. Supp. at 1). The Applicant's supplement also included an additional claim of $1,736.25 for 26.25 hours in attorney fees for preparing its Rebuttal and 10.75 hours for secretarial services. Therefore, the fees and costs claimed in this EAJA proceeding total $11,302.07.

DISCUSSION

The first issue we must address is whether Danrenke's Application for attorney fees and costs pursuant to the Equal Access to Justice Act is barred by the negotiated settlement entered into by the parties. The parties disagree as to whether attorney fees and costs were precluded under the settlement. Each party contends that the language contained in the Settlement Agreement is "unambiguous" in support of their opposing opinions as to whether the final settlement addressed attorney fees and costs.

Applicant's attorney alleges that the revision to the Government's proposal, wherein the phrase "arising out of Contract No. V691C-1297" was deleted and the words "arising out of *the performance* of Contract No. V691C—1297" were inserted, created a "major change to the draft" proposed by the Government and that the purpose of the changed language was "to eliminate from release, costs and fees associated with the processing of the appeal of the Appellant." (Appl., Exh. C) The Applicant asserts that "[i]t is clear and unambiguous that the release specifically applies only to claims of the Respondent *arising out of (not relating to) peformance* under the contract." (Appl., Claim at 2, ¶ 1) (Emphasis added.)

The Government submits that the Appellant's agreement to release it from "all claims whatsoever" includes attorney fees and that the use of the phrase *"arising out of the performance"* of the Contract instead of the words *"arising out of [the] Contract"* did not alter the liabilities of the parties. (Gov't Rply. at 3). The Government further states that "[i]f Appellant truly believed that it had just rendered a 'major change' to the settlement agreement, it would have presumably told [the Government]. Instead, Appellant remained silent until filing its EAJA application, hoping that the Board

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would later interpret the settlement agreement in its favor." (Gov't Rply. at 2, ¶ 2)

It is not disputed that the Applicant did not advise the Government that it wished to reserve the right to pursue legal fees. In fact, Government counsel contends that he verbally informed the "Appellant that the final version of the settlement agreement precluded all claims whatsoever, including attorney fees." (Gov't Rply. at 2, ¶ 2) The Government states that further evidence that the parties intended that all matters including attorney fees be settled is illustrated by the cover memorandum sent to the Board after settlement which stated all disputes under the Contract including all claims before the Board had been settled. (Gov't Rply., Exh. 3) The Government contends that since Danrenke never informed it that Danrenke would later seek attorney fees, "Respondent thus reasonably *assumed* that the settlement agreement would bar attorneys fees." (Gov't Rply. at 3, ¶ 3) (Emphasis added.)

In its Rebuttal, the Applicant did not respond to the Government's assertion that Danrenke had been informed that the final version accepted by the parties precluded attorney fees. Instead, Danrenke's counsel asserted that the Government failed to carry its burden of proof that the "settlement included an expressed bar to an EAJA application or that there was consideration for release." He further stated that the Government may not attempt to "vary, by parole evidence, the plain meaning of the words ... to create an unwritten, unspecified bar to appellant's EAJA application."

We disagree with the Applicant's attorney's contentions that its revised version is indisputably unambiguous as to exclude attorney fees from the release. However, we find that there is no compelling evidence that the parties specifically discussed the disposition of attorney fees in negotiations or that there was ever any meeting of the minds regarding this issue. Although the Government asserts that it informed Danrenke that the settlement included attorney fees, there is no evidence that Danrenke agreed to this request or intended for the settlement to include said fees. In fact, the Government's comment in its Reply—that because Danrenke never informed the Government that it would seek attorney fees, it *reasonably assumed* the Settlement Agreement would bar attorney fees—indicates that the parties did not discuss this issue or reach agreement as to whether fees were precluded.

The Government cites the appeal of *Nikiforos P. Kalfountzos,* in support of its position that attorney fees and costs should be barred by the executed settlement. In that case, the Department of Transportation (DOT) Board rejected an EAJA application on such basis but acknowledged that there was not unanimity among Boards on the question of whether a general release bars an application for fees under EAJA. In a concurring opinion, one Judge stated, "I read the EAJA as giving the prevailing party, even where a settlement has been reached, a separate statutory right to establish and recover attorney fees and other expenses, where the government's position has not been substantially justified." *Nikiforos P. Kalfoutzos d/b/a Engineered Electric,* DOTBCA No. 1819, 87-2 BCA ¶ 19,768 at 100,025.

The Armed Services Board of Contract Appeals (ASBCA) has, in our view, the better position that an application for attorney fees and expenses pursuant to EAJA derives from a statutory right independent from any rights granted by either the contract or the Contract Disputes Act. *PetroElec Construction Co., Inc.,* ASBCA Nos. 32999 *et al.,* 87-3 BCA ¶ 20,111. The Board reasoned that EAJA applications "do not constitute 'claims by a contractor ... relating to a contract,' which are required to 'be submitted to the contracting officer for a decision.' *See* 41 U.S.C. § 605(a)." *See PetroElec* at 101,840. Further, although the parties may provide for an EAJA award in their settlement agreement, the Government has the burden of proving that the parties made such a provision or otherwise agreed to foreclose application for any EAJA award. *Peter Kraus Versorgungstechnik GmbH,* ASBCA No. 27256, 87-2 BCA ¶ 19,880.

The Government has failed in the instant case to meet its burden of proving that the parties agreed during settlement discussions that an EAJA application would be precluded under the executed Settlement Agreement. We do not reach the question of whether the changes submitted by the Applicant's attorney altered the original proposal submitted by the Government as to the exclusion of attorney fees, because we find that the executed settlement did not preclude an application for such fees and costs. Pursuant to the above-mentioned independent statutory provisions a separate claim under EAJA may be pursued. Accordingly, we now turn to consideration of the EAJA application.

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Prevailing Party

In order to recover fees and expenses under EAJA, Danrenke must be a prevailing party. *Siska Construction Co., Inc.*, VABCA No. 3381E, 92-1 BCA ¶ 24,730; *Delfour, Inc.*, VABCA No. 2049E, *et al.*, 90-3 BCA ¶ 23,066. Danrenke need not have prevailed on all of its claims; it need only show that it obtained some significant relief from the litigation. *Fletcher & Sons, Inc.*, VABCA No. 3248E, 93-1 BCA ¶ 25,472; *see also Preston-Brady Co., Inc.*, VABCA Nos. 1892E, 1991E, and 2555E, 88-2 BCA ¶ 20,574. The Government does not seriously contest that Danrenke is a prevailing party. It merely states that "the parties settled all disputes before the Board could hear the facts necessary to determine the validity of the termination for default." (Gov't Rply. at 4) Attorney fees and expenses are not precluded where the parties agree to settle a matter in lieu of further litigation. *Penn Environmental Control, Inc.*, VABCA Nos. 3599E, 3600E, 3725E, 94-1 BCA ¶ 26,326, 1993 WL 331797 (August 20, 1993). The fact that Danrenke obtained favorable results through settlement rather than through a decision on the merits is irrelevant, so long as there is a "causal connection between the relief sought, the relief obtained, and the settlement of the litigation." *Austin v. Department of Commerce,* 742 F.2d 1417 (Fed. Cir. 1984).

Danrenke achieved the major benefit it sought in VABCA No. 3601, and is a prevailing party because the termination for default was rescinded and converted to a "no-cost" termination for convenience. Likewise, the Applicant prevailed in VABCA No. 3736, because the Government waived payment for a deductive change in the amount of $17,205.04.

Danrenke was not a prevailing party in VABCA No. 3721, where it sought an equitable adjustment in the amount of $1,645.32; and in VABCA No. 3722, when it waived its Contract retainage claim for $5,883.11. It is noted that Danrenke has voluntarily withdrawn the 4.50 hours of attorney fees which it claims were associated with "VABCA Nos. 3601, 3721 and 3722." (Appl. Supp. at 1) Additionally, $10.24 in mailing expenses are associated with the deleted work. (Appl., Exh. D, at 2)

Substantial Justification

Once an applicant has demonstrated that it is a prevailing party, fees and expenses shall be awarded "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). The Government is "substantially justified" if it is clearly reasonable in asserting its position, at the agency level and during the adversary adjudication, in view of the law and facts. In making this determination, we consider the complete administrative record, not just the litigation position of the agency.

Whether the Government's position was substantially justified is "determined on the basis of the appeal record, as a whole, which was made in the appeal." EAJA Rule 14(a). Such determinations can be particularly difficult in cases like these, where the parties have entered into a settlement and the appeal record may not have been not fully developed. Nevertheless, it is the Government which bears the burden of proving that its position was substantially justified in VABCA Nos. 3601 and 3736, and it is in error when it asserts that the application must fail because the Appellant has "not shown that the Government was not substantially justified." (Gov't Rply. at 1) EAJA Rule 5, "STANDARDS FOR AWARDS," states:

> The burden of proof that an award should not be made to an eligible prevailing applicant because the Government's position was substantially justified is *on the Government.* (emphasis added)

See Marino Construction Co., Inc., VABCA No. 2752E, 92-2 BCA ¶ 25,015; *Blosam Contractors, Inc.*, VABCA No. 2187E, 88-3, BCA ¶ 20,942.

Thus, it is well established that the Applicant "has no burden to prove that the Government's position was not substantially justified." *Siska Construction Company, Inc.*, VABCA No. 3381E, 92-1 BCA ¶ 24,730 at 123,421. The Applicant is only required to allege that the VA's position was not substantially justified, which it has done. 5 U.S.C. § 504(a)(2). Danrenke alleged that the VA was not justified in issuing a termination for default where the Government's COTR certified all the work had been completed in accordance with the Contract requirements and Danrenke's request for six progress payments had been granted.

Rather than explain why its decision to terminate for default was substantially justified, the Government argued that because a "no cost" termination for convenience was agreed to by the parties, this was justification for the Government's actions. The Government did not address any of the arguments presented by Danrenke in its Application other than to state that because the Board denied the Appellant's Motion for Summary Judgment, and this matter was

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settled without trial, the Board can not determine whether the VA was substantially justified. The denial of the Appellant's Motion for Summary Judgment does not indicate that the Government's position was substantially justified, only that there were material facts in dispute which, for purposes of the motion, the Board was required to resolve in favor of the non-movant Government. *Infotec Development, Inc.*, ASBCA Nos. 31809 and 32235, 92-2 BCA ¶ 24,817 at 123,782.

As noted, it is not the Applicant's burden to present evidence that the Government was not substantially justified, it is the Government's obligation to prove that it was substantially justified. In the instant case, based on the administrative record before us, and without the benefit of a hearing, we are unable to affirmatively conclude that the Government's position was substantially justified. Generally, an EAJA application may only be based on the record existing before a tribunal as a result of the documents entered and hearing of the case. *See Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049 at 106,322. Where a case is disposed of as a result of a settlement or otherwise, before a hearing has been held, a different principle must apply because there is often little record upon which to rule on an EAJA application. The legislative history of the Act furnishes the following insight:

> When the case is conceded on the merits, dropped by the agency, or otherwise settled on terms favorable to the private party before any of the merits are heard, the court (or adjudicative officer) will determine whether the position of the government was substantially justified. The record in this instance will consist of the pleadings, affidavits and *other supporting documents* filed by the parties . . ..

H.R. Rep. No. 99-120 part I, 99th Cong., 1st. Sess. 13, reprinted in 1985 U.S. Code Cong. & Admin. News 141-42. (emphasis added) *See also Digital Services Group, Inc.*, DOT BCA No. 1817E, 93-1 BCA ¶ 25,358 at 126,303.

In the absence of any compelling Government argument, the Board finds that the VA has failed to establish that its position was substantially justified with regard to its actions in VABCA Nos. 3601 and 3736. *Gavette v. Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986); *Industrial Refrigeration Service Corp.*, VABCA No. 2532E, 93-1 BCA ¶ 25,291. Accordingly, we find Danrenke is entitled to an award of reasonable fees and expenses on VABCA Nos. 3601 and 3736.

Recoverable Fees and Expenses

In determining whether certain fees and expenses are recoverable, we follow the applicable statutory provision, which states that the prevailing party in an adversary adjudication shall be awarded "fees and other expenses incurred by that party in connection with that proceeding." 5 U.S.C. § 504(a)(1). Danrenke's initial Application sought $10,278.32 for attorney's fees and expenses. (Appl.) In its Supplemental Application, Danrenke stated it did not prevail in VABCA "Nos. 3601, 3721 and 3722," and accordingly reduced its attorney fees and expenses by 4.5 hours attorney fees and 3.25 hours secretarial hours, for a total reduction of $318.75. It is not clear from the record before us why the Applicant stated it did not prevail in VABCA No. 3601, since the default termination was rescinded and converted to a "no-cost" termination for convenience. However, this question does not impact our decision because the Applicant's proposed reduction did not include any fees or expenses associated with VABCA No. 3601.

While acknowledging a reduction should be made in the amount of $318.75, the Applicant also modified its Application to increase attorney fees 26.25 hours ($1,575) and secretarial expenses 10.75 hours ($161.25), for services performed in preparing its EAJA Application and Rebuttal to the Government's Reply, for a total increase in fees of $1,736.25. (Appl. Supp.). Such an amendment is appropriate since it is well settled that attorney fees and expenses incurred in filing an application under the EAJA are compensable. *INS v. Jean*, 496 U.S. 154 (1990). Further, we allow EAJA applications to be updated to include fees and expenses incurred on the petition and defense thereof. *See Beta Systems, Inc. v. United States* [35 CCF ¶ 75,620], 866 F.2d 1404 (Fed. Cir. 1989); *Brewer v. American Battle Monuments Commission*, 814 F.2d 1564 (Fed. Cir. 1987); *Bridgewater Construction Corporation*, VABCA No. 2956E, *et al.*, 92-3 BCA ¶ 25,064; *Blosam Contractors, Inc.*, VABCA No. 2187E, 88-3 BCA ¶ 20,942.

Based on the initial Application and Supplemental Application, the Applicant now seeks a total of $8,371.58 in fees and expenses for Attorney Malloy (this amount includes secretarial and miscellaneous expenses expended by Attorney Malloy) minus $318.75 which the Applicant represents is associated with "VABCA Nos. 3601, 3721

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and 3722." The Applicant also seeks $2,675.00 in consultant fees for Mr. Healey and $574.24 for corporate expenses incurred by Danrenke Corporation in the litigation.

Addressing the fees for Attorney Malloy, the Applicant requests an hourly rate of $60 per hour for Attorney Malloy's legal services, which we find reasonable. We further note that, with limited exceptions, the Government does not contest the reasonableness of the hours spent by Attorney Malloy in this litigation. Except as set forth below we find the claimed hours to be reasonable.

Our review of the Application reveals that Attorney Malloy incurred approximately 5.75 hours time prior to the Contracting Officer's final decision defaulting Danrenke. Fees and expenses incurred prior to the receipt of the Contracting Officer's final decision are not recoverable. *Levernier Construction, Inc. v. United States,* 947 F.2d 497 (Fed. Cir. 1991); *Fletcher & Sons, Inc.,* VABCA No. 3248E, 93-1 BCA ¶ 25,472. As this Board has stated previously: "[t]he efforts of a contractor or its attorney in presenting a claim which ultimately results in any appeal and subsequent litigation before the Board are 'work performed in connection with routine claims processing,' and are not 'incurred in connection with the adversary adjudication.'" *Delfour Inc.,* VABCA Nos. 2049E, *et al.,* 90-3 BCA ¶ 23,066 at 115,813-14 (citations omitted). Based on the foregoing analysis we deduct $345 of attorney fees for the work Attorney Malloy performed preceding the final decision.

This would also preclude the Applicant's recovery of $2,675 in costs associated with Danrenke's claims consultant. EAJA allows the "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case." 5 U.S.C. § 504(b)(1)(A). However, the Federal Circuit specifically disallowed consultant fees incurred prior to the contracting officer's final decision, even though those costs were necessary to the preparation of the case. *Levernier,* 947 F.2d at 501-02. See also *Fletcher & Sons, Inc.,* VABCA No. 3248E, 93-1 BCA ¶ 25,472 (consultant fees for services rendered prior to the final decision were not allowed). To the extent that such fees and expenses were incurred after receipt of the Contracting Officer's final decision, the record before us lacked the specificity to enable us to analyze the need for, and the reasonableness of, the consultant services. There was no evidence to support the Applicant's contention that the services were related to the adversary adjudication as opposed to being related to the administration of the Contract and the threatened default termination. Mr. Healey did not testify as an expert witness and we see little proof of his services or that the services were necessary to this litigation. In making this determination, it is also noted that a report was not made part of the appeal record. In fact, based on the record before us, it appears that the consultant never wrote a report. (Gov't Rply., Exh. 5, at 18, no. 5; Exh. 6, at 14, no. 5). The only documentary evidence we have in the record is Mr. Healey's invoice and a copy of the prospectus of Healey International. Based on the foregoing, there is insufficient evidence to recover for consultant fees even if some portions were incurred after the final decision.

Government counsel contends that the Applicant should not be reimbursed for 6.5 hours in attorney time and 1.5 hours in secretarial time spent in preparing Danrenke's Motion for Summary Judgment because the Appellant's Motion was denied. Summary Judgment is a separate and distinct phase of litigation. *Ellis v. United States,* 711 F.2d 1571, 1576 (Fed. Cir. 1983); *Porter v. Heckler,* 780 F.2d 920, 922 (11th Cir. 1986). In the appeal herein, we found that the Government's opposition to Danrenke's Motion for Summary Judgment was justified and denied the Motion because of the existence of genuine issues of material fact and law. Thus, Danrenke cannot be considered a prevailing party with respect to the Motion which was denied. *See American Federal Contractors, Inc.,* PSBCA No. 1359, 88-2 BCA ¶ 20,526. Based on the foregoing, attorney fees in the amount of $390 which represents 6.5 hours of services for drafting and preparing the summary judgment motion will be deleted from allowable fees. Similarly, secretarial charges in the amount of $22.50 (1.5 hours at $15 per hour) will be deleted from allowable fees.

So too, Attorney Malloy spent 1.5 hours ($90.00 at his hourly rate) and $9.95 in expenses in his unsuccessful attempt to redraft the Settlement Agreement already signed by his client. *See* Discussion, *supra,* at 11. Since he was not successful, we will not compensate him for this effort. *See Bridgewater Construction Corporation,* VABCA No. 2956E, *et al.,* 92-3 BCA ¶ 25,064 (attorney fees incurred after settlement of the appeal denied).

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We now turn to the issue of the secretarial services. The Applicant claims it incurred $555.00 for a total of 37 hours of services provided by Attorney Malloy's secretary, at a rate of $15.00 per hour. From this amount the Applicant deducts $48.75 or 3.25 hours which it claims were associated with appeals in which it acknowledged it did not prevail. In addition, another $22.50 must be deducted as discussed above. Attorney Malloy asserts that since he does not employ a full-time secretary these charges represent a "reasonable rate." However, secretarial charges, whether reasonable or not, are not separately recoverable under EAJA as allowable attorney expenses because those services are considered an "office overhead expense, typically subsumed in the attorney's hourly rate." *Western Avionics, Inc.*, ASBCA No. 33158, 90-2 BCA ¶ 22,664 at 113,861. *See also Software Research Associates,* ASBCA No. 33578, 89-3 BCA ¶ 21,931 at 110,336; *Building Services Unlimited, Inc.*, ASBCA No. 33283, 88-2 BCA ¶ 20,611 at 104,154; *PetroElec Construction Co., Inc.*, ASBCA No. 32999 *et al.*, 87-3 BCA ¶ 20,111 at 101,844-45. Thus, deeming such charges to be subsumed as attorney fees means that the charges are recoverable in that category, subject to the statutory ceiling of $75 per hour. That is, we may consider Mr. Malloy as having charged his client at two rates: $60 per hour when his efforts did not require a secretary and $75 per hour when a secretary was needed. Since neither hourly rate exceeds the statutory ceiling of $75 per hour, both rates are allowable. We note that in the cases cited above, where secretarial charges were disallowed, the attorney's hourly rates, exclusive of secretarial charges, equalled or exceeded the ceiling. We agree that charges traditionally included in attorney fees cannot be separated out and recovered as "expenses" in order to avoid the statutory ceiling. However, that is not the situation here. To the contrary, under these limited circumstances, we are merely considering secretarial charges in their proper place—as part of allowable attorney fees up to $75 per hour. Had the attorney added the $15 per hour charge to his normal $60 per hour fee and billed his client $75 per hour, there would be no question that the $75 fee reflected legal services properly billed to Appellant. To deny recovery of the $15 per hour charge because Mr. Malloy separately itemized these occasional additional expenses (not otherwise a part of the overhead making up his fee) would be truly to elevate form over substance. We do not see that the EAJA compels such a result. Accordingly, we find secretarial charges of $483.75 ($555.00 – $48.75 – $22.50) eligible for recovery.

The Applicant seeks $136.58, for "miscellaneous expenses of litigation" incurred by Attorney Malloy for postage, Federal Express mailings, and binders. Copies of invoices were attached to the Application and listed on Attorney Malloy's time log. (Appl., Exh. D). Except where noted, these itemized statements of costs and invoices provide sufficient detail for this Board to determine their reasonableness. *Buckley Roofing Company, Inc.*, VABCA No. 3374E, 92-2 BCA ¶ 24,826. As specifically reduced by the amounts indicated earlier in this decision ($10.24 and $9.95), we find the Applicant's claimed miscellaneous expenses are reasonable and allowable under EAJA.

Finally, the Applicant seeks $574.24 for corporate expenses incurred by Danrenke Corporation in the four appeals, including telephone expenses ($256.17, from January 23 through August 13, 1992); Federal Express charges ($121.55, from April 24 through September 29, 1992); photocopying expenses ($130.23); and expenses for copying of drawings ($66.29). Based on our reasoning as stated earlier in this decision, the telephone expenses for January 23, and February 23, 1992 ($11.71 and $97.45, respectively) are not allowed because they were incurred prior to the receipt of the Contracting Officer's final decision. The remaining $465.08 of Danrenke corporate expenses are related to the litigation of the four appeals but are disallowed on other grounds as explained below.

Where the contractor is represented by counsel, as in this case, and except for costs of expert witnesses and test reports, studies or analyses, most corporate expenses are not recoverable. *See, Crooker v. EPA,* 763 F.2d 16 (1st Cir. 1985) (salaries of corporate officers and employees disallowed), *Fletcher & Sons, Inc.*, VABCA No. 3248E, 93-1 BCA ¶ 25,472, *ERG Consultants,* VABCA No. 3346E, 93-1 BCA ¶ 25,457; *M. Bianchi of California,* ASBCA Nos. 26362 *et al.*, 90-1 BCA ¶ 22,369 (corporate travel expenses disallowed), and *J.V Bailey Co., Inc.*, ENG BCA No. 5348-F, 91-3 BCA ¶ 24,350 (fees and travel for a corporate officer, costs for postage and Federal Express, costs for FOIA copies, photographs, labor for discovery and a fee for a employee witness not recoverable). In *J.V Bailey Co., Inc.*, the board allowed attorney fees and expenses (including copying, telephone and postage) but disallowed the contractor's corporate expenses which it

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characterized as "operating expenses of Appellant during the pendency of the appeal," and "a potpourri of various administrative expenses." While we have allowed recovery of minor corporate expenses under limited circumstances, such as where there was a *pro se* appellant, *Preston-Brady Company, Inc.*, VABCA No. 1992E, 88-1 BCA ¶ 20,446, that situation does not exist here. We note that even a *pro se* appellant cannot recover corporate salaries, *Preston-Brady Company, Inc.*, and *Crooker v. EPA*, 763 F.2d 16 (1st Cir. 1985).

Computation of Allowable Fees and Expenses

Danrenke stated in its Rebuttal that attorney fees and expenses were not assigned to each case separately because its request that the Government convert the termination for default to a termination for convenience was the "major common request" for relief under all the appeals. We are now tasked with determining what portion of attorney fees and expenses are appropriate where the Applicant has prevailed in two out of the four claims it appealed to this Board. It is not appropriate to award fees associated with VABCA Nos. 3721 and 3722, the appeals in which the Applicant did not prevail. *N & P Construction Co., Inc.*, VABCA Nos. 3283E & 3286E, 1993 WL 291674 (August 3, 1993)

A review of the $318.75 reduction proffered in the Supplemental Application reveals the deduction was solely associated with work relating to VABCA No. 3721, and represents the time spent drafting and typing the complaint and a related amended complaint. However, the Applicant did not attempt to calculate a reduction for VABCA No. 3722, in which it also did not prevail, or relate the "no cost" aspect of the settlement in VABCA No. 3601 to its Application.

For its part, the Government contends that the Applicant should not be entitled to any fees and expenses incurred in VABCA Nos. 3721 and 3722 since Danrenke relinquished these claims through settlement. The Government also asserts that it is impossible to ascertain from the Applicant's breakdown of attorney fees what portion of the total fees represented time spent on these two appeals, and argues that at least one half of the time spent on the entire litigation involved discussions between the parties and discovery which focused heavily on these claims "due to the close relationship between each claim." Government counsel argues that the Applicant's claim for Contract retainage (VABCA No. 3722) was a major issue under the default termination (VABCA No. 3601) because Danrenke was defaulted in part due to its refusal "to complete certain punch list items." Therefore, Government submits that one half of the total attorney fees and costs claimed ($4,997.28) should be denied.

As we already noted, in its supplemental EAJA Application, the Applicant acknowledged that it did not prevail on the monetary claims pursued in VABCA Nos. 3721 and 3722. Further, under the terms of the settlement, the Applicant gave up any right it might have to claim termination costs arising out of VABCA No. 3601. With regard to VABCA No. 3721, the Applicant deleted 4.5 hours in attorney fees attributable to the drafting of its Complaint and Amended Complaint and 3.25 hours in secretarial services for typing these documents. (Appl. Rebuttal at 7, Appl. Supp. at 1). *See also* discussion on Prevailing Party, p. 17, *supra.*

We note it is incumbent upon the Applicant seeking payment of fees and expenses to "keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees allowed." *Peter Kraus Versorgungstechnik GmbH*, ASBCA No. 27256, 87-2 BCA ¶ 19,880. Where the fee record lacks sufficient detail to enable us to allocate particular fees and expenses to a specific appeal we may apportion the fees and expenses. As this Board recently concluded in *N&P Construction:*

> There is no universal formula by which boards can apportion litigation costs among various constituent elements of one appeal or, for that matter, among several appeals which were litigated together and where, as in the instant litigation, the invoices do not distinguish which claims/appeals were involved in the services rendered. In such a situation, the board is expected to apportion such expenses in some rational relationship to the efforts actually expended, but tempered by an analysis of the results obtained in connection with each severable claim.

1993 WL 291674, at 10.

In the matter before us, $318.75 has already been apportioned to VABCA No. 3721, and found by the Board to be reasonable. The fees and costs associated with VABCA No. 3736, the deductive credit of $17,205.04 relinquished by the Government, are able to be severed from the Application. These fees and costs were incurred during an identifiable period from August 10 through 18, immediately preceding the settlement. A

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close review of the Application, reveals that Attorney Malloy spent 8.5 hours of and incurred $2.52 postage responding to the issues, and ultimately appealing the issues raised in VABCA No. 3736. Accordingly, we separate out and award the Applicant $512.52 in fees and expenses associated with VABCA No. 3736.

We turn to the remaining two appeals, VABCA No. 3601, in which the Appellant succeeded through settlement in having the default termination converted to a "no cost" termination for convenience, and VABCA No. 3722, in which the parties agreed through the settlement that the Government had the right to retain $5,883.11 in Contract retainage. We agree with the parties' assertions that the facts and law pertinent to these two appeals are inextricably intertwined and unseverable. As earlier noted, the facts reveal that in determining to default Danrenke, the Contracting Officer looked at certain deficiencies which she alleged the Appellant failed to cure, and indicated that the Government would reprocure those services and hold Danrenke liable for excess costs. Ultimately, when Danrenke invoiced for the final payment under the Contract, the VA, by a final decision, refused payment claiming that "[a]n inspection of work determined that there were many deficiencies and work was not acceptable." This dispute was docketed as VABCA No. 3722.

In addressing these appeals during discovery, settlement negotiations, and its dealings with the Board, the parties invariably would have to address the magnitude of the deficiencies which served as the primary basis of the default action. By proving that the deficiencies did not exist, and that it was entitled to the $5,883.11 withheld, the Appellant could prove the default was not supported. It is noteworthy that in settling these two appeals both parties relinquished portions of their positions: the Government, its default action and Danrenke, its termination costs and the $5,883.11 associated with the allegedly defective work on which the Government based its default. We understand how difficult it sometimes is for an applicant to separate out the fees and expenses on such interrelated appeals. However, in cases such as these, it is also fair to apportion fees and costs. Appellant has made no attempt to give us a formula for apportioning the instant appeals. While the administrative record before us does not enable us to separate out the time and expenses associated with these two appeals, we can reasonably apportion the time and expenses, and we do so now. The Government has urged a fifty-fifty split of fees. Due to the symbiotic relationship between the two appeals, we find the Government position compelling and apportion the attorney fees (which includes Attorney Malloy's miscellaneous expenses) fifty-fifty, awarding the Applicant $3,311.94 for prevailing in VABCA No. 3601.

In conclusion, in the above captioned appeals, Danrenke seeks $8,371.58 in attorney fees and expenses, $574.24 in corporate expenses, and $2,675.00 in consultant fees. Set forth below is a summary of the Board's treatment of the fees and costs sought by the Applicant:

Attorney fees and expenses:

$8,371.58	This figure is the amount of attorney fees and expenses incurred in all four appeals per the Application and Supplemental Application and includes the fees of Attorney Malloy, secretarial expenses and other miscellaneous expenses incurred by Attorney Malloy. It does not include Danrenke corporate expenses or consultant fees.
(345.00)	Delete attorney fees of 5.75 hours spent preceding final decision.
(412.50)	Delete attorney fees ($390) and secretarial charges ($22.50) for unsuccessful Summary Judgment Motion in VABCA No. 3601.
(90.00)	Delete attorney fees of 1.5 hours incurred following settlement in an unsuccessful attempt to renegotiate the settlement.
(9.95)	Delete expenses incurred following settlement in an unsuccessful attempt to renegotiate the settlement.
(48.75)	Delete expenses for secretarial services related to appeals in which Appellant did not prevail.
$7,465.38	Total eligible attorney fees and expenses attributable to VABCA Nos. 3601, 3721, 3722 and 3736.

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(328.99)	Delete attorney fees ($318.75) and expenses ($10.24) for VABCA No. 3721, in which Appellant did not prevail.
$7,136.39	Total eligible attorney fees and expenses attributed to VABCA Nos. 3601, 3722 and 3736 and apportioned below:
$3,311.94	Total attorney fees and expenses apportioned to and **awarded** in VABCA No. 3601.
$3,311.93	Total attorney fees and expenses apportioned to and **disallowed** in VABCA No. 3722.
$512.52	Total attorney fees and expenses apportioned to and **awarded** in VABCA No. 3736.

Danrenke corporate expenses:

$574.24	Corporate expenses totally **disallowed.**

Consultant fees:

$2675.00	Consultant fees totally **disallowed.**

SUMMARY OF AWARD

Based on the foregoing discussion, Danrenke Corporation is awarded:

$3,311.94	Attorney fees and expenses in VABCA No. 3601.
512.52	Attorney fees and expenses in VABCA No. 3736.
$3,824.46	**Total award.**

[¶ 26,505] O.K. Johnson Electric Co., Inc.

VABCA No. 3464, November 10, 1993. Contract No. V677C-485.

Site Conditions—Unusual Conditions, Category II—Foreseeability.—Under a contract for the installation of cable trays in a hospital's ceilings, a contractor was not entitled to an equitable adjustment for the costs incurred in connection with an alleged Type II differing site condition caused by above-ceiling congestion, because it failed to show that the condition was unknown and of an unusual nature that differed materially from conditions ordinarily encountered and generally recognized as inherent in the contract work. Regardless of an alleged industry inspection standard, a reasonable prebid site investigation, as required by the Site Investigation clause, would have disclosed the above-corridor congestion. Although the drawing notes indicated that the straight line cable tray layouts could not be relied upon for bidding purposes, the estimator unreasonably based his bid on the fittings shown in the drawings. The estimator also unreasonably failed to use a ladder to investigate above the ceilings to determine the presence of any obstructions.

Pricing of Adjustments—Total Cost Method—Bid Reasonableness.—An electrical contractor's adjustment for rerouting wiring as a result of a differing site condition caused by above-corridor congestion and obstruction was measured under the jury verdict approach rather than under the total cost method because the cable tray installation component of the contractor's bid was unreasonable. The board relied on the government's more reliable computations, which included savings from the use of cheaper, smaller conduits in the congested areas, in calculating the adjustment of the difference between the reasonable cost of performing with the unforeseeable above-corridor conditions and without the conditions.

For the appellant: Stumbo, Hanson & Hendricks, Topeka, Kansas, by Gary H. Hanson. For the government: Sonya Cromwell-Singleton, Trial Attorney, Phillipa L. Anderson, Deputy Assistant General Counsel, and William E. Thomas, Jr., Assistant General Counsel, Washington, D.C.

Before ROBINSON, MCMICHAEL, and PULLARA, Administrative Judges.

ROBINSON, Administrative Judge: This appeal is from a final decision by the Contracting Officer ("CO"), denying the claim of O.K. Johnson Electric Co., Inc. ("OKJ" or "Contractor"), for costs incurred in connection with an alleged differing site condition. The Contractor contends that it encountered above-ceiling congestion which was

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neither shown nor described in the contract, and which was beyond normal expectations for installation of cable trays. As a result, OKJ claims that its construction costs were increased by $157,756.47.

The Department of Veterans Affairs ("VA" or "Government"), in whose hospital buildings the cable tray installation was performed by the Appellant, defends against the claim by stressing that the pre-contract bid documents pointedly cautioned all bidders to avoid reliance on contract drawing depictions of cable tray routing (shown as straight lines), and to themselves ascertain the nature of existing conditions. The VA contends that, had OKJ made a reasonably thorough pre-bid site investigation, the Contractor would have discovered the existing congested conditions above the ceilings, and would have prepared its bid estimate to account for the difficulty of installing continuous cable trays in such congested spaces.

A hearing was held in Topeka, Kansas, where both entitlement and quantum were litigated. The record for decision in this appeal includes the transcript of the hearing (Vols. I through IV). Transcript Volume IV concludes with the recorded observations of several witnesses and the presiding judge during the course of a site investigation of two of the hospital buildings involved in this dispute. The post-hearing site visit was jointly requested by the parties. To the extent that this opinion reflects the observations made during the site visit, citation will be made to those portions of Volume IV which reflect such observations.

In addition to the hearing transcript, the Board's decision will be based upon evidence contained in the Government's Rule 4 Appeal File (R4, tabs 1 through 24), Appellant's supplements thereto (R4, tabs 101 through 122), together with several exhibits (G-1 through G-15) entered into evidence during the course of the hearing. Counsel for the parties filed post-hearing briefs addressing both entitlement and quantum issues.

FINDINGS OF FACT

The Solicitation

On June 30, 1989, the VA issued invitation for bids (IFB), No. 677-98-89, for "Telephone System Site Preparation" at its Topeka, Kansas Medical Center ("VAMC"). The medical center buildings in which the work was to be done were constructed in 1958. Buildings of that vintage often contain many items of equipment in the spaces between finished ceilings and the structural (concrete) slabs beneath the next higher floor level. For the balance of this decision, this space will be termed the "service area." At the Topeka hospital, the finished ceilings involved in this dispute were composed of lay-in tiles (2′ × 2′ and 2′ × 4′) which generally could be pushed up from below and removed (from their grid support system) for access to/inspection of the service areas above. (R4, tab 24; tr. II/411-12)

The IFB (and subsequent Contract) contained the usual clauses required of construction contracts by the Federal Acquisition Regulations (the "FAR"), including General Condition 1.41, "Differing Site Conditions (Apr 84)" (FAR 52.236-02) and General Condition 1.45, "Site Investigation and Conditions Affecting the Work (Apr 84)." (FAR 52.236-03) The latter clause reads as follows:

> (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon ... the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work, without additional expense to the Government.
>
> (b) The Government assumes no responsibility for any conclusions or interpretation[s] made by the Contractor based on information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

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The general scope of the Contract consisted of site preparation, in seventeen existing buildings, for a future telephone system to be installed by another entity (Bell South). This preparation was described, in Paragraph 1.2.A of the General Requirements, to include "general construction, alterations, mechanical and electrical work, utility systems, necessary removal of existing structures and construction." In addition to the above-ceiling installation of cable trays and/or conduits in most of the seventeen buildings, the project consisted of utilizing existing underground ducts to carry telephone lines from the outlying buildings to Building 1, the main hospital building. Within Building 1, an existing telephone room was to be demolished and rebuilt. In addition, new telephone closets were to be constructed on three floor levels (basement, 1st, 2nd). (R4, tabs 8, 22, 24; Exh. G-14)

The dispute underlying this appeal concerns a distinct portion of the Contract involving the installation of cable trays running the length of each corridor of the various buildings. These trays were to be installed in the service areas above those corridors. Although called "trays," these devices are actually completely enclosed rigid metal raceways (also called "wireways"), ranging in sizes of 4", 6", and 8" square, with one side hinged for access. On all of the Contract drawings showing the buildings' floor plans, the cable trays to be installed are depicted with straight lines down the middle of each corridor. However, on Contract Drawing No. 4 of 31, containing information pertinent to the project as a whole, the following General Note 8 states that:

> Cable tray layouts are *only diagrammatic and are not intended to show all required fittings, offsets and exact location.* Contractor shall field verify all obstructions and provide an installation which will fit within existing ceiling heights, etc. (Emphasis added)

(Exh. G-13)

The Pre-Bid Inspection

While the IFB made no provision for a Government conducted pre-bid site visit, the Bidders were nevertheless warned by the several FAR clauses in the contract to make themselves familiar with the conditions which would affect the work. Accompanying that warning, General Requirement 1.1.B stated that: "Visits to the site by Bidders may be made only by appointment with the Medical Center Engineering Officer."

An estimator for OKJ testified that he had made several unannounced visits to Topeka's VA Medical Center to inspect the premises. He was not accompanied by any VA personnel when he examined the service areas above the ceilings in the halls. He went to several of the corridors in the various buildings, although at the time of the hearing (3 + years later) the only two locations that he could recall with precision were one in Building 1 and one in Building 4. He described his several visits:

> Usually they would be on the way home, and I would come by and I would come in the hospital and I would walk in the halls and I would pop the ceiling up and shine my flashlight up in the ceiling and so I could see what was up there. ... Of the places that I [saw], there were some that had an awful lot of, for the lack of a term, equipment or material above the ceiling and some were very nice.

(Tr. IV/553-54)

The witness explained that he had used a rigid $8\frac{1}{2}" \times 11"$ notebook to lift the ceiling tiles and to slide them aside for viewing the service areas above with a flashlight. He stood on the floor, approximately eight to nine feet below the ceiling tiles. He did not bring a ladder with him nor seek to borrow one from any member of the VA staff. Being just under six feet in height, his view was necessarily limited to that which he could see by standing in place on the floor. This vantage point allows one an (oblique) sight line of approximately ten feet into the overhead area. (Tr. IV/553; 586; 678; II/348)

The estimator further explained that his use of the term "very nice" described those locations he saw, during his pre-bid visits, where there appeared to be sufficient clearance in the service areas to permit the installation of uninterrupted straight runs of wireway material. With respect to those "very nice" areas, he stated that they were what he would expect, comparing such areas to the Contract drawing representations in this manner:

> Well, the engineer had a straight line going down that hallway. He designed these plans and he got all of his information to draw these plans up with. So, on that basis I make the assumption that he has already done his investigation to show that this is the way that the thing is to run and there should be relatively no problem.

(Tr. IV/555)

The witness, when asked what level of difficulty he had anticipated as a result of

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his several site investigations, replied that: "With what I saw, it would be average." (Tr. IV/557)

During one site visit, the estimator had contacted the hospital's Engineering Service, and been shown to a switch key room in connection with the installation of certain electrical equipment. He did not then inquire about anything relating to above-ceiling cable tray installations in the corridors of any of the buildings, nor did he ask (nor did the VA volunteer) whether there were any as-built drawings ("as-builts") of the hospital which were available for examination. (Tr. IV/552-53)

No as-builts had been furnished or mentioned in the IFB. At the hearing, the VA engineer revealed considerable knowledge of the kinds of equipment which were located in the above-ceiling service areas of the hospital buildings. He further testified that his office possessed some as-builts of the hospital buildings, and that they showed "[m]ost of [the locations of equipment above ceilings], you know, I couldn't say there was a hundred percent, but I'd say on different projects, yes, we have, you know, a layout of what's up there." Neither of the parties attempted to enter any of these pre-contract as-built drawings into evidence. (Tr. II/427-54; IV/629-30)

According to the President of OKJ, this particular project was one of the firm's larger jobs. It was also the Contractor's most extensive installation of wireways (between 10,000 and 12,000 lin. ft.) to that point. The Contractor's largest previous wireway installation had been at the Stormont Vail hospital in Topeka, where over 7,000 linear feet of four inch wireway had been installed above ceilings. He had not encountered congestion anywhere as severe as at the VAMC. This was the fourth or fifth job which OKJ had done at the Topeka VAMC over the preceding thirteen years. (Tr. II/168-92)

OKJ's President did not conduct a pre-bid site visit, although he did review the estimator's takeoff figures. He was aware of Note 8 of Contract Drawing 4 of 31, and acknowledged that one could not rely on the straight line depictions of wireway above corridors. He further stated that an estimator would have to put some factor into the bid to account for more offsets than were shown on the drawings. He would have expected the estimator to review the drawings and visit the site, taking a ladder with him. (Tr. II/193-196, 240)

Bid Preparation

The estimator who made these site visits had a considerable amount of experience in estimating commercial and institutional electrical construction, including other hospitals. He admitted to having "busted" an estimate on one of those projects. He subsequently prepared OKJ's cost estimate for the bid to the VA. Based upon his observations at the job site and his reading of the Contract specifications and drawings, the estimator performed a takeoff. He calculated the cost of all wireway materials to be $43,168.50. He estimated a total of 1,671(+) labor hours at a rate of $20.64, for a total labor price of $34,492.50. The total for this wireway work, excluding OKJ's markup, was $ 77,661.00 (Exh. G-5; tr. IV/536-37, 560)

In his bid, the estimator had included the costs for only thirteen 90° fittings for all of the cable trays on the project. He arrived at this figure by counting the number of 90° fittings that he saw on the Contract drawings. He did not see or include any 45° fittings. Soon after Contract award (and *before* this dispute arose), he ordered "maybe" one hundred of these 90° fittings, as well as "maybe" one hundred and twenty-five 45° fittings. (Tr. IV/584-90; Exh. G-5) When cross-examined on this matter, the witness testified as follows:

> The reason I didn't put it in my bid was because I didn't know how many I was going to have, to be exact, and I felt that it was just better to try to—I knew I was going to have to order more than what I had on my take-off, I'll be able to put it that way. When I did this and I did order more material, I ordered it because I didn't know how many I was going to have and I didn't want to put them in there because I thought—I'm not naive but I thought that I might be able to get by with [*i.e.*, use] as few fittings as possible and so that is why—this is one reason they weren't on here [his bid], and what I did have to start off with, I didn't think that was excessive.

(Tr. IV/591)

Notwithstanding his optimistic bidding assumptions with respect to the number of fittings needed for the cable trays, the estimator had been aware of Note 8 of Contract Drawing 4 of 31 prior to the time of his bid estimate. He understood that the essence of the Note was that the straight line depictions of cable tray corridor runs on the plans were not a guarantee that the wireways could actually be run straight from one end

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of a corridor to the other. He was equally aware that not all necessary offsets/fittings were shown on these plans. (Tr. IV/543-46, 549)

At another part of his testimony, the estimator (in explaining his bid price for only 13 fittings), stated that he was reluctant to bid more fittings for fear that the electrical foreman would arrive on the job and question "Why all the fittings?" In the estimator's own words: "[S]o that's why, because when the people install a job, they are more or less deciding—*they are designing it then because it hasn't been designed before.* They have to get it into the best accessibility that they have, and you don't try to buy any more material than you have to." (Emphasis added) (Tr. IV/677)

Post-Award Problems

There were five bidders for this project. The base bid prices (high to low) were as follows: $1,573,042, $1,072,000, $1,067,200, and $994,240, with OKJ's low responsive bid at $978,175. The VA awarded the contract to OKJ for its base bid price and the notice to proceed was received by the Contractor on January 17, 1990. (R4, tabs 1, 4, 5)

On August 1, 1990, the CO notified the Contractor that he was concerned that the site preparation project might not be finished by the contract completion date of October 15, 1990. He attributed the problem to undermanning of the job, requesting that OKJ advise as to whether the project was on schedule or if additional resources were contemplated to meet the October 15 date. (R4, tab 9)

In a letter dated September 12, 1990, the Contractor responded to the CO's concerns by stating, *inter alia:* "[T]he hallways where the 4×4, 6×6, & 8×8 [inch] Wireway is to run, is so obstructed and congested that the installation has tripled our labor, fittings, supports and practically halted our progress." The letter was signed by the Contractor's President, Mr. James Mylnek. (R4, tab 10)

A series of letters ensued, culminating in OKJ's certified claim for $157,756.47—attributed solely to additional wireway installation costs. The Contractor contended that the area had been inspected prior to bid but that "lifting out ceiling tile in excess of 10,400 feet prior to bid time was unfathomable." It characterized the congestion as a differing site condition involving "unknown physical conditions at the site which differ from those ordinarily encountered." (R4, tabs 8-18)

The Contractor sought the difference between the labor hours bid for wireways (1,671.17 hrs. for $34,493) and the labor hours actually expended for that work (6,939.50 hrs. for $143,230.91). It also sought the difference between the price bid for wireway materials at $43,168.50, and the $57,106.54 actually expended. OKJ ultimately installed 565 more fittings than it had bid for this project. (Tr II/222-23; R4, tabs 110, 111)

In his final decision denying this claim, the CO pointed to the drawing note which cautioned that the straight lines depicting future cable tray installation above corridors were diagrammatic only and did not show "required fittings, offsets and exact locations." Further, the CO stressed the Contractor's duty to conduct an adequate prebid site investigation in accordance with the warning in (FAR) Clause 52.236-03, General Condition 1-45 of the contract, titled "Site Investigation and Conditions Affecting the Work." The first sentence of that clause reads, inter alia, that: "The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work and its cost...." (R4, tab 24)

At the hearing, the Contractor's electrical foreman explained that the contract entailed the installation of cable trays running the length of each corridor. These cable trays would then connect to smaller conduit servicing the individual rooms along each corridor. Bell South would use this system of ducts to carry telephone cable under a later VA contract. The cable tray comes in ten foot sections of hinged metal boxes, which are installed "end to end" with coupling devices requiring eight bolts per connection. Prior to actually starting work (but after contract award), the journeyman electrician member of a two-person team of installers (journeyman and helper) will remove enough ceiling panels so that he can stand on a stepladder and inspect the service area (about 4 feet in height, width of corridor—12 feet+). Having observed the existing equipment, including sheetrock firewalls, he selects the most favorable route for running the cable tray within the service area in such a manner as to avoid as many cuts or bends (90° or 45°) as possible. Having laid out the most accessible route, the installation team then stands on stepladders to attach the cable trays to the overhead ceiling slab and to each other. Because Hospital

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Buildings 1 and 2 were to be occupied during construction, OKJ could not plan to use a more substantial work platform such as portable scaffolding. (Tr. I/30-41)

The electrical foreman had over 22 years of experience installing such equipment in homes, schools, industrial buildings and hospitals. Although he would expect to find more congested above-ceiling conditions in hospitals ("a lot of ductwork, a lot of air handling equipment, stuff like that"), and was aware of a "degree of difficulty" to be expected when running wireway in a thirty-one year old hospital such as the VA's, he testified that the amount of congestion found at the VA's Topeka hospital buildings was greater than any that he had previously encountered. He referred to four hospitals on which he had worked. He specifically compared the K.U. Medical Center with the VA Hospital, stating that the "VA would be a whole lot more cluttered, a whole lot more packed in. The hospital is older." He provided no information as to the ages of the other three hospitals. (Tr. I/23-24, 49, 57-58)

The Contractor had started its wireway installation in Building 2, a three story structure with a basement. The third floor was not so bad as the others, except for the corridor junctures. On the lower floors, however, the Contractor encountered frequent obstructions which necessitated the use of 90° or 45° fittings. In alluding to these obstructions, the electrical foreman stated:

> You couldn't miss them. There was no way—you could pick the best route that you could pick and eventually sooner or later—and there was more than I really would have expected. There was—eventually you would have to change directions or elevations to miss something. You could not run, you know, very far without hitting something no matter what spot you picked to start in, so we tried to pick the least trouble.

(Tr. I/66-67)

The witness further described his experience in Building 2 as follows:

> In other areas it got to be a little bit tough, you know. There was, like I said, there's a lot of water lines, steam lines, stuff like that above the ceiling. IR units—[it is] an individual refrigeration unit that hangs above every door in the hallway, that feeds the fresh air into these rooms. You've got a lot of stuff that you've got to—the degree of difficulty began to—didn't take long for us to realize there was a lot of stuff there that we hadn't planned.

(Tr. I/49)

When asked to elaborate on the IR units which were individually suspended within the above-ceiling service areas from the concrete (upper) floor slabs by four hanger rods, this witness testified as follows:

> Q. What's an IR Unit?
>
> A. ... It supplies—it's a small air conditioner that hangs above the hallway over the doorway and supplies air [hot] or cold into that room. Its just a small air conditioner is what it is. They call it an IR unit. I don't really know the technical name. I always called them IR unit[s]. It drew air out of that particular room and circulated it through the air conditioner and back into the room. And they could supply hot or cold water to them if I'm right—remember right. We were not allowed to run underneath those. There was usually a 6 to 12 inch space underneath those but we weren't allowed to run underneath because there was an access panel to service the motor and filters and things like that.
>
> Q. So that means you had to go around?
>
> A. Either behind or above them. Most generally we tried to go above them because if you went down the hallway, you were going between them [and] the ones that were on the opposite side of the hallways and there was water lines and drain lines that come off the back of them and invariably you would hit every one of them, so you try to get above them. Usually the water lines were above the IR units and they had drops coming off of them that were insulated copper drops tie-ins and we [ran] into those. So we could try to get over above the IR units as best we could. That also didn't work because there was duct work. The junctures of the hallways, and I stated before they were the worst because that's where everything kind of came together from the different directions.

(Tr. I/63-64)

Because of the existing $1/2$ inch to 4 inch electrical conduits, the $3/4$ inch to 6 inch insulated water lines, the round and square air duct (which sometimes completely filled the hallway from one side to another), the IR units (with their associated space needs and restrictions), together with the congested corridor junctures, the actual installation required numerous offsets (fittings). Because of the time required to install necessary fittings, the Contractor averaged only

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30 to 40 linear feet of cable tray per crew per day versus a planned daily progress of 100 feet, based on a 7 1/2 hour workday for each two person crew. (Tr. I/52-56)

After completing work in Building 2, OKJ moved to Building 1, where the greatest congestion problems were encountered. This structure contains the admissions office, administrative areas, patient care, and surgical facilities. It was the largest building on the project, containing six floors plus a basement. The Contractor began work on the sixth floor. This floor consisted only of offices and the above-ceiling congestion was moderate—conditions that the Contractor stated to be within its normal expectations. As work progressed to the lower floors, however, the above-ceiling congestion worsened because of the accumulation of more equipment. As a result of this congestion, it became "impossible," in the opinion of the foreman, for the Contractor to make a planned installation layout for the entire corridor lengths of each floor. Instead of planning layouts for 100 feet at a time, the Contractor frequently had to change directions and elevations of the cable trays. Every obstacle encountered required a change of routing direction, necessitating cutting, drilling bolt holes, installing fittings, and the extra labor and material entailed. This difficulty was a repeat of the problems in Building 2. (Tr. I/50-55)

In Building 1, where the greatest amount of wireway installation work (in any one building) was to be done, any cuts to be made in the metal cable trays had to be done with a special saw located on the sixth floor, away from the patient care and surgical areas on the five lower floors. In addition, new bolt holes would have to be drilled in cut ends of the shortened trays for connecting to the fixtures. In order to minimize the lost time in transporting these ten foot trays to the sixth floor for cutting and drilling, it was in the Contractor's interest to avoid cutting wherever possible. Likewise, the additional labor involved in installing several 90° or 45° angles to route around, below or above ceiling obstructions, made it important to select the most accessible route before beginning installation above each corridor. (Tr. I/31-41)

In both Buildings 1 and 2, the "worst" areas of congestion were found at corridor junctures, where the equipment above several corridors converged. (Tr. I/64-65; 82) In the words of OKJ's foreman, "the junctures of the hallways were always the worst because the air duct would come down the hallway and it would have to usually branch in four different directions." (Tr. I/64-65)

The hallway junctures in Buildings 3, 4, 5, 6 and 9 were also congested, with air ducts, hangers and conduits, while the corridors had varying amounts of equipment, including the IR units adjacent to the room entrances. The congestion in these five buildings was less than in Buildings 1 and 2. According to Appellant's electrical foreman, wireway installation in these buildings was "a little closer to what we would have figured on the contract and the degree of difficulty." (Tr. I/89-96) Even then, however, the witness described the (relatively) difficult wireway installation in Building 4 in these words:

> I would probably say almost twice the amount of difficulty that we would have really figured on because there's still a lot of air handlers, steam lines. *Its getting pretty congested after forty some years of remodeling and add on.* I would probably say almost twice the degree of difficulty. [Emphasis added]

(Tr. I/90)

An examination of the plan view drawings for this Contract shows the following buildings and their corridor junctures: Bldg. #1, basement—1, first floor—4, second floor—4, third floor—3, fourth floor—3, fifth floor—3, sixth floor—1 (a total of 19); Bldg. #2, basement—1, first floor—3, second floor—4, third floor—3 (a total of 11); Bldg. #3, first floor—2, second floor—2 (a total of 4); Bldg. #4, first floor—3, second floor—2 (a total of 5); Bldg. #5, first floor—3, second floor—2 (a total of 5); Bldg. #6, main floor—2 (total); Bldg. #9, first floor—3 (total); Bldg. #20—1. Altogether, there are fifty corridor junctures in these eight buildings, where the drawings show the greatest amount of cable tray installation to be done. The drawings also showed some cable tray installation in Buildings 21, 22 and 24, but with no corridor junctures. The drawings reveal that the remaining buildings involved in this project would not require cable trays, although some conduit was called for. (Exh. G-14)

Site Visit Observations by Judge and Witnesses

During the site visit portion of the hearing, the Board member was accompanied by the attorneys and the witnesses to several areas in Building 1. The estimator was asked to recall where he had looked during his site visit. Although he was sure that he had looked in several locations of this building, he could only remember one with exacti-

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tude. This was in the corridor of the First floor, outside the telephone room. Standing on the floor with a flashlight while looking through a ceiling tile opening seemed to show sufficient room for wireway installation for ten feet in either direction. Further down the same corridor, however, there were areas of extreme congestion and also clear areas as seen from the floor. In some areas, the IR units were visible. The estimator did not check both sides of these corridors to get a complete picture. (Tr. IV/674-87)

Several other locations in Building 1 were also examined, both from a position on the floor, and then on the ladder. The obstructions lying ahead of the openings, including IR units, ductwork, and corridor junctures, were much more vivid from the ladder, while the view from the floor sometimes gave one a "snapshot" of open space which was quite misleading. The congestion observed was consistent with that shown on the photographs which were placed in evidence. (Tr. IV/643-86; R4, tabs 23, 113, 114)

In addition to Building 1, the Board was shown areas on the first floor of Building 4, where congested ceiling conditions were again more visible from the ladder than from the floor. Generally, the congestion observed, except for the corridor juncture, was less severe than in Building 1. (Tr. IV/687-93)

Conduit Substitutions and Off-Corridor Installations

At two locations in the above-corridor service areas in Building 1, the congestion would not permit installation of the rigid square wireways. The VA engineers were aware of the problem and allowed OKJ to substitute smaller, round (and flexible) metal conduit until it was again possible to use the cable trays. (Tr. IV/595; Exh. G-10; Exh. G-11, Dwngs. 5, 11)

At three other locations in the above-corridor service areas in Building 1, and one location in Building 2, the Contractor encountered such extreme congestion that neither wireway nor conduit could be installed. The VA engineers were aware of that extreme congestion and approved the routing of the wireways above the ceilings of adjacent rooms ("off-corridor") until the obstructions had been bypassed, at which point the wireways re-entered the above-corridor areas. (Tr. IV/595; Exh. G-10; Exh. G-11, Dwngs. 11, 12, 15)

Although the Government originally had denied liability for these conditions, it conceded during the hearing that the costs associated with the wireway reroutings were compensable. However, the VA takes the position that any equitable adjustment for these off-corridor runs of cable tray must reflect whatever savings resulted from not having to run the tray for each length of corridor that was bypassed. It also seeks a reduction for the costs saved when less expensive conduit was substituted above two of the corridor areas. (Tr. II/251, IV/597; Exh. G-10)

The VA engineer utilized the electrical engineering portion of the 1992 Means Estimating Guide ("Means") to determine both the amounts due to the Appellant and the amounts to be credited against that equitable adjustment. Although the Appellant was critical of Means, stating that it is "too general," it made no pricing effort comparable to the VA's, nor did it offer rebuttal. The Board thus accepts Means as the best available guide for pricing the efforts described. (Tr. IV/551, 595-617, 639-43; II/179, 266; Exh. G-10, G-11, G-12)

The VA engineer described the two areas where OKJ was allowed to substitute conduit in place of wireway. They were both in Building 1. In the Basement, in Corridor CB-9, near Room B-3, 24 feet of six-inch wireway was replaced by 20 feet of three-inch conduit. Utilizing Means, he estimated the savings in using the less expensive conduit as follows: $437.12 – $247.10 = *$190.02.* On the Third floor, in Corridor C3-7, 32 feet of four-inch wireway was replaced by 32 feet of two-inch conduit. The savings were: $378.33 – $193.48 = *$184.85.* (Tr. IV/598-603, 608-610; Exh G-10, G-11)

The four areas where off-corridor installation was necessary were likewise examined in the field and scaled on the drawings by the VA engineer in order to determine both the planned "straight line" installations above corridors and the actual "detour" installations above adjoining rooms. He calculated the materials and labor used versus that saved as follows:

In Building 1, on the Third floor, off-corridor wireway ran from Room A-342 to B-329, a distance of 84 feet. Had the installation been done "straight" through the corridor area, only 60 feet would have been needed. The estimated total of labor and material costs of the "detour," including costs of fittings, hangers, and necessary wall penetrations, was $1,948.58, minus $1,017.66 saved, for a net cost of *$930.92.* (Tr. IV/603-607; Exh G-10, G-11).

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On the Fourth floor, the wireway detoured off-corridor in two locations near Room A-403, running for 76 feet and using 18 fittings with 7 separate wall penetrations, for an estimated total cost of $2,272.03. The total direct labor and material cost saved by not running "straight" above the corridor for 52 feet was $922.10. The net cost to the Contractor was thus *$1,349.93.* (Tr. IV/611-613; Exh G-10, G-11)

At the Fourth floor ICU suite, the off-corridor run was 76 feet, estimated at $1,934.88, including 14 fittings and 4 wall penetrations. The "straight" run of 68 feet was priced at $1,215.57. Here, the net cost to the Contractor was *$719.31.* (Tr. IV/613-616; Exh. G-10, G-11)

In Building 2, on the Second floor near Room 233A, the off-corridor detour was for a distance of 40 feet at $855.89 versus 28 feet of a "straight" corridor run at $570.48. Only two wall penetrations and one additional fitting were necessary with the detour, and the net cost to the Contractor was *$285.41.* (Tr. IV/616-617; Exh. G-11, G-12)

DISCUSSION

The Appellant charges that the congested conditions above the corridor ceilings (predominantly in Buildings 1 and 2, and, to a lesser degree, in five others) so differed from the norm as to constitute a Type II changed condition. Appellant further contends that these conditions could not have been discovered during several reasonably conducted pre-bid site visits by its experienced estimator. Finally, Appellant argues that the VA engineers possessed certain "as built" drawings depicting the equipment above the corridor ceilings and withheld disclosure of this "Superior Knowledge" to the Contractor's detriment.

The law regarding the basic issues raised by Appellant were previously addressed by the Board in the appeal of *Markey Construction Company,* VABCA No. 2019, 85-3 BCA ¶ 18,425 at 92, 51:

> In regard to the omission of crucial details of work from contract documents, our Board has often remarked upon the contractor's duty to conduct a reasonable site investigation before submitting its bid. In *George E. Jensen Contractor, Inc.,* VACAB-1322, 78-2 BCA ¶ 13,359 at 65,515, we stated that:
>
> While the site investigation clause does not nullify the provisions of the Differing Site Conditions clause, nor require the Contractor to discover, at his peril, conditions at the site that would not be ascertainable by a reasonable pre-bid site investigation, the Contractor is chargeable with the knowledge reasonably ascertainable on proper site investigation by a prudent bidder, in the absence of any misrepresentation or withholding of essential information by the Government. (Citations omitted)
>
> The Appellant charges that the Government in fact *did* withhold essential information in this case. Where the missing information could easily have been discovered through a bidder's independent pre-bid site investigation, however, there can be no invocation of the Superior Knowledge doctrine against the Government. *Ambrose Augusterfer Corp. v. United States,* 184 Ct.Cl. 18, 38 (1968).

Shortly after the *Markey* decision, the Board, in the appeal of *ECOS Management Criteria, Inc.,* VABCA No. 2058, 86-2 BCA ¶ 18,885, addressed a Contractor's similar contentions of withholding of Superior Knowledge by the Government. In *ECOS,* at 95,259-61, we reviewed the existing law concerning this doctrine, including the seminal case of *Helene Curtis Indus., Inc. v. United States* [9 CCF ¶ 71,992], 160 Ct.Cl. 437, 312 F.2d 774 (1963). We concluded that in those situations where a reasonable site inspection by a contractor would have disclosed the conditions complained of, the Government's withholding of the information would not serve to substitute for such an inspection. We stated that:

> The cases cited by the parties, and a long line of others, have one common exception to the duty of the Government to disclose to prospective contractors information which it possesses. When the undisclosed information is not exclusively within the knowledge of the Government, but could reasonably be expected to be known by the contractor, or readily ascertainable from a pre-bid or pre-proposal site investigation (in cases where the invitation for bids or request for proposals advises the contractor to make such an investigation), the contractor cannot base a claim on the fact that the Government did not volunteer the information.

Apart from the question of what an adequate pre-bid investigation would have shown, it should be noted that the "as built" drawings, upon which the Appellant bases its Superior Knowledge argument, are not in evidence. The Board is thus unable to make a determination that those drawings were sufficiently complete/current to have war-

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ranted reliance for bidding purposes. As the party alleging Superior knowledge, it was Appellant's burden to secure such evidence (in pre-hearing discovery) and to place it in the record.

To prove its Type II claim under the Differing Site Conditions ("DSC") clause, Appellant must show not only that the conditions were unknown, but that they were "of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract." One making such a Type II claim of a differing site condition is often said to carry a "relatively heavy burden." *Charles T. Parker Construction Co. v. United States,* 193 Ct.Cl. 320, 333-34 (1970); *Shumate Contractors, Inc.,* VABCA No. 2772, 90-3 BCA ¶ 22,946.

The question thus is whether the degree of above-corridor congestion found in these thirty-one year old hospital buildings was sufficiently unusual or unexpected to qualify as a Type II condition. Even were such conditions found to qualify under the above criteria, however, they must not have been otherwise reasonably ascertainable by the bidders. The viability of this appeal thus rests on the accessibility to a reasonable bidder of the information which was necessary to properly estimate the difficulty (and thus the cost) of installing cable trays in the hospital's above-corridor service areas. To put it another way: Did this Contractor conduct a reasonable pre-bid site investigation, and would such an investigation have disclosed the congested conditions which were ultimately encountered? In its main brief (at pp. 16-17) Appellant's Counsel calls the Board's attention to the fact that the VA failed to rebut the testimony by OKJ's estimator concerning the adequacy of his pre-bid site investigation. From that failure, Counsel has constructed the following argument:

> "The process of conducting a reasonable site investigation is sufficiently technical, both in terms of what the inspector does and looks for and in terms of *what is the industry standard,* to require some expertise in order to testify regarding these matters with any authority." The Government has supplied the Board with neither. OKJ has met its burden of showing that it lacked knowledge of the site condition, and the Government has wholly failed to rebut that showing. [Emphasis added]

The problem with this argument is Counsel's assertion that the testimony of Appellant's estimator, standing alone, was sufficient to establish some sort of an industry site investigation standard (also often referred to as a "trade practice") for this type of a project. That contention is simply untenable. As we recently stated in the appeal of *Caddell Construction Company, Inc.,* VABCA No. 3509, 93-3 BCA ¶ 26,114: "Trade practice cannot override or alter the clear intent of a contract provision;" *citing Craft Machine Works, Inc. v United States,* 926 F.2d 1110 at 1115 (Fed. Cir. 1991). In our view, the "clear intent" of the contract clause titled "Site Investigation and Conditions Affecting the Work," was that the bidder(s) take "steps reasonably necessary" to determine existing site conditions that can affect "the work or its cost." Further, the Contract drawing note unambiguously warned the Contractor of the need to closely examine the existing areas where the wireway was to be installed. Whether such steps were taken is essentially a legal conclusion which goes to the heart of this dispute. We will not be bound by essentially self-serving and uncorroborated testimony offered on behalf of one of the parties to this dispute. Instead, we will ourselves determine the reasonableness of the site investigation, based upon the factual record as a whole.

The Contractor is warned, in General Drawing Note 8, that the (straight line) cable tray layouts on the plan views "are not intended to show all required fittings, offsets and exact locations." Following the warning is this instruction: "Contractor shall field verify all obstructions and provide an installation which will fit within existing ceiling heights." While it is true that this note is equally applicable to post-bid layout and installation, it nevertheless serves to place a contractor on notice that straight wireway runs shown in all corridors on the plan view drawings cannot be relied upon for bidding purposes, a fact acknowledged by the estimator himself. His ordering of several hundred fittings even before the congested conditions were encountered illustrates his understanding. He testified that the Contractor was itself required to "design" the wireway runs. Despite his awareness of this cautionary note and its implications, the estimator nevertheless proceeded to base his bid price on only thirteen fittings, the precise amount shown on these drawings. He did not satisfactorily explain this action. Regardless, these pre-bid actions cannot have comported with any industry standards in light of the clear contract warning. Even the Appellant's President acknowledged that more fittings

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would be needed than shown on the drawings.

Furthermore, the estimator stood on the floor when prying up the individual corridor ceiling tiles. He was thus limited to what could be seen from that position. If the estimator had brought or borrowed a ladder, there is no doubt that he would have seen numerous obstructions which were vividly described by the Contractor's electrical foreman. As the foreman said: "You couldn't miss them." Indeed, OKJ's President said he would have expected a ladder to be employed. We reject any notion that it was reasonable to not use a ladder to actually look above the ceilings as part of the site investigation. After all, the foreman testified that before beginning any cable tray layout, he would climb the ladder and look above the ceilings to determine the presence of any obstructions. The Board's own site visit during the hearing confirmed the much more accurate picture which one derives from standing on a ladder and peering into the service areas versus the very limited oblique view afforded, through a 2′ by 2′ opening, from the floor some eight to nine feet below. Nor has Appellant established that such restricted inspection of the service areas was in accordance with any reasonable industry standard.

The contract was to be performed in a working hospital setting. There was no representation in the solicitation or the specifications that would have led any bidder to believe otherwise. In Building 1, the only way that cable tray could be cut was to remove and transport the (standard) ten foot length to the sixth floor by means of a freight elevator. There was no other location where the cuts could be made utilizing Appellant's specialized saw without interfering with the operation of the hospital. This entirely predictable situation further emphasizes the need for a particularly thorough site investigation of Building 1 prior to bidding. The sheer impact of transporting and cutting the cable trays, on labor efficiency and performance time, made it imperative to get as accurate a picture as possible of the conditions existing above the corridors of Building 1. With this awareness of the consequences of underestimating the number of fittings (and associated cuts), a prudent bidder would use the best availible means to investigate the service areas above corridor ceilings—a ladder. While the use of a ladder would not be required every ten feet for the length of each corridor, the congestion seen even in random viewings would reasonably induce further examination, particularly where the interior refrigeration units and their hangers, wiring, access panels and associated plumbing accessories could be seen blocking access in so many service areas on both sides of the corridors.

The Appellant's electrical foreman also encountered extreme congestion because of the IR units and at the corridor junctures in at least seven of the hospital buildings (Bldgs. 1 through 6 and 9), with the worst being on most floors of Building 1 and several floors of Building 2. Since these corridor junctures are where various systems intersect or branch out, we cannot fathom why some greater degree of congestion was not forseeable. The estimator failed to make an adequate inspection of the above-ceiling corridor junctures. In such a situation, the Contractor, having failed to take reasonable precautions, cannot now claim that this particular congestion was unforseeable.

We have concluded that both the interior refrigeration units and the corridor junctures were accessible and visible upon a reasonable inspection of these above-ceiling service areas. With respect to the other equipment which existed in these areas (ducts, pipes, conduits, etc.), we observe that this VA hospital was thirty-one years old at the time of the solicitation. Although Appellant's witnesses identified several hospitals where the Contractor had performed similar installation of wireways (but with less difficulty), the ages of three of those facilities were not given, while the fourth was stated to be of more recent vintage. We thus have no basis for a true comparison. Certainly, one would normally expect an older hospital to have been periodically upgraded with utility system additions and modifications over time, resulting in cumulative congestion in areas reasonably expected to contain, at the very least, domestic plumbing, sewage/interior drainage, HVAC (ductwork and plumbing), communication wiring, and electrical equipment. Therefore, the older the facility, the more important it becomes to conduct a *thorough* site investigation.

The Appellant's assertion that it was simply impractical to lift over ten thousand feet of ceiling tile in numerous buildings as a part of any reasonable site investigation sets up a "strawman." Lifting every tile was simply not necessary. A random inspection (from a ladder) at several spots in the corridors of each floor of the buildings would not have been an oppressive burden in preparing a bid of nearly $1 million for a project involving extensive cable tray installation above those

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building corridors. Such a random inspection would have revealed both congested corridors (IR units and hangers, ducts, plumbing, etc.) and corridor junctures. Having discovered this congestion, a bidder then could have asked the VA for any as-built drawings, or placed some contingencies in its bid (as is often done when exact site conditions cannot be *precisely* determined), or simply declined to submit a bid for the contract.

We are not convinced, moreover, that excessive contingencies were called for in this situation. As we have found, and as testified to by the Appellant's electrical foreman, almost all of the corridor junctures in the seven buildings scheduled for extensive cable tray installation were congested. It would have been a relatively simple matter to have examined two or three above-ceiling corridor junctures in each of these seven buildings (at least one per floor in Building 1—the largest). Having done so, the estimator could have taken the number of 90° and 45° fittings needed in the most congested corridor juncture (or an average of several) and multiplied those two figures by the total of forty-nine junctures depicted on the contract drawings for those seven buildings. Since it was evident from almost any vantage point in the seven buildings that the IR units posed a problem with straight wireway runs above the corridors, and since there was one of these units for nearly every room, the estimator could have counted the number of rooms per floor of each building and estimated the number of IR units to be encountered. Then, just as with the corridor junctures, he could have examined several of the IR units and calculated a "worst case" (or averaged) number of fittings necessary to detour around that equipment. Again, simply multiplying the number of fittings per unit by the total number of IR units would have given a bidder a reasonably reliable basis for preparing an estimate. Of course, the above-described methodology is not exact, nor for that matter is any other in fixed price competition, in this Board's experience. However, we are convinced that the above-described methodology, or something similar, was reasonably available to the bidders for this project. It certainly was not necessary, as suggested by Appellant, to closely examine over 10,000 feet of corridor ceilings or to place excessively large price contingencies in the bids for this project. This Appellant took none of the reasonable precautionary measures which we have just discussed. It cannot now shift responsibility to the Government for the consequences of its overly optimistic estimating assumptions.

Quantum

The Government has conceded that in those instances where the service areas were too congested for any amount of fittings to allow passage of the cable trays, the Contractor's need to go "off corridor" and route the wireway around the obstructions resulted from a differing site condition and should be compensated. The Board agrees. The Contract drawings indicated, by use of the straight lines above the corridors, that the wireways could be installed somewhere in those service areas. A contractor was entitled to rely on that representation. In those instances where this representation was erroneous due to extreme congestion or complete obstruction, making wireway installation impossible above any corridor, there were Type I differing site conditions.

The parties could not agree on the amount of the equitable adjustment due as a result of these unforseeable conditions. The Appellant takes the position that it should prevail in the entire claim, and that it has established a right to prove its costs through the use of the total cost approach. The VA, on the other hand, has presented more specific information regarding the probable costs which the Contractor incurred by having to route wireway around the four totally obstructed corridor locations in Buildings 1 and 2.

As has been repeatedly stated, the total cost approach to quantifying claims is generally not favored by either the boards or the courts. *Servidone Construction Corporation v. United States* [37 CCF ¶ 76,082], 931 F.2d 860, 61 (Fed. Cir. 1991); *Fletcher & Sons, Inc.*, VABCA No. 3248, 92-1 BCA ¶ 24,726; *Sefco Constructors*, VABCA No. 2747, *et al.*, 93-1 BCA ¶ 25,458. Even in those limited situations when the method is allowed, several preconditions are required to be met. One of these criteria is that the Contractor's bid price must have been reasonable. *Servidone*, 931 F.2d at 861. While there is no question that OKJ's base bid of $978,175 was quite close to that of the next lowest bidder's $994,240, the focus of our attention here is the reasonableness of that component of the bid relating to cable tray installation. We conclude that the Appellant's price estimate for this particular work was unreasonable in that it included only thirteen 90° fittings and no 45° fittings at all. As we have already found, the estimator simply counted the fittings shown on a drawing, ignoring the cautionary note on Note 8, Contract Draw-

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ing 4 of 31. The material costs, together with the associated labor costs of cutting, drilling, transporting and installing these fittings (particularly in Building 1) make up the overwhelming bulk of the total cost claim before us. For the Contractor to have so completely underbid such a labor-intensive item as fittings in calculating costs of cable tray installation was simply not reasonable. The Appellant thus can not meet this prerequisite for use of the total cost method. We need not discuss the other criteria.

The Government points to the fact that the Contractor was allowed to use less expensive smaller round conduit instead of the specified larger square cable trays in certain extremely congested areas above the corridors, and that the Contractor saved some (lesser) amount of its planned effort above the corridors when complete obstruction forced it to install off-corridor runs of cable tray. Because of these putative savings, the Government argues that costs provably incurred by the Appellant in the above instances must be adjusted downward. We agree. The purpose of an equitable adjustment is to "keep a contractor whole" whenever the Government modifies a contract. *Bruce Construction Corp. v. United States* [9 CCF ¶ 72,325], 163 Ct.Cl. 97, 100, 324 F.2d 516, 518 (1963). As our Board stated in *Zurfluh Enterprises,* No. 1941, 85-1 BCA ¶ 17,789 at 88,908: "The measure of the equitable price adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion."

We will thus accept the more reliable computations made by the VA engineer, set forth in our findings of fact, which reflect the savings discussed above. *See, e.g., Blount, Inc.,* VABCA No. 3236, 93-1 BCA ¶ 25,474 at 126,894. However, we will make an adjustment to the estimated costs associated with OKJ's three off-corridor wireway runs in Building 1. This reflects the loss of efficiency in having to stop, measure, and transport wireway to the Sixth floor in order to then cut and drill for the unanticipated additional fittings required by the detours. Although there is no precise way of measuring this inefficiency factor, there is adequate support *for some adjustment* in the testimony offered by Appellant's electrical foreman and made a part of the foregoing findings of fact. On a jury verdict basis, therefore, the Board will add 20% to the estimated costs of the three off-corridor detours in Building 1: 3rd Floor, $1,948.58 plus $389.72 = $2,338.30, minus a $1,017.66 credit, for a net of *$1,320.64;* 4th Floor (A-403), $2,272.03 plus $454.41 = $2,726.44, minus a $922.10 credit, for a net of *$1,804.34;* 4th Floor (ICU), $1,934.88 plus $386.98 = $2,321.86, minus a $1,215.57 credit, for a net of *$1,106.29.* There is no comparable credible evidentiary basis for similarly adjusting the costs of the one Building 2 off-corridor detour.

Applying the foregoing factors to the estimated costs and credits contained in the findings of fact, we find the Appellant entitled to the equitable adjustment calculated below:

Bldg. 1 (A-342)	$1,320.64	
Bldg. 1 (A-403)	$1,804.34	
Bldg. 1 (ICU)	$1,106.29	
Bldg. 2 (233A)	$ 285.41	
Total Adj.	$4,516.68	$4,516.68
Bldg. 1 (CB-9)	($ 190.02)	
Bldg. 1 (C3-7)	($ 184.85)	
	($ 374.87)	(374.87)
		$4,141.81
	Overhead (10%)	414.18
		$4,555.99
	Profit (10%)	455.60
		$5,011.59

DECISION

In accordance with the foregoing findings and discussion, that portion of the Appellant's differing site conditions claim relating to the obstructions in the previously-discussed above-corridor locations, found to be Type I conditions, is sustained in the (rounded) amount of $5,012.00. The balance of the claim, as it relates to partially obstructed/congested above-corridor locations, characterized as Type II conditions, is denied.

[¶ 26,506] Penn Environmental Control, Inc.

VABCA Nos. 3599E/R, 3600E/R, 3725E/R, November 2, 1993. Contract No. V513C-220.

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Attorney Fees and Costs Under Equal Access to Justice Act—Application Procedures—Motion for Reconsideration.—A contractor's motion for reconsideration of a previous decision that denied the full amount of the contractor's Equal Access to Justice Act application preparation fees was granted because the board determined that it had mistakenly failed to include the amounts contained in the contractor's replies to the government's answers to the original applications. The board's rules, procedures for processing EAJA applications, and orders concerning the applications did not prevent the contractor from increasing the amount of its application in a reply. Upon review of the record, the board concluded that but for its failure to recognize that the contractor was increasing the total amount of its fee requests, the EAJA application preparation costs would have been considered by the board in the principal decision.

Attorney Fees and Costs Under Equal Access to Justice Act—Amount—Application Preparation.—Under the Equal Access to Justice Act, a contractor was entitled to recover the full amount of the application preparation fees requested because the government failed to show that the hours of effort claimed for EAJA application preparation, EAJA research, and replies to the government's answers were unreasonable. However, the contractor was not entitled to recover all of the requested EAJA application preparation costs in connection with a claim that involved issues and amounts identical to another claim for which an application had been prepared.

For the appellant: Frederick J. Condon, Solon, Ohio. For the government: Kenneth B. MacKenzie, Trial Counsel, Office of General Counsel, Washington, D.C., William E. Thomas, Jr., Assistant General Counsel, and Phillipa L. Anderson, Deputy Assistant General Counsel, of Counsel.

Before KREMPASKY, PULLARA, and ROBINSON, Administrative Judges.

Reconsideration of 94-1 BCA ¶ 26,326 granted.

KREMPASKY, Administrative Judge: Penn Environmental Control, Inc. ("PEC" or "Applicant"), has timely moved for reconsideration of our decision, issued on August 20, 1993, in VABCA Nos. 3599E, 3600E, and 3725E. In that decision, we awarded PEC fees and expenses under the *Equal Access to Justice Act* ("*EAJA*"), 5 U.S.C. § 504, in the total amount of $5,525.25. The recovery allowed in each application was as follows:

Application No.	*Amount Awarded*
VABCA No. 3599E	$1,725.63
VABCA No. 3600E	1,725.62
VABCA No. 3725E	2,074.00
Total	5,525.25

Familiarity with the principal decision is presumed.

PEC asks the Board to reconsider the amount of the fees and expenses awarded in the principal decision in light of the Board's apparent failure to include the attorney fees claimed for preparation of each its three *EAJA* applications. PEC alleges that the total amount of attorney fees and expenses requested in the three applications cited in the principal decision did not include the amounts, contained in PEC's Replies to the Government's Answers to the original applications, requested for preparation of the *EAJA* applications. Because of the Board's apparent failure to evaluate the application preparation fees in its principal decision, PEC claiins the following additional attorney fees for preparation of its *EAJA* applications:

Application No.	*Additional Amount Claimed*
VABCA No. 3599E	$1,312.50
VABCA No. 3600E	1,100.00
VABCA No. 3725E	810.00
Total	3,222.50

The Department of Veterans Affairs ("VA" or "Government") contests the Motion on the basis that, since PEC has presented no newly discovered evidence or evidence not readily available at the time of the principal decision, there is no basis for the Board to reconsider the principal decision. In the alternative, if the Board decides to reconsider the principal decision, the VA avers that the amounts claimed by PEC for preparation of the *EAJA* applications are excessive and any additional award should be prorated based on the amounts originally awarded.

DISCUSSION

PEC's original applications for *EAJA* fees and expenses in VABCA Nos. 3599E, 3600E, and 3725E were received by the Board on

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May 23, June 11, and June 21, 1993 respectively. The VA's Answers to the applications were filed on June 21, 1993 in the case of VABCA 3599E and July 21, 1993, in the case of both VABCA Nos. 3600E and 3725E. The Board received PEC's Replies to the Answers (styled, in each case, by PEC as "Memorandum Re: Government's Answer to Appellant's EAJA Application") on July 13, August 17, and August 10, 1993. The Reply to the Answer in VABCA No. 3599E included, without explanation or introduction, the following table:

Additional Fees—Frederick J. Condon

May	3	Research on EAJA	3.0 hrs.
	4	Draft Application for EAJA	2.5 hrs.
	6	Draft Application for EAJA	2.5 hrs.
	7	Draft Application for EAJA	1.0 hrs.
	11	Draft Application for EAJA	3.0 hrs.
June	28	Study Government Answer on EAJA	1.0 hrs.
July	3	Draft Memorandum on EAJA	2.0 hrs.
	4	Draft Memorandum on EAJA	3.0 hrs.
	5	Draft Memorandum on EAJA	1.0 hrs.
			17.5 hr @ $ 150/hr.=
			$ 2,625.00

We note that the table lists 19 hours of services rendered by Mr. Condon, not the 17.5 hours listed as the total in the table. In its Motion for Reconsideration, PEC reiterates its claim for an additional $2,625.00 (17.5 hr. @ $150/hr) for Mr. Condon's services in preparing the *EAJA* application. Thus, we will use 17.5 hours as the additional number of hours of *EAJA* application preparation fees for which PEC seeks recovery in VABCA No. 3599E.

PEC's replies to the VA's Answers in VABCA Nos. 3600E and 3725E followed the same format and contained tables similar to the table in the reply in VABCA No. 3599E. The additional request for *EAJA* application preparation fees in the reply in VABCA No. 3600E was $2,200 (9.3 hours application preparation + 5.5 hours reply preparation = 14.8 hrs @ $150/hr); in VABCA No. 3725E, the request was for $1,620 (6.3 hours application preparation + 4.5 hours reply preparation = 10.8 hrs. @ $150.00/hr). In its Motion for Reconsideration, PEC, recognizing the holding in our principal decision that we are limited to the $75 per hour rate stated in *EAJA* in awarding attorneys fees, revised the amounts stated in the Replies that it sought to recover for *EAJA* application fees to $1,312.50, $1,100, and $810, in VABCA Nos. 3599E, 3600E, and 3725E respectively.

In reviewing the record, we have determined that we misconstrued the nature and purpose of the tables presenting PEC's application for attorney's fees for preparation of the *EAJA* applications. Because of the manner in which the requests for *EAJA* application preparation fees were made in the Replies, the Board did not treat them as additions to the fee requests made in the original applications. Consequently, the Board, mistakenly, did not include the attorney fees claimed for preparation of the *EAJA* applications in its consideration of PEC's applications in the principal decision.

The VA has correctly noted that we will ordinarily grant a motion for reconsideration only when the movant presents newly discovered evidence or evidence not readily available at the time of the principal decision. *Saturn Construction Co., Inc.,* VABCA No. 2600R, 88-3 BCA ¶ 21,183. However, because of the circumstances present here, the ordinary standard applicable to our consideration of a motion for reconsideration does not preclude our granting this Motion. When the Board's decision is based, to some extent, on its own material mistake or oversight, a motion for reconsideration will ordinarily be granted. *Sentry Insurance, A Mutual Company,* VABCA No. 2617R, 92-3 BCA ¶ 25,147 at 125,360.

We question the wisdom of PEC in increasing its fee applications through the vehicle of a reply to a Government answer to an application without clearly highlighting its intent to the Board. However, there is nothing in the Board's Rules, the Board's procedures for processing *EAJA* applications, or the Board's Order Concerning *EAJA* Application issued in each of the three applications that prevented PEC from increasing the amount of its application in a reply. Upon review of the record, we are

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convinced, but for our failure to recognize that PEC was increasing the total amount of its fee requests, that the *EAJA* application preparation costs would have been considered by the Board in the principal decision. Therefore, in the interests of justice, we will reconsider the principal decision to include the *EAJA* application preparation fees.

It is well settled that fees for preparation of *EAJA* applications are recoverable. *Commissioner, Immigration and Naturalization Service v. Jean, et al.*, 496 U.S. 154, 110 S.Ct. 2316 (1990); *Scheuenemeyer v. United States*, 776 F.2d 329 (Fed. Cir. 1985). An applicant is entitled to recover only reasonable attorney fees. In determining the reasonableness of fees, the Board is entitled to examine the complexity of the legal work, the results obtained, and the hours expended. *Buckley Roofing Company, Inc.*, VABCA No. 3374E, 92-2 BCA ¶ 24,826 at 123,839, citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, (1983). Thus, we will examine the reasonableness of PEC's application for attorneys fees for the preparation of the *EAJA* application under the *Buckley* standard.

The VA contends that PEC's fee request for payment for 3 hours of services to research *EAJA* in VABCA No. 3599E is excessive. Because of the Board's detailed instructions on the preparation of *EAJA* applications provided to PEC and Mr. Condon's acknowledged expertise in Federal procurement law, the VA asserts that the 3 hours claimed for *EAJA* research is excessive. In addition, in light of the fact that the three applications and Government answers are virtually identical, the VA asserts that PEC's requests for a total of 24.6 hours to draft the three applications and 17.8 hours to prepare the replies to the Government's answer are unreasonable. Finally, the VA asks us to prorate any amount of additional recovery we determine to be reasonable based on the relationship of the amount originally awarded to the original amount requested.

The three applications for fees and expenses under *EAJA* are essentially identical and are supported by the same evidentiary submissions of fees and costs incurred. PEC's Replies to the Government's Answers, in each of the three applications, specifically addressed the Government's position and arguments in relation to the particular facts and circumstances of each application. The VA, other than expressing its belief that an attorney with Mr. Condon's expertise and experience should have been able to prepare the Applications and the Replies in a shorter time, offers nothing to support its position that the claims for preparation of the replies to the Government's Answers should be reduced to a more reasonable amount. In regard to the effort for *EAJA* research, only the application for VABCA No. 3599E contained a request to recover fees for research.

We find the 17.5 hours of effort to claimed for *EAJA* preparation, preparation of PEC's Reply, and *EAJA* research in VABCA No. 3599E to be reasonable. Thus, we will allow recovery for an additional 17.5 hours of Mr. Condon's services in VABCA No. 3599E.

PEC requests 9.3 hours of effort to prepare the application in VABCA No. 3600E. The issues involved (as well as the amount requested) in VABCA No. 3600E were identical to the issues in VABCA No. 3599E. Consequently, we find that the request for 9.3 hours of effort to prepare the *EAJA* application in VABCA No. 3600E to be unreasonable. In our view, the only effort necessary to prepare the application in 3600E was the editing of the application prepared for VABCA No. 3599E. Therefore, we will allow recovery for 2 hours of effort in preparing the *EAJA* application in VABCA No. 3600E. The 5.5 hours of Mr. Condon's services claimed for preparation of PEC's Reply in the VABCA No. 3599E appears reasonable on its face and we will allow recovery for those services. Thus, PEC is entitled to an additional 7.5 hours of effort in VABCA No. 3600E.

The effort and work product to prepare the applications in VABCA Nos. 3599E and 3600E was directly translatable to the application in VABCA No. 3725E. However, VABCA No. 3725E involved additional issues concerning the substantial justification of the Government's position not involved in the other two applications. Consequently, we will allow 3 hours of effort to prepare the application in VABCA No. 3725E; the 4.5 hours of additional attorney effort claimed for preparation of the Reply is reasonable and will be allowed. Thus, we will allow an additional recovery based on 7.5 hours of Mr. Condon's services to prepare the *EAJA* application in VABCA No. 3725E.

The VA urges us to prorate any award for *EAJA* application preparation fees based on the ratio of the Board's award in the principal decision to the amount claimed. We see no reasonable basis for such proration. The reductions to the amounts originally requested by PEC in the principal decision resulted from the Board's application of the

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$75 per hour rate for fees to PEC's fee request and from the Board's holding that certain fees requested in the application were either incurred prior to PEC's appeals or were incurred in a period after the Government was substantially justified in its position. None of these circumstances are applicable to the request for *EAJA* application preparation costs.

Therefore, PEC is entitled to recover the additional $1,312.50 (17.5 hours @ $75 per hour) claimed for *EAJA* application preparation costs in VABCA No. 3599E. In VABCA Nos. 3600E and 3725E, we will allow additional recovery of $562.50 (7.5 hours @ $75 per hour) in each of those two applications.

DECISION

For the foregoing reasons, Penn Environmental Control, Inc.'s, Motion for Reconsideration of the Boards decision, dated August 20, 1993 in VABCA Nos. 3599E, 3600E, and 3725E is GRANTED. Accordingly, the amount of fees and other expenses awarded in the Board's August 20, 1993, decision is VACATED.

The Applicant, Penn Environmental Control, is awarded fees and expenses under the *Equal Access to Justice Act* in the applications in VABCA Nos. 3599E, 3600E, and 3725E as follows:

Application No.	*Amount of Fees and Expenses*
VABCA No. 3599E..	$3,038.13
VABCA No. 3600E..	2,288.12
VABCA No. 3725E..	2,636.50
TOTAL	7,962.75

[¶ 26,507] The Planters, Inc.

AGBCA No. 93-209-10, November 17, 1993. Contract No. 52-447U-1-4604.

Attorney Fees and Costs Under Equal Access to Justice Act—Substantial Justification—Default Termination.—A tree planting contractor was entitled to recover attorney fees and expenses under the Equal Access to Justice Act because the government's position in terminating for default a tree planting contract before the time for performance had run was not substantially justified. The government terminated the contract on the ground that the contractor had failed to make sufficient progress to ensure completion of the contract by the specified date. The government, however, failed to show that there was no reasonable likelihood that the contractor could not complete performance in the remaining time. In terminating a contract prior to the date of completion, the government must do more than compare the percentage of work completed with the time remaining for completion, and it may not terminate on the ground that completion is less than absolutely certain.

For the appellant: William N. Carden, Indianapolis, Indiana. For the government: Ted L. Elders, Office of the General Counsel, U.S. Department of Agriculture, Atlanta, Georgia.

Before EATON, HOURY, and SETO, Administrative Judges.

EATON, Administrative Judge: The Planters, Inc., of Indianapolis, Indiana (Applicant), applies for attorney fees and expenses in the amount of $14,528.84 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended. The Government opposes the application but argues that if the Board finds entitlement, the amount claimed should be reduced.

Under EAJA and implementing U. S. Department of Agriculture (USDA) regulations, 7 CFR § § 1.180-1.203, attorney fees up to $75 an hour and other expenses may be awarded to prevailing parties in adversary proceedings against the Government. Appeals of decisions under the Contract Disputes Act, 41 U.S.C. § § 601-613, are among such proceedings. Applicants initially must demonstrate that they meet certain income and size standards.[1] Upon doing so, they are eligible to receive an award unless the Government's position was "substantially justi-

[1] For corporations, the standard is a net worth of not more than $7 million and not more than 500 employees. 7 CFR § 1.184(b)(5).

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fied" or other circumstances would make the award unjust.

The Adversary Proceeding

The dispute between Applicant and the Forest Service, USDA, arose under contract No. 52-447U-1-4604, for hand planting of loblolly pine seedlings on 571 acres in the Holly Springs National Forest, Mississippi. The Forest Service awarded the contract, in the amount of $22,394.62, to Applicant on December 10, 1990. Performance was to be completed by March 12, 1991. On February 11, 1991, however, the Contracting Officer (CO) terminated the contract for default on grounds that Applicant had failed to make sufficient progress to ensure completion by the date specified. At the time of termination, Applicant had completed 24 percent of the work in 55 percent of allotted time, although the first pay estimate showed planting quality of 97 1/2 percent.

Applicant challenged the termination (AGBCA No. 91-154-1) and Government claims for $8,228.48 in excess costs of reprocurement and $1,290 for spoiled seedlings (AGBCA No. 91-194-1). In addition, Applicant claimed $18,306.20 in damages for alleged breach of contract, primarily Government interference with performance (AGBCA No. 91-198-1).

In a decision issued March 1, 1993, *The Planters, Inc.*, AGBCA Nos. 91-154-1 *et al.*, 93-2 BCA ¶ 25,880, the Board found the termination for default improper. We denied the Government's claims and remanded Applicant's monetary claim for resolution by the parties under the regulations applicable to a termination for the convenience of the Government.[2]

The EAJA Application

In an EAJA application dated June 30, 1993, Applicant argues that the position of the Government in the appeals was not substantially justified. Applicant seeks $13,837.50 in attorney fees for 184.5 hours of legal services, including conferences with Applicant, the CO, Government counsel, witnesses, and the presiding judge, as well as research, preparation for and participation in a 1-day hearing in Memphis, Tennessee, and briefing. All services were billed at $75 an hour. Applicant also claims $691.34 in expenses, including transcript, $92.40; postage, $45.94; copying, $25.30; and travel from Indianapolis to Memphis and return, $458.70 for mileage and $69 for accommodations.

On July 21, 1993, Applicant supplemented its application with information on net worth and number of employees, demonstrating its eligibility under EAJA.

The Government's Response

The Government asserts that the CO's decision to terminate the contract and to seek excess costs and damages was "justified to a degree that could satisfy a reasonable person," citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). According to the Government, there is a limited time when weather conditions are favorable for survival of seedlings planted in Mississippi, and a CO is under significant pressure to accomplish this work in a manner that meets overall forest plans and guarantees the continuous production of timber. The Government argues that even a few additional days may be critical when a CO is deciding whether to terminate an ongoing contract for default and obtain another contractor to complete the work while weather still permits, or to continue with the incumbent in hopes that performance will improve. Under these circumstances, the Government contends, the CO's decision to terminate Applicant's contract for default was reasonable, and she was then obligated to seek excess costs and damages.

The Government adds that proceedings were delayed by counsel for Applicant, who allegedly sought postponement of the hearing and agreed to holding it in Jackson, Mississippi, or Memphis, rather than closer to Applicant's home base. The Government argues that even if the Board finds the Government was not "substantially justified," fees and expenses should be reduced.

Analysis

The Government does not challenge Applicant's eligibility. We therefore consider only whether the Government's position during the appeals was "substantially justified." It is the Government's burden to establish substantial justification. *Francis Paine Logging*, AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043.

The Government is essentially reasserting the positions espoused during the hearing and attempting to relitigate its claims. As indicated above, the Board held the termination for default improper and denied the claim for excess costs. Among the bases for

[2] Counsel for Applicant has advised the Board that the parties recently settled the termination claim. Although the parties also discussed possible settlement of the attorney fee claim, they were unable to reach agreement on it.

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this decision were a finding that Forest Service inspectors had interfered with performance and attempted to supervise Applicant's planters; the CO's inability to recall Applicant's promise to bring more planters to Holly Springs upon completion of another contract in Georgia; and the lack of evidence that the CO had compared the time needed for Applicant to complete performance with the time in which the same work could be accomplished by reprocurement, as required by the Federal Acquisition Regulation (FAR), 48 CFR 49.402-3(f). In this case, we stated, such consideration might have changed the result. We concluded that the Government had failed to prove there was no reasonable likelihood that Applicant could not complete performance in the 29 days remaining at the time of termination.

The Board also denied the Government's claim for 56 bags of spoiled seedlings, each containing an estimated 384 seedlings. We found that the CO's Representative had not conferred with Applicant, as required by the contract, before ordering additional seedlings from the nursery. In addition, the Government's own witness testified that the number of seedlings per bag ranged from 50 to 1,000, leading the Board to conclude that the Government's estimated loss was too speculative to support the claim.

Our decision did not require resolution of close questions of law or fact, as in *Giuliani Contracting Co.*, AGBCA No. 91-166-10, 92-2 BCA ¶ 24,930. Nor were the issues presented without clear precedent, as in *B & M Constr., Inc.*, AGBCA No. 93-160-10, 93-3 BCA ¶ 26,126, so that the Government would have been justified in defending its actions. The cases cited in our decision of March 1, 1993, make clear that in terminating a contract before the time for performance has run, the Government must do more than compare the percentage of work completed with the time remaining, and may not terminate on grounds that completion is less than absolutely certain. In our opinion, the weaknesses in the Government's case should have been apparent to it prior to hearing and briefing. But for apparent personality conflicts between and among the parties, a settlement might have been effected.[3]

Finally, the Government's contention that counsel for Applicant delayed the hearing is incorrect. Correspondence in the prior appeals indicates that one hearing was rescheduled due to the Government's late response to Applicant's discovery requests and late filing of witness and exhibit lists. The rescheduled hearing was postponed at the request of the parties to allow an additional 30 days for settlement negotiations which, as indicated, were not successful. With regard to location, it is the Board's practice to schedule hearings where it is most convenient for counsel and the majority of witnesses. In this case, Government counsel was in Atlanta, and counsel for Applicant in Indianapolis. The parties agreed that neither of these locations was as desirable as one close to the contract site.

We conclude that the Government's position during the adversary proceeding was not "substantially justified." We find no basis for reducing the attorney fees and expenses claimed.

DECISION

The application is granted in the amount of $14,528.84 ($13,837.50 in attorney fees plus $691.34 in expenses).

[¶ 26,508] Kato Corporation, Inc.

AGBCA No. 93-169-1, November 23, 1993. Contract No. 50-05G1-2-0320.

Contract Disputes, Claims—Statement Adequacy—Disputed Extra Work.—Although a construction contractor maintained that its letter was a routine request for a price adjustment as a consequence of a work order directing the installation of fire dampers, the board ruled that the correspondence was a claim because a dispute existed as to whether the installation of the fire dampers was extra work. The government had directed the contractor to install the fire dampers at no increase in the contract cost, whereas the contractor took the position that the installation of the fire dampers would be at extra cost to the government.

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[3] Correspondence in the prior appeals indicates that on February 11, 1992, Applicant offered to settle for less than 20 percent of its claimed damages and, in return, not to bid on contracts in the Holly Spring area again. The CO did not respond to this offer.

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Timeliness of Appeals to Boards—Filing—Ninety-Day Deadline.—An appeal regarding a contractor's claim for the costs of installing fire dampers was dismissed because the contractor failed to file its appeal within 90 days of receiving the contracting officer's final decision. The contractor argued that the contracting officer's final decision was a nullity because its letter was a request for an equitable adjustment, not a claim. The contractor contended that it should be allowed to file a new claim, receive an adverse final decision, and then file an appeal within 90 days of such a decision. It was clear, however, that the contractor's correspondence was a claim, the decision on which the contractor was required to appeal within 90 days of its receipt.

For the appellant: Smith, Currie & Hancock, Atlanta, Georgia, by Karl Dix, Jr. For the government: Michael E. Trow, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before HOURY, DOHERTY, and SETO, Administrative Judges.

HOURY, Administrative Judge: This appeal arose under contract No. 50-05G1-2-0320 between the Forest Service, U.S. Department of Agriculture, and the Kato Corporation (Appellant). The contract, in the amount of $559,300, was for construction of the New Curlew Job Corps Dormitory located in the Colville National Forest, Washington.

A dispute arose between the parties over whether Appellant was required to install fire dampers under the terms of the contract or whether Appellant was entitled to extra payment therefor. The Contracting Officer (CO) wrote a final decision denying compensation. The Board assigned a docket number to an appeal from Appellant's subcontractor. The Board, however, advised Appellant that only Appellant could appeal, and that it would hold the matter in abeyance until Appellant did appeal. Appellant did not respond. After the expiration of the 90-day appeal period, the Board issued Appellant a Notice to Show Cause why the appeal[1] should not be dismissed as untimely.

Appellant entered an appearance, asserting that the CO's decision was a nullity, since Appellant had filed only a request for an equitable adjustment, not a claim. Appellant seeks dismissal without prejudice. The Government has now moved to dismiss on the basis that the appeal was not timely and the Appellant opposes the Government's Motion.

FINDINGS OF FACT

1. Contract No. 50-05G1-2-0320, for construction of the New Curlew Job Corps Dormitory, was awarded June 10, 1992, in the amount of $559,300 (Appeal File (AF) 53).[2] The dormitory was approximately 10,000 square feet and was intended to house 64 people (AF 49). The contract included a Changes clause (Federal Acquisition Regulation (FAR) 52.243-3 (Aug. 1987) (AF 119)) and a Disputes clause (FAR 52.233-1 (Apr. 1984) Alternate I (Apr. 1984) (AF 117)).

2. On September 17, 1992, the CO's Representative (COR) issued Work Order K, directing Appellant to install fire dampers as shown on drawings/specifications, with no adjustment in contract price (Exhibit (Ex.) A).[3]

3. By letter dated September 21, 1992, General Sales Company, Inc., a supplier to Air Flow Heating, Appellant's subcontractor, advised that its bid excluded the fire dampers and the reasons therefor (Ex. B).

4. By letter dated October 24, 1992, from the subcontractor directly to the CO, the subcontractor advised that the specifications did not include fire dampers, that fire dampers could be provided, but that the subcontractor expected "to receive payment in full for them" (Ex. C).

5. By letter dated October 27, 1992, the subcontractor advised the CO fire dampers would cost $2,900 plus $780 for installation (Ex. C).

[1] The matter docketed is referred to as an appeal for convenience only. Appellant, technically, has never filed an appeal and has entered an appearance to obtain a dismissal of the matter docketed without prejudice to Appellant's filing a claim and appealing a new CO's decision.

[2] Unless otherwise indicated, references to AF are to the AF in appeal AGBCA No. 93-178-1, involving the same parties and contract.

[3] As attachments to its Motion the Government included the Declaration of Lucy Soldan, the CO, and Exhibits A-E as attachments to the Declaration. The references in the Findings of Fact (FF) are to these exhibits.

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6. The CO called Appellant and advised that the subcontractor should be communicating through Appellant, that the CO disagreed that the fire dampers should cost extra, and that Appellant needed to decide whether the subcontractor's position was correct (CO's Declaration ¶ 3).

7. By letter dated November 19, 1992, Appellant advised the CO that "We agree with Air Flow .... Therefore as authorized [directed] under work order K, the fire dampers that are being installed are being done so at extra cost above and beyond the contract price." (Ex. C.)

8. By facsimile transmission dated December 30, 1992, Appellant sent the CO a Change Order, signed by Appellant, for the fire damper work in the amount of $5,075.52. Appellant relied on its subcontractor's October 27, 1992 price breakdown (FF 5) and added overhead, profit, and bond costs. (Ex. D.)

9. The CO in a final decision dated February 5, 1993, denied Appellant's request (Ex. E).

10. By undated letter postmarked March 11, 1993, received by the Board March 16, 1993, Air Flow appealed the CO's decision and characterized the CO's decision as "[t]he letter which I just received from the contracting officer dening [sic] my *claim* ...." (Emphasis added.)

11. By letter dated March 19, 1993, the Board docketed the appeal and advised both Appellant and the subcontractor that only Appellant could appeal and that the matter would be held in abeyance until Appellant filed a timely appeal.

12. No response was received by the Board. On June 17, 1993, the Board issued Appellant a Notice to Show Cause, within 10 days, why the appeal should not be dismissed as untimely.

13. By letter dated July 12, 1993, Appellant asserted that the request for an equitable adjustment did not amount to a claim, that the CO's decision was a nullity, and that the appeal should be dismissed without prejudice. By letter dated July 26, 1993, the Government indicated it had no objection to a dismissal without prejudice.

14. By letter to Appellant and the Government dated August 3, 1993, the Board stated:

> [I]f the appeal had been timely filed and the Government moved for dismissal because the CO had not been presented with a claim (as Appellant now alleges), we would have considerable difficulty concluding there was no claim based upon the present incomplete record....

The Board requested the parties to supplement the record with relevant evidence prior to the Board's deciding to dismiss with or without prejudice.

15. In response to the Board's letter, the Government changed its position and filed a Motion to Dismiss (with prejudice). Appellant opposes the Government's Motion and seeks dismissal without prejudice.

DISCUSSION

Appellant and the Forest Service were already before the Board in another appeal involving the same contract (FF 1, note 2). Nevertheless, under the Contract Disputes Act (CDA) only "the contractor" may appeal an adverse decision of the CO. 41 U.S.C. § 606. A subcontractor may not file an appeal because the subcontractor lacks privity. *Erikson Air Crane Co. v. United States* [32 CCF ¶ 72,392], 731 F.2d 819 (Fed. Cir. 1984); *United States v. Johnson Controls, Inc.* [31 CCF ¶ 71,374], 713 F.2d 1541 (Fed. Cir. 1983). Therefore, the purported appeal by Appellant's subcontractor was clearly a nullity since even Appellant has not argued that it authorized the appeal. (FF 10, 11.)

An appeal to the Board of a CO's adverse decision must be filed within 90 days of its receipt. 41 U.S.C. § 606. This time limit is jurisdictional in nature and may not be waived. *Tom Farrell,* AGBCA No. 93-185-1, 93-3 BCA ¶ 26,026. Since Appellant did not file an appeal within 90 days of the CO's final decision (FF 9-12), the matter docketed would ordinarily be dismissed. However, in response to the Board's Notice to Show Cause (FF 12, 13), Appellant contends that under 41 U.S.C. § 605(a), all "claims" must be the subject of a CO's final decision, and that Appellant's request for an equitable adjustment was not a claim. Appellant contends that the CO's final decision was, therefore, a nullity and that Appellant should be allowed to file a claim, receive an adverse CO's final decision, and file an appeal within 90 days of such decision. Appellant contends the present appeal should be dismissed without prejudice to the filing of a new appeal.

Appellant is correct that 41 U.S.C. § 605(a) requires a CO's final decision on all "claims." A claim is defined by FAR 52.233-1(c) as follows:

> (c) "Claim," as used in this clause, means a written demand or written assertion by

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> one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract .... A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Appellant asserts that its facsimile transmission of December 30, 1992 (*see* FF 8), "was an attempt to initiate negotiations for providing the fire dampers ... was nothing more than a cost proposal [that] neither implicitly nor explicitly request[ed] a CO's final decision."

The contract includes the Changes clause which provides that a written order, not designated a Change Order, may nevertheless be treated as a Change Order, and the contractor may request an equitable adjustment thereunder (FF 1). Appellant's position is that Appellant's December 30, 1992 facsimile (FF 8) was only a request for an equitable adjustment submitted as a consequence of the Work Order directing that Appellant install the fire dampers (FF 2).

Under the FAR's definition of a claim, a routine request for payment is not a claim. Therefore, ordinarily, a request for an equitable adjustment is also not a claim, because it is both contemplated and called for under the Changes clause. Such a request, with or without negotiation, may become a modification to the contract and, unless disputed, never becomes a claim. *See Raven Indus.*, ASBCA Nos. 44048 and 44049, 93-3 BCA ¶ 26,031; *Saco Defense, Inc.*, ASBCA Nos. 44792 and 45171, 93-3 BCA ¶ 26,029; *RMS Technologies, Inc.*, ASBCA No. 44727, 93-2 BCA ¶ 25,789, *recon. denied*, 93-3 BCA ¶ 26,023.

At the other extreme from routine requests for equitable adjustments, there are cases holding, not surprisingly, that a claim exists after the parties have reached an impasse. *Santa Fe Eng'rs, Inc. v. Garrett* [38 CCF ¶ 76,506], 991 F.2d 1579 (Fed. Cir. 1993); *Essex Electro Eng'rs, Inc. v. United States*, 22 Cl. Ct. 757 (1991), *aff'd* 960 F.2d 1576 (Fed. Cir. 1992), *cert. denied* 113 S. Ct. 408 (1992).

Where a routine request for an equitable adjustment is submitted to the CO, and the CO, without discussions with the contractor, writes a final decision denying the request, it would appear to be incongruous to conclude that no jurisdiction exists over a contractor's timely appeal therefrom. The CO, by considering and denying the requested equitable adjustment, has created an impasse and converted an otherwise routine request for equitable adjustment to a claim. To hold that a board is without jurisdiction because Appellant's request was not a claim when submitted simply obviates 41 U.S.C. § 607(e) requiring boards to provide informal, expeditious and inexpensive relief. Such a holding may also unfairly deprive prevailing contractors of interest under 41 U.S.C. § 611.

In the present matter we need not decide whether the CO can convert a routine request for an equitable adjustment into a claim by issuing a final decision denying the request. When all the facts are considered, it is clear that Appellant's December 30, 1992, facsimile was anything but a routine request for an equitable adjustment. Appellant had already been *directed* to install the fire dampers *at no increase in contract cost* (FF 2). Appellant's subcontractor and the subcontractor's supplier not only advised the CO directly that payment was expected, but also stated the precise amount of payment sought (FF 3-5). The CO advised Appellant that she disagreed the fire dampers should cost extra and asked Appellant to decide whether Appellant agreed with the subcontractor. (FF 6.)

Appellant took the position in writing that its subcontractor was correct, and that the fire dampers that were then being installed would be at extra cost to the Government (FF 7). Therefore, there was a clear dispute at this point in time. Appellant then sent the CO its December 30, 1992, facsimile which it signed, and transmitted the Change Order form on the fire damper installation with its own increased costs (FF 8). Only the CO's signature was necessary to authorize the claimed amount. The CO could either sign the form or deny the claim. The CO considered the facsimile to be a claim and issued a final decision denying it.

We conclude that after the CO unequivocally advised Appellant that she disagreed with paying extra for the fire dampers (FF 6), Appellant's submittals of November 19 and December 30, 1992, taken together, constituted submission of a claim for a specific amount. The CO's denial required Appellant to accept the decision or appeal within 90 days. Appellant failed to appeal within 90 days.

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The parties have been given a full opportunity to present evidence and brief the issues. Appellant has failed to show cause why the present matter should not be dismissed. The facts and circumstances presented a close enough question to have warranted at least a protective appeal by Appellant, particularly after Appellant's subcontractor appealed and the Board advised Appellant thereof.

RULING

The Board is without jurisdiction. The docketed matter is dismissed with prejudice to reintroduction to the Board.

[¶ 26,509] Clifford La Tourelle

AGBCA Nos. 93-132-1, 93-133-1, November 22, 1993. Contract No. 52-0112-1-00132, 52-0112-1-00149.

Sales of Government Property—Timber Sales—Extensions.—A timber sales contractor's decision not to subcontract, made after being informed that the agency considered subcontractors as employees for purposes of state workers' compensation law, did not provide a basis for granting the contractor's request for a time extension, because the contractor was required to provide all labor necessary to complete performance and his decision not to subcontract amounted to a business decision. The contractor's assertion that state law prohibited subcontracting was not established. The contract neither prohibited nor required subcontracting, but merely required agency approval if the contractor decided to subcontract. The contractor provided no evidence that the agency withheld such approval. If the contractor had decided to subcontract, the Permits and Responsibilities clause of the contract would have required him to comply with the state law. The board stated that the contractor was presumed to have known its contractual responsibility to comply with state law and noted that the contractor could have included any workers' compensation costs in its bid.

Delays—Adjustments—Government Interference with Work.—A tree-thinning contractor's claim that the government's failure to ensure that workers on other tree-thinning contracts were adequately equipped and trained to work safely caused delay was not summarily dismissed, because there remained disputed or unknown facts with regard to the health and safety requirements of the other tree-thinning contracts and the time of government action or failure to act. Furthermore, the contractor was seeking only extensions of time, which in turn would eliminate its liability for liquidated damages. Under the Default and Liquidated Damages clauses of the contract, the contractor was not required to prove government fault, but only that the delays were beyond the contractor's control and without its fault or negligence. In addition, the contractor would have to prove the number of days that overall completion of its own contract was delayed by assisting stranded workers and taking precautions against habituated bears.

Liquidated Damages—Amount—Reasonableness.—A government motion for summary judgment on the issue of liquidated damages to be assessed against a tree-thinning contractor was denied because there remained fact questions concerning the basis of the $20-a-day rate. The contractor argued that the rate was based on mistaken assumptions with regard to the number of inspections to be made.

For the appellant: Clifford La Tourelle. For the government: James J. Ustasiewski, Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska.

Before EATON, HOURY and DOHERTY, Administrative Judges.

EATON, Administrative Judge: These appeals are from two final decisions covering two contracts between the Forest Service, U.S. Department of Agriculture, and Clifford La Tourelle of Sitka, Alaska (Appellant). Both contracts were for pre-commercial tree thinning on Kruzof Island in Alaska's Tongass National Forest.

The appeal docketed as AGBCA No. 93-132-1 concerns contract No. 52-0112-1-00132, awarded May 21, 1991, in the amount of $59,400. When Appellant did not finish within the specified time, the

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Contracting Officer (CO) allowed him to complete performance in default status and withheld $1,440 in liquidated damages. The appeal docketed as AGBCA No. 93-133-1 concerns contract No. 52-0112-1-00149, awarded September 26, 1991, in the amount of $22,195.88. Time for performance of this contract expired before Appellant even began work. The CO initially allowed Appellant to work in default status, but ultimately terminated the contract and imposed liquidated damages of $4,340.

In seeking remission of liquidated damages, Appellant advances two reasons for excusable delay: (1) state law and Forest Service contract provisions that allegedly preclude subcontracting, and (2) Forest Service failure to enforce health and safety requirements for other tree thinning contractors on Kruzof Island, allowing these contractors to interfere with Appellant's own performance. In addition, Appellant argues that actual damages were not difficult to predict and that the contractually-specified rate of $20 a day was based on mistaken Forest Service assumptions regarding the frequency and number of inspections.

Appellant requested a hearing and, in preparation for it, presented the Government with 11 interrogatories. The Government asserted that responding in writing would be an undue burden and expense and sought a Protective Order. Appellant responded with a Motion to Compel Discovery.

In a Ruling dated June 7, 1993, the Board treated the Government's request as a Motion to Limit the Scope of Discovery under Federal Rule of Civil Procedure 26(a). We delayed ruling on either party's Motion, finding that the appeals might be appropriate for partial summary judgment, obviating the need for some interrogatories. *See Clifford La Tourelle,* AGBCA Nos. 93-132-1, 93-133-1, 93-3 BCA ¶ 26,125.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. § § 601-613.

FINDINGS OF FACT

Contract No. 52-0112-1-00132

1. Contract No. 52-0112-1-00132, the Kruzof Island Pre-commercial Tree Thinning contract, was in the Chatham Area of the Tongass National Forest, Alaska. The contract site, approximately 20 air miles northwest of Sitka, Alaska (Appeal File (AF) I at 22), could be reached by a combination of helicopter, float plane, or boat and all terrain vehicle (ATV) (AF I at 25).[1]

2. The Forest Service awarded Bid Item 3, consisting of two units designated 120A and 120B, to Appellant on May 21, 1991. Appellant bid $330 an acre for 180 acres, or a total of $59,400 (AF I at 11, 18, 113).

3. The Government estimate for Bid Item 3, $51,933.60, was based on a crew of two completing an average of .6 acres a day for 254 days. The estimate included direct labor costs of $148.48 and fringe benefits and payroll taxes (FICA, workers' compensation, unemployment, and health and welfare) of $69.79 a day. (AF I at 109, 110.)

4. The Forest Service issued a Notice to Proceed effective June 3, 1991. Performance was to continue until November 1, 1991, unless severe weather intervened. (AF I at 38, 118.)

5. On October 7, 1991, Appellant requested a partial suspension retroactive to September 1 because access to the contract site required crossing two tidal rivers and was hazardous if not impossible due to heavy rains. The Forest Service granted the request and placed in effect a contract provision stating that during partial suspensions, 1 day in 10 would be counted against performance time. (AF I at 123, 128, 129, 132; *see* Finding of Fact (FF) 17, below.)

6. The Forest Service issued a Resume Work Order on April 16, 1992 (AF I at 140). The 254 days for performance expired on September 3, 1992. A daily diary prepared by the CO's Representative (COR) on October 15, 1992, indicates that by this date the Forest Service had accepted 76 percent of Appellant's work, which the COR noted was of Appellant's "usual high quality." The COR recommended payment in full, minus liquidated damages if the CO decided to assess them. (AF I at 174.)

7. On November 1, 1992, Appellant requested a partial suspension that the Forest Service approved, again counting 1 day in 10 against performance time (AF I at 177, 180). Appellant completed performance during the pendency of these appeals, using 326 calendar days. The CO withheld liquidated damages of $20 a day, or $1,440, for the 72 days in excess of the performance time specified. (Correspondence File.)

[1] The record includes two appeal files, one for each contract. AF I refers to that for contract No. -00132; AF II refers to that for contract No. -00149.

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Contract No. 52-0112-1-00149

8. Contract No. 52-0112-1-00149, the 1991 Chichagof Precommercial Tree Thinning contract, was also on Kruzof Island, approximately 16 air miles northwest of Sitka (AF II at 23).

9. The Forest Service awarded Bid Item 2, unit 454, to Appellant on September 26, 1991. Appellant bid $326.41 an acre for 68 acres, or $22,195.88. (AF II at 10, 19, 134.)

10. The Government estimate, $19,505.80, was based on a crew of two completing .6 acres a day in 119 calendar days. It included direct labor costs of $152.48 and fringe benefits and payroll taxes (FICA, unemployment, and health and welfare) of $22.87. (AF II at 132, 133.)

11. The Forest Service issued a Notice to Proceed effective October 15, 1991 (AF II at 138). Appellant requested and the Forest Service approved a total suspension effective November 1, 1991 (AF II at 142, 145).

12. The Forest Service issued a Resume Work Order on April 16, 1992 (AF II at 149). Time for performance expired on July 25, 1992, before Appellant had done any work on the contract; however, the CO advised Appellant that he would be allowed to work in default status and subject to liquidated damages (AF II at 160, 161, 181).

13. The Forest Service granted Appellant's request for a total suspension effective November 1, 1992 (AF II at 169, 177). Although the record does not show when Appellant resumed performance, Government counsel states that Appellant worked for 336 calendar days before the contract was terminated for default on August 10, 1993. The CO withheld $4,340 in liquidated damages on this contract. (Correspondence File.)

Relevant Contract Provisions [2]

14. Contract No. -00132 included the Federal Acquisition Regulation (FAR) clause entitled Permits and Responsibilities, 48 CFR 52.236-7 (April 1984). Among other things, the clause requires a contractor, without additional expense to the Government, to comply with federal, state, and municipal laws, codes, and regulations. It also requires the contractor to take proper safety and health precautions to protect the work, the workers, the public, and the property of others. (AF I at 72.) Contract No. -00149 did not include this clause.

15. Both contracts required the contractor to obtain written permission from the Forest Service before subcontracting any portion of the work. Subcontracts were to incorporate the terms and conditions of the prime contract and to "otherwise be in compliance with applicable laws and regulations." (AF I at 43, AF II at 45.)

16. The contracts included the standard FAR clause covering the Service Contract Act of 1965, as amended, 48 CFR 52.222-41 (May 1989). The clause defines "service employee" to include all persons engaged in performance of the contract, regardless of the relationship between a prime contractor and any subcontractor. (AF I at 54, AF II at 63.)

17. The CO was authorized to issue either partial or total suspensions, depending on weather conditions. The contracts stated that winter shutdowns would begin about November 1; during mild winters the contractor could request a partial suspension when 1 day of performance time would be counted for every 10 calendar days (AF I at 37, 38, AF II at 40).

18. The contracts included the standard FAR clause covering Default of Fixed Price Service and Supply Contracts, 48 CFR 52.249-8 (April 1984). The clause states in pertinent part:

> (c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(AF I at 73, AF II at 82.)

19. The contracts also included the FAR clause entitled Liquidated Damages—Supplies, Service, or Research and Development, 48 CFR 52.212-4 (April 1984). It provided for liquidated damages at the rate of $20 a calendar day for failure to perform within the time specified. The contractor was not to be charged if delays in performance arose "out of causes beyond the control

[2] Unless otherwise indicated, the cited provisions appeared in both contracts.

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and without the fault or negligence" of the contractor, as defined in the Default clause. (AF I at 37, AF II at 39.)

20. The contracts stated that the Forest Service would conduct inspections at such times and places as the CO deemed sufficient to ensure satisfactory performance. Due to the remoteness of some units and related access problems, and to the limited number of inspectors, once-a-month inspections were not guaranteed. Between November 1 and April 15, inspections were to be scheduled as weather permitted, but might not be conducted at all. In addition, no more than ten inspections per bid item were to be made for the purpose of progress payments. (AF I at 33, AF II at 35.)

21. The contracts stated that there were hazards associated with field work in southeast Alaska, among them brown bears, a large coastal form of the Grizzly considered unpredictable and potentially dangerous. Contractors were advised to carry large caliber weapons and to avoid human/bear encounters. The contracts specifically stated that "all campsites are to be kept clean and free of garbage so as not to attract bears." (AF I at 27, AF II at 29.)

Appellant's Requests for Extensions

A. *Requests Based on Status of Subcontractors*

22. On June 2, 1992, Appellant requested permission to subcontract portions of unit 120B on contract No. -00132 (AF I at 153). On June 10, 1992, however, Appellant wrote the CO requesting a 75-day extension on contract No. -00132 and a 110-day extension on contract No. -00149. Appellant stated that he had intended to subcontract the former and move his camp to the latter on June 1, 1992, allowing him to complete both contracts on time; he instead had decided to complete the work himself because new (1992) Forest Service solicitations warned that subcontractors might be considered "employees."[3] (AF I at 154.) The Government, in its Answer, admits that on occasion Alaska has considered tree thinning subcontractors to be "employees" for purposes of state workers' compensation law.

23. On June 29, 1992, the CO denied Appellant's requests for extensions but stated that she would allow Appellant to continue to work in default status, incurring liquidated damages, until both contracts were completed (AF I at 158).

24. On July 20, 1992, Appellant wrote the CO indicating that he interpreted Alaska law to prohibit subcontracting. He argued that the prohibition was beyond his control and that he had no reason to expect he could not follow his previous practice of subcontracting if it appeared that he could not complete work himself within the performance time specified. He also argued that use of "employees" would result in bid prices much higher than the Forest Service was willing to pay, and that Forest Service estimates were therefore faulty. Appellant requested a final decision, within 60 days, on his requests for extensions. He also sought relief from liquidated damages. (AF I at 160, 161.)

B. *Requests Based on Conditions in Other Camps*

25. On September 7, 1992, Appellant wrote the CO alleging that the Forest Service had failed to prevent other tree thinning contractors from interfering with his own performance. Appellant stated that the only people on Kruzof Island in addition to himself were employed by other contractors, and that these workers were not adequately prepared or equipped for conditions at a remote site. Appellant alleged that he had been delayed by having to assist these workers, who had no means of transportation and no funds to hire any, when they needed supplies or quit. (AF I at 165, 166.)

26. Appellant further alleged that problems with habituated bears were the direct result of Forest Service inaction and negligence. He stated that he had lived in the woods for 12 years, was aware of "normal and acceptable" risks of bears, and had never had a camp destroyed. In the past 2 years, however, Appellant stated, bears had been attracted to food left in camps abandoned by other contractors and had destroyed them, as well as a Forest Service camp. Appellant alleged that despite his complaints to the CO, the Regional Forester, the Forest Supervisor, and a member of Congress, the Forest Service had taken no action to clean up abandoned camps; to require contractors to maintain clean camps; to inform the Alaska Department of Fish and Game of conditions attractive to bears; or to inform him of increased risk after the Forest service camp was destroyed. Appellant stated that he had been forced to take immediate action to protect his own camp, for example, siding it with boards to make it more difficult for bears to get inside. Appellant concluded that

[3] The statement did not appear in Appellant's contracts.

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he intended to complete his contracts, but requested an additional 60 days for each. (*Id; see also* AF I at 163, 175, 176.)

27. Appellant supports his allegations with copies of 1991 and 1992 daily diaries prepared by the COR for four other tree thinning contractors on Kruzof Island: B&C Thinning, David Chavez, Chile Fritos Cutters, and J&R Reforestation. A sampling of entries confirms that workers in these camps did not properly store or clean up food, and were not provided with emergency transportation, working radios, or safety gear, for example, chainsaw chaps. In addition, workers were abandoning camps due to disputes over pay. When one contractor instructed a helicopter pilot not to pick up his workers, the diaries show that Appellant transported them to the mainland by ATV and boat and, in addition, volunteered to take them back to Kruzof Island to retrieve their gear. (Appellant's Supplement to AF, Tabs 1.0 to 1.9.)

28. In an undated "Explanation of Delays," Appellant alleges that he lost at least 20 days assisting other contractors' workers and 10 days in milling lumber and siding his camp. Appellant asserts that days lost during the summer cannot be replaced on an equal basis with shorter fall and winter days when weather is worse. (AF I at 186.)

29. The COR's diaries also show that the COR warned contractors of the need to maintain clean camps, threatened termination for default if conditions were not corrected, and worked with officials of the Immigration and Naturalization Service and the Department of Labor when problems appeared to be within the jurisdiction of these agencies. (Appellant's Supplement to AF, *supra.*)

30. The Government, in its Answer, admits that at times during the summer of 1992, employees of David Chavez were not equipped to work safely; that two temporary work camps on Kruzof Island, operated by this contractor, did not meet safety standards; and that one bear was attracted to the camps.

Liquidated Damages

31. As indicated above, the Forest Service assessed $1,440 in liquidated damages on contract No. -00132 and $4,340 on contract No. -00149 (FF 7, 13).

32. The COR, in an affidavit attached to the Government's Motion for Partial Summary Judgment, states that at the time of award, actual damages were difficult to predict. While damages generally would be limited to the cost of administering the contracts beyond the specified time, the actual amount depended on the number of additional inspections, the method of transportation used, the number of other contractors for whom inspection trips could be combined, and personnel costs, both for inspections and in-office. The COR concluded that liquidated damages would average $600 a month and could exceed this if a helicopter were used. (Affidavit of Barry L. McDonald, July 14, 1993.)[4]

33. Appellant, in correspondence addressed to the CO, argues that except for a few summer months, inspections were seldom conducted monthly, and that at the time his contract was awarded, the Forest Service knew that there were other contracts in the area on which work would continue into 1993 (AF I at 179).

Final Decisions

34. On September 23, 1992, the CO issued a final decision denying Appellant's requests for extensions. On November 10, 1992, the CO issued a second final decision, reaffirming her denial and assessing liquidated damages under contract No. -00132. The CO noted the rate of $20 a day, but did not state the amount actually due.

Proceedings on Appeal

35. Appellant timely appealed both decisions, generally repeating the allegations in his claims to the CO. As indicated above, in preparation for a hearing Appellant submitted 11 interrogatories to the Government, leading Government counsel to move for a Protective Order allowing it to respond orally and Appellant to move to compel written answers. The Board delayed ruling on both Motions until it could consider the

[4] The COR's liquidated damages estimate for 1992 Chichagof Pre-commercial Tree Thinning contract included the following:

Two technicians, 2 days @ $10.18 an hour	$325.12
Remote *per diem* @ $15 a day	60.00
Two fixed wing flights to job site, 45 minutes each @ $330 an hour	495.00
	$880.12
Overhead @ 5 percent	44.01
Cost per inspection	$924.13
Cost per day ($924.13 divided by 30)	$30.80

(Appellant's Supplement to AF, Tab 1.12.) It is not clear whether this estimate also was used for Appellant's contract, which was awarded in 1991.

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positions of the parties in the context of a Government Motion for Partial Summary Judgment.

DISCUSSION

Summary judgment is appropriate when there are no material facts in dispute, so that the moving party is entitled to judgment as a matter of law. The Board, however, will decline to decide legal questions on the basis of an inadequate factual record or when it is not reasonably certain there are no triable issues of fact. *Cannon Structures, Inc.*, AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.

We grant summary judgment with regard to Appellant's alleged inability to subcontract. The Government need not answer interrogatories on this subject. As discussed below, we find disputed or inadequate facts with regard to Appellant's other claims.

Status of Subcontractors

Appellant alleges that the Service Contract Act's definition of "service employee" and Alaska's treatment of tree thinning subcontractors clearly establish that subcontractors are "employees." Therefore, Appellant argues, contract provisions permitting subcontracting with Forest Service approval are contrary to and/or create a conflict between state and federal law.

Appellant further alleges that under previous Forest Service contracts, he was allowed to subcontract a portion of the work. In bidding the disputed contracts, Appellant states, he relied on this practice. When he learned that subcontractors might be considered "employees," Appellant instead decided to complete performance himself and sought additional time to do so.

Appellant's interpretation of state law, and of contract provisions regarding subcontracting, is flawed. Our review of the Alaska code reveals no prohibition against subcontracting, and neither party has directed our attention to a specific code provision. With regard to workers' compensation, the code indicates that persons *not* covered include part-time babysitters, cleaning persons, harvest help, and "similar part time or transient help." ALASKA STATUTES § 23.30.230.

We do not decide whether, in this particular case, a subcontractor of Appellant would be considered an "employee." What we glean from the Government's Answer, in which it admits that on occasion Alaska has treated tree thinning subcontractors as "employees" for purposes of state workers' compensation law (FF 22), is that the state may require a tree thinning contractor who elects to subcontract to obtain the workers' compensation coverage to which "employees" would be entitled.[5] If Appellant had proceeded to subcontract, the Permits and Responsibilities clause of contract No. -00132 required him to comply with all federal, state, and municipal laws (FF 14). While this clause did not appear in contract No. -00149 (FF 14), Appellant is presumed to know the law. In order to comply with it, Appellant could have adjusted his bids to include an amount for workers' compensation coverage.

Appellant's contracts do not otherwise prohibit or require subcontracting; they merely require Forest Service approval if the contractor elects to subcontract (FF 15). There is no evidence that in this case the Forest Service withheld approval. A contractor is expected to provide all labor and equipment necessary to perform. *Schmalz Constr. Ltd.*, AGBCA Nos. 86-207-1 *et al.*, 91-3 BCA ¶ 24,183. Whether this includes subcontracting is a business decision of the prime contractor.

We conclude that inability to subcontract does not constitute excusable delay or justify an extension of Appellant's contracts. We grant the Government's Motion for Partial Summary Judgment on this portion of the claim, and we deny Appellant's Motion to Compel Discovery with regard to interrogatories No. 1-3, 8, and 9, related to subcontracting.

Appellant additionally argues that the Forest Service underestimated the cost of performance. With regard to contract No. -00149, Appellant may have a point, since the Government estimate did not include workers' compensation for either of the two workers on which the estimate was based (FF 10). The estimate, however, was not available to Appellant before bidding, so he could not have relied on it. As indicated in our prior Ruling, the Government also need not answer interrogatory No. 6, seeking facts underlying the Government's denial of Appellant's allegation that Forest Service estimates are unrealistic.

Conditions in Other Camps

Appellant alleges that because the Forest Service failed to ensure that workers on

[5] The Alaska Supreme Court has held that an uninsured subcontractor's employees are considered employees of the contractor. *Searfus v. Northern Gas Co.*, 472 P.2d 966 (Alaska 1970).

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other tree thinning contracts on Kruzof Island were adequately equipped and trained to work safely, he was forced to assist them, delaying his own performance. In addition, Appellant alleges that food left in abandoned camps attracted and habituated bears, delaying him because of the need to take extraordinary precautions to protect his own camp. Appellant concludes that the Forest Service's failure to enforce health and safety requirements allowed other contractors to interfere with Appellant's contract. (*See* FF 25-28.)

The Government responds that Appellant's contract did not require him to assist workers employed by other contractors and that alleged delays were therefore not the result of Government action or inaction. It also seeks summary judgment on this basis.

The Government has an implied duty not to interfere with or delay a contractor's performance. When some Government action is essential for the contractor to perform, the Government will be liable if it wrongfully refuses or fails to take action. *Mann Constr. Co.*, EBCA No. 362-6-86, 88-3 BCA ¶ 21,014 (quoting J. Cibinic and R. Nash, Administration of Government Contracts (2d ed. at 212)). Consequently, if Appellant were seeking damages, he would be required to prove fault, negligence, or breach of warranty on the part of the Forest Service. *See Xplo Corp.*, DOT CAB No. 1242, 86-2 BCA ¶ 18,867 at 95, 144-146 and cases cited therein.

The Government, however, is generally not liable for interference by third parties. *Id.* At a minimum, to recover damages Appellant would be required to show that the Forest Service could have effectively intervened to prevent interference by other tree thinning contractors. *Development Management Consultants, Inc.*, HUD BCA No. 79-405-C28, 85-3 BCA ¶ 18,338. Diaries provided by Appellant indicate that in 1991 and 1992, the Forest Service was aware of health and safety violations by other tree thinning contractors on Kruzof Island; that it directed the contractors to correct the conditions; and that in some instances the Forest Service brought the problems to the attention of other responsible Government agencies (FF 28).

There nevertheless remain disputed or unknown facts with regard to the health and safety requirements of the other tree thinning contracts and the timing of Forest Service action (or failure to act) in response to Appellant's complaints. In these appeals, moreover, Appellant seeks only extensions of the time for performance, which in turn would reduce or eliminate his liability for liquidated damages. Under the Default and Liquidated Damages clauses of his contracts, Appellant is not required to prove Government fault, but only that the delays were beyond his control and without his own fault or negligence.[6] (FF 19, 20.) In addition, Appellant must prove the number of days overall completion of his own contracts was delayed by (1) assisting stranded workers and (2) taking precautions against habituated bears. *Xplo Corp., supra.*

Since Government fault or negligence is not the legal question to be decided, the Motion for Partial Summary Judgment on the basis of conditions in other contractors' camps is denied.

Liquidated Damages

Fault or negligence, if any, resulting in delays of Appellant's performance is irrelevant for purposes of deciding the remaining question in these appeals, *i.e.*, whether the liquidated damages claimed by the Government are excessive or represent a penalty. *Connell Rice & Sugar Co.*, AGBCA No. 85-483-1, 87-1 BCA ¶ 19,489, *rev'd on other grounds*, 837 F.2d 1068 (Fed. Cir. 1988).

The Government has the initial burden to prove that:

> at the time of contracting, actual damages were uncertain in amount or difficult to ascertain;
>
> the parties intended to liquidate them; and
>
> the amount specified is reasonable and not greatly disproportionate to the presumed loss or injury.

Tru-Tech, Inc., AGBCA No. 83-295-3, 84-2 BCA ¶ 17,247; *see also M&T Logging*, AGBCA No. 85-122-1, 88-3 BCA ¶ 21,124.

Appellant disputes the Forest Service contention that actual damages were difficult to ascertain and alleges that the $20-a-day rate was based on mistaken assumptions with regard to the number of inspections to be made. The rate appears to be based on monthly inspection of only Appellant's work. (FF 32; *see also* note 4.) The record, however, indicates that there were four other tree thinning contractors on Kruzof

[6] We note that under Appellant's contracts, foreseeability is not an element of excusable delay that Appellant is required to prove.

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Island for whom inspection trips possibly could have been combined (FF 27), and that monthly inspections were not guaranteed (FF 20). Appellant argues that these facts were known at the time of contracting. This alone is sufficient to preclude summary judgment.

In addition, the FAR requires a CO to take all reasonable steps to mitigate liquidated damages and specifically states:

> If a liquidated damages clause is in a contract and a basis for termination for default exists, the contracting officer shall take appropriate action expeditiously to obtain performance by the contractor or to terminate the contract.

48 CFR 12.202(c). Appellant was in default status before he even began performance of contract No. -00149; nevertheless the CO allowed him to perform (FF 12), a potential breach of the Government's duty to prevent the contractor from having to pay a disproportionately high amount or allowing the damages to run for an unreasonable length of time. *See JEM Devel. Corp.*, ASBCA No. 42645, 92-1 BCA ¶ 24,428 (quoting *Jennie-O Foods, Inc. v. United States* [24 CCF ¶ 81,814], 580 F.2d 400 (Ct. Cl. 1978)).

Finally, the CO's willingness to forbear, allowing Appellant to begin and/or keep on working in default status, may have constituted a waiver of contract delivery or performance dates. In that case, unless a new completion date were established within a reasonable time, the Government would not have been entitled to terminate contract No. -00149 for default, and could not assess liquidated damages for late performance of either contract. *See*, for example, *Jack L. Hartman & Co.*, AGBCA No. 84-126-1, 91-1 BCA ¶ 23,546; *Robert E. Moore Constr.*, AGBCA No. 85-262-1, 90-2 BCA ¶ 22,803. Alternatively, forbearance coupled with Appellant's continuing to perform may have constituted (1) a modification of Appellant's existing contracts, or (2) new, implied-in-fact contracts wherein the parties agreed that the contract price would be decreased by $20 a day. We have no evidence as to the intent of the parties in this regard, and therefore cannot grant summary judgment.

RULING

The Government's Motion for Partial Summary Judgment is granted with regard to the status of subcontractors. The Motion is denied with regard to (1) delays allegedly caused by other tree thinning contractors and (2) liquidated damages.

As for the Government's Motion for a Protective Order and Appellant's Motion to Compel Discovery, Appellant may narrow interrogatories so that they are reasonably calculated to lead to the discovery of admissible evidence on delays caused by other contractors and on liquidated damages. The Government shall provide written answers to any revised interrogatories or copies of requested documents within 30 days of receipt.

By attached letter of today, the Board encourages settlement but proposes a schedule for further proceedings.

[¶ 26,510] McGee Landscaping, Inc.

AGBCA No. 92-194-1, November 24, 1993. Contract No. 50-4741-9-706.

Procedure, Boards—Failure to Prosecute—Failure to Respond.—An appeal arising out of a contract for the reconstruction of rural strip mining land was dismissed with prejudice because the contractor failed to respond to the board's show cause order. The board requested that the contractor's response include either a brief or a request that the appeal be decided without a brief.

For the appellant: Charles A. McGee. For the government: Ted L. Elders, Office of the General Counsel, U.S. Department of Agriculture, Atlanta, Georgia.

Before HOURY, EATON, and DOHERTY, Administrative Judges.

HOURY, Administrative Judge: This appeal relates to Soil Conservation Service (SCS), U.S. Department of Agriculture, Contract No. 50-4741-9-706 with McGee Landscaping, Inc. (Appellant) dated August 10, 1989 in the amount of $202,098.60. Appellant appealed the Contracting Officer's (CO) final decision denying claims for equitable adjustments totaling $301,066.99.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613.

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The Board has substantially adopted the opinion of its Chief Counsel, M. C. Shager.

BACKGROUND

The SCS awarded Contract No. 50-4741-9-706 to Appellant on August 10, 1989. The contract covered reconstruction of 29.6 acres of rural abandoned strip mine land located in Marion County, Tennessee. The timely appeal in this case was from the CO's final decision dated February 24, 1992, denying all but $7,906.20 of Appellant's claims for equitable adjustments. The CO's final decision organized the claim into nine items; the Appellant responded in its Complaint to the Board using these same nine items as follows:

1. Modification No. 4, Bid Item 7—inadequate compensation for increased length of rock riprap in chute B, softer subgrade, and material transportation distances;

2. Modification No. 4, Bid Item 10—threefold increase in moving spoil due to uphill travel for 2.4 acres;

3. Bid Item 9—additional .6 acres of reclamation work;

4. Modification No. 4, Bid Items 9 & 10—additional 2.4 acres of reclamation work performed before SCS issued Modification No. 4;

5. Modification No. 4, Bid Item 10—59,656 additional cubic yards of excavation in reshaping the 2.4 acres;

6. Modification No. 4, Bid Item 11—natural material encountered requiring additional ripping;

7. Modification No. 5, Bid Item 5A—inadequate compensation for added berm construction;

8. Bid Item 5—movement of 30,157 additional cubic yards of material caused by misplacement of lower 2 berms;

9. SCS interference, unnecessary withholding, and unjustified liquidated damages.

Appellant's claim to the CO was in the amount of $301,066.99. On appeal, Appellant increased the claimed amount to $301,574.99.

The parties filed the pleadings and Appeal File. At Appellant's request, the Board held a hearing in this appeal on May 19-20, 1993, in Chattanooga, Tennessee. After receiving the transcript of the hearing, on June 17, 1993, the Board set the briefing schedule, which Appellant received on June 30, 1993 (Certified Receipt No. P 481 948 619). Appellant's brief was due August 23, 1993.

Appellant did not file a brief or contact the Board to request an extension. On September 20, 1993, the Board issued a Notice to Show Cause why the appeal should not be dismissed for Appellant's failure to prosecute. The Board requested that Appellant's response include either its brief or a request that the appeal be decided without Appellant's brief, and provided Appellant 20 days to respond. The Board stated that "[i]n the absence of a reply, the Board may dismiss the appeal with prejudice without further proceedings." Appellant received the Notice on October 7, 1993 (Certified Receipt No. P 481 951 290).

DISCUSSION

The Notice to Show Cause made clear that Appellant was required either to respond in some fashion to the Board's request or face dismissal of the appeal. Appellant failed to respond.

Board Rules 31, Dismissal or Default for Failure to Prosecute or Defend, and 33, Sanctions, allow for appropriate Board action in the face of a party's failure to file documents or respond to notices or correspondence from the Board. In this case, Appellant neither filed the required brief nor complied with the Board's Notice. It is thus appropriate to dismiss the appeal with prejudice for failure to prosecute. *Garlick Enters.*, AGBCA Nos. 78-137-4, 78-189-4, 84-2 BCA ¶ 17,440.

DECISION

The appeal is dismissed with prejudice.

[¶ 26,511] Centennial Contractors, Inc., a/k/a CCI, Inc.

ASBCA No. 46280, November 12, 1993. Contract No. NAS5-35030.

Interpretation of Contracts—Ambiguities, Patent—Duty to Seek Clarification.—Although neither the specifications nor the architectural drawings of a building construction contract showed shelf angles at the third level of a building, the contractor was not entitled to recover the costs of complying with a direction to furnish and install shelf angles at this level, because it was aware that structural drawings did show the shelf angles

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at the third level but failed to seek clarification of this inconsistency. The inconsistency was on the face of the contract, with the shelf angles depicted on the structural drawings but not on the architectural drawings. The contractor had reviewed all the drawing details and noticed the differences, but it failed to perceive an ambiguity and relied on the architectural drawings for the overall scope and purpose of the project. The board noted that the contractor, faced with this inconsistency, was required to seek clarification before it could rely on its own unilateral interpretation of the contract requirements.

For the appellant: Lewis Mulitz, Executive Vice President. For the government: Geoffrey Swanson, Counsel, Goddard Space Flight Center, Greenbelt, Maryland.

Before TODD and RIISMANDEL, Administrative Judges.

TODD, Administrative Law Judge: This appeal involves a dispute as to whether the contract required installation of shelf angles at the third level of a two-story building. Appellant has elected the accelerated procedure provided in Rule 12.3. A one-day hearing was held. At the hearing the Government filed a brief and appeared with an expert witness. Appellant appeared *pro se* with appellant's representative the only witness and elected to make a closing argument in lieu of filing a brief. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 25 September 1990, contract NAS5-35030 was awarded by the National Aeronautics and Space Administration (NASA) to Centennial Contractors, Inc. (CCI), in the amount of $7,380,000 for the construction of a two-story Customer Data Operations Facility at the Building 28 complex at NASA's Goddard Space Flight Center. Work was to be performed in accordance with Specification No. 90GCCZ dated May 1990, and Government-prepared Drawings Nos. GF-28-16996 through GF-28-17128 and GF-28-17130. (R4, tab 1) CCI awarded a subcontract to Potomac Iron Works, Inc. (PIWI) for the structural steel, the miscellaneous metal, and some of the architectural metal work (tr. 15). Neither the contract specifications nor the subcontract were made part of the record on appeal.

2. There is no allegation that the contract specifications required the installation of a shelf angle at any level, including the third roof level of Building 28 (R4, tab 1; Gov't Br., at 2). The purpose of a shelf angle, also known as a relieving angle, is to provide structural support for levels or floors on a building for vertical expansion and relieving loads on masonry (R4, tab 12; tr. 66-67). The contract included architectural drawings designated with an "A" and structural drawings designated with an "S", specifically Drawings A-3, ROOF PLAN (GF-28-17026); S-3, ROOF FRAMING PLAN (FUTURE THIRD FLOOR) (GF-28-17062); and S-8, SECTIONS AND DETAILS (GF-28-17067) (R4, tabs 2, 3). The contract included one other relevant architectural drawing which was the subject of testimony at the hearing (tr. 19, 59).

3. The contract included a clause, SUBMISSION OF SHOP DRAWINGS, in Section H.23 that specified that approval of shop drawings by the Contracting Officer shall in no way relieve the contractor from responsibility for complying with the requirements of the contract, as provided in Section I.17, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984)(FAR § 52.236-21). Section H.25, SPECIFICATIONS AND DRAWINGS, stated in relevant part that "[l]arge scale drawings shall govern over small scale drawings." The clause, ORDER OF PRECEDENCE—CONSTRUCTION, in Section H.35 provided that any inconsistency in the contract be resolved by giving precedence to the schedule, clauses, specifications and drawings over referenced documents, exhibits and attachments. (R4, tab 1, §§ H.23, H.25, H.35) The contract incorporated by reference the standard clauses, CHANGES (AUG 1987)(FAR § 243-4), and DISPUTES (APR 1984)-ALTERNATE I (APR 1984)(FAR § 233-1) (R4, tab 1, § I.1).

4. The contract specifications and drawings referenced the American Institute of Steel Construction (AISC) Manual of Steel Construction, Eighth Edition (tr. 26). Section 4.2.1 provides in pertinent part that "[a]pproval by the owner of shop drawings prepared by the fabricator indicates that the fabricator has correctly interpreted the contract requirements" (exh. A-5; tr. 21). Both this Manual and the Structural Welding Code—Steel manual of the American Welding Society, which are established standards in the industry, provide that full and complete information for the structural steel design showing the work to be performed shall be included in the contract documents, drawings and plans (exh. A-6, § 2.1.1; tr. 21,

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27-28). The Order of Precedence clause in the contract provided that if there were a variation, the contract documents would override these manuals (finding 3; tr. 47-48).

5. Appellant's representative, Mr. Lewis Mulitz, Executive Vice President and Chief Executive Officer of PIWI, reviewed the bidding documents and prepared PIWI's bid to CCI (tr. 15, 24). In 1919, PIWI was established by Harry Mulitz, the father of Lewis Mulitz, and it has been family owned and operated for 74 years. The company fabricates and installs miscellaneous metal, structural steel, ornamental metal, and architectural metal. Mr. Mulitz has been in the metal fabrication business all his life. He went to George Washington University where he took special courses in engineering and business from 1945 to 1951. He has been an active member of the Panel of Arbitrators of the American Arbitration Association for over 25 years and presided in many cases related to the construction and particularly the metal fabrication industry. (Exh. A-4; tr. 24) Mr. Mulitz considers himself recognized as an expert in the field of metal fabrications and in the ability to read specifications and make determinations (tr. 25).

6. All of the specifications and drawings were reviewed in the preparation of PIWI's bid (tr. 18, 22, 69). Although Mr. Mulitz noted a shelf angle at the third level in details on a structural drawing, it was not shown on the architectural drawings, and he did not find the drawings ambiguous (tr. 23, 28, 36). No pre-bid inquiry was made to the Government about the shelf angles (tr. 23, 35-36). PIWI came to a considered, reasonable and logical conclusion that shelf angles were not required at the third level (tr. 16, 18, 28-29, 72).

7. PIWI prepared shop drawings based on its interpretation of the architectural and structural drawings. Contract Drawing A-9 showed the wall sections with shelf angles at the second floor, but it did not depict shelf angles at the third level. Detail 1 on Drawing A-5 was a specific, large scale ($1\frac{1}{2}$" = 1'-0") detail of the condition at the roof level, and shelf angles were not shown on it (R4, tab 8; tr. 19-20, 39). This detail was drawn to a larger scale than any other detail on the drawings, including the structural drawings (tr. 59, 62). Drawing S-3, according to its title, "ROOF FRAMING PLAN (FUTURE THIRD FLOOR)," was prepared by the structural engineer for the roof framing plan or the future third floor. If it were used for the third floor, shelf angles would be required to support masonry above the roof level, but they were not necessary for the roof. The architectural drawings showed that the scope of the project did not include a third floor. (Tr. 22-23, 31-34) Mr. Mulitz thought the language used for the drawing title was "confusing," because the structural engineer was referring to both the roof and the future third floor, but he was not confused because reference back to the architectural drawings clarified the scope of the project (tr. 23). On cross-examination, he did not testify that the language was confusing, but rather that in his opinion the engineer had prepared the plan in "a dumb way" that was "kind of stupid, really" (tr. 31-32). He understood that the plan was prepared as advice to the architect of what would be required for supporting heavy electronic data equipment if there were a third floor (tr. 31, 70). Drawing S-3 referred to Details 1 and 2A on Drawing S-8 (R4, tabs 2, 11; tr. 34). Details 1 and 2 and 2A both have the caption "SECTION" and are drawn to the scale $\frac{3}{4}$" = 1'-0" (R4, tab 2). They showed a shelf angle at the third level (R4, tab 11). They both refer to Detail 5 on Drawing S-8. Detail 5 has the caption "DETAIL (TYP.)" and is drawn to the scale 3" = 1'-0". Detail 5 was a larger scale drawing that depicted a typical shelf angle at the second floor with masonry and not roof above (tr. 33, 46). There is no dispute involving the scale of Detail 5 (tr. 59).

8. Mr. Mulitz testified that in the interpretation of the contract drawings, PIWI did not consider an inquiry to be needed before bidding because the scope of the project was clear in the architectural drawings. In addition, since large scale details take precedence, they were relied on as governing (tr. 19, 35, 60, 69-70, 71).

9. The Government's expert witness, Mr. Walter M. Daly, is a registered architect with 20 years experience who is currently employed as a Project Architect by a company that provides architectural an engineering services for both government and privately owned construction projects. His expertise is in the design, production and coordination of contract drawings and specifications on construction projects. (R4, tab 12; tr. 39-41) Mr. Daly's opinion is that the drawings required a shelf angle at the third level (tr. 41). His opinion was based on the absence of any legend, notation or symbol on Drawing S-3 to indicate future work. The title of the drawing, according to Mr. Daly, did not necessarily mean that all or any part of the work depicted in the drawing was for future construction and not part of the con-

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tract work. If something is to be dealt with in the future, it is depicted differently than something that is part of the contract. There was no annotation "N.I.C." meaning "Not in Contract" beside the illustration of any details on Drawings S-3 or S-8. Mr. Daly stated his opinion that work which is properly depicted in a construction contract drawing need not have an apparent present purpose to be a part of the contract work. He also was of the opinion that the shelf angle depicted in structural drawings was not required or expected to be depicted in the architectural drawings. (R4, tab 12; tr. 45-47)

10. Mr. Daly did not agree on cross-examination that large scale details take precedence over small scale details in the interpretation of contract drawings (tr. 60). Mr. Mulitz was obviously surprised and stated that "[l]arge scale details take preference over smaller details and it's written in every Government standard I've ever read and I've read thousands of them" (tr. 60). He also said that "everybody knows that large scale details take preference," that the specifications so provided, and he offered to supplement the record later (tr. 61). The record remained open for receipt of this evidence after the conclusion of the hearing. Appellant submitted an excerpt from a General Services Administration solicitation with the text of GSAR 552.236-77, SPECIFICATIONS AND DRAWINGS (APR 1984), which supplements the "Specifications and Drawings" clause at FAR 52.236-21, and states in relevant part, "[i]n case of difference between small and large-scale drawings, the large-scale drawings shall govern." The same substantive provision was included in the contract (finding 3). Mr. Mulitz testified with respect to the scale of the details and not the scale of the drawings. There was no showing that either the bid package or the contract included sets of different scale drawings.

11. PIWI submitted its shop drawings to CCI by transmittal sheet, dated 10 December 1990 (exh. A-1). The shop drawings for the contract item "GALV. STEEL SHELF ANGLES W/ INSERTS & SHIMS AS REQ'D" are on Drawing No. 41940, dated 7 December 1990 (exh. A-3). The drawing showed shelf angles at the second floor and none at the third level. The drawing stated the reference drawings were Drawings A-3, A-9, and S-8. (R4, tab 8; exh. A-3) Appellant used the details of the wall sections on architectural Drawing A-9 and followed the basic intent of the architect who designed the structure in preparing it (tr. 20, 36, 69). The shop drawing included three details that were captioned and referenced as follows:

> LOCATION PLAN; 2ND FLOOR GALVANIZED STEEL SHELF ANGLES W/ INSERTS
>
> DETAIL (TYP.) [with reference symbols for Detail 5, and Drawings A-9 and S-8]
>
> DETAIL—SHELF ANGLES @ 2ND FLOOR

(Exh. A-3) The shop drawing was reviewed by the Government and returned marked to change cold galvanizing to hot dipped galvanizing (exh. A-3; tr. 22). NASA stamped the drawing "approved as noted" on 23 January 1991. The NASA stamp states, "All actions subject to contract requirements. No responsibility assumed for quantities or dimensions." (Exh. A-3) On 1 February 1991, CCI sent Drawing No. 41940 back to PIWI approved as noted (exh. A-2).

12. PIWI fabricated, delivered and installed shelf angles for the second floor (tr. 22). PIWI then learned that the Government had decided it wanted shelf angles for the third floor. Mr. Mulitz met with the contracting officer and explained appellant's position that they were not part of the contract requirements. The contracting officer directed appellant to furnish the shelf angles. (Tr. 24)

13. On 8 July 1991, PIWI submitted a cost proposal for extra work to CCI. Reference was made to a verbal request on 8 July 1991 from Whitney Hanscom of CCI. The extra work was described as an added shelf angle that involved the supply of 41 galvanized angles, 215 galvanized wedged inserts, shop labor, and field labor. The total amount requested, including overhead and profit, was $17,748. (R4, tab 4)

14. By letter dated 15 August 1991, CCI submitted a proposal in the amount of $21,690 for the job costs of making the alleged change (R4, tab 4).

15. Negotiations were conducted 13 December 1991 (R4, tab 5).

16. The contracting officer by letter dated 9 January 1992, rejected the proposed change to the contract for the stated reason that the work was clearly shown on the structural drawings (R4, tab 5).

17. On 23 April 1992, CCI requested a contracting officer's final decision on behalf of PIWI based on a letter dated 16 April 1992, from PIWI; PIWI's cost proposal; and the relevant drawing excerpts, all of which were enclosed (R4, tab 6). PIWI gave as reasons for its claim (1) there was no function for the

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shelf angle at the third level, (2) there was a difference between the structural drawing and Detail 1 on Drawing A-5, and (3) approval of the shop drawing confirmed PIWI's conclusion that the shelf angle was not required.

18. The contracting officer's final decision dated 8 September 1992, stated that the shelf angle at the roof was included to support future expansion of Building 28. The angle was not shown in the architectural drawings, but was depicted in structural Drawing S-3 and in Details 1, 2, 2A, and 5 on structural Drawing S-8. The contracting officer said that if PIWI did not understand the function of the shelf angle or believed the requirement to be ambiguous, it had a duty to inquire and resolve the matter before bidding. The request for a contract modification and equitable adjustment was denied. (R4, tab 7)

19. By memorandum dated 18 September 1992, PIWI noted to NASA that an important fact was not included in the final decision and requested review so that the matter could be settled without going through the appeal procedure. Approval of the shop drawing showing shelf angles at the second floor and none at the roof had not been mentioned in the decision. (R4, tab 8)

20. On 25 September 1992, PIWI filed a timely notice of appeal to initiate these proceedings at the NASA Board of Contract Appeals. The appeal was docketed NASA BCA No. 81-0992. The Government filed a motion to dismiss the appeal for lack of jurisdiction, but withdrew that motion upon receipt of evidence that CCI, the prime contractor, had agreed to authorize and sponsor the appeal. The caption was retitled to reflect that the appeal was taken by and in the name of CCI. On 7 May 1993, appellant elected the accelerated procedure. The appeal is before the ASBCA as a result of the merger of the NASA BCA and ASBCA that was effective 12 July 1993.

DECISION

The issue in this appeal is whether appellant is entitled to an equitable adjustment for a Government direction to furnish and install shelf angles at the third level of the building. The contract specifications did not provide for the location of shelf angles, and the architectural drawings did not show shelf angles at the third level, but appellant has acknowledged it was aware that some details on the structural drawings showed shelf angles at the third level. Appellant maintains that its interpretation of the contract drawings that shelf angles were not required at the third level was reasonable, and that is all that is required for it to prevail even though there may be another reasonable interpretation of the contract requirements. Appellant did not find an ambiguity in the drawings and did not make any inquiry of the contracting officer before bidding.

The Government argues that appellant's interpretation is unreasonable because if it were adopted, the drawing details which showed shelf angles at the third floor would be rendered meaningless. The Government maintains there was no conflict in the drawings since it is not necessary to include information on structural components in architectural drawings. According to the Government, the illustrations, symbols, and annotations on the structural drawings set forth a contract requirement for shelf angles at the third level and appellant's interpretation would create an ambiguity. The Government argues that there was a purpose for the shelf angles at the third level, and in any event, it is not uncommon for work to be included in drawings for which there is no apparent present purpose. Since appellant should have known this to be true, the shelf angles shown could not be disregarded without making an inquiry, according to the Government.

In this case there was an inconsistency on the face of the contract drawings. Shelf angles at the third level were depicted on some, but not all drawings. Appellant saw all the drawing details and saw the differences, but did not perceive an ambiguity. Appellant relied on the architectural drawings, which did not show the shelf angles at the third level, for the overall scope and purpose of the project. Appellant understood Drawing S-3, "ROOF FRAMING PLAN (FUTURE THIRD FLOOR)," which references the Details 1 and 2-A on Drawing S-8 that show shelf angles at the third level, to have been prepared by the structural engineer to provide either for the roof or a third floor. The roof did not require shelf angles, but a third floor addition, which was not part of the contract, would. Accordingly, by appellant's interpretation, shelf angles at the third level were also not part of the contract.

When the bidder is aware of internal inconsistencies in the bidding documents, he is under an affirmative obligation to bring the problem to the attention of the Government prior to bidding. *Santa Fe Engineers, Inc.*, ASBCA No. 23523, 92-1 BCA ¶ 24,420. The knowledge that a drawing requirement

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might be applicable will impose a duty on a bidder to seek clarification before he can rely on an interpretation which ignores the potentially applicable requirement. When faced with an inconsistency, a bidder is thus required to seek clarification before he can attempt to rely on his own unilateral interpretation of the contract requirements. *A.A. Beiro Construction*, ASBCA No. 22107, 78-2 BCA ¶ 13,372, *aff'd on reconsid.*, 79-1 BCA ¶ 13,813. This Board follows the rule that where the contractor was aware of a discrepancy before bidding, the question whether an ambiguity is patent is irrelevant. *Solar Turbines International v. United States* [31 CCF ¶ 71,259], 3 Cl.Ct. 490 (1983); *James A. Mann, Inc. v. United States* [22 CCF ¶ 80,289], 210 Ct.Cl. 104, 123, 535 F.2d 51, 61 (1976); *accord, J.W. Bateson Company, Inc.*, VABCA No. 3482, 93-3 BCA ¶ 26,115 (a contractor must seek clarification of *any* interpretive problem of which it is actually aware); *Foley and Associates Construction Company, Inc.*, PSBCA No. 2851, 92-1 BCA ¶ 24,397 (the fact that the amount in issue is insignificant or the matter is relatively minor will not override the duty to seek clarification); *Saturn Construction Company*, PSBCA No. 959, 84-2 BCA ¶ 17,342 (the obviousness of the ambiguity is irrelevant).

Mr. Mulitz was fully qualified to interpret contract drawings involving this type of construction on behalf of appellant. He made a thorough review of the drawings before bidding, and presented what sounded like a reasonable explanation of how he reconciled the drawing differences and why no inquiry was made. The architect's intent in designing a two-story building, the drawing title that suggested future work, the nature and purpose of the item in dispute, and the details and notations on the Government's drawings all served to resolve a potential conflict in the drawings for appellant. The failure of the Government to notice any problem in reviewing appellant's shop drawings, which plainly showed shelf angles only at the second floor, is not binding on the Government, and also has no bearing on whether appellant was required to clarify the drawing requirements. We further note there is no suggestion that appellant was acting in other than good faith.

We have concluded, however, that there was an inconsistency known to appellant and appellant did not attempt to clarify its obligations before bidding. Accordingly, we cannot grant recovery on appellant's claim.

The appeal is denied.

[¶ 26,512] Packard Construction Corporation

ASBCA No. 45996, November 15, 1993. Contract No. DACA31-93-C-0014.

Mistake—Relief After Award—Government Knowledge.—A contractor's claim for relief from a unilateral mistake in omitting the price for fabric panels, curtains, and draperies under a contract to cover exposed trusses and ceiling joists in an amphitheater was denied because there was nothing on the face of the contractor's bid to place the contracting officer on notice that there was a pricing mistake. The contractor's bid to the government merely contained a stated price to perform the contract in its entirety. The fact that the bid was 13 percent less than the government's estimated cost of performance was not significant enough to place the contracting officer on notice that a mistake in the bid might exist.

For the appellant: Christine Pak, President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and John F. Herbert and Douglas P. Knowles, Sr., Engineer Trial Attorneys, U.S. Army Engineer District, Baltimore, Baltimore, Maryland.

Before HARPER and RUBERRY, Administrative Judges.

HARPER, Administrative Judge: Appellant, Packard Construction Corporation, a Virginia corporation located in Newington, Virginia (hereinafter "contractor") appeals from a decision of a contracting officer of the United States Army Corps of Engineers (hereinafter "Government") which denied a claim for an increase in the price of a construction contract because of a mistake in bid. Contractor elected to proceed under our accelerated procedure pursuant to Board Rule 12.3.

SUMMARY FINDINGS OF FACT AND CONCLUSIONS

On 28 October 1992 Government solicited bids for the materials and labor to cover exposed roof trusses and ceiling joists in a large amphitheater or ceremonial hall known as Building 241 at Fort Myer, Vir-

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ginia, in accordance with Government's own design. The work contemplated involved fabricating tubular steel frames of rectangular shape which were to rest upon L-shaped steel supports welded to the existing steel roof trusses and beams in the existing building. The steel frames were to be covered with a specified cloth. When completed the cloth covered frames were to serve as a ceiling which would prevent persons seated in the amphitheater from observing the stage flood lighting equipment and appurtenances which were mounted on and above the roof trusses and beams. In addition curtains and valences were also to be supplied and installed which would further limit the audience in the amphitheater from seeing the interior areas of the building existing above the bottom of the roof trusses and beams. The building already had curtains, valences, and cloth at the ceiling level which would have to be removed by Government before the new materials could be installed.

Government's solicitation called for performance of the proposed contract to begin within 10 calendar days after receipt of a notice to proceed from Government. The proposed contract also provided for performance to be completed within 24 calendar days after receipt of such notice. There was no date or requirement as to when such notice had to be provided by Government to contractor.

Item 0001 of the Solicitation stated as follows:

> *Provide all* tools, labor, equipment, *materials* and all incidentals *required to cover exposed ceiling rafters* in Building 241 (Ceremonial Hall) in Fort Myer, Arlington, VA, with a removable panel system. The panel system consists of steel tubing *covered with fabric.* The work also includes pipe batten and border above the main floor (continuation of existing) and pipe battens and borders against the wall. (Emphasis added)

Section 13025—Fabric Panel System—of the Solicitation specifications, in pertinent part, provided that the furnishing of materials required to cover the "exposed ceiling rafters" was to be done in accordance with the specifications and attached drawings. The specifications called for providing a "removable panel system above main floor (continuous panel system above east side bleachers)" and providing "all required associated items such as supports, fastenings, etc."

Sheet 2 of the Solicitation drawings showed that the successful bidder was to manufacture 95 steel tubular frames of rectangular shape to the various sizes shown. Such rectangular frames or panels were to be mounted between existing roof trusses and joists on L-shaped steel angles to be provided by contractor and welded to such roof trusses and joists as shown on the drawings. The drawings also showed that the frames or panels were to be installed in areas of the ceiling level of the building designated on the drawings as Rows A and B. The frames and their cloth covering were to cover 11 bays designated as such between Rows A and B of the drawings. Dimensions were shown on the drawings outlining the perimeters of all the panels that were to be installed. By adding up the dimensions shown on the drawings it can be determined that the panels cover a horizontal area of 9001.058 square feet. The specifications described the cloth needed to cover the 9001.058 square feet of area as being flame retardant cotton Duvetyne colored black.

In addition to the panels the drawings and specifications called for curtains to be furnished. The drawings contained the following pertinent "SPECIFIC NOTES":

> 3. WORK REQUIREMENTS:
>
> A.) THE INSTALLATION OF FABRIC PANELS IN EACH BAY OF ROW A & ROW B.
>
> B.) THE INSTALLATION OF CURTAINS AT WALL OF ROW A, BAY 1 AND ROW A, BAY 11.
>
> C.) THE INSTALLATION OF HUNG CURTAINS AT ROW B, BAY 1, BAY 2, BAY 3, AND ROW B, BAY 9, BAY 10, BAY 11.

Sheet 2 of the drawings depicted curtains along one side of Row B at Bays 1, 2, 3, 9, 10 and 11 and along one side of Row A at Bays 1 and 11. Notes on the drawing stated "Provide 2' (±) Long Curtain X width of bay to match exist, see Sheet 3 of 3 for detail (Field verify length & width)."

The contract specifications provided that the curtains were to conform to specified requirements such as being black colored cotton Duvetyne chemically treated to be flame retardant and having certain fullness, pleats, top finish and hems. (R4, tab 4; exh. G-1; tr. 1/26, 111, 112, 209, 2/171, 200)

Contractor received a copy of the Solicitation together with the drawings and specifications (tr. 1/24, 25). Contractor sent copies of the drawings and specifications to subcontractors it intended to use in the event it was

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awarded a contract. Contractor sought bids from S&F Ironworks of Springfield, Virginia (hereinafter S&F) to supply the steel rectangular frames and other steel work needed, and from P&M Draperies, Inc. of Laurel, Maryland (hereinafter P&M) to supply the cloth covering of the steel rectangular frames and the curtains to be hung (tr. 1/29, 31-32, 152).

On 8 December 1992 S&F faxed to contractor a bid for $35,000 for the manufacture and supply of the steel work needed to perform the contract. S&F's bid specifically indicated that it did not include "demolition, cutting & patch work" and "field layout." (R4, tab 7; tr. 1/32)

On 10 December 1992 (the day bids were scheduled to be opened at Government's offices in Baltimore, Maryland), P&M delivered a bid to contractor as follows:

> Re: Bldg 241, Ceremonial Hall Ft Myer VA
>
> We respectfully submit our bid for the above referenced project per plans and specificatons [sic] as follows:
>
> Fabric Type: Duvetyne Color Black 6 pr 246 × 24
>
> We propose to supply fabric, fabricate, supply hardware and velcro necessary and install the above draperies for the sum of $3,985.00.
>
> Please call if you have any questions.

(R4, tab 7; tr. 1/33)

The record is silent as to whether or not P&M field verified the length and width of the curtains or the area of cloth needed to cover the rectangular frames prior to bid preparation. Contractor admits that it made no prebid site inspection or ascertainment of the amount of cloth needed to meet the contract requirements (tr. 1/72-73).

After receiving P&M's bid contractor did not carefully review the same. Contractor incorporated S&F's and P&M's prices into its own pricing for its bid, but did not include the actual subcontractor bids as part of its bid submittal to Government. Upon completing its bid contractor hastened to Government's offices in Baltimore, Maryland, to meet the bid opening deadline. Contractor bid $43,895 to perform the contract.

Two other bids were received by Government. One was in the amount of $114,500 and the other was in the amount of $120,000. Government had estimated the cost of performing the contract to be $50,000. Government's estimate included a cost of approximately $12,000 for the cloth needed to cover the horizontal rectangular steel frames that comprised the ceiling (R4, tab 11).

Upon seeing the difference between its bid, the other bids and Government's estimate at the bid opening contractor did nothing to check whether it had made any mistake in its bid (tr. 1/37).

Before making a contract award Government checked upon contractor to determine if it was a competent and responsible bidder. Government's records disclosed that contractor had satisfactorily performed contracts for Government in 1991 and 1992. (Tr. 2/133, 134) One of the said prior contracts had been for the renovation of an office at Fort Belvoir, Virginia. Thirteen bids had been received for such contract. Contractor's bid for such contract was $106,000 with the next lowest bid being $122,122 and the remainder ranged up to the highest at $207,000. Government's estimate for such job had been $162,000. (Tr. 2/135; exh. G2) No claim of mistake was made by contractor on that contract.

As to the contract involved in this appeal Government did not ask contractor to verify its bid (tr. 2/143-44). Government saw nothing in contractor's bid or behavior to cause it to suspect or believe that a mistake might have been made by contractor. Government knew that contractor had bid on the Fort Belvoir job at a cost below Government's estimate for such job yet finished performance of such contract successfully without the need for a contract price increase (tr. 2/148-50).

Government awarded contract DACA31-93-C-0014 (the subject of this dispute) to contractor on 15 December 1992 (tr. 2/137). Contractor learned of the award on 16 December 1992 when Government called contractor and requested a meeting to discuss the job. Such meeting was held at the job site on 17 December 1992. At such meeting contractor for the first time saw the area and scope of the work to be performed. Contractor saw no need to check the accuracy of its bid.

At a subsequent meeting held on 21 December 1992 Government inquired concerning the cloth to be attached to the horizontal steel frames. For unexplained reasons doubt arose in contractor's mind as to whether its subcontractor, P&M, had bid upon the proper amount of cloth. Contractor said nothing about its doubt to Government. (R4, tab 8; tr. 1/62, 69)

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After the meeting was over contractor returned to its office, telephoned P&M, and inquired whether P&M had bid upon enough cloth to cover the full area of the ceiling shown by the contract drawings. (Tr. 1/59-60, 69)

P&M did not testify at the hearing. On 22 December 1992 P&M wrote to contractor as follows:

Re: Bldg 241, Ceremonial Hall

Ft Myer

Covering ceiling joists

In reference to the above project we respectfully submit our bid as follows:

6 each vals 290 × 24; 2 wall panels 290 × 75

150 yds Duvetyne Black @ 8.25	$ 1,237.50
Labor to fabricate	1,500.00
Installation	900.00
	3,637.50

Cover ceiling joists – 324 panels

1,100 yds Duvetyne Black @ 8.25	9,075.00
Labor to sew with velcro	1,875.00
Installation	4,000.00
	14,950.00
TOTAL PRICE	18,587.50

The fabric is in stock at the mill and if we place to [sic] order by 2:00pm today we can have the fabric in our warehouse on Dec. 28, 1992.

We have adequate manpower to complete this project by January 6, 1993.

We are experienced in handling a wide range of commercial projects and are equipped to handle all field measurements and co-ordination to complete this prject [sic] in a timely and professional manner.

Please do not hesitate to call if we can be of any further assistance.

(R4, tab 7)

Upon receipt of the aforesaid letter contractor called Government, advised that contractor had made a mistake in its bid, and wrote a letter, dated 22 December 1992, explaining the mistake. Contractor argued that P&M had failed to include a price for the fabric needed to cover the ceiling panels. Contractor requested that it receive $19,517 for additional cost in order to be able to complete the job. (R4, tabs 6, 7; tr. 1/58, 70, 71-72, 2/137-38)

On 26 January and again on 11 March 1993 contractor reasserted its claim for a contract price increase in the amount of $19,517 based upon a mistake discovered after award of contract (R4, tabs 9, 13).

On 8 April 1993 Government denied contractor's claim. (R4, tab 1; tr. 2/138)

Contractor made a timely appeal from such decision.

DECISION

A contractor seeking relief from a unilateral mistake in bid claimed after a contract award must prove not only the mistake, but also that Government's contracting officer knew or ought to have known of the mistake at the time the bid was accepted. *Singleton Contracting Co.*, ASBCA No. 26862, 82-2 BCA ¶ 15,994, *affirmed* 2 FPD 20, 723 F.2d 68 (Fed. Cir. 1983 (Table)).

From the facts of this appeal it is easy to see that contractor made a unilateral mistake in its bid. It failed to carefully read P&M's written bid. As a direct result it did not observe that P&M clearly bid on only six pairs of "draperies" (the "hung curtains" shown on the contract drawings along Row B at Bays 1, 2, 3, 9, 10 and 11). P&M's written bid covered such draperies for a price of $3,985 and contained no prices for the curtains called for by the contract drawings to be installed at the wall of Row A at Bays 1 and 11. Likewise, such bid contained no price for the fabric panels called for by the contract drawings to cover the 95 rectangular shaped steel frames depicted by such drawings for installation in the 9001 square feet of ceiling area shown for all the Bays of Rows A and B. The omissions are obvious when the P&M bid is compared with the contract drawings and specifications. By failure to make the simple comparison contractor mistakenly arrived at a bid price that did not include all the materials and labor needed to perform the contract.

However, such mistake was not open and obvious to Government's contracting officer. Contractor's bid to Government merely contained a price of $43,895 to perform the contract in its entirety. The P&M subcontract bid was not included as part of contractor's bid, and, accordingly was not made available to the contracting officer for a comparison with the contract requirements. Moreover, contractor provided no information concerning the very existence of P&M's bid. Accordingly, on the face of contractor's bid there was nothing to place the contracting officer on notice, or constructive notice, of a mis-

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take prior to contract award other than, possibly, the difference in pricing between the three bids received and Government's estimate of the cost of the job.

A difference in price alone is not necessarily enough to put a contracting officer on notice that a mistake has been made, even if the price differential is great. *Wender Presses, Inc. v. United States* [10 CCF ¶72,978], 170 Ct. Cl. 483, 343 F.2d 961 (1965)

Contractor's bid was only 13% beneath Government's estimated cost of performance. In the absence of other evidence such is not enough to place a contracting officer on the alert that a mistake in bid might exist. This is particularly true considering that the contracting officer was aware that contractor had previously bid lower than a Government estimate, had made no complaint of mistake in such bid, and had successfully performed the contract that had resulted therefrom.

When the bids involved in this appeal were opened contractor could see the difference between its price and the prices bid by others and of Government's higher cost estimate. Contractor, nevertheless, made no protest, took no action, and failed to even check its own pricing to see if it had made a mistake.

If contractor found no cause to check its prices upon seeing the bids of others at higher prices and Government's estimate at a higher price it follows that the contracting officer had even less cause to suspect a mistake in bid.

In this instance we find insufficient evidence to show that the contracting officer was on actual or constructive notice of a mistake in bid. Likewise, we find no evidence of bad faith in accepting contractor's bid.

This appeal is denied.

[¶ 26,513] Kvaas Construction Co.

ASBCA No. 45965, November 12, 1993. Contract No. N68711-88-C-4451.

Interpretation of Contracts—Contract Documents—Referenced Specifications v. Drawings.—The costs of complying with a direction to provide expansion loops in steam pipes for a heat distribution system were not compensable to a contractor, even though referenced specifications allowed the contractor to use other expansion devices in place of the loops, because the contract drawings required the expansion loops, and the drawings took precedent over the referenced specifications. The Specifications and Standards clause provided that in the case of a difference between referenced specifications and the project specifications or its accompanying drawings, the project specifications and its accompanying drawings would govern.

For the appellant: Jeff S. Moore, Niles, Illinois. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Wayne O. Hadland, Trial Attorney, Naval Facilities Engineering Command, San Bruno, California.

Before FREEMAN and STEMPLER, Administrative Judges.

FREEMAN, Administrative Judge: Kvaas Construction Co. (Kvaas) appeals denial of a claim for providing expansion loops in steam and condensate pipes for a heat distribution system. We find that the expansion loops were a contract requirement, and deny the appeal.

FINDINGS OF FACT

1. The contract was awarded to Kvaas on 30 September 1991 for construction of a hangar and related facilities at the North Island Naval Air Station, San Diego, California. The contract was administered for the Government by the Resident Officer in Charge of Construction (ROICC), North Island/Coronado. The contract specifications at section 15705, paragraph 1.3, required design, fabrication, installation and test of a heat distribution system in strict accordance with "the Federal Agency Approved Brochure" for the system being supplied, and the project drawings.

2. The project drawings for the heat distribution system showed a steam line and a condensate line running parallel to each other. Both lines were straight runs except for one right angle bend, one obtuse angle bend and four expansion loops in each line. Section 2.2.2 of the federal agency approved

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brochure for the system being supplied gave the supplier (Perma-Pipe Division of Midwesco, Inc.) discretion to design the system in accordance with its own design standards.

3. Perma-Pipe's design standards at section 4.2.4.4.1 of the brochure and subparagraphs thereunder provided for use of expansion compensation devices in the following order of priority: (i) expansion elbows, (ii) "Z" bends, (iii) expansion loops, and (iv) expansion joints. Section 5.1.3.3 of the brochure provided for the use of 'cold springing" in conjunction with expansion elbows, Z-bends and expansion loops. On 13 February 1992, Kvaas submitted a shop drawing of the stern and condensate piping prepared by Perma-Pipe. This drawing showed expansion elbows and cold springing at the obtuse and right angles in the pipes, but no expansion loops. Kvaas certified that the submittal was in compliance with the contract drawings and specifications "subject to (ROICC) approval of eliminating the expansion loop."

4. On 16 March 1992, the ROICC returned the submittal to Kvaas with the notation "expansion loops required." Kvaas protested the requirement arguing that cold springing was permitted in place of expansion loops under the approved brochure for the Perma-Pipe system. On 3 April 1992, the Government again directed that the expansion loops be included as shown on the contract drawing. After further correspondence, Kvaas provided the expansion loops under protest and submitted a claim in the amount of $48,059 for the work. By final decision dated 22 January 1993, the contracting officer denied the claim. This appeal followed.

5. Section 01010 of the contract specifications at paragraph 3.7 stated in relevant part:

> 3.7 SPECIFICATIONS AND STANDARDS: The specifications and standards referenced in this project specification, including addenda, amendments, and errata listed, will govern in all cases where references thereto are made. In case of differences between these specifications or standards and this project specification or its accompanying drawings, this project specification and its accompanying drawings will govern to the extent of such differences....

6. Kvaas has presented evidence that under four prior contracts at North Island with similar provisions, the Government allowed the use of alternative expansion compensation devices in piping systems in place of some or all of the expansion loops shown on the contract drawings for those systems.

DECISION

This appeal does not involve an ambiguity in the contract, but rather a conflict between the contract drawing which specified expansion loops, and the agency approved brochure which allowed the supplier to use other expansion compensation devices in place of the specified loops. The agency approved brochure, however, was a referenced specification. Specification section 01010 at paragraph 3.7 provided that in the case of differences between referenced specifications and the project specification or its accompanying drawings, "this project specification and its accompanying drawings will govern...." See Finding 5. Accordingly, the contract unequivocally required the expansion loops as shown on the contract drawing. *Cf., Caddell Construction Co., Inc.*, ASBCA No. 32641, 87-1 BCA ¶ 19,359.

Kvaas alleges that Government approval of alternative expansion compensation devices under four prior contracts having substantially the same provisions established a past practice of deviation or waiver on which it was entitled to rely, absent notice to the contrary before bidding. Considering the unique circumstances of each construction project, we are unable to find from the four prior contracts, a course of dealings so consistent and numerous as to cause the reasonable expectation that the same deviation would be automatically allowed in all future construction.

In *Gresham & Co., Inc. v. United States* [18 CCF ¶ 81,896], 470 F.2d 542 (Ct. Cl. 1972), the Government was held bound by a consistent course of allowing the same deviation on 21 prior contracts for the same item. In *Doyle Shirt Manufacturing Corp. v. United States* [17 CCF ¶ 81,544], 462 F.2d 1150 (Ct. Cl. 1972), the Government was held not bound by deviations on only three contracts. Kvaas here falls on the *Doyle* side of the line. We also note that Kvaas' certification on the initial submittal of the shop drawing recognized that the drawing was not in compliance with the contract, and that Government approval of the elimination of the expansion loops was required. See Finding 3.

The appeal is denied.

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[¶ 26,514] **Alpha Matrix, Inc.**

ASBCA No. 45794, November 18, 1993. Contract No. N62470-92-C-5922.

Defaults, Grounds—Failure to Progress—Inability to Complete on Time.—The default termination of a construction contract was proper because the contractor did not show that its failure to timely perform was due to circumstances beyond its control and without its fault or negligence. The contractor did not provide sufficient evidence in support of its contention that construction was delayed by the extended submittal period, during which suppliers and subcontractors researched the specifications and faced difficulties in locating the allegedly atypical material needed to complete the contract. Under the contract, the contractor was responsible for scheduling the contract work to ensure timely completion.

For the appellant: Matthew Towns, President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Anthony M. Dowdle, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before ELMORE and FREEMAN, Administrative Judges.

ELMORE, Administrative Judge: Alpha Matrix, Inc. (A-M or appellant) has appealed the contracting officer's (CO) 12 February 1993 "final decision" terminating A-M's contract for default (R4, tab 21). A-M has elected to utilize the Board's ACCELERATED Procedure and the parties have waived hearing electing to submit the matter on the record pursuant to Board Rule 11. The record consists of the appeal (R4) files; Towns' affid.; Hendricks' affid.; complaint with exhibits (Complaint exh.); and Government and appellant briefs with exhibits (Govt. exh.) and (app. exh.) respectively. Only entitlement will be decided.

SUMMARY FINDINGS OF FACT

A-M on 25 September 1992 was awarded firm fixed price construction contract N62470-92-C-5922 (C-5922) to "Construct Air Traffic Facility at Bogue Field, Marine Corps Air Station, Cherry Point, North Carolina" at a contract price of $73,420 (R4, tab 1). The contract completion date was 7 February 1993 (Hendricks' affid.; R4, tab 23).

The contract included or incorporated by reference Federal Acquisition Regulation (FAR) clauses: 52.233-1, DISPUTES (DEC 1991); 52.236-15, SCHEDULE FOR CONSTRUCTION CONTRACTS (APR 1984); 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984); 52.249-10, DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984). Under the terms of the contract Section 01011, "ADDITIONAL GENERAL PARAGRAPHS" the contractor was to "(a) commence work within 10 calendar days, (b) prosecute the work diligently, and (c) complete the entire work for use within 120 calendar days after receiving the award." Failure to complete the work within the time specified, or any extension, subjected the contractor to "the assessment of liquidated damages in the amount of $100 for each day of delay." (R4, tab 1)

Under FAR clause 52.236-15, SCHEDULE FOR CONSTRUCTION CONTRACTS (APR 1984), (R4, tab 1) the contractor was to prepare and submit for the CO's approval, within five days after the work commenced on the contract or any other period of time determined by the Contracting Officer, three copies of a practicable schedule showing the order in which it contemplated performing the work and the contemplated starting and completing dates. Failure of the contractor to comply with the requirements under this clause was grounds for a CO's determination that the contractor "is not prosecuting the work with sufficient diligence to ensure completion within the time specified" which was basis for the CO to terminate the contract for default.

FAR Clause 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984), (R4, tab 1) required the contractor to indicate its approval of shop drawings after having coordinated and reviewed them for accuracy, completeness, and compliance with contract requirements. The CO was to indicate an approval or disapproval of the shop drawings or if not approved as submitted to indicate the reason therefor. Any work done by the contractor before approval by the CO was done at the contractor's risk.

Contract Section 01300 "SUBMITTALS", (R4, tab 1) provided for the contractor to "coordinate preparation and processing of submittals with performance of the work so that work will not be delayed by submittal processing," and for the approving authority to review submittals "for approval with rea-

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sonable promptness and only for conformance with project design concepts and compliance with the Contract documents." Submittals were forwarded using the "Submittal Register Form."

A-M in a 1 October 1992 memorandum informed its "Subcontractors/Suppliers" that it had been awarded contract C-5922 and would "be forwarding a construction schedule within 10 days". The subcontractors/suppliers were requested to "begin preparing all . . . submittal information for the Navy." On 19 October 1992 A-M requested the subcontractors to submit their contracts and all submittals as soon as possible as the "start date" for the project was 20 October 1992. (App. exh. A) On 21 October 1992 A-M was authorized to commence work (R4, tab 2). On 2 November 1992 A-M was advised its "Schedule of Prices" was disapproved due to an "inadequate basis for determining progress payments in accordance with the 'Payment to Contractor' and 'Schedule of Prices' provisions of the contract." A-M was requested to "resubmit the 'Schedule of Prices' " after correcting the noted deficiencies." (R4, tab 3)

On 19 November 1992 the Assistant Officer in Charge of Construction (AOICC) informed A-M of the Government's concern that the work had not commenced; that contract submittals "vital to beginning work on the site" including submittals for fill, selected material test, soil treatment, concrete mix design, reinforcing steel and pre-engineered metal building, were not received or approved; and that the Government did not assume any responsibility for "delays incurred as a result of [A-M's] failure to make submittals in a timely fashion" (R4, tab 5). A-M responding to the AOICC's 19 November letter, on 23 November 1992 stated it was "anticipating starting work on Nov. 30 or Dec. 1;" that the submittals necessary to start the project were turned in; and that it was confident "the project would be completed within the contracted time frame" (R4, tab 6; app. exh. E). The Government on 23 November approved A-M's revised submittal register (R4, tab 7).

On 17 December 1992 A-M assured the Government the "[metal] building submittals" would be delivered 21 December 1992 (R4, tab 9; app. exh. G).

The Government by letter dated 18 December 1992 issued a "Cure Notice" notifying A-M of the Government's concern that 61 percent of the contract time had expired and A-M had not completed any work; that although A-M stated in its 23 November letter that it had turned in the submittals necessary to start the project, the foundation plan, a submittal vital to starting work, was not received until 15 December 1992; and that the submittal of a complete set of drawings for the building, slab, and foundation had not been tendered. The Government also stated it was concerned with A-M's capability to complete the contract within a reasonable period; and that A-M's lack of planning, management, and its limited work force were endangering the performance of the contract. A-M was requested to "present within 15 days . . . a plan . . . to correct and change the direction of job progress." (R4, tab 10)

By letter dated 21 December 1992 A-M stated it was submitting its "updated construction schedule" showing 26 February 1993 as its anticipated completion date vice the contract completion date of 7 February 1993. A-M, contending the delay in the construction was due to the "extended and protracted submittal period" resulting from its suppliers and subcontractors having had to "research" the specifications and due to their difficulty in locating "not typical" material, requested a new completion date of 3 March 1993 be established. On 22 December 1992 the Government approved and returned A-M's Schedule of Prices. (R4, tabs 11, 12; app. exh. B).

On 23 December 1993 A-M, responding to the Government's 18 December "cure notice," contended it had already taken the necessary steps to expedite the construction schedule which, it argued, was greatly delayed due to the requirements and nature of the material and supplies that were specified for the project, which A-M contended were "atypical"; that due to the "atypical" nature of the needed material it was required to work with "5-6 suppliers" on each item; and that the suppliers many times had to undertake substantial levels of research to find the specified material. A-M further contended that the updated log indicated "95-97%" of all required submittals, including the foundation and anchor bolt plans, had been completed and the actual construction would proceed fairly quickly. (R4, tab 13)

On 30 December 1992 the AOICC requested A-M provide its updated progress schedule which was referred to in its 21 December letter but which was not attached (R4, tab 14).

On 6 January 1993 the Officer in Charge of NAVFAC Contracts (OIC) issued a "Show Cause" letter wherein he stated that al-

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though "85% of the contract time has expired no construction has been accomplished on site;" that although A-M's plan to expedite the project called for pre-ordering and storing all material on-site, foundation work over the Christmas holidays, and expediting the pre-engineering metal building, that as of the date of the cure notice very few materials were stored on site and the Government had yet to receive a complete submittal for either the building or foundation plan. A-M was advised the Government was considering terminating the contract for default and pending a final decision A-M should, within 10 days after receipt of the notice, submit in writing any facts bearing on whether the failure to perform arose out of causes beyond A-M's control and without its fault or negligence. (R4, tab 15)

The Resident Officer in Charge of Construction (ROICC) in a 12 January 1993 memorandum to file, discussing a meeting held 8 January 1993 between the Government and A-M, noted that the main points coming out of the meeting were (1) A-M was to complete submittal for the foundation and building by early in the week of 11 January or default proceedings may begin and (2) there was no justification for a time extension (R4, tab 24).

By FAX dated 22 January 1993, A-M informed the Government it would be "fedexing the entire building spec package . . . for Monday [24 January 1993] delivery" (R4, tab 18). On 27 January 1993 A-M was informed its submittal of the pre-engineered metal building was unacceptable because it did not provide the manufacturer's catalog data, drawing information, the pre-engineered building's design calculations prepared and stamped by a professional engineer, and the certificates for the pre-engineered metal building materials as required by specification section 13121, paragraphs 1.3.1, 1.3.3, 1.3.4.1, and 1.3.5, section 01300, paragraphs 1.5.2.1 and 1.6.4.b (R4, tab 19).

On 8 February 1993, Ms. Linda L. Dowling, Head, Contracts Division in her "MEMORANDUM OF FINDINGS AND DETERMINATIONS" recommended to the CO that the contract be terminated for default due to the contractor's lack of performance (app. exh. K). On 12 February 1993 A-M was issued a notice of default termination for contract C-5922 due to A-M's failure to perform. The CO stated the contract completion date was 7 February 1993 and as of the date of the termination no work had been performed (R4, tab 21).

In a letter dated 23 February 1993, apparently in response to an inquiry from A-M, the Government stated (R4, tab 27):

> In response to your letter dated 15 February 1993, there has been a miscommunication between this office and Mr. Dave Lamoureux at LANTDIV. Our discussion during the meeting on 8 January 1993 was that the Government was considering default action and that this action would hinge heavily on your ability to meet your promise to have an approved submittal for the metal building and foundation by 12-13 January 1993. You were unable to meet this date and therefore the Government addressed proceeding with default.
>
> With respect to the metal building submittal our records indicate that your first submittal was received on 4 January 1993. This was returned with comments on 4 January 1993 because it was incomplete. After having our 8 January 1993 meeting, we anticipated receiving a complete submittal on or about 12-13 January 1993. Your resubmittal was dated 25 January 1993 and was returned to you on 27 January 1993 with comments due to incompleteness. At this point, the Government made the decision to proceed with default.
>
> In your letter you indicated that all submittals except the metal building submittal and foundation plan had been submitted and approved. Our review of the submittal log indicated that . . . submittals have not been approved. Further, we have no record of a pre-approved submittal and in fact, it is not our policy to review preliminary submittals.

By letter dated 5 March 1992 A-M timely appealed the CO's "final decision" to the Armed Services Board of Contract Appeals (Board).

DECISION

A-M's default termination is based on its failure to make progress and complete the contract by 7 February 1993, the acknowledged contract completion date. A-M does not dispute the Government's contention it defaulted in its performance, but contends the failure to timely complete contract performance was due to circumstances beyond its control and without its fault or negligence or was otherwise excusable. *See, Orlando Williams*, ASBCA Nos. 26099, 26872, 84-1 BCA ¶ 16,983. The fact of default being undisputed, the Government has met its burden of proof, and it only remains for us to determine if A-M's failure to perform was excusable. *Local Contractors, Inc.*, ASBCA

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No. 37108, 92-1 BCA ¶ 24,491, *aff'd. on reconsid.*, 92-1 BCA ¶ 24,693, *aff'd., Local Contractors, Inc. v. Stone, Secretary of the Army*, 988 F.2d 131 (Fed. Cir. 1993) (Table); *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759, 765 (Fed. Cir. 1987).

A-M argues the delay in the construction was due to the extended and protracted submittal period resulting from its suppliers and subcontractors having to "research" the specifications and because they experienced difficulty in locating the "not typical" material needed to complete the contract. We find A-M's contentions specious and unsupported in the record.

The contract clearly puts the onus on the contractor, A-M, to schedule the contract work so as to ensure its completion within 120 days from the date of award. To ensure this the contractor must have located the source of its supplies and materials prior to the award. Except for the affidavit of A-M's president, Mr. Towns, appellant has not provided us with any other evidence, such as an affidavit from the subcontractors or suppliers, either supporting and/or substantiating its contentions regarding the difficulty in locating material or that the material was "atypical." We have previously held that unsupported self serving statements are insufficient and unpersuasive proof and would not be considered as evidence. *See, AGH Industries, Inc.*, ASBCA Nos. 27960, 31150, 89-2 BCA ¶ 21,637. A-M's frivolous contentions that it was delayed by a delay in the preconstruction conference is also without merit. A-M's lack of progress was due to its untimely and incomplete submittals. The submittals were not dependent on the holding of the preconstruction conference. A-M's appeal fails for lack of proof.

Accordingly, the appeal from the default termination is denied.

[¶ 26,515] Tele-Sentry Security, Inc.

ASBCA No. 45323, November 12, 1993. Contract No. F02601-91-D-0002.

Interpretation of Contracts—Contract as a Whole—Meaning to Every Part.—Although a radio communications equipment services contractor was not entitled to an equitable adjustment for alleged excess repair calls that were substantially similar to recurring workload estimates provided to bidders as a basis for formulating bids, the contractor's unreasonable interpretation of some services as excess emergency calls under the contract's nonrecurring maintenance schedule rather than as priority services under the recurring maintenance schedule rendered other provisions meaningless. The contract clearly indicated that priority services under the recurring maintenance schedule required repairs during or outside of normal duty hours and on holidays, 24 hours per day, seven days per week, and that routine recurring maintenance included work during normal duty hours. The contract clearly defined nonrecurring maintenance as maintenance and repair of equipment not listed in the land mobile radio contract or of equipment damaged by abuse, unfair wear and tear, or acts of God. Moreover, the contractor failed to show that it relied on its interpretation when it bid on the contract.

For the appellant: James E. Watt, President. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Paul L. Whalen, Trial Attorney.

Before LUSSIER, RUBERRY, and SPECTOR, Administrative Judges.

LUSSIER, Administrative Judge: This appeal is from a decision by the Air Force contracting officer on the subject contract denying claims by Tele-Sentry Security, Inc., (appellant) for equitable adjustments under a service contract for radio communications equipment at Davis Monthan Air Force Base, Tucson, Arizona. A hearing was held in Phoenix, Arizona and the parties have filed opening briefs and reply briefs. Only the issue of entitlement is before us.

FINDINGS OF FACT

1. Contract No. F02601-91-D-0002 was awarded to appellant on 29 October 1990. The basic contract period, as amended, ran from 1 November 1990 through 30 September 1991, with an option permitting the Air Force to extend the contract for three month periods not to exceed a maximum of six months. By unilateral Modifications P00007 and P00012, the Government exercised the two three month options effectively extending the contract through 31

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March 1992 (R4, tabs 12, 15). In each case, the price was increased using the same unit prices bid for the base contract period. A third three month extension was negotiated by the parties and effectuated by bilateral Modification P00012 (R4, tab 17), extending the contract through 30 June 1992 on the same price increase basis.

2. Line item 0001 in the "SCHEDULE OF SERVICES" of the contract is described as:

> NON-PERSONAL SERVICES: BASIC CONTRACT PERIOD 1 OCT 90 OR DATE OF AWARD, WHICHEVER IS LATER, THROUGH 30 SEP 91. CONTRACTOR TO PERFORM TROUBLESHOOTING, REPAIR, PREVENTIVE MAINTENANCE, REMOVAL, AND INSTALLATION OF COMMUNICATIONS EQUIPMENT LISTED BELOW. (EQUIPMENT IS LISTED BY SERIAL NUMBER IN TECHNICAL EXHIBIT 9)

Immediately below this heading, and under the title "RECURRING CHARGES," there followed a list of numerous subitems of specific types of equipment, each with a fixed price for monthly service, and a total price for 12 months service which was merely the unit price times 12.

For example a subitem would appear as follows:

LI NO.	*EQUIPMENT*	*QTY/DESCRIPTION*	*QTY*	*UNIT*	*UNIT PRICE*	*AMOUNT*
0003AA	Base station	1/compu station	12	Mo	$2.00	$24.00

The parties both understood this to be a flat rate charge which appellant was entitled to regardless of the number of actual service calls made.

3. Under the title "NON-RECURRING CHARGES" an additional number of subitems appeared under a "DESCRIPTION" column. The description identified the type of service, such as "removal of units or vehicle chargers," or "one time pager repair," or "installation of remote control unit or console." Following the "DESCRIPTION" column there was a column entitled "QTY (ESTIMATED)" under which a number was shown for the number of units of the particular item followed by a space for the bidder to insert a unit price, and another space to insert a total amount. For example, a subitem would appear as follows:

LI NO.	*DESCRIPTION*	*QTY (ESTIMATED)*	*UNIT*	*UNIT PRICE*	*AMOUNT (ESTIMATED)*
0003DC	Hospital Antenna Installation —over 50 ft.	4	EA	$N/C	$N/C

Appellant bid "N/C," i.e. no charge, for all the non-recurring items except for reimbursable parts which it bid at "not to exceed" dollar amounts.

4. While the non-recurring schedule was composed primarily of installation or removal of equipment, rather than repair, there were three line items under the description "emergency service and repairs"; one of "10 ea" for "TAC," one of "5 ea" for "AMARC" and one of "5 ea" for "Hospital," all at no charge. The acronyms were not explained but are not relevant to the appeal. The contract did not define elsewhere the term "emergency service and repairs." Also, the bidders had been advised at a pre-bid conference that if the estimated quantities under the "non-recurring" charge schedule changed there would be no renegotiation of price (R4, tab 3; tr. 1/132-33). After the pre-bid conference and in response to a request from the contracting officer, appellant checked and verified its bid before award was made to it.

5. Appellant prepared its bid for recurring charges by deciding upon a total figure and then making the individual line items correlate to that total. Mr. James Watt, Jr., who prepared the bid for appellant, explained, for example, that the $2 unit price figure might change to $13 or $35 on other bids because "nobody wants to release what they actually charge to repair a radio" and that it just depends "on how my numbers work out (tr. 1/131)."

6. Section C-1 of the contract contains the Performance Work Statement (PWS) which at ¶ 1.1 sets forth the general scope of work as follows:

> 1.1 SCOPE OF WORK. The contractor shall provide all personnel, equipment, tools, materials, vehicles, supervision, and other items and services necessary to perform troubleshooting, repair, installation, and removal of commercial two-way radio communications equipment and systems on both a recurring and nonrecurring basis as defined in this Performance Work

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Statement (PWS) except as specified in Section C-3 as Government Furnished Property and Service at Davis-Monthan AFB, the Mt. Lemmon facility and the surrounding area. The contractor shall also provide special technical/engineering assistance to correct malfunctions in any equipment, nets or systems covered by this PWS as outlined in Section C-5. The contractor shall ensure that intrinsically safe and/or Data Encryption Standard (DES) radios are maintained in such a manner as to retain their intrinsically safe and/or DES certification, IAW AFR 700-18, after repair. *The estimated quantities of recurring work are listed in Technical Exhibit 2, Workload Estimates.* [Emphasis supplied]

7. Technical Exhibit 2 (TE-2) contained the following information at page 33a:

Recurring Workload Estimates
Based on FY90 Historical Data

	Oct	*Nov*	*Dec*	*Jan*	*Feb*	*Mar*	*Apr*	*May*	*Jun*	*Jul*	*Aug*	*Sep*	
Maintenance													
Portable	18	11	6	15	20	23	21	18	11	7	10	6	(166)
Mobile	5	0	6	2	9	6	8	6	7	4	5	7	(65)
Pager	5	8	2	2	4	2	1	3	2	2	1	2	(34)
Fixed	5	10	2	5	6	12	5	8	12	11	10	9	(95)

The figures in parenthesis represent the Board's total of the twelve months figures, and did not appear as such in TE-2. There is no evidence to reasonably conclude that the historical data was inaccurate.

8. During contract performance appellant complained about being called out on calls for fixed equipment service, which turned out to be telephone company problems (tr. 1/49, 50, 113, 187). The basis for these complaints, according to appellant's president, Mr. James Watt, Sr., was that, while Paragraph 5.10.1 [1] of the PWS required appellant to assist telephone company repair personnel, there were occasions when appellant was called out and no telephone company personnel showed up leaving appellant to repair the problem (tr. 1/51). The procedure used by the Air Force contract manager in calling appellant was that he would call appellant if he did not know it was a phone company problem. He would check the circuit diagram of the network and if, for example, one leg of a phone circuit had 4 remote units and they all went out at the same time he would assume it was a phone company problem. If there was only one remote on the leg he would not know whether it was a phone company problem or a remote unit problem and appellant would be called (tr. 1/113-14). We find this procedure reasonable under the circumstances.

9. Appellant's president testified that he took the estimated number of fixed equipment service calls on TE-2 "to mean that it would not be called out as an emergency call, that we'd do it on a regularly scheduled time when we went to the base, which is on a Tuesday and on a Thursday between the hours of 7:00 and 4:00 or 7:00 and 5:00, whenever we got there to work on it" (tr. 1/76). However, the PWS included a provision for an on-base facility for appellant to use five days a week (see finding 19, PWS paragraph 5.6.4). At the pre-bid conference bidders were advised that, while it was not necessary that the contractor utilize the government furnished facility, the contractor "must ensure that the response and restoral times identified in Technical Exhibit 8 are adhered to." (R4, tab 3) In addition, Technical Exhibit 8 required a response time of 2 hours for "fixed" equipment. We note in this connection that the appellant is located in Tempe, Arizona, outside of Phoenix, well over an hour's drive to Tucson, where Davis Monthan AFB is located (tr. 1/153).

10. The first written evidence of a claim for excess service appears on 15 April 1992, when appellant, in the last three months of performance, filed a claim for $24,375 for exceeding the "estimated number of emergency service and repairs." The letter asserted that the contract (in the *non*-recurring schedule) provided for 10 "emergency service" calls, whereas appellant had made 136 "emergency service" calls for the first year and a half of the contract. Appel-

[1] 5.10. REQUEST FOR SPECIAL TECHNICAL/ENGINEERING ASSISTANCE.

* * *

5.10.1. The contractor shall assist telephone repair personnel or the QAE in resolving problems related to the radio network telephone control line circuits. The contractor shall dispatch a qualified technician to assist the telephone repair personnel as required. The technician shall coordinate with the telephone repair personnel to determine what assistance he can provide.

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lant deducted the 10 from the 136, reduced it by an allowance of 1 more call (representing 10% of the 10) and came up with 125 extra service calls. It multiplied this by 3 hours labor to arrive at 375 hours, at $65 per hour, totaling $24,375 (R4, tab 18). The "emergency service" claim relates only to the "fixed" equipment (tr. 1/49, 82). The Air Force manager on this contract, when calling for the services in question here, never used the term "emergency service" but always referred to "priority service" (tr. 1/111). His example of an "emergency service" would be, if the base commander's mobile radio broke down and he wanted it fixed "right away" (tr. 1/96).

11. On 30 April 1992, in response to a request from the contracting officer for additional information appellant increased its claim from 136 "emergency service" calls to 151 such calls, claimed none were provided for in the contract, and increased its hours per call. Its claim now was for 151 calls at 4.5 hours × $65 per hour, totalling $44,167 (R4, tab 20).

12. A bilateral modification to the contract in August 1991 (P00005) established a unit price of $28.00 under "NON-RECURRING CHARGES," [2] for "one time pager repair/maintenance" in excess of 22 calls, whereas prior to this such repair had been at no charge. The Government witnesses explained that this was done because the estimated quantity (20) for these repairs in the original schedule had been exceeded (tr. 1/109, 177). P00005 made like price adjustments under the "non-recurring charges" schedule for "removal of mobile units or vehicle chargers" and for "installation of mobile units or vehicle chargers." However, similar adjustments were not made for the "emergency service" calls appellant is now claiming, despite the fact that appellant was experiencing what it now alleges are excess "emergency service" calls. Further, when appellant agreed in March 1992 to a final three month extension, after the Government options to extend had expired, that agreement (bilateral Modification P00012) continued to provide no charge for "emergency services" under a "non-recurring charges" schedule (R4, tab 17). Execution of these two bilateral modifications under the circumstances, without credible explanatory evidence, is not consistent with the allegation that appellant held the view, at the time, that it was performing excessive "emergency service" under the "non-recurring charges" schedule.

13. While we are satisfied that appellant complained earlier about being called out on what were telephone company problems, we are not persuaded by the evidence in the record that it raised the "emergency services" interpretation issue prior to its 15 April letter. This is the first point in time that it clearly appears appellant espoused the interpretation that the service calls fell under the "emergency services" items in the non-recurring schedule. More importantly, we are not persuaded by credible evidence, after very careful review of the testimony, that appellant held that interpretation at the time it made its bid.

14. On 30 April 1992 appellant also sent separate letters claiming $4,312.50 for excess repair calls on mobiles and $1,925 for excess repair calls on portables. The claim for excess repair calls for mobiles and portables was related to the *recurring* schedule of the contract. It was based on the fact that the contract (TE-2) provided 166 repair calls for portables and 65 such actions for mobiles whereas appellant had to make 198 and 106 such calls respectively (R4, tabs 21, 22).

15. The claims were ultimately denied by the contracting officer who took the position that all three claims involved "recurring" maintenance and that the estimated quantities given in Technical Exhibit 2 for a twelve month period were, in effect, reasonably accurate. The letter noted that the claims covered a longer period and did not take into account the additional fact that units had been added by various contract modifications, which would naturally increase repair actions.

16. The Air Force contract administrator on the subject contract at the time the claims were filed went through the Air Force computer list, maintained for all units serviced by appellant, and compared it to the invoices submitted in support of appellant's claim letter of 30 April 1992. He arrived at totals for the first twelve months of the contract of 152 service calls for portable equipment, 72 service calls for mobile radios and 107 "priority" calls for fixed equipment (tr. 1/194-96).

17. Viewed from the standpoint of appellant's claim letters of 30 April 1992, it must be taken into account that the claimed actual service calls covered an eighteen month

[2] The contracting officer did not know the reason why pagers were included both in "NON-RECURRING CHARGES" and also in TE-2 estimates of "Recurring Workload Estimates" (tr. 1/177). We conclude it was the result of a mistake (tr. 1/197).

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period, not a twelve month period. Estimating 95 calls for "fixed" equipment over a twelve month period, and carrying that over to 18 months would result in an estimate half again as large, or 142 calls, very close to the 151 actual calls claimed. Applying the same 50% increase to the TE-2 estimate for mobiles (65) and portables (166) results in estimates of 97 and 249 as compared to appellant's claimed actual calls in those categories of 106 and 198. By virtue of the contract modifications (see finding 1), appellant was compensated for the additional six months period at the same rates as he had been for the base period.

18. We find that the number of service calls made by appellant was substantially similar to Technical Exhibit 2 estimates for "recurring workload." In so finding, we recognize this does not dispose of the issue of whether the service calls on "fixed" equipment were excess "emergency" calls under the non-recurring schedule (as asserted by appellant), or were (as the Government asserts) "priority" service required by the PWS under the recurring schedule.

19. The Performance Work Statement contained the following pertinent provisions relied upon by either one, or both, of the parties to this appeal:

SECTION C-1

GENERAL

* * *

1.6. HOURS OF OPERATION.

1.6.1. Normal Hours. The contractor shall provide the following customer service hours: 0700—1600 (7:00 AM to 4:00 PM) daily, Monday through Friday.

1.6.1.1. Recognized Holidays. The contractor is not required to provide routine service on: New Year's Day, Martin Luther King Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day.

1.6.1.2. Priority Service. Service shall be required to troubleshoot and/or repair equipment, nets or systems needed to maintain mission essential communications, during or outside of normal duty hours and recognized holidays described above. Contractor personnel may be required to travel to any point (location) under the responsibility of Davis-Monthan AFB up to a radial distance of 40 miles and the Mt. Lemmon facility. *Workload Estimates, Technical Exhibit 2, may be used as a basis to protect priority restoral actions.* The contractor shall establish and maintain procedures and communications to ensure standby technician call-outs can be accomplished as required. The contractor's responsibilities for priority service are described in Section C-5. [Emphasis supplied]

* * *

SECTION C-2

DEFINITIONS

* * *

2.2. TECHNICAL DEFINITIONS PECULIAR TO THE PERFORMANCE WORK STATEMENT.

* * *

2.2.44. Nonrecurring Charges.[3] A charge for the maintenance and repair of equipment:

a. Not listed on the LMR maintenance contract.

b. Damaged by abuse, nonfair wear and tear, or "Acts of God."

* * *

2.2.53. Priority Installation, Removal or Repair. Recurring and nonrecurring work which must be performed without regard to normal duty days or hours. Work will be performed according to response and restoral times as determined by an authorized person in accordance with the net priority listing.

* * *

SECTION C-4

CONTRACTOR FURNISHED ITEMS AND SERVICES

* * *

4.4. GOVERNMENT REIMBURSEMENT FOR ITEMS

* * *

4.4.1. Nonrecurring Maintenance Costs. The contractor shall provide nonrecurring maintenance *over and above the provisions of the recurring maintenance contract.* Such actions shall be accomplished on a separate trouble ticket.

4.4.1.1. Demand Maintenance. The contractor shall provide nonrecurring maintenance on a demand maintenance basis. Nonrecurring maintenance actions in-

[3] There has been no showing that the service calls appellant is claiming for "emergency service and repairs" under the "NON-RECURRING SCHEDULE" fell under either subparagraph a or subparagraph b.

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clude, but are not limited to, the installation/removal of fixed and mobile equipment, recrystalization or otherwise changing frequencies in various items of equipment, repair of pagers *not otherwise covered on the recurring maintenance contract*, cases of nonfair wear and tear, etc.... [Emphasis supplied]

* * *

SECTION C-5

SPECIFIC TASKS

* * *

5.6. RECURRING MAINTENANCE SERVICE.

5.6.1. Priority Recurring Maintenance Service. The contractor shall ensure that a technician(s) is available for contact, response, and repair of priority items/systems outages and problems listed in Part 1: Schedule of Services, Technical Exhibit 9.[4] Contractor repair shall include troubleshooting, adjustment and repair required to maintain an item so that its performance will equal or exceed the original manufacturer specifications. The contractor shall respond, repair and restore to service, the priority items and systems prescribed in Technical Exhibit 8.[5] Priority service may be required 24 hours per day, 7-days a week, per paragraph 1.6.1.2. herein. The contractor shall meet all response and restoral times specified in Technical Exhibit 8.

5.6.2. Routine Recurring Maintenance. The contractor shall ensure a technician is available for contact, response and repair of routine items/system outages and problems for the items listed in Technical Exhibit 9 as specified in paragraph 1.6.1. herein. Routine requests for service received after 1400 hours may be deferred until the first hour of the next normal work day. The contractor shall check, by telephone, with the QAE daily, Monday through Friday, excluding authorized holidays, by 1000 hour [sic], to determine daily repair requirements. Schedules, agreeable to the contractor, QAE and using organization, to effect repair of fixed station equipment, mobiles, etc., shall be determined within 24 hours of contractor notification. The contractor must comply with the response and restoral times listed in Technical Exhibit 8. The contractor shall perform an operational check of each item or system following repair actions.

* * *

5.6.4. Contractor Availability. A maintenance facility is provided on the base and the contractor shall ensure a technician(s) is available from 0700 to 1600 hours, Monday through Friday each week, excluding authorized holidays. The contractor's technicians may be utilized to respond to outages and/or trouble calls on government equipment and systems, identified in this contract, on and off base. Directions and/or instructions to the technicians shall be made by the contractor or a designated representative.

20. The contract contained the standard "Changes-Fixed Price (AUG 1987)" clause required by FAR 52.243-1, and "Disputes (APR 1984)" clause required by FAR 52.233-1. It also contained the "Requirements (APR 1984)" clause in FAR 52.216-21 which provided in pertinent part:

> (a) This is a requirements contract for the supplies and services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

---

[4] Technical Exhibit 9 listed the serial numbers of all equipment accompanied by a reference to a note on Technical Exhibit 8, which indicated the "response" time and the "restoral" time for the particular item. A notation of "1" meant 2 hours response time and 4 hours restoral time seven days a week. A notation of "2" meant 2 and 8 hours respectively, also seven days a week. There were over 150 items with a "1" or "2" response time so designated. There were also a number of items which had a response time of 24 hours and a 24 hour, or next day, restoral time. There was a 10 day restoral time for equipment returned to the contractor's facility.

[5] Technical Exhibit 8 listed an order of priority repair service for base operational components when there were "multiple net outages." For example, "Base Commander" was the first item listed, followed by "INF Escort," "Fire Crash/EOD," "Det 1, 120 F16 (alert forces), "Security Police," "Medical Services," and so on, through 29 separate base areas.

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DECISION

As our findings show (findings 7, 16) the service calls claimed by appellant to have been excessive were substantially similar to the estimate in Technical Exhibit 2 for recurring workload. For mobiles the twelve month estimate was 65, and appellant had 72 such calls. For portables the estimate was 166, and appellant had 152. The twelve month estimates in TE-2 for "fixed" equipment was 95 and the actual turned out to be 107. On all three claims the actual service calls were substantially similar to the estimates provided in TE-2 as a basis for bidders to formulate their bids. The estimates were not a guarantee of exact quantities and there is no proof that the FY 90 historical data used for TE-2 were untrue. This completely disposes of appellant's claims for portables and mobiles.

However, the claim for excess "emergency" calls presents the further issue of whether the service calls, which the Government treated as "no-charge recurring priority" service, were instead "emergency service and repairs" under the "NON-RECURRING CHARGES" schedule. If they were, they substantially exceeded the 20 such calls estimated in that schedule (see finding 4).

The issue is one of contract interpretation. We are not faced with a question of ambiguity giving rise to application of the rule of *contra proferentem* because that rule applies only if there is a latent ambiguity with appellant's interpretation lying within "the zone of reasonableness." *WPC Enterprises Inc. v. United States* [9 CCF ¶ 72,289], 323 F.2d 874, 876 (Ct. Cl. 1963). Moreover, that rule requires that the contract be ambiguous; i.e., susceptible to two or more different and reasonable interpretations, each of which is consistent with the contract language. *George Bennett v. United States* [11 CCF ¶ 80,884], 178 Ct. Cl. 61,371 F.2d 859 (1967).

For us to find the appellant's interpretation reasonable would do violence to the basic rule that requires avoiding an interpretation which renders a contract provision meaningless. *Julius Goldman's Egg City v. United States* [30 CCF ¶ 70,662], 697 F.2d 1051 (Fed. Cir. 1983) *cert. denied.* 646 U.S. 814; *United Pacific Insurance Company v. United States* [20 CCF ¶ 83,173], 204 Ct. Cl. 686, 692, 697 F.2d 1402, 1405 (1974); *Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶ 72,885], 169 Ct. Cl. 384, 351 F.2d 972 (1965). Further, it is axiomatic that contractual language should be given its plain and ordinary meaning. *Thanet Corp. v. United States* [25 CCF ¶ 82,997], 219 Ct. Cl. 75, 82, 591 F.2d 629, 633 (1979).

The contract is quite clear that recurring service calls included "priority service," which was stated to be service "required to troubleshoot and/or repair equipment, nets or systems needed to maintain mission essential communications" (PWS 1.6.1.2). It was just as clear that this service was required during or outside of normal duty hours and on holidays (PWS 1.6.1.2 and 2.2.53). The contract reiterated that requirement by explicitly stating the service may be required "24 hours a day, 7-days a week" and it mandated that the contractor was "to meet all response and restoral times specified on Technical Exhibit 8" (PWS 5.6.1). In the next paragraph it distinguished "routine recurring maintenance" as work to be done during normal duty hours which, while it had to meet the same response and restoral times, could be deferred until the next normal work day, if requested after 1400 hours (PWS 5.6.2).

The non-recurring maintenance, on the other hand, was stated to be for maintenance and repair of equipment "not listed on the LMR (Land Mobile Radio) maintenance contract" or equipment "damaged by abuse, nonfair wear and tear or acts of God" (PWS 2.2.44). The reference to not being "listed" on the LMR maintenance contract we read as referring to Technical Exhibit 9 which listed all the equipment to be served under the contract. The contract further delineated this in its references to nonrecurring maintenance, in PWS 4.4.1, as "over and above the provisions of the recurring maintenance contract," and in PWS 4.4.1.1, as "not otherwise covered on the recurring maintenance contract." Again the use of the word "contract," while not the best example of good draftsmanship, leaves clear, in context, that if the service is covered in recurring services it is not covered in nonrecurring services.

We conclude that the services claimed by appellant as "emergency service" under the "non-recurring" schedule were "priority" services under the "recurring" schedule and appellant's interpretation of the contract to the contrary is unreasonable. Under the rules of contract interpretation set forth above it cannot control. Accordingly, appellant's claim for excess "emergency services" must fail.

A further obstacle to relief here is appellant's failure to establish to our satisfaction that it relied upon the interpretation it now

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asserts when it bid on the contract. *Lear Siegler Management Services Corps. v. United States*, 867 F.2d 600 (Fed. Cir. 1989); *Fruin-Colnon Corp. v. United States* [36 CCF ¶ 75,923], 912 F.2d 1426 (Fed. Cir. 1990).

The appeal is denied.

[¶ 26,516] Contract Automotive Repair & Management

ASBCA No. 45316, November 16, 1993. Contract No. M00681-92-C-0047.

Defaults, Procedure—Cure Notice—Termination Prior to Expiration.—The government's partial default termination of a truck repair contract within a 10-day cure period was proper, despite the contractor's motion for summary judgment on appeal from the termination, because the contractor did not show that it actually cured the many deficiencies cited by the government before the termination or that it could have or would have cured such deficiencies before expiration of the cure period if given the opportunity. The contractor failed to demonstrate that any material facts remained in dispute or that it was entitled to relief as a matter of law.

For the appellant: Sam Zalman Gdanski, Montebello, New York. For the government: Theresa M. Young, Special Counsel, Procurement Law, U.S. Marine Corps, Western Area Counsel Office, Camp Pendleton, California.

Before RUBERRY, FREEMAN, and LUSSIER, Administrative Judges.

RUBERRY, Administrative Judge: Appellant moved for summary judgment on its appeal from the Government's partial default termination of a vehicle repair contract. Appellant alleges that termination prior to expiration of a ten-day cure period was improper. The Government opposes the motion.

UNDISPUTED FACTS

The Contracting Office, United States Marine Corps, Camp Pendleton, California, awarded contract No. M00681-92-C-0047 to appellant on 23 July 1992. The $52,206 fixed-price service contract called for the repair of four special purpose trucks. (R4, tab 4)

The contract incorporated by reference the standard Default clause of FAR 52-249-8, which, in pertinent part, provides:

> DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)
>
> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after the receipt of the notice from the Contracting Officer specifying the failure.

Contract Line Item Number (CLIN) 1, vehicle number 279886, an auger drilling truck, and CLIN 4, vehicle number 271244, an aerial lift truck, were delivered by appellant to the Government for inspection on or about 30 September 1992. The base maintenance division stated in a 30 September memo to the contracting office that:

> Vehicle #279886 [CLIN 1] could not be inspected because of major oil leaks from hoses and one hydraulic cylinder causing a spillage on the parking lot. This vehicle was returned to the contractor.
>
> Vehicle #271244 [CLIN 4] was left to be inspected by BMT Maintenance and Facilities Maintenance with results to be presented to the contractor upon next delivery of vehicle #279886 [CLIN 4].

(R4, tab 7)

Appellant returned CLIN 1 to the Government for inspection on or about 7 October 1992. By memo dated 7 October 1992 to the contracting officer, the General Foreman,

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Maintenance Division, outlined the deficiencies found upon inspection of CLIN 1. The memo identified 40 deficiencies, including leaking cylinders and hoses and a lack of California Occupational Safety and Health Administration (California OSHA) certification. (R4, tab 8)

By letter dated 8 October 1992, the contracting officer sent a cure notice to appellant regarding the deficiencies in the repair of CLIN 1 and CLIN 4. The notice listed 39 deficiencies for CLIN 1 and 34 deficiencies for CLIN 4 and also stated that corrected vehicles had to be accompanied by California OSHA certifications. The notice further stated:

> Unless these conditions are cured within 10 days after receipt of this notice, the Government may terminate for default under the terms and conditions of the DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) CLAUSE, FAR 52.249.8.

(R4, tab 9) The contractor received the written cure notice on 13 October 1992. (R4, tab 10) Appellant tendered CLIN 1 to the Government for reinspection on 14 October 1992. (Compl./Answer)

By letter dated 19 October 1992, confirming verbal notice of 14 October, the contracting officer partially terminated the contract for default. The default notice stated:

> This letter confirms our verbal notice to you on 14 October 1992 that Item 1, Vehicle #279886 on above referenced contract is terminated for default, pursuant to the clause entitled DEFAULT, FAR 52.249.8. You are advised that this termination is due to unsatisfactory performance in the maintenance and repair of vehicle #279886. You have delivered this vehicle three times for government inspection and acceptance, and each time the vehicle has failed to pass inspection. You still have in your possession Items 2, 3, and 4 of the contract for maintenance and repair services. Vehicle #271244 [CLIN 4] has been returned to you to correct the discrepancies noted in our Cure Notice. You have until 23 October to correct all discrepancies and deliver this vehicle in an acceptable condition. Failure to comply with the requirements of the cure notice relative to Vehicle #271244 [CLIN 4] will result in the complete termination of the referenced contract.

(R4, tab 11) Appellant received the termination letter on 21 October 1992. (R4, tab 12)

CONTENTIONS OF THE PARTIES

Appellant essentially argues that "[w]hen the government issues a cure notice giving a stated period within which to correct deficiencies in the performance of the contract, it waived its prior right to terminate for default. So a default termination cannot be effective before the expiration of the cure period and therefore a [con]version to a termination for convenience is required." (App. Mot. at 2)

In response, the Government argues that it is entitled to terminate for default within a cure period where it is apparent that the contractor will not sufficiently perform. The Government contends that appellant's three failures to deliver the vehicle properly repaired demonstrated appellant's inability to perform and justified the partial default termination within the cure period.

DECISION

Summary judgment is appropriate where the material facts are undisputed and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of demonstrating both elements and the non-moving party is entitled to have all inferences drawn in its favor. *Mingus Constructors, Inc. v. United States* [33 CCF ¶75,126], 812 F.2d 1387, 1390 (Fed. Cir. 1987); *J.W. Creech, Inc.*, ASBCA Nos. 45317 and 45454, 94-1 BCA ¶ 26,459, (26 October 1993) (citations omitted).

The record indicates that appellant presented the vehicle in question for final inspection and acceptance on three occasions, the last of which was 14 October 1992. The Government maintains that the numerous deficiencies identified by these inspections demonstrated appellant's inability to successfully perform the contract, and entitled the Government to terminate within the cure period. Appellant presents no evidence regarding its performance during the course of the contract or its ability to successfully perform the contract within the cure period.

Appellant relies on *B&C Janitorial Services*, ASBCA No. 11084, 66-1 BCA ¶ 5355, in contending that it is entitled to summary judgment merely because the Government terminated within the ten-day cure period. However, this decision was distinguished and limited to its particular facts in *Soledad Enterprises*, ASBCA No. 20376, 77-2 BCA ¶ 12,552. In *Soledad* the Board upheld a default termination within a cure period

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where there was no indication that the contractor had taken any action to improve performance. The Board distinguished *B&C Janitorial Services* and a similar appeal, *Bill Powell, d/b/a Bill's Janitor Service*, ASBCA Nos. 10345, 10393, 65-2 BCA ¶ 4916, stating:

> In both of those appeals a default termination effected prior to the expiration of the cure period was held not to be proper. However, the facts are significantly different. In the first appeal, the Board noted that at one time the contract could have been terminated for default because of the contractor's failure to perform; however, the default was actually effected because of deficiencies in services performed. The Board found that as of the day of termination, those deficiencies had been corrected. In the second case the Board found that the contractor was in a position to cure the noted deficiencies within the designated cure period but, because of the premature termination, was deprived of the opportunity to do so.

77-2 BCA at 60,872. Appellant does not allege that it actually cured the numerous deficiencies cited by the Government prior to the termination or that it could or would have cured such deficiencies prior to the expiration of the cure period if given the opportunity. In short, appellant has not demonstrated that no material facts remain in dispute and that it is entitled to relief as a matter of law.

CONCLUSION

Appellant's motion for summary judgment is denied. Within 30 days of receipt of this decision, the parties are directed to provide a schedule for proceeding with the adjudication of the subject appeal.

[¶ 26,517] Merrimac Management Institute, Inc.

ASBCA No. 45291, November 15, 1993. Contract No. N00102-91-D-0055.

Indefinite Delivery Contracts—Limitations and Minimums—Minimum Amount.—A contractor's cross motion for summary judgment under an indefinite delivery, indefinite quantity, time and materials contract for management training services was denied because the contractor failed to present undisputed facts showing that it was entitled to recover as a matter of law for the government's alleged failure to comply with the contract's Minimum and Maximum Quantities clause. The contractor did not refute the government's contention that before negotiation of the delivery order, the government advised the contractor that the delivery order was intended to satisfy the contract's minimum quantity requirement and that the contractor accepted the order without objection.

For the appellant: Harry B. Ellis, Jr., President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and James E. Fender, Trial Attorney, Portsmouth Naval Shipyard, Portsmouth, New Hampshire.

Before STEMPLER, RUBERRY, and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: This appeal arises under an indefinite delivery, indefinite quantity, time and materials contract to train Navy personnel in management services. The Government moved for summary judgment. Appellant replied by filing a cross motion for summary judgment. The Government withdrew its motion, alleging material facts were in dispute, leaving only appellant's cross motion before the Board for resolution. The Contract Disputes Act is applicable.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

The above-referenced contract was awarded to appellant on 16 September 1991. It included the following clauses:

> MINIMUM AND MAXIMUM QUANTITIES
>
> As referred to in paragraph (b) of the "Indefinite Quantities" clause of this contract, the contract minimum quantity is a total of $75,000.00 BASIC YR $50,000 OPTION YEARS *at the contract's unit price(s)*... [Emphasis added]
>
> SECTION C—DESCRIPTION/SPECIFICATIONS
>
> * * *

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SUBCONTRACTING

Occasionally the contractor may be requested by the Government to satisfy special training needs requiring recognized authorities/experts for which the contractor may need to subcontract in order to perform an assigned task. However, subcontracting by the Contractor shall not be permitted without prior approval of the Government. Rates for such work are not restricted to Section B rates but must be negotiated prior to issuance of a delivery order.

On 8 May 1992, the Government issued Delivery Order 0001 for work valued at $92,399.27. Of the total, the parties agreed that $12,119.99 was for work to be performed by appellant at the contract's unit prices, while the remainder was for work to be subcontracted at a negotiated price. Subcontracting was necessary because appellant did not possess the expertise needed to perform the delivery order. The Government alleges by affidavit that prior to the negotiation of delivery order 0001 the Government advised appellant that it was the Government's position that this order would satisfy the minimum order under the contract and appellant had no objection to this statement. No other work was ordered under the contract, and a dispute arose involving whether this single delivery order had satisfied the $75,000 minimum quantity requirement specified in the contract clause noted above. By letter dated 21 October 1992, appellant submitted a certified claim to the contracting officer demanding payment in the amount of $62,880.01 ($75,000—$12,119.99). By letter dated 30 October 1992, the contracting officer denied appellant's claim in its entirety. Thereupon, appellant filed a timely notice of appeal with the Board.

CONTENTIONS OF THE PARTIES

Appellant contends that under Delivery Order 0001, only $12,119.99 of the total work ordered was based upon the contract's designated unit prices. It alleges that the work performed by the subcontractor was at a price resulting from *negotiations* between appellant and the Government. Therefore, appellant argues that the Government failed to order $75,000 worth of work at the contract's unit prices, and appellant is entitled to the difference. Appellant asserts that there are no material facts in dispute and that the issue before the Board is simply a matter concerning the interpretation of the contract's Minimum and Maximum Quantities clause to determine whether the Government has fully complied with its requirements.

The Government contends that, prior to appellant's acceptance of the delivery order, appellant had been informed that Delivery Order 0001 was intended to satisfy the contract's $75,000 minimum quantity requirement and the order was accepted without objection.

DECISION

Summary judgment is properly granted only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States* [33 CCF ¶75,126], 812 F.2d 1387, 1390 (Fed. Cir. 1987). The moving party has the burden of demonstrating both elements and the opposing party is entitled to have all inferences drawn in its favor. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Jacksonville Shipyards, Inc.*, ASBCA No. 32300, 86-3 BCA ¶19,147.

The issue in this appeal is whether delivery order 0001 satisfied the contract's Minimum and Maximum Quantities clause. It is clear that the parties dispute whether during performance of the contract (*i.e.*, during negotiations for the issuance of delivery order 0001) the Government advised appellant of the Government's interpretation that delivery order 0001 satisfied the Government's obligation under the clause and appellant accepted that interpretation. Appellant has not set forth undisputed facts demonstrating that it is entitled to recover as a matter of law. Consequently, summary judgment may not be granted.

CONCLUSION

Appellant's cross-motion for summary judgment is denied.

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[¶ 26,518] Loral Infrared and Imaging Systems, Inc.

ASBCA No. 44832, November 10, 1993. Contract No. N62269-90-C-0554.

Contract Disputes, Certification—Amount of Claim—Potential Amount.—Although a board of contract appeals decision would have precedential impact on similar claims that in total exceeded $50,000, certification of the contractor's claim was not required, because the claim did not exceed $50,000. The board was not entitled to look beyond the amount in controversy ($2,000) and consider all matters that would be impacted by the decision. The matters were not in dispute, and the board did not have access to the facts of each potential dispute.

For the appellant: Sidley & Austin, Washington, D.C., by Melvin Rishe and Howard Stanislawski. For the government: Jerome C. Brennan, Chief Trial Attorney, Defense Contract Management District, Northeast Boston (DLA), and Rita M. Quinn, Trial Attorney.

Before STEMPLER, RUBERRY, and SPECTOR, Administrative Judges.

STEMPLER, Administrative Judge: This matter comes before us on the appellant's motion for a ruling that no Contract Disputes Act certification is required for the instant appeal and the Government's motion to dismiss for lack of jurisdiction based on the absence of a certification.

STATEMENT OF THE CASE FOR MOTION PURPOSES

On 31 December 1989, Loral Corporation acquired substantially all of the assets of Honeywell's Electro-Optics Division, which name was changed to that of appellant. On 23 July 1990, FAR 31.205-52, "Asset Valuation Resulting From Business Combinations" was promulgated. Appellant, Loral Infrared and Imaging Systems, Inc. (Loral) became aware that, contrary to its position, it was the Defense Contract Audit Agency's (DCAA) position that the FAR provision applied to acquisitions completed prior to promulgation of the provision. In order to resolve the issue, Loral discussed the matter with the Government Administrative Contracting Officer (ACO) and submitted a voucher on 21 March 1991 under the instant contract (awarded 29 September 1990) as a test case. The voucher was for $2,087, representing costs under the instant contract attributable solely to asset step-up resulting from the 31 December 1989 acquisition. It is agreed by the parties that if all the asset revaluations issues under this and all of appellant's other contracts were combined, the total would exceed $50,000 in controversy. On 22 July 1991, DCAA issued a Form 1, Notice of Contract Costs Disapproved relating to the costs in dispute. The parties were unable to resolve the matter and on 20 February 1992, Loral requested a contracting officer's decision on DCAA's Form 1 to allow Loral to appeal the matter. The ACO issued his decision on 17 April 1992, declining to approve payment of Loral's $2,087 invoice. A timely appeal was filed on 13 July 1992. Subsequently, on 10 February 1993, Loral filed the invoice as a certified claim with the ACO.

CONTENTIONS OF THE PARTIES

It is the Government's position that we lack jurisdiction because the $2,087 invoice represents a contractor's claim and that it was required to be certified even though it is less than $50,000 because it is a "test case" and the "matter has application beyond the amount at issue in the Appeal." (Gov't br. at 8)

Loral argues that the amount in controversy does not exceed $50,000 and no certification is required. Alternatively, Loral urges us to hold that the appeal concerns a Government claim and therefore no certification is necessary. Finally, Loral contends that the recent amendments to the CDA regarding certification (P.L. No. 102-572, § 907, 29 October 1992) allow it to remedy any defective certification. It is submitted by Loral that its 10 February 1993 certification cures any alleged defect.

DECISION

We do not deal with most of the issues raised by Loral, for we determine that we have jurisdiction on the basis that the claim does not exceed $50,000 and therefore is not required to be certified.

Assuming the claim to be Loral's, the CDA requires that all claims by contractors be certified if they exceed $50,000 (41 U.S.C. § 605(c)(1)). In the instant appeal, the request submitted by Loral and the contracting of-

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ficer's decision, that serve as the vehicles for the Board's jurisdiction, concern a $2,087 amount. While the precedential impact of our decision, according to the parties, will have an impact on the parties in excess of $50,000, we cannot adopt the standard urged by the Government of looking beyond the amount in controversy and considering all matters that our decision will have application to. These matters are not in dispute and we do not have the facts of each potential dispute before us. It is not clear what the Government would have Loral certify to. The amount in controversy in this appeal is only $2,087, the total amount of potential disallowance is not known and has not been invoiced. If Loral were to certify, it could not do so in good faith since the matters which our ruling may have application to are not yet known, were not presented by Loral nor considered by the contracting officer.

There is properly no allegation that there has been claim fragmentation here, and we do not regard the use of a test case as claim fragmentation. *Brunswick Corporation*, ASBCA No. 26691, 83-2 BCA ¶ 16,794.

CONCLUSION

An appeal under contract No. N62269-90-C-0554 concerning $2,087 is the only matter before us. A certification is not required. Appellant's motion is granted, The Government's motion is denied.

[¶ 26,519] Bath Iron Works Corporation

ASBCA Nos. 44617, 45232, November 12, 1993. Contract Nos. N00024-87-C-2257, N00024-89-C-2033.

Modifications—Notice of Claims for Adjustments—Shipbuilding Contracts.—The government's motion to dismiss the contractor's appeal was treated as a motion for summary judgment and denied because there was a question of the timeliness of the contractor's claim to the contracting officer pursuant to the statutory limitation on the adjustment of shipbuilding contracts. 10 U.S.C. § 2405 provides that the secretary of a military department may not adjust a price under a shipbuilding contract on a claim arising out of events occurring more than 18 months before the submission of the claim. Although the government contended that the contractor filed its claims more than 18 months after the government changed the requirements, the 18-month period would begin to run when the contractor complied with the direction, and there was no proof that the contractor complied with the government's alleged direction.

Modifications—Constructive Changes—Proof.—It was inappropriate to grant a government motion for summary judgment denying a claim for increased costs attributable to a modification of a shipbuilding contract, because there was inconsistent information in the record with respect to the alleged government direction and the contracting officer's knowledge of the direction. It was undisputed that the specifications did not prescribe or limit the size of secondary sheathing plates. However, the appeal file and documents did not identify the party that proposed the alteration of the sheathing plates. Moreover, the file contained inconsistent statements as to whether the government directed the contractor to reduce or change secondary sheathing plate size and contained no information as to whether the contracting officer knew or had reason to know of such a direction.

For the appellant: Patton, Boggs & Blow, Washington, D.C., by Robert H. Koehler. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John B. Dale, Trial Attorney.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

JAMES, Administrative Judge: In consolidated ASBCA Nos. 44617 and 45232, respondent's 30 August 1993 "Partial Motion[s] to Dismiss Appellant's Fragmentation Protection Plate Claim[s] as Untimely," state parallel grounds: that appellant submitted certified DDG 53 and DDGs 54/56/58 claims on 12 June 1990 and 6 February 1991 respectively; appellant alleged that respondent changed the specified secondary sheathing requirements on 8-9 March 1988; such event occurred more than 18 months before appellant submitted its claims; and,

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therefore, 10 U.S.C. § 2405 bars relief for such event.

Appellant's 7 and 13 October 1993 Oppositions to Respondent's Motions argue that the Navy direction to reduce the size of the DDG secondary sheathing plates in March 1988 is among several interrelated, evolutionary changes in the DDG 51 secondary sheathing design, subject of its DDG 53 and DDG 54/56/58 claims. Appellant also argues strenuously that 10 U.S.C. § 2405 cannot be an affirmative defense to its claim.

Statement of Facts for the Purposes of This Motion

Background Facts. The parties entered into contract N00024-85-C-2144 (contract 2144) for the detail design and construction of the DDG 51 ARLEIGH BURKE lead ship in April 1985; contract N00024-87-C-2257 (contract 2257) to construct the DDG 53 follow ship in September 1987; and contract N00024-89-C-2033 (contract 2033) to construct the DDGs 54/56/58 follow ships on 13 December 1988 (complaint & answer, ¶ 6; R4, tab 57).

Respondent first required fragment protection of DDG 51 class ships in contract 2144's 15 March 1985 specification section 072d, providing that the DDG 51 class ships were to have two types of fragment protection:

> a single plate system and a spaced system .... The spaced system consists of ... a frontal plate and a backup plate .... Steel single plate systems shall be High Strength Steel (HSS) ... except where a higher yield steel is required for structural purposes, [and] shall not exceed 10 percent of the fragment protection total area without NAVSEA approval.
>
> Spaced system general requirements.—Either the frontal or the backup plate shall be structural; the remaining plate shall be nonstructural. The nonstructural plate shall be HSS or high yield steel (HY80) ... or high yield steel (HSLA-80) ... as modified herein. A minimum of 4 inches shall separate the frontal and backup plates ... distributive systems shall not be run between the frontal and backup plates. The spaced system shall be designed to permit the spraying of insecticides .... Spaced system installation requirements for nonstructural plate.—The plating shall be mechanically fastened unless welding is approved by NAVSEA. Gaps in the nonstructural plating over 0.25 inches that are not continuously shielded by stiffeners shall be covered with a strap of thickness and material equivalent to the nonstructural plating. The strap shall overlap the edges of the plate by at least 1.0 inch.

(App. oppos., Attach. 3)

The 1 July 1986 specification section 072d in contracts 2257 and 2033 was the same as that in contract 2144, except (a) engineering change ECP 51-0865 changed the single plate limit to "25 percent for DDG 59 and follow" ships; (b) specification change notice 01206 for DDG 52 through 63 restricted the weight and location of attachments on spaced system frontal and backup plates; and (c) the following provision was added:

> For DDG 59 and follow, gaps in the nonstructural plating that are not continuously shielded by the stiffeners shall be covered with a strap of thickness and material equivalent to the nonstructural plating. The strap shall overlap the edges of the plate by at least 1.0 inch.

In the 2033 contract, respondent changed the effectivity to DDG 67 in exception (b) above regarding attachments. (R4, tabs 3, 13) Specification section 072d in contracts 2144, 2257 and 2033 neither prescribes nor limits the size of secondary sheathing plates.

DDG 53 (ASBCA No. 44617)

Before award of DDG 53 contract 2257, appellant's 27 May 1986 ECP 51-0134R2C1 sketched three and four horizontally oriented secondary sheathing plates between decks. Appellant's undated secondary sheathing drawing 450-BH-ISBO-01, Rev. A (putatively July 1986), specified plates measuring from 1' $1\frac{3}{8}$" to 2' $6\frac{3}{16}$". (R4, tab 16 at 54; tab 62)

Respondent's June-July 1987 minutes of a secondary sheathing design conference stated that the rear plate's size would be limited to 60 lbs. per panel to allow ease of handling by two men and to facilitate the plate's installation and removal (app. response, tabs 5, 6).

After award of contract 2257, on 12 February 1988 appellant depicted secondary sheathing plates measuring approximately 2 by 3 feet (R4, tab 52).

According to appellant, at the March 1988 Design Review Meeting PMS 400D, Captain Perkinson, respondent's AEGIS Program Manager—

> indicated that the plates were to be removable for maintenance by Ship's force. Compartment congestion dictated that, if plates were to be removable, then they would necessarily need to be smaller, due

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to their close proximity to equipment .... [He] criticized the use of large plates that did not permit maintenance removal by ship's force. The Navy maintained that this invalidated the intended purpose of secondary sheathing. BIW pointed out that there was no ship specification requirement in this area.

(R4, tab 14 at 6, tab 16 at 184)

Respondent's 8-9 March 1988 Design Review minutes stated that respondent had conducted ballistic tests of secondary sheathing consisting of "a series of small plates to facilitate easy removal by ships crew for maintenance and access" with three horizontal seams and clips to secure the plates in place and a 1/4 inch gap between the plate and stiffener flange. Those tests showed "that the horizontal seams resulted in an equivalent 17 percent degradation in the overall effectiveness of the sheathing" and the protection was unachievable "using HSS materials." The minutes stated that:

Both Mr. [R.] Fortune [Navy AEGIS Program Deputy Director] and Mr. [A.] Summers [Navy ship design manager] noted that the secondary sheathing will only be removed for maintenance during a shipyard overhaul. There is no requirement to limit the size of the plate panels to permit removal by the ship's crew. Mr. Fortune observed that the present design has invalidated the purpose of the secondary sheathing and requested that a system level review be presented at the April Design Review.

(R4, tab 53)

On 31 March 1988 Mr. Fortune directed appellant "to eliminate the gaps" in the fragment protection design (R4, tab 16 at 69).

At the 12 April 1988 Design Review appellant stated that its 2' by 2' sized secondary sheathing plates should be of limited weight to facilitate removal "during the latter stages of construction" and that the reduced effectiveness of the secondary sheathing "due to the larger number of seams can be compensated by welding strips to adjoining plates." Respondent reiterated a "desire to prohibit the use of HSS material for secondary sheathing, to minimize the number of seams in the secondary sheathing by using larger plate sizes, and to eliminate the remaining gaps by welding strips to the adjacent plates" and requested appellant's cost estimate to substitute HSLA 80 or HY80 for HSS material. Mr. Fortune stated that 2' × 2' plates "appeared to be too small." (R4, tab 54)

Appellant's 21 April 1988 letter to Gibbs & Cox (appellant's designer—G&C) concurred with G&C's "logic ... in maintaining relatively small [approximately 2 × 2 feet], mechanically attached plates of standardized dimensions where possible [with] overlapping stiffener flanges" (R4, tab 16 at 72).

On 22 August 1988 respondent, after testing, (a) determined to eliminate "HSS steel as an allowable choice for non-structural plate material" and to prohibit "clear gaps in non-structural plate" and (b) directed appellant to perform shipbuilder's special study "SSS LY-0006," under Lead Yard Services contract N00024-87-C-2077, to investigate the feasibility of incorporating HSLA 80 non-structural plate, increasing individual plate [size] where practical, and overlapping plate seams (R4, tab 16 at 79, tab 29 Encl. (11)).

Appellant's 3 March 1989 SSS LY-0006 report stated that HSS and HY80 steel could be eliminated for DDG secondary sheathing because Navy tests had shown that "at the clear gap area HSS at blast impact would curl the unsupported edge, whereas HSLA 80 had insignificant distortion," and gaps could be eliminated at unsupported plate seams by welding a flatbar between structural stiffeners, overlapping nonstructural plate by one inch minimum and noted that gap elimination required a change to specification § 072d, which permitted spaces not greater than 0.25 inch. The report was silent with respect to increasing individual plate size. (R4, tab 16 at 98-110)

Appellant's 21 June 1989 secondary sheathing viewgraphs depicted a typical plate measuring 2' 4" by 2' 2 7/8" (R4, tab 16 at 119).

Appellant's 12 June 1990 certified DDG 53 "Request for Equitable Adjustment" (REA) for $2,157,161 alleged that its 17 February 1987 proposal to construct DDG 53 envisioned spaced system "back up plates about two feet wide extending from deck to deck, held in place by ... resilient spacers, flat washers and threaded studs" and that constructive changes arose from Government actions affecting specification § 072d for DDG 53 (R4, tabs 14, 16).

Before 13 April 1992 respondent told appellant that 10 U.S.C. § 2405 barred DDG 53 fragment protection claim events which occurred before 13 December 1988 (R4, tab 29, ¶ 2).

The contracting officer's 18 May 1992 final decision addressed the three changes appellant alleged in its 12 June 1990 REA: (1)

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redesign of fragment protection plates to a smaller size, (2) elimination of gaps between plates necessitating greater use of backer bars, and (3) greater use of the single plate system. He (a) decided that appellant had failed to substantiate that at the March 1988 design review respondent directed appellant to limit the size of plate panels to permit their removal by the ship's crew, and in any event such claim element was precluded by 10 U.S.C. § 2405; (b) acknowledged that gap elimination and greater use of single plates were changes made by ECP 51-865, the second of which significantly relaxed specification requirements and offset the added costs of gap elimination and backer bars; and (c) determined that no contract price adjustment was warranted. (R4, tab 11)

DDGs 54/56/58 (ASBCA No. 45232)

Appellant's 6 February 1991 DDGs 54/56/58 REA presented cryptic entitlement conclusions with no new technical allegations. Appellant based its DDGs 54/56/58 labor and material cost estimates on its DDG 53 REA. (R4, tab 4) On 12 March 1991 appellant reduced its estimate to a $6,658,958 ceiling price increase (R4, tab 5). The contracting officer's 3 August 1992 final decision addressed appellant's DDGs 54/56/58 claim in terms of the same three changes as the DDG 53 claim, repeated his previous decision on the first change, and with respect to the second and third alleged changes decided that "a downward price adjustment of $555,053 is warranted . . . based on the net cost effect of performing these two changes" (R4, tab 1). On 3 August 1992 respondent's unilateral modification A00519 reduced the contract 2033 target price by $512,159 and ceiling price by $589,615 (R4, tab 10).

DECISION

I.

Respondent's motions seek to "dismiss" appellant's claim insofar as respondent allegedly changed the secondary sheathing requirements at the March 1988 Design Review Meeting. We treat the motions as for partial summary judgment, because respondent grounds its motions on 10 U.S.C. § 2405, which establishes an affirmative defense, that, if valid, would result in denial rather than dismissal of portions of appellant's claims. *Bath Iron Works Corporation*, ASBCA No. 43303, 93-2 BCA ¶ 25,792 at 128,347. Summary judgment is appropriate only when the material facts are undisputed and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States* [33 CCF ¶ 75,726], 812 F.2d 1387, 1391 (Fed. Cir. 1987). Any doubt about the existence of a disputed material fact is to be resolved against the movant. *Short Electronics, Inc.*, ASBCA No. 40499, 91-3 BCA ¶ 24,100.

II.

Respondent "treats as true" only for the purpose of its motions its alleged March 1988 direction to reduce or to change secondary sheathing plate size. We must determine first whether such direction involved conduct and facts interrelated or closely connected with other fragment protection claim items, or is an independent claim. *See, Roscoe-Ajax Construction Co. v. United States* [20 CCF ¶ 83,138], 499 F.2d 639, 204 Ct. Cl. 726, 742-43 (1974) (discussing what is a single claim or dispute for purposes of appeal); *Allied Repair Service, Inc.*, ASBCA No. 26619, 82-1 BCA ¶ 15,785 (discussing what is a claim for purposes of CDA certification and of *res judicata*).

The parties treated the 1988-89 questions about secondary sheathing plate material and size, reduction or elimination of interplate gaps and protecting plate seams, and their technical resolutions, as interrelated. We see nothing unreasonable or illogical in such treatment. Respondent did not direct appellant to reduce or increase the plate size in isolation from, but rather in conjunction with, its resolution of technical concerns about eliminating HSS steel, reducing interplate gaps and protecting plate seams, of secondary sheathing. Appellant's continued use of the smaller sized plates after 8-9 March 1988 was consistent with its SSS LY-0006 report on the feasibility of incorporating HSLA 80 non-structural plate and overlapping plate seams, which report was silent about increasing plate size. The secondary sheathing technical questions, including plate size, were not resolved until after 3 March 1989, when respondent accepted the recommendations in appellant's SSS LY-0006 report and appellant conformed its contract performances thereto. The present record tends to show that the plate size claim element is connected factually to other secondary sheathing claim items, whose global resolution occurred less than 18 months before appellant submitted its certified claim. Moreover, whatever occurred in March 1988 does not prove whether appellant complied with respon-

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dent's alleged direction at that time and thus cannot establish that there was a constructive change order in March 1988.

In its 8 November 1993 reply to appellant's opposition, respondent cites our statement in *Bath Iron Works Corp.*, ASBCA No. 43303, 93-3 BCA ¶ 25,992 at 129,233 (recon. den., *"Bath I"*), that

> we believe that for each shipbuilding claim, the statutory term "events" includes dual operative facts of the Government's conduct giving rise to liability and the contractor's recognition of (or time by which a reasonable contractor should recognize) such conduct

and argues that—

> both the occurrence of the Government conduct giving rise to liability (the alleged constructive change order) and the contractor's recognition of such conduct, the "dual operative facts" identified by the Board, took place at the March 1988 meeting.

We made the quoted statement in response to appellant's *Bath I* argument that we misconstrued the term "events" by treating it as a singular "event" with respect to a single item of allegedly defective Government furnished material. In *Bath I,* we noted the Congressional view that the "event" triggering the 18-month period occurs when the contractor discovers the defective GFM and the Government directs its repair or replacement, and held that the 18-month period began when appellant's subcontractor made the 6 July 1987 troubleshooting call to repair defective GFM. 93-2 BCA ¶ 25,792 at 128,346. In the present dispute concerning the secondary sheathing plate size, the conduct giving rise to liability must embrace not only the alleged Government direction, but also appellant's putative compliance with that direction, just as in *Bath I.*

III.

Next we must determine whether there are undisputed material facts disproving any element of appellant's first claim item: *viz.,* that contracts 2257 and 2033 prescribed no limit on the size of secondary sheathing plates; respondent, at the 8-9 March 1988 Design Review Meeting, directed appellant to change the fragment protection specification or changed or reduced appellant's secondary sheathing plate size; respondent's contracting officer knew or had reason to know of such direction; and appellant complied with such direction.

It is undisputed that specification section 072d in contracts 2144, 2257 and 2033 neither prescribes nor limits the size of secondary sheathing plates. The appeal file and documents accompanying the motions and oppositions (a) do not identify at whose instigation appellant's allegedly proposed secondary sheathing "plates about two feet wide extending from deck to deck" were altered before award of contract 2257 to three to four horizontally oriented plates between decks, each plate measuring one to two to three feet on the side, (b) contain inconsistent statements on whether respondent directed appellant to reduce or change the secondary sheathing plate size at the 8-9 March 1988 Design Review Meeting, and (c) contain no information on whether the contracting officer knew or had reason to know of such direction. It is undisputed that in August 1988 respondent directed appellant to perform the SSS LY-0006 study to investigate the feasibility of *increasing* individual plate size, and that appellant's SSS LY-0006 report was silent with respect to *increasing* plate size. It is undisputed that appellant did not change the size of its secondary sheathing plates after 9 March 1988, but continued to perform contracts 2257 and 2033 with the two to three foot rectangular size secondary sheathing plates.

Based upon the inconsistent information in the present record with respect to the alleged Government direction to reduce or change the secondary sheathing plate size and the contracting officer's knowledge of such direction, it is inappropriate to grant summary judgment. Nothing said in this opinion is intended to decide or to intimate any opinion on any facet of the merits of appellant's claims. Respondent's motions are denied.

[¶ 26,520] Amplitronics, Inc.

ASBCA No. 44119, November 12, 1993. Contract No. DAAH01-78-C-0912.

Value Engineering—Acceptance—Board's Jurisdiction.—A claim for a portion of the savings resulting from the alleged use of ideas submitted by a contractor as value engineering change proposals was dismissed for lack of jurisdiction because there was no

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constructive acceptance of the proposals. Although the contract for circuit card assemblies did not contain a Value Engineering clause, the contractor submitted three proposals, which were subsequently disapproved. The contractor alleged that the government's use of the ideas constituted constructive acceptance of the VECPs. However, the board found that the contract had been completed before the alleged use of the ideas. The Federal Circuit has held that there is no basis for constructive acceptance of a VECP once a contract is complete. Without acceptance, there was no contract over which the board could have jurisdiction.

Awards—Existence of Contract—Implied-in-Fact Contracts.—The board did not have jurisdiction over a claim for a portion of the savings resulting from value engineering change proposals, because the elements of an implied-in-law contract were missing. An implied-in-law contract requires a meeting of the minds that is inferred from the conduct of the parties and requires the same elements as an express contract, i.e., an offer, acceptance, and consideration. In this case, the contractor submitted value engineering change proposals even though the contract under which the proposals were made did not contain a Value Engineering clause. It was undisputed that the government rejected the VECPs when they were presented; therefore, the element of acceptance was missing.

For the appellant: Cosmo Fiore, President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. David C. Hoffman, JAGC, Trial Attorney.

Before DICUS, RUBERRY, and STEMPLER, Administrative Judges.

DICUS, Administrative Judge: Respondent has filed a Motion to Dismiss the captioned appeal, alleging the underlying claim is based on a contract implied-in-law over which the Board has no jurisdiction. Appellant contends its claim is brought under either an express contract or a contract implied-in-fact. Respondent's Motion originally included lack of standing as a basis for dismissal, as appellant had cited Contract No. DAAH01-88-P-1976, to which appellant was not a party. Appellant has subsequently filed proof it was a party to Contract No. DAAH-78-C-0912 (referenced in claim documents at R4, tab 18), and respondent has withdrawn its Motion to Dismiss for Lack of Standing. The contract reference in the heading has been amended accordingly.

Undisputed Facts

1. Contract No. DAAH01-78-C-0912 ("contract 0912") in the amount of $25,444.28 between Amplitronics, Inc. and respondent United States Army was executed 10 July 1978. The contract called for 303 circuit card assemblies (Appellant's Opposition to Respondent's Motion to Dismiss, encl. A). The contract did not contain a Value Engineering (VE) clause (R4, tabs 19, 30).

2. Appellant submitted Value Engineering Change Proposals (VECP) 7891, 7892, and 7893. All three proposals were dated 7 September 1978 and referenced contract 0912. They were contingent upon incorporation of applicable VE clauses into the referenced contract (R4, tab 30). The VECPs were disapproved by letter dated 21 November 1978 (R4, tab 22).

3. There is no evidence as to when the contract was completed. There is no evidence of a claim reservation related to the subject VECPs under the contract. The Government's contract files have been destroyed (R4, tab 13).

4. In a claim dated 10 July 1991 appellant asserted that beginning in 1987 respondent made use of the ideas it had submitted in its 1978 VECPs. Appellant claimed a portion of the savings (R4, tab 18). In the absence of evidence to the contrary, we find the contract had been completed before the alleged use of appellant's ideas in 1987 (*cf.* finding 3).

5. Appellant's claim was denied in a final decision dated 9 December 1991 (R4, tab 7). An appeal was filed by letter dated 10 February 1992.

DECISION

Respondent argues there is no contract under which we may take jurisdiction, contending there was no constructive acceptance of Appellant's VECPs because the contractual relationship between the parties had ended. It is also argued that the elements of a contract implied-in-law are not present. Appellant argues that respondent constructively accepted the VECPs submitted by appellant in 1978, thereby incorporating the VE clause into the contract. Alternatively, appellant argues that an implied-in-fact contract arose under the alleged constructive acceptance.

The Contract Disputes Act of 1978, 41 U.S.C. §§601-613 ("the Act"), provides at

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§ 607(d) "Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relating to a contract ...." Section 602(a) makes the Act applicable to express or implied contracts. It is well-established that the Board has jurisdiction under the Act over contracts implied-in-fact, but not over contracts implied-in-law. *J. Brinton Rowdybush*, ASBCA No. 24955, 83-1 BCA ¶ 16,188.

Appellant's argument that an express contract existed is premised upon the theory of constructive acceptance. However, in *John J. Kirlin v. United States* [34 CCF ¶ 75,354], 827 F.2d 1538 (Fed. Cir. 1987), the Court held there is no basis for constructive acceptance of a VECP when the contractual relationship under which the VECP was submitted has ended. We have found the contract here, which had no VE clause, was completed by the time respondent allegedly used appellant's VECP ideas in 1987 (findings 1, 4). In this regard, we note appellant has not asserted that contract 0912 was still in existence in 1987. As we understand appellant's theory, its VECP was conditioned upon inclusion of a VE clause in contract 0912 (finding 2). According to appellant, respondent's alleged use of the VECP was a constructive acceptance of the VECP under which respondent agreed to incorporation of a VE clause in the contract. The problem with appellant's theory is there was no contract in existence in 1987 when respondent allegedly used the VECP. We are not aware of any basis whereby a express contract could somehow be created through the process of constructive acceptance of a VECP. Thus, even if respondent used the VECPs in 1987 as appellant claims, there was no express contract under which the Board may exercise jurisdiction over appellant's claim.

Alternatively, appellant argues we have jurisdiction under a implied-in-fact contract. A contract implied-in-fact "requires a meeting of the minds which is inferred from the conduct of the parties and, in light of surrounding circumstances, shows their tacit understanding and agreement .... Such an implied contract requires the same elements as an express contract, i.e., an offer, acceptance, and consideration." *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982). It is undisputed that respondent rejected the VECPs when they were presented in 1978 (finding 2). Thus, the element of acceptance is missing. Jurisdiction based on an implied-in-fact contract is contingent upon a finding of constructive acceptance.

Appellant cites *Algonac Manufacturing Co. v. United States* [15 CCF ¶ 83,779], 428 F.2d 1241 (Ct. Cl. 1970), and *Alan Scott Industries*, ASBCA No. 24729, 82-1 BCA ¶ 15,494 in support of its implied-in-fact contract argument. In *Algonac*, the Court based its finding of an implied-in-fact contract on a provision in a contract between the parties that imposed certain duties on the contractor with respect to storage of Government property. Thus, there was a demonstrable offer and acceptance by the parties on the subject matter of the claim. Here, there is no dispute that contract 0912 had no VE clause, and therefore no basis on which an agreement under that contract can be implied by the conduct of the parties with respect to appellant's VECPs.

In *Alan Scott*, the Board relied on Armed Services Procurement Regulation (ASPR) 1-1708, Unsolicited VE Proposals, which provided for submission and acceptance of VECPs by proposers without a current contract, as authority for an implied-in-fact contract. Additionally, there was a contemporaneous exchange of correspondence in which the contracting officer told appellant its proposal had "been evaluated and favorably considered" and asked for additional cost estimate data "in order to share the resultant savings from your VECP." *Id.* at 76,856. The Government then proceeded to use the VECP. Thus, the elements of offer and acceptance were shown, and authority to enter into a contract was present in the regulations. However, ASPR 1.1708 was deleted by Defense Procurement Circular No. 76-9, effective 30 August 1977, and the contemporaneous correspondence between appellant and respondent here affirms rejection, not acceptance, of the VECP (finding 2). Even if appellant were able to demonstrate use of the ideas in its 1978 VECPs by respondent in 1987, it could not show constructive acceptance under the Federal Circuit's holding in *John J. Kirlin v. United States, supra* at 1541, that "when the contract is completed ... there is no basis for constructive acceptance of a VECP." Without acceptance, constructive or express, there is no contract. While appellant might still pursue relief under *quantum meruit*, that is a basis over which we have no jurisdiction. *J. Brinton Rowdybush, supra.*

The appeal is dismissed for lack of jurisdiction.

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[¶ 26,521] **Northwest Marine, Inc.**

ASBCA No. 43502, November 22, 1993. Contract No. N00024-90-H-8337.

Performance—Specifications—Implied Warranty of Suitability.—A ship repair contractor was not entitled to an equitable adjustment for the installation of light fixtures, because it did not show that the allegedly defective specifications resulted in a breach of an implied warranty of suitability. The contractor failed to show that performance was not possible, that installation was outside the state of the art, or that the specified methods were economically unrealistic. The drawings showed various means for installing fixtures. Moreover, the contract made the contractor responsible for all but government-furnished materials, and the means depicted on drawings to show the location of light fixtures were consistent with trade practice.

Modifications—Change—Failure to List.—A ship repair contract's failure to specifically list foundation materials did not constitute a change, because it was clear that the contractor was responsible for all materials not listed as government-furnished. Although foundation materials for the installation of lighting fixtures were not listed as government-furnished, they were not included in the specific lists of contractor-supplied materials. However the contract expressly stated that the contractor was to supply all materials except those furnished by the government under express provisions of the contract. The contractor did not contend that foundation materials were unnecessary, and thus, there was no reasonable interpretation under which the contractor could prevail without ignoring the contract's provisions.

Interpretation of Contracts—Trade Usage—Nondimensional Drawings.—A ship repair contractor was not entitled to an equitable adjustment for installing light fixtures at locations other than those depicted on the drawings, even though the light fixtures to be installed were not dimensioned on the drawings, because it was a common practice for nondimensional drawings to reveal only the general location for lighting fixtures, and the contractor was charged with knowledge of this practice. The trade practice of showing approximate locations for lighting fixtures affords greater flexibility to the installer because less adaptable systems, such as ventilation and wave guides, have to be installed first. Contractors are charged with knowledge of trade practices that have a regularity of observance in the trade. In any event, the contractor's electrical foreman understood that only general locations were shown for the lights.

For the appellant: Jones & Donovan, Irvine, California, by Peter B. Jones and Toni L. DeGasparin. For the government: Arthur W. Hildebrandt, Navy Chief Trial Attorney, and James D. Beback, Supervisor of Shipbuilding, Conversion, and Repair, Seattle, Washington.

Before DICUS, REITER, RUBERRY, and SPECTOR, Administrative Judges.

DICUS, Administrative Judge: 1. Appellant was awarded a Master Agreement for the Repair and Alteration of Vessels on 27 February 1990, the terms and conditions of which applied to all job orders for ship repairs and alterations between appellant and respondent, United States Navy. Among the required clauses was 52.217.7112, Performance. That clause provides:

> Except as otherwise provided in the job order, the Contractor shall furnish all necessary materials, labor, services, equipment, supplies, power, accessories, facilities and such other things and services as are necessary for accomplishing the work specified in the job order subject to the right reserved in the Government under Clause 52.217-7218 entitled GOVERNMENT PROPERTY.

(R4, tab 1)

2. Solicitation No. N00024-89-R-8519 was issued 18 September 1989 for the regular overhaul of the USS STANDLEY. The solicitation called for a New Threat Upgrade (NTU) which included weapons systems upgrades. The specifications included Work Item Nos. 411-91-003, 452-90-001, 453-90-003, and 473-90-001. The resulting contract made the contractor responsible for planning and scheduling and for furnishing "materials, services, and facilities (except those furnished by the Government under express provisions of this contract) . . . ." (R4, tabs 2, 10, 11, 12, 13)

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3. Prior to award the following question and answer from a bidder was distributed to all bidders:

> QUESTION: This offeror assumes that its responsibility for procuring installing activity-furnished material is limited to those items identified as IAF material on the CG-32 drawings, plus additional material identified as GFM on the drawing but not included as GFM in Section 5 of the individual work item or in Attachment K, NTU ShipAlt Material Kit List. All other ShipAlt material is to be GFM. Is this correct?
>
> ANSWER: *No.* Contractor is responsible for procuring *all material* incidental or otherwise unless as noted above. [emphasis in original]

(R4, tab 3; tr. 2/84)

4. The solicitation and resulting contract also included NAVSEA Standard Items as Attachment H. NAVSEA Standard Item 009-01, General Criteria, requires the contractor to "Provide labor, materials, and equipment which are required to complete the Work Items, including that which is indicated on drawings or test specifications as being provided by sources other than the contractor, unless specifically listed as Government Furnished Material (GFM) in the Work Items." (R4, tabs 2, 9)

5. The solicitation and resulting contract do not specifically list foundation materials (aluminum and steel piping and flat bar) for attaching lighting to the ship as either Government Furnished Material or in the various Bills of Materials as contractor supplied (R4, tabs 2, 10, 11, 12, 13, attachments 1-5; tr. 1/90-91, 2/12-14). The various means of attaching lighting to ships and appropriate materials therefor are listed on drawing 803-518-4170 including piping and flat bar (R4, attachment 5). General Note 30, contained on relevant lighting drawings, provides "light fixtures shall be installed in accordance with NAVSEA 803-5184170." [sic] (R4, attachments 1-4) Relevant lighting drawings were referenced in the Work Item specifications (R4, tabs 10, 11, 12, 13). Respondent considered the foundation materials to be of a miscellaneous nature because quantities cannot be predicted (tr. 2/55; *see also* Price Proposal No. 3110, which describes the material as miscellaneous, R4, tab 108).

6. The proposal submitted by appellant did not include the cost of foundation materials for lighting (tr. 1/62). Appellant is an experienced ship repair firm, and the electrical estimator who prepared the relevant estimate has prepared more than 500 such estimates (tr. 1/27, 34). He did not consider that General Note 30 had significance to him as an estimator (tr. 1/65). There is no probative evidence on how the job was bid with respect to the locations of the lighting fixtures. The contract, or Job Order, in the amount of $29,798,179.00 was awarded to appellant on 27 February 1990 (R4, tab 2).

7. The overhaul of the ship made appellant responsible for various repairs and alterations and involved the work of various crafts (R4, tabs 2, 10, 11, 12, 13; tr. 1/105-07, 119, 151-53). The relevant drawings for lighting locations showed the lights in dark lines, with other systems represented by lighter lines (exh. A-1, -2, -3). Clearances from the overhead to the top of the light were shown by a "B" dimension (*id.*; tr. 2/104). The drawings were to scale but not otherwise dimensioned with respect to the lights, which, according to witnesses for both parties, is common practice in the trade with regard to surface ships (exh. A-1, -2, -3; tr. 1/153, 2/103-04). This affords flexibility to the installer as lighting systems are usually the last to be installed, and must be made to fit around less flexible systems that must be installed first, such as waveguides and ventilation (tr. 2/51-52, 104-07). The location of lights is not critical. By scaling the drawings but not dimensioning the lights, the approximate location of the lights and an approximation of the overall layout is given, affording some additional latitude to the installer (tr. 2/46-49). Appellant's electrician foreman understood that only a general location for the lights was shown on the drawings (tr. 1/106).

8. Appellant filed Inspection/Deficiency Reports ("IDRs") asserting that the lack of dimensions and precise locations for lighting fixtures hampered progress. Respondent directed appellant to "template," or install to fit existing conditions (R4, tab 7; tr. 2/101). A number of lighting fixtures were installed in locations more than one foot from the locations indicated in the non-dimensioned drawings (tr. 1/217-20; exh. A-1, -3). Appellant conducted the installation of lighting at the same time as other crafts were in the same space installing other systems such as ventilation, piping, cableways, and waveguides, and interferences were experienced (tr. 1/105-07, 124-26, 145). Several fixtures had to be moved after the initial installation due to interferences caused by changes to other systems directed by respondent (tr. 1/189-91). While the normal proce-

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dure is for such changes to include all costs, including the additional cost of relocating the light fixture (tr. 2/112-14), the record contains no specific identification of which lights were relocated because of changes directed by respondent and no specific identification of changes for which appellant was paid for relocating lighting. As many as six situations involved moving fixtures to avoid interferences that required special attention. These were handled by filing IDRs (tr. 2/54). There is no evidence as to whether change orders were issued.

9. In performing the contract work, appellant's electricians ascertained what contractor-supplied materials were necessary and ordered them through their own purchasing department (tr. 1/88-89). As noted in finding 5, lights are installed using a combination of steel or aluminum piping, which is attached to the ship, and flat bar steel or aluminum, which is attached to the piping and the mounting brackets of the lights (R4, attachment 5; tr. 1/117, 157-58). When the electricians ordered these foundation materials, appellant's purchasing department could not identify the foundation components on its list of materials and instructed the electricians to file an IDR (tr. 1/156). Appellant filed eight IDRs as a result between 10 August 1990 and 22 August 1990 (R4, tab 8).

10. Appellant's IDRs were received by respondent, which prepared and sent to appellant Price Proposal No. 3110, dated 7 September 1990, which stated in relevant part:

Add the following subparagraph to the work item:

3.11 Provide miscellaneous foundation materials as necessary to accomplish installation.

REASON: Miscellaneous material not addressed by general notes of Ref. 2.m.

(R4, tab 108) The purpose of the Price Proposal was to solicit from appellant a cost proposal for the foundation materials (tr. 2/70, 97).

11. Prior to directing the preparation of Price Proposal No. 3110, respondent's lead electrical surveyor had attempted to obtain information as to whether other Navy ship overhauls specifically listed foundation materials for lighting. When the information was not forthcoming, he went ahead and ordered preparation of the Price Proposal. After it was submitted to appellant, he received information that lighting foundation materials were not specifically listed as contractor furnished in any previous overhauls. A meeting with the contracting officer and others was held, whereupon Price Proposal No. 3110 was canceled (tr. 2/95-99). The cancellation notification cited paragraph 3.4 of Standard Item 009-01 (R4, tab 8; *see* finding 4).

12. Appellant thereafter purchased the necessary foundation materials and completed installation of the lighting (tr. 1/169). By letter dated 26 April 1991 a properly certified claim in the amount of $377,764.00 was submitted by appellant. The claim sought additional costs for installation of the lighting system arising from the allegedly defective drawings which did not list foundation materials or include lighting dimensions (R4, tab 4). The claim was denied in a final decision dated 13 June 1991 (R4, tab 5). A notice of appeal was filed 6 September 1991.

DECISION

Appellant argues that the contract contained detailed design specifications which carry an implied warranty of suitability, and that the specifications and drawings were defective in both their failure to list foundation materials and the manner in which lighting locations were depicted. Respondent argues, in effect, that the contract required appellant to supply all materials not expressly Government-furnished. With respect to the location of the lighting fixtures, respondent argues that the drawings were consistent with trade practice, and that any ambiguity arising from the non-dimensioned drawings imposed on appellant the duty to inquire.

With respect to the implied warranty, in *Natus Corporation v. United States* [11 CCF ¶ 80,882], 371 F.2d 450, 458 (Ct. Cl. 1967), the Court held:

> The warranty, properly construed, promises only that performance is possible and within the state of the art. How that performance shall be achieved, or at what price, is a matter properly reserved for the contractor, and he may claim a breach of warranty only if the specified method demands resort to the economically unrealistic.

We cannot find the implied warranty was breached by respondent. There is no contention by appellant that installation of light fixtures was outside the state of the art. Indeed, the drawings showed various means for installing light fixtures (finding 5), and they were ultimately installed with only six

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installations requiring special attention (finding 8). Moreover, the contract made appellant responsible for all but Government-furnished materials (findings 1-4), and the means used on the drawings to show the location of the lighting fixtures was consistent with trade practice (finding 7), as discussed below.

As to appellant's contention that the failure to specifically list foundation materials constituted a change, we find that argument without merit. In the Master Agreement and in the contract itself, as well as in the response to a pre-bid question provided to appellant (findings 1-4), respondent made it clear that the contractor was responsible for all materials not listed as Government-furnished. Pre-bid questions and answers resolving specification questions are not "wiped from the record by the formal execution of the contract." *Sylvania Electric Products, Inc. v. United States* [17 CCF ¶ 81,287], 458 F.2d 994, 1008 (Ct. Cl. 1972). Further, foundation materials were not listed as Government-furnished and they were not included in the specific lists of contractor supplied materials. The contract expressly states the contractor is to supply all materials "(except those furnished by the Government under express provisions of this contract)." (Finding 2) It is not contended that appellant interpreted the contract as not requiring the lighting fixtures to be attached to the ship, nor is it contended that foundation materials were somehow unnecessary. Since foundation materials were necessary and they were not expressly listed as Government-furnished in the contract, there is no reasonable interpretation under which appellant can prevail without ignoring the provisions referred to above. This we may not do under governing rules of contract interpretation. *Hol-Gar Manufacturing Corporation v. United States* [10 CCF ¶ 72,885], 351 F.2d 972 (Ct. Cl. 1965).

In *Service Engineering Company*, ASBCA No. 40272, 92-3 BCA ¶ 25,106, the contractor maintained that stanchions and other supports not shown in the contract's Guidance Plan constituted changed work. The contract, however, made the contractor responsible for omitted details necessary to fulfill the intent of the specification. The Board found the contractor responsible for the omitted stanchions and supports, stating at 125,183:

> SECO was an experienced contractor, having overhauled a number of Navy vessels (finding 5). It had experienced estimators (finding 24). We simply cannot accept the notion that SECO could have been so naive as to believe that what was shown in the Guidance Plans constituted the total scope of its work, particularly in view of the above-cited specification provision.

Similarly, we cannot conclude that a contractor as experienced as appellant was misled into believing it was not responsible for foundation materials, particularly in light of the several bid, contract, and Master Agreement statements (finding 1-4) making appellant responsible for all but Government-furnished materials.

Appellant contends the lighting drawings were defective because the lighting fixtures were not dimensioned on the drawings and they had to be moved from the locations depicted thereon. Witnesses for both parties testified that non-dimensioned drawings for lighting are common practice in the trade (finding 7). Appellant's electrician foreman understood that only general locations were shown for lights (finding 7). Thus, the drawings were not defective. Moreover, a contractor is charged with knowledge of trade practices which have a "regularity of observance" in the trade. *Alfred A. Altimont, Inc. v. United States* [25 CCF ¶ 82,515], 579 F.2d 622, 625 (Ct. Cl. 1978). We are not persuaded that an experienced contractor such as appellant (finding 6) could be unfamiliar with common industry practices, or that the practice in question caused unanticipated disruption. To the contrary, we are persuaded that this practice of showing approximate locations for lighting affords flexibility to the installer. Logically, less adaptable systems such as ventilation and waveguides had to be installed first (finding 7), and respondent's direction to install lighting to fit conditions is not, on this record, shown to be somehow the cause of additional work.

In this regard, testimony was offered on crowding in limited work spaces where several crafts attempted to work and interferences were experienced (finding 9). As the contract made appellant responsible for scheduling and planning (finding 2), the timing and sequence for installation of the various systems was appellant's contractual responsibility. We are not persuaded that the non-dimensioned drawings somehow created or contributed to this problem, or excused appellant from its responsibility for managing the job.

We note that appellant presented testimony that some of the location changes were the result of change orders issued by respondent, and respondent presented evidence that the normal procedure was to in-

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clude any lighting changes in the change order. Appellant presented no proof as to specific change orders or directions by respondent (finding 8). On balance, we find the record inconclusive on this point. As the burden of proof is on appellant, *Peterman, Windham, and Yaughn*, ASBCA No. 21147, 77-2 BCA ¶ 12,674, we cannot find respondent liable. The appeal is denied.

[¶ 26,522] Gaffny Corporation

ASBCA Nos. 37639, 39740, 46025, 46026, 46027, 46028, 46029, November 22, 1993. Contract No. N62472-85-C-0007.

Modifications—Reduction in Requirements or Prices—Cost Savings.—Under a contract for the renovation of a heating plant, the government's price reduction arising from its determination to abandon attempts to relocate a feedwater line was improper, because there was no indication that the government's abandonment of the work resulted in any cost savings to the contractor.

Delays—Approval Delays—Processing Period.—Under a contract for the renovation of a heating plant, the government was responsible for delays caused by its failure to approve submittals within a two-week process period because it had promised a submittal turnaround period of two weeks and the contractor had relied on that time frame for locking in work schedules and material delivery lead times. There was uncontested evidence that the delayed review of the submittals affected the contractor's ability to timely order materials that had to be approved in the submittals.

Modifications—Constructive Change—Rejected Ceramic Tile Work.—Under a contract for the renovation of a heating plant, the government's direction that a contractor remove and replace allegedly nonconforming ceramic tile laid in shower room areas was a constructive change because the government failed to prove that the ceramic tile work done by the contractor did not conform to contract requirements. The government personnel who rejected the ceramic tile work were not qualified to make the decision to reject the tile.

Contract Disputes, Claims—Government Claims—Withheld Payments.—A claim for relief from the government's purportedly improper withholding of liquidated damages was properly before the board because the issue of liquidated damages was raised in another claim by the contractor and the deemed denial of that claim was appealed to the board.

Liquidated Damages—Propriety of Assessment—Government Delay.—An assessment of liquidated damages for delay in completion of a contract for the renovation of a heating plant was improper because the government was a cause of the delayed contract performance from the original completion date until substantial performance. The government delayed approval of the contractor's submittals, which subsequently delayed the delivery of required materials. The government was also shown to have delayed performance when it improperly directed the removal and replacement of ceramic tile.

Contract Disputes, Claims—Submission to Contracting Officer—New Claim v. Factual Assertion.—An assertion relating to a cumulative delay claim that first appeared in a contractor's post-hearing brief was not a new claim over which the board lacked jurisdiction, but was an assertion of another fact in support of the cumulative delay claim. A new assertion that an additional fact supports the validity of an existing claim is not the assertion of a new claim.

Delays—Causation—Concurrent.—Under a contract for the renovation of a heating plant, the contractor's cumulative delay claim was denied because the contractor failed to demonstrate that its claimed costs were due solely to the delays caused by the government. Instead of demonstrating a causal connection between its claimed costs and the government-caused delay, the contractor relied solely on the total costs incurred. However, it was

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insufficient to show total costs. Rather, the contractor was required to show that there were increased costs and that the increase was caused solely by the government.

Payments, Prompt—Dispute—Subsequent Assertion.—A contractor was entitled to Prompt Payment Act interest on funds improperly retained by the government under a contract for the renovation of a heating plant, because the government failed to make timely payment after the submission of the contractor's final invoice. Because the contract did not contain a specific payment due date, for purpose of the PPA, payment was due 30 days after the receipt of the invoice. Although the government later asserted a claim for liquidated damages, the amount of the invoice was not in dispute at the time it was submitted and for at least 16 months afterward. Testimony that the invoice was not received was not credible.

For the appellant: John J. Gaffny, President, and Michael F. Gaffny, Vice-President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Chuck Kullberg, Trial Attorney, Naval Facilities Engineering Command, Washington, D.C.

Before KIENLEN, RUBERRY, and SPECTOR, Administrative Judges.

KIENLEN, Administrative Judge:

INTRODUCTION

This case arose out of a contract for the renovation of the heating plant at the Naval Air Station in Brunswick, ME. ASBCA No. 37639 is a delay impact claim. ASBCA No. 39740 concerns liquidated damages. ASBCA No. 46025 concerns asbestos. ASBCA No. 46026 concerns late approval of submittals. ASBCA No. 46027 concerns rejection of ceramic tile. ASBCA No. 46028 is a claim for payment of the contract balance. ASBCA No. 46029 is a claim for prompt payment act interest. Entitlement and quantum were tried.

GENERAL FINDINGS OF FACT

On 21 March 1986, the Northern Division, Naval Facilities Engineering Command, U.S. Naval Base, Philadelphia, PA, awarded a $119,000 construction contract to Gaffny Corporation, incorporated in Massachusetts. The work was part of the renovation of the central heating plant at the Naval Air Station, Brunswick, ME, and was to be completed on 3 August 1986.

The contract included these standard clauses: SUSPENSION OF WORK (APR 1984); DISPUTES (APR 1984); CHANGES (1984); DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (JUL 1985); INTEREST (APR 1984); and PRICING OF ADJUSTMENTS (APR 1984).

The Navy administrative contracting officer was LT Hyde, the Assistant Resident Officer in Charge of Construction (AROICC) at the Brunswick Naval Facility Engineering Command. He had full authority to accept or reject work; but could not assess liquidated damages, he could only recommend their assessment to a contracting officer at higher headquarters. He was not knowledgeable about ANSI requirements for ceramic tile. Carl Thorpe was the government inspector. He visited the site nearly every day; often twice a day. He was not knowledgeable about the ANSI requirements for ceramic tile.

Michael Gaffny was appellant's vice-president and site superintendent. He was responsible for the submission of submittals and overall supervision of the contract. The contract required the contractor to have a supervisor on site whenever work was performed.

By letter of 25 February 1987, Gaffny submitted, concerning previously disputed matters, claims totaling $65,522.10 and a 202 day time extension, certified by its president, John J. Gaffny, using the form provided by statute (41 U.S.C. 605(c)(1)). LT Hyde acknowledged that Gaffny's claim was received on 2 March 1987. On 5 March 1987 Gaffny submitted a final invoice.

A final decision on Gaffny's claim was issued on 25 July 1988 by higher headquarters. Gaffny then went to Brunswick to negotiate quantum on items which had been favorably decided. During that meeting Gaffny was first told that liquidated damages were being considered.

By letter of 21 September 1988, Gaffny appealed to this Board. The appeal of those claims was docketed on 28 September 1988; as ASBCA No. 37639, 46025, 46026 and 46027. The complaint included a request for relief from liquidated damages. In a decision of 15 May 1989, in response to a Government Motion to Strike, this Board held that liquidated damages were not part of the 21 September 1988 appeal. The request for re-

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lief from liquidated damages was dismissed. *Gaffny Corporation,* ASBCA No. 37639, 89-3 BCA ¶ 22,007.

On 11 July 1989, Gaffny submitted, as to previously disputed matters, claims for the contract balance of $6,808, plus statutory interest from the "5 March 1987 requisition date," and asked for recission of the liquidated damages. Gaffny requested a final decision. It was received by the Navy on 17 July 1989. On 19 July 1989, a new AROICC acknowledged receipt of Gaffny's 11 July 1989 "request for a contract adjustment in the amount of $8,092.00."

On 29 August 1989, the Northern Division acknowledged receipt of Gaffny's claim. On 30 August 1989, Gaffny forwarded to the Northern Division a copy of the 5 March 1987 invoice. On 17 October 1989 Gaffny appealed a deemed denial. Those claims were docketed as ASBCA Nos. 39740, 46028 and 46029. The Head of the Claims Branch of the Northern Division issued a contracting officer's final decision on 22 November 1989. He denied the claim for the contract balance and the claim for interest; confirmed liquidated damages of $3,500 at $50 per day; and, agreed that Gaffny was entitled to $3,308. He insisted that Gaffny file another invoice before the Navy would pay the amount it owed.

All of Gaffny's claims are now before the Board. We discuss them more or less in chronological order, finding facts and deciding each claim in turn.

ASBCA No. 46025—Asbestos—FINDINGS OF FACT

The contract had no provisions concerning asbestos. Asbestos was raised during a preconstruction conference. LT Hyde told Gaffny that asbestos was only in the superintendent's office, and that it would be removed before Gaffny started work.

On 22 May 1986, while drilling holes for the feedwater line, Gaffny encountered a latent obstruction. That work was suspended. On 10 June Gaffny proposed $600 for relocating the line. Gaffny said a time extension would not be required if the modification was approved before 1 July 1986. In late July, Gaffny told the Navy that it needed 45 days after approval to relocate the feedwater line. This was a reasonable estimate for scheduling the subcontractor, getting the materials, and doing the work.

On 30 July 1986, the Navy prepared Modification P00001, with a price of $600 and the original completion date of 3 August 1986. On 5 August 1986, Gaffny signed the modification; the Navy signed on 8 August 1986. We find the parties must have intended a reasonable time to complete the work,

On 3 September 1986, Gaffny began the relocation of the feedwater line. Gaffny began this work within a reasonable time after being directed to do so by the Navy. After work progressed, government personnel called in the installation industrial hygienist, who determined that the insulation at the relocation point contained asbestos. Because of the asbestos, Gaffny was required to stop the relocation work on 3 September 1986. By this time Gaffny had incurred all its labor and material costs. The unused material was turned over to the Navy. The Navy abandoned all efforts to relocate the feedwater line.

LT Hyde requested a price reduction for deleting the relocation work. Gaffny declined. There is no evidence that Gaffny had any savings from the deletion of the relocation work. Likewise, there is no evidence that the contractor performed any work beyond that covered by Modification P00001.

On 23 September 1986, Gaffny encountered asbestos while tying-in the heat coil to existing steam coil piping. Gaffny immediately identified a new tie-in location and additional materials. The Navy inspector agreed. Gaffny purchased additional pipe and fittings, and completed the tie-in work that same day. LT Hyde asked Gaffny for a proposal for the changed work. On 29 October Gaffny submitted a proposal for $161.40. The work and price were accepted by LT Hyde in an internal memorandum, and by a new contracting officer in unilateral Modification P00002 of 6 December 1988.

The record does not distinguish the costs for the work performed from the costs for the work which was otherwise required by the contract, except for the additional pipe and fittings. Those costs were included in Gaffny's proposal. It is not possible to conclude from the record that Gaffny incurred costs greater than the $161.40 as a result of the changed work.

The new contracting officer unilaterally took a credit, from the agreed $600 in Modification P00001, for the abandoned feedwater relocation. The credit was identical to the price increase for rerouting the tie-in. No explanation was given.

Neither of the incidents of encountering asbestos resulted in delay to the overall completion of the contract.

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ASBCA No. 46025—Asbestos—DECISION

Gaffny claims damages plus a time extension as a result of the discovery of asbestos. As to the feedwater line, there was no evidence that Gaffny performed work in addition to that covered by Modification P00001. Gaffny was compensated under that modification and is not entitled to more.

There also was no evidence that the Navy's abandonment of attempts to relocate the feedwater line resulted in any savings to the Appellant. The Navy's determination to delete $161.40 in Modification P00002 was taken in response to Appellant's claim. The appeal brings the case to us *de novo. Space Age Engineering, Inc.,* ASBCA No. 26028, 82-1 BCA ¶ 15,766, at 78,033. The Navy's unilateral action to deduct $161.40 from Modification P00001 is a nullity and is not approved.

As to the redesign of the heat coil tie-in to the steam piping, LT Hyde accepted the work and agreed to the $161.40 price. The new contracting officer also accepted $161.40 as just compensation, in Modification P00002. We found that it is not possible to determine from the record that Gaffny incurred costs greater than $161.40 as a result of the changed work.

Since the Navy has accepted those costs, we accept them. *Melvin Wilner, d/b/a Wilner Construction Company v. The United States,* No. 92-5161 (Fed. Cir. 24 May 1993); *Cox & Palmer Construction Corp.,* ASBCA Nos. 43438, *et al.,* 93-3 BCA ¶ 26,005, *Page Construction Co.,* ASBCA No. 30266, 89-1 BCA ¶ 21,488 at 108,255; *Structural Finishing, Inc.,* ASBCA No. 30260, 85-3 BCA ¶ 18,235 at 91,563; *Robert McMullan & Son. Inc.,* ASBCA No. 19023, 76-1 BCA ¶ 11,728 at 55,903. Gaffny is entitled to $161.40 for the extra work performed for the tie-in of the heat coil, plus Contract Dispute Act (CDA) interest from 2 March 1987, the date the claim was received by the Navy.

Because the discovery of asbestos did not result in delay to the overall completion of the contract, the appellant is not entitled to extra time.

ASBCA No. 46026—Late Approval of Submittals—FINDINGS OF FACT

On 1 April 1986, LT Hyde sent to Gaffny a "Manual of Instruction to Contractors," for "detailed guidance to specific contract requirements and items of policy which will be pertinent to this contract." The manual said submittals would be processed in two weeks. The Navy conceded it promised a submittal turn around time of two weeks. The appellant relied on that time frame for locking in work schedules and material delivery lead times. All the submittals were simple and straight forward.

On 5 May 1986, the Navy received the first submittal package. The processing and return of the first submittal should have been completed no later than Monday, 19 May 1986. On 7 May 1986, the Navy received the second submittal package. The processing and return of the second submittal should have been completed no later than Wednesday, 21 May 1986.

Earlier, the Navy decided to send the submittal reviews to an architect & engineer firm. On 15 May 1986, the appellant first learned that the Navy had taken no action on appellant's first two submittals and did not have a submittal review contract with an architect & engineer firm.

The designated architect & engineer firm agreed, as an accommodation to the Navy, to review the submittals before a contract was awarded. On 16 May 1986, Gaffny picked up the submittals from the Navy and took them 145 miles to the firm in Boston, MA, so that the firm could start on the review of the submittals. On 15 June 1986, the Navy finally entered into a contract with the architect & engineer firm for the review of all submittals.

On 2 June 1986, submittal number 1 was approved and returned to Gaffny, 28 days after the Navy received it from the appellant. This processing period was 14 days longer than the turn around period the Navy had promised and upon which the appellant had reasonably relied.

The Metcraft gang shower was in the first submittal. The gang shower was a specialty plumbing fixture which permitted several people to take a shower at the same time. It was a wall mounted unit that had three separate shower heads. The showers were essential for the 24 hour crew of the boiler plant; the absence of the showers precluded full use of the facilities.

Gaffny ordered the Metcraft gang shower through Peabody Supply on 16 April 1986, subject to the submittal approval. The lead time for the specialty Metcraft gang shower was 10 weeks from order to delivery. It was uncontested that Metcraft shut down for a three week vacation beginning the last week in July and continuing through the first two weeks of August. A reasonable result of the vacation period was that incoming orders would backlog and extra time would be

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needed for production start up at the end of the vacation period, increasing the normal delivery lead time beyond the usual ten weeks.

If the first submittal had been returned within two weeks, the Metcraft shower would have been ordered in time to be delivered to Gaffny prior to the vacation shut down, and to be installed before contract completion. The first submittal was returned two weeks late, putting the last two weeks of delivery lead time at the beginning of the vacation shut down, adding extra weeks to the delivery lead time. The showers actually were delivered on 19 September 1986, for a lead time of $15\frac{1}{2}$ weeks. This is consistent with three weeks of vacation, three weeks of backlogged orders, and a few extra days for production start up after the vacation shutdown.

On 12 June 1986, submittal number 2 was approved and returned to Gaffny, 36 days after the Navy received it from the appellant. This processing period was 22 days longer than the turn around period that the Navy had promised and upon which the appellant had reasonably relied.

The heat coil was in the second submittal. The heat coil was made by McQuay, which also had a summer shutdown period. The delivery lead time for the heat coil was also ten weeks. The McQuay heat coil was purchased through D. Griffin Company, Inc. The order was placed by Gaffny on 18 April 1986, subject to the submittal approval. The heat coil was delivered on 23 September 1986, for a delivery lead time of $14\frac{1}{2}$ weeks.

In Modification P00002 of 6 December 1988, a Navy contracting officer unilaterally granted a 14 day extension of contract performance time as a result of the delayed approval of submittals, extending contract completion from 3 August 1986 to 17 August 1986. There was no explanation for choosing 14 days. While the 14 days were equal to the delay in approving the first submittal, they were eight days short of the 22 days of delay in approving submittal number 2, and many weeks short of delayed delivery of materials.

ASBCA No. 46026—Late Approval of Submittals—DECISION

Because the Navy delayed in reviewing and approving submittals, Gaffny claims an adjustment of $1,423.13 (plus profit) for disruption, and a time extension for material delivery delays. The Navy denies a price adjustment, but concedes 14 days of contract delay.

The first claimed labor disruption was for obtaining off site materials on 14 and 15 May 1986, which materials would have been on site if the submittals had been promptly returned. We found that the first submittal was not due to be approved until 19 May. Any such off site costs were not caused by the Navy's delay in approving the submittals and they are denied.

The second claimed labor disruption was for the direct labor costs of the 290 mile round trip travel time to take the submittals to the architect & engineer firm in Boston. Gaffny did not offer evidence that the supervisor's travel time to Boston would not otherwise have been spent at the construction site that day, and did not show that the supervisor was paid more than he would otherwise have been paid. All the disruption costs are denied.

The Navy represented that the submittals would be returned within two weeks. We have found that the submittals were simple and straight forward; and, that appellant reasonably relied upon the Navy's promise to review and approve the submittals within two weeks. See *Azerind, Inc.*, ASBCA No. 34294 *et al.*, 87-3 BCA ¶ 20,122, (more than two weeks was unreasonable); *Ernest A. Cost*, ASBCA No. 28811, 86-1 BCA ¶ 18,559 (10 days normally acceptable maximum). Delays caused by the Navy's failure to approve the submittals within 14 days are the responsibility of the Navy.

There is uncontested evidence that the delayed review of the submittals delayed appellant's ability to order materials which had to be approved in the submittals; and, pushed delivery lead time for the Metcraft gang shower into the manufacturer's vacation schedule. As a result, the delivery of this material was delayed from Monday, 28 July until 19 September 1986, or 53 days. All of this delay directly impacted overall completion of the contract. The renovation was not usable until the showers were complete.

The material delivery delay caused by the delayed submittal review for the McQuay heat coil was from Wednesday, 30 July until 23 September 1986, or 55 days.

LT Hyde testified that there would have been no delay in obtaining materials if the appellant had turned in submittals for approval right after the preconstruction conference. However, LT Hyde knew or should have known at the time, and at the time of his testimony, that the Navy had no contract or extra contractual arrangements with the architect & engineer firm for the review

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and approval of submittals. There is no basis for any presumption that an earlier submittal would have meant an earlier actual return date. That position is not credible.

The Navy also argued that Gaffny "should have known well in advance that it would encounter such problems with deliveries and sought other sources." This argument is not persuasive. The Navy offered no proof that there were other suppliers that could have delivered earlier. It is the Navy's burden to show that the delay it caused could have been overcome. Moreover, having caused a delay, the Navy is responsible for the consequences of that delay. The significance of those delays will be discussed *infra* when the liquidated damages and the cumulative delay claims are discussed.

ASBCA No. 46027—Ceramic Tile—FINDINGS OF FACT

The contract incorporated the specifications of the American National Standards Institute (ANSI) for ceramic tile standards of workmanship (ANSI A108.1) (Section 09310, part 1.1.1). The relevant portions are:

A.3.3: Workmanship, Cutting and Fitting:

A.3.3.1: Center and balance areas of tile, if possible.

A.3.3.2: An excessive amount of cuts shall not be made. Usually, no cuts smaller than half size should be made. Make all cuts on the outer edges of the field.

* * *

A.3.3.5: The splitting of tile is expressly prohibited except where no alternative is possible.

* * *

A.3.3.7: Make corners of all tile flush and level with corners of adjacent tile, with due allowance to tolerances for tile as specified in TCA 137.1.

A.3.3.8: Keep all joint lines straight and of even width, including miters.

* * *

A.3.3.10: Finish floor and wall areas level and plumb with no variations exceeding 1/8 inch in 8 feet (3 mm in 2.4 m) from the required plane.

The contract also incorporated the ANSI specifications for the Standard Grade of ceramic tile (ANSI A137.1) (Section 09310, part 2.1.1). Relevant portions are:

6.1.1.2.5 Facial Dimensions. The average major facial dimension(s) of each tile when measured as described in ASTM C 499, shall not vary more than 4.0 percent from the nominal dimension(s) [i.e., 5/32 of an inch, or slightly more than 1/8 of an inch, for $4\frac{1}{4} \times 4\frac{1}{4}$ tile]. The range(s) of the average major facial dimensions of all tile in the sample shall not exceed 0.6 percent of the largest value in the range.

6.1.1.2.6 Spacers. Unless otherwise specified, flat wall tile shall have lugs or other means on all edges to provide uniform spacing.

The Secretary of the ANSI A108 Committee on Ceramic Tile, Kenneth R. Erikson, furnished the Committee's official opinion on balancing a field of tile: "If the tile installer made *any* effort to attempt centering or balancing the tile and followed local trade practices, he has fulfilled the 'if possible' statement of Section A-3.3.1." (Emphasis in the official opinion of the committee.)

Section 09310, part 3.1.3, specified installation methods. Grouting was to be in accord with ANSI 108.1, using white grout for walls and gray grout for floors. Joint widths were specified in part 3.1.4.1 and provided that single or unmounted tiles were to be spaced "as determined by spacing lugs" on the pieces of tile.

On 24 July 1986 Gaffny began installing the ceramic tile. The contract called for a combined 800 square feet of ceramic tile in the mens' shower and in the womens' shower rooms. The tile work was completed on 7 August 1986.

The Navy performed no final inspection on the ceramic tile work until one month later, when on 8 September 1986, the Navy inspector complained to Gaffny about deficiencies. This oral notice was followed by a letter of 10 September 1986 from LT Hyde, which enclosed handwritten descriptions of deficiencies and invited questions or comment from Gaffny. The letter was received on 12 September 1986.

On 24 September 1986 Gaffny responded in writing to the 10 September 1986 letter. Gaffny agreed that some of the ceramic tile work needed to be corrected. Gaffny spent six hours correcting that ceramic tile work. Gaffny denied that the other work was defective, but began removing it on 24 September 1986. Both parties agree that the replacement of 300 square feet of ceramic tile work was in dispute.

With respect to the mens' shower room, the Navy said the wrong size bullnose tile was used, some of the tile was not plumb, portions were out of alignment, and the fields of tile on two of the walls were out of balance.

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As to bullnose tile, the Navy objected to the use, at the entrance to the shower, of a 2 × 6 bullnose tile to finish the edge of the tiled wall which abutted a vertical row of tiles less than a half tile wide. The Navy insisted that a 4 × 6 inch bullnose edge tile should have been used. It is standard trade practice to use 2 × 6 bullnose tile in such situations. The contract does not specify that 4 × 6 bullnose tile is to be used.

As to plumbness, LT Hyde could point out only one spot as not being plumb. LT Hyde admitted on cross examination that the spot he pointed out was a defect which Gaffny agreed with and was one that Gaffny corrected without dispute. No other locations were identified as being out of plumb.

As to alignment, LT Hyde said there were joint lines which wandered, and were not in a straight line, "we measured 1/8th inch variations of those joint lines." The only example LT Hyde had was on photo "1 & 2" in the mens' shower. On cross examination LT Hyde agreed the grout was only 1/16 of an inch and that the grout lines met. The joint lines did comply with the contract standard. LT Hyde's contrary assertions were not credible.

As to balancing the fields of tile on two separate walls, the back wall in the mens' shower room had a vertical row of tile in the corner of the left hand and back walls, which was about 3/4 inch wide. The Navy contended that this 3/4 inch vertical row of tile caused the whole wall, or field of tile, to be unbalanced.

The appellant maintains that the 3/4 inch row of tile resulted, not from a failure to lay out a balanced field of tile, but from variations in tile size. The tile field (the wall area) was laid out for standard 4 1/4 tile. There would have been 20 and 3/4 rows of tile for tile exactly 4 1/4 square; this would have been an acceptably balanced field. However, when the tile was actually installed the result was 21 and 1/4 rows of tile. The last row was only 1/4 tile or approximately 3/4 inch.

When this wall of tile was replaced, the last row of tile in the corner was nearly a full tile. Since all tiles have space lugs to ensure uniform spacing between tiles, and there was no evidence that the size of the grout or space between the tiles was too narrow or too wide, the only explanation for the difference in the number of tiles is variance in the size of the tiles. If the size of the tiles varied 1/16 of an inch (within ANSI 137.1 § 6.1.1.2.5 tolerances of 1/8 inch),[1] that would account for the extra 3/4 inch tile it took to complete the field. There is no requirement that every tile be measured before the field is laid out or the tile installed. The tile variance was within ANSI specifications. According to trade practice, the layout of the tile field was balanced and met the "if possible" provisions of ANSI.

The front wall was the other wall which the Navy contended was out of balance. The Navy said that the front wall was unbalanced because one vertical row of tile was 4 1/8 and one was 3 3/8. According to trade practice, this was a balanced field within the meaning of ANSI.

Our conclusions with respect to the trade practice interpretation of the ANSI requirement for a balanced field of tile is in accord with that of the only tile expert called to testify, Mr. John Salvo. He had 33 years of experience, including large jobs with as many as 30 tile men working for him in the New England area. He was knowledgeable about the tile industry, the changes in the trade resulting from techniques developed in the 1950s, as well as the changes in quality control standards of tile manufacturers. As to both walls in the mens' shower room, Mr. Salvo said that they met the ANSI balancing standard as practiced in the local trade.

In accord with Mr. Salvo's testimony was the statement of the Secretary of the ANSI A108 Committee on Ceramic Tile. He provided the Committee's official opinion on balancing a field of tile, "If the tile installer made any effort to attempt centering or balancing the tile and followed local trade practices, he has fulfilled the 'if possible' statement of Section A-3.3.1."

With respect to the womens' shower room, the Navy complained about the use of 2 × 6 bullnose, unbalanced fields of tile, and alignment or plumbness. The bullnose and balance issues were of the same nature as those raised with respect to the mens' shower room. Notwithstanding the Navy's contentions, the 2 × 6 bullnose tile was appropriate and the tiles were balanced.

With respect to the alignment or plumbness issue, LT Hyde testified that photo #1

[1] These tiles would meet, nevertheless, the standard set by ANSI 137.1, 6.1.1.2.5, for facial dimensions. "The average major facial dimension(s) ... shall not vary more than 4.0 percent from the nominal dimension(s) [4 1/4 × 4 1/4]." This means that 4 1/4 inch tile shall not vary more than 2.7 16ths of an inch. [4 percent of 68 16ths is 2.7 16ths.] The variation encountered by appellant was thus well within the variation permitted by the applicable ANSI.

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for the ladies shower showed wavy grout lines. He explained that the tile, "instead of being plumb with the wall, was canted out a little bit ... about a micrometer. ..." The ANSI standard required the wall to be "level and plumb with no variations exceeding 1/8 inch in 8 feet. ..." Neither the government's testimony that the wall was canted "a micrometer," nor the photographic evidence, established any variation exceeding the 1/8 inch ANSI standard. LT Hyde's contrary assertions were not credible.

Gaffny replaced 300 square feet of tile under protest. This tile was removed and replaced between 24 September and 10 October 1986, in both the mens' and womens' shower rooms. Gaffny worked five days between 24 and 30 September removing ceramic tile, and seven days between 29 September and 10 October replacing ceramic tile. This was a reasonable schedule for removing and replacing the ceramic tile. The Metcraft gang shower was installed and the other fixtures reinstalled on 10 October 1986. Gaffny claimed to have incurred 130 labor hours for a labor cost of $1,731.50; that amount is supported by the records and the audit. Gaffny claimed 56 supervisory hours at a cost of $1,859.20; the records support the hours claimed, but an audit only supports a cost of $1,414.56. This establishes a cost of $3,146.06 to which a labor burden of 31.4% is applied for a total labor cost of $4,133.92.

Gaffny's material costs of $669.33 were not disputed. Gaffny did not provide sufficient evidence to support its allocation of tool costs. We accept the audit G&A rate of 11% for 1986 and find that a profit of 10% is reasonable. The total cost on the ceramic tile replacement is $5,864.77.

ASBCA No. 46027—Ceramic Tile—DECISION

Gaffny claims an adjustment of $8,404.44, profit, and a time extension for the directed replacement of ceramic tile. The crux of this claim is the Navy's rejection of 300 square feet of ceramic tile work, causing Gaffny to incur additional expense and delays to contract performance. "In such cases the Government bears the burden of proving that the work which it rejected did not conform to the contract requirements." *Southwest Welding & Manufacturing Company v. United States*, 188 Ct.Cl. 925, 413 F.2d 1167 (1969); *Ace Precision Industries, Inc.*, ASBCA No. 40307, 93-2 BCA ¶ 25,629; *D.E.W., Incorporated*, ASBCA No. 37232, 93-1 BCA ¶ 25,444.

With respect to bullnose tile, using 2 × 6 bullnose tile is standard trade practice. The Navy failed to establish that there was any contractual obligation to use a 4 × 6 inch bullnose instead of a 2 × 6 inch bullnose. With respect to plumbness and alignment of the tile, the Navy failed to establish that the tile alignment and plumbness exceeded ANSI tolerances.

As to a balanced field of tile, the Navy argued that ANSI specifications unambiguously required that a field of tile be balanced, that there was no room for any deviation, and that trade practice was not to be used. The Navy relies on *George Hyman Construction Company v. United States* [24 CCF ¶ 81,802], 215 Ct.Cl. 70, 81, 564 F.2d 939 (1977), holding that a "trade practice cannot prevail over unambiguous provisions of a contract such as we have in the instant case." See, *R.B. Wright Construction Co. v. United States*, 919 F.2d 1569, 1572 (Fed. Cir. 1990); *S.S. Silberblatt v. United States* [15 CCF ¶ 84,068], 433 F.2d 1314, 1323, 193 Ct.Cl. 269, 288 (1970); and *WRB Corporation v. United States* [12 CCF ¶ 81,781], 183 Ct.Cl. 409, 436 (1968).

But the appellant does not argue that the trade practice is in conflict with the ANSI provisions of the contract. Appellant argues that the trade practice gives meaning to the ANSI specification which was incorporated into the contract. The correct principle is that the language of a contract is to be given effect according to its trade meaning. *Gholson, Byars & Holmes Construction Co. v. United States* [11 CCF ¶ 80,065], 173 Ct.Cl. 374, 395, 351 F.2d 987, 999 (1965); *W.G. Cornell Co. v. United States*, 179 Ct.Cl. 651, 670-71, 376 F.2d 299, 311-12; *Riley Stoker Corporation*, ASBCA No. 37019, 92-3 BCA ¶ 25,143 (good discussion at 125,327); Tomahawk Construction Co., ASBCA No. 41717, 93-3 BCA ¶ 26,219 (9 July 1993).

The language of *Gholson, Byars and Holmes Construction Co.*, is instructive:

> The Board's failure to consider the evidence of trade practice and custom on the basis of absence of ambiguity was in error. For the principle is now established in this court (and almost every other court) that in order that the intention of the parties may prevail, the language of a contract is to be given effect according to its trade meaning notwithstanding that in its ordinary meaning it is unambiguous.[fn] That is to say the trade usage or custom may

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show that language which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning.[fn] [extensive cases and authorities cited are omitted]. The defendant [Government] contends, however, that plaintiff has not shown that the government was actually aware of the trade usage and hence that it may not be bound by it. The short answer is that such knowledge will be presumed when (as here) the evidence shows the usage was an established, well-defined and obviously well-recognized one. [citations omitted] Moreover, in view of the fact that there was no provision in the contract which expressly or by implication precluded resort to usage in defining the meaning of its terms, plaintiff's reliance thereon to determine the meaning of the specification requirement in question was entirely reasonable; any ambiguity on this score must be resolved against the government as the drafter of the instrument. *E.g., Peter Kiewit Sons' Company v. United States*, 109 Ct.Cl. 390, 418 (1947).

In *W.G. Cornell Company of Washington, D.C., Inc. v. United States* [12 CCF ¶81,040], 179 Ct.Cl. 651, 670 (1967), 376 F.2d 299, 311, the issue was the use of flexible insulation vs rigid insulation around air-conditioning ducts. The Federal specifications incorporated by reference required rigid insulation. The specific contract specifications provided that the insulation could be of other "equally suitable material" and no mention of rigidity was made. The Court of Claims reversed the ASBCA and held that flexible insulation met the contract specification. The language of that case is also instructive:

The decisions of the Boards below are replete with declarations of the general rule that evidence of trade usage may not vary or contradict plain contract language. While that rule is correctly stated, it is not applicable or controlling here because a close analysis of the administrative opinions discloses that only one provision of the contract was examined and taken into consideration. Moreover, evidence of trade usage and custom may always *explain* or *define*, as distinguished from *vary* or *contradict*, contract language. That is the status of the controversy before us. Assuming, *arguendo*, that the only ordinary meaning which could be placed upon the words "other equally suitable material" would exclude flexible insulation, evidence of trade usage still must be taken into consideration, since it supplies a meaning to that phrase which is not disclosed from a casual reading thereof. Even in the absence of ambiguity, contract language must be given the meaning which "would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States, supra*, at 388.

In the instant case, the Navy witnesses had no expertise in the installation of, or the installation standards for, ceramic tile. The testimony of the appellant's independent expert and the statement by the Secretary of the ANSI Committee were credible and persuasive. The tile met the ANSI standards for balancing fields of tile, as well as for plumbness, alignment, and the use of 2 × 6 bullnose tile. The Navy has failed to prove its case.

The 300 square feet of ceramic tile replaced by the appellant were rejected by Navy personnel who were not qualified by experience or training to make the decisions rejecting that tile. Their rejection was in error. The Navy's direction is a constructive change for which the appellant is entitled to an equitable adjustment of its costs in the amount of $5,864.77, plus CDA interest from 2 March 1987.

Under the Changes clause, appellant is also entitled to a time extension for the changed work; that is, for the time it took to remove and replace the improperly rejected tile, as well as a reasonable amount of time for any related work which was delayed while the tile was being removed and replaced.

In this connection, the ceramic tile work was originally begun on 24 July and completed on 7 August 1986. The Navy did not complain about the ceramic tile work for over a month, until 8 September 1986, when Carl Thorpe orally indicated to Michael Gaffny that there was some objection to a portion of the tile work. The formal letter of complaint was not received until 12 September 1986. That letter raised questions about the quality of the ceramic work and invited questions or comment from Gaffny. It was not an unequivocal direction to immediately remove and replace the ceramic tile.

Under those circumstances, it was reasonable for Gaffny to explore the possibility of reaching some agreement with the Navy about the extent of the removal and replace-

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ment of the ceramic tile. It is also reasonable that it took some time to obtain the materials and schedule the work. Gaffny began removing the tile on 24 September 1986. The 12 days between receipt of LT Hyde's letter and the beginning of the ceramic tile removal was reasonable. *J.D. Hedin Constr. Co. v. United States* [13 CCF ¶ 82,580], 187 Ct.Cl. 45, 55 (1969).

The replacement of the ceramic tile was completed, the Metcraft gang shower was installed, and the other fixtures were reinstalled, on 10 October 1986. The work schedule for removing and replacing the ceramic tile was reasonable. The Navy has not established otherwise. Cases cited by the Navy are inapposite. Appellant is entitled to extra time to complete the contract, as discussed under the liquidated damages claim.

ASBCA No. 39740—Liquidated Damages—FINDINGS OF FACT

In this case it is clear that the Navy caused the submittal delays which resulted in material delivery delays. It is also clear that the Navy improperly rejected the ceramic tile and thus caused the delays necessary for removing and installing replacement ceramic tile. We have so held. We need not reiterate the factual predicates for those delays.

The 22 November 1989 contracting officer's final decision, in response to appellant's claim for the $6,808 balance and remission of the liquidated damages, was the only decision to discuss those damages, it said:

> The OIC, NAVFAC Contracts, NAS Brunswick, ME First Endorsement dated 7 January 1987 to your Invoice No. 4 dated 20 December 1986 notified you that the building was useably complete on 27 October 1986, and that liquidated damages of $3,500.00 for 70 days delay were being withheld to cover the period 17 August 1986 to 26 October 1986. The contract Beneficial Occupancy Date was established as 27 October 1986.
>
> At a negotiation meeting at NAS Brunswick, ME on 20 October 1988, you were orally advised that liquidated damages of $3,500.00 were being assessed against your firm at the contract rate of $50.00 per day for 70 days. You were further advised to invoice for the $3,308.00 balance of the total retention of $6,808.00. The rest of the retention was being withheld to cover the assessed liquidated damages of $3,500.00.
>
> The Government has no record that you ever invoiced for the balance of the retention you are entitled to of $3,308.00.
>
> *Conclusion*
>
> You have not shown that the assessed liquidated damages of $3,500.00 for 70 days of delay in contract performance were improperly assessed.

With respect to invoice no. 4, mentioned in that final decision, the first endorsement was addressed to a Navy disbursing officer. It was not addressed to appellant. There is no evidence that the first endorsement was ever communicated to appellant. In any event, we have found that the AROICC (also called OIC NAVFAC Contracts) did not have authority to impose liquidated damages; authority to impose liquidated damages was reserved to a contracting officer at higher headquarters.

JURISDICTION—ASBCA No. 39740—Liquidated Damages

A claim for liquidated damages can only be asserted by the Navy through a decision. 41 U.S.C. § 605(a). The only relevant decision was that of 22 November 1989. However, that decision was not an express assertion of a government claim against appellant for liquidated damages, instead it was merely a denial of appellant's request for payment of the contract balance and for relief from the improper withholding of liquidated damages. Thus, it cannot be considered the assertion of a government claim. See *Spartan Building Corp.*, ASBCA Nos. 43849 and 44431, 94-1 BCA ¶ 26,336, 26 August 1993 (On Motion for Reconsideration).

Nevertheless, we have jurisdiction over the issue of liquidated damages, because the issue of liquidated damages was raised in appellant's claim of 11 July 1989. The deemed denial of that claim was appealed to this Board. See *Acme Process Equipment Co. v. United States* [10 CCF ¶ 73,060], 171 Ct.Cl. 324, 365-6 (1965); *Bradford Electric Co.*, ASBCA No. 43356, 92-3 BCA ¶ 25,205. The instant case is distinguishable from the facts in *Spartan, supra*, where the contractor did not specifically seek remission of liquidated damages. Cf., *Sharman Company, Inc. v. United States*, No. 92-5150 (Fed. Cir., 17 August 1993).

ASBCA No. 39740—Liquidated Damages—DECISION

As to the substantive merits of the issue of liquidated damages, the Navy asserts that, in order to avoid liquidated damages, "a con-

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tractor has the burden of proof to establish that not only was the delay beyond its control and without its fault or negligence, but also, that it took all reasonable action to perform the contract notwithstanding its excuse." Citing *William M. Wilson's Sons, Inc.*, ASBCA No. 30553, 85-2 BCA ¶ 18,028, which cited *Jennie-O Foods, Inc. v. United States* [24 CCF ¶ 81,814], 217 Ct.Cl. 314, 327, 580 F.2d 400, 408 (1978).

Those cases state the applicable law of a contractor's claim for damages arising from Government caused delay. Those cases are inapposite to the issue of liquidated damages. A contractor claim for damages arising solely from Government caused delay must be distinguished from a Government claim for liquidated damages arising solely from contractor caused delay. The actual assessment of liquidated damages arises under the provisions of the Default clause, which governs the determination of the delay period. It is black letter law that the assertion of a right to liquidated damages is a government claim.

If and only if the contractor is in default may the government exercise default remedies, which include termination, common law actual damages, or liquidated damages for the duration of the default. The Federal Circuit has reaffirmed that "the government bears the burden of proof on the *issue* of default by the contractor ...." *Lisbon Contractors, Inc. v. United States* [34 CCF ¶ 75,358], 828 F.2d 759, 763 (Fed. Cir. 1987).

The relevant cases are those which discuss the Government's burden on the Government's claim for liquidated damages. It has long been the rule that where the Government prevents "performance of the contract within the stipulated time ... and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived." *United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 242, 58 L. Ed 1294 (1914); see also *United States v. Brooks-Callaway Co.*, 318 U.S. 120, 87 L. Ed 653 (1943); Michael R. Finke, "The Burden of Proof in Government Contract Schedule Delay Claims," 22 Pub Contract Law J. 125 (1992).

In order to assess liquidated damages the Government must establish that it did not prevent or contribute to the delay. Any other rule, the Supreme Court reasoned in *United States v. United Engineering & Contracting Co., Id.*, "would permit it [the Government] to recover damages for delay caused by its own conduct." The government must prove its case by a preponderance of the evidence. E.g., *West Coast General Corporation*, ASBCA No. 35900, 88-2 BCA ¶ 20,751, at 104,863; *Apollo Construction Company*, ASBCA No. 29861, 88-2 BCA ¶ 20,704, at 104,622; *Roda Enterprises, Inc.*, ASBCA No. 22323, 81-2 BCA ¶ 15,419, at 76,399; see *Central Ohio Building Co., Inc.*, PSBCA No. 2742, 92-1 BCA ¶ 24,399, at 121,824.

We have found that the Navy's delay in approving the submittals caused a delay in the delivery of the Metcraft gang shower. It was not delivered until 19 September 1986. We have found that the Navy delayed in issuing its order to remove and replace 300 square feet of ceramic tile from 7 August 1986 until on or about 12 September 1986, even though the tile work had been completed on 7 August 1986. The Navy's order to remove and replace 300 square feet of ceramic tile was a constructive change and entitled the appellant to a time extension for the removal and replacement of the ceramic tile until completed on 10 October 1986.

There were other delays during this period that are attributable to the Navy; e.g., the issuance of Modification P00001 on 8 August 1986 for extra work, causing work to be performed on 3 September 1986; and, the delayed delivery of the McQuay heat coil until 23 September 1986. There were other causes of delay asserted by Gaffny which, in light of our findings and decision, we have not discussed. These delays were claimed to be attributable to delayed approval of submittals and delayed delivery of materials and rescheduling of performance.[2]

The Navy clearly was a cause of the delayed contract performance from the original completion date of 3 August 1986 until substantial completion on 10 October 1986. No liquidated damages can be assessed for periods in which the Navy was a contributing cause for the delayed performance.

We found in ASBCA No. 46208 that the work was substantially complete on 10 October 1986. Liquidated damages cannot be assessed for any period after substantial completion has occurred and only punch list items remain, even though the government

[2] *E.g.*, the delivery of fencing was delayed and not installed until 13 and 14 August 1986. The delivery of doors was delayed and doors were installed on 18 and 22 August 1986. Duct work and heating coils and controls were installed on 22 and 23 September 1986.

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did not take beneficial occupancy until sometime after substantial completion. *Sauter Construction Co.*, ASBCA 27050, 84-2 BCA ¶ 17,288, at 86,081:

> Liquidated damages are not assessable once substantial completion occurs and only punch list items remain to be corrected. See *Lindwall Construction Co.*, ASBCA No. 23148, 79-1 BCA ¶ 13,822. We, therefore, conclude the Government has failed in its burden of proving why liquidated damages should be assessed against appellant for the fourteen days between 27 December 1979, the date upon which the record discloses only punch list items remained to be performed, and 10 January 1980, the date upon which final inspection was made and the Government took beneficial occupancy.

The Navy has failed to prove by a preponderance of the evidence that the delay from 3 August until substantial completion on 10 October 1986 was solely due to the fault of the contractor. The liquidated damages must be annulled. *United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 58 L.Ed 1294 (1914); *S.W. Electronics & Manufacturing Corps.*, ASBCA Nos. 20698 & 20860, 77-2 BCA ¶ 12,631, at 61,221, cited with approval but reversed in part on other grounds in *S.W. Electronics & Manufacturing Corp. v. United States* [29 CCF ¶ 81,726], 228 Ct.Cl. 333, 342 (1981); *Blinderman Construction Co., Inc.*, ASBCA No. 24445, 84-3 BCA ¶ 17,527; *Arrow, Inc.*, ASBCA No. 39621, 90-3 BCA ¶ 23,217. See also, *Fortec Constructors v. United States* [32 CCF ¶ 73,702], 8 Cl.Ct. 490, 508 (1985).

As the Federal Circuit said in *Klingensmith, Inc. v. United States* [32 CCF ¶ 72,527], 731 F.2d 805, 809 (Fed. Cir. 1984), "The general rule is that where both parties contribute to the delay neither can recover damages, unless there is in the proof a clear apportionment of the delay and expense attributable to each party." Citing *Blinderman Construction Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Coath & Goss, Inc. v. United States* [30 CCF ¶ 70,619], 101 Ct.Cl. 702, 714-715 (1944). See also, *Acme Process Equipment Co. v. United States* [10 CCF ¶ 73,060], 171 Ct.Cl. 324, 367 (1965).

JURISDICTION—ASBCA No. 37639—Cumulative Delay

In its post hearing brief Gaffny asserted that the cumulative delay was caused by "late material delivery caused by protracted submittal approval," "inability to proceed on Modification #1," "improper rejection of tile," and "asbestos not shown on drawings."

The Navy raised a jurisdictional challenge to Gaffny's reliance on Mod P00001 as one of the several factual predicates for the cumulative delay claim.[3]

Without jurisdiction, our decision would be a nullity. Jurisdictional issues must be addressed. *Mansfield v. Swan*, 111 U.S. 379, 382-384, 28 L.Ed. 462, 463-464 (1884) (jurisdiction fails unless evidence affirmatively appears in the pleadings or elsewhere in the record); *Capron v. Van Noorden*, 2 Cranch 126, 6 U.S. 126, 2 L.Ed. 229 (1804) (judgment vacated for lack of jurisdiction on application of the losing party); *Universal Canvas, Inc. v. Stone, Sec. of the Army* [38 CCF ¶ 76,370], 975 F.2d 847 (Fed. Cir. 1992) (judgment vacated for lack of jurisdiction on motion of the losing "plaintiff" contractor).[4]

The Navy's motion was raised in an untitled paragraph of its brief (at 34-35). The Navy seems to argue that an assertion that a fact contributed to a cumulative delay is an "issue" over which the Board does not have jurisdiction, because that fact, event, or "issue" was not raised in the claim letter:

> It should be noted that for the first time, Appellant alleged in its brief that the Government's actions in processing Modification P00001 contributed to the "ripple" effect delay. (*App. Br. 18*). Appellant never raised that issue in its claim letter. (*PFF 51, 52*). Consequently, the Board is without jurisdiction to determine entitlement on that issue. *See Structural Finishing, Inc.*, ASBCA No. 30260, 85-3 BCA 18,235.

The 25 February 1987 claim letter does not specifically assert that the Navy's action in processing Modification P00001 was one of several causes of the cumulative delay. The claim letter (at 17) asserts that the "ripple effect" was caused generally by the Navy's actions, which resulted in "non-sequential and interrupted work:"

---

[3] A similar motion was denied earlier in this case. *Gaffny Corporation*, ASBCA No. 37639, 89-3 BCA ¶ 22,007.

[4] The Navy should have treated this issue more seriously by raising it in a separate motion. If time did not permit a more thoughtful presentation by counsel, additional time could have been sought.

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> The disruption caused by the initial government caused delays is evidenced by the non-sequential and interrupted work. It is submitted that Gaffny Corp. is entitled to be reimbursed for the additional, unanticipated costs and expenses incurred in the performance of the project work.

Newly asserting that a fact contributed to the cause of an existing claim, would be jurisdictionally defective if the new allegation gave rise to a claim that was separate and distinct from the existing claim. The question is whether the allegation is merely an extension of a claim which the contracting officer had the opportunity to consider. *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595.

Our cases have differentiated between a new claim and an extension of a claim which the contracting officer had the opportunity to consider. A constructive acceleration claim, although arising out of the same facts as a delay claim, has been held to be a separate claim because it requires proof of the additional element of an express or implied Government order to overcome the excusable delay. *Trepte, supra*, at 113,386. See also, *Systems Engineering Associates Corp.*, ASBCA No. 37536, 90-2 BCA ¶ 22,900 (allegations of fraud requires proof of elements in addition to those required for allegations of negligence.)

When the complaint or evidence varies from the claim as submitted to the contracting officer, we have looked to see whether the matter raised before the Board differs from the claim as submitted to the contracting officer as to the essential nature of the claim and the basic operative facts. A "cardinal change/material breach" claim, which was based on the sum of the "individual compensable actions [taken] by the Government," has been held to constitute a claim which was separate and independent from the individual claims. *Reinhold Construction, Inc.*, ASBCA Nos. 33312 *et al.*, 92-3 BCA ¶ 25,031, at 124,771. See *J.L. Ewell Construction Co.*, ASBCA Nos. 37746 *et al.*, 90-1 BCA ¶ 22,485.

We have held that where the "same set of operative facts" underlies the claim as submitted to the contracting officer and as submitted to the Board, there is only one claim, even though the theory may be different. *RGI, Inc.*, ASBCA No. 38772, 92-2 BCA ¶ 24,839 at 123,932.

In this case, the delay in issuing Mod P00001 and the delay attempting to relocate the feedwater line (from 8 August to 3 September 1986) could stand alone as a disruption claim. However, the fact that a particular delay may stand alone as an individual claim, does not necessarily preclude that same fact from being one of many elements in a different and broader claim, as in *Reinhold, supra*, at 124,771. See also the discussion in *Dyson & Company*, ASBCA No. 21673, 78-2 BCA ¶ 13,482, at 65,970.

The cumulative delay is a single claim of a number of days of delay, a total delay caused by government action or inaction. An additional fact or event which supports that the government caused the cumulative delay, does not change the nature of the claim. *Cf.*, *James P. Purvis v. United States*, 216 Ct.Cl. 398, 24 CCF ¶ 82,223 at 87,696 (1978), and *Norman Engineering Company*, NASA BCA Nos. 1189-12 *et al.*, 92-2 BCA ¶ 24,900, at 124,181, which discussed the nature of cumulative or ripple impact claims:

> As a matter of law, an "impact" claim or a "cumulative impact" claim is a claim based on the constructive change theory that is asserted separately from individual compensable changes. Cumulative impact arises from changes which had such an effect on performance that there is a separately compensable impact claim that does not include the direct costs of the changes. *Bechtel National, Inc.*, NASA BCA No. 1186-7, 90-1 BCA ¶ 22,105 ("Bechtel"), *see McMillan Bros. Constructors, Inc.*, EBCA No. 328-10-84, 91-1 BCA ¶ 23,351, at 117,102, *motion for recons. denied*, 91-1 BCA ¶ 23,574, aff'd, 949 F.2d 403 (Fed. Cir. 1991); *Fruehauf Corporation*, PSBCA No. 477, 74-1 BCA ¶ 10,596, at 50,231. In *Santa Fe Engineers, Inc.*, ASBCA No. 36682, 90-3 BCA ¶ 23,020, *vacated and remanded on other grounds*, 937 F.2d 624 (1991), after claims involving labor inefficiency costs arising from three changes had been litigated, the contractor was not barred from appealing a claim for costs from the collective nature of all the changes and directives that were issued because it was a new claim. The first litigation of the changes claims did not bar a second appeal of a claim for "overall job disruption" on the grounds of collateral estoppel, judicial estoppel or res judicata.

We conclude that we have jurisdiction, because the new assertion that an additional fact supports the validity of a claim, is not the assertion of a new claim. In any event, the facts surrounding Modification P00001 are admissible as a defense to the Navy's claim of liquidated damages. *Leal Petroleum Corporation*, ASBCA No. 36047, 92-1 BCA

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¶ 24,719; *Litton Systems, Inc.*, ASBCA No. 36976, 93-2 BCA ¶ 25,705, appeal docketed on another issue, No. 93-1300 (Fed. Cir. 13 April 1993). See also, *Structural Finishing, Inc.*, ASBCA No. 30260, 85-3 BCA ¶ 18,235.

ASBCA No. 37639—Cumulative Delay—FINDINGS OF FACT

Gaffny claims adjustment for cumulative delay, or "ripple effect" from various events which contributed to the overall delay, in the amount of $19,840.28, plus profit. Gaffny abandoned at trial its assertion that the delay in the Government approval of the bonds was an event which contributed to the cumulative delay.

Gaffny's delay claim apparently includes delays resulting from the changed work resulting from the discovery of asbestos, delay in issuing Modification P00001, delays resulting from the delayed material delivery as a result of the delayed submittal approval, and delays resulting from the replacement of the ceramic tile as a result of the Navy's improper rejection of the original ceramic tile installation. The facts relating to those delays have already been discussed.

The Navy has come forward with evidence to establish that there were periods when the contractor did not perform much work, and that there were concurrent periods when the contractor was performing both work that was delayed by the Navy and work that was not delayed by the Navy.

For example, demolition work did not begin until 12 May 1986; the contractor did not complete the original ceramic tile work until 7 August 1986; and on 7, 8, 10, 27 and 29 August 1986 Gaffny was doing rough duct work. On 18 to 22 August Gaffny did electrical work and painting. On 21 to 26 August Gaffny installed vinyl tile in one of the offices in the boiler plant. There are other days during August and September 1986 where the evidence fails to show that Gaffny was doing any work at all.

As to Gaffny's claimed costs of $19,840.28, the appellant has not shown that any of the claimed costs (which are in addition to those attributed to the ceramic tile and the asbestos issues) were caused solely by delays which were caused solely by the Navy.

There has not been a sufficient showing that all the delays were caused solely by the Navy. There is insufficient evidence to conclude that, during the period of contract performance, all unproductive time was due to delays caused by the Navy. It is also not clear how much time during the contract performance period was productive and how much was nonproductive time. Nor is there sufficient evidence to establish that nonproductive time would have been productive, but for delays caused by the Navy. It appears just as likely that some of the delays were the result of scheduling decisions by the appellant.

ASBCA No. 37639—Cumulative Delay—DECISION

The appellant has the burden of proving its claim for increased costs due to cumulative delays. The appellant has failed to demonstrate that its claimed costs were caused solely by the delays caused by the Navy. Instead of demonstrating a causal connection between its claimed costs and the Navy caused delay, Gaffny has relied solely on the total costs incurred. It is insufficient to show total costs. The appellant must establish that there were increased costs and that the increase was caused solely by the Navy. *WRB Corp. v. United States* [12 CCF ¶ 81,781], 183 Ct.Cl. 409, 426 (1968); *S.W. Electronics & Manufacturing Corp. v. United States* [29 CCF ¶ 81,726], 228 Ct.Cl. 333, 347 (1981); *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991).

Gaffny's reliance upon *James P. Purvis v. United States*, 216 Ct.Cl. 398, 24 CCF ¶ 82,223 at 87,696 (1978), is misplaced. More to the point is *Commerce International Company, Inc. v. United States* [9 CCF ¶ 72,781], 167 Ct.Cl. 529 (1964) and *Kirk Brothers Mechanical Contractors, Inc.*, ASBCA Nos. 35771R *et al.*, 92-3 BCA ¶ 25,144 at 125,343: "Where both parties contribute to delay, neither can recover delay damages unless there is in the proof a clear apportionment of the delay and expense attributable to each. *William F. Klingensmith, Inc. v. United States* [32 CCF ¶ 72,527], 731 F.2d 805, 809 (Fed. Cir. 1984)."

ASBCA No. 46028—Payment of Contract Balance—FINDINGS OF FACT

The shower facilities were completed when the Metcraft gang shower was installed on 10 October 1986. There was no other work remaining that would preclude the operation of the boiler plant. The operation of the boiler plant was scheduled to begin on 27 October 1986. The Navy formally accepted occupancy of the boiler plant on the day it began operating, which was 27 October 1986. Nevertheless, the work had been substantially completed and ready for

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beneficial occupancy after the showers were finished on 10 October 1986. On 10 October 1986, LT Hyde, Carl Thorpe, and Michael Gaffny first met to discuss punch list items. Punch list items continued through the Navy's final inspection on 20 February 1987.

By letter of 23 February 1987, LT Hyde advised Gaffny that, "Upon the satisfactory completion of the attached punch list items, submittal of final payrolls, As-Built drawings, final invoice and contractor's release forms, final payment will be processed." That letter also enclosed the final invoice and release forms. Gaffny was instructed to "submit three copies with original signature ... for final processing."

On 5 March 1987, Gaffny submitted the final invoice for 100 per cent of the work. The invoice sought payment of the balance. Enclosed with the invoice was the final release, which excepted the claim dated 25 February 1987. The Navy argued before the Board that work remained on two items of another punch list dated 8 June 1987. The first item was a broken window, which we find had been fixed in January 1987. The second item was an exhaust balance problem, which we find was a Navy design deficiency. Thus, the June 1987 punch list was erroneous. We find that all work was completed and accepted, including punch list items, by 5 March 1987, the date of appellant's final invoice.

The Navy also argued that the final invoice was never received. The only evidence offered to support this contention was the testimony of a former Navy engineer. On direct examination this former Navy engineer testified that as the acting supervisor it was his responsibility to sign off on all invoices; and, that he neither saw nor signed off on Gaffny's 5 March 1987 invoice.

On cross examination, he admitted that he was not the acting supervisor during the time the invoice was sent in by Gaffny in March 1987. His testimony elicited on direct examination was misleading. His testimony on cross examination established that he had no knowledge, and was not in a position to have any knowledge, about appellant's March 1987 invoice.

There is no reason to disbelieve that the appellant did not forward the final invoice as represented. The invoice was properly addressed. It was in compliance with the Navy's directions. It contained appropriate final release language. It was in appellant's interest to do so.

On the other hand, the Navy has displayed some indifference to properly handling and paying invoices submitted by the appellant. The ROICC office failed to forward appellant's first invoice to the finance office for payment. The Navy has had an extra copy of the final invoice since September 1989. The Navy admits that appellant is entitled to be paid $3,308. The Navy continues not to pay appellant for monies it agrees the Navy owes to the appellant, and for which an invoice covering that sum has unquestionably been received. We find that the Navy received the Thursday, 5 March 1987 invoice in the regular course of the mails on Monday, 9 March 1987.

ASBCA No. 46028—Parent of Contract Balance—DECISION

Gaffny now claims the balance due on the contract in the amount of $6,808, and a decision that the Navy's liquidated damages were improper. The Navy admits that it owes Gaffny $3,308. It is the Navy's view that the appellant is entitled only to the $3,308 retained by the Government (the $6,808 less the $3,500 in liquidated damages); and then only after the appellant submits another invoice for that exact amount.

We found that a final invoice for the balance due under the contract was received by the Navy on 9 March 1987. We have held that the Navy wrongfully withheld $3,500 for liquidated damages. We hold that the Navy owes the appellant the full balance due under the contract, in the amount of $6,808.

We thus conclude that the Navy has improperly failed to pay Gaffny the sum of $6,808. This non-payment of the contract balance was turned into a contract disputes act claim by Gaffny's letter of 11 July 1989, which was received by the Navy on 17 July 1989. Gaffny is entitled to $6,808 (which includes the amount wrongfully withheld as liquidated damages) plus CDA interest from 17 July 1989 until paid.

ASBCA No. 46029—Prompt Payment Act—FINDINGS OF FACT

Gaffny claims statutory prompt payment act interest of $1,284.38 on the claimed $6,808.00 balance on the contract, for the period 5 March 1987 thru 15 July 1989.

The PAYMENTS clause in the contract provided that the balance due under the contract was to be paid "after —

(1) Completion and acceptance of all work;

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(2) Presentation of a properly executed voucher; and

(3) Presentation of [a] release of all claims . . . other than claims . . . specifically excepted . . . .

We have already held that the work was completed and accepted by 5 March 1987, and that a proper invoice and claims release were received by the Navy on 9 March 1987. In accord with the Payments clause, payment was thus due after 9 March 1937, although no specific payment date was provided for by the contract.

We further have found that the intent to assess liquidated damages was never communicated to Gaffny until after the final decision of 25 July 1988, after which the appellant was orally advised that the Navy was considering withholding liquidated damages. Thus, at the time the final invoice was submitted, and for at least a year and 4 months thereafter, there was no dispute about appellant's entitlement to payment in full.

ASBCA No. 46029—Prompt Payment Act—DECISION

After the Navy received the Gaffny invoice on 9 March 1987, Gaffny was entitled to the balance on the contract price of $6,808. Because the contract did not contain a specific payment due date, for purposes of the Prompt Payment Act, payment was due on 8 April 1987, 30 days after the 9 March 1987 receipt of the invoice (31 U.S.C. § 3903).

The Navy was required to pay prompt payment act interest beginning the day after the payment due date, if the invoice was not paid within 15 days after the payment due date of 8 April 1987, (31 U.S.C. § § 3901(a)(4), 3902(b), and 3903(1)). The Navy still had not paid the balance on the contract at the time of the 25 July 1988 final decision, after which the invoice was turned into a CDA claim by the Gaffny letter of 11 July 1989.

Interest is set at rates computed by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978. If the interest is not paid for 30 days, the interest then due is added to the principal and the prompt payment act interest begins anew to accrue on the added amount. It is thus that prompt payment act interest compounds every thirty days until the total amount due is paid. However, the prompt payment act contains a provision which limits the running of interest for only one year (31 U.S.C. 3906(b)(1)(B)). Thus, Gaffny is entitled to prompt payment act interest for only one year.

The payment of that interest was turned into a CDA claim by Gaffny's letter of 11 July 1989, entitling Gaffny to CDA interest on the one year sum total of the unpaid prompt payment act interest. For the prompt payment act interest claim, Gaffny is entitled to $607.69, plus CPA interest from 17 July 1989 until paid.

SUMMARY DECISION

ASBCA No. 37639, for cumulative delay, is denied.

ASBCA No. 39740, for remission of the Navy's assertion of liquidated damages, is sustained.

ASBCA No. 46025, for changed work caused by asbestos, is sustained in part and denied in part and the amount of $161.40 is awarded, plus CPA interest from 2 March 1987 until paid.

ASBCA No. 46026, for delays caused by late review of submittals, to the extent monies were claimed for specific work disruption, is denied; and, to the extent extra days were claimed for contract performance, sustained to the extent discussed under ASBCA No. 39740.

ASBCA No. 46027, for costs and extra days for the replacement of ceramic tile, is sustained in part and denied in part; extra days were sustained to the extent discussed under ASBCA No. 39740, and the amount of $5,864.77 is awarded, plus CPA interest from 2 March 1987 until paid.

ASBCA No. 46028, for payment of the balance due under the contract, is sustained and the amount of $6,808.00 is awarded, plus CDA interest from 17 July 1989 until paid.

ASBCA No. 46029, for Prompt Payment Act interest, is sustained in part and denied in part and the amount of $618.28 is awarded, plus CDA interest from 17 July 1989 until paid.

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[¶ 26,523] Tri-State Design Construction Co., Inc.

DOT BCA No. 2570, November 30, 1993. Contract No. J231C-013.

Interpretation of Contracts—Contract as a Whole—Tank Level Transmitter.—Under a contract to renovate a water tower and to install a waterline, a contractor was not entitled to recover the costs of furnishing a tank level transmitter, because the contract, when read as a whole, required the contractor to furnish the equipment. The contract required the contractor to provide a storage tank valve vault, which maintained the water level within the tank. This valve vault contained the tank level instrument equipment. The section referring to the "Transmitter Equipment" stated that the supplier of the vault was to furnish all required tank level instrumentation equipment. This provision also required the contractor to provide all necessary technical assistance. The board concluded that these provisions made sense only if the contractor were required to procure the equipment on its own. To adopt the contractor's position that it was not required to furnish the tank transmitter would render these provisions meaningless.

For the appellant: Frank O'Konski. For the government: Edmund W. Chapman, U.S. Department of Justice, Washington, D.C.

Before STERN, WARE, and FENNESSY, Administrative Judges.

STERN, Administrative Judge: Tri-State Design Construction Company, Inc. ("Appellant" or "Tri-State") appeals the decision of the contracting officer for the Federal Bureau of Prisons ("respondent" or "Bureau of Prisons") denying its claim that it was not required by its contract to provide certain radio transmitting equipment. The parties have elected to proceed on the written record.

Findings of Fact

1. On July 12, 1991, the Bureau of Prisons awarded a contract to the U.S. Small Business Administration which awarded the contract to Tri-State under the provisions of Section 8(a) of the Small Business Act. (AF, Tab 4) The contract, in the amount of $340,000.00, was to renovate a water tower and install a water line at the Federal Corrections Institution in McKean, Pennsylvania. (AF, Tab 4)

2. The "DETAIL SPECIFICATIONS" provided,

> 2. *GENERAL DESCRIPTION*
>
> This project involves construction of a 12-inch diameter water main to connect the existing 12-inch water main situated along Big Shanty Road, S.R. 4001, to the existing elevated water storage tank located at the Federal Correctional Institution.
>
> The work includes but is not limited to the following:
>
> A. Furnishing and installation of all required pipe, valves, fittings and other related water line appurtenances to the extent indicated on the Contract Drawings.
>
> * * *
>
> D. Furnishing and installation of a prefabricated steel valve vault.
>
> * * *
>
> F. Furnishing and installation of a 3/4-inch copper pressure sensing line and fittings, along with a pressure transmitter and control piping.
>
> G. Removal of the existing radio telemetry equipment from the vault near the FCI ground storage tank and reinstallation of the same equipment with the new vault installed as a part of this Contract.
>
> * * *
>
> 8. *STORAGE TANK VALVE VAULT*
>
> A. *General*
>
> The Contractor shall furnish and install one factory-built, underground valve vault, with all the necessary piping, controls, electrical work and appurtenances as shown on the Plans or as specified herein. The vault shall be complete with all necessary equipment installed in a fabricated steel capsule. Entrance to the equipment capsule will be through a rectangular entrance hatch, with an access ladder provided. The vault shall be as manufactured by Engineered Fluid, Inc., Centralia, Illinois, or equivalent.

(AF, Tab 9)

The Valve Vault is a unit which contains the Tank Level Instrumentation Equipment. The purpose of this equipment is to maintain the water level within the tank. (Resp. Brief, p. 2) The tank level transmit-

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ter, also known as a transducer, senses the pressure in the water tank and converts it to a radio signal. The radio signal is conveyed to the Radio Transmitting equipment which sends the signal to the water source outside the facility. (Resp. Br., p. 4)

3. The "DETAIL SPECIFICATIONS" also provided:

N. *Electrical Equipment*

All electrical equipment will be designed for the equipment provided and shall perform as indicated by these Specifications. All electrical work shall meet the National Electrical Code, latest edition.

The electrical equipment will include the following:

* * *

(4) Outlet for telemeter transmitter.

4. The "DETAIL SPECIFICATIONS" continued:

10. *RADIO TRANSMITTING EQUIPMENT*

The radio transmitting equipment required to remotely monitor the elevated water storage tank level shall be removed from the vault near the FCI ground level storage tank and reinstalled within the new vault adjacent to the elevated water storage tank.

The existing antenna mounted on the FCI ground storage tank shall be removed and reinstalled on the elevated tank. The antenna cable shall be installed within conduit between the antenna and the new vault.

The radio transmitting equipment shall accept the tank level output signal and transmit said level to an existing level recorder at the Bradford City Water Authority Water Treatment Plant.

Work under this Contract shall include providing all necessary technical assistance from an authorized representative of the radio telemetry equipment manufacturer to remove, reinstall, adjust and calibrate the radio telemetry equipment to return the equipment to a fully functional condition.

11. A. *General*

Under this item the supplier of the vault shall furnish all required tank level instrumentation equipment.

B. *Tank Level Transmitter*

The tank level transmitter shall be designed to translate direct (gauge) pressure into a DC current and shall be the four-wire type which permits operation on 120-volt, 60-cycle current. Actuation shall be by a sensing element which operates on the principle of differential capacitance, the relative values of which are electronically converted into the output signal. The sensing diaphragm shall be of single crystal silicon material which provides no measurable hysteresis and shall be isolated from the process fluid by Hastelloy "C" barrier diaphragms and a silicone oil fill fluid. The pressure cell module shall be type 316 stainless steel, hermetically sealed and shall be interchangeable regardless of capsule span specifications.

The transmitter housing shall be rated NEMA 4 (splash proof) and NEMA 7 (explosion proof) for Class I, Division 1 Groups B, C and D locations. The housing shall be cast low copper aluminum alloy, anodized and finished with aliphatic urethane. A universal mounting bracket shall be supplied suitable for either wall or pipe mounting.

The current output signal shall be 4-20 mAdc into 650 ohms or less. Accuracy shall be ±0.2 percent of calibrated span including the combined effects of linearity, hysteresis and repeatability.

The differential pressure transmitter shall be BIF Model 251-16 or equivalent.

The transmitter shall be used to transmit a maximum level of 40 feet with a zero suppression of 105 feet.

Work under this Contract shall include providing all necessary technical assistance from an authorized representative of the tank level transmitter manufacturer to install, adjust and calibrate the transmitter to a fully functional condition.

4. The contract drawing describing the detail work stated "Provide mounting hardware for radio transmitting equipment (to be relocated from FCI ground storage tank vault. Install radio transmitting equipment in valve vault ....)."

5. Finally, The "DETAIL SPECIFICATIONS" stated:

K. *Equipment in Vault*

The supplier of the vault shall factory install therein the following equipment; (1) Pressure transmitter and control piping

(AF, Tab 16)

6. The manufacturer's instruction manual for the pressure transmitter states that, "transmitters are pressure transducers ..." (App. Brief Appendix)

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7. The shop drawings submitted by appellant's supplier stated "Telemeter Transmitter (By Others)."

8. The contract required work to be completed within 105 calendar days after appellant's receipt of a notice to proceed. Contract completion date was October 17, 1991. (AF, Tab 22) Liquidated damages of $260 for each day of delay were to be assessed for late performance. (Supp. AF, Tab 15)

9. By letter of September 24, 1991, Tri-State notified respondent that delivery of the vault would take 12 weeks. A contract extension of 30 days was requested. By letter of October 3, 1991, appellant informed the contracting officer that that vault delivery would not occur until October 16, 1991. Again, contract extension was requested. Respondent denied the request by letter of October 16, 1991.

10. The respondent imposed liquidated damages on appellant for late completion of performance. The damages were imposed through January 3, 1992. (AF, Tab 27)

11. By letter of February 18, 1992, Tri-State notified the Bureau of Prisons, *inter alia*, that the contract did not require it to install new radio transmitting equipment, but, rather, only required removal and installation of existing radio equipment. Tri-State claimed that it was delayed as a result of the four-month lead time required for the radio equipment. Tri-State sought an extension in the time for it to complete the contract performance. The contracting officer denied its request.

Decision

We have a very limited question before us: Did the contract require that Tri-State provide a tank level transmitter? If so, then Tri-State is not entitled to a contract time extension. If not, then Tri-State is entitled to a time extension and a remission of any liquidated damages assessed against it.

The contract required that Tri-State construct a 12-inch diameter water main between an existing 12-inch main and an existing elevated water storage tank. Part of the work was for appellant to furnish and install a new underground valve vault with all equipment as specified in the contract. The "General Description" of the work required that appellant "furnish and install" a "pressure transmitter." Appellant was also required to remove "existing radio telemetry equipment" from an existing vault and install it in the new vault. The new vault was specified to be manufactured by a particular supplier. The contract stated that this supplier "shall factory install ... [a] pressure transmitter..."

The contract also contained two other sections pertinent here. The first entitled "Radio Transmitting Equipment" stated, "The radio transmitting equipment required to remotely monitor the elevated water storage tank level shall be removed from the vault near the FCI ground level storage tank and reinstalled within the new vault adjacent to the elevated water storage tank." The second provision entitled "Tank Level Transmitter" required that the "supplier of the vault furnish all required tank level instrumentation equipment." The transmitter was to meet certain very detailed specifications. Finally, Tri-State was to provide "all necessary technical assistance from an authorized representative of the tank level transmitter manufacturer..."

The transmitting equipment that was to be removed from one vault and installed in the new vault was that instrumentation used to transmit the signal regarding the tank water level. This equipment, though related, was distinct from the pressure transmitter or transducer that sensed the pressure in the tank and converted it to a radio signal.

We find no ambiguity or conflict in these specifications. It is clear that Tri-State was to furnish a tank level (pressure) transmitter in addition to moving the existing radio transmitting equipment used to remotely monitor water level in the elevated storage tank. The contract contained two separate provisions to establish these requirements. The provision relating to the transmitter was very specific and informed appellant how the transmitter was to be designed. The provision would make no logical sense if appellant was not to procure this equipment on its own. If we adopted appellant's contract interpretation, part of the contract would be meaningless. Read as a whole we find that the reasonable contract interpretation was that Tri-State furnish the tank level transmitter. A contract must be read as a whole to discern the intent of the parties. *Crowley Constructors, Inc.*, DOTBCA No. 1738, 89-1 BCA ¶ 21,303 (1988). Here, it is clear that certain equipment was to be moved and the transmitter furnished by appellant. There-

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fore, the Bureau of Prisons is not responsible for any delay resulting from appellant's tardiness in providing this transmitter.

The appeal is denied.

[¶ 26,524] Gulf Construction Group, Inc.

ENG BCA No. 5964, November 30, 1993. Contract No. DACW64-90-C-0013.

Indefinite Delivery Contracts—Estimates by Government—Negligent Preparation.—A contractor's claim that the government's estimated quantity of vertical seals to be replaced on gate sectors was negligently prepared was denied, even though the overrun exceeded 115 percent of the estimated quantity, because the contractor failed to present evidence that proved that the quantity estimates were negligently prepared. The contractor merely asserted that the government's faulty estimates were evidenced by the overall amounts of overrun. Disparities in estimates alone, however, do not show that estimated quantities are prepared without due care.

Payments—Measurement for Payment—Installation v. Reinstallation.—Under specifications providing that payment for the removal and reinstallation of old vertical seals on gate sections was to be included under payment item 12, the contractor was not entitled to be paid on a different basis for installing new vertical seals, because both parties, contemporaneously with accomplishment of the work, interpreted the specifications to include payment for the reinstallation of old or the installation of new seals under payment item 12. By specifically mentioning only the reinstallation of old seals for payment under payment item 12, it could be said that the payment provisions were ambiguous regarding payment for the installation of new seals. The government would have done well to have omitted the word "old" when it described measurement for payment of installation or reinstallation of seals.

For the appellant: Smith, Gunn & Kaster, Baton Rouge, Louisiana, by Steven E. Sanders. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Daniel Keys III, Government Trial Attorney, Galveston, Texas.

Before SHERIDAN, PEACOCK, and SOLIBAKKE, Administrative Judges.

SHERIDAN,[1] Administrative Judge: The Appellant seeks additional compensation in the amount of $90,066.22, and a 6-day time extension, as relief for an estimated quantity overrun. It asserts negligent preparation by the Respondent of the estimated quantity and entitlement to an equitable adjustment for the excess quantity or, in the alternative, demands a price increase pursuant to the Variation in Estimated Quantity provision of the contract. The claimed equitable adjustment is based on the alleged actual costs to perform a representative portion of the work under the unit-priced payment item.

The Respondent determined that the Appellant was entitled to an increased payment for that portion of the quantity overrun which exceeded 115% of the estimated quantity. Following unsuccessful negotiations, the Respondent unilaterally issued a modification to the contract which allowed $13,575.00, but no time extension, based on its estimate of the costs for the same representative portion of the work under the unit-priced payment item as was used by the Appellant to calculate its claim. The Respondent denies that any additional recovery is due.

The Appellant filed a pre-hearing memorandum. Following a one-day hearing in Houston, Texas, the Appellant also filed a post-hearing brief. The Respondent filed no briefs.

FINDINGS OF FACT

The Contract

1. Contract No. DACW64-90-C-0013 (the contract) was awarded by the U.S. Army En-

[1] The Board adopts the opinion of its Hearing Examiner, Steven L. Reed, Esq., who presided at the hearing of the appeal.

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gineer District, Galveston, Texas (the Respondent or Corps) to Gulf Construction Group, Inc. (the Appellant or GCG) on January 14, 1990. The contract work, to be performed on the Gulf Intracoastal Waterway, consisted of rehabilitation of the Brazos River Floodgates near Freeport, Texas, and the east gate of the east lock of the Colorado River Locks near Matagorda, Texas. (Consolidated Board Rule 4 Appeal File and Hearing Exhibits, Respondent's Exhibit 3 (R.4, Exh. R-3)).

2. As awarded, the contract price was $1,249,360.00 (increased by contract modifications to $1,405,269.78), the total estimated sum of 29 estimated quantity, unit-priced and fixed price, lump sum payment items. The contract work included, *inter alia*, replacement of an estimated quantity of vertical rubber seals on the gate sectors. Payment Item No. 11 of the contract listed an estimated quantity of 120 linear feet of vertical seals to be replaced at a unit price of $15.00 per linear foot, yielding an estimated price of $1,800.00. (R.4, Exhs. R-3, R-3a).

3. The Corps' notice to proceed was received by GCG on March 22, 1990. The contract specified 428 days for completion after receipt of the notice to proceed. Therefore, the original contract completion date was May 24, 1991. The performance period was extended a total of 51 days by modifications to the contract. The modified contract completion date was July 14, 1991. The work was substantially complete on August 26, 1991. Liquidated damages have been assessed by the Corps. (*Gulf Constr. Group, Inc.*, ENG BCA No. 5850, Finding 4;[2] *Gulf Constr. Group, Inc.*, ENG BCA No. 5961;[3] R.4, Exhs. R-3a, R-4).

4. The contract included standard Contract Clauses typically found in Corps of Engineers construction contracts. The following are pertinent to resolution of the appeal:

a. Variation in Estimated Quantity (APR 1984) FAR 52.212-11.

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

b. Disputes (APR 1984) FAR 52.233-1.

(R.4, Exh. R-3).

5. Certain paragraphs of section 2A of the Technical Provisions of the contract are relevant, in part, as quoted below.

1. Scope. The provisions of this section consist of furnishing all plant, labor, equipment and materials for performing the following work ....

* * * *

(7) Replace damaged portions of rubber seals.

* * * *

8. MISCELLANEOUS REPAIRS TO GATE SECTORS. Repair items, including those stated in Paragraphs: ... RUBBER SEALS AND GASKETS below ... are items of repair work for which the need cannot be determined definitely until the sectors are taken out of the water. The quantities are based on experience with the Brazos River Floodgates and Colorado River Locks. It is considered reasonable to assume that these sectors will require similar work. If it is found to be necessary, the contract may be modified to provide for increases or decreases of the estimated quantities ....

* * * *

11. RUBBER SEALS AND GASKETS.

11.1 *Gate Seals.* In connection with "Cleaning and Painting of Sectors [Payment Item No. 12]," all rubber seals, and the structural steel bars and angles holding same, shall be unbolted and removed. Following the cleaning and painting, these members shall be put back in place using new bolts, nuts, and washers .... Worn-out or damaged portions, if any, of the rubber seals shall be replaced with new sections of rubber seals .... Government-furnished molds for the vertical seals are available ....

[2] 93-1 BCA ¶ 25,229 at p. 125,663.

[3] Slip op. at 15 (Oct. 13, 1993).

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These molds ... may be used in making the vertical seals .... [Payment Item No. added]

* * * *

11.3 Payment for removing and reinstalling *old* gate seals, including furnishing of the necessary bolts, nuts and washers as indicated on the drawings shall be included in the item for "Cleaning and Painting of Sectors [Payment Item No. 12]". Payment for new seals authorized to be installed shall be made at the contract unit price for ... "Rubber Seal, Vertical [Payment Item No. 11]." ... [Emphasis and Payment Item Nos. added]

(*Id.*).

The Bid

6. No direct evidence was provided by GCG to explain how its bid price for vertical seals, Payment Item No. 11, $15.00 per linear foot, was formulated. The other five bids for Payment Item No. 11 ranged from a low bid of $45.60 per linear foot to $200.00 per linear foot. The pre-bid Government Estimate for Payment Item No. 11 was $65.70 per linear foot. In separate appeals under the contract, the Board found that GCG prepared its bid for the entire contract as a lump sum. For example, certain equipment was to be used throughout the life of the project; therefore, the cost of its use was calculated for the entire performance period. After all costs were similarly calculated, unit prices were entered on the bidding schedule solely for the purposes of receiving estimated payments as the work progressed. Costs were not allocated to specific payment item prices based on the projected cost of the work required by that payment item. (*Gulf Constr. Group, Inc.*, ENG BCA Nos. 5944 and 5945, Finding 5 [4]; ENG BCA No. 5945, Exh. A-8).

Interpretation of Contract Payment Items and Claim Analysis

7. Pursuant to the Corps' incremental directions, GCG replaced all vertical seals on all six gate sectors. The total length of all vertical seals replaced was 288 linear feet, *i.e.*, about 240% of the estimated quantity of 120 linear feet. (R.4, Exhs. A-3, A-5, R-8 through R-10; Tr. 713, 737-39, 785-93).

8. In formulating the claim for the excess quantity of new vertical seals, GCG's President included the costs for disposing of old seals, purchasing new seal materials, and labor and equipment to handle (unload, unroll, dry, and straighten) the new materials, drill mounting holes, and otherwise prepare the new seals for installation. He did not include any costs for the actual installation of new seals since installation involved the same effort as would have been required to reinstall the old seals. Later, in preparing for litigation, after discussions with counsel, he determined that the better interpretation of the contract payment provisions was that payment for reinstallation of old seals was included under Payment Item No. 12, while payment for installation of new seals was to be made under Payment Item No. 11. (Tr. 719-20, 730-32, 783-86).

9. By letter dated June 10, 1991, GCG requested an adjustment in the unit price for vertical seals replacement work pursuant to the Variation in Estimated Quantity (VEQ) provision of the contract. A cost breakdown, computer listings of various costs, materials invoices, and equipment cost worksheets were attached to the letter. The cost breakdown was alleged to be a compilation of the total costs to install 176 linear feet of vertical seals (the "representative sample"). In accordance with GCG's initial contract interpretation, as explained above, labor costs were halved, with half allocated to preparation for installation (included in the claim) and the other half allocated to installation (not included in the claim). Supervision and "general conditions" costs were halved on account of other ongoing work, with half of such costs being included in the claim. The request totaled $91,474.74, or about $519.74, per linear foot. In addition, based on GCG daily reports, a six-day time extension was requested based on half of twelve days' work to prepare and install the excess quantity of new vertical seals. (Finding 8, *supra;* R.4, Exh. A-1; Tr. 711-25, 785-87).

10. In a letter dated June 17, 1991, GCG revised its equitable adjustment request to $90,066.22. The same average unit price, $519.74, allegedly derived from the costs to prepare and install 176 linear feet of new vertical seal, was multiplied by the alleged overrun quantity of 150 linear feet. The alleged costs for six days of "impact," including time-related costs for added supervision, "general conditions," and equipment usage and ownership costs, were added. (R.4, Exh. A-3; Tr. 710-17, 727-30, 785).

11. The Corps agreed that an equitable adjustment was due for the quantity overrun pursuant to the VEQ provision of the contract. The Corps further agreed that the overrun quantity was 150 linear feet, the

[4] Slip op. at 4 (November 23, 1993).

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difference between 115% of the estimated quantity of 120 linear feet and the actual quantity of 288 linear feet (1.15 × 120 = 138; 288 − 138 = 150). In attempting to reach agreement on a price increase for the equitable adjustment, the Corps focused on the costs attributable to obtaining and preparing for installation 176 linear feet of vertical seals. Thus, the Corps calculated a new, increased unit price for new vertical seal. The Corps interpreted the contract such that payment under Payment Item No. 11, "Rubber Seal, Vertical," covered only the cost of procuring the additional materials and preparing them for installation, but not for installing the vertical seal. The Corps interpreted the contract to mean that the cost of installation was provided for under Payment Item No. 12, "Cleaning and Painting of Sectors." (R.4, Exhs. R-8, R-9; Tr. 738-42, 754-65).

12. A Corps cost analyst/engineer determined that the only additional work for the overrun quantities payable under Payment Item No. 11, was to drill holes in the vertical seal materials in preparation for installation. On that basis and relying on GCG's and the Corps' daily reports of work progress, he analyzed the labor and equipment time required to prepare 176 linear feet of vertical seals for installation and developed a "production rate" from which an average cost per linear foot was rendered. The Corps' analyst also determined that the vertical seal work (drilling only) required eight days and did not delay project completion; therefore, in his opinion, no time extension was justified. (R.4, Exhs. R-8, R-9; Tr. 736-43, 756-58).

13. Following unsuccessful negotiations, the Corps unilaterally estimated the increased costs and markups to purchase and drill holes through the excess quantity of new vertical seal. The estimate totaled about $13,575.00, or $90.50 per linear foot. On September 18, 1991, Modification No. 18 to the contract was issued by the Corps to increase the contract price by $13,575.00, with no time extension. GCG did not agree to the contract modification. (R.4, Exhs. R-8, R-10).

14. In a letter signed by its President, dated October 9, 1991, which purported to be a claim, GCG demanded payment of $90,066.22, and a time extension of 6 days, minus the amount allowed by the Corps in the unilateral contract modification. The text of the letter included the following:

> In accordance with the Contracting [sic] Disputes Act of 1978 we hereby certify that this claim is made in good faith and all supporting data is accurate *and correct* to the best of our knowledge and belief. We hereby request a Contracting Officer's decision within the time allowed under FAR 52.233-1, Disputes. [Emphasis added]

(R.4, Exhs. A-4, R-7).

15. GCG appealed to the Board the Contracting Officer's lack of a decision by counsel's letter dated April 8, 1992. (R.4, Exh. R-1).

16. In a Contracting Officer decision dated April 27, 1992 (actually but incorrectly dated 1991), the claim belatedly was denied entirely. The Contracting Officer, as the basis for his denial, relied on the same contract interpretation and cost analysis as formed the basis for the Corps unilateral contract modification. The Contracting Officer found no justification for any additional equitable adjustment above that allowed by the unilateral contract modification. (R.4, Exh. A-5).

17. After receipt by the Board of the pleadings and the appeal file, the Board raised, *sua sponte*, the possibility of a defective claim certificate. This matter and its expeditious resolution was discussed among the Board and both counsel. The Board suggested consideration of a stipulation of the type approved in *United States v. Hamilton Enter., Inc.* [31 CCF ¶71,239], 711 F.2d 1038, 1042-43 (Fed. Cir. 1983), and counsel agreed to explore that possibility. In an undated letter signed by its President, received by the Contracting Officer on November 20, 1992, GCG resubmitted its demand, certified with language identical to that found in the contract Disputes provision. Subsequently, in a *Hamilton*-type stipulation dated December 15, 1992, GCG and the Corps agreed that the same demand previously submitted to the Corps and appealed to the Board had now been properly certified, submitted as a claim to the Contracting Officer, considered by the Contracting Officer, and *de facto* denied by him on the same grounds as in his earlier decision such that issuing a new decision would serve no useful purpose. (Board Correspondence File).

Project Delay

18. Replacement of vertical seal was originally scheduled by GCG to occur during six separate time periods of about seven days for each of six gate sectors, totaling about 42 days. The work was to be performed concurrently with each gate sector's overall rehabilitation. As originally scheduled, the final

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segment of vertical seal replacement work was to be completed about eight weeks prior to completion of the overall project. Later versions of GCG's schedule indicated that vertical seal replacement work was slipped to later dates and was consolidated into three separate periods of work of about 14-15 days per gate for three gates, totaling about 44 days for all three gates. The first segment of vertical seal replacement work was to be performed concurrently with gate rehabilitation work. The second and third segments of the work were scheduled to begin after completion of other rehabilitation work on the respective gates. The final vertical seal work segment was to be completed 17 days prior to completion of the overall project. (ENG BCA No. 6015, Exhs. A-12, R-23 [5]).

19. The work to dispose of old seal and prepare and install the excess quantity of new vertical seal required a total of twelve days. The vertical seal work was not the final work on the project. Project daily reports show that vertical seal work of all types (removal of old, preparation and installation of old and new) was accomplished during all or portions of 27 days, with the last work on new seal being completed on or about June 25, 1991. (R.4, Exhs. A-1, A-3, R-10; Tr. 712-14, 722-30, 767, 779-80).

20. GCG's President generally testified that the excess vertical seal work delayed completion of the overall project; however, there is no analysis or other probative evidence that explains the interrelationship between or among the revisions to GCG's original schedule, the delay alleged in this appeal, the delays evidenced by the contract modifications, or any of the other delays alleged by GCG in other appeals. No summary, analysis, or comparison of schedules was presented by GCG to indicate the effect on specific work activities or the overall contract completion date of the excess vertical seal work. No exhibit or testimony convincingly explained, analyzed, or compared the excess vertical seal work as it related to specific work activities or the overall project as-scheduled or as-built. (*Gulf Constr. Group, Inc.*, ENG BCA No. 5941, Finding 22 [6]; Finding 3, *supra;* Tr. 713, 727-29).

Quantum

Labor

21. GCG's documentation of its claim for labor consists of a list of computer entries, encoded (recorded) for vertical seal work. Payments to particular individuals and for labor burden cost amounts during certain weeks are listed. Specific dates and types of work are not identified. As found above, in formulating its claim, GCG estimated that half the vertical seal effort was allocated to removal and reinstallation, which would have been required whether old or new vertical seal was installed, and half was allocated to preparation of new seal for installation. No evidence was adduced by GCG to show the effort required to do preparation work for new seals, whether drilling or other handling. No analytical basis for allocating the costs in the manner claimed was shown. (Findings 8-9, *supra;* R.4, Exh. A-1; Tr. 712-20).

22. In preparing an estimate to support the Corps' unilateral contract modification, the Corps' cost analyst, based on GCG's daily reports, extracted a list of specific dates on which the initial 176 linear feet of vertical seals drilling work, only, was performed. For those dates, the analyst identified the hours worked and the types of workers employed by GCG, *i.e.*, laborers and/or skilled workers. Other work was being performed by GCG personnel on those dates. The vertical seal drilling crew consisted of one laborer, one skilled worker, and an equipment operator. The analyst allocated only half of the equipment operator's time to vertical seal work; however, when questioned by the Board, he testified that the operator could have been employed on vertical seal work full time. (R.4, Exhs. R-8, R-10; Tr. 735-74).

23. Relying principally on the Corps' cost analysis, the Board finds that a laborer, a skilled worker, and an equipment operator were employed by GCG to perform 176 linear feet of vertical seals preparation and drilling work during 68.5 hours. The following labor rates, including labor burden costs, are applicable for each of those labor classifications, respectively: $10.27, $16.31, and $12.33. The total direct labor cost for 176 linear feet of vertical seals is $2,665.34 (68.5 × $38.91). The portion of the cost attributable to 150 of 176 linear feet is $2,271.60. (Finding 22, *supra;* R.4, Exh. R-10; Tr. 776-78).

[5] The parties agreed that evidence from all appeals under the contract may be considered in any of the appeals. (ENG BCA No. 6015, Tr. 26-27).

[6] 93-3 BCA ¶ 26,040 at p. 129,446.

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Equipment

24. The vertical seal is fastened onto the gate sectors by steel bars and angles. The spacing of the mounting holes in the bars and angles is irregular. To mark the new vertical seal materials for drilling, GCG was obliged to hoist the new vertical seal into position alongside the gate sectors. On account of the weight of the new vertical seal materials and the height of the gate sectors, a crane was required to hold the new vertical seal materials in place for marking. The claim indicates and GCG's President testified that the new seal drilling work required the use of an air compressor and drill, a land-based crane, a barge-mounted crane, a barge, and a tugboat for 12 days. (Finding 5, *supra;* Tr. 708-10, 724-27, 789-91).

25. The Corps' cost analyst, in the estimate for the unilateral contract modification, included use of the drill for the same number of hours as for labor and half of that time for use of the land-based crane, only, in figuring the cost of preparing 176 linear feet of vertical seals. The basis for allowing the crane for only half the time was not specifically explained. When questioned by the Board, he testified that the equipment could have been employed on vertical seal work full time. He could not determine from the daily reports the amount of time during which each item of equipment was employed. (Finding 22, *supra;* R.4, Exh. R-10; Tr. 743-74).

26. The Board finds that neither the necessity for, nor the actual use of, marine equipment for the vertical seal work was convincingly proved. There is no question that equipment was needed to handle the vertical seal materials and the Board has found that an equipment operator was employed for the full extent of vertical seal drilling work. The Board finds that a land-based crane and an air compressor and drill were used for a total of 68.5 hours to prepare new vertical seal for installation. The hourly rates for those items of equipment are $21.25, $38.47, and $0.64, respectively, a total rate of $60.36 per hour. The total direct equipment cost for 176 linear feet of vertical seals work is $4,134.66 (68.5 × $60.36). The portion of the cost attributable to 150 of 176 linear feet is $3,523.86. (Findings 22, 24-25, *supra*).

Materials

27. GCG's President's testimony concerning the quantity of vertical seals represented by the invoices included with the claim was abbreviated, confusing, disjointed, and unpersuasive. He alleged a reorder of materials; however, the record contained only one set of invoices for materials ordered on or about the same date. (Tr. 709-12, 720-22, 733, 785).

28. Consistent with the total dimensions of all gate sectors to be rehabilitated under the contract, allowing for some wastage and cutting of seal materials, and based on its own examination of invoices submitted with GCG's claim, the Board finds that GCG obtained a sufficient quantity of vertical seal materials for the entire project (288 linear feet installed) for the total cost of $14,671.60, including taxes and freight charges. The portion attributable to the installation of 150 linear feet is $7,641.46. The molding charge paid by GCG to its supplier would have been required even if no excess quantity had been directed by the Corps. (R.4, Exhs. A-1, R-10; Tr. 712, 721-22, 771-72).

Markups

29. GCG claims and the Corps does not dispute a 15% markup for overhead. (R.4, Exhs. A-1, R-10).

30. GCG claims 12% profit. The Corps computed a profit of 7.05% based on its weighted guidelines method. (*Id.*). The Board allows 10%.

31. GCG claims a bond rate of 2.5%. The Corps included 2.0% for bond costs in the unilateral contract modification. A Corps audit report for a different VEQ equitable adjustment verified a bond rate of 2.6%. (*Gulf Constr. Group, Inc.*, ENG BCA No. 5850, Exh. R-27;[7] R.4, Exhs. A-1, R-10). The Board allows 2.5% as claimed by GCG.

DECISION

The Parties' Positions

GCG argues that the Corps' estimated quantity was "faulty" and the Corps "should be estopped from requiring [GCG] to assume any portion of the excess over or the shortfall under the estimated quantities." As mentioned in the introduction to this opinion, the Corps did not file a post-hearing brief in this appeal; however, briefs were filed in two other appeals under the same

[7] Nn. 2, 5, *supra*. Quantum evidence was presented in the hearing for ENG BCA No. 5850; however, no equitable adjustment was allowed in that appeal.

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contract involving the Variation in Estimated Quantity (VEQ) provision of the contract. In those appeals, the Corps responded to an identical argument by GCG. The Corps asserted that there was no proof of a negligently estimated quantity.

In the alternative, GCG asserts the right to an equitable adjustment pursuant to the VEQ provision of the contract, on account of the quantity overrun. The Corps determined that the Appellant was entitled to an increase in the unit price and issued a unilateral modification to the contract in the amount of $13,575.00.

Jurisdiction

The contract is subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13 (1988, Supp. II 1990, & Supp. III 1991). For claims over $50,000.00, proper certification pursuant to 41 U.S.C. § 605, implementing regulations (FAR 33.207), and the Disputes provision of the contract, is a jurisdictional prerequisite for appeal to the Board in this case. *W.M. Schlosser Co. v. United States* [30 CCF ¶ 70,985], 705 F.2d 1336 (Fed. Cir. 1983).[8]

In 1991, a dispute arose between the parties concerning the claim which underlies this appeal. In its claim letter, dated October 9, 1991, by which GCG sought a Contracting Officer decision concerning alleged extra costs in excess of $50,000.00, the claim certificate deviated from the language required by the contract Disputes provision in two respects: (1) GCG certified that the claim's supporting data was accurate and *correct* instead of accurate and *complete*, and (2) the certificate failed to include any version of the assertion that "the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." (Findings 4b, 9-14).

After the appeal was filed, the Board reviewed the appeal file and considered the certificate technically defective. To avoid unnecessary delay and additional expense in the resolution of the claim and appeal, the Board suggested a remedy and the parties proceeded to cure the defect. A proper certificate was received by the Contracting Officer on November 20, 1992. GCG resubmitted its demand as a properly certified claim and the Contracting Officer considered and denied it, *de facto*, by way of a stipulation dated December 15, 1992. (Findings 15-17). At that point, the Board was satisfied that it clearly had subject matter jurisdiction over the appeal.

Negligent Estimated Quantity Preparation

Arguments identical to those presented in this appeal were advanced in two other appeals by GCG under the same contract. In those decisions, the Board held that contractors are protected, by way of the standard VEQ provision, from the risk of overstated or understated estimated quantities. *Gulf Constr. Group, Inc.*, ENG BCA Nos. 5944 and 5945 (Nov. 23, 1993).

Even if the negligent estimated quantities theory was considered applicable to this appeal, the Corps correctly argues that GCG has presented no evidence that tends to prove that the quantity estimates were negligently prepared. GCG merely asserts that the Corps' faulty estimates are evidenced by "the overall amounts of ... overrun." (Appellant's Pre-Trial Hearing Memorandum at 2). However, cases relying on the negligent estimated quantities theory hold that disparities in estimates, alone, do not prove that estimated quantities were prepared without due care. *Medart, Inc. v. Austin* [38 CCF ¶ 76,349], 967 F.2d 579 (Fed. Cir. 1992); *Emerald Maintenance, Inc.*, ASBCA No. 29948, 89-3 BCA ¶ 22,127.

The contract provides that the estimated quantities were based on experience with the Brazos River Floodgates and Colorado River Locks. (Finding 5). There is no evidence to the contrary.

Variation in Estimated Quantity

The VEQ provision of the contract states that if the actual quantity of a unit-priced item varies more than 15% from the estimated quantity, an equitable adjustment in the contract price will be made upon demand of either party. Given the posture of this case, *i.e.*, a demand by GCG for a price increase based on a quantity overrun, any equitable adjustment is to be based upon GCG's proof of an increase in costs attributable to or caused by the variation above 115% of the estimated quantity. If GCG proves that the quantity variation caused an increase in the time necessary for completion, a time adjustment will also be due. (Finding 4a).

[8] For appeals filed on or after October 29, 1992, a defect in the certification of the underlying claim does not deprive the Board of jurisdiction to consider an appeal. However, the Board will require correction of a defective certification prior to issuance of its decision. 41 U.S.C. § 605(c)(6), as added by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a)(1)(B), 106 Stat. 4518.

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Interpretation of the Contract Payment Provisions

Before the amount of the equitable adjustment may be calculated in this appeal, the matter of what work is to be included within the scope of the equitable adjustment must be determined. A brief examination of the payment provisions of the specifications is required.

The specifications are clear that removal and reinstallation of the *old* vertical seals is to be paid for under Payment Item No. 12, "Cleaning and Painting of Sectors." (Finding 5). There is no disagreement on that point.

GCG did not explain the specific basis for its bid price for Payment Item No. 11. However, when the work was accomplished and when the claim was submitted, there was no disagreement between the parties that the scope of Payment Item No. 11, "Rubber Seal, Vertical," did not include the cost of installation of new seal materials. Only later, as GCG prepared for litigation and after consulting with counsel, did GCG focus on the specification wording that explicitly only addressed reinstallation of old seals. (Findings 6, 8).

GCG now argues that payment for new vertical seals "authorized to be installed," which GCG apparently construes to include installation, is to be made as a part of the contract unit price for Payment Item No. 11, "Rubber Seal, Vertical." Rather than increase its claim amount to include the cost of installation of new vertical seals, GCG seeks to occupy the moral high ground by arguing that it has, consistent with its earlier interpretation of the payment provisions of the contract, "computed its claim, discounting half of its labor associated with the new seals. However, since *no* [reinstallation] of the [old] vertical seals was performed, Gulf [should] be entitled to assert 100% of its costs associated with the installation of new vertical seal. Gulf's approach to pricing the equitable adjustment is more than fair and reasonable." (Appellant's Post-hearing Brief at 5).

By specifically mentioning only the reinstallation of old seals for payment under Payment Item No. 12, it could be said that the payment provisions are ambiguous as to payment for installation of new seals. The Corps would have done well to omit the word "old" when describing measurement for payment of installation or reinstallation of seals. However, the Board need not decide whether the specification is ambiguous since both parties, contemporaneously with accomplishment with the work, interpreted the specifications to include payment for reinstallation of old or installation of new seals under Payment Item No. 12. There is no evidence that GCG relied on its "litigation interpretation" at the time of bid and GCG definitely did not rely on that interpretation when it performed the work and formulated its claim. (Findings 6, 8).

The Equitable Adjustment

Neither GCG nor the Corps actually measured the costs to perform the adjustable quantity, that is, the costs incurred to handle and prepare the last 150 linear feet of vertical seal materials. Both parties focused, for the most part, on a "representative sample" of vertical seals work. GCG allegedly compiled and the Corps estimated the costs to prepare and/or install 176 linear feet of vertical seal materials. While the Board is not entirely satisfied with that method of calculating the equitable adjustment, it is clear that GCG is entitled to an equitable adjustment. On this record, there is no better, fairer way to determine the monetary extent of the equitable adjustment than to derive it from the cost data used by both parties. *See C.F. Bean Corp.*, ENG BCA No. 4537, 86-3 BCA ¶ 19,283.

The Corps has not disputed that GCG is entitled to an equitable adjustment under the VEQ provision; it issued a unilateral modification to the contract to that effect. The factual aspects of proven allowable extra costs are addressed in the Board's quantum findings. A summary follows:

Labor	$ 2,271.60
Equipment	3,523.86
Materials	7,641.46
Subtotal	$13,436.92
Overhead—15%	2,015.54
Subtotal	$15,452.46
Profit—10%	1,545.25
Subtotal	$16,997.71
Bond—2.5%	424.94
TOTAL	$17,422.65

(Findings 21-31).

Delay

The balance of GCG's claim for money and time is related to delay. Absent proof of delay to the overall completion date caused by the quantity overrun, GCG may not recover for delay or obtain a time extension. *Bruno Law v. United States* [16 CCF ¶ 80,286], 195 Ct.Cl. 370 (1971); *Granite-Groves (JV)*, ENG

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BCA No. 5674, 93-1 BCA ¶ 25,475. If the specific work activity allegedly affected by the estimated quantity overrun was not shifted, delayed, or extended beyond the planned duration estimated by GCG for that work activity, no extra costs for delay could have accrued. It is GCG's burden to prove disruption or delay to the specific work activity as well as the overall project. *Gulf Constr. Group, Inc.*, ENG BCA No. 5850, *supra*.

The Board concludes that GCG has not proved delay to the vertical seals replacement work activity. GCG's planned duration for vertical seals work was about 42-44 days. The record shows that the work was actually accomplished in no more than about 27 days. Obviously, from a comparison of those durations, without more, the only conclusion is that there was no delay. (Findings 18-19).

Likewise, the Board is not convinced that overall project completion was adversely impacted by the vertical seals overrun. The vertical seals work was completed about two months prior to completion of the overall project. GCG has presented no analysis that shows how the vertical seals quantity overrun delayed the overall project alone or in conjunction with other delays to the project. (Findings 3, 19-20).

In its argument, GCG "submits that it took an additional twelve days to drill all the holes [in] the new seals." (Appellant's Post-hearing Brief at 4). It is true that those assertions were made. (Findings 19, 24). However, assertions are not proof. Even if true, the additional time to drill holes, alone, does not prove that the overall project was delayed or even that the specific work activity was extended. To be probative of delay, extra time to perform extra work must be interrelated and analyzed with the schedule as-planned and as-built, considering, among other things, planned and actual durations and work sequence as well as any other delays.

CONCLUSION

There is no dispute that the actual quantity performed was greater than 115% of the estimated quantity and that the Appellant is entitled to an equitable adjustment. Proven costs of the overrun amount to $17,422.65. Prior to submission of the claim, the Respondent allowed $13,575.00. The Appellant is entitled to the difference, $3,847.65, plus interest in accordance with the CDA and the Disputes provision of the contract from November 20, 1992, until paid. Neither delay nor delay-related costs were proved. The appeal is SUSTAINED IN PART.

[¶ 26,525] Gulf Construction Group, Inc.

ENG BCA Nos. 5944, 5945, November 23, 1993. Contract No. DACW64-90-C-0013.

Indefinite Delivery Contracts—Estimates by Government—Negligent Preparation.—A construction contractor could not utilize a negligence theory to obtain an adjustment for an underrun of certain estimated contract work items, because the contractor was adequately protected from the effects of inaccurate estimates under the contract's Variations in Estimated Quantity clause. The contractor received the agreed-upon unit price for all items ordered. In addition, a standard VEQ clause provided for an equitable adjustment for variances of more than 15 percent from contract estimates. These provisions effectively protected the contractor from the risk of overstated estimates. Moreover, even if a negligence theory were applicable, the only evidence of negligence that the contractor presented was the variance between the government's estimated and actual requirements. The existence of a variance does not, in itself, prove that the estimates were prepared negligently.

Indefinite Delivery Contracts—Price Adjustments for Variation—Proof of Harm.—A contractor was not entitled to additional compensation for an underrun of estimated-quantity, unit-priced construction work items, because the contractor could not demonstrate that it was harmed by the underrun. The contract's Variation in Estimated Quantity clause provided for an equitable adjustment for any increase or decrease in costs due solely to a variation above 115 percent or below 85 percent of the estimated quantity for unit-priced work items. Although the government ordered less than 85 percent of the estimated quantity of the work items, the contractor was unable to demonstrate that specific fixed costs in its bid were not recovered as a result of this underrun. The contractor's item price was unreasonably low, and it was benefitted rather than harmed by the underrun.

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For the appellant: Smith, Gunn & Kaster, Baton Rouge, Louisiana, by Steven E. Sanders. For the government: Frank Carr, Chief Trial Attorney, Washington, D.C., and Daniel Keys III, Government Trial Attorney, Galveston, Texas.

Before SHERIDAN, PEACOCK, and SOLIBAKKE, Administrative Judges.

SHERIDAN,[1] Administrative Judge: In ENG BCA No. 5944, the Appellant seeks additional compensation in the amount of $21,078.74, as relief for an estimated quantity underrun based either on negligent preparation of the estimated quantity and the total cost to perform the actual quantity of a unit-priced payment item or pursuant to the Variation in Estimated Quantity provision of the contract.

In ENG BCA No. 5945, the Appellant seeks additional compensation for an estimated quantity underrun of a unit-priced payment item. The amount sought is $4,050.00, which is alleged to be an approximation of the unrecovered costs attributable to the quantity underrun. The Appellant's theory of recovery is based either on negligent preparation by the Respondent of the estimated quantity or pursuant to the Variation in Estimated Quantity provision of the contract.

The Respondent denies that any recovery is due in either appeal. The Respondent asserts that the Appellant has neither proved negligent preparation of estimated quantities nor any unrecovered fixed indirect costs attributable to the quantity underruns.

The appeals were not consolidated, but are decided together given the similarity of the issues. The Appellant submitted a consolidated pre-hearing memorandum, seriatim one-day hearings were conducted in Houston, Texas, and the Respondent filed a consolidated post-hearing brief.

FINDINGS OF FACT

The Contract

1. Contract No. DACW64-90-C-0013 (the contract) was awarded by the U.S. Army Engineer District, Galveston, Texas (the Respondent or Corps) to Gulf Construction Group, Inc. (the Appellant or GCG) on January 14, 1990. The contract work, to be performed on the Gulf Intracoastal Waterway, consisted of rehabilitation of the Brazos River Floodgates near Freeport, Texas, and the east gate of the east lock of the Colorado River Locks near Matagorda, Texas. (Consolidated Board Rule 4 Appeal Files and Hearing Exhibits for ENG BCA Nos. 5944 and 5945, Respondent's Exhibit 3 (ENG BCA Nos. 5944 and 5945, R.4, Exh. R-3)).

2. As awarded, the contract price was $1,249,360.00 (increased to $1,405,269.78 by contract modifications), the total estimated sum of 29 estimated quantity, unit-priced and fixed-price, lump sum payment items. The contract work included, *inter alia*, the following:

ENG BCA No. 5944: replacement of ladder rungs on existing ladders at the canal walls adjacent to the gates; payment Item No. 16 of the contract listed an estimated quantity of 41 ladder rungs to be replaced at a unit price of $10.00 each, yielding an estimated price of $410.00. (R.4, Exhs. R-3, R-3a, R-4; Tr. 272).

ENG BCA No. 5945: emergency removal of two temporary recess fenders and reinstallation of two gate sectors in the event of heavy rains or a flood on either the Brazos or Colorado River; payment Item No. 4 of the contract listed an estimated quantity of two such emergency occurrences at a unit price of $7,500.00 each, yielding an estimated price of $15,000.00. (R.4, Exhs. R-3, R-3a, R-4).

3. The Corps' notice to proceed was received by GCG on March 22, 1990. The contract specified 428 days for completion after receipt of the notice to proceed. Therefore, the original contract completion date was May 24, 1991. The performance period was extended a total of 51 days by modifications to the contract. The modified contract completion date was July 14, 1991. The work was substantially complete on August 26, 1991. Liquidated damages have been assessed by the Corps. (*Gulf Constr. Group, Inc.*, ENG BAA No. 5850, Finding 4;[2] *Gulf Constr. Group, Inc.*, ENG BCA No. 5961;[3] ENG BCA Nos. 5944 and 5945, R.4, Exhs. R-3a, R-4).

4. The contract included standard Contract Clauses typically found in Corps of Engineers construction contracts. The following are pertinent to resolution of the appeals:

[1] The Board adopts the opinion of its Hearing Examiner, Steven L. Reed, Esq., who presided at the hearings of the appeals.

[2] 93-1 BCA ¶ 25,229 at p. 125,663.

[3] Slip op. at 15 (Oct. 13, 1993).

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a. Variation in Estimated Quantity (APR 1984) FAR 52.212-11:

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

b. Disputes (APR 1984) FAR 52.233-1.

(R.4, Exh. R-3).

5. When GCG formulated its bid price, the payment item prices did not reflect the cost that GCG anticipated spending on the work specified thereby. GCG prepared its bid for the entire contract work as a lump sum. For example, certain equipment was to be used throughout the life of the project; therefore, the cost of its use was calculated for the entire performance period. After all costs were similarly calculated, unit prices were entered on the bidding schedule solely for the purposes of receiving estimated payments as the work progressed. Costs were not allocated to specific payment items based on the projected cost of the work required by that payment item. (R.4, Exh. A-4; Tr. 275-82).

ENG BCA No. 5944: Ladder Rung Replacement

6. Certain paragraphs of section 2A of the Technical Provisions of the contract are relevant, in part, as quoted below.

1. Scope. The provisions of this section consist of furnishing all plant, labor, equipment and materials for performing the following work ....

* * * *

(11) Install stainless steel ladder rungs.

* * * *

8. MISCELLANEOUS REPAIRS TO GATE SECTORS. Repair items, including ... those in the following subparagraphs are items of repair work for which the need cannot be determined definitely until the sectors are taken out of the water. The quantities are based on experience with the Brazos River Floodgates and Colorado River Locks. It is considered reasonable to assume that these sectors will require similar work. If it is found to be necessary, the contract may be modified to provide for increases or decreases of the estimated quantities ....

(1) *Miscellaneous Welded Structural Reinforcement.* This item provides for miscellaneous repair ... of corroded ... ladder rungs ... using the typical details shown on the drawings ....

(R.4, Exh. R-4).

7. Contract Drawing No. S-1 included typical details showing existing and new ladder rungs. Existing $^3/_4$-inch diameter ladder rungs to be replaced were to be cut and removed. New ladder rungs were shown to be 18 inches long and formed from 1-inch diameter, round stainless steel (rounds). Each new ladder rung was to be inserted into the centered hole through and welded into two new stainless steel plates, one at each end of each new ladder rung. Each new plate, measuring $4 \times {}^1/_2 \times 4$ inches, was to be welded in place in the existing ladder recesses. (R.4, Exh. R-4; Tr. 272-74).

8. When GCG formulated its bid price of $10.00 per ladder rung, that amount did not reflect the cost that GCG anticipated spending on the work item. In fact, the ladder rung unit price did not cover the direct cost of materials, alone, much less labor, equipment, and markups. GCG expected to make no profit on ladder replacement work and would have lost money with respect to that item of work if it had performed 85% of the estimated quantity. (Finding 5, *supra;* R.4, Exh. A-4; Tr. 275-82). Derivation of the pertinent payment item price in this case, $10.00 per ladder rung, was not specifically explained.

9. At the Corps' direction, GCG replaced 26 ladder rungs, *i.e.*, about 63% of the estimated quantity of 41 ladder rungs. (R.4, Exhs. A-4, A-6, A-7; Tr. 271-73).

10. By letter dated September 27, 1991, GCG requested an adjustment in the unit price for ladder rung replacement pursuant to the Variation in Estimated Quantity

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(VEQ) provision of the contract. A cost breakdown, materials invoices, and a computer listing of various costs were attached to the letter. The cost breakdown was alleged to be a compilation of all costs to replace 26 ladder rungs, totaling $21,078.74, or about $810.72 per ladder rung. (R.4, Exh. A-4; Tr. 273).

11. In a letter dated October 21, 1991, the Corps Administrative Contracting Officer (ACO) declined to allow an equitable adjustment in the ladder rungs replacement price. The ACO acknowledged the quantity underrun but took the position that the VEQ provision did not allow contract payment items to be repriced in an underrun situation unless GCG could show "certain fixed costs that were not recovered because [GCG] did not perform" the underrun quantity of nine ladder rung replacements (85% of the estimated quantity of 41 is 35, or nine more than the quantity of 26 actually performed). The ACO also wrote that "if [GCG] can prove that any [unrecovered] fixed costs were contained in [its] bid price (such costs) will form the basis for the equitable adjustment." (R.4, Exh. A-7).

12. In a letter dated October 24, 1991, GCG resubmitted the matter as a claim to the Contracting Officer. (R.4, Exh. A-1).

13. In a Contracting Officer decision dated February 3, 1992, the claim was denied entirely. The Contracting Officer, as the basis for his denial, adopted and incorporated the ACO's letter dated October 21, 1991, in its entirety. (R.4, Exh. A-8).

14. GCG appealed the Contracting Officer's decision to the Board by counsel's letter dated March 9, 1992. (R.4, Exh. R-1).

15. At the hearing, GCG's President testified that materials were bought piecemeal, at an increased cost, with some material left over. The quantities and dates listed on the materials invoices reveal that sufficient bulk lengths of stainless steel rounds to install about 100% of the estimated quantity and enough bulk stainless steel plate materials to install well over 115% of the estimated quantity had been purchased by June 1991. In August 1991, an additional quantity of rounds and 14 pre-cut, pre-drilled plates were purchased. The supplier's invoices indicated that the materials could be returned for credit. (R.4, Exh. A-4; Tr. 279-80). There is no evidence that GCG made any attempt to return unused materials or calculated the cost benefit of retaining the excess materials.

16. GCG's President implied, in his hearing testimony, that unspecified project delays caused ladder rung replacement work to be performed at or near the end of the project. He testified that dedicated labor costs for the project superintendent, the contractor quality control representative, and certain travel expenses for workers, normally allocated to job overhead, were directly recorded as a labor cost for replacement of ladder rungs because most of the ladder rungs were installed at or near the conclusion of the job. For the same reason, he testified, direct costs for equipment were increased because equipment was dedicated solely to the task of ladder rung replacement at or near the conclusion of the job. (Tr. 273-82).

17. There is no probative evidence that the quantity underrun caused any delay. Replacement of ladder rungs was scheduled by GCG to occur during three separate time periods as each of the three gates was rehabilitated. As originally scheduled, the final segment of ladder rung replacement work was to be completed about five weeks prior to completion of the overall project. Later versions of GCG's schedule indicated that ladder rung replacement work was slipped to later dates such that the final segment of the work was to occur during the last 17 days of the project, concurrent with the final removal and the return of temporary recess fenders to the Corps as well as reinstallation of the last gate. (ENG BCA No. 6015, R.4, Exhs. A-12, R-23 [4]). The schedule modification was not shown to be connected to ladder rung replacement work.

18. When questioned at the hearing by the Corps counsel, GCG's President was unable to identify any unrecovered "fixed indirect costs" that were attributable to the quantity underrun. (Tr. 276-77)

19. At the hearing, the ACO elaborated on the Corps position on "fixed indirect costs." In his view, the VEQ provision was intended to allow recovery of fixed indirect costs not recovered by performing and being paid for the actual quantity, if less than 85% of the estimated quantity. Fixed indirect costs could include, for example, that portion of the mobilization and demobilization costs for the entire job or home office overhead costs allocable to ladder rung replacement

[4] The parties agreed that evidence from all appeals under the contract may be considered in any of the appeals. (ENG BCA No. 6015, Tr. 26-27).

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work but which costs were not fully recovered unless at least 85% of the estimated quantity was performed. Any recovery could not include direct costs. (Tr. 286-87).

20. The ACO determined that the unit price for ladder rung replacement was for payment purposes only and that it had little or no relation to the actual cost of the work. However, he attempted to estimate fixed indirect costs included in the unit price by first estimating direct costs and then subtracting such costs from the unit price. The remainder, he analyzed, was fixed indirect costs. Of course, that calculation rendered zero fixed indirect costs because the unit price was less than the estimated direct costs. By that method, the ACO concluded that the Appellant was not entitled to any recovery. (Tr. 287-96).

ENG BCA No. 5945: Emergency Occurrence Work

21. A Government Estimate was prepared and six offers were submitted prior to award of the contract. The estimated total bid prices for Payment Item No. 4, two emergency occurrences, were as follows, in ascending order:

GCG (Bidder No. 3)	$15,000.00
Bidder No. 1	30,000.00
Bidder No. 4	32,000.00
Bidder No. 2	40,000.00
Bidder No. 6	60,000.00
Government Estimate	84,204.00
Bidder No. 5	89,200.00

(R.4, Exh. A-8)

22. A portion of paragraph 7 of section 2A of the Technical Provisions of the contract, as quoted below, is relevant.

> 7. REMOVAL AND REINSTALLATION OF SECTORS.
>
> * * * *
>
> 7.4 *Emergency Reinstallation and Removal of Sectors.* In the event of heavy rains or anticipated floods on the respective Brazos or Colorado River, the Contractor shall be prepared to put the sectors back into service within 48 hours after he is so directed by the Contracting Officer. The work includes the removal of the recess fenders, reinstallation of sectors with or without seals but with a minimum of three (3) complete lines of fenders, restoring the sectors to normal operating conditions for the duration of the flood, then removing the sectors and giving each a thorough washdown with fresh water before resuming the work to be done.... The temporary emergency reinstallation of sectors is an item of work that will only be used when, and if, in the opinion of the Contracting Officer, such action is warranted to prevent excessive deposits of silt in the Gulf Intracoastal Waterway during floods.

(R.4, Exh. R-4).

23. GCG's President formulated the bid price of $7,500.00 per emergency occurrence. He anticipated (and bid accordingly), based on the specifications, a small probability of being directed by the Corps to install the gates on an emergency basis. He interpreted the specifications (especially the requirement to perform within 48 hours) to mean that GCG would have to be "on standby," "on call," and "like a contingency to be ready and available to do the work" at all times. He knew that the work site was a "hurricane-prone area" of the Texas coast. (Tr. 309-17, 325).

24. GCG's President determined that the same labor and equipment resources could be used to perform the emergency occurrence work as was performing all other contract work. Those resources would be on hand throughout the life of the project and in the event of an emergency occurrence. Therefore, the cost of those resources was included elsewhere in GCG's bid. The one exception was the necessity for an additional barge-mounted crane. To obtain that item of equipment if required, a verbal arrangement was made with one of GCG's subcontractors and other back-up plans were coordinated with other nearby marine equipment owners, all at no cost unless the work was actually directed. The emergency work was never directed and the additional barge-mounted crane neither stood idle for this purpose nor accrued any standby costs. (R.4, Exh. A-1; Tr. 310-15, 336-37).

25. Unspecified preparedness costs were anticipated by GCG on account of the emergency occurrence work. On that account, an unspecified amount for overhead was added to the overall bid. The payment item amount for emergency occurrence work was entered on the bidding schedule by GCG, along with the other bid prices, solely for "draw purposes," *i.e.*, to obtain periodic estimated payments. (Finding 5, *supra;* Tr. 310, 324). Derivation of the pertinent payment item price in this case, $7,500.00 per emergency occurrence for an estimated two occurrences, was not specifically explained.

26. Procurement of materials and certain services for the job was scheduled and coor-

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dinated by GCG such that the 48-hour deadline for an emergency occurrence could be met, if directed. Unspecified and unproven higher costs allegedly were paid by GCG for local rehabilitation of one of the gate hinge castings and pins and for shorter planned durations for certain subcontractor work. GCG claimed it had to "work around [the] 48-hour time frame on everything [it] did." No specific costs in support of these assertions were included in the claim. (R.4, Exhs. A-1, R-7; Tr. 312-19).

27. The Corps never directed performance of the emergency occurrence work during performance of the contract. (Complaint & Answer, ¶ 8).

28. By letter dated September 16, 1991, GCG requested payment, pursuant to the VEQ provision of the contract, on account of the quantity underrun. GCG demanded $4,050.00, comprised of 27% (15% overhead and 12% profit) of $15,000.00 (the full payment amount for the estimated quantity of two emergency occurrences). GCG asserted that its overhead and profit "were distributed throughout [all] bid items" and that it "maintained the equipment and personnel readiness along with any material necessary for an emergency reinstallation of the gates throughout the contract as specified." (R.4, Exh. A-1).

29. GCG did not quantify any particular overhead costs which it claims were incurred to maintain a state of readiness to perform in the event of an emergency occurrence. GCG's President testified that GCG's audited overhead rate was 24%; therefore, he believed the Corps would accept a claim for a portion (15%) of GCG's overhead costs related to the unit price. He explained that the claimed profit (12%) was a substitute for the inability to isolate specific costs. The alleged extra costs were described by GCG's President generally as long distance phone calls, time for preparation of correspondence, and time for coordination efforts by GCG personnel. (Tr. 319-29). There is no documentation or further explanation of the claimed costs.

30. In a letter dated September 24, 1991, the Corps ACO declined to allow an equitable adjustment for the emergency occurrence work. The ACO acknowledged the quantity underrun but took the position that the information submitted by GCG provided "no justification that you are entitled to any additional compensation since no work was performed under the [payment] item." (R.4, Exh. A-5).

31. In a letter dated September 24, 1991, GCG resubmitted the matter as a claim to the Contracting Officer. (R.4, Exhs. A-6, R-7).

32. In a Contracting Officer decision dated February 3, 1992, the claim was denied entirely. The Contracting Officer noted that emergency occurrence work was not performed and that GCG now wanted "to collect [overhead] and profit on what in essence was a contingent requirement in the contract specifications that was never performed." The Contracting Officer concluded that in the case of an underrun, certain "fixed indirect costs" may be recovered, but that GCG submitted no evidence of such costs "included or specifically associated" with the contract price for the work. (R.4, Exh. A-7).

33. GCG appealed the Contracting Officer's decision to the Board by counsel's letter dated March 9, 1992. (R.4, Exh. R-1).

34. At the hearing, a Corps project engineer/cost estimator elaborated on the Corps position on "fixed indirect costs." After the appeal was taken, he prepared an estimate of the direct costs to perform the emergency occurrence work. His purpose was to analyze whether any recoverable costs, that is, unrecovered indirect costs, could be justified. He analyzed that if his estimate of the direct costs was subtracted from the unit price, the remainder would represent the indirect costs. Those costs could then be examined to identify any recoverable costs. (R.4, Exh. R-10; Tr. 340-41).

35. The Corps post-appeal estimate of GCG's direct costs, only, to perform the emergency occurrence work, using actual direct costs recorded by GCG for Brazos River gate removal and reinstallation performed in the normal course of the contract work, not as emergency work, amounted to almost $78,000.00. Subtracting that amount from the price for two emergency occurrences ($15,000.00) is, of course, zero. The Corps cost estimator concluded that it was "impossible to tell" from that calculation "what the indirect cost would be" for performance of the emergency occurrence work. He also concluded that the bid price was unbalanced, was less than the cost that would be required to perform the work, and that the indirect costs must have been included elsewhere in the bid. His ultimate conclusion was that there was no justifiable basis for the claim. (R.4, Exh. R-10; Tr. 342-55).

36. On further examination and questioning during the hearing, the Corps cost esti-

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mator agreed that any of GCG's direct costs, indirect costs, profit, or some combination of costs or profit to perform the emergency occurrence could be elsewhere in the bid. (Tr. 353, 361-62).

37. As found above, the ACO acted based on certain views regarding "fixed indirect costs" and the VEQ provision. In response to the explanation, at the hearing, of GCG's bidding methodology, that the bid price included only a small contingency for overhead-type costs, with direct and other costs included elsewhere in the bid, his opinion was that GCG did not bid in accordance with the contract specifications in that the price did not include all the costs to perform the work. However, he did agree that the unrecovered costs described by GCG's President in his testimony, if proved, could be characterized as unrecovered fixed indirect costs. (Findings 18-20, 23-26, 29, *supra;* Tr. 366-67, 375-76).

DECISION

The Parties' Positions

GCG argues in both appeals that the Corps estimated quantities were "faulty" and the Corps "should be estopped from requiring [GCG] to assume any portion of the excess over or the shortfall under the estimated quantities." The Corps responds that there is no proof of a negligently estimated quantity in either case. In the alternative, in both appeals, GCG asserts the right to an equitable adjustment pursuant to the Variation in Estimated Quantity (VEQ) provision of the contract, on account of quantity underruns. The Corps posits that there is no proof of fixed costs included in either of GCG's pertinent bid and unit prices, and no proof of recoverable fixed indirect costs.

ENG BCA No. 5944: Ladder Rung Replacement

GCG seeks a complete repricing of the payment item for ladder rung replacement work. The claim amount is calculated using GCG's alleged total costs to perform the actual quantity of ladder rung replacements. The actual quantity performed amounts to about 63% of the estimated quantity.

ENG BCA No. 5945: Emergency Occurrence Work

GCG seeks payment of overhead and lost profit for the non-performance of work specified under the payment item for emergency occurrences of reinstallation and removal of waterway gates in the event of high water or a flood, if warranted, as determined and directed by the Contracting Officer, to prevent excessive deposits of silt in the Gulf Intracoastal Waterway.

Jurisdiction

The contract is subject to the Contract Disputes Act, 41 U.S.C. §§ 601-13 (1988, Supp. II 1990, & Supp. III 1991). In 1991, both disputes arose between the parties concerning the claims which underly the appeals. GCG submitted written claims for sums certain (ENG BCA No. 5944, $21,078.74; ENG BCA No. 5945, $4,050.00) and demanded Contracting Officer decisions. The Contracting Officer denied both claims. In both instances, GCG timely appealed to the Board. (Findings 4b, 10-14, 28, 30-33). The Board has proper subject matter jurisdiction.

Negligently Estimated Quantities

Citing *Chemical Technology, Inc. v. United States* [28 CCF ¶ 81,196], 227 Ct.Cl. 120, 645 F.2d 934 (1981); *John Murphy Constr. Co.*, AGBCA No. 418, 79-1 BCA ¶ 13,836; and *Integrity Management Int'l., Inc.*, ASBCA No. 18289, 75-1 BCA ¶ 11,235, *aff'd on recon.*, 75-2 BCA ¶ 11,602; GCG argues that the Corps' faulty estimates should estop the Government "from requiring [GCG] to assume any portion of the ... shortfall under the estimated quantities." Appellant's Pre-Trial Hearing Memorandum at 2. Although not cited by the Appellant, all three decisions rely on the authority of *Womack v. United States* [12 CCF ¶ 81,795], 182 Ct.Cl. 399, 389 F.2d 793 (1968).

The point of *Womack* and the other decisions is that the Government cannot leave a contractor uncompensated for work that was required to be performed where the Government negligently understated the estimated volume of the work to the contractor as the basis for the contractor's bid or price proposal. None of the cited cases involved a contract which included the standard ASPR/DAR/FAR VEQ provision as is found in GCG's contract.

Under construction contracts which include the standard VEQ provision, such as GCG's contract, a contractor is paid the unit price, as bid or proposed and accepted by the Government, for every unit performed. *B&L Constr. Co.*, ENG BCA No. 5772, 91-1 BCA ¶ 23,612. In addition, the contractor may receive an equitable adjustment if an actual quantity variation exceeds 15% of the estimated quantity and causes an increase in the contractor's costs or time for performance. The contract, by way of the standard VEQ provision, protects the contractor from the

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risk of overstated or understated estimated quantities.[5] (Finding 4a).

In any event, even if the negligently estimated quantities theory were considered applicable to these appeals, the Corps correctly argues that GCG has presented no evidence that tends to prove that the quantity estimates were negligently prepared. GCG merely asserts that the Corps faulty estimates are evidenced by "the overall amounts of ... underrun." Appellant's Pre-Trial Hearing Memorandum at 2. However, cases relying on *Womack, supra*, hold that disparities in estimates, alone, do not prove that estimated quantities were prepared without due care. *Medart, Inc. v. Austin* [38 CCF ¶ 76,349], 967 F.2d 579 (Fed. Cir. 1992); *Emerald Maintenance, Inc.*, ASBCA No. 29948, 89-3 BCA ¶ 22,127.

Variation in Estimated Quantity

The usual measure of an equitable adjustment is the reasonable increase or decrease in the contractor's net costs (to which a profit allowance is applied) caused by the compensable event for which the equitable adjustment is due, *e.g.*, a change or differing site conditions. This process is variously described as keeping the contractor whole or maintaining the contractor's profit or loss position as it was before the occurrence of the compensable event.

The VEQ provision of the contract, as here applicable, states that if the actual quantity of a unit-priced item varies by more than 15% below the estimated quantity, an equitable adjustment in the contract price and time for performance will be made upon demand of either party. Any equitable adjustment is to be based upon proof by GCG of an increase in costs due solely, that is, attributable to or caused by, the quantity variation below 85% of the estimated quantity. Concerning ENG BCA No. 5944, only, if GCG proves that the quantity variation caused an increase in the time necessary for completion, a time adjustment may also be due. (Finding 4a).

In general, where a contractor seeks a cost increase pursuant to the VEQ provision for a quantity underrun, the equitable adjustment usually reflects unrecovered fixed costs attributable to non-performance of the adjustable or underrun quantities. *Savoy Constr. Co.*, ENG BCA No. 3789, 78-1 BCA ¶ 13,138; *C.W. Roberts Constr. Co.*, ASBCA No. 17070, 73-2 BCA ¶ 10,108 (contractor recovered the cost of inefficient labor and unnecessary travel expenses during the last nine weeks of the performance period on account of an underrun below 85% of an estimated quantity for painting work).

The effect of procuring construction services by use of unit-priced payment items based on estimated quantities is to establish a range of revenue the contractor can expect for the work called for by the payment item. Recovery for a quantity underrun generally may not exceed the contract price of the adjustable or underrun quantities, *i.e.*, the adjustable quantities multiplied by the unit price. Assuming reasonably priced payment items, the contractor's profit or loss position is maintained by subtracting (1) the costs that would have been incurred to perform the adjustable quantities, *i.e.*, the unperformed unit-priced work below 85% of the estimated quantity, from (2) the revenue that such performance would have provided to the contractor at the unit price agreed upon in the contract.

In these appeals, the Board is unable to assume or infer that reasonably priced payment items were bid by GCG. On the contrary, GCG bid the work without regard for the specific costs of the work to be performed under particular payment items. GCG substantially underpriced the work items pertinent in these appeals. (Findings 5, 8, 20-21, 23-25, 34-35).

In ENG BCA Nos. 5944 and 5945, nonperformance of the adjustable quantities was actually greatly beneficial to GCG on account of its understated unit prices on the two items involved. The foregoing formulation for an equitable adjustment would result in no increased payments to GCG.

[5] From this Board's reading of the *John Murphy* decision, it is not entirely clear whether that contractor would have received payment for each unit performed under unit-priced, estimated-quantity payment items in its contract. That contract included a quantity variations-type provision; however, it never became operative because the actual quantity variations did not exceed the 25% range specified therein. The AGBCA found that the Government solicited bid prices based on estimated quantities which it knew to be incorrect. The apparent reason for the Board's decision was that it would not allow the Government to hold the contractor to the unit prices where there existed intentional, as compared with negligent, understatement of quantities. Such circumstances are not present in these appeals.

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ENG BCA No. 5944: Ladder Rung Replacement

A. *General Considerations*

This discussion is subject to the general rule, formulated above, that any recovery may not exceed the contract price for the adjustable or underrun quantities. GCG seeks over $21,000.00 for an underrun of nine ladder rung replacements. If the underrun quantities had been directed by the Corps and performed by GCG, it would have received a total of $90.00. (Findings 2, 9-11).

The claim is audacious and is its own refutation. The unit price of $10.00 is totally unrealistic. The claim amounts to over $800.00 per unit. It is clear that rather than suffering a financial detriment by not performing the adjustable quantities, GCG greatly benefitted by performing as few ladder rung replacements as it did. Performing additional ladder rung replacements would have increased GCG's loss, if one compares in isolation the actual cost of the work and the contract unit price.

In any event, GCG's claim incorrectly focuses on the costs to complete 26 ladder rung replacements rather than properly attempting to show unrecovered costs attributable to the underrun of nine ladder rung replacements. The facts of this case also allow for examination of particular elements of cost. Such an examination reveals that the total cost claimed by GCG principally is the result of unspecified delays not attributable to the quantity underrun, as will be discussed below. We look below to three direct cost items alleged to have been affected by the underrun.

B. *Extra Material Costs*

GCG claims material costs. If excess material was purchased but not used on account of the quantity underrun, GCG may be entitled to the direct costs plus markups for the excess, less any credit for returned materials. To this extent, the Corps' position, that *only* unrecovered "indirect fixed costs" but no direct costs are recoverable, is too limited. (Findings 18-20, 34-37). Analysis of recoverable costs should not be fixated upon, or limited by, how the costs are best classified in an accounting sense. Most often, any recovery will consist primarily of unrecovered fixed indirect costs; however, as here, recoverable costs may also include direct costs that generally vary by unit of work. Semivariable costs also may, in an appropriate case, be considered.

GCG's President testified that materials were purchased piecemeal, at an increased cost, with some material left over. However, the Board is not persuaded that piecemeal purchases were required because of the quantity underrun. GCG had sufficient bulk quantities of rounds and plate materials in June 1991. Much of the work was performed in August 1991, and more material was purchased at that time. Custom cut and drilled stainless steel plates were purchased in August 1991, in contrast with bulk purchases through June 1991. Even though the materials supplier allowed returns, there is no evidence that GCG made any attempt to return unused materials or calculated the cost benefit of retaining the excess materials. (Findings 7, 15).

No explanation was offered to support the necessity for the purchase of an additional quantity of rounds in August 1991. It would appear that the custom plates were purchased as an expedient in August 1991, to finish quickly and avoid additional liquidated damage assessments. No effort to mitigate any cost increase by availing itself of the opportunity to return materials was evidenced. No credit for their return has been offered. GCG has failed to prove that any excess materials costs resulted from the quantity underrun and that it reasonably mitigated any resultant extra costs. (Findings 3, 15).

C. *Extra Labor Costs*

Claimed labor costs for the project superintendent, contractor quality control representative, and travel costs, which would normally be job overhead costs, but which here were allegedly dedicated full-time to ladder replacement work, resulted from unspecified delays not related to that work. Ladder rung replacement work was not originally scheduled to occur at the end of the job. Schedule revisions after the work had begun, which were not shown to have been caused by ladder rung work, shifted the ladder rung work to a later time, relative to other work. (Findings 16-17). To the extent that extra labor costs or the labor component of job overhead was increased on account of delay, such delay has not been shown to have resulted from the quantity underrun.

D. *Extra Equipment Costs*

Claimed equipment use costs for equipment allegedly dedicated full-time to ladder rung replacement work were also the result of delays unrelated to underrun quantities in that work. (Findings 16-17). There is no

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proof that equipment costs were increased as a result of the quantity underrun.

ENG BCA No. 5945: Emergency Occurrence Work

A. *General Considerations*

Under the contract, GCG was entitled to be paid $7,500.00 for each ordered emergency reinstallation and removal of gate sectors. GCG chose to structure its bid by putting most of the costs for such work in other bid items. It did so because its President considered the emergency work to be an unlikely contingency. (Findings 2, 23-25).

GCG's claim of $4,050.00 for *not* being ordered to do emergency work is based on an allocation of arbitrarily selected overhead and profit percentages to the total payment item price of $15,000.00 (two estimated occurrences of emergency work) that GCG would have received if the work had been ordered. However, it is clear that the *cost* to GCG of such work would greatly have exceeded $7,500.00 per occurrence. There is evidence that the cost to GCG would have been at least double GCG's unit price. Direct costs alone could have been as much as $78,000.00 per occurrence. (Findings 21, 27-29, 34-35).

Simply stated, GCG was unable to prove that any costs were incurred as a result of not being ordered to perform the emergency work. (Findings 24, 26, 29). On the contrary, GCG benefitted greatly from not having to perform the work at a loss. Below, we look to more specific difficulties with GCG's claim formulation.

B. *Overhead*

GCG seeks a portion of its overhead (15% rather than the alleged audited rate of 24%) it claims should be allocated to the pertinent bid item. The theoretical premise of the claim formulation is that the bid price was calculated in the normal manner for construction work: estimated direct costs for labor, equipment, and materials, plus markups. Based on that pricing structure, the claimed equitable adjustment is founded on GCG's allegation that it performed some of the necessary overhead-type activities in preparation for performance of the emergency occurrence work and should recover some of the overhead-type costs. (Findings 28-29).

The claim's premise is contrary to the facts. GCG's specific bid amount for the emergency occurrences bore no proven relationship with the costs which would actually be incurred to perform the emergency occurrence work. (Findings 5, 21, 23-25). The Board will not allow recovery of overhead costs based on an arbitrary percentage allocation which lacks a basis in fact. Any costs arguably incurred with respect to that work were not specifically explained or quantified with sufficient precision to sustain GCG's burden of proof. Moreover, any overhead costs possibly incurred in relation to preparations for the emergency work appear to have been *de minimis* as well as unquantified and insufficiently documented.

C. *Profit*

The claimed profit is similar to the claimed overhead in that it is presented as an arbitrary markup on unproven costs. The same factual problems identified above in connection with overhead are present here.

CONCLUSION

There is no dispute in either appeal that the actual quantity performed was less than 85% of the estimated quantity. The Appellant would be entitled to an equitable adjustment to the extent that any unrecovered costs attributable to non-performance of the adjustable or underrun quantities had been proved. However, the Appellant failed to prove any such costs. In fact, performance of more ladder rung replacement or any emergency occurrence work would have been to GCG's financial disadvantage. No equitable adjustment is due.

ENG BCA Nos. 5944 and 5945 are DENIED.

[¶ 26,526] Jake Sweeney Auto Leasing, Inc.

PSBCA Nos. 3165, 3167, 3168, 3174, 3176, 3180-82, 3194, 3198, November 12, 1993. Contract Nos. 381793-86-V-A045, 381793-86-V-A033, 174038-85-W-A026.

Contract Types—Vehicle Rentals—Burden of Proof.—A contractor was not entitled to recover for dents and other damage that occurred while its vehicles were on lease to the U.S. Postal Service, because the contractor was unable to meet the applicable burden of proof, i.e., establishing that the damage was caused by government personnel and exceeded

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ordinary wear and tear. The board declined to alter this burden of proof on the basis of the contractor's two arguments concerning the proper scope of the government's liability. The contractor maintained that a contract provision absolving the government of liability for ordinary wear and tear was unenforceable and that a vehicle rental contract was a bailment for mutual benefit, which subjected the government to a presumption that it had caused any damage that occurred while the vehicles were in its possession. The board noted that it had considered and rejected both of these arguments in a prior appeal.

For the appellant: Teri Geraci. For the government: John T. Farrell, Jr., United States Postal Service, Philadelphia, Pennsylvania.

Before BROCHSTEIN, COHEN, and FINN, Administrative Judges.

BROCHSTEIN, Administrative Judge: Appellant, Jake Sweeney Auto Leasing, Inc., has appealed from contracting officer's decisions denying, in whole or in part, its claims for damage to vehicles leased by Respondent, United States Postal Service. These appeals are being decided on the record in accordance with 39 C.F.R. § 955.12.

FINDINGS OF FACT

1. Contract No. 381793-86-V-A045 was awarded to Appellant on February 14, 1986, and covered the lease of eight passenger vehicles for use in Park & Loop service at six stations in Cincinnati, Ohio. The term of the contract was from March 23, 1986, through October 25, 1991. (PSBCA Nos. 3165, 3168, 3174, 3176 and 3198 Appeal File Tab (3165 AF A)).

2. Contract No. 381793-86-V-A033 was awarded to Appellant on November 25, 1985, and covered the lease of five passenger vehicles for use in Park & Loop service at the main office and Fort Thomas Branch office in Newport, Kentucky. The term of the contract was from December 21, 1985, through October 21, 1991. (PSBCA Nos. 3167 and 3180-82 Appeal File Tab (3167 AF A)).

3. Contract No. 174038-85-W-A026 was awarded to Appellant on August 14, 1985, and covered the lease of one passenger vehicle for use in Park & Loop service in Brandenburg, Kentucky. The term of the contract was from August 17, 1985, through August 16, 1991. (3194 AF A).

4. Each of the contracts contained the July 1980 version of PS Form 7476, "U.S. Postal Service, General Provisions for Vehicle Hire Contracts." Clause GP-6 of the General Provisions contained the following relevant language:

LIABILITY PROVISIONS

(a) *Contractor's Vehicles.* The Postal Service shall be responsible for loss of, or damage to, the Contractor's vehicles while in its custody only when caused by the act or negligence of any officer or employee of the Postal Service acting in the scope of his employment .... In no event shall the Postal Service be responsible for ordinary wear and tear. (AF A).

5. Through a series of claims dated October 2, 1991 (PSBCA No. 3194 only) and December 2, 1991, Appellant sought the cost of repairing damage to ten of the vehicles, which damage was alleged to have occurred during the contract term. As the basis for each claim, Appellant stated substantially the following:

> USPS had physical possession of vehicle. Damage was not present when vehicle was delivered. No reports have been submitted by USPS to explain damages.

Each of the claims was accompanied by two repair estimates, the lower of which reflected the amount of the claim. (AF B).

Contract No. 381793-86-V-A045

PSBCA No. 3165—Vehicle No. 12002

6. In this appeal, the Form 4577, "Leased Vehicle Condition Report," executed by both parties at the time the vehicle was returned, showed a small dent in the right side door and a small dent in the rear. Appellant's claim, in the amount of $113.00, sought payment for repairs to the left rear quarter panel. In a final decision dated February 7, 1992, the Contracting Officer denied the claim on the basis that it was not possible to determine the cause of the damage or to conclude that the damage exceeded ordinary wear and tear. (3165 AF D, B, E).

PSBCA No. 3168—Vehicle No. 11206

7. In this appeal the Form 4577 noted damage to the rear of the left side of the vehicle. A photograph of the area appeared to show chipped paint and some marks which might be paint damage, but the record contains no further explanation of the photograph. Appellant's claim, in the amount of $113.00, sought payment for repairs to the same area. The Contracting Of-

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ficer, in a decision dated February 7, 1992, denied the claim on the basis that it was not possible to determine the cause of the damage or to evaluate the damage as exceeding ordinary wear and tear. (*Id.*).

PSBCA No. 3174—Vehicle No. 11146

8. The Form 4577 in this appeal showed small dents in the front of the left side and on the hood. Photographs accompanying the claim are consistent with the information on the Form, but provide little, if any, useful information. Appellant's claim, in the amount of $199.00, sought payment for damage to the left front fender and hood. In a decision dated February 7, 1992, the Contracting Officer allowed the claim in the amount of $99.50 for damage to the hood, but disallowed the balance on the basis that he could not determine the cause of the damage or determine that it was in excess of ordinary wear and tear. (*Id.*).

PSBCA No. 3176—Vehicle No. 11203

9. In this appeal, the Form 4577 noted damage to the right front of the vehicle. Appellant's claim, in the amount of $130.00, sought payment for the cost of replacing the vehicle's front valance [spoiler]. In a final decision dated February 7, 1992, the Contracting Officer conceded that damage to the valance was outside ordinary wear and tear but denied the claim on the basis that Appellant had submitted no evidence that the damage had been caused by the act or negligence of a Postal Service employee. (*Id.*).

PSBCA No. 3198—Vehicle No. 11364

10. The Form 4577 in this appeal noted damage to the front spoiler and Appellant's claim, in the amount of $130.00, sought payment for replacing the same part. In a final decision dated February 7, 1992, the Contracting Officer conceded that a broken valance was outside ordinary wear and tear but denied the claim on the basis that Appellant had not shown that the damage was caused by the act or negligence of a Postal Service employee. (*Id.*).

Contract No. 381793-86-V-A033

PSBCA No. 3167—Vehicle No. 11222

11. In this appeal, the Form 4577, "Hired/Borrowed Vehicle Condition Report," noted a dent in the left front fender and a small dent in the right door. Appellant's claim, in the amount of $194.00, sought payment for repairs in the same locations. In a final decision, dated February 3, 1992, the Contracting Officer denied the claim on the basis that the damage had not been shown to have been caused by negligence of Postal Service personnel or to have been in excess of ordinary wear and tear. (3167 AF D, B, E).

PSBCA No. 3180—Vehicle No. 11223

12. The Form 4577 in this appeal noted small scratches at the rear of the left and right sides of the vehicle. Appellant's claim, in the amount of $128.00, sought the cost of making repairs in the same areas. In a final decision dated February 3, 1992, the Contracting Officer denied the claim on the basis that the damage could not be determined to be the result of negligence of Postal Service personnel or to be in excess of ordinary wear and tear. (*Id.*)

PSBCA No. 3181—Vehicle No. 11220

13. In this appeal, the Form 4577 showed a dent in the left front fender, dents in the front of the vehicle, and a broken spoiler. Appellant's claim, in the amount of $244.60, covered the cost of repairing the left front fender and replacing the spoiler. In a final decision, dated February 3, 1992, the Contracting Officer denied the claim in its entirety. The Contracting Officer concluded that it was not possible to determine that the damage to the left front fender was caused by the negligence of Postal Service personnel or that it was in excess of ordinary wear and tear. As to the broken spoiler, the Contracting Officer conceded that the damage was outside ordinary wear and tear, but denied the claim on the basis that Appellant had not submitted evidence that the damage was caused by the act or negligence of Postal Service employees. (*Id.*).

PSBCA No. 3182—Vehicle No. 11221

14. The Form 4577 in this appeal showed a dent in the rear of the left side and a broken spoiler. Appellant's claim, in the amount of $238.60, sought payment for repairing the left quarter panel and replacing the spoiler. In a final decision, dated February 3, 1992, the Contracting Officer denied the claim. The portion related to quarter panel damage was denied on the basis that it was not possible to determine that the damage was in excess of ordinary wear and tear and had been caused by the negligence of Postal Service personnel. As to the broken spoiler, the Contracting Officer agreed that the damage was in excess of ordinary wear and tear, but denied the claim on the basis that Appellant had not shown the damage to

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have been caused by the act or negligence of Postal Service employees. (*Id.*).

Contract No. 174038-85-W-A026

PSBCA No. 3194—Vehicle No. 11126

15. In this appeal, the Form 4577 noted scratches on the front and rear bumpers and on the right side, a dent in the front of the vehicle, faded paint, and a torn driver's seat. Appellant's claim, in the amount of $156.00, sought payment for repairing damage to the right quarter panel and front bumper. In a final decision dated February 3, 1992, the Contracting Officer denied the claim on the basis that the damage had not been shown to have been in excess of ordinary wear and tear or to have been caused by the negligence of Postal Service employees. (3194 AF D, B, E).

DECISION

In its Complaints,[1] Appellant argues that these contracts are mutual benefit bailment contracts under which Respondent, as bailee, is subject to a presumption that any damage to the bailed property was caused by Respondent's negligence. Appellant also argues that terms of the "Liability Provisions" [Finding 4] which limit Respondent's liability with respect to ordinary wear and tear are unenforceable. These arguments have been considered and rejected by this Board in *Jake Sweeney Auto Leasing, Inc.*, PSBCA Nos. 3091-3094, 3096, 3098, 3122, 3125, 93-1 BCA ¶ 25,363, where we concluded that the presumption urged by Appellant was inconsistent with the contract language and that the limitation on liability for ordinary wear and tear was enforceable. Those conclusions apply equally to the appeals here.

As the party seeking recovery, Appellant has the burden of proving that an act or negligence on the part of Respondent's personnel was the proximate cause of the damage to each vehicle and that the damage exceeded ordinary wear and tear. *E.g., Jake Sweeney Auto Leasing, Inc.*, PSBCA Nos. 2784-2788, 2791-2798, 91-3 BCA ¶ 24,278. Respondent argues that Appellant has failed to meet that burden.

In PSBCA Nos. 3176, 3181, 3182 and 3198 the Contracting Officer conceded that damage necessitating the replacement of a valance was beyond damage which could be considered ordinary wear and tear. However, Appellant has provided no evidence to show that such damage was caused by an act or negligence of Respondent's personnel. As to other damage in dispute in these appeals, Appellant has provided no evidence to show that any damage was beyond ordinary wear and tear or was caused by an act or negligence of Respondent's personnel. Thus, Appellant has failed to satisfy its burden of proof in these appeals.

The appeals are denied.

[¶ 26,527] Montgomery Ross Fisher, Inc. & H.A. Lewis, Inc., A Joint Venture

VABCA No. 3696, November 17, 1993. Contract No. V691C-1248H.

Modifications—Bar to Claims—Settlement Agreement v. Modification.—Although the Federal Acquisition Regulation requires that a modification to a contract be in writing and executed by both parties, the board determined that an oral agreement to settle litigation did not need to be reduced to writing in order to be enforceable, because the agreement to settle was not a contract modification within the meaning of the FAR. Although the settlement agreement may have had an effect on the dispute arising out of the instant contract, it was a settlement of claims in litigation before an administrative body rather than a contract modification.

Mistakes—Relief After Award—Settlement Agreement.—An express agreement to settle an appeal could not be rescinded on the basis of the contractor's unilateral mistake concerning the price proposal for a field change order, because the mistake was not a clerical or arithmetic mistake but a mistake in estimating the cost of the changed work. The contractor, as the author of the price proposal submitted to the government, was presumed to know the basis on which the proposal was prepared.

Mistake—Relief After Award—Unconscionability.—The fact that a subcontractor's claimed costs for a field change order were more than six times the amount estimated

[1] Appellant did not file a brief.

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by the prime contractor and the government did not render the settlement agreement concerning the change order unconscionable, because the subcontractor's cost proposal was submitted after the settlement meeting, and there was no indication that the government took unfair advantage in the parties' negotiation of the settlement. The contractor's and the government's estimate of the field change order were nearly identical. This fact strongly suggested that the parties were on an equal footing in reaching the settlement amount and that the reasonable value of the work for the change order was embodied within the estimates.

For the appellant: David W. Cornwell, Torrance, California. For the government: John Manfredonia, Trial Attorney, Office of General Counsel, Washington, D.C. William E. Thomas, Jr., Assistant General Counsel, and Phillipa L. Anderson, Deputy Assistant General Counsel, of Counsel.

Before KREMPASKY, MCMICHAEL, and ROBINSON, Administrative Judges.

KREMPASKY, Administrative Judge: Respondent, Department of Veterans Affairs ("VA" or "Government") has filed a Motion for Summary Judgment seeking to enforce an oral settlement of this appeal. Appellant, Montgomery Ross Fisher, Inc. and H.A. Lewis, Inc., A Joint Venture ("MRF"), contests the VA's Motion on the basis that the parties' settlement agreement to resolve this appeal was premised on a mistake of fact and that enforcement of the settlement agreement would be unconscionable. This appeal arises out of Contract No. V691C-1248H ("Contract"), for the Renovation of Domiciliary Buildings 214 and 215 at the West Los Angeles, California VA Medical Center ("VAMC, West Los Angeles"). The appeal is from a deemed denial by the VA Contracting Officer ("CO") of MRF's claim for an equitable adjustment of $7,597 for Field Change Order ("FCO") 4K for the rerouting of a conduit for a new transformer in Building 217. The appeal was docketed on June 2, 1992.

The record before the Board consists of the Complaint and Answer; the Government's Motion for Summary Judgment, including 5 attached exhibits (cited as "MSJ Exh. G-__"; and, Appellant's Opposition to the Government's Motion which also includes six exhibits (cited as "MSJ Exh. A-__"). The record also includes the Consolidated Appeal File submitted by the parties (cited as "R4, tab __") consisting of 132 exhibits.

FINDINGS OF FACT FOR THE PURPOSES OF RULING ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The following findings of fact are made for the purposes of this decision only.

The Contract was awarded to MRF on September 30, 1987, for the original contract price of $11,600,000. The Notice to Proceed was issued on November 17, 1987; the Contract was to be complete 1080 days from the Notice to Proceed date. (R4, tab 1)

In Request for Information ("RFI") No. 204, dated August 14, 1990, MRF requested direction concerning a discrepancy with the existing route of an electrical conduit and the location of a required new transformer to which the conduit was to connect. The VA responded to RFI No. 204 on August 15 and 29, 1990, with direction to reroute the conduit. On October 10, 1990, the VA Senior Resident Engineer, acting within the scope of the authority delegated to him by the Contracting Officer, unilaterally issued FCO 4K in the amount of $7,300 for the conduit rerouting. The Government cost estimate for the work was $7,377. FCO 4K indicated that the Contract price had been increased by $7,300 "for fiscal purposes" and directed MRF to submit a cost proposal for the conduit work within 30 days. (R4, tab 18)

By letter dated March 2, 1992, MRF forwarded its price proposal for FCO 4K in the amount of $7,597. The amount of the proposal was developed by MRF's estimator and was not based on any submission from MRF's electrical subcontractor, EMI Electric, Inc. ("EMI"). (MSJ Exh. A-1, A-2).

The VA's counsel, by a January 11, 1993, facsimile transmission, forwarded an offer to MRF's counsel to settle 35 appeals arising out of the Contract. Included in this offer was an offer to settle the appeal in VABCA No. 3696 for a total of $7,377. The offer to settle VABCA No. 3696 included $6,706 for the claim of MRF's electrical subcontractor and $671 for MRF's "fee" and was expressly approved by the VA's Contracting Officer. (MSJ Exhs. G-1, G-5)

Having received no response to its January 11 offer, the VA, by letter dated February 24, 1993, asked MRF to respond to the Government's offer, including the offer to resolve VABCA No. 3696. (MSJ Exh. G-2)

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MRF's counsel responded to the VA's settlement offer by facsimile transmission on March 10, 1993. MRF's response, in part, stated that it accepted the VA's offer to resolve VABCA No. 3696 for the amount offered by the VA. As stated in his declaration supporting Appellant's opposition to the Government's motion, MRF's principal responsible for the settlement negotiations, Mr. Herbert A. Lewis, authorized counsel to accept the offer to settle VABCA No. 3696 based on his cursory review of the summary sheet of MRF's original proposal for FCO 4K. This summary included an amount claimed by MRF for the work of its electrical subcontractor, EMI Electric, Inc. ("EMI") (who is the real party in interest in this appeal) for the Building 217 conduit rerouting work. (MSJ Exhs. G-3, A-1, A-2)

The parties conducted a settlement conference, attended by the counsel and principals for each party, including Mr. Lewis and Mr. Joshua Rubin, a principal of EMI, on June 21, 1993, for the purpose of finally resolving numerous appeals arising under the Contract, including this appeal. The subject of VABCA No. 3696 was broached at the conference by Mr. Rubin. At that time, counsel for both parties represented to Mr. Rubin that VABCA No. 3696 was settled and that there was no need for further discussion. Mr. Rubin made no further comment or inquiry about VABCA No. 3696. Consequently, the prior settlement in VABCA No. 3696, although acknowledged, was not specifically discussed at the settlement conference. Mr. Lewis' settlement conference notes characterize VABCA No. 3696 as having been "settled by stipulation." (MSJ Exhs. G-4, A-1)

Consistent with several Joint Status Reports submitted to the Board by the parties, the Board, upon the parties' request, by Order dated May 25, 1993, had suspended proceedings in the numerous appeals arising out of the Contract to facilitate the parties' settlement discussions. Based on the parties' declared intention in the Joint Status Reports to prepare a written Stipulation of Settlement, the Board's May 25 Order included a direction to submit a written stipulation of settlement with the Joint Motion for Judgment. Therefore, the parties contemplated that any settlement agreements reached would be memorialized in writing in the form of a Stipulation of Settlement to support the Joint Motion for Judgment and to facilitate payment of the anticipated judgment to be received from the Board.

The parties filed their Joint Motion for Judgment on Stipulated Settlement relating to 57 appeals arising under the Contract on July 20, 1993; the Board, in turn, issued its Order Entering Judgment on July 27, 1993. The appeal in VABCA No. 3696 was not included in either the parties' Motion or the Order Entering Judgment.

On July 13, 1993, Mr. Lewis met with Mr. Rubin to resolve outstanding issues between MRF and EMI. At that time, Mr. Rubin informed Mr. Lewis that EMI's cost proposal for FCO 4K was $42,028.70. In reviewing MRF's original proposal for FCO 4K, Mr. Lewis determined that MRF's original claim to the VA had been based on an estimate prepared by MRF's estimator and that EMI, prior to July 13, 1993, had not submitted a cost proposal for FCO 4K. Upon EMI's presentation of its cost proposal, counsel for MRF, under Mr. Lewis' instruction, contacted VA counsel by telephone on July 14, 1993, and retracted MRF's prior "acceptance" of the Government's offer to settle VABCA No. 3696. (MSJ Exhs. A-1, A-3)

On July 22, 1993, EMI's counsel formally submitted EMI's claim for FCO 4K to MRF. Mr. Lewis responded, by letter to EMI's counsel dated July 23, 1993. In his response, Mr. Lewis stated that he was returning the claim without action because it was incorrectly prepared. In addition, Mr. Lewis, characterizing EMI's cost proposal as "fallacious", questioned its validity. (MSJ Exhs. A-4, A-5)

DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Saturn Construction Company,* VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd. per curiam,* 991 F.2d 810 (Fed. Cir. 1993) (unpublished decision).

There are no material facts relevant to the Government's Motion in dispute. Therefore, our inquiry is directed to whether the Government, based on the undisputed facts, is entitled, as a matter of law, to a judgment enforcing the parties' agreement to settle VABCA No. 3696.

The VA, relying exclusively on our holding in *Elkhorn Construction Co.,* VABCA No. 1493, *et al.,* 84-2 BCA ¶ 17,435, asserts that MRF's acceptance of the VA's offer to settle VABCA No. 3696 and the parties' subsequent mutual oral reaffirmation of their agreement at the settlement conference constituted an enforceable express oral contract

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notwithstanding the fact that the parties intended, as directed by the Board, to execute a formal, written Stipulation of Settlement memorializing the agreement. Consequently, the VA contends that it is entitled to a judgment enforcing the oral settlement as a matter of law.

MRF does not contest that it orally agreed to settle VABCA No. 3696; nor, is it contested that the parties' agreement to resolve VABCA No. 3696 included the understanding that settlement of this appeal would be implemented by a Stipulation of Settlement supporting a Joint Motion for Entry of Judgment to be submitted to the Board. However, MRF contends that the agreement to settle VABCA No. 3696 resulted from its unilateral mistake of fact concerning the value of EMI's claim and that this mistake of fact entitles it to rescind its acceptance of the VA's offer. In addition, MRF asserts that it is entitled to rescission because enforcement of its agreement to accept payment of $7,377 to settle VABCA No. 3696, in view of EMI's claim of $42,028.70, would be "unconscionable."

The VA correctly asserts that under *Elkhorn*, the parties' oral agreement to settle VABCA No. 3696 is binding and enforceable. We found in *Elkhorn* that the enforceability of an otherwise valid and binding oral settlement agreement could not be defeated by the parties' failure to execute a written Stipulation of Settlement formalizing the agreement. Critical to our holding in *Elkhorn* was our finding, under the facts present there, that the oral Stipulation of Settlement fulfilled all of the elements necessary for a binding contractual agreement. Based on the undisputed facts and the parties representations here, it is clear that these same elements were fulfilled in the agreement to settle VABCA No. 3696. However, the Board in *Elkhorn* recognized that it may have been compelled to reach an opposite result by *SCM Corp. v. United States* [26 CCF ¶ 83,166], 219 Ct. Cl. 459, 595 F.2d 595 (1979) if the applicable regulations controlling the result in *SCM* had been present in the case before it.

In *SCM Corp.*, the Court of Claims, the predecessor court to the Court of Appeals for the Federal Circuit, held that a settlement agreement resolving a dispute arising out of a Department of the Army contract constituted a contract modification. Contract modifications, the court held, were required to be executed in writing on a Standard Form 30 by the then current Armed Services Procurement Regulations ("ASPR"). In the face of this regulatory requirement, the Court stated:

> Oral understandings which contemplate the finalization of the legal obligations in a written form are not contracts in themselves. When legal obligations between the parties *will be deferred* until the time when a written document is executed, there will not be a contract until that time. *See Restatement of Contracts* § 26 (1932). *See also Corbin on Contracts* § 30 (1963). Under the regulations [ASPR], Government funds were not obligated until the execution of standard form 30. The parties were well aware of the fact that only the written contract modification could finalize their agreement. No commitments in the oral understanding to act in any way by either party were to be consummated until execution of the supplemental agreement. Whether the parties had reached a clear understanding of the terms of the settlement makes no difference and we specifically intimate no decision on that issue. We thus conclude that neither party was bound by its negotiations until standard form 30 was executed. *SCM Corp.*, 219 at 464,595 F.2d at 598 [emphasis in original].

We should note, however, that the court in *SCM* carefully pointed out that it was not ruling on the more general issue of enforceability of oral contracts with the Government. *SCM Corp.*, 219 Ct. Cl. at 464, 595 F.2d at 598.

The United States Court of Appeals for the Federal Circuit, in *Mil-Spec Contractors, Inc. v. United States* [34 CCF ¶ 75,412], 835 F.2d 865 (Fed. Cir. 1987), after reviewing the Federal Acquisition Regulation ("FAR"), 48 CFR Chap. 1, mandating that contract modifications be written, found the effect of the FAR requirements to be the same as the ASPR requirements considered by the Court of Claims in *SCM*. The *Mil-Spec* court, citing *SCM* and the applicable FAR language, held that oral settlements of claims under a Federal procurement contract are ineffective, noting that: "SCM fully supports, if it does not compel, our conclusion that the oral agreement to settle Mil-Spec's claim for $6,367 was not an effective modification of the contract until both parties had signed a written modification agreement—which the contractor never did." *Mil-Spec*, 835 F.2d at 869.

We are confronted with the issue of whether the parties' oral settlement is a contract modification; if the settlement is a contract modification, as defined by the FAR, it

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is governed by the holding of *Mil-Spec*. If it is not a modification, then, as discussed above, the oral settlement agreement is binding and enforceable.

The case at bar involves the same FAR provisions as those extensively quoted and confronted by the *Mil-Spec* court. That court, citing *SCM Corp.*, found that the provisions of FAR 2.101 (including bilateral modifications within the definition of a contract and defines contract as written instrument), FAR 43.101 (contract modifications defined as written changes to a contract), and FAR 43.103(a) (bilateral modification defined as a contract modification signed by both parties) read collectively resulted in the parties' oral settlement of the contractor's equitable adjustment claim being unenforceable. The Court concluded: "The oral agreement was a modification of the contract, since it increased the amount the government would pay for the work Mil-Spec had done." *Mil-Spec*, 835 F.2d at 866-67

The Court of Appeals for the Federal Circuit in *Texas Instruments, Inc.*, 922 F.2d 810 (Fed. Cir. 1990), addressed the issue of the enforceability of oral contract modifications and upheld the enforceability of an oral agreement establishing the price of certain unpriced line items in a contract. Although it specifically recognized the continuing validity of *Mil-Spec*, the *Texas Instruments* Court, nevertheless, permitted the enforcement of an oral agreement on the price of several unpriced contract line items. The Court based its holding on applicable contract terms and regulations and distinguished the circumstances present in *Texas Instruments* from *Mil-Spec* by determining that the negotiation of prices for the unpriced contract line items did not constitute a contract modification. Therefore, the Court concluded, *Mil-Spec* did not preclude the enforcement of the oral negotiated price agreements since there was no regulatory provision requiring that such pricing agreements be reduced to writing. *Texas Instruments*, 922 F.2d at 814.

SCM, Mil-Spec, and *Texas Instruments* all involved oral settlements of claims or proposals for equitable adjustments arrived at in the normal course of contract administration prior to appeal. *See also Centennial Leasing v. General Services Administration*, GSBCA No. 11451, 93-1 BCA ¶ 25,350. Here, however, as in *Elkhorn*, we are dealing with the settlement of litigation. In our view, in the absence of controlling law or regulation, an agreement to settle litigation under the jurisdiction of the Board is not a contract modification within the meaning of the FAR. Consequently, we are not bound by *Mil-Spec*'s formalistic dictates with regard to the necessity that agreements for contract modifications be reduced to writing in a form specified by an applicable regulation in order to be enforceable.

The 9th Circuit in *United States v. Bissett-Berman Corp. et al.* [18 CCF ¶ 82,287], 481 F.2d 764 (9th Cir. 1973) confronted circumstances similar to those present in this case. In *Bissett-Berman*, the Government appealed the District Court's grant of the defendant-appellee's motion for summary judgment in the Government's breach of contract, tort, and admiralty suit. The suit arose out of a contract between the Department of Navy and Bissett-Berman for the installation at sea of a Government-owned hydrophone array. During contract performance, the hydrophone array was lost at sea. The Government instituted the action in District Court following a contract dispute and appeal to the Armed Services Board of Contract Appeals ("ASBCA") relating to the loss of the hydrophone array. The appeal was dismissed by the ASBCA with prejudice pursuant to the parties' Stipulation of Settlement filed with the board. The District Court based its judgment in favor of Bissett-Berman, in part, on the Stipulation of Settlement filed in the ASBCA proceeding.

In both the District Court and Court of Appeals actions, the Government argued that the Stipulation of Settlement was a nullity because such a settlement could only be effectuated by a contract modification properly executed under applicable procurement regulations. Citing the sources and extent of the ASBCA's authority and the judicial nature of ASBCA proceedings, the Court of Appeals upheld the lower court's ruling concerning the conclusive effect of the settlement of the appeal before the ASBCA, stating:

> The [District] trial court did not regard the Stipulation of Settlement as simply a contract modification, nor do we. It may have had an effect on a dispute arising out of a contract, but it was in fact and in law the settlement of claims in litigation before an administrative body constituted by law to make an adjudication. *Bissett-Berman*, 481 F.2d at 769.

We concur with 9th Circuit's well-reasoned analysis in *Bissett-Berman Corporation*. Holding the Board and the parties before us hostage to the minutiae of FAR forms and procedures for contract modifications in the settlement of appeals would

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eviscerate our authority, and obligation, to control our docket and to oversee, encourage, and implement the settlement of contract appeals properly in litigation before the Board. Thus, the parties' oral agreement for the settlement of the appeal in VABCA No. 3696 is a binding and enforceable agreement.

Even if we were to find that a "writing" was required to bind MRF to the settlement of VABCA No. 3696, the facsimile offer and acceptance exchanged by the parties' counsel would satisfy any requirement for a written agreement. *Robinson Contracting Co., Inc. v. United States* [35 CCF ¶ 75,654], 16 Cl. Ct. 676 (1989). The fact that the offer and acceptance were not executed by MRF's principal or the CO does not defeat the enforceability of the agreement. Both counsel were acting with the express knowledge of their clients; furthermore, the principals and their counsel in litigation are entitled to rely on the actions of opposing counsel even where the CO has the sole authority to bind the United States. *Bissett-Berman,* 481 F.2d at 768.

Having found that the parties entered into an express agreement for the settlement of the appeal in VABCA No. 3696, we turn to MRF's contentions that the agreement to settle VABCA No. 3696 should be rescinded because MRF based its acceptance of the VA's offer on its unilateral "ministerial error" and that enforcement of the agreement in this circumstance would be unconscionable.

A party seeking reformation or rescission of contract based on a unilateral mistake must demonstrate both that the mistake resulted from a clear arithmetic or clerical error or misreading of contract requirements and that the other party knew or should have known of the mistake at the time of contract formation. A party's unilateral error of judgment will not support contract reformation or rescission. *United States v. Hamilton Enterprises, Inc.* [31 CCF ¶ 71,239], 711 F.2d 1038 (Fed. Cir. 1983); *The Faulkner Corporation,* VABCA No. 2998, 90-1 BCA ¶ 22,507.

Thus, MRF must demonstrate that: 1) it made a mistake; 2) the mistake was clerical or arithmetic (there is no issue relating to misreading Contract requirements here); and, 3) that the Government knew or should have known of the mistake in order to rescind its agreement settling VABCA No. 3696. The "mistake" asserted by MRF arose only upon EMI's submission, subsequent to MRF's acceptance of the Government's offer, of its claim to MRF. MRF argues that Mr. Lewis' cursory review of the 1992 proposal for FCO 4K to simply verify the amount of the proposal was a "ministerial" act resulting in MRF's mistake as to the amount claimed by EMI for the FCO 4K work.

MRF asserts that it can be relieved of the consequences of its unilateral "ministerial" errors. Although it offers no precedent or other basis for doing so and without defining the term, MRF apparently presumes that "ministerial" errors are the same as clerical or arithmetic errors. Mr. Lewis, in January 1993, reviewed the summary cover of its proposal for FCO 4K submitted to the VA the previous year in determining to accept a VA offer $200 less than MRF's proposal. This review, even if it could be characterized as "ministerial", was neither a clerical nor arithmetic error. Moreover, if MRF made a mistake concerning the price of FCO 4K, the mistake was made in March 1992, nearly eighteen months after FCO 4K was issued, when MRF decided to submit a proposal for FCO 4K based on its own estimates without receiving a proposal from EMI. Since Mr. Lewis was the author of the proposal submitted to the VA, he is presumed to know the basis on which it was prepared. The fact that, in January of 1993, he only reviewed the cover summary of his March, 1992 proposal, does not eliminate the fact that the proposal amount in March 1992 was the result of MRF's exercise of its business judgment to seek additional funds from the VA on the basis of its, not EMI's, estimate of the costs associated with FCO 4K.

Consequently, any MRF mistake in accepting the VA's offer to settle VABCA No. 3696 was a unilateral mistake of judgment for which it is not entitled to rescission of the agreement. We should also note that MRF makes no assertion, nor is there any evidence, that the VA was or should have been aware of the mistake. In fact, the evidence is to the contrary. The VA's estimate for FCO 4K was $7,377, the amount of its offer; MRF's proposal was $7,597. Clearly, MRF has not met its burden to demonstrate that the VA knew or should have known that MRF's agreement to the sum of $7,377 was a mistake or that EMI would submit a claim to MRF for over six times the amount at which MRF had valued its work.

Even though we have found that MRF's unilateral mistake of judgment will not support rescission of the settlement agreement, we must also deal with the issue of whether enforcement of the agreement would be unconscionable. Where the factors permitting

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rescission of a contractual agreement due to a unilateral mistake are not present, such relief may still obtain based on the theory of unconscionability. John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts, 2nd Edition,* 239-48 (1985) MRF asserts that the VA should not be permitted to "get something for nothing" by the enforcement of its agreement to settle VABCA No. 3696. In MRF's view, it would be unconscionable to permit the VA to pay only $6,838 (the amount for the EMI portion of the FCO 4K work) in the face of EMI's claim of over $42,000 for the work.

The application of the theory of unconscionability to Federal contracts, requires proof that the Government has somehow taken an unfair advantage of the contractual relationship. *Fan, Inc.,* GSBCA Nos. 7836, 8715, 91-1 BCA ¶ 23,364. In this case, the VA's and MRF's independent estimates of the value of FCO 4K are within $220 of each other; this fact strongly suggests that the parties were on equal footing in reaching the settlement amount and that the reasonable value of the work for FCO 4K is embodied within the estimates. EMI's cost proposal was submitted subsequent to the settlement meeting at which EMI was present, nearly two years after FCO 4K was issued. The fact that EMI's cost proposal was over six times the amount estimated by the both MRF and the Government for EMI's work does not, absent some indication of validity, necessarily result in the conclusion that the VA took unfair advantage in the parties' negotiation of the settlement.

MRF has propounded what may be characterized as a theory of "speculative unconscionability" by grounding the purported unconscionability of its settlement on a cost proposal by its subcontractor which it has previously rejected as erroneous and fallacious. Thus, MRF asks us to void its agreement to settle VABCA No. 3696 because of the potential, based on EMI's rejected cost proposal, that the agreement, at some point, may become unconscionable.

In the Federal contracts area, unconscionability is normally applied to mistake-in-bid situations where, in the absence of a mutual or unilateral mistake permitting such relief, a bid is allowed to be rescinded or withdrawn because of the "extreme" difference between other bids or the reasonable price of the item or work. *Carrier Corp. v. United States* [32 CCF ¶ 72,717], 6 Cl. Ct. 169 (1984). Rescission of a negotiated mutual agreement because of unconscionability is generally not available absent demonstrable Government overreaching. *Louisiana-Pacific Corp. v. United States* [29 CCF ¶ 81,737], 228 Ct. Cl. 363, 656 F.2d 650 (1981).

Thus, under the undisputed facts present here, Appellant has not established that the parties' agreement to settle VABCA No. 3696 is unconscionable. As the General Services Administration Board of Contract Appeals stated in *American Transparents Plastics Corporation,* GSBCA No. 7006, 85-1 BCA ¶ 17,819 at 89,150-151:

> The doctrine of unconscionability is applied in our circuit as a means to prevent oppression and unfair surprise. It is not intended as a tool to permit tribunals the discretion to redistribute risks assumed by the contracting parties in the bargaining process.

Accordingly, the VA is entitled to the enforcement of the agreement to settle VABCA No. 3696 which was finalized at the settlement conference of June 21, 1993.

DECISION

For the foregoing reasons the Government's Motion for Summary Judgment in the Appeal of Montgomery Ross Fisher, Inc. & H.A. Lewis, Inc., A Joint Venture, VABCA No. 3696, under Contract No. V691C-1248H is **GRANTED.**

Accordingly, the above referenced appeal is **SUSTAINED** and Appellant, Montgomery Ross Fisher, Inc. & H.A. Lewis, Inc., A Joint Venture, is found entitled to a judgment of $7,377 plus interest pursuant to the Contract Disputes Act.

[¶ 26,528] Computer Valley International, Ltd.

ASBCA Nos. 39658, 40496, November 16, 1993. Contract No. NAFSAC-86-C-0006.

Procedure, Boards—Reconsideration—Factual Error.—Upon reconsideration of an earlier decision denying a contractor's claim for the costs incurred in relocating its computer concession, the board considered the exceptions advanced by the contractor to the

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factual findings and affirmed its decision because there was no showing that the board erred in its findings.

For the appellant: James A. Langemak, Vice President, and Michael J. Lyon, Director. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. E. Michael Chiaparas, JAGC, Trial Attorney.

Before YOUNGER, SPECTOR, and THOMAS, Administrative Judges.

Reconsideration of 94-1 BCA ¶ 26,297 denied.

YOUNGER, Administrative Judge: Appellant has moved for reconsideration of our decision regarding its claims relating to a concession contract with a non-appropriated fund activity. Familiarity with our decision is assumed.

In its motion, appellant takes exception to 26 of our 35 findings. Most of these exceptions are simply expressions of disagreement with our findings. Those exceptions that appear to be either outcome-determinative or otherwise significant are as follows:

- contrary to finding 18, and our decision regarding Lyon's advice to respondent to make payments to Scope, "it is irrelevant how many verbal requests Mr. Lyon might have made [to respondent] to make contract ... payments to Scope GmbH. Until a contract modification per clause I-42 had been accomplished, no change in contract payment terms is in effect;"
- contrary to finding 21, "there is a considerable body of evidence in the record that Appellant's two key [5 January 1988 and 15 February 1988] letters were received by Respondent in a timely manner," rather than in December 1988; and
- contrary to finding 29, "[t]here is no evidence [that] Respondent's 26 May 1988 letter was ever even sent, let alone received by Appellant."

In view of the finality accorded our decision by the "DISPUTES" clause of the contract (*see* finding 5), we have granted the motion. Upon reconsideration, we are not persuaded that we erred. We address appellant's major exceptions in the order set forth above.

1. *Finding 18.* We reject appellant's contention that we disregarded clause I-42, "MODIFICATIONS AND ADDITIONS," which generally required modifications, deletions or additions to be accomplished bilaterally through formal amendment. There is no doubt that the preponderance of the evidence, as recited in finding 18 and as implied in appellant's 5 January 1988 letter (finding 21) is that appellant requested, and respondent agreed, to make Scope a payee on checks beginning in 1987. While this informal arrangement was not reduced to writing, clause I-42 does not render it nugatory on that account. "[U]nder District of Columbia law [*see* finding 7], '[i]t is well settled that a written contract may be modified, rescinded or discharged by subsequent oral agreement; also that an express stipulation against oral modification is no bar to the parties' right to contract anew on the subject, since such stipulation like any other term of the contract may be rescinded.'" *Southern Railway Co. v. National Railroad Passenger Corp.,* Civil Action No. 88-1672-LFO (D.D.C. Aug. 16, 1989), 1989 U.S. Dist. LEXIS 8857 (*quoting Nickel v. Scott,* 59 A.2d 206, 207 (D.C. 1948)); *see also Pan American Optical Co., Inc.,* ASBCA Nos. 17383 *et al.,* 74-1 BCA ¶ 10,566 at 50,058 (holding that a clause identical to clause I-42 did not bar an informal agreement effecting a price increase on a date earlier than specified in a formal amendment). In any event, we have found that the payments made to Scope, as enumerated in finding 22, represented Scope's percentage of gross sales from inventory that it owned and sold.

2. *Finding 21.* We continue to give credence to the consistent testimony of the contracting officer (he did not see the January letter "until I received that letter dated 16 December 1988;" the February letter "is the same. It was attached to the 16 December letter of '88"); the contracting officer's representative (he did not see the January letter "at any time in any conjunction with that [January] date at all;" "[t]he same would apply" to the February letter); and the contract specialist ("there's no doubt" that he first saw the January and February letters in December). In the face of this testimony, we are not swayed by the conclusion of one of respondent's attorneys that, in preparing the 26 May 1988 letter (*see* finding 29), respondent derived appellant's then-current address from the February letter. While this conclusion, if true, would suggest receipt of the February letter by May, we do not find it persuasive. The attorney was reviewing the Rule 4 file nearly two years af-

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ter the fact, and he lacked personal knowledge of the circumstances. By contrast, the contracting officer's representative had personal knowledge. He testified that "[t]he address that's on the letter is a residence address that was shown in documents where Mr. Langemak had actually sold an interest in Scope GmbH to a third party ... and that address was the address that was available.... [T]hat was the address I used."

3. *Finding 29.* We reject appellant's assertion that the record fails to establish that the 26 May 1988 letter was either sent or received. The record contains credible testimony that the letter was sent. When asked about the letter, the contract specialist testified unequivocally that "I personally put it in the mail to the address as so indicated on the letter." Mindful of the "CHOICE OF LAW" clause in the contract (*see* finding 7), we apply the rebuttable presumption that "[p]roof that mail matter is properly addressed, stamped and deposited in an appropriate receptacle has long been accepted as evidence of delivery to the addressee." *Legille v. Dann,* 544 F.2d 1, 4-5 (D.C. Cir. 1976); *see also Diamond Service Co., Inc. v. Utica Mutual Insurance Co.,* 476 A.2d 648, 654 n. 13 (D.C. 1984) ("[a] letter properly addressed, stamped and mailed, is presumed to have been duly delivered to the addressee"). We do not regard the presumption as rebutted by appellant's irrelevant insistence that respondent "failed to send this pivotal letter by registered mail." In any event, even if appellant's seeming denials of receipt could be deemed to satisfy its "duty to come forward with other evidence," *Legille v. Dann, supra,* 544 F.2d at 5, we would nonetheless resolve the issue of receipt against appellant. The preponderance of the evidence is that the letter was sent on 26 May 1988 and received in the ordinary course shortly thereafter.

We have carefully considered the other exceptions and arguments advanced by appellant. We cannot concur that appellant has demonstrated that they warrant alteration of our findings or decision.

Accordingly, upon reconsideration, we affirm our decision.

[¶ 26,529] Triax Pacific, Inc.

ASBCA No. 41891, November 22, 1993. Contract No. N62474-89-C-1175.

Mistake—Relief After Award—Reconsideration.—A contractor's motion for reconsideration of an earlier decision in which the board refused to grant reformation of a contract on the basis of an alleged bid mistake was denied because the board's resolution of the issue was not shown to have been based on misleading fact findings or misapplication of the law. The contractor insisted that the finding that it had failed to give the government preaward notice of any suspected error in the bid was not relevant to the board's ruling. The contractor noted that it could correct a suspected bid error only if it had clear and convincing evidence of the existence of the mistake, which it did not have, and, therefore, the finding was irrelevant. However, the contractor had another preaward alternative besides bid correction. The regulations allowed the contractor to withdraw its bid if the evidence of the contractor's mistake was clear and convincing only as to the mistake but not as to the intended bid. The contractor asserted that the board miscited precedents, but the board, in reaching its decision, cited no precedent "on all fours" with the facts dispositive of the appeal.

For the appellant: Timothy Miguel Willardson, Alpine, Utah. For the government: Arthur H. Hildebrandt, Chief Trial Attorney, and Wayne O. Hadland, Trial Attorney, Naval Facilities Engineering Command, San Bruno, California.

Before JAMES, RUBERRY, and RIISMANDEL, Administrative Judges.

Denying reconsideration of 94-1 BCA ¶ 26,380.

JAMES, Administrative Judge: On 15 October 1993 Triax timely moved for reconsideration pursuant to Board Rule 29 of our 16 September 1993 decision on Triax's alleged mistake in bid claim, which decision Triax received on 20 September 1993. Familiarity with our 16 September decision is assumed. The Government responded to the motion on 3 November 1993 and appellant replied thereto on 12 November 1993. The original dispute centered on whether the Government knew or should have known that Triax

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made a mistake in its bid. Appellant contends that the Board's resolution of that issue depended upon misleading fact findings and misapplication of the law.

According to appellant, finding 7 is misleading because estimating the IFB roof was "beyond Triax's estimating competence," Triax did not change its bid price for the roof as a result of its site inspection, and contract specialist Diana Thomas' familiarity with the three Washington state bidders is proof that such bidders had performed previous work on Whidbey Island Naval Air Station (NAS) or repairs comparable to the IFB repairs.

Estimating a hypalon roof was not beyond Triax's estimating competence. Appellant's James Vallett testified in response to counsel's question:

> Q Does Triax have the expertise in-house to accurately estimate the cost of a hypalon roof?
>
> A Oh, in that we could refer to Means and know what's involved in it. We could come up with some kind of an answer. (Tr. 1/86)

We found that Triax's bid included LaVoie's roofing price quote (findings 9, 10). Finding 7 did not state that Triax changed its roofing bid as a result of its site visit, although appellant's Kayl Smith testified that as a result of the site visit Triax changed its roofing demolition estimate "number" (tr. 1/97). Diana Thomas was a Naval Facilities Engineering Command, Northwest, contract specialist (tr. 3/7). She did not testify that any of the three Washington state bidders, with whom she was familiar, actually performed a contract on Whidbey Island NAS or repairs comparable to the IFB repairs (tr. 3/14-15). Nothing in finding 7 is misleading.

According to appellant, the statement in our finding 12, "Triax gave respondent no pre-award notice of any suspected error in the roofing cost in its bid," is misleading because, pursuant to FAR § 14.406-3, Triax could correct a suspected error only if it had clear and convincing evidence of the existence of the mistake and the bid actually intended, which evidence it did not have. Thus our finding 12 "should be irrelevant."

It is probably true that, before contract award, Triax had no clear and convincing evidence of the existence of the mistake and of the bid actually intended by LaVoie or by the other roofing contractor whose belated quote was "dramatically higher" than LaVoie's price. Triax lacked such evidence mainly due to its ineffectual efforts to verify subcontract price quotations (tr. 1/93, 120). However, Triax had another pre-award alternative besides bid correction. FAR § 14.406-3(c) allowed Triax to withdraw its bid if the evidence of LaVoie's mistake was "clear and convincing only as to the mistake but not as to the intended bid" or the evidence reasonably supported the existence of a mistake but was "not clear and convincing." Bid withdrawal was the relief for which Triax strenuously argued in its post-hearing brief, page 7, but is conspicuously absent from its motion for reconsideration. Triax's conclusion that finding 12 is irrelevant is specious. Nothing in finding 12 is misleading; it is relevant and dispositive.

According to appellant, findings 13, 14, and 15 are misleading because contract specialist Diana Thomas' testimony that she suspected a buy-in to get Government business contradicts the conclusory Government testimony that it "had no reason" to suspect a mistake.

Findings 13-15 state the facts and circumstances known to respondent's acquisition officials relevant to the possibility of suspecting a mistaken bid. Triax's argument that Ms. Thomas' suspicion of a buy-in is suspicion of a bid mistake is fallacious. "Buying-in" is the "prohibited practice" of intentionally underpricing a contract. It triggers no Government duty to verify the bid, but only the duty to ensure that the contractor does not recover its buying-in losses improperly. FAR 3.501-2. A mistake is not intentional, cannot be "prohibited," and may create a duty to verify the intended bid. Nothing in findings 13-15 is misleading.

According to appellant, our finding 5 is misleading because we did not recognize mistakes and omissions in respondent's Final Design Submission. Our correlation of the items and finding of no significant discrepancy between the Final Design Submission and the specification were consistent with, and fully supported by, the record. Nothing in finding 5 was misleading in any way.

Triax also argues that the Board miscited precedents. Our decision cited no precedent "on all fours" with the facts and hence dispositive of the appeal. We cited precedents to establish the principles governing our decision. In *Hankins Construction Co. v. United States,* 838 F.2d 1194, 1195 (Fed. Cir. 1988) the three low bids clustered in the range of $1,280,000 to $1,353,000, a $73,000 or 5.7% variance (not $73 or 0.06% as Triax wrongly states) and "tended to confirm the reliability of Hankins' bid." Here the 1.63% variance from respondent's estimate and 13.78% variance from the second low bid

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tended to confirm the reliability of Triax's bid. Just as Hankins might have let its bid lapse, Triax might have withdrawn its bid for the reasons explained previously. Triax, just like Hankins, after its bid was submitted but before contract award, received a "dramatically higher" vendor price, and failed to investigate why it varied so much from an earlier vendor price. As discussed in the comments to *Restatement (Second) Contracts,* § 154(b), Triax undertook to perform contract 1175 between 14 September and 4 December 1989, including "preparing submittals, approving and ordering materials," when it learned of the LaVoie roofing mistake (findings 17, 18). Appellant's distinctions of *Hankins* and *Restatement,* § 154(b), are unsound and unpersuasive.

We deny the motion for reconsideration and affirm our initial decision.

[¶ 26,530] Meisel Rohrbau GmbH & Co., KG

ASBCA No. 35622, November 19, 1993. Contract No. DAJA76-86-C-0370.

Brand Name or Equal—Brand Name Only—Reconsideration.—Upon reconsideration of an earlier decision holding that the government properly refused to permit a contractor, after award, to substitute an equal product for the one that was promised, the board affirmed its decision because there was no error in the board's conclusion that the government was entitled to insist on the brand-name product promised by the contractor. The contractor asserted that the board overlooked precedence that not only permitted the substitution of a brand-name product after contract award but held that the government's failure to permit a contractor to do so constituted arbitrary conduct. The board, however, noted that the case cited by the contractor was factually distinguishable from the instant case.

For the appellant: von Maur and Partners, Sulzbach, Germany, by Reed L. von Maur and Michael J. Murphy. For the government: Col. Riggs L. Wilkes, JAGC, Chief Trial Attorney, and Lt. Col. Stephen R. Dooley, JAGC, Trial Attorney.

Before REITER, RUBERRY, and SPECTOR, Administrative Judges.

Affirming 93-3 BCA ¶ 26,222 on reconsideration.

REITER, Administrative Judge: The Appellant moves us to reconsider our 13 July 1993 decision in this matter. In that decision, we held that the Government's refusal to permit appellant after award to substitute an equal product for the one that appellant promised to deliver was not arbitrary or capricious. We based that decision on the long standing and well defined general principle that the Government is entitled to what the contractor promised in the contract. The appellant in its then brief in this case argued that both *Jack Stone Co. v. U.S.,* 170 Ct. Cl. 281, 344 F2d 370 (1965) and our decision, in *Acorn Specialty & Supply Company,* ASBCA No. 22710, 79-1 BCA ¶ 13,820, which relied on *Jack Stone supra,* directed that an equal product not only may be substituted after award, but that a failure to permit a contractor to do so, constituted arbitrary and capricious conduct.

In its motion for reconsideration, the appellant notes that:

> The Board dismisses appellant's reliance on *Jack Stone Co. v. U.S.* . . . as too facile noting that, unlike here, the contract in *Jack Stone Co.* contained no clause permitting the bidder the option of listing the brand names it intended to supply.

but goes on to say that we "overlooked and failed to consider the more applicable and controlling precedent in *Acorn Specialty & Supply Co.* . . ."

Both *Jack Stone Co.* and *Acorn Specialty & Supply Co., supra* were considered by the Board in deciding the case although *Acorn,* a progeny of *Jack Stone Co.,* was not specifically dissected as was *Jack Stone Co.* in our 13 July 1993 opinion. By our decision we nevertheless rejected, albeit *sub silentio,* the applicability of *Acorn* to the instant case.

We note now for the record that *Acorn* is not this case; the settings are significantly different. In the instant case there was no Government claim. The Government did not terminate for default nor attempt to assert liquidated damages. In *Acorn* the Gov-

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ernment terminated the contractor for default in July rather than consider the contractor's request to substitute an allegedly equal product. Also, the Board noted that "[i]f the Government had approved substitution of the Dyna Quip valve, it naturally would have been entitled to a deductive change price adjustment for any resulting cost savings to appellant."

We also note that the clause which appellant claims is substantially the same in *Acorn* as the clause in the instant case which we found to satisfy the national anti-monopoly policy and desideratum, carries baggage which did not exist in the instant case and subtly encourages the use of the name brand item.

A bidder under the *Acorn* invitation choosing to offer an alternate equal product in its bid was prominently warned as follows:

> "NOTE: If an alternate offer submitted in response to this solicitation is low and technical evaluation of the alternate item will require more than 30 days, the offeror will be so advised *and the alternate offer will not be considered* for this procurement. [emphasis added]

Thus, under *Acorn* a contractor's ability to achieve award with an equal non-brand name item was defeasible, and the option the bidder was afforded subject to easy annulment. In the instant case, the bidder's option to offer an equal product before award was not so fettered.

Here and in summary, the appellant promised the name brand. After award the Government had under the circumstances the option, but not the obligation, to permit appellant to substitute an equal product. However, the Government could insist on receiving what the appellant bound itself to deliver so long as no public policy was violated thereby. "If a contractor can bind himself to build a snowman in August," *Rixon Electronics, Inc. v. U.S.* [22 CCF ¶ 80,365], 210 Ct. Cl. 309, 536 F2d 1345 (1976), it can also bind itself to supply a name brand.

We see no caprice in insisting on what was promised under the existing circumstances.

Upon reconsideration, our prior decision is affirmed.

[¶ 26,531] Ametek Aerospace Products, Inc.

ASBCA No. 45307, November 29, 1993. Contract No. F34601-91-G-7703.

Contract Disputes, Claims—Submission to Contracting Officer—Incorporation of Prior Correspondence.—A government motion to dismiss a portion of a contractor's complaint was denied because the argument made in that portion had been previously presented to the contracting officer. The government contended that the issue had not been presented to the contracting officer and was not a part of the contracting officer's final decision. However, that issue had been raised previously in a letter that was incorporated by reference in the contractor's claim letter.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Allocation from Parent Corporation.—A government motion to dismiss a contractor's claim for costs allegedly allocable to it by its corporate parent was denied because the presence of the parent as a party was not necessary. The government contended that the contractor sought relief for a purely hypothetical situation because the parent had not in fact allocated the costs in question to the contractor and the contractor had not claimed them as a home office allocation. However, questions concerning the admissibility, relevance, and probative value of evidence concerning the pertinent accounting practices would be better addressed in connection with hearing and prehearing preparation.

For the appellant: McKenna & Cuneo, Denver, Colorado, by Thomas A. Lemmer and Janice Davis. For the government: Debra E. Berg, Trial Attorney, Defense Contract Management District Northeast, (DLA), Boston, Massachusetts.

Before YANNELLO, RUBERRY, and SPECTOR, Administrative Judges.

YANNELLO, Administrative Judge: This appeal follows a final decision by the contracting officer (CO). At issue in the appeal is the proper cost accounting for, and appropri-

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ate value of, certain capital assets following various business combinations and acquisitions.

The Government has moved to dismiss paragraph 38 of appellant's complaint. Appellant has responded in opposition to the motion.

For purposes of considering the pending motion, the essential facts may be summarized as follows.

The General Electric Company ("GE") contained an operating division known as Instruments Products Operations (or "Instruments"), which was not a separate legal or accounting entity. "Instruments" produced cockpit instruments as well as engine sensor products, signal conditioning and monitoring products, and flight reference systems for both public or Government and private or commercial customers and, on 7 August 1989 was performing various Government contracts.

GE also owned a subsidiary known as Technology, Inc., Sub. 64 (hereinafter "Technology"), which was an inactive corporation, with minimal assets and liabilities, which conducted little or no business.

On or about 3 June 1989, GE entered into a Purchase and Sale Agreement with Ametek Incorporated ("Ametek Inc.") whereby Ametek Inc. would purchase certain assets, and liabilities, of "Instruments."

At about that time, and in furtherance of the Agreement, GE transferred from "Technology" its minimal assets and transferred to this subsidiary certain of the assets and liabilities of GE's "Instruments" division which were to be acquired by Ametek Inc. (GE's "Technology" subsidiary, thus consisting of certain assets formerly of GE's "Instruments" division, may also be referred to herein as "Technology/Instruments".)

On 7 August 1989, and pursuant to the Purchase and Sale Agreement, GE and Ametek Inc. entered into a series of almost simultaneous transactions which may be summarized as follows. GE, as sole stockholder and parent of its "Technology/Instruments" subsidiary, sold all of the outstanding stock in "Technology/Instruments" to Ametek Inc. in exchange for about $100 million in cash and other consideration.

Thus, "Technology/Instruments" became a wholly-owned subsidiary of Ametek Inc. The new parent, Ametek Inc, then changed the name of its wholly-owned subsidiary to "Ametek Aerospace Products, Inc." (or "Ametek Aero"). Various other changes within Ametek Aero were made.

In its books and records, Ametek Inc. accounted for the acquisition of Technology/Instruments, renamed Ametek Aero, by using the "purchase method of accounting." Under this method, the assets were accounted for at their fair market value (or, approximately, their purchase price); this represents a "stepped-up" value from the book value at which the assets would have been recorded prior to the acquisition by Ametek Inc.

After 7 August 1989, the Government contracts previously being performed by "Instruments" were performed by Ametek Aero, the subsidiary wholly-owned by Ametek Inc. In December 1989, a Novation Agreement was entered into between the United States, "General Electric Company (Transferor)" and "Ametek Aerospace Products, Inc. (Transferee) and formerly known as Technology, Inc. 64" recognizing that the transferee had acquired the assets of "Transferor's Instrument Product Operation," and was in a position to fully perform all obligations of the then on-going contracts between the Government and the transferor. With respect to such contracts, the Novation Agreement precluded any increases in costs as a result of the transfer.

As described by appellant, Ametek Aero also has, since 7 August 1989, accounted for the value of its assets using the purchase method of accounting, that is: at their "stepped-up" or fair market value and/or purchase price.

Beginning in 1990, a series of audits was conducted by the Defense Contract Audit Agency (DCAA); reports of these audits were prepared and copies furnished to Ametek Aero. By letter of 12 September 1990, the Administrative Contracting Officer (ACO) advised appellant of his preliminary determination, and that of DCAA, that appellant's accounting did not conform with the provisions of CAS 404 and FAR 31.205-11. The Government and Ametek Aero discussed this issue during 1990 and 1991. In an attachment to a letter of 19 October 1990, appellant contended:

... DCAA's argument would say that the asset write-up belongs on the corporate books of Ametek Inc. However, CAS 403, Allocation of Home Office Expenses to Segments, would require that cost to be

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allocated to the operating segments. Based on the allocation method hierarchal preference included in the standard, the depreciation expenses on those assets would be directly allocated to [Ametek Aero]. CAS 414 includes similar allocations for the net book value of corporate assets .... A CAS argument does nothing to eliminate cost; it merely affects how it is accounted for and in this case only changes the accounting path with no impact on the result. [R4, Tab 6]

In January 1991, the Government awarded the subject, firm fixed-price contract or Basic Ordering Agreement (BOA) to appellant, Ametek Aero. The contract called for the furnishing of cockpit indicators to the Air Force, and appellant received the contract as the sole-source. On 2 April 1992, the Government issued Order No. SA33, for 98 indicators at a unit price of $33,500 or a total price of $3,283,000. (By contract modification in September 1992, the contract term was extended to 30 November 1992.)

By letter of 6 May 1992, the ACO advised the contractor that he had determined that the contractor was not in compliance with CAS 404; the contractor was requested to provide a cost impact statement. By letter of 28 May 1992, the contractor advised the ACO that it disagreed with, and intended to appeal from, this determination, and that "[t]o begin that process, attached is a claim under the Contract Disputes Act of 1978." By letter of 28 May 1992 (R4, tab 23), the contractor submitted a claim stating its belief that its step-up of asset values (relating to the acquisition of Instrument's assets) did not comply with CAS 404; The contractor referred, *inter alia*, to its earlier letters of 19 October 1990 and 9 July 1991. The contractor requested a final decision.

By letter of 28 July 1992 (R4, tab 24), the CO issued a final determination, with respect to the subject contract, that *inter alia*, appellant's increased depreciation cost, as a result of the step-up or write-up of its assets, was unallowable. The CO pointed to CAS 404 and FAR 31.205-11. Appellant filed a timely Notice of Appeal.

Essentially, the Government contends, *inter alia*, that the contractor (also referred to as Ametek Aero) improperly accounts for its assets at their "stepped-up" value, representing their fair market value (or, approximately, purchase price).

Appellant's complaint contains two counts or assertions, which may be summarized as follows: (1) appellant's books and records properly recognized and accounted for the assets of Technology/Instruments at their fair market value and/or purchase price; and, alternatively, (2) in accordance with CAS 403, Ametek Inc. might properly allocate to Ametek Aero costs based upon Ametek Inc.'s acquisition of the assets of the former Technology/Instruments.

Paragraph 38 of the complaint, under Count II, states:

> Alternatively, assuming that [Ametek Inc.] and not [Ametek Aero] must recognize the cost of acquiring the former [Technology/Instruments] capital assets, those acquisition costs on Ametek Inc.'s books are a proper basis for measuring certain costs that are allocable to [Ametek Aero] under CAS 403.

This is also referred to by the parties as appellant's "alternative CAS argument."

In its prayer for relief, the complaint asks the Board to rule that:

> (a) The contracting officer's final decision is erroneous in fact and law;
>
> (b) The acquisition costs of the former [Instruments] assets recognized on [Ametek Aero's] books and records are proper under CAS 404 and FAR § 31.205-11;
>
> (c) Or alternatively, [Ametek Inc.] properly may allocate to [Ametek Aero] under CAS 403 certain costs measured based upon the costs of acquiring the former [Instruments] assets and [Ametek Aero] may allocate those costs to government contracts pursuant to CAS 410 or CAS 418.

The Government's answer contains a First Affirmative Defense in which the Government asserts that appellant's amortization costs, cost of money, and depreciation costs are unallowable, relying upon FAR 31.205-52 (effective 23 July 1990) which was not recited in the CO's determinations.

The Government has moved to dismiss paragraph 38 of the complaint for lack of jurisdiction. The grounds relied upon by the Government are essentially as follows:

> 1. The issue involved, the allocation of costs from [Ametek Inc.] to [Ametek Aero] under CAS 403, was neither presented to the ACO nor part of his Final Decision ....
>
> 2. The relief sought is an advisory opinion on a purely hypothetical situation. [Ametek Inc.] has not even attempted to use the values at issue as a basis for allocating costs to [Ametek Aero] under CAS 403 and [Ametek Aero] has never claimed these

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costs as a Home Office Allocation under CAS 403.

3. [Ametek Inc.] is not a party to the contract under which this action is brought.

In response to the motion, appellant contends, *inter alia*, that:

1. Appellant's alternative CAS argument does not present a new claim not previously submitted to the CO; rather it presents a new legal theory in support of its existing claim;

2. Appellant's alternative argument does not seek an advisory opinion inasmuch as it merely presents an alternative argument in support of appellant's contention that it may allocate certain costs to its government contracts which costs are measured by the acquisition cost of its assets.

3. The claim is that of Ametek Aero, and need not be asserted by Ametek Inc. Appellant cites the provisions of CAS 403-50(e) concerning contracts with a "segment" or wholly owned subsidiary for whom the parent company may serve as a "home office", and providing that the contracting corporation may only accept allocations from the [parent] company to the extent that such allocations meet the requirements of CAS for allocation of home office expenses to segments.

DECISION

The Government's motion is denied. The Board notes, firstly, that the Complaint is not first time that appellant has raised its alternative contention (see appellant's claim letter of 28 May 1992 incorporating by reference its earlier correspondence, including that of 19 October 1990).

Secondly, while the Board agrees with the Government that clearly Ametek Inc. (appellant's parent) is not a party to either the subject contract or this appeal, the presence of such party is not necessary. Appellant may pursue its contentions as a separate and independent legal entity.

In so deciding, the Board is not unmindful of the Government contentions concerning accounting practices, and their ramifications, which may possibly be hypothetical as contrasted with those actually reflected in books and records. However, questions concerning the admissibility, relevance, and/or probative value of evidence concerning such accounting practices may be better addressed in connection with possible hearing and pre-hearing preparation.

Conclusion

The Government's Motion to Dismiss is denied.

[¶ 26,532] Metric Constructors, Inc.

ASBCA No. 46279, November 26, 1993. Contract No. NAS10-11800.

Modifications—Bar to Claims—Accord and Satisfaction.—A modification executed by the parties after an appeal was filed did not operate as an accord and satisfaction, because the modification, by its terms, did not include the change orders covered by the appeal. To reach accord and satisfaction, there must be a mutual agreement between the parties with the intention clearly stated and known by the contractor. The contractor's conduct in pursuing its claim before the board at the time the modification was signed indicated that the parties never understood the agreement as an abandonment of the earlier claim.

Modifications—Changes—Proof of Increased Costs.—Although additional requirements were imposed by a change order, a contractor was not entitled to additional compensation under a construction contract, because it did not prove that it incurred additional costs or that any costs were directly attributable to the changed requirements. There was no question that modifications involving tests and temperature readings were changes to the original contract specifications. The contractor contended that it was required to add a technician to its work force and that it incurred costs to pay for engineering supervision and support, secretarial support, and supplies involved in the review and compilation of test reports. However, although some changes to the test requirements were made, the changes did not cause the contractor to incur the additional costs of a full-time technician, because the costs of the technician were to be incurred without regard to the issuance of the change order. Moreover, the contractor failed to establish how it attributed the costs

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of the test reports to the different types of tests required. In the absence of such evidence, the board could not find that the costs claimed were caused by the change order .

For the appellant: Bonner, Hogan & Coleman, PA, Clearwater, Florida, by Jon A. McAuliffe. For the government: Dudley R. Cannon, Jr., Trial Attorney, National Aeronautics and Space Administration, Kennedy Space Center, Florida.

Before TODD, RUBERRY, and FREEMAN, Administrative Judges.

TODD, Administrative Judge: This appeal involves a claim for additional concrete testing under a building construction contract. The parties have submitted the appeal for decision on both entitlement and quantum under Rule 11 without oral hearing.

FINDINGS OF FACT

1. On 15 February 1991, the National Aeronautics and Space Administration (NASA) awarded Contract No. NAS10-11800 to appellant Metric Constructors, Inc. (Metric) for the construction of the Space Station Processing Facility (SSPF) and related improvements at Kennedy Space Center. The contract incorporated by reference the standard clauses, "Material and Workmanship (APR 1984)" (FAR 52.236-5), "Inspection of Construction (JUL 1986)" (FAR 52.246-12), "Changes (AUG 1987)" (FAR 52.243-4), and "Disputes (APR 1984)" (FAR 52.233-1) (R4, tab 32).

2. Section IV, Article 3 of the contract schedule stated that specified tests of construction materials "shall be accomplished by the Contractor utilizing the services of an acceptable independent testing laboratory" (R4, tab 32, p. 39). Section I, Article 3 of the contract schedule placed the schedule provisions first in order of precedence for resolving any inconsistency in the contract (R4, tab 32, p. 7).

3. Section 03300, "Cast-in-Place Concrete," of the contract specifications stated at paragraph 1.3: "All work shall be in accordance with ACI [American Concrete Institute Standard] 318" (R4, tab 23). ACI 318 at paragraph 4.8.1.1 required taking samples for compressive strength tests from "each class of concrete placed each day . . . not less than once a day, nor less than once for each 150 cu yd of concrete . . ." (R4, tab 25).

4. Specification section 03300 at paragraph 1.5 stated in relevant part:

> 1.5 Concrete Sampling and Testing
>
> Quality-control testing during construction shall be by the Contractor using an independent commercial laboratory. Two specimens shall be tested for compressive strength at 7 days and 2 specimens shall be tested at 28 days for each design mix. Two additional test cylinders shall be cast and held in reserve for testing at 56 days . . .

(R4, tab 23)

5. On 11 February 1991, prior to award of the contract, Atlanta Testing & Engineering (ATE) offered to provide construction materials testing for Metric with a senior engineering technician and a support technician on-site, full time for twelve months (exh. G-3). On 16 April 1991, Metric awarded a subcontract to ATE for performance of construction materials testing and inspections required by specification section 03300 and other listed sections of the contract specifications (exh. G-5).

6. Section IV, Article 5 of the contract schedule required Metric to maintain a quality program to assure compliance with the contract requirements (R4, tab 32, pp. 40-48). Metric's quality program plan, dated 10 May 1991, described its inspection program and stated that "[i]nspectors shall perform day-to-day monitoring of activities to verify that accepted and identified items and proper procedures are being used" (exh. G-6).

7. On 2 May 1991, by KSC Form 8-268, Contractor Request for Information/Clarification (RFI) No. 48, Metric asked whether there were any testing requirements in addition to those specified in paragraph 1.5 of specification section 03300 (R4, tab 1). Metric and ATE knew at that time that the compressive strength testing specified in paragraph 1.5 was less than that required by ACI 318 and good construction practice (R4, tab 12; Deposition [Dep.] of Harry Webster, pp. 24-27).

8. On 30 May 1991, Metric began concrete placement. Pursuant to its contract with ATE, Metric directed ATE to follow ACI 318 for concrete testing and to provide quality control monitoring (R4, tab 18; Webster dep., p. 25; Affidavit [Aff.] of Steven N. Murray; Declaration [Decl.] of Rechea H. Hutchinson). ATE had initially planned to use one engineering technician for both soils testing and concrete testing and inspection, but found that one technician's time was fully employed on the soils testing (R4, tabs 12, 18).

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9. Before the concrete testing requirements were revised by change order, ATE and Metric agreed that ATE would provide an additional inspector on site "to properly monitor the concrete placement ... with the understanding Metric would ask the owner for additional compensation ..."

(R4, tab 12). The second inspector was hired on 10 June 1991. (R4, tab 18; exh. G-47; aff. of C. Rees Nickerson)

10. On 7 June 1991, the contracting officer issued Change Order No. 19 which replaced specification section 03300 with new section 03305 for the cast-in-place concrete work. Paragraph 3.11 of section 03305 required quality control tests on the concrete which included a slump test to be performed "for each concrete load at point of discharge," and for each set of compressive strength tests; an hourly temperature test when the air temperature was 40 degrees F or below and 80 degrees F or above; and compressive strength tests "one set for each 150 cubic yards or fraction thereof of each concrete class placed in any one day ..." (R4, tab 24).

11. Paragraph 3.12.2 of section 03305 set forth inspection criteria for determining if the strength of the concrete structure in place was deficient. One of the stated criteria was: "Poor workmanship likely to result in deficient strength." (*Id.*)

12. Appellant interpreted the revised specifications to add slump tests for each concrete truck load and hourly concrete temperature tests when the air temperature was at certain stated ranges. Appellant considered that continuous observation of concrete placement was also required because that is the only method of discovering poor workmanship. That was listed as a condition that could be considered deficient strength of the concrete structure under paragraph 3.12.2. (Nickerson aff.) Mr. C. Rees Nickerson, a Senior Professional Engineer with ATE who was responsible for the construction material testing and inspection services performed on the contract, has stated that "[o]bviously, the only method of determining if their [sic] is poor workmanship during concrete placement, is to observe the placement" (*id.*, ¶ 11).

13. Upon receipt of Change Order No. 19, appellant promptly contacted Ms. Rechea H. Hutchinson, the contracting officer, to obtain clarification of the specifications because some of the testing requirements, such as strict inspection of each load of concrete, were out of the norm and appeared unintentional. Appellant notified her that Change Order No. 19 would result in additional man hours for testing and inspection of concrete (Webster dep., pp. 11-16; Hutchinson decl.).

14. After meeting with the contracting officer, appellant met with Mr. H.C. Williamson, the contracting officer's technical representative, to discuss the revised specifications. A concrete technician from ATE was also present. Mr. Williamson interpreted the specifications regarding slump tests and said that visual slump tests on each load of concrete would be acceptable, and that mechanical tests would only be required when concrete specimens were obtained, approximately every 150 cubic yards of concrete. (R4, tab 31; Webster dep., pp. 13-15; Nickerson aff.)

15. After issuance of Change Order No. 19, ATE's second on-site technician provided concrete monitoring, testing and reporting (R4, tab 18). The Government observed no change in ATE's field monitoring activities and time on site before and after the issuance of Change Order No. 19, except for some additional slump tests (Murray aff.). The Government has acknowledged that appellant performed 11 additional slump tests required by Change Order No. 19 during the period 10 June 1991, through 4 October 1991 (Hutchinson decl.; Murray aff.).

16. On 18 June 1991, the contracting officer issued Change Order No. 21 that deleted portions of the revised cast-in-place concrete specification that had been issued by Change Order No. 19. This change clarified that the contractor was only required to comply with paragraphs 1.7, 3.11, and 3.12 of section 03305. No changes were made to the requirements for testing and inspection of concrete, and no additional expenses or costs were associated with this change order. (R4, tab 5)

17. These change orders required the performance of a slump test on every load of concrete between the effective date of Change Order No. 19 on 7 June 1991, and 4 October 1991, when the specification was changed by Change Order No. 130. Slump tests involve the placement of a representative sample of the concrete being tested into a metal cone using a tamping rod and subsequent inversion and removal of the cone after which the slump of the unsupported concrete is measured (exh. G-16; Webster dep., pp. 31-32). Concrete temperature tests involve a simple quick temperature reading which takes no more than five minutes to perform (Murray aff.).

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18. On 16 July 1991, appellant submitted a cost proposal for Change Order No. 21 in the amount of $70,436 (R4, tab 7). On 22 July 1991, appellant provided back up documentation from ATE in support of the proposal. ATE's costs of $45,600 were for an engineering technician for 40 weeks (40 hours/week) at $28.50/hour. ATE stated that it needed an additional technician on site full time for the additional testing requirements in Section 03305, paragraphs 3.11 and 3.12. Appellant stated that the quality control labor was for "the additional work required for [their] quality control man to coordinate government inspections and further review and process test results required by the additional concrete testing." (R4, tab 9)

19. NASA's proposal evaluation, dated 8 August 1991, recommended that ATE provide detailed justification for additional testing and the frequency of the testing. The evaluator thought field staff of ATE had not changed as of that date. (R4, tab 10) During negotiations with Metric on 20 August 1991, the contracting officer advised that no justification could be found for a cost impact of the change orders. The additional staff employed by ATE was then stated to be covering a different job near the Vehicle Assembly Building (VAB). (R4, tab 11)

20. ATE furnished justification for the additional inspection to Metric by letter, dated 23 August 1991. Concrete Placement Monitoring logs showed that ATE performed concrete monitoring on 31 May 1991, 4 June 1991, and then on a daily basis. ATE considered this monitoring "additional inspection." (R4, tab 12)

21. NASA's further proposal evaluation, dated 10 September 1991, noted that an extra man was on site as ATE field staff, but he was covering a job near the VAB. NASA did not consider that ATE had identified any additional cost or justification for entitlement to additional compensation. (R4, tab 13)

22. In October 1991, the contracting officer issued Change Order No. 130, which required slump tests when concrete specimens were obtained, approximately every 150 cubic yards of concrete, and provided for visual tests on all other loads, unless an additional slump test were required for questionable loads. The change order formally adopted the verbal instruction that had been given earlier by Mr. Williamson and removed the mandatory requirement for a slump test for every load from the specifications. No additional expenses or costs were associated with this change order. (R4, tab 33; Hutchinson decl.; Nickerson aff.)

23. By letter, dated 19 December 1991, appellant submitted a revised cost proposal for Change Orders Nos. 19 and 21 in the amount of $90,768 (R4, tab 14). ATE had itemized its claim of $70,650 for an additional engineering technician, overtime, out-of-town living expenses, secretarial services, supplies (copies, mailing and postage), and for engineering review of reports by a project engineer and a professional engineer (R4, tab 16). As a result of negotiations conducted on 5 February 1992, it was agreed that NASA would reevaluate based on information provided by the contractor (R4, tab 15).

24. NASA's proposal evaluation, dated 18 February 1992, included an evaluated construction cost of $1,003 for the costs of nine cylinder tests and two slump tests which were considered additional. The amount included mark-up costs of 15% overhead, 5% profit and 0.645% bond. (R4, tab 16) Negotiations were conducted with Metric on 27 and 28 February 1992. (R4, tab 17)

25. By letter dated 11 March 1992, Metric submitted to the contracting officer additional information from ATE in support of its position on the specification change and demanded a final decision. The ATE letter, dated 5 March 1992, which was enclosed, stated that "Metric and Atlantic Testing implemented a program of testing similar to Specification Section 03346 'Light Weight Concrete' to assure NASA that the concrete installed was of high quality." ATE described the activities for the additional technician as including work to monitor the field placement, collect the cylinders, strip the cylinder molds, put them into and remove them from curing, cap with capping compound, conduct compressive strength tests, make calculations, and write up field and laboratory reports. (R4, tab 18) Most of these activities appear to be related to compressive strength tests and not slump tests. All testing that was performed was not a result of Change Orders Nos. 19 and 21. The daily samples for compressive strength tests were required by ACI 318 which was part of the original contract (finding 3). Office time was required for review, typing, copying and mailing of test reports. ATE costs incurred as of 13 December 1991, were itemized in a total amount of $35,026.94, and the total claimed including estimated costs through the end of the project in March 1993, was $70,650. (R4, tab 18)

26. NASA's proposal evaluation, dated 16 March 1992, did not change after review of

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the additional information. The recommendation was that appellant be compensated $1,003 for an extra 11 slump tests. (R4, tab 19) A letter dated 20 March 1992, from the contracting officer noted that the offer had been declined and that appellant's cost proposal was not a claim without the required certification (R4, tab 20).

27. By letter dated 7 April 1992, Metric submitted its properly certified claim for $89,473 for the costs of the additional testing with the following itemization:

Subcontract		$70,650
Jobsite Overhead	@16.94%	11,968
G & A Overhead	@ 3.14%	2,594
Fee	@ 10%	4,261

The amount claimed for fee was calculated at 5% of the total amount of the claimed costs. (R4, tab 21) It is apparent that the rate for fee should have been stated in the claim as 5% to calculate the dollar amount of fee claimed, and that the number 10% was a mistake (R4, tab 29). Enclosed with the claim were detailed time summaries and cost estimates prepared by ATE (R4, tab 21).

28. NASA's proposal evaluation, dated 20 April 1992, included an evaluated construction cost of $418 for the costs of 11 slump tests which were considered additional. The cost per test was $30 based on competitive quotations received by telephone. The amount included mark-up costs of overhead, G&A, and profit at the same rates that had been claimed by Metric. (R4, tabs 22, 29) After appellant declined this offer of compensation, the contracting officer issued Change Order No. 513 increasing the contract price by $418 (Hutchinson decl.).

29. The contracting officer's final decision, dated 4 June 1992, denied the amount of Metric's claim as excessive stating that it did not represent the fair and reasonable increased costs for the change in performance attributable to Change Orders No. 19 and 21. An equitable adjustment in the amount of $418 was awarded. (R4, tab 29) On 4 September 1992, Metric filed its timely notice of appeal to initiate these proceedings at the NASA Board of Contract Appeals (R4, tab 30). Notice of the appeal that was sent to the contracting officer reduced the claim to $85,105 to reflect actual cost and forwarded a letter, dated 18 August 1992, from ATE in response to the contracting officer's final decision. This letter acknowledged that the original contract required concrete testing through the reference to ACI 318, but stated that a second engineering technician was needed on site to monitor the concrete for slump and hourly temperatures during placement. The basis for the claim was the new requirements in Change Order No. 19 for an increase in the number of required slump tests and the monitoring of the concrete for temperature. (R4, tab 31) The appeal was docketed NASA BCA No. 80-0992 prior to the merger of the NASA BCA and ASBCA that was effective 12 July 1993.

30. The parties entered into a supplemental agreement, effective 7 October 1992, that is Modification No. 674 to the contract, to incorporate definitized change orders. The form stated that it applied only to modifications or change orders that were described in the agreement. One of the change orders was Change Order No. 130, but Change Orders No. 19 and 21 were not listed. The agreement provided:

> It is hereby agreed that ... the adjustments agreed to herein constitute an accord and satisfaction and fully satisfy any and all claims against the Government arising out of or related to the changes specified in this Supplemental Agreement including, but not limited to, claims for additional costs associated with delays, disruptions, extended overhead or time impact.

(R4, tab 33) There were no reservations of any claims for costs incurred beyond 4 October 1991, the effective date of Change Order No. 130.

31. Mr. Nickerson, the responsible senior professional engineer with ATE, estimated for appellant the reasonable additional time required for the additional inspection and testing services based on ATE's records of the actual times that concrete pours occurred. He reviewed appellant's daily Concrete Placement Monitoring reports and its daily Field Reports and prepared a "Summary of Concrete Pour Monitoring" which shows for each day there were concrete pours during the period 31 May 1991 and 30 July 1992, the actual time of the concrete pour and the number of sets of concrete tests (from 0 to 2, and in two instances 3) performed. Mr. Nickerson stated his opinion that the actual time of concrete pours was between 1010 and 1100 hours. He used 1000 for the number of additional hours claimed for the changed inspection (less concrete sampling time). This number and amounts for travel time, down time, and overtime for the technician, as well as engineering time and secretarial time were itemized. Applying reasonable rates of compensation, the total claimed for additional time, was $71,171.75

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(Nickerson aff.). The rates for mark-up costs of overhead, G&A, and profit are undisputed (R4, tabs 22, 29; aff. of Chip Angenendt). In the opinion of Mr. Robert Chen, a senior professional engineer and manager of ATE, a reasonable fee for additional inspection and testing services required by Change Order No. 19 for ATE would be approximately $71,000 (Aff. of Robert Chen). The total amount of appellant's claim is $89,473 (R4, tab 21).

DECISION

The Government maintains that Modification No. 674 executed by the parties after the filing of this appeal operated as an accord and satisfaction to bar appellant's claims for the period of performance after 4 October 1991, the date of Change Order No. 130. The contract modification was to definitize change orders that included Change Order No. 130, but not Change Orders Nos. 19 and 21. The Government has the burden of proving the affirmative defense of accord and satisfaction. *Whitton Construction Co., Inc.*, ASBCA No. 40756, 93-1 BCA ¶ 25,375 (Aug. 30, 1993). To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor. *Todd-Grace, Inc.*, ASBCA No. 34469, 92-1 BCA ¶ 24,742; *Chantilly Construction Corporation*, ASBCA No. 24138, 81-1 BCA ¶ 14,863. By its terms the modification covered only Change Order No. 130. To find that it also covered Change Orders Nos. 19 and 21 would require a showing by the Government that both parties understood the language to accomplish that purpose. Appellant was pursuing its claim before the Board at the time the modification was signed. This conduct indicates an intent that the parties never understood the agreement as an abandonment of appellant's earlier claim. *Community Heating & Plumbing Co. v. United States* [38 CCF ¶ 76,488], 987 F.2d 1575 (Fed. Cir. 1993). We have concluded that none of the costs of Change Orders Nos. 19 and 21 are barred by the operation of an accord and satisfaction in Modification No. 674.

Appellant has the burden of proving its affirmative claim and establishing its entitlement to an equitable adjustment by a preponderance of the evidence. *PAE GmbH*, ASBCA No. 46163 (Nov. 10, 1993). In order to recover for the costs of performing additional concrete testing, appellant must show three necessary elements—liability, causation and injury. *Servidone Const. Co. v. United States*, 931 F.2d 860 (Fed. Cir. 1991); *BellinCo, Inc.*, ASBCA No. 41601, 91-2 BCA ¶ 23,896; *Bechtel National, Inc.*, NASA BCA No. 1186-7, 90-1 BCA ¶ 22,549, *motions for reconsid. denied*, 90-3 BCA ¶ 23,105. Appellant alleges that additional requirements were imposed by Change Order No. 19 since the contract specifications did not refer to the tests that the Government argues were incorporated because of ACI 318. We find that the slump tests for each concrete load and the hourly temperature readings, but not the compressive strength tests, were changes to the original contract specifications.

Appellant is entitled to compensation for changes, however, only to the extent that a change actually caused an increase in the costs of performance of the contract work. *Lectro Magnetics, Inc.*, ASBCA No. 15971, 73-2 BCA ¶ 10,112. The overriding basic principle applicable to price adjustments under the Changes clause is that they are measured by the cost impact on the contractor. *G&S Construction, Inc.*, ASBCA No. 28677, 86-1 BCA ¶ 18,740, at 94,309. A contractor who acts as a volunteer cannot be paid for extra work which is furnished on its own initiative. *DWS, Inc.*, ASBCA No. 29743, 93-1 BCA ¶ 25,404; *Advanced Control Technology, Inc.*, NASA BCA No. 24-0790 *et al.*, 92-2 BCA ¶ 24,947; *Optimal Data Corporation*, NASA BCA No. 381-2, 85-1 BCA ¶ 17,760, *motion for reconsid. denied*, 85-2 BCA ¶ 18,165, *aff'd*, 802 F.2d 469 (Fed. Cir. 1986).

The Government maintains that appellant did not change its methods of inspection and testing as a result of the change orders and there was no impact for which compensation could be claimed. Appellant was monitoring the concrete placement, and no additional time or effort was required to conduct the concrete testing after the issuance of Change Order No. 19, according to the Government. Appellant claims it was required to add a technician to perform the additional slump tests and take hourly temperature readings for every concrete pour. Appellant further claims that it was required by the change order to begin continuous observation of the concrete pours. Although some changes to the test requirements were made, we do not find that they caused appellant to incur the additional costs of a full-time technician for testing or inspection and monitoring of the concrete placement. By referring to poor workmanship when specifying what would be conditions of deficient concrete in Change Order

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No. 19, the Government did not thereby change appellant's inspection system. There is no assertion that inspection standards became more stringent or that closer supervision of the work was required to meet a higher standard of performance. Under the Material and Inspection clause and quality control provisions of the original contract, appellant was responsible for the quality of the work and obligated to monitor its performance and needed a second technician on site to do so (findings 6, 8-9). Since the costs of the second technician were to be incurred without regard to the issuance of Change Order No. 19, they cannot be attributed to the Government's change order. We are not persuaded that they would not have been incurred but for appellant's anticipation of receipt of the change order.

The Government further argues that appellant has failed to produce sufficient cost data to prove the costs of its claim. We have considered whether appellant's other claimed costs were attributable to the changed test requirements and have been sufficiently proved. These costs were for engineering supervision and support, secretarial support, and supplies involved in the review and compilation of written test reports. The estimated amounts claimed have varied (findings 23, 25, 27, 31). To meet its burden of proof, appellant must establish both the reasonableness of the costs claimed and their causal connection to the event on which the claim is based. *Delco Electronics Corp. v. United States* [35 CCF ¶ 75,679], 17 Cl.Ct. 302 (1989). The Government argues that these costs "all appear to be driven by the compressive strength tests requirements" in the original contract. (Gov't br. at 58) Its argument is based on ATE's listing of the activities of the additional technician, most of which concerned the compressive strength tests exclusively (finding 25; Gov't. br. at 19-20). We have concluded that Appellant has failed to establish how it attributed costs of the test reports to the different types of tests that were required, and we cannot find the costs claimed to have been caused by the change order in the absence of such evidence.

For the reasons stated, the appeal is denied.

[¶ 26,533] Hom-Russ, Inc.

ASBCA No. 46084, December 2, 1993. Contract No. F09651-90-C-0135.

Interpretation of Contracts—Drawings—Typical Detail.—In a contract for the construction of a vehicle maintenance building, a detail drawing was not sufficient to indicate that steel floor plates were to be provided wherever two sets of parallel lines appeared on a concrete floor, because the drawing did not indicate that it was a typical detail and applied to the entire contract. The notation "typical" is necessary to indicate that the drawing applies to the entire contract. The contractor did not have any reason to know whether the plating on only one portion of the building was consistent with the intended use of the building. Moreover, there was nothing on the face of the drawing that would have alerted the contractor that the drawing was intended to be typical. The government, as author of the drawings and specifications, had the responsibility of assuring that the drawings expressed its intent to the contractor.

For the appellant: Seifer, Yeats & Mills, Portland, Oregon, by Rodney R. Mills. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, Maj. William M. Lackermann, Jr., USAF, Trial Attorney, and Maj. Flayo O. Kirk, USAF, Contract Law Attorney.

Before FREEMAN and RIISMANDEL, Administrative Judges.

FREEMAN, Administrative Judge: Hom-Russ, Inc. (HRI) claims a price adjustment for an alleged change order requiring six additional steel floor plates in a vehicle maintenance building. The parties have submitted the appeal for decision on the issue of entitlement under Rule 11 without oral hearing. HRI has elected the Rule 12.3 accelerated procedure.

FINDINGS OF FACT

1. The contract was awarded to HRI on 28 September 1990 for construction of a two-bay, "range support maintenance facility" at Eglin Air Force Base, Florida. The title page of the contract drawings had a picture of a tank. That picture indicated that the vehicles and equipment to be maintained in

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the facility would include tracked armored vehicles.

2. Contract Drawing C-2 ("Foundation Plan, Details") showed in plain view for each bay, two parallel lines four feet apart running the length of one side of the bay, and two parallel lines four feet apart running the length of the opposite side of the bay. Detail 5 on the drawing was a cross-section of the foundation showing a thickened foundation under each set of parallel lines in the two bays. The manifest intent of the thickened foundation was to provide increased support under the wheels and tracks of vehicles being serviced in the bays.

3. Detail 4 on Drawing C-2 showed two steel plates anchored to the concrete floor between one set of parallel lines in one bay. The two plates formed a four-foot wide steel track running the length of one side of the bay. Detail 4 was not marked "typical." There is no indication otherwise on the face of the drawings or in the specifications that similar steel plates were to be provided between the parallel lines on the opposite side of the same bay or between the two sets of parallel lines in the second bay.

4. The term "typical" is generally used on construction drawings where a detail is intended to be applicable to similar elements of the construction. The term "typical" was used on the drawings for details on other elements of the construction, but not for Detail 4.

5. HRI's bid estimate included two steel floor plates for the one set of parallel lines indicated in Detail 4. It did not include steel floor plates for the other three sets. After award, the Government directed that steel plates be provided between all four sets of parallel lines. HRI complied with this direction under protest. On 9 July 1991, it submitted a claim in the amount of $20,851.93 for providing six additional steel plates. By final decision dated 18 February 1993, the claim was denied.

DECISION

Detail 4 referred to only one of the four sets of parallel lines in the maintenance bays. It was not marked "typical," nor did the drawings and specifications otherwise indicate that steel plates were to be placed between the other three sets of parallel lines. HRI's understanding that steel plates were required only between one set of parallel lines in one bay as shown in Detail 4 did not render the other sets of parallel lines meaningless. All four sets showed in plan view where the thickened foundation shown in the cross-section detail was to be placed.

The Government as the author of the drawings and specifications had the responsibility of assuring that the words and symbols used expressed its intent to the contractor. It can avoid that responsibility only where it makes a major error or discrepancy that the contractor should reasonably have noticed in the bidding process and should have brought to the Government's attention before bidding. *Blount Brothers Construction Co. v. United States* [10 CCF ¶ 73,058], 171 Ct. Cl. 478, 495-97 (1965).

We find no major discrepancy or error on the face of the drawing which HRI should have noted and brought to the attention of the Government before bidding. HRI was not responsible for evaluating the design of the building. It knew that the building was to be used for maintenance of "range support" vehicles, and that those vehicles included tracked armored vehicles. But it did not know, nor did it have any reason to know whether the steel plating of only one side of one bay as indicated on the drawings, was or was not consistent with the characteristics of those vehicles, or otherwise consistent or inconsistent with the intended use of the building.

The appeal is sustained and remanded to the parties for settlement of amount.

[¶ 26,534] COLSA, Inc.

ASBCA No. 45505, November 30, 1993. Contract No. DAAD07-87-C-0020.

Procedure, Boards—Reconsideration—Arguments Already Considered.—A motion for reconsideration that asserted that two contract clauses were in conflict was denied because the contractor had made that argument in its brief and failed to note that the board's decision expressly stated that although the two clauses were similar, they authorized action with respect to different costs. The contractor failed to identify the provisions in the clauses that it contended were in conflict, either in its brief or in the motion for reconsideration.

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Procedure, Boards—Reconsideration—Misunderstood Ruling.—A contractor's request, in a motion for reconsideration, to receive the fixed fee payable upon contract completion was denied because the prior decision had determined only entitlement to a government claim; there was no claim seeking the fixed fee or any other monies before the board. The motion reflected a misunderstanding of the nature of the board's ruling. There was no basis to modify the prior decision to add the language requested by the contractor.

Procedure, Boards—Reconsideration—Immaterial Evidence.—Excerpts from a contract that were not previously a part of the record were immaterial and were not accepted on a motion for reconsideration, because the excerpts were not from the contract at issue. As part of its motion, the contractor attempted to proffer evidence into the record to show that the contract specialist was a contracting officer in the other contract. However, even if the individual was the contracting officer in another contract, the contractor is charged, as a matter of law, with knowing the authority of government officials.

For the appellant: Gary L. Rigney and Henry L. Brown, Huntsville, Alabama. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Capt. Scott E. Lind, JAGC, Trial Attorney.

Before HARTMAN and VAN BROEKHOVEN, Administrative Judges.

Reconsideration of 94-1 BCA ¶ 26,309 denied.

HARTMAN, Administrative Judge: Appellant, COLSA, Inc. ("COLSA"), has moved for reconsideration of our 16 August 1993 decision denying its appeal of a final decision, which disallowed $46,553.62 in costs billed by and paid to it under a cost-plus-fixed-fee contract because it had "overrun" the estimated work cost set forth in three work assignment orders by that sum without notifying the contracting officer ("CO") and obtaining approval to do so. Familiarity with our prior decision, which was issued pursuant to Rules 11 and 12.3, is assumed.

COLSA asserts in its reconsideration motion that, "in paragraph (e) of its reply [brief], [it] challenged the validity of the provisions of paragraph H.21 ... establish[ing] additional funding restrictions which conflicted with the provisions of the Limitation of Funds (LOF) clause contained in the contract" and that "[t]he decision rendered by the Board does not discuss or apparently consider th[is] issue." It is true COLSA contended for the first time in paragraph (e) of its reply brief that "use of a policy, procedure, contract clause or method that is inconsistent with the intent, principle or substance of the required FAR clause constitutes a 'deviation' as that term is defined at FAR 1.401" and that "[t]he contract file does not contain any information relating to approval for the [CO] to use the additional funding limitations set out in section R.21.10" (emphasis deleted). COLSA, however, never identified in its brief the provisions of section H.21 and LOF clause it believes conflict, and fails to note that our decision expressly states, with respect to COLSA's unsupported contention, "[w]hile schedule section H.21.10 and the LOF clause are similar in that they both allow a CO to decline reimbursement of costs, they authorize such action with respect to 'different' costs."

In its two-page reconsideration motion, COLSA once again fails to identify the provisions of section H.21 and the LOF clause which it believes are in conflict. COLSA's simple assertion that section H.21 and the LOF clause are in conflict does not make it so. In order for there to be a deviation from the prescribed FAR LOF clause, there must be action *"inconsistent* with the FAR" (emphasis supplied). FAR 1.401; *Northwest Marine, Inc.*, ASBCA No. 43097, 92-2 BCA ¶ 24,861 at 124,012-13. As described in DFARS 1.402(a)(1), there must be a "contract clause covering the *same* subject matter which varies from the FAR or DoD FAR supplement coverage, or use of a collateral provision which *modifies* either the clause or its prescribed application" (emphasis supplied). Because appellant has pointed us to no such variation or modification and we ourselves have been unable to find any such variation or modification, we see no reason to change the conclusion set forth in our prior decision—that COLSA's arguments relating to the LOF clause are without merit.

COLSA further asserts in its reconsideration motion, without any citation to the record or legal authority, that it "has completed all the tasks that were to be performed by this contract" and the Board should "modify its decision to find that upon satisfactory completion of the con-

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tract, [it] is entitled to receive the fixed fee set out in the contract." COLSA's assertion, however, reflects a misunderstanding of the nature of the Board's proceedings to date. The Board simply has held that the CO properly disallowed certain costs, *i.e.*, determined "entitlement" with respect to COLSA's appeal of the CO's decision disallowing specific costs billed by and paid to COLSA under the parties' cost-plus-fixed-fee contract based upon COLSA's "overrun" of the estimated work cost set forth in three work assignment orders. The Board, therefore, has determined entitlement with respect to a "Government" claim "adversely" to COLSA and remanded the appeal to the parties to see if they can resolve amicably the issue of quantum, *i.e.*, the proper amount of the disallowance. Because COLSA has not submitted a claim to the CO seeking "fixed fee set out in the contract" or any other sum, the Board lacks jurisdiction to "award" COLSA "fixed fee" or any other monies. *See* 41 U.S.C. § 605(a); *Heyl & Patterson v. O'Keefe* [38 CCF ¶ 76,475], 986 F.2d 480 (Fed. Cir. 1993); *Paragon Energy Corp. v. United States* [28 CCF ¶ 81,290], 645 F.2d 966, 971 (Ct. Cl. 1981); *Eurostyle, Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458; *LGT Corp.*, ASBCA No. 44066, 93-3 BCA ¶ 26,184 (June 30, 1993). Thus, we are aware of no basis to modify our prior decision to add the language requested by COLSA.

Finally, COLSA asserts in its reconsideration motion that, while the Board referred to Ms. Schrecongost as a "Contract Specialist in accordance with the affidavits submitted by Ms. Schrecengost" [sic], "COLSA knew her, based upon her representations, as the 'Contracting Officer' who issued contract DAAD07-89-C-0024." COLSA appends to its motion excerpts from what appears to be contract No. DAAD07-89-C-0024 which previously were not part of the record, but proffers no reason why the Board should, in resolving a reconsideration motion, examine evidence previously available to COLSA and not submitted. The belatedness of COLSA's attempt to supplement the record, however, need not concern us because, as the Government notes in opposition to the reconsideration motion, the excerpts proffered are immaterial. At issue in this appeal is contract No. DAAD07-87-C-0020, not contract No. DAAD07-89-C-0024. COLSA is charged, as a matter of law, with knowing the authority of Government officials. *E.g., Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *HTC Industries, Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560 at 127,310, *aff'd on recon.*, 93-2 BCA ¶ 25,701. Moreover, as stated in our prior decision, even if one assumed Ms. Schrecongost was the CO for contract No. DAAD07-87-C-0020, the statement she purportedly made regarding modification of the contract would "not justify a failure by COLSA to obtain a modification of a [Work Assignment Order]." Accordingly, COLSA's motion for reconsideration is denied and our prior decision affirmed.

[¶ 26,535] New England Construction Company

ASBCA No. 44229, November 30, 1993. Contract No. DAHA43-91-C-0011.

Interpretation of Contracts—Drawings—Drawings and Specifications Read Together.—A drawing that did not provide for the installation of cranes and that provided that the installation was an additive bid item was patently ambiguous, because the relevant specification expressly stated that crane quantity was indicated on the drawing. A contract for construction work at an airplane engine inspection and repair shop described the base-bid work as the installation of an overhead crane system, and it described the furnishing and installing of three overhead monorail cranes as an the additive bid item. Construing the contract to require the supply of cranes only under the additive bid item would give no meaning to the word "crane" as used in the phrase "overhead crane system," which is contrary to the principles of contract interpretation.

Interpretation of Contracts—Ambiguities, Patent—Duty to Seek Clarification.—A contractor had an affirmative obligation to obtain clarification of a discrepancy between a specification and a drawing because it was aware that a drawing made no reference to the number of cranes to be installed in an overhead crane system and because it knew before bidding that its prospective subcontractors disagreed concerning the number of cranes to be installed. The contractor's interpretation of the discrepancy that a drawing, which omitted the number of cranes to be installed, meant that it was not required to install any

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cranes in an overhead crane system was unreasonable. Although the contractor contacted, by phone, a government employee who did not have authority to respond to the inquiry and who indicated that he was unable to respond, the procedure did not conform to the instructions furnished with the invitation for bids to contact the contracting officer.

For the appellant: Arter & Hadden, Cleveland, Ohio, by Barry J. Miller. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Lt. Col. Thomas O. Mason, JAGC, Trial Attorney.

Before HARTMAN, WILLIAMS, and RUBERRY, Administrative Judges.

HARTMAN, Administrative Judge: Appellant seeks review of a contracting officer's final decision denying its claim for an equitable adjustment in contract price based upon supply and installation of three cranes as part of its base-bid work. Entitlement only is at issue.

STATEMENT OF FACTS

On 31 July 1991, the Department of the Army issued an invitation for bids ("IFB"), No. DAHA43-91-B-0006, for the performance of construction work at the Vermont Air National Guard Base Engine Inspection and Repair Shop, Building No. 330, Burlington International Airport, which contained a base bid and four "additive bid" items. The base bid was "to furnish all plant, labor, materials, equipment and services necessary" to construct an addition housing administrative functions, and to "[a]lter existing facility for the expansion of the engine repair area by eliminating the administrative areas and installation of an overhead crane system." (R4, tab 1 at 1)

Section 14920 of the IFB was entitled "Overhead Monorail Cranes." The first part of section 14920, which was entitled "General," provided in part as follows:

1.02 *DESCRIPTION OF WORK:*

A. The work covered by this section includes the furnishing and installation of overhead monorail cranes.

B. The quantity, requirements and locations are indicated on Drawing No. S2.

1.03 *QUALITY ASSURANCE*

A. Provide at least one person who shall be present at all times during the execution of this portion of the work and who shall be thoroughly trained and experienced in installing monorail cranes specified ....

(R4, tab 1 at 36) (Emphasis added)

The second part of section 14920 entitled "Products" stated that: "the clearance between the ends of the crane and the building columns, knee braces or any other obstructions shall be not less than 2 inches with crane centered on runway rails;" there shall be "a minimum clearance of 3 inches between the highest point of the crane and the lowest overhead obstruction;" "crane stops furnished by the purchaser shall be designed to suit the specific crane to be installed;" "runway rails should be standard rail sections of a proper size for the crane to be installed;" "conductors shall have sufficient capacity to carry the required current to the crane, or cranes, when operating with rated load;" and "[t]he rated capacity of the crane shall be that load for which the crane is designed." (R4, tab 1 at 36-38) (Emphasis added)

The third part of section 14920 entitled "Execution" provided in part as follows:

A. *PREPARATION:*

Coordinate installation of monorail cranes and associated equipment indicted [sic] on the drawings....

Coordinate delivery of cranes and associated equipment to project site to avoid delaying progress.

[sic] *INSTALLATION:*

General: Comply with manufacturer's detailed instructions for the installation of cranes and associated equipment.

B. *ERECTION:*

[] The Crane shall be erected ... by the contractor.... The purchaser shall protect the crane from the time of its receipt until it is placed in service....

C. *LUBRICATION:*

[] The crane shall be provided with all necessary lubrication fittings. Before putting the crane in operation, the contractor shall lubricate all bearings, gears, etc. in accordance with the crane manufacturer's recommendations.

D. *PAINTING:*

[] Before shipment, the crane shall be cleaned and painted with the crane manufacturer's standard paint, unless otherwise specified.

E. *ASSEMBLY AND PREPARATION FOR SHIPMENT:*

[] The crane shall be assembled in the manufacturer's plant. ... The crane shall

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be taken apart only to the extent necessary for shipment and all parts shall be carefully match-marked. . . .

F. *WARRANTY:*

[] Provide the manufacturer's standard warranty.

G. *ADJUST AND CLEAN:*

[] Make necessary adjustments for safe, efficient operation of monorail cranes and associated equipment.

(R4, tab 1 at 38-40) (Emphasis added)

Section 01010 of the IFB, which was entitled "Summary of Work," expressly provided that "an overhead crane system is to be added." It also provided that the work was to be performed in four phases, "[c]onstruction of the new crane area should be delayed until after the exterior storage area and addition are completed," and "[d]uring construction of the new crane area, the Owner must have complete use of the [existing] crane system at the East end of the building" (R4, tab 1 at 31-32) (emphasis added).

Section 01030 of the IFB entitled "Additive Bid Items" defined an additive bid item as "an amount proposed by Bidders and stated on the Bid Form for certain construction activities defined in the Bidding Requirements that may be added to the Base Bid amount if the Owner decides to accept a corresponding change in either the amount of construction to be completed, or in the products, materials, equipment, systems or installation methods described in the Contract Documents." It described additive bid item No. 2 as follows:

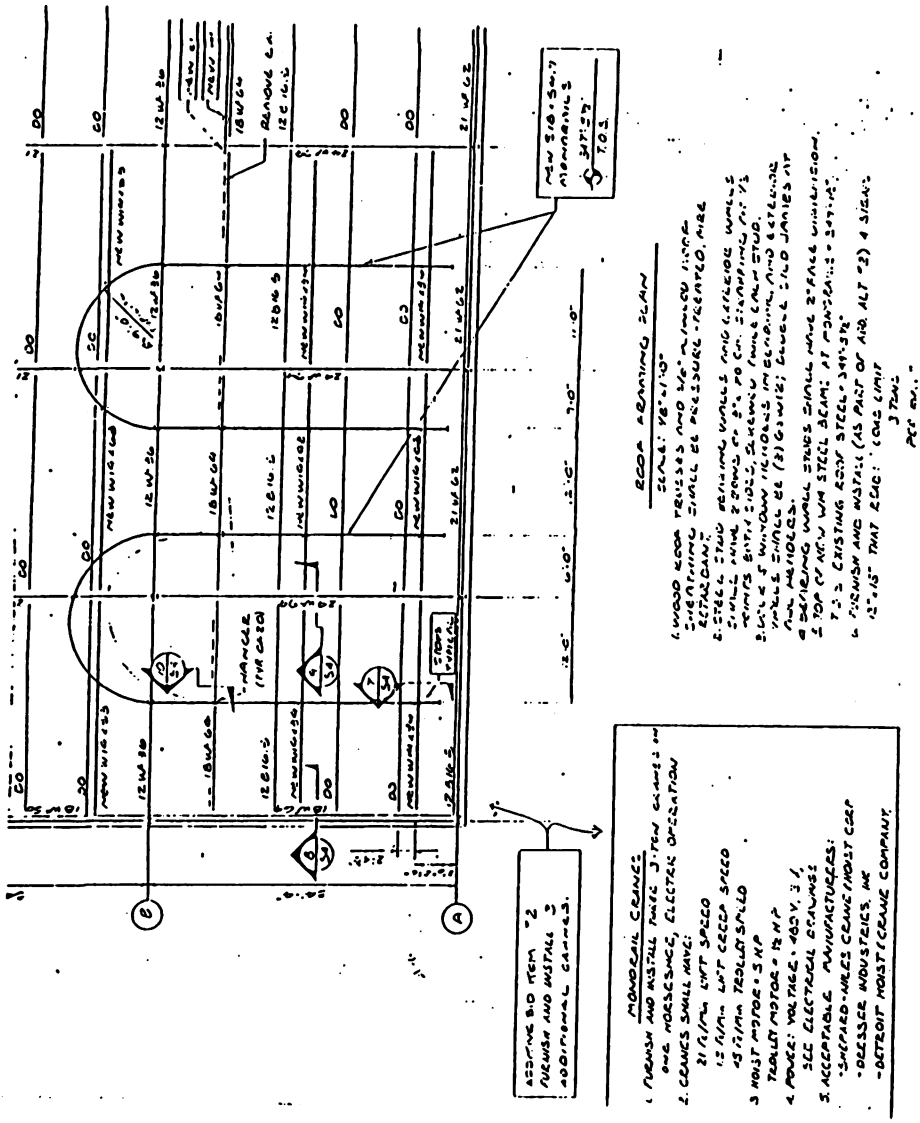
> The work of this additive bid item consists of the furnishing and installing of 3 Overhead Monorail Cranes. All other work at the monorails is part of the Basic Contract Amount.

(R4, tab 1 at 33-34)

Drawing S2, which was referenced in part one of IFB section 14920 and enclosed with the IFB, was labeled "Framing Plan" and depicted a new monorail crane system in the altered structure as follows:

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The IFB incorporated by reference various standard clauses (R4, tab 1 at 5-12), including FAR 52.236-21 and DFARS 52.236-7002. The former provides that "[i]n case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing" and "[a]ny adjustment by the Contractor without such a determination shall be at its own risk and expense." The latter provides that "[t]he Contractor shall check all drawings furnished him immediately upon their receipt and shall promptly notify the Contracting Officer of any discrepancies."

Appellant, New England Construction Company ("NECCO"), an experienced Government contractor, received a copy of the IFB and commenced preparation of a bid. NECCO sent copies of the plans and specifications to potential subcontractors, such as hoist manufacturers, structural steel fabricators, and steel erectors, and solicited quotes from them to perform various aspects of the contract work. The crane suppliers solicited submitted quotes for supplying different numbers of cranes to NECCO's estimator, Jack Barnes, causing Mr. Barnes to conclude "there seemed to be confusion out there as to how many cranes were required" under the contract. (Tr. 28-29, 34-36, 48-49, 56-58, 78-79, 145)

On 29 August 1989, one day before bid opening, because Mr. Barnes "was feeling somewhat confused about what exactly the plans and specifications were asking for regarding cranes and monorails," he called Tom Boll, the chief structural engineer with Hallam & Associates ("Hallam"), an architect and engineer ("AE") firm retained by the Government, in order to obtain a "clarification." Mr. Boll had not been involved in Hallam's preparation of the project plans and specifications because he only joined the firm in the summer of 1991, and had not been designated by the Government as an individual to respond to inquiries from bidders. Mr. Boll advised Mr. Barnes that he was not able to say how many cranes were specified and Mr. Barnes would have to use his own judgment. (R4, tabs 25, 38; tr. 57-61, 69, 76, 109, 117-19, 124-25, 130-31, 137-38, 162)

After speaking with Mr. Boll, Mr. Barnes did not call the contracting officer, the base civil engineer, or anyone else knowledgeable about the project. Rather, he simply "reached [his] own conclusions about or [his] own understanding of what was required in the base bid and what was required in the alternates," which was that the base bid did not require supply of any cranes and that additive bid item No. 2 required the supply of three cranes, if awarded. In completing NECCO's bid, Mr. Barnes therefore did not include the cost of supplying any cranes, except with respect to additive bid item No. 2. (R4, tabs 8, 39; tr. 33-34, 60-61, 64-65, 69-70, 72-73, 76, 107, 146, 157)

On 30 August 1991, the contracting officer learned that there were sufficient funds for the Government to award all of the additive bid items for the project and opened the four bids she had received. The bids had been submitted by NECCO, E.G. Wall & Associates, Delphia Construction, and K.R. Adams, and totalled for the base and additive bid items, respectively, $270,010, $297,283, $304,353, and $345,900. The contracting officer requested that NECCO verify its apparent low bid and NECCO did so without raising the issue of the number of cranes to be supplied. (R4, tabs 3, 24; tr. 39-40, 72-73, 108, 146-47, 149-51, 156-57)

On a prior IFB issued for work at the base where NECCO was the apparent low bidder, NECCO notified the contracting officer after bid opening that it had failed to include in its bid material and labor costs for some additive bid items and thereafter did not receive award of the contract. NECCO, thus, was familiar with the procedures for alerting a Government contracting officer to a mistake in bid and the possibility that, if it did so, it may not receive award of the contract. (Tr. 38, 144-45)

In mid-September of 1991, the contracting officer awarded the contract to NECCO. Approximately one month later, on 14 October 1991, Mr. Boll, who had been assigned by Hallam to be the contract project manager, called NECCO to ascertain whether there were any issues it planned upon raising at the pre-performance conference scheduled for the next day. Mr. Barnes reminded Mr. Boll of their conversation on 29 August 1991 and advised Mr. Boll that, when NECCO's clarification request went unanswered, NECCO "carried no cranes on the base bid and had three on the additive bid item." Because NECCO's action was "clearly against [Mr. Boll's] understanding" that the contract required "[t]hree [cranes] in the base bid and three in the additive bid items," Mr. Boll promptly sent a letter by facsimile to the Government's contract specialist advising that: "[i]n talking to Jack Barnes ... it became clear that [NECCO] included *zero* cranes in the base bid and car-

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ried 3 as AB#2 that will result in one of the monorails being a non-functional crane system;" "[i]t was the consultant's intent to have 3 in the base bid and 3 in additive bid item #2;" and "[t]his is a 'big ticket' item and we should be prepared to talk about it at our meeting" (emphasis in original). (R4, tabs 1, 4; tr. 61, 72-73, 117-18, 120-21)

At the pre-performance conference and a subsequent meeting in October, the parties discussed their differing views regarding the number of cranes to be supplied and the contracting officer requested that NECCO furnish her documentation supporting its claim that it had included in its bid only the cost of supplying three cranes. Thereafter, NECCO sent the contracting officer documents generated during preparation of its bid, a letter setting forth its interpretation of the contract, and cost information for supply and installation of three additional cranes. (R4, tabs 5 through 8, 10; tr. 63, 158-59)

By letter dated 4 November 1991, the contracting officer advised NECCO that its "stated interpretation of the plans and specifications does not relieve [it] of the responsibility to perform the contract, to include the provision and installation of two (2) Overhead Crane Systems," each with "three (3) overhead cranes. She also requested assurance from NECCO that it "possess[ed] the capability and intent to perform th[e] contract in its entirety at no additional cost to the Government." On 19 November 1991, NECCO notified the contracting officer that: "NECCO Inc. is not asserting that there was any error in its bid, nor ... seeking relief from its bid;" NECCO "stands ready to perform the contract work in accordance with its bid;" and "[i]n the event that the Government wishes to have NECCO Inc. install three overhead cranes on each monorail, please issue and [sic] appropriate written directive for us to perform that work." (R4, tabs 9, 11, 12)

In a letter dated 12 December 1991, NECCO advised the contracting officer that it had "not received the requested [crane work] directive and would like the matter made clear." On 4 February 1992, after receiving a letter from Hallam that "[i]t remains [Hallam's] interpretation that three cranes are included in the Base Bid and an additional three cranes ... in Additive Bid Item #2," the contracting officer issued a document notifying NECCO that "[y]our stated interpretation of the contract requirements ... is in error," setting forth a detailed explanation for her conclusion, and stating "[t]his is the final decision of the Contracting Officer." By letter dated 27 February 1992, NECCO advised the contracting officer that it was in receipt of her "Directive to install six (6) cranes," and was "at this time making a claim for equitable adjustment of $35061.00 and requesting a four (4) day extension" of contract time. On 2 March 1992, the contracting officer notified NECCO simply that "[i]f you choose to appeal my final decision, rendered on 04 February 1992, you must follow the guidelines, as stated in paragraph 8 [of that decision]." (R4, tabs 13, 16 through 18)

Approximately one week after the contracting officer advised it to follow the appeal guidelines previously set forth, NECCO filed this appeal with the Board. During November of 1992, the Board conducted a one-day hearing in Burlington, Vermont, at which the AE's project manager testified that the components of an "overhead crane system" are understood to include one or more "cranes" and the contracting officer testified that, if she had been made aware of the problem with the plans and specifications, she could have amended the solicitation and extended the bid opening date to allow bidders a chance to make any necessary modifications to their bids (tr. 117, 126, 140, 143, 150-51). Subsequently, the parties submitted to the Board both initial and reply, post-hearing briefs.

DECISION

NECCO contends in its briefs that it is entitled to receive an equitable adjustment in the contract price for supplying three cranes as part of its base-bid work because the contract drafted by the Government was ambiguous concerning the number of cranes to be supplied and NECCO's interpretation of the contract as requiring only the supply of three cranes under the second additive bid item was reasonable. The Government, however, contends in its briefs that NECCO is precluded from receiving a price adjustment because any ambiguity regarding the number of cranes to be supplied was "patent," NECCO did not apprise the contracting officer of that ambiguity before contract award, and NECCO's interpretation of the contract as requiring zero cranes to be supplied under the base bid was unreasonable.

Under the rule of *contra proferentem*, a contract ambiguity is to be construed against the party who drafted the contract. An exception to the rule exists, however, if the ambiguity is "patent." The rule does not ap-

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ply with respect to a patent ambiguity unless an authorized representative of the drafting party has received an inquiry prior to contract award from the other party about the contract's true meaning. This exception ensures that all bidders are bidding upon the same specification, protects the drafting party from being taken advantage of by a bidder who relies upon the least costly interpretation of a serious ambiguity in order to obtain contract award and who plans to seek an increase in contract price later when a more costly interpretation is advanced by the drafter, and assists contract administration by requiring ambiguities to be resolved administratively pre-award, rather than in costly litigation post-award. *Newsom v. United States* [29 CCF ¶ 82,417], 676 F.2d 647, 649 (Fed. Cir. 1982); *S.O.G. of Arkansas v. United States* [23 CCF ¶ 80,878], 546 F.2d 367, 371, 212 Ct. Cl. 125, 131 (1976); *Beacon Construction Co. v. United States* [9 CCF ¶ 72,018], 314 F.2d 501, 504, 161 Ct. Cl. 1, 6-7 (1963).

There is no general rule for determining when an ambiguity is patent. Rather, that determination is made on a case-by-case basis, utilizing an objective standard of what a reasonable man would find to be patent and glaring. *Newsom*, 676 F.2d at 649-50; *Max Drill, Inc. v. United States* [15 CCF ¶ 83,691], 427 F.2d 1233, 1244, 192 Ct. Cl. 608, 626 (1970); *M.C. Dean Electrical Contracting, Inc.*, ASBCA No. 38132, 90-1 BCA ¶ 22,314 at 112,066, *aff'd on recon.*, 90-2 BCA ¶ 22,711; *Harco Manufacturing Co.*, ASBCA No. 27567, 85-1 BCA ¶ 17,926 at 89,759, *aff'd*, 790 F.2d 91 (Fed. Cir. 1986) (table).

Here, the parties' contract described the base-bid work as including "installation of an *overhead crane system*" (emphasis added). The phrase "overhead crane system" means an overhead system containing one or more "cranes." To conclude otherwise would be to give no meaning to one of the words contained in the phrase, *i.e.*, "crane," contrary to the principles of contract interpretation. *See, e.g., State of Arizona v. United States*, 575 F.2d 855, 863, 216 Ct. Cl. 221, 235 (1978); *Astro-Space Laboratories, Inc. v. United States* [18 CCF ¶ 81,894], 470 F.2d 1003, 1010, 200 Ct. Cl. 282, 295 (1972).

Section 14920 of the contract Specification stated that "[t]he work covered by th[at] section includes the furnishing and installation of overhead monorail cranes" and "[t]he quantity, requirements and locations are indicated on Drawing No. S2." Contract drawing No. S2 contained a note which was enclosed in a box and labeled "Monorail Cranes." The note stated that the contractor was to "[f]urnish and *install three 3-ton cranes* on one horseshoe, electric operation," specified acceptable crane manufacturers, and set forth required speeds, horsepowers, and voltages for the cranes (emphasis added). Drawing No. S2 contained a second note enclosed in a box, which had arrows pointing from the box to both the note described previously and a horseshoe-shaped track depicted upon the drawing. That note stated: "Additive Bid Item #2 Furnish And *Install 3 Additional Cranes*" (emphasis added).

The parties' contract described additive bid item No. 2 as simply the "furnishing and installing of 3 Overhead Monorail Cranes." The contract noted, with respect to additive bid item No. 2, that "[a]ll other work at the monorails is part of the Basic Contract Amount." Because the contract expressly defined an additive bid item as "an amount proposed by Bidders . . . for certain construction activities . . . that may be added to the Base Bid amount if the Owner decides to accept a corresponding change . . . in the products, materials, equipment, systems or installation methods described in the Contract Documents," the three cranes referenced under additive bid item No. 2 would be supplied and installed by the contractor *only* if the Government elected after bid submission to make a "change" in the equipment or systems required under the base bid.

Although the language used in the contract to convey the number of cranes to be installed under the base bid is not a model of clarity, one reading the contract documents as carefully as a prospective bidder and construing drawing No. S2 as requiring only the supply of cranes under the additive bid item could not help but notice a conflict between the drawing and other contract documents. Such a construction would result in the installation of an overhead system with *no cranes*, unless the Government subsequently elected to "change" the equipment by awarding additive bid item No. 2, when the contract documents repeatedly described the base bid work as "installation of an overhead *crane* system" (emphasis added). *See, e.g., Bodell Construction Co.*, ASBCA No. 44474, *M.C. Dean Electrical Contracting, Inc.*, 94-1 BCA ¶ 26,429 (18 Oct. 1993) 90-1 BCA ¶ 22,314 at 112,067; *Master Mechanical Contractors, Inc.*, ASBCA No. 33304, 87-2 BCA ¶ 19,799 at 100,160.

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Moreover, such a reading would be premised upon a glaring drawing "omission." Because Specification section 14920 expressly states that crane "quantity, requirements and locations *are indicated* on Drawing No. S2" and *nowhere* on the drawing does it state that the contractor is to supply "zero" cranes when installing an "overhead crane system" under the base bid, a bidder so reading the drawing necessarily must conclude that the "number" of cranes to be installed as part of that work has been omitted from the drawing and furnish its own number, *i.e.*, "zero." (Emphasis added) *See, e.g., Jefferson Construction Co. v. United States* [7 CCF ¶ 71,364], 151 Ct. Cl. 75, 88 (1960); *Lord and Son Construction, Inc.*, ASBCA No. 42700, 91-3 BCA ¶ 24,346 at 121,620.

In its post-hearing briefs, NECCO acknowledges that, under its reading, drawing No. S2 makes no mention of cranes as part of the base bid work. NECCO also acknowledges that it knew before bidding its prospective subcontractors disagreed concerning the number of cranes to be supplied under the contract. (App. br. at 11, 18, 23; app. reply br. at 3, 5) When a bidder has notice of a significant problem, such as NECCO here, the bidder is not free simply to "bridge the gap" in its own favor by supplying the number zero or another number. Rather, it has an affirmative obligation to make appropriate inquiries in an effort to obtain clarification. *E.g., Max Drill*, 427 F.2d at 1243; *Westerchil Construction Co.*, ASBCA No. 35191, 88-2 BCA ¶ 20,528 at 103,776.

NECCO asserts in its briefs that it made such an inquiry and was furnished no guidance (app. br. at 26-27, app. reply br. at 1, 8-10). However, NECCO, an experienced Government contractor, did not follow the instructions furnished bidders in the IFB and contact the Government's contracting officer regarding the problem. Rather, one day before bid opening, it simply contacted by telephone an employee of the AE firm retained by the Government for the project who had not been designated or authorized to respond to such inquiries and who indicated he was unable to respond. NECCO therefore did not make appropriate inquiries to obtain clarification. *See, e.g.*, FAR 52.366-21; *Jefferson Construction Co.*, 151 Ct. Cl. at 90-91; *Construction Foresite, Inc.*, ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,072.

Citing *Wright Associates, Inc.*, ASBCA No. 22492, 79-2 BCA ¶ 14,102, *aff'd on recon.*, 80-1 BCA ¶ 14,252, NECCO also asserts that an inquiry of the contracting officer was unnecessary because it would not have produced a meaningful response (app. reply br. at 6-7). However, unlike the case cited, which this Board previously has characterized as "turn[ing] primarily on the proven facts," *Wright*, 80-1 BCA ¶ 14,252 at 70,207, there is no evidence in the record which would support such a finding here. *See Fred A. Arnold, Inc.*, ASBCA Nos. 22124, 22428, 78-2 BCA ¶ 13,369 at 65,345. Indeed, NECCO's contracting officer testified at the hearing that, if she had known of the problem, she could have extended the date for bid opening to allow review of the issue and notification of all potential bidders of her advice on the issue.

In sum, NECCO failed to bring to the Government's attention a patent ambiguity regarding the number of cranes to be supplied. Accordingly, it cannot now avail itself of the

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contra proferentem rule to obtain an equitable adjustment based upon that ambiguity.*

CONCLUSION

The appeal is denied.

[¶ 26,536] J.A.K. Construction Company, Inc.

ASBCA No. 43099, November 30, 1993. Contract No. DAKF27-89-D-0042.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Frozen Pipes.—The government's order to repair burst pipes was a compensable change because the work was outside the scope of the contract in that the contractor made a *prima facie* showing that the contract required it to protect buildings from freezing only while the buildings were in its possession. The government contended that even if the pipes froze when the units were back in the government's possession, the contractor was responsible because it failed to warn the government that supplemental heating would be necessary. However, the contract did not impose that burden on the contractor, and there was no obligation to provide a warning to the government, because the government was aware of the need to protect the buildings from freezing since it had drafted the specifications authorizing supplemental heating while the buildings were in the contractor's possession.

Interpretation of Contracts—Plumbing, Pipes, and Welding—Water Damage.—A contractor was responsible for water damage caused by burst pipes, even though the pipes were damaged while the housing units were in the possession of the government, because the contractor, as the party in possession of the units when the water was turned back on, should have checked for the possibility of cracked pipes to prevent water damage as a matter of simple prudence. In a contract for the replacement of heating systems in family housing units, the contractor knew that the water had been shut off for at least seven months over the winter. It also knew that it had not drained the pipes and that the pipes might have frozen and cracked. Since it failed to drain the pipes, it was responsible for resulting water damage under the terms of the clause that made the contractor responsible for all damage to the property that occurred as a result of the contractor's fault or negligence, and the work was not a compensable change.

For the appellant: John Sfakianoudis, Vice President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Margaret A. Schuyler, JAGC, Trial Attorney.

Before LANE, SPECTOR, and STEMPLER, Administrative Judges.

LANE, Administrative Judge: Appellant had a contract for replacement of heating systems in family housing. The contract required appellant to protect the housing units from freezing. The units in issue were in appellant's possession for part of the winter, in the Government's possession for the rest of the winter, and then back in appellant's possession for completion of the work. At some unknown time during the winter the pipes froze and water damage resulted. Appellant claims $2,264.06 for the cost of performing ordered repairs to fix the pipes and correct the water damage.

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* NECCO raises two additional contentions in support of its receipt of an equitable adjustment, but neither merits much discussion. While NECCO contends the "Government cannot establish the ultimate instructions [it furnished] to the design professional for the treatment of cranes" and, when drafting the final specification, the AE believed cranes simply were to be an alternate bid item because of a miscommunication between it and the Government, neither the subjective intent of the AE nor the Government is at issue here. The goal in an appeal such as this is to determine the intent of the contracting parties *as expressed* in their contract. *E.g., L. Rosenman Corp. v. United States* [12 CCF ¶ 81,648], 390 F.2d 711, 714, 182 Ct. Cl. 586, 590 (1968); *Harco Manufacturing, supra*, at 89,759. Moreover, while NECCO contends that this appeal is analogous to *United States v. Turner Construction Co.* [34 CCF ¶ 75,292], 819 F.2d 283 (Fed. Cir. 1987), a case where the court concluded there was no patent ambiguity because, "[e]ssentially, the location of the transmitters appears to [have] be[en] a nonissue in the specifications," one cannot fairly construe the parties' contract here as leaving the number of cranes which were to be installed to the discretion of the contractor. As found above, the contract expressly stated that the crane "quantity, requirements and locations *are indicated* on Drawing No. S2" (emphasis added).

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This appeal was submitted for decision on the written record under Rule 11 without a hearing. Only entitlement is in issue.

We conclude that appellant is entitled to recover for the cost of repairing the pipes because the Government has not carried the burden of showing that the damage occurred during appellant's possession of the units, and appellant did not have an obligation to warn the Government when turning back the units of the need to protect them. However, appellant is not entitled to recover its cost of repairing the water damage to the units because it has not carried its burden of showing due care in checking for leaks when it turned the water back on.

FINDINGS OF FACT

1. On 29 August 1989 the Directorate of Contracting, Fort Meade, Maryland, awarded appellant contract No. DAKF27-89-D-0042 for the replacement of heating systems in 300 military family housing units. It was a firm fixed-price requirements contract for $1,224,345. (R4, tab 1; Sfakianoudis Affid., ¶ 3, 4)

2. The contract included (in Section I) the following standard clauses: Permits and Responsibilities (APR 1984) (FAR 52.236-7) [1]; Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements (APR 1984) (FAR 52.236-9) [2]; Use and Possession Prior to Completion (APR 1984) (FAR 52.236-11) [3]; and Changes (AUG 1987) (FAR 52.243-4).[4] (R4, tab 1)

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[1] PERMITS AND RESPONSIBILITIES (APR 1984)

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

[2] PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984)

(a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site, and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

[3] USE AND POSSESSION PRIOR TO COMPLETION (APR 1984)

(a) The Government shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government's possession or use shall not be deemed an acceptance of any work under the contract.

(b) While the Government has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from the Government's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities." If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

[4] CHANGES (AUG 1987)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—

(1) In the specifications (including drawings and designs); (2) In the method or manner of performance of the work; (3) In the Government-furnished

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3. (a) The specifications contained two provisions relating to protection of buildings from freezing.

(b) Part I, Statement of Work, included the following in the Notes to Bidders:

4. The Contractor shall be responsible for protection of all quarters in his possession from weather damage and freezing. Any quarters with heating systems which are inoperable during freezing weather shall be provided with supplemental electric heat or shall have the plumbing system and fixtures properly drained and protected from freezing.

(R4, tab 1)

(c) Part II, Technical Provisions, in Section 15011—General Requirements, Mechanical, included the following paragraph:

22. SHUT DOWN OF EXISTING HEATING/COOLING SYSTEMS: Contractor shall not shut down heating systems during normal work hours during the period from 15 October through 15 April and shall not shut down cooling system during normal work hours from 15 June through 15 September unless specifically approved in writing by the Contracting Officer or his authorized representative. Work requiring shut down of existing systems shall be performed from 1600 hours through 0600 hours on normal work days or on weekends provided the system is again in operation for the next regular work day. During times of outages of the heating system, the contractor shall be fully responsible for the protection of the building, its systems, and its contents from damage due to freezing. Any damages which may occur shall be repaired or replaced at the Contractor's expense.

(R4, tab 1)

4. Section F, Deliveries or Performance, of the contract included the following provision:

1.) The contractor will be given fifteen (15) sets of housing units initially to begin work. The first set of completed quarters must be returned to the Government within 21 calendar days of receipt. Thereafter, the contractor shall be required to complete a minimum of 15 sets of quarters per calendar month. The contractor shall return no more than 5 sets of quarters to the Government during any seven day moving period. When a unit is completed and accepted by the Government, a new unit will be released to him. The Contractor shall have no more than 15 units in his possession at any given time, however, delivery orders for more than 15 units may be issued by the Government giving projected availability dates for the quarters.

2.) As with the quantities stated in the Bid Schedule, the quantities stated in paragraph 1. above are estimates and are based on optimum conditions. The failure of the Government to order these quantities shall not constitute the bases [sic] for an equitable price adjustment.

(Footnote Continued)

facilities, equipment, materials, services, or site; or (4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

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(R4, tab 1, Amendment No. 0005 to Solicitation)

5. On 29 September 1989 the Government issued Delivery Order No. 0001 for work on 144 units. On 30 September 1989 the Government issued Delivery Order No. 0002 for work on 138 additional units. (R4, tabs 5, 6)

6. (a) On 4 December 1989, the Government gave appellant keys to fifteen housing units—ten two-bedroom units and five three bedroom units. The latter were units Nos. 7116-H, 7226-E, 7226-D, 7226-H, and 7313-A. (Sfakianoudis Affid., ¶ 5; R4, tab 48)

(b) The parties have treated the receipt and return of keys to individual units as receipt and return of possession of those units.

7. Appellant proceeded with the work and removed the existing furnaces from the fifteen units. On 20 December 1989, appellant informed the Government inspector that telephone conduit in the three-bedroom units (Nos. 7116-H, 7226-D, 7226-E, 7226-H and 7313-A) interfered with the new ducts. (R4, tabs 11, 12, 50; Sfakianoudis Affid., ¶ 5-6) The parties discussed the problem at a 27 December 1989 meeting but did not resolve it. By letter of 28 December appellant advised the Government that the telephone conduit would have to be relocated or abandoned; that until the matter was resolved appellant could not continue work in the three-bedroom units; and that it wanted the housing office to issue two-bedroom units to replace the affected three-bedroom units. (R4, tabs 13, 15; Sfakianoudis Affid., ¶ 7)

8. It is undisputed that on 4 or 5 January 1990 appellant returned to the Government the keys to the five three-bedroom units. (R4, tabs 14, 48, 50) The parties disagree as to whether this was pursuant to a Government directive; we do not consider it material to the case and make no finding on the point.

9. It is undisputed that when appellant initially took possession of the units on 4 December 1989, the water had been turned off and there was no indication of leaks in the existing piping systems. (Sfakianoudis Affid., ¶ 16)

10. (a) Appellant asserts in a rather general way that

> [w]hen JAK first took possession of these units on December 4, 1989, it took all reasonable and necessary precautions to protect these units from weather damage and freezing as called for under the Contract. The precautions taken by JAK remained in effect until JAK relinquished possession of these units back to the Government on January 4, 1990.

(Sfakianoudis Affid., ¶ 15)

(b) It is evident from the subsequent freezing of the pipes that appellant did not drain the plumbing systems and fixtures. The alternative method permitted by the contract to protect against freezing was to provide supplemental electric heating (finding 3(b)). Appellant's vice president does not state specific details as to precisely what precautions appellant took. Furthermore, while he states that he has personal knowledge of the facts, he does not state that he personally observed the precautions taken against freezing as opposed to relying on reports from his workers. We therefore decline to make a finding one way or the other as to whether appellant took precautions against freezing and whether they were adequate. Such a finding is not necessary to our decision.

11. When appellant returned the keys to the five units to the Government on 4 January 1990, it did not advise the Government whether the water pipes had been drained, whether the buildings had supplemental heating, or whether measures by the Government to protect the buildings were now required. Appellant does not assert otherwise.

12. Correspondence and discussions concerning the telephone conduit continued, but it was not until 3 July 1990 that bilateral modification P00005 was issued, adding a new line item to the contract to relocate electrical and telephone lines. (R4, tab 19)

13. There is no evidence or allegation that the Government took any precautions against freezing between 4 January and July 1990. We find that it did not.

14. During July 1990 the Government reissued to appellant the keys to the five three-bedroom units in issue (one on 5 July and the other four on 16 July) (Sfakianoudis Affid., ¶ 11). From 4 January to 5 July 1990, appellant had no access to the five units in issue. They were entirely in the Government's possession during that time. (Sfakianoudis Affid., ¶ 19)

15. Appellant proceeded to complete the work in those units. Before final cleanup, the water to the units was turned on (whether by appellant or by the Government at appellant's request is not clear), and appellant proceeded with final cleanup. During cleanup, appellant discovered water damage and water leaking into the kitchen

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and laundry areas in the five units, and discovered that pipes encased in the walls of the housing units had frozen and burst during the winter. (Sfakianoudis Affid., ¶ 12-14; R4, tabs 22, 23) Appellant immediately shut off the water, notified the Government, and asked the Government inspector to observe the leaks. (Sfakianoudis Affid., ¶ 13)

16. There is no allegation or evidence that when appellant turned the water back on or asked the Government to do so, appellant checked the units to be sure the pipes were intact and not leaking. We find it did not do so.

17. There is no allegation or evidence that water damage done by water leaking from the pipes that had burst occurred while the units were in the Government's possession. On the contrary, the record indicates that appellant discovered water leaking and water damage only during final cleanup after the water had been turned back on. We find that the water damage occurred after the water had been turned back on while the units were in appellant's possession.

18. It also appears that there were three other causes of water leaks and damage not pertinent to the claim before us. On 9 July and 13 July 1990, appellant wrote the Government about a large accumulation of water in the mechanical room of unit No. 7116-H, apparently due to broken pipes under the kitchen sink that appellant had reported several months before and that was apparently not due to freezing of the pipes. (R4, tabs 20, 21) On 19 July 1990, in writing the Government about the water leaks in the kitchen and laundry areas in the five units in issue, appellant also mentioned a leak in the elbow of the sink in the upstairs bathroom in one of those units (No. 7226-H), and a leak in the upstairs toilet tank in another unit (No. 7104-C) that is not part of the present claim. (R4, tab 22)

19. There is no persuasive evidence as to when the water pipes in the five units in issue froze and burst. On this record it is not possible to find whether the pipes froze and burst between 4 December 1989 and 4 January 1990 while the units were in appellant's possession or between 4 January and 5 July 1990 while the units were in the Government's possession.

20. Appellant's vice president states without contradiction that the Government directed appellant to repair the leaks to the pipes encased in the walls. (Sfakianoudis Affid., ¶ 14) The affidavit does not specifically state that the Government ordered appellant to repair the water damage resulting from the leaks. The contracting officer's decision (R4, tab 48), however, determined that appellant was responsible for "any resulting damages" from the freezing. We find that the Government ordered appellant to repair the pipes and the water damage at its own expense and that the contracting officer either gave that order or at least ratified it in his final decision.

21. It is undisputed that appellant repaired the burst pipes and the water damage they had caused.

22. By letter of 9 January 1991, appellant submitted to the contracting officer a "claim for the damages to the five units" in the amount of $2,264.06, which included costs of repairing pipes and costs of repairing drywall, spackling, and painting. (R4, tab 32)

23. The contracting officer acknowledged receipt of the claim and promised a final decision. (R4, tab 33) After further correspondence (R4, tabs 36, 38, 44, 45), the contracting officer on 2 May 1991 issued a final decision denying appellant's claim (R4, tab 48). Appellant timely appealed to this Board by letter of 19 June 1991.

DECISION

Appellant claims reimbursement for the cost of repairing frozen water pipes and the damage that resulted from the leaking pipes.

Appellant has the ultimate burden of proof as the claimant. Appellant has established a prima facie case for recovery of the cost of repairing the broken pipes by demonstrating that the work was ordered by the Government and was not within the scope of the original contract. The Government then has the burden of going forward with the evidence and showing that the broken pipes occurred because of appellant's failure to fulfill a contractual responsibility or because of appellant's negligence. Such a showing would establish appellant's responsibility to repair the pipes under the Permits and Responsibilities clause and the Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements clause. The Government has not carried this burden.

The contract required appellant to protect the buildings from weather damage and freezing, but only while they were in its possession. The pertinent specification provision is note 4 of the Notes to Bidders in Part I of the specifications (finding 3(b)), which made appellant "responsible for protection of all quarters *in his possession* from weather damage and freezing" (emphasis ad-

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ded). (Paragraph 22 of section 15011 (finding 3(c)) only applied to temporary shut down of heating systems for night work, not to long-term shut-down for replacement as in this case.)

Note 4 expressly gave appellant two alternatives for providing such protection—draining the plumbing systems and fixtures, and providing supplemental electric heating. If appellant had chosen the first alternative, the pipes would not have burst and the damage would not have occurred, but that is beside the point since the contract authorized the second alternative. Since appellant chose not to drain the plumbing systems, it *was* obligated to provide supplemental heating instead during freezing weather, and by doing so it could fully meet its contractual obligation to protect the quarters from freezing.

We have been unable to make a finding as to whether appellant actually did provide supplemental heating. However, appellant was only obligated to do so while the quarters were in its possession.

Even assuming appellant failed to provide supplemental heating while the quarters were in its possession during freezing weather, which would have violated its obligation under note 4 and would also have constituted negligence, that failure has not been shown to have caused the freezing and bursting of the pipes. The record does not provide a basis for a finding as to when the pipes froze—whether before 4 January 1990 while the units were in appellant's possession or after 4 January 1990 when appellant returned possession to the Government for the balance of the winter.

Thus the Government has not carried its burden of showing that the pipes froze because of a failure by appellant to protect them from freezing. *See Baldwin-Lima-Hamilton Corp. v. United States*, 193 Ct.Cl. 556, 434 F.2d 1371 (1970), which held that where the evidence showed two equally plausible causes of damage to equipment, one within the contractor's warranty responsibility and the other the Government's fault, the Government had not carried its burden of proof.

The Board's decision in *Beach Building Corp.*, ASBCA Nos. 30969, 31953, 88-1 BCA ¶ 20,490, cited by the Government, is not on point. That case held the contractor responsible for freeze damage which occurred over a Christmas holiday weekend when the contractor was not on the job, but the contract contained the Work Outside Regular Hours clause which the Board observed had been held to negate the notion of exclusive control by the Government. In the present case, the Government had exclusive control of the buildings in issue from 4 January until July 1990, during which period we presume the freezing of the pipes occurred, absent a showing by the Government that it occurred during appellant's possession.

The Government further argues that even if the pipes froze when the units were back in the Government's possession, appellant is responsible because it failed to warn the Government, when turning back the units on 4 January 1990, that it had not drained the plumbing systems and that supplemental heating by the Government would be necessary. The contract does not expressly impose such an obligation upon appellant, and we do not find in the contract an implied obligation to do so, whether as part of appellant's duty to cooperate or otherwise. Nor do we think appellant had an obligation to the Government to provide such a warning as a matter of reasonable care. But even if appellant did have such an obligation, the Government had to be as aware as appellant of the need to protect the buildings from freezing, and the Government had to know that appellant might not have drained the plumbing systems; the Government had drafted the specification note authorizing the alternative of supplemental heating. The Government either forgot that that option had been allowed or assumed appellant had chosen to drain the plumbing systems. In either case, that was an error on the Government's part. The most proximate cause of the frozen pipes, given our presumption that the freezing occurred while the units were in the Government's possession, was the Government's failure to provide supplemental heating, not appellant's failure to warn the Government to do so.

Accordingly, we conclude that appellant has not been shown responsible for the freezing of the pipes, and that the Government's order to repair the burst pipes was a compensable change. No issue has been raised over the absence of notification of a claim as a bar or limitation on recovery by appellant.[5]

[5] See *Central Mechanical Construction*, ASBCA Nos. 29431, 29432, 29433, 85-2 BCA ¶ 18,061, at 90,657-58; *Radionics Inc.*, ASBCA No. 22727, 81-1 BCA ¶ 15,011, at 74,278-79 (& authorities cited); *General Time Corp.*, ASBCA No. 21211, 79-1 BCA ¶ 13,611, at 66,737-38; *Davis Decorating Service*, ASBCA No. 17342, 73-2 BCA ¶ 10,107; *J.D. Abrams*, ENG BCA No. 4332, 89-1 BCA ¶ 21,379,

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The damage caused by water leaking from the burst pipes after the water was turned on again is another matter. This occurred after appellant took possession of the units in July 1990 and while they were still in appellant's possession; appellant itself says it was unaware of any leaks when it took possession on 4 December 1989, and it has not asserted there was any water damage when it took possession again in July 1990. The water damage must have occurred when the water was turned on again, after appellant completed the work but before final cleanup.

We think that when appellant turned on the water, or asked the Government to turn it on, in July 1990, it had a duty as a matter of reasonable care to check for leaks or at least to inquire whether the Government had taken precautions against freezing of the pipes. The water had been shut off for at least seven months over the winter. Appellant knew that it had not drained the pipes itself and had to know that the Government might not have drained them. Appellant also had to know that the pipes might have frozen and cracked, whether because the Government had not taken any precautions against freezing or because the Government had provided supplemental heat that was inadequate or was interrupted for whatever reason. As the party in possession of the units when the water was turned back on, we think appellant as a matter of simple prudence should have checked for that possibility.

Since it failed to do so, appellant became responsible for the resulting water damage under the terms of the Permits and Responsibilities clause (finding 2), which makes the contractor "responsible for all damage to persons or property that occurs as a result of the Contractor's fault or negligence." Therefore the repair of the water damage was part of appellant's contractual obligations. The Government's order to perform that repair was not a compensable change.

CONCLUSION

The appeal is sustained to the extent that appellant is entitled to recover the cost of repairing the burst water pipes, plus interest under the Contract Disputes Act from the date the contracting officer received appellant's claim until the date of payment. Appellant is not entitled to recover the cost of repairing the water damage.

The matter is remanded to the parties for negotiation of the amount of appellant's recovery, subject to reinstatement at the request of either party for a determination of quantum in the event the parties do not reach agreement within 60 days after the date of this decision.

[¶ 26,537] Phoenix Petroleum Company

ASBCA No. 42763, November 26, 1993. Contract No. DLA600-90-D-0542.

Defaults, Waiver—Delay in Terminating—Length of Delay.—A contractor's motion for summary judgment was denied because the government's 32-day delay in terminating a contract after the contractor failed to make a scheduled delivery was not, as a matter of law, an unreasonable delay. In addition, there were material facts in dispute as to whether the contracting officer consented to a substantial purchase for contract purposes after the default. Thus, the undisputed facts did not establish government waiver of the contract delivery schedule.

Defaults, Procedure—Government Decision—Totality of Circumstances.—A contractor was not entitled to summary judgment in its appeal from a default termination, because the undisputed facts did not show that the contracting officer failed to consider adequately the factors in FAR 49.402(f) when making the decision to terminate. Determining that an alleged excuse was invalid because the contractor's failure to perform was not beyond the contractor's control constituted adequate consideration of the excuse. The factor of availability of other sources refers to the availability to the government, not to the contractor. The contracting officer's failure to consider the contractor's ability to perform would not be conclusive, but it would be only one fact to be considered in evaluating the propriety of the decision to terminate.

(Footnote Continued)

at 107,757; *Santa Fe, Inc.*, VABCA Nos. 1898, 2167, 87-1 BCA ¶ 19,527, at 98,692, 98,696-97; *Russell Construction Corp.*, AGBCA No. 379, 74-2 BCA ¶ 10,911, at 51,914-15 (& authorities cited).

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For the appellant: Paul Crowley, Exton, Pennsylvania. For the government: John J. Ralston and Howard Phifer, Counsels, Defense Fuel Supply Center, DLA, Alexandria, Virginia.

Before TUNKS, WILLIAMS, and RIISMANDEL, Administrative Judges.

TUNKS, Administrative Judge: Appellant moves for summary judgment alleging that the Government waived the delivery date, improperly rejected JP-4 jet engine fuel containing blue dye and failed to adequately consider the factors in section 49.402-3(f) of the Federal Acquisition Regulation in terminating the contract for default.

FINDINGS OF FACT

The Government awarded indefinite quantity Contract No. DLA-600-90-D-0542 to appellant on 4 September 1990 (R4, tab 11). Under the contract, appellant was to supply approximately 10,000,000 gallons of JP-4 jet engine fuel per month to be delivered primarily by barge during the period 1 October 1990 through 30 September 1991 (R4, tabs 1, 11). On 7 September 1990, appellant advised the Government pursuant to clause I193, "Schedule of Contractor's Refinery Shutdown for Turnarounds (DFSC Feb 1989)," that its refinery would be shutdown for repairs for three weeks beginning 1 October 1990 (App.'s Motion, tab 5). Clause I193 provided, in pertinent part, as follows:

> (a) ... Any revisions to [the tentative refinery shutdown] schedule will necessitate prior notice of at least 60 days....
>
> (b) If the Contractor can not [sic] provide the 60 days advance notice, then, at no additional cost to the Government, the Contractor shall maintain sufficient inventory to make deliveries ... or ... provide for an alternate source of product during the shutdown period.

(R4, tab 1). Appellant proposed to continue truck deliveries from inventory (R4, tab 24).

On 24 October 1990, appellant notified the Government that the turnaround period would be extended by about four weeks due to a delay in receipt of a heat exchanger and that it would not be able to make any barge deliveries in November (App.'s Motion, tab 6; R4, tab 24). The contracting officer issued a cure notice on 26 October 1990 indicating that notice of the revised turnaround schedule was untimely under clause I193, that appellant was required to deliver even if it had to purchase JP-4 from another refiner, that the Government considered the extended shutdown a condition endangering performance of the contract and demanded that appellant submit a written proposal to cure the condition. (R4, tab 20). Appellant replied that it could not make any barge deliveries in November (R4, tab 21). The contracting officer terminated the November barge orders for default on 6 November 1990 (R4, tab 24). The Government ordered 10,181,000 gallons of JP-4 to be delivered by barge ad truck in November. Of that amount, appellant delivered 677,464 gallons by truck (Resp.'s Motion, tab 1).

On 20 November 1990, appellant advised the contracting officer that it had not yet received the heat exchanger, that it was hoping to resume barge deliveries in December and that it was unable to purchase JP-4 from other refineries (R4, tab 27). The contracting officer issued a second cure notice on 30 November 1990 demanding that appellant cure its inability to make barge deliveries by 14 December 1990 (R4, tab 28). On 10 December 1990, appellant replied that it had jury rigged its equipment and could process some JP-4, that the heat exchanger would be delivered by 18 December 1990 and that it expected the refinery to be on line by 21 December 1990. Appellant also indicated that it expected to deliver 60,000 barrels by barge between 27 December 1990 and 7 January 1991 (R4, 29).

On 18 December 1990, appellant tendered approximately 1,500,000 gallons of blue JP-4 (Resp.'s Motion, tab 1). The Government's Quality Assurance Representative (QAR) rejected the tender on the grounds that it did not meet the workmanship standards of the contract and contained an unauthorized additive (R4, tab 52). Appellant requested the contracting officer to overrule the QAR's rejection stating that if the blue JP-4 was rejected undyed feedstocks could not be purchased, processed and delivered before late January 1991 (R4, tab 53). The contracting officer declined to overrule the QAR (R4, 54). The Government ordered 10,355,500 gallons of JP-4 for delivery in December. Of that amount, 9,450,000 gallons were to be delivered by barge. The December barge orders were to be delivered as follows: order 4015 by 14 December 1990, order 4016 by 21 December 1990, order 4017 by 28 December 1990 and delivery order 5502 by 30 December 1990. (R4, tab 26) Appellant delivered a total of 411,878 gallons in December all by truck (Resp.'s Motion, tab 1).

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On 24 December 1990, the contracting officer issued another cure notice indicating that appellant's inability to provide JP-4 until late January was a condition endangering performance and demanding that appellant submit a plan to cure the condition (R4, tab 54). Appellant replied that the heat exchanger had arrived and proposed to deliver 60,000 barrels by barge the first week of February using undyed feedstock purchased on the Gulf coast. Appellant stated that it would not commit the approximately $3,000,000 required to buy the Gulf coast feedstock unless the contracting officer approved its proposed delivery schedule. Appellant further indicated that it would no longer be able to make truck deliveries due to the rejection of the blue JP-4. (R4, tab 60)

During a telephone conversation with appellant's vice president on 8 January 1991, the contracting officer indicated that the Government expected to order approximately 225,000 barrels for delivery in February. Appellant's vice president said he would check and see if appellant could deliver that quantity and reiterated that his company would not commit to the purchase of the Gulf coast feedstock unless the contracting officer approved the revised delivery schedule (App.'s Motion, tab 2; Resp.'s Motion, tab 1). During a telephone conversation on 9 January 1991, appellant's vice president stated that appellant could make a barge delivery on 18 February 1991, but that it could not deliver the full 225,000 barrels. According to appellant's vice president, the contracting officer agreed to this schedule and instructed appellant to "go do it," meaning to go purchase the Gulf coast feedstock (App.'s Motion, tab 2, p. 165; Resp.'s Motion tab 1). The contracting officer denies agreeing to the proposed schedule or instructing appellant to make the purchase (Resp.'s Motion, tab 1, R4, tab 62). In reliance on the alleged agreement, appellant bought 67,358 barrels of undyed feedstock at a cost of $2,105,893.30 on 11 January 1991 (App.'s Motion, tab 18).

The Government placed orders for 10,197,500 gallons of JP-4 for delivery in January 1991. Appellant made no deliveries in January. The contracting officer terminated the contract for default on 15 January 1991. (R4, tab 61)

DECISION

Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c); *Aydin Corporation (West).* ASBCA No. 43273, 93-2 BCA ¶ 25,575. The burden of establishing both elements is on the moving party and the non-moving party is entitled to have all reasonable inferences construed in its favor. *Brill Brothers, Inc.,* ASBCA No. 42573, 93-2 BCA ¶ 25,795.

Appellant first argues that the Government waived the delivery date. In order to establish waiver, a contractor must meet the test set forth in *DeVito v. United States* [13 CCF ¶ 82,319], 413 F.2d 1147 (Ct. Cl. 1969). The first prong of that test requires a contractor to demonstrate that the Government failed to terminate within a reasonable time after default under circumstances indicating forbearance. The second prong requires a contractor to show that it relied on the Government's failure to terminate and continued to perform beyond the delivery date with the Government's knowledge and implied or express consent.

There are no material facts in dispute with respect to the first prong of *DeVito.* The Government ordered 9,450,000 gallons of JP-4 for delivery by barge in December. The delivery dates for the orders were 14 December 1990, 21 December 1990, 28 December 1990 and 30 December 1990. Appellant did not deliver any of the December barge orders. There was one January barge order with a delivery date before termination. That order was for 2,520,000 gallons and the delivery date was 11 January 1991. Appellant did not deliver any of these orders. The contracting officer terminated the contract on 15 January 1991.

Although there are no material facts in dispute with respect to the first prong, we are unable to grant appellant's motion for summary judgment. The Government acquired the right to terminate on 14 December 1990, the delivery date for the first December barge order, 32-days prior to termination. We do not agree that, as a matter of law, 32-days is a unreasonable length of time between the default and termination. *See Enginetics Corporation,* ASBCA No. 40834, 92-2 BCA ¶ 24,965 (33-day delay did not waive the delivery date); *Harold Burgmayer Real Estate, Inc.,* HUDBCA 88-3404-C5, 88-3 BCA ¶ 21,063 (89-day delay between cure notice and default not a waiver); *Security Parachute Co.,* ASBCA No. 20334, 76-1 BCA ¶ 11,722 (two-year delay between delivery date and termination not a waiver).

Appellant is not entitled to summary judgment on the second prong of *DeVito* because

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there are material facts in dispute. Under the second prong, a contractor must show that it relied on the Government's failure to terminate and continued to perform beyond the delivery date with the Government's knowledge and implied or express consent. Appellant alleges that the contracting officer consented to the purchase of $2,100,000 in feedstock after the delivery date had passed. The contracting officer denies consenting to the alleged purchase or knowing that appellant made the purchase. This dispute precludes summary judgment.

As its second basis for summary judgment, appellant alleges that the Government improperly rejected JP-4 containing blue dye. Appellant argues that since the specifications did not specifically prohibit the use of blue dye, the Government's rejection of blue JP-4 was wrongful. The Government argues that the specifications listed all the additives that were approved for use in JP-4 and that blue dye was not on the list. The Government additionally alleges that, within the industry, blue dye is used exclusively to distinguish aviation gasoline from jet engine fuel. These are disputes regarding material facts which preclude summary judgment on this issue.

As its third basis for summary judgment, appellant argues that the contracting officer did not adequately consider the factors in FAR 49.402(f) and misapplied the standards to the circumstances surrounding appellant's contract in reaching his decision to terminate the contract. In particular, appellant finds fault with the contracting officer's treatment of factors (2), (3), (4) and (7).

Factor (2) requires the contracting officer to consider the specific failure of the contractor and the excuses for the failure. Appellant alleges that its failure to deliver was caused by the inability of its subcontractor to obtain a heat exchanger as a result of a strike. Appellant criticizes the contracting officer because he concluded in his "Memorandum for Record" that this excuse was not beyond appellant's control or without its fault or negligence. According to appellant, the contracting officer should have considered the excuse, valid or not, in making the termination decision.

This argument is without merit. When the contracting officer determined that appellant's excuse was not valid, he took the excuse into account. Appellant's argument also ignores the language of clause I11.02 "Termination for Default (DFSC 1983 May) (Deviation)" which defines an excusable cause as one which is beyond the control and without the fault or negligence of the contractor. Contrary to appellant's assertions, the standards for termination are not willful failure to perform, dereliction, ineptitude or egregious conduct. The Default clause authorizes the Government to terminate a contract for default when a contractor fails to meet the delivery date or make progress such that contract performance is endangered.

Factor (3) requires the contracting officer to consider the availability of the supplies from other sources. Appellant argues that the contracting officer was "wrong" when he concluded that appellant could have obtained the fuel from historic DFSC contractors who had remaining capacity. We construe the factor to refer to availability to the Government, not the contractor *e.g.*, whether or not the terminated supplies or services will be available to the Government from other sources if the contract is terminated for default. In any event, whether or not there were other sources of JP-4 is a disputed fact precluding summary judgment.

Factor (4) requires the contracting officer to consider the urgency of the need for the supplies and the period of time required to obtain them from other sources as compared to the time delivery could be obtained from the delinquent contractor. The contracting officer did not make a finding as to how quickly it could obtain the fuel from other sources as compared to how quickly appellant could supply the fuel. Appellant argues that it could have provided the fuel more quickly than any other source.

Appellant argues that it was ready, willing and able to provide the required JP-4. However, appellant's history on this contract does not support this assertion. Appellant's plant was shutdown for turnaround for most of the first three months of the contract and it delivered only 1,089,342 of the 30,734,000 gallons ordered for delivery in November, December and January. When asked if it could supply the 225,000 barrels the Government expected to order for delivery in February, appellant indicated that it could not supply the full amount. Given these facts, the contracting officer reasonably concluded that appellant would probably not be able to satisfy the contract requirements despite the promise to begin deliveries on 18 February 1991. In any event, the failure to consider one or more FAR factors does not automatically render a default improper. *Ruffin's A-1 Contracting, Inc.*, ASBCA No. 38343, 90-3 BCA ¶ 23,243. The contracting officer's failure to consider this aspect of fac-

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tor (4) is only one of the facts which must be taken into account in evaluating the overall propriety of the termination for default.

Appellant also criticizes the contracting officer for failing to consider other factors, such as the possible closing of appellant's refinery, the adverse impact such a closing would have on the people and economy of West Virginia, appellant's history of timely deliveries under another contract, excess JP-4 under existing contracts which was available for resupply, the alleged lack of a critical need for the fuel and appellant's commitment to resume delivery in February. These issues are subject to differing views and do not lend themselves to summary judgment.

Appellant's motion for summary judgment is denied.

[¶ 26,538] **Freightliner Corporation**

ASBCA No. 42982, November 26, 1993. Contract No. DAAE07-85-C-J010.

Contract Disputes, Claims—Related Items—Option Exercise.—The board had jurisdiction to hear the second count of a complaint alleging that the government's exercise of an option was an attempt to acquire an unauthorized requirement for a sixth program year, even though this argument had not been presented to the contracting officer, because the second count was based on a common or related set of operative facts that had already been presented to the contracting officer. As alleged in the other three counts of the complaint, the contractor had complained to the contracting officer that exercise of the option effectively extended the period of performance nearly one year beyond the production schedule originally contemplated by the parties and that the government appeared to be attempting to purchase quantities originally scheduled for a follow-on contract.

Methods of Procurement—Multiyear Procurement—Option Exercise.—The government's exercise of an option to be funded by appropriations from a sixth fiscal year did not violate a prohibition against options exceeding the requirement for five years, because the option was exercised for currently existing requirements within 60 months of the date of contract award. Under DAR 1-322, limitation of multiyear contracts to five program years applied only to basic quantities. Multiyear contracts were permitted to include options subject to DAR 1-1502, which was generally applicable to options and required that the total of basic and option quantities not exceed the requirement for five years. Because the limitation in DAR 1-1502 made no reference to program years or fiscal years, it was construed to refer to five 12-month periods.

For the appellant: Hogan & Hartson, Washington, D.C., by William A. Bradford, Jr., Thomas L. McGovern III, and Pierre M. Donahue. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Lt. Col. Thomas O. Mason, JAGC, and Maj. Rodney A. Grandon, JAGC, Trial Attorneys.

Before THOMAS, GROSSBAUM, TING, RUBERRY, and SPECTOR, Administrative Judges. Administrative Judges GROSSBAUM and TING concurred in that portion of the decision denying the motion to dismiss, but dissented from that portion of the decision denying the contractor's motion for summary judgment. Separate opinion by Administrative Judge GROSSBAUM, joined by Administrative Judge TING.

THOMAS, Administrative Judge: Appellant seeks an equitable adjustment in the amount of $15,598,353 in connection with the exercise of an option in a five year multiyear contract. Appellant's complaint contains four counts. Count two alleges that the exercise of the option violated the statutory and regulatory limitations on multiyear contracts because the quantity in question, a portion of the option quantity for the fifth program year, represented an "unauthorized requirement for a sixth program year" (Complaint ¶ 87). Appellant has moved for summary judgment on count two. The Government opposes the motion, and has moved to dismiss count two for lack of subject matter jurisdiction. Jurisdiction of the appeal arises under the Contract Disputes Act (CDA), 41 U.S.C. § § 601 *et seq.* We deny both motions.

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UNDISPUTED FACTS RELEVANT TO BOTH MOTIONS

Contract Provisions

On 31 October 1984, the U.S. Army Tank-Automotive Command (TACOM) awarded appellant a five year multiyear contract for Small Emplacement Excavator (SEE) tractors (sometimes referred to as vehicles). The amount of the contract was $64,209,511. Because TACOM issued the solicitation prior to the effective date of the Federal Acquisition Regulation (FAR), the contract included standard Defense Acquisition Regulation (DAR) clauses.

The contract required the delivery of a basic quantity of tractors for each of five program years. There were a total of 922 basic quantity tractors. The contract designated the basic quantities as the "FIRST PROGRAM YEAR BASIC QUANTITY," "SECOND PROGRAM YEAR BASIC QUANTITY," and so forth. At time of award, the contracting officer funded the first program year basic quantity. Clause H04 provided for cancellation payments to the contractor if the later program year requirements were not funded by specified dates.

The contract also included options for 200% of the quantity of basic tractors within each program year. There were a total of 1844 option quantity tractors. The option clause, H05, provided in part that the right to exercise the option "for any given CLIN shall expire upon Government acceptance of 50% of the vehicles initially specified for each program year (exclusive of any option vehicles)." The contract provided for acceptance at place of origin (Clause E01(b)) and delivery F.O.B. origin (Clause F01). The delivery schedule for the "vehicles initially specified" depended upon the date of contract award. For the fifth program year, deliveries at a rate of 33 tractors per month (with a final shipment of 19) were scheduled beginning 1410 DAC (Days After Contract) or 10 September 1988 and ending 1680 DAC or 7 June 1989. Clause H05 did not provide for cancellation payments if the options were not exercised.

Funding of the Basic Quantities

The contracting officer funded the first program year basic quantity with FY 1984 funds (that is, funds appropriated for the fiscal year ending 30 September 1984), the second program year basic quantity with FY 1985 funds, and so forth. He funded the fifth program year basic quantity with FY 1988 funds. Funds for the SEE program primarily came from the appropriation for Other Procurement, Army (OPA), and remained available for obligation for three years.

Option Exercises

Prior to the disputed quantity, the contracting officer exercised options for 793 tractors. Bilateral modification P00041 dated 21 September 1988 required delivery of the last 38 of these tractors in September 1989, and provided that 50% of them might be delivered in October 1989 at the discretion of appellant at no change in contract price.

The contracting officer funded the option quantities with appropriations for various fiscal years, not necessarily corresponding to the appropriation used for the basic quantity for the same program year. For example, he funded 13 of the option tractors for the first program year with FY 1985 funds and 12 of the option tractors for the second program year with FY 1986 funds. (*See* App. Exh. 23)

On 5 January 1989, the contracting officer issued unilateral modification P00051 purporting to exercise the fifth program year option for an additional quantity of 491 tractors. The accounting classification indicated the following funding: 453 tractors, FY 1989 funds in the amount of $31,155,075; 26 tractors, FY 1988 funds in the amount of $1,788,150; and 12 tractors, FY 1987 funds in the amount of $825,300. The contracting officer required appellant to provide a proposed delivery schedule for the additional tractors within thirty days. As a result of modification P00051, deliveries could be expected to extend into 1990.

On 15 February 1989, appellant advised the contracting officer that it did not agree that modification P00051 was an effective exercise of the contract's option clause and that it intended to treat the order as a constructive change order under the Changes clause. Under protest, it provided a proposed delivery schedule with final deliveries due 31 August 1990. (R4, tab 32)

MOTION TO DISMISS

Further Findings for Purposes of Deciding the Motion to Dismiss

Under date of 1 September 1989, appellant submitted a certified "claim" for reasonable costs and profit in the amount of $17,850,305 "resulting from TACOM's legally ineffective option order" for a quantity of 491 tractors. Appellant stated:

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The basic facts pertinent to this claim may be simply stated. The option clause of the Contract clearly provided that TACOM's right to order optional quantities of S.E.E. Tractors was subject to several constraints. One such constraint was that the total number of option vehicles deliverable "within each Program Year" was limited to 200% of the basic vehicles scheduled for delivery within that Program Year. In this case, TACOM has issued an option order that purports to require the delivery of a substantial number of 5th Program Year option vehicles long after the expiration of the 5th Program Year.

This unilateral order effectively extends the period of Freightliner's performance for the 5th Program Year nearly a year beyond the production schedule originally contemplated by the parties, without any provision for an equitable adjustment to Contract price. As discussed below, this unilateral adjustment to the Contract delivery schedule impermissibly alters the terms under which Freightliner was obligated to supply the option vehicles.

Neither Freightliner nor (prior to this dispute) TACOM ever intended that Freightliner would be producing S.E.E. Tractors well into 1990 under the present Contract. Indeed, the record shows that at least as late as six months before announcing its intention to order the additional 491 vehicles that are the subject of this claim, TACOM was still planning to award a *follow-on* S.E.E. Tractor production contract, with scheduled deliveries commencing in the fall of 1989. This circumstance suggests that TACOM, having encountered unexpected delays in issuing the solicitation for the follow-on contract, is now looking for ways to force as many additional S.E.E. Tractor orders as possible into the present Contract, without regard to whether it has any contractual right to place such orders.

(R4, tab 49 at 1-2) Under "Legal Basis for Claim," appellant relied upon the express language of the contract, the parties' predispute conduct, and the doctrine of *contra proferentem*. Appellant alluded in a footnote to the fact that modification P00051 was funded in part with FY 1989 funds, and said that "It is clear that the 5th Program Year was intended to be funded with FY 88 monies.... It is not plausible that the 5th Program Year was intended to correspond to both fiscal years 1988 *and* 1989" (*ibid.* at 48, n. 16).

On 25 February 1991, the contracting officer issued a final decision denying the claim. Because of concerns about the possible applicability of the decision in *United States v. Grumman Aerospace Corp.* [36 CCF ¶ 76,013], 927 F.2d 575 (Fed. Cir.), *cert. den.*, 116 L.Ed.2d 270 (1991), on 24 April 1991 appellant recertified and resubmitted its claim, revising the amount to $15,598,353. The claim was unchanged in relevant respect, and we refer to the September 1989 and April 1991 submissions collectively as the claim. On 13 May 1991, the contracting officer issued a final decision reiterating the determination in his 25 February 1991 final decision.

On 24 May 1991, appellant filed a timely notice of appeal from the 25 February 1991 decision, and a protective notice of appeal from the 13 May 1991 decision, requesting that the appeals be consolidated. The Board docketed both appeals under docket number 42982.

On 1 July 1991, appellant filed its complaint, consisting of four counts. Counts one, three, and four set forth the three legal theories discussed in the claim, that the option exercise was ineffective based on the express language of the contract, the parties' predispute conduct, and the doctrine of *contra proferentem*. Count two alleged in part:

80. The vehicles acquired under Contract Modification P00051 were purchased with fiscal year 1989 appropriations obligated in fiscal year 1989.

81. During the six fiscal years including fiscal year 1984 through fiscal year 1989, the Army submitted budget requests reflecting funding for the S.E.E. Tractor program in an amount totalling approximately $148.2 million.

82. The total Contract obligations representing the Army's purchase under the S.E.E. Tractor Contract totalled approximately $148.6 million.

83. The Army acquired a total of six year' requirements for S.E.E. Tractors under the Contract.

84. The statutory authority for multiyear contracts set forth at 10 U.S.C. § 2036(h)(8) provides that multiyear contracts shall be used for "the purchase of property or services for more than one, but not more than five, program years."

85. FAR § 17.103-1(b)(2) states "[e]xcept as permitted by statute, agencies shall not use multiyear contracts when ... (2) Requirements exceed a 5-year planned program."

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86. Department of Defense Directive 7200.4 "Full Funding of DoD Procurement Programs," at Enclosure 2, defines a "Multiyear Contract" as "a contract covering current and future-year procurement of quantities of items but not more than 5 years' procurement quantities as reflected in the Five Year Defense Program (FYDP). Each program year is budgeted and funded annually. At the time of award, funds need only to have been appropriated for the 1st year."

87. TACOM's use of Contract Modification P00051 to acquire an unauthorized requirement for a sixth program year violated the statutory and regulatory limitations on multiyear contracts set forth above in ¶ ¶ 84—86. Contract Modification P00051 is therefore legally ineffective.

88. Under TACOM's interpretation of the Contract's option clause, TACOM would be permitted to acquire a legally unauthorized sixth program year's requirements. TACOM's interpretation of the option clause therefore cannot be sustained as a matter of law, and Contract Modification P00051 is an ineffective option order.

Decision On Motion To Dismiss

On 24 June 1992, following appellant's motion for summary judgment, the Government filed "RESPONDENTS MOTION TO DISMISS AND RESPONSE TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT." The Government moves to dismiss count two upon the ground that the allegations in count two were not presented to the contracting officer in the claim. Specifically, the Government argues:

> In its Claim to the Contracting Officer, Appellant claimed that the subject option did not conform to the contract's option clause. As such, Appellant claimed that the option was ineffective thereby entitling Appellant to an equitable adjustment. Specifically Appellant claimed that the option order required Appellant to deliver option vehicles beyond the end of what it characterized as the fifth program year. It was on this basis that the final decision was issued. An examination of Appellant's detailed claim reveals that Appellant never claimed that the Government violated statutes or regulations concerning multiyear contracting. In fact, not one theory of relief advanced by Appellant in its Claim alleges that the Government violated funding statutes and regulations.

(Motion to Dismiss at 7)

The U.S. Court of Appeals for the Federal Circuit has established the rule that "[t]o determine whether two or more separate claims, or only a fragmented single claim, exists, the court must assess whether or not the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States* [36 CCF ¶ 75,967], 920 F.2d 903, 907 (Fed. Cir. 1990). Applying this rule, we recently held in an option exercise case that:

> Since an option must be exercised by the optionee—the Government—in strict conformance with its terms, it is appropriate for us to treat the exercise of the option, and not the individual grounds for invalidating the option as the "common denominator" operative fact for purposes of determining whether a claim has been submitted to the contracting officer for decision.

Aydin Corp. (West), ASBCA No. 43273, 93-2 BCA ¶ 25,575 at 127,364.

As in *Aydin Corp. (West)*, the issue in this appeal is the validity or invalidity of the option exercise. Appellant's claim asserted that modification P00051 effectively extended the period of performance nearly a year beyond the production schedule originally contemplated by the parties, and that the Government appeared to be attempting to purchase quantities originally scheduled for a follow-on contract, with deliveries commencing in the fall of 1989, under appellant's contract. Count two alleges that modification P00051 was an attempt "to acquire an unauthorized requirement for a sixth program year." We conclude that count two is based on a "common or related set of operative facts." Accordingly, we have subject matter jurisdiction of count two.

MOTION FOR SUMMARY JUDGMENT

On 23 April 1992, appellant moved for summary judgment on count two of the complaint. Appellant stated:

> Count Two of the Complaint alleges that ... TACOM ... improperly invoked the option terms in its multiyear contract with Freightliner ... to acquire in excess of 5 years' planned requirements in direct violation of the statute and regulations governing multiyear contracts. The evidence so overwhelmingly supports this conclusion that TACOM cannot reasonably dispute it. Accordingly, there being no

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material facts in dispute, Freightliner is entitled to summary judgment because TACOM's option order is *illegal*, and thus, ineffective, and because TACOM's interpretation of its rights under the option clause cannot be sustained as a matter of law.

("APPELLANTS MOTION FOR SUMMARY JUDGMENT ON COUNT TWO OF THE COMPLAINT" at 1, footnote omitted, emphasis supplied)("MSJ"). Appellant did not submit a supporting affidavit. The Government has opposed the motion, submitting a opposing affidavit.

Federal Rule of Civil Procedure 56 provides that a motion for summary judgment should be granted if the filings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The parties' filings show that there are no genuine issues as to any material fact, and that the question presented may be decided as a matter of law.

Undisputed Material Facts

In addition to the facts set forth in the beginning of this opinion, there are no genuine issues as to the following material facts:

The DoD Five Year Defense Program (FYDP), as referred to in DAR 1-322.1(d)(2) *infra*, was a long-range planning document setting forth DoD's planned and budgeted requirements for five fiscal years. The name and format of the FYDP have changed over time. Those changes are not important for present purposes. (*See* explanation in "SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT TWO OF THE COMPLAINT," dated 5 April 1993, at 2-3 and n.3) ("App. Supp. Br.")

At or about the time of contract award, the basic quantities (922 tractors), but not the option quantities, were included in the FYDP for fiscal years 1984 through 1988. (Affidavit of MAJ John Semler dated 29 September 1992 attached to "RESPONDENT'S RESPONSE TO APPELLANT'S REPLY TO RESPONDENT'S BRIEF OPPOSING APPELLANT'S MOTION FOR SUMMARY JUDGMENT," filed 30 September 1992)

The FYDP is revised at least annually. Appellant has analyzed the most recent revisions of the FYDP for fiscal years 1984 through 1989. The Government has not challenged this analysis, which is based on Government responses to discovery, and we adopt it for purposes of deciding the motion. According to appellant, "[b]y issuing the disputed option order, TACOM purchased SEE Tractors in excess of the Army's planned and budgeted requirements for more than five years as reflected in the FYDP." In particular, "FYDP data shows that the Army 'budget line' contained a *planned and budgeted* quantity of approximately 1460 SEE Tractors for fiscal years 1984 through 1988, inclusive." Prior to modification P00051, TACOM had acquired a total of 1715 vehicles under the contract, 922 basic vehicles and 793 option vehicles. Some of those vehicles (167) were funded by DoD or the Marine Corps. "Thus, an apples-to-apples comparison of planned and budgeted quantities to purchased quantities is 1453-1463 (budgeted) to 1548 (purchased Army requirements)." Appellant suggests that the difference between the planned and budgeted and purchased quantities (85-90 vehicles) "appears to be the result of TACOM shifting funds from other places in the DoD budget *within* the five program years spanning fiscal years 1984 through 1988." Appellant concludes that "the disputed option order cannot be seen as procuring overall planned and budgeted requirements for fiscal years 1984 through 1988." (App. Supp. Br. at 3, 29-30, 34)

Appellant also states that currently the 453 vehicles funded with FY 1989 funds are in the FYDP for fiscal year 1989 (*ibid.* at 43). (The current status of the vehicles funded with FY 1987 and 1988 funds is unclear. We focus on the 453 vehicles for purposes of deciding the motion.)

The FYDP has never included all of the Army's requirements for SEE tractors. According to the Government's opposing affidavit, as of September 1988:

> [T]he Army had requirements for 3047 SEE vehicles as reflected in the Army Acquisition Objective (AAO), and 2424 SEE vehicles as reflected in the Initial Issue Quantity (IIQ). The AAO is the sum of all recognized Army SEE requirements based on Basis of Issue Plans, Tables of Organization and Equipment, and includes maintenance requirements, readiness requirements, and war reserves. The IIQ is a minimum quantity of SEEs the Army needs for the vehicles to be a completely effective combat multiplier as reflected by priority unit fielding plans.

The Army had fulfilled some of those requirements through the basic quantities (922 tractors) and option quantities. It had a

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remaining requirement for in excess of 491 additional tractors. (Semler affidavit)

As of 5 January 1989, the Army continued to have an existing need for in excess of 491 additional tractors, and the contracting officer had OPA appropriations available to fund acquisition of 491 additional tractors.

The key undisputed fact from appellant's point of view, therefore, is that 453 of the 491 option vehicles were included in the FYDP for fiscal year 1989.

Decision on Motion for Summary Judgment

We conclude that appellant has not shown that it is entitled to judgment as a matter of law for three reasons: (1) appellant has not shown that the option exercise was illegal apart from the possible applicability of the multiyear statute and regulations; (2) the provisions of the multiyear statute and regulations upon which appellant relies apply to quantities subject to a cancellation payment rather than to option quantities; and (3) appellant has not shown that the provision of the regulations applicable to option quantities, DAR 1-1502(e), was violated.

1. *Appellant has not shown that the option exercise was illegal apart from the possible applicability of the multiyear statute and regulations.*

Appellant does not contend that there was a violation of the Antideficiency Act, 31 U.S.C.A. § 1341, "*Bona Fide* Needs Rule," 31 U.S.C.A. § 1502(a), or other funding statutes. Thus, appellant states:

> Respondent expends significant effort trying to justify its option order under the "classical fiscal controls of time, purpose, and amount." Opposition Brief at 22-23. Whether TACOM did or did not comply with the "classical fiscal controls," TACOM still violated 10 U.S.C. § 2306(h)(8) by acquiring in excess of five years' requirements under its existing multiyear contract with Freightliner. In FY 1989, Congress appropriated $32,588,000 in response to TACOM's budget request for its FY 1989 requirement for S.E.E. Tractors. Since sufficient funds were made available by Congress in FY 1989, TACOM was justified—under the "time, purpose, and amount" tests—to use those funds to purchase the S.E.E. Tractors to fill Army's FY 1989 requirement. Nevertheless, TACOM was *not* authorized to obligate those funds to buy the Army's FY 1989 requirement *under this contract.*

("APPELLANT'S REPLY TO RESPONDENT'S BRIEF OPPOSING APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT TWO AND OPPOSITION TO RESPONDENT'S MOTION TO DISMISS" dated 7 August 1992 at 20-21, footnote omitted)

Furthermore, appellant has not shown that the contracting officer failed to comply with the regulatory requirements for exercise of an option. At the time the contracting officer exercised the option, 5 January 1989, the FAR provided, in relevant part, that the contracting officer might exercise an option only after determining that funds were "available" and that the requirement fulfilled "an existing Government need" (FAR 17.207(c)(1) and (2)). It is undisputed that funds were available and that there was an existing need for the tractors.

2. *The provisions of the multiyear statute and regulations upon which appellant relies apply to quantities subject to a cancellation payment rather then to option quantities.*

Appellant argues that regardless of the above, the statute and regulations governing multiyear contracts prohibited exercise of the option because the quantities in question were in the FYDP for fiscal year 1989. Appellant states that the Board must analyze the situation as if the contract had contained a Sixth Program Year Basic Quantity at time of award:

> Respondent argues that its "use of FY 1989 funds was proper." *See* Respondent's Brief, Sept. 30, 1992, at 16-17. While "tagging on" a sixth fiscal year's requirement *after* receiving appropriations technically may not violate the Antideficiency Act, it does violate 10 U.S.C. § 2306(h). Moreover, in order to determine whether or not this is a "legal" contract under the funding statutes, the Board must analyze the situation from the perspective in time when the contract was awarded in 1984. If TACOM had structured [the] contract in 1984 to purchase a total of six fiscal years' planned and budgeted requirements, the contract would have violated both 10 U.S.C. § 2306(h) and the Antideficiency Act. It would be a perverse result indeed (and one obviously not intended by Congress) if the Board permitted TACOM to do at the end of a contract what TACOM expressly was prohibited from doing when the contract was awarded.

(App. Supp. Br. at 11, n. 10)

This argument seeks to diminish any distinction between quantities subject to a cancellation payment if not funded (hereinafter

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basic or multiyear quantities) and quantities which, although they may be included in a multiyear contract, are not subject to a cancellation payment (option quantities). (*Cf. Cessna Aircraft Co.*, ASBCA No. 43196, 93-3 BCA ¶ 25,912, in which the contract included a three year option, and provided for a cancellation ceiling, applicable to the second and third years of the option period, effective upon Government exercise of the option. 93-3 BCA at 128,876.) At or about the time of contract award, the first through fifth program year basic quantities were planned and budgeted in the FYDP for fiscal years 1984 through 1988. Given that fact, we assume for purposes of this decision that TACOM could not properly have included a sixth program year basic quantity which was planned and budgeted in the FYDP for fiscal year 1989. *See Army's Multiple Launch Rocket System Multiyear Contract*, 64 Comp. Gen. 164 (1984). The question is not, however, whether such a sixth program year basic quantity would have been illegal, but whether a fifth program year option quantity was illegal when, because of the award date of the contract (31 October 1984), it was susceptible of being exercised in fiscal year 1989, to fill an existing need.

In considering this question, we look first to the language of the statute authorizing multiyear contracts for the acquisition of property, 10 U.S.C.A. § 2306(h)(1)-(11). "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Appellant relies upon the following language of the statute (10 U.S.C.A. § 2306(h)(8)):

> For the purposes of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

This language defines a multiyear contract. It states that such a contract "may provide that performance ... is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made ...." It does not refer to options, at least explicitly.

We look next to the language of the DAR as in effect at the time the solicitation was initiated (DAC 76-20). (Although count two refers to the FAR, appellant chiefly relies upon the DAR in its motion. There is no material difference for present purposes.) The DAR contained two key provisions: 1-322.1(d) and (g). Appellant highlights DAR 1-322.1(d). It provided that "[m]ultiyear contracts for property and services shall not be used ... (2) To obtain requirements which are in excess of the Five-Year Defense Program." Appellant argues that "[t]here is every reason to believe that when Congress adopted the 'five program years' language [in § 2306(h)(8)], it simply meant to 'codify' the above quoted DAR 1-322 limitation" (App. Supp. Br. at 26). Like the statute, however, DAR 1-322.2(d) did not refer to options. DAR 1-322.1(g), on the other hand, expressly dealt with options. It provided:

> (g) *Use of Options.*
>
> (1) Options may be used when some future requirements are definite and additional quantities of supplies or services are likely, though not definitive as to amount.
>
> (2) Options to increase quantities or options to renew the contract for a reasonable period shall be priced not to include (i) charges for plant and equipment already amortized or (ii) any other nonrecurring charges that were included in and already recovered under the basic contract price. Any such option provision shall not exceed the period described in 1-1502(e).

Considering (d) and (g) together, we conclude that (d) (and the statute) concern the requirements for multiyear (basic) quantities and (g) concerns the requirements for option quantities. The former are limited to the requirements in the FYDP; the latter are not.

3. Appellant has not shown that the provision of the regulations applicable to the option quantities, DAR 1-1502(e), was violated.

As noted, DAR 1-322.1(g) cross-referenced DAR 1-1502(e), stating that "[a]ny such option provision shall not exceed the period described in 1-1502(e)." DAR 1-1502(e) applied to service and supply contracts in general with certain exceptions. It provided (DAR 76-42) that "the total of the basic and option quantities shall not exceed the requirement for five years in the case of supplies." Appellant contends that DAR 1-322.1(g) and 1-1502(e):

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unequivocally preclude any argument that TACOM had authority to use any unexercised option quantities for the Fifth Program Year to acquire its requirements for a sixth year. Thus, it is clear that the options provided for in the S.E.E. Tractor Contract were intended only to allow TACOM to order additional S.E.E. Tractors when its requirements for those program years became "definitive as to amount"—*within* the five planned Program Years corresponding to fiscal years 1984 through 1988.

(MSJ at 26-27)

Our interpretation is just the opposite. DAR 1-322.1(g) said, in effect, a multiyear contract may include option quantities. Make sure that the option prices do not include certain charges. Other than that, apply the regulations applicable to options in general. DAR 1-1502(e), in turn, limited the total of the basic and option quantities to the "requirement for five years." It did not refer to program years or fiscal years or the FYDP. In the absence of such a reference, we interpret "years" as a generic reference to twelve month periods. We conclude that DAR 1-1502(e) did not prohibit the award of a contract crossing fiscal years provided that the basic and option quantities did not exceed the requirement of the Government for the five years beginning with the award of the contract.

Proceeding on the basis of this interpretation, the undisputed material facts establish that at time of contract award (31 October 1984), there was a requirement for the first program year basic quantity. At time of option exercise (5 January 1989), whether one looks at the FYDP, the AAO, or the IIQ, there was an existing need for the option quantities. The span of time from contract award to option exercise was less than five years. The regulatory requirements were met.

Conclusion

Appellant extended options for 1844 tractors. TACOM exercised options for 1284 tractors within five years of contract award. Appellant suggests that it would be a perverse result if TACOM were allowed to do so. With all due respect, we believe it would be a perverse result to interpret the multiyear statutory and regulatory provisions, which were designed to ease funding constraints, in such a manner as to prohibit this result as a matter of law.

The motions with respect to count two are denied.

SEPARATE OPINION BY ADMINISTRATIVE JUDGE GROSSBAUM

GROSSBAUM, Administrative Judge: I respectfully dissent from that portion of the decision on appellant's motion for summary judgment which disconnects the option quantity requirements completely from the basic multiyear requirement in order to support the conclusion that appellant has not shown a violation of DAR 1-1502(e). I also dissent from the denial of appellant's summary judgment motion.

The Option clause in the contract granted the Government

> the option to increase the quantity of vehicles of each CLIN [contract line item number] *within each Program Year* by a additional quantity not to exceed 200% of the initial quantity of vehicles specified for each CLIN for all five Program Years.

(R4, tab 1; emphasis added) Moreover, the contract schedule tied specific option quantities inextricably to particular program years.

Paragraph (a) of DAR 1-322.1 then applicable to the contract describes the multiyear procurement procedure and provides in relevant part that: "[m]ultiyear contract quantities are budgeted for and financed in accordance with the applicable program year as reflected in the DoD Five-Year Defense Program [FYDP]." Accordingly, the program years applicable to a multiyear contract are determined by what is reflected in the version of the FYDP which establishes the multiyear requirement.

The Government has proffered what it calls a "working definition" of the term "program year," which denies any possible direct relationship between program years and fiscal years or calendar years and, instead, attaches significance to the dates when funds are obligated to the contract and when supplies are scheduled to be delivered. As the Government applies this "working definition" to the SEE tractor multiyear contract, program years overlap one another and are even permitted to expand and contract. (Gov't response to app's mot. at 10-13). Thus, the term "program year" takes on whatever meaning the Government chooses to give it. *Cf.* L. Carroll, *Through the Looking Glass*, in THE ANNOTATED ALICE 269 (New York 1960) (" 'When *I* use a word,' Humpty Dumpty said ..., 'it means just what I choose it to mean —neither more nor less.' ") (emphasis in original).

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To the contrary, in accordance with DAR 1-322.1(a), scheduled delivery dates and dates when funds are obligated to a multiyear contract are not relevant to determining the parameters of applicable program years, unless so reflected in the FYDP.

In this case, it is undisputed that the Army's initial multiyear requirement for a total of 922 SEE tractors was first finalized under the FYDP "commencing in FY84 and ending in FY88." Moreover, the total planned quantity of 922 vehicles corresponded to the "basic" quantity of tractors stipulated in the contract schedule.

It is also undisputed that the FYDP covering fiscal years 1984 through 1988 did not reflect the applicable "program years" in any manner other than as fiscal years. Therefore, despite the Government's failure to award the SEE tractor contract until 31 October 1984, the five program years identified in the schedule of this multiyear contract necessarily corresponded to fiscal years 1984, 1985, 1986, 1987 and 1988, with fiscal year 1984 being the first program year and fiscal year 1988 being the fifth program year.

I agree with the majority that the purported exercise of an option by Modification P00051 did not violate either the "not more than five program years" limitation prescribed by 10 U.S.C. § 2306(h)(8) nor the DAR 1-322.1(d)(2) prohibition against using multiyear contracts "[t]o obtain requirements which are in excess of the Five-Year Defense Program." The statutory constraint appears to apply only to basic multiyear quantities subject to cancellation provisions. By contrast, the DAR 1-322.1(d)(2) restriction may encompass both basic and option quantities, but it would appear to operate meaningfully only at the time of contract formation. Therefore, any possible violations of the DAR 1-322.1(d)(2) restriction would be redressable, if at all, in a forum other than this Board.

However, I cannot agree with the majority's view that option quantity requirements attached to a multiyear supply contract can summarily be divorced completely from the parameters of that contract. The majority holds, as a matter of law, that the exercise within sixty months from contract award of any option for quantities of supplies for which a current need then exists satisfies, in all cases, the DAR 1-1502(e) prohibition against total basic and option quantities of supplies exceeding "the requirement for five years." Thus, the holding renders irrelevant both the source of "the requirement" and, in this case, the multiyear character of the contract under which the option is exercised.

The use of options in multiyear contracts is, in the first instance, governed by DAR 1-322.1(g), not DAR Subpart 1-15. Options may be used in multiyear contracts "when some future requirements are definite and additional quantities of supplies ... are likely, though not definite as to amount."

Current Army guidelines in Army Material Command Acquisition Letter 90-AMC-1 prescribe that: "[t]he difference between firm requirements and program requirements should be the subject of option provisions." (App. exh. vol. IVA, tab II-A-6.) If that guideline were shown to have been in effect at the time the instant contract was formed, it would have cast doubt on the propriety of including any option provision in the contract at all, because the difference between the firm contract requirement for a basic quantity of 922 vehicles and the then-current FYDP total program requirement for 922 SEE tractors would leave a balance of zero vehicles that could be the subject of option provisions. In any event, the current guidelines demonstrate that option quantity requirements in multiyear contracts cannot be disconnected cavalierly from either the requirements of the FYDP or the "applicable program year[s]" in the contract.

The approved FYDP current at the time when a multiyear procurement action is initiated determines the program years (including outyears beyond the first program year) applicable to a particular authorized multiyear contract and fixes the requirement for the first program year. However, the planning programming and budgeting system that produces the FYDP is not static. The FYDP is updated every year and quantities and budgeted amounts in the FYDP covering the outyears defined therein vary from year to year, because it is important to keep the FYDP current with DoD's "best estimate" of total program and systems costs. (App. exh. vol. IVA, tabs B-2, B-3) This updating process permits flexibility in establishing total requirements, including option quantity requirements, for applicable outyears in a multiyear contract.

DAR 1-322.1(g)(2) circumscribes any option provision in a multiyear contract by the period described in DAR 1-1502(e), which in turn provides in part that: "the total of the basic and option quantities shall not exceed the requirement for five years in the case of supplies." Since the program years applicable to the instant contract were fiscal years 1984 through 1988, the relevant "require-

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ment for five years" in this case was the requirement for fiscal years 1984 through 1988, inclusive.

Appellant has supported its motion on the "requirement for five years" issue by showing the Government's FY 1984 through FY 1988 requirements for the SEE tractor acquisition gleaned from excerpts from the "Procurement Programs (P-1)" exhibits that DoD submits to Congress each year in conjunction with the President's budget. (App. exh. vol. IVA, tab II.C.) Viewed most favorably to the nonmoving party, relevant P-1 exhibits show that the maximum requirement for SEE tractors for the five fiscal years 1984 through 1988 could not have exceeded a total of 1,625 vehicles (23 + 390 + 409 + 334 + 469).

Opposing the motion on this issue, the Government asserts that the 453 SEE tractors ordered under modification P00051 using funds from the fiscal year 1989 Other Procurement, Army appropriation satisfied a "current" need. There is, of course, no dispute that these vehicles satisfied a "current" need of FY 1989. The Government also argues that the 453 tractors purchased with FY 89 funds could have been "legitimate requirements of the initial five year multiyear contract" and, in fact,

> ... were not new requirements uniquely related to FY 89 or any period of time beyond the initial multiyear contract. Rather, these vehicles were part of the program requirements as set forth in the multiyear contract that had not been satisfied with earlier year funds because funding was not available.

(Gov't supp. br. at 14, 16-17)

To support this assertion and to show that there may be a genuine factual issue for trial, the Government has presented evidence of TACOM's shopping list requirements for varying quantities of SEE tractors from FY 1984 through FY 1991, as gleaned from a series of supporting exhibits used to develop the Army's "Appropriation Budget Activity Reports" (Gov't exh. vol. III, tab E). These exhibits show, *inter alia,* that at no relevant point in time did TACOM's planned requirements for SEE tractors during the five fiscal years from FY 1984 through FY 1988, inclusive, ever exceed a total quantity of 1,614 each. Moreover, viewing these exhibits most favorably to the nonmoving party by considering the highest quantity for each of the five fiscal years shown on any exhibit (23 + 397 + 435 + 334 + 528), the maximum requirement of SEE tractors for the five fiscal years 1984 through 1988 could not have exceeded a total of 1,717 vehicles. In addition, up through and including September 1988 all Procurement History & Planning exhibits reflecting SEE tractor requirements for FY89 and beyond showed the "contractor" for these requirements as "TBS" or "TO BE SELECT[ED]." By contrast, "Freightliner" had consistently been shown as the "contractor" for the FY84 through FY88 requirements.

During proceedings on this motion, the Government was given ample opportunity to show the existence of genuine issue for trial. The only showing offered by the Government, in addition to the exhibits associated with the Army's "Appropriation Budget Activity Reports," is the "Semler affidavit" quoted in the majority opinion. However, the conclusory statements in this affidavit do not correlate alleged "requirements for 3047 SEE vehicles" to any specific program, fiscal or calendar years, let alone to the "requirement for five years" that is relevant to the motion. On balance, the affidavit appears to be devoid of probative value and I would conclude that the Government has failed to set forth specific facts showing that the 2,200 vehicle total of the basic and option quantities ordered under the contract did not exceed the requirement for the five fiscal years 1984 through 1988, inclusive.

In ruling on motions for summary judgment, this Board is guided by the standards of Fed R. Civ. P. 56 and, if the moving party would otherwise be entitled to judgment as a matter of law, paragraph (e) of the rule provides that, unless a showing of genuine factual issue has been made, summary judgment "shall be entered" against the nonmoving party. It is not the object of this provision of the rule to permit replacing conclusory allegations in an answer with conclusory allegations in an affidavit or brief. *See Lujan v. National Wildlife Federation,* 497 U.S. 871, 888 (1990); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986).

From the record developed on appellant's motion for summary judgment, it appears undisputed that, when the Government issued modification P00051 to exercise a fifth program year option, it contravened the prohibition in DAR 1-1502(e) against exceeding "the requirement for five years." In particular, the 453 SEE tractors ordered under this unilateral modification by using more than $31 million from the Army's appropriation

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for fiscal year 1989 clearly had never been included in the multiyear requirement for any of the five applicable program years and had, instead, theretofore been planned and budgeted as requirements of fiscal years 1989 and beyond. The purported option exercise brought the total quantity of vehicles ordered under the contract to 2,200 and exceeded the requirements of the applicable five years, from fiscal year 1984 through fiscal year 1988, inclusive, in violation of DAR 1-1502(e), a published procurement regulation binding on the Government and having the "force of law." *Paul v. United States*, 371 U.S. 245, 255 (1963); *see Public Util. Comm'n v. United States*, 355 U.S. 534, 542 (1958).

The United States cannot be bound by acts of its agents which contravene its statutes or published regulations. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). When a binding regulation or directive has the effect of denying procurement officials the authority to exercise a particular option in a contract, we must first determine whether or not the Government's purported option exercise contravened such authority-denying regulation or directive. *New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685 (Fed. Cir. 1988), *pet. for modifications denied*, 865 F.2d 243 (1989) (violation of unpublished, internal housekeeping directive affecting funds control invalidates option exercise).

If the violation of an unpublished, internal, directive of a housekeeping nature is a matter of more than internal concern and, if the directive is "binding on the government," may invalidate an otherwise facially unconditional option exercise, as in *New England Tank v. United States*, 861 F.2d at 692, 695, it stands to reason that more than internal concern attaches to the contravention of published procurement regulations binding on the Government. Since DAR 1-1502(e) denied the contracting officer authority to exercise an option exceeding the requirement for the pertinent five years, I would hold that the option purportedly exercised by modification P00051 was invalid and would grant appellant's motion for partial summary judgment as to liability.

[¶ 26,539] The Ryan Company

ASBCA Nos. 41235, 42095, November 29, 1993. Contract No. N62472-88-C-0301.

Interpretation of Contracts—Electrical Work—Switchgear Drawings.—A letter directing a contractor to comply with sketches on switchgear constituted a contract change for which the contractor was entitled to an equitable adjustment because the discrepancy in the contract drawings concerning the switchgears was latent, not patent, and the contractor's interpretation was reasonable. Although the contractor had noted two conduits leading from the switch, it was only upon reaching an installation note on one of the drawings that one could find the first indication that two lines were exiting the switch. Although a government witness testified that during the preparation of a government cost estimate, the installation detail drawings are studied in addition to the one-line drawings to determine the specific electrical equipment requirement for the job and architect-engineer witnesses testified that they would have performed such a detailed study prior to bid, the board indicated that a bidder could not be expected to conduct the same kind of study before submitting a bid.

Interpretation of Contracts—Electrical Work—Transformers.—A contractor was not entitled to additional compensation for being required to provide 208-volt transformers instead of the 240-volt transformers originally ordered, even though there was a latent ambiguity that raised no obligation to inquire, because the contractor failed to prove that it suffered any damage. The record showed the cost of the replacement transformer, but it did not indicate that the transformer originally ordered could not be returned or used for some other purpose or that the 208-volt transformer was more costly than the 240-volt transformer. More important was the fact that despite two requests from the architect-engineer, the contractor failed to supply a correlation between each transformer and its proposed location. The architect-engineer testified that if he had had the correlation information he requested, he would have checked out each drawing.

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For the appellant: McNamara, Desimone & Flynn, P.A., Boston, Massachusetts, by Leo S. McNamara. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Brad L. Johnson, Trial Attorney.

Before BURG, RIISMANDEL, and RUBERRY, Administrative Judges.

BURG, Administrative Judge: Each of these appeals was filed by appellant pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5) from deemed denial of a request for equitable adjustment. ASBCA No. 41235 concerns an appeal for costs incurred in ordering new electrical switches which it alleges were not required by the contract. ASBCA No. 42095 concerns costs incurred in ordering a new transformer because of allegedly defective plans and specifications. Only entitlement is before the Board.

FINDINGS OF FACT

1. On 8 December 1988 appellant was awarded this contract in the amount of $2,848,000 for conversion of the electrical system at the Naval Air Station, South Weymouth, MA, from 2.4kV to 13.8kV. The contract contained the standard Disputes and Changes clauses. Of relevance to these appeals, the contract contained detailed requirements for electrical submittals, including a certification that the proposed material conformed to the contract requirements. It also required the contractor to obtain approval of electrical items before procurement, fabrication or delivery to the job site. The contract further noted that partial submittals would not be acceptable and would be returned without review. (R4, tab 1, Specifications § 16011-1, ¶ 1.3, 1.3.1, 1.3.2; § 16476-2, ¶ 1.3.)

ASBCA No. 41253. THE SWITCHGEAR CLAIM

2. The contract required appellant to supply and install, *inter alia*, six large outdoor switches, each mounted on a concrete pad. Four of the switches appear on contract drawing E-8 "13.8 KV Feeder System One Line Diagram" and drawing E-11 "New 13.8 KV Duct System One Line Diagram" servicing the feeds for transformers in four vaults in Hangar No. 1. The other two switches appear on one-line drawings E-7 and E-12 servicing feeds to transformers in Building Nos. 82 and 24. On several of these drawings the switch one-line diagram is labelled "selector switch" or "transfer switch," terms which are used interchangeably. The electrical diagramatics or "one-line" drawings depicted two leads entering each switch and a single line exiting with a "dot" on that line. The dot was unexplained (see finding 7, *infra*). At some distance beyond the dot the line split, going to two transformers. Additional information concerning the switches appeared on other contract drawings.

3. Specifications for the switches are set forth in Section 16476 of the Contract Specifications. Other pertinent specifications concerning required submittals and approvals as well as contract drawing discrepancies were contained in Sections 01010, 01011, 01400, and 16011.* Under the contract appellant was required to submit shop drawings and certain information for the switches it proposed to use after the submittal was approved by appellant's Quality Control Representative (CQC). Final approval of electrical equipment had to be obtained from the Government before procurement, fabrication or delivery to the job site. (R4, tab 1, § 01400 ¶ 1.5; § 16011 ¶ 1.3; § 16476 ¶¶ 1.3.1, 1.3.2)

4. Appellant selected Grainger-Rush Company/RTE (RTE) to manufacture the switches. It had been in the business for many years and is a recognized electrical supplier. Appellant forwarded the contract specifications and the one-line diagram pages of the drawing package to RTE. Since it is standard practice in the trade to use the one-line diagramatics and specifications for designing electrical equipment unless additional information is required, appellant saw no need to supply other drawings in the package which contained additional information concerning the switches. It considered the one line drawings, and specifications clearly established the switches required under the contract both at the time it prepared and submitted the bid and when it submitted the information to RTE. RTE prepared the shop drawings attached to appellant's submittals based on the one-line drawings and specifications without request for additional information.

5. On 8 August 1989 appellant forwarded its proposed outdoor pad mounted

*These specifications are lengthy and, despite the Government request that various portions be quoted, we have concluded they would extend these findings to a greater extent than necessary. They have been carefully considered and will be discussed to the extent considered relevant.

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switchgear submittal to the Government which in turn forwarded it to the A/E for the project. The A/E reviewed the submittal, which included the RTE drawings, and on 23 August 1989 recommended the submittal be rejected and returned to appellant because of its failure to include the following:

1. Submission of the manufacturer's documentation for electrical ratings;

2. A statement of interrupting and insulating medium;

3. A statement of the type and model of switchgear

The Government contract administrator, a civil engineer, relied on the A/E for specific electrical engineering matters because of its expertise which he considered superior to his own. He returned the submittal to appellant noting its rejection for the above three alleged failures. No additional reasons for rejection were given to appellant. Appellant's 8 August 1989 submittal actually contained Items 2 and 3, *supra*. In lieu of submitting manufacturer's documentation supplying the information noted as required by Item 1, *supra*, appellant's quality control engineer had handwritten the information on the submitted drawing.

6. On 21 September 1989, appellant resubmitted its proposal for the six outdoor switches. The submittal was identical to the first submittal, including attachment of the same shop drawings, except that, to comply with Item 1 of the rejection, appellant included as the "manufacturer's documentation" four pages of the manufacturer's catalog. Pages three and four gave the ratings which were identical to those which appellant had handwritten on the original submittal. Other pages of the documentation indicated how to interpret the switch model number. Various switching combinations appeared in the documentation. In the middle of the second page of appellant's resubmittal appellant placed the following note in bold print:

Our configuration is not listed in RTE's available catalog. The shop drawings give more specific information not shown in the catalog. The electrical ratings however still apply.

(R4, tab 7) The catalog specifically alerted individuals that it did not contain all available configurations by indicating that inquiry could be made for other configurations. The submittal was reviewed by the A/E and approval noted in three places. The 3 October 1989 letter from the A/E to the Government contract administrator states that "The above referenced submittal is approved in its entirety" (exh. 104; tr 2-11). A similar notation of approval in its entirety appears on the "Contractor Drawings and Information" submittal form and on the second page of the submittal under appellant's note set forth above. The Government contract administrator endorsed the A/E approval on 20 October 1989. The submittal was returned to appellant with the approval endorsements. Following the approval, appellant released the switches for manufacture and received them at the job site in November 1989. Neither the initial or second submittal indicated the location of each of the proposed switches or the drawings which were the basis for the equipment. Appellant considered, and we so find, that it was obvious where they were to be used. The A/E also did not consider it a basis for rejection and unlike the problem with location of transformers (see finding 15, *infra*) raised no question about location of the switches at the time of "approval in its entirety" of the resubmittal. We conclude that failure to specify the exact locations of the switches or the drawings which referenced the switches created no difficulty or confusion. At the oral hearing the A/E who approved the submittals indicated that he had other reservations about the submittals but approved them so that appellant would not be delayed. The A/E neither reduced any such concerns to writing nor informed the Government orally at the time of the submittals of any concerns other than the three items listing above (finding 5). Appellant had no contact with the A/E. All contacts were with the Government contract administrator.

7. About a year into the construction, appellant's field superintendent informed appellant's project manager that he was having a problem determining where to connect the two wires on the load/tap side of the switch because there was no place to splice the two cables outside of the switch. The contract required all splices to be made at man-holes. Drawing E-11 indicated location of both new and old man-holes. No manholes were shown in the vicinity of the "dots" related to the switches at Hangar No. 1 which are involved in this dispute. While appellant was aware that splices would be required between the switches and the transformers, at the time of bid it did not investigate to make certain that there were manholes where splices were required, relying on the "integrity" of the Government drawings,

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i.e., that man-holes would be located where required or new man-holes specified. It also interpreted the "dot" near each switch to indicate that a splice would be used. The list of symbols on the drawings in this contract did not indicate what the "dot" signified. Appellant interpreted it as being a splice. The only explanation offered by the Government at the hearing was that one-line diagrams (such as E-10) are electrical schematic representations, not intended to represent any physical characteristics and that one must study the detail drawings for such characteristics. The A/E engineer and expert witness considered the "dot" to show a junction and not specifying where the junction occurred—whether inside or outside the switch. However, the symbol for the switch on the drawings did not include this "dot" as part of the switch. Frequently a dot is used to indicate a splice without the word and without appearing in the symbol listing. Drawings E-24, "Transformer Removal and Installation Details Feeder No. 2" and E-31 "Transformer Removal and Installation Details Emergency Generator Feeder" contained fifteen or more notes regarding pulling of electrical cable. In following the 29 notes on Drawing E-24 listing steps of wiring sequentially, Notes 8 and 13 of the 15 notes for Hangar 1-Vault 2 and Notes 8 and 12 of the 14 notes for Hangar 1-Vault 1, and Notes 8 and 12 of the 14 notes for Hangar 1-Vault 3 on Drawing E-31, require that two cables be pulled from the switch to the transformer rather than one cable with a splice at the "dot." Drawings E-24 and E-31 depict two conduits from the switch to the transformer. The two conduits were noticed by appellant but raised no question in appellant's mind and were not a matter of concern to it at the time it prepared its bid since it is common in electrical installations to include additional conduits for possible later use in the event additional lines are required some time in the future. Appellant reviewed these drawings prior to bidding but did not consider them in terms of switch design since they were detailed notes for installing (pulling) electrical cables which are not usually reviewed at the time of bidding for determining design characteristics of electrical equipment unless the drawings and specifications are not clear.

8. The Government expert witness testified that if appellant had reviewed all the drawings, including E-24 and E-31, checking all details, it would have realized that the switches required two leads into and out of the switch and that his company followed such practice prior to submitting a bid. He was not involved in this contract prior to the dispute. However, he was a principal in the A/E firm that both designed this project and reviewed the various submittals and from which the Government had considered seeking redress. At some time prior to the oral hearing, the Government decided it would not do so. Appellant's expert had been its electrical consultant for this contract and had helped prepare the bid and the submittal for the switches. An electrical engineer with 42 years of experience, including teaching experience, he testified that it is usual to rely on the one-line drawings and specifications for the type of electrical equipment required for this contract and appellant had done so in this case. The Government contract administrator testified that he carefully reviews all detail drawings in preparing Government cost estimates for a job.

9. When appellant's field superintendent raised the problem, about a year into construction, appellant's project manager at first had some difficulty in understanding just what the problem was. After then carefully studying all of the installation details and noting the installation details in notes on E-24 and E-31 (finding 7), on 11 November 1989 appellant inquired how it should proceed in making the connections between the switch and the two transformers it was to feed since the details did not indicate any means or method of doing so. Appellant had not noted this discrepancy at the time it submitted its bid and, based on the specifications and one-line drawings had determined that it would provide the types of switches included in its submittals (findings 5 and 6). Appellant considered the discrepancy far too subtle to have been recognized at time of bid preparation because it was only by putting together the exact routing of the piping, the number of feeders, etc., that the inability to make a splice becomes clear (tr. 1/161-62). At the time of inquiry appellant was not overly concerned about the matter since it felt there were several alternatives for making the connections. One was by use of "feed-through bushings" which would only have required a slight modification to the switches and the other was by "racks and elbows" which would not have required any modification to the switches.

10. The Government forwarded appellant's inquiry to the A/E. It was not until two months later that the A/E forwarded a response, containing one-line drawings for two switches, to the Government which, in turn, forwarded it to appellant on 10 Janu-

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ary 1990. Appellant was "stunned" by the response since it indicated that appellant should furnish two entirely different switches than those which had been approved following appellant's resubmittal. The switches depicted on the three one-line drawings in the A/E response were far more elaborate than the switches previously approved. They could not be considered selector or transfer switches (see finding 2, *supra*). The A/E reply also indicated the model number for five of the switches as they appeared in the catalog which appellant had included in its resubmittal, despite the notation appellant had set forth in that resubmittal that the catalog did not contain the models which appellant intended to supply. The sketch for the fused switch did not indicate a model number reference but there was one.

11. By letter dated 18 January 1990, appellant protested what it considered a directive from the Government to supply the switches set forth in the A/E reply and detailed the differences between those switches and the ones for which it had received approval and had on location for two months. Various communications between appellant and the Government and between the Government and the A/E followed thereafter (R4, tabs 9-13). At no time did appellant request permission to use the alternatives which it felt could be used for the installations. While at no time did the Government "order" appellant to purchase the new switches, indicating that it was appellant's responsibility to comply with the contract, by letter dated 16 February 1990 the Government informed appellant that

> ... Again, you are directed to proceed based on the clarification sketches provided by PLM Technologies [the A/E] and the building details as shown on drawings E-20, E-22, E-24, E-29, E-30 and E-31. Again, you are directed to provide switches that accept two sets of loadbreak separable connectors (or more where indicated) on the transformer side and from two sources on the supply side. ...

(R4, tab 13). In the Government's view "whatever any slight ambiguity might exist on the one-line documents is clarified by the details" on Drawings E-20, E-22, E-24, E-29, E-30, and E-31 (R4, tab 22). At the oral hearing the A/E engineer who was responsible for reviewing appellant's submittals and responding to appellant's request, testified that he would have had serious concerns about the installation alternatives appellant considered possible. While he never specifically stated he would have recommended that they be disapproved, we conclude, from the import of his testimony and that of the Government expert at the oral hearing, that appellant would not have been given approval to use either alternative it considered feasible (finding 9). We conclude that based on the reliance by the Government civil engineer on the electrical engineering expertise of the A/E and his concerns about his own expertise in such areas, that he would not have approved either alternative, and that based on the "directions" in the Government letter, *supra*, appellant was required to order the switches as shown on the A/E sketches forwarded to it on 10 January 1990.

12. Appellant investigated the possibility of modifying the switches it had on hand to comply with the requirement that two feeds enter and two feeds exit the switch and found that the cost would exceed the cost of ordering new switches. Because of the time constraints and the indication by the A/E of the model number of the switches appellant should order, appellant did not seek other sources for the required switches. Appellant ordered new switches based on the sketches supplied by the A/E. It ordered Model 9B for the non-fused switches and Model 7B for the fused switch. All of these switches were far more elaborate than so-called selector or transfer switches and capable of many functions not required by the contract. While the Model 9B switch was referenced by number in the A/E sketch, the Model 7B (the fused switch) was not referenced by number but did comply with the sketch supplied by the A/E. There was specific testimony by the Government expert that appellant's submitted and approved fused switch for Building 82 would have complied with contract requirements (tr 2-144) so that the new fused switch was not required. However, that was not the import of the Government direction of 16 February 1990 (finding 11).

13. Appellant was unable to return, use or sell the original switches it had ordered and received. At the time of the oral hearing those six switches were still in appellant's possession and only worth salvage value. By letter dated 17 April 1990 appellant notified the Government that it had ordered new switches based on the clarification sketches supplied by the A/E through the Government and submitted a claim for $117,829 certified by its project manager and requested a contracting officer decision. When no decision was forthcoming, appellant filed an appeal from a "deemed denial." After a

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decision in ASBCA Nos. 42774 and 42776 that the project manager's certification was valid, this appeal moved forward to an oral hearing.

ASBCA No. 42095. THE TRANSFORMER CLAIM

14. The contract required appellant to furnish and install a number of transformers. Drawings E-7 and E-8 listed a total of 45 transformers with the voltage required for each transformer. Many of the transformers, including two listed for Building No. 17, specified a voltage of 240 Volt Delta. Appellant ordered the transformers from the information furnished on E-7 and E-8. While checking the specific lines prior to the installation of the transformers, on 8 March 1990 appellant discovered that the actual secondary voltage at Building No. 17 was 120/208Y so that a 208 volt transformer was required rather than the 240 volt transformer listed on E-7.

15. Appellant's submittal of proposed transformers was rejected by the A/E. One reason for rejection was that the submittal failed to include a list of the transformer ID numbers along with the locations where they were to be installed. Appellant's resubmittal also failed to specify where appellant intended to install each transformer. Upon review of the resubmittal, the A/E engineer spent several hours attempting to correlate the information and "gave it up" because he was reaching too many "dead ends." While he approved the transformer configurations, he again refused to approve the submittal. The record fails to indicate that appellant ever submitted this correlating information. At the hearing the A/E engineer testified that had that information been given him, he would not have relied on the listing on E-7 and E-8 but would have looked at other drawings, which contained information about the proposed location for each transformer, to assure that the listing was correct.

16. By letter dated 9 March 1990, appellant informed the Government of the discrepancy in the voltage for the Building 17 transformer, that it had ordered the transformers from the one-line diagram drawings and that it had used a 208 volt transformer on hand for another location in order not to delay progress. By letter dated 21 March 1990, the Government contract administrator informed appellant that it should not have ordered merely using the one-line drawings and that if it had reviewed Drawing E-22 it would have been apparent that a 208 volt transformer was required.

17. Drawing E-22, "Transformer Removal and Installation Details" is labelled Building 106. By careful analysis it is possible to discern that in the upper right hand corner of the drawing a note appears which indicates "New 4" RGS conduit to existing 4" PVC conduit Bldg. 17 ..." Following the conduit to the bottom of the detail it goes to a transformer below which there is a note "New 75 EVA, [three phase] 13.8 kV—208v[sic]/120V transformer."

18. Appellant had ordered the transformers from the one-line diagrams of E-7 and E-8 plus the specifications. A bidder would not normally go through the drawings and compare every detail on each drawing at the bid stage. It would not be practical to do so. E-22 is a layout diagram and at most appellant would have "glanced" at it to determine whether certain equipment was installed inside or outside. It would not have studied it sufficiently to recognize that it addressed Building 17 transformer voltage requirements, especially since it was labelled Building 106.

19. Appellant filed a claim of $14,622 for the cost of providing the replacement transformer. When it failed to receive a contracting officer decision on its claim, it filed an appeal from a deemed denial which was docketed as ASBCA No. 42095. Thereafter, the contracting officer denied appellant's claim.

DECISION

The major thesis of the Government argument is that the contract must be read as a whole and, that reading this contract in its entirety to the last detail, one could determine that the switches which appellant ordered would not do the job and that there was an error in the drawings concerning the 208V transformer about which appellant should have inquired. Certainly the principle that a contract must be read as a whole is a well-established basic principle of contract interpretation. That is not the issue as we view these appeals. In our view, the question is whether appellant had to go through a detailed and laborious scrutiny of numerous document drawings or whether it had a right to rely on the one-line drawings using other detail drawings merely to check for other information to the extent necessary for ordering the switches and transformers involved in these appeals but not to the depth of detail which was required to discern the problems which are the cause of these appeals.

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A contract will be interpreted against the drafter. However, where the defect is patent, there is duty upon a bidder for a Government contract to inquire prior to contract award. *Hol-Gar Manufacturing Corp. v. United States* [10 CCF ¶72,885], 169 Ct.Cl. 384 (1965). While after the fact, it is often possible to show that careful scrutiny would have detected a defect in a contract, that is not the test which is applied in determining whether a defect was latent or patent. The defect must be obvious, significant and glaring to be considered patent and create a duty on the part of a bidder to inquire. *Newsom v. United States* [29 CCF ¶82,417], 676 F.2d 647 (Ct.Cl. 1982); *Chris Berg, Inc. v. United States* [17 CCF ¶81,143], 455 F.2d 1037, 1045 (Ct.Cl. 1972). A subtle, hidden or minor inconsistency does not raise such a duty on the part of a bidder. *Blount Brothers Construction Co., v. United States* [10 CCF ¶73,058], 346 F.2d 962 (Ct.Cl. 1965); *WPC Enterprises v. United States* [9 CCF ¶72,289], 323 F.2d 874 (Ct.Cl. 1963).

ASBCA No. 41235, THE SWITCHGEAR CLAIM

Applying the above discussed basic concepts to the issues before us, in our view, the problem concerning the switches falls into the latter, not the former category. The one-line drawings, E-7, E-8, E-11 and E-12 contained symbols which the drawing legends indicated designated a "selector switch" or "transfer switch" (both designations defining the same type of switch). It was not until nearly a year later, during installation, that it became apparent to appellant that the switch not only had two lines feeding into it but that there also were two "feeds" or outputs from the switch into the building. while appellant had noted the two conduits leading from the switch, it was not concerned about this and had concluded, in reliance on the one-line drawings, it had to include an extra conduit merely for possible future use. It was only upon reaching installation note 8 on the detailed 29 installation notes on drawing E-24 (finding 7), that one could find the first indication two lines were exiting the switch. In our view that does not give rise to a blatant or obvious discrepancy. It was far too subtle. We, therefore, conclude that the discrepancy concerning the switches was a latent, not a patent discrepancy. Appellant having bid relying upon its own interpretation had no duty to inquire.

Having reached the conclusion that the problem was latent, we must determine whether appellant's interpretation was reasonable. The installation details are not generally studied in the bidding process. We recognize that the Government witnesses testified that in preparing a Government cost estimate the installation detail drawings are studied in addition to the one-line drawings to determine the specific electrical equipment required for the job and that A/E witnesses testified that they would have performed such a detailed study prior to bid. However, we cannot equate the pressure of preparing a Government cost estimate and a bid. Nor are we persuaded by the testimony of the Government expert, a principal of the A/E who prepared the drawings and specifications, that his firm's practice to review all drawings in great detail before bidding is the usual one in the general contracting field. We are also concerned about possible bias on the part of a principal of the A/E involved in this contract. We recognize that the evidence indicated that the Government had decided not to pursue any legal action against the A/E because of various problems about possible design deficiencies. However, the reputation of the A/E would not be absolved because of this. While appellant's rebuttal witness also had a vested interest because he was appellant's consultant for this contract, we are persuaded by his 42 years of experience and his teaching credentials that it is customary in preparing bids of the type present here to look at other than the one-line drawings for clarification of questions not answered by the one-line drawings and then only to the extent necessary to answer such questions, not to study them to the detail which was required here to indicate the problem. As we weigh the evidence, the bias created because the Government expert was a principal in the A/E is greater than any bias of appellant's expert.

Our conclusion is further influenced by the fact that the A/E submitted one-line drawings in response to appellant's request for clarification how to resolve the problem. The assumption by the A/E that the manufacturer's catalog submitted by appellant contained the type of switch which appellant ultimately ordered should not have been made in light of the clear note which appellant placed on the submittal that the schematics in the catalog did not include the switch it was proposing. The catalog specifically alerted individuals that it did not contain all available configurations by indicating that inquiry could be made for other configurations. In light of appellant's note, the catalog proviso and inclusion by appellant of the shop drawings referenced in

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the note, we consider the conclusion reached by the A/E unreasonable. It could and should have inquired if there was concern that location of the proposed switches was not clear. If they were not to be used in all locations, the submittal was deficient not only as to where they were to be used but also what was proposed for the other locations. We are not persuaded by the A/E testimony that it approved the second submittal despite certain deficiencies because contractors usually need to order the items. The alleged deficiencies were not listed in the first, disapproved submittal; there was no indication that time was of the essence; and no objection was voiced when the A/E took two months to respond to the request for clarification when appellant raised the problem.

While the parties argued the merits of the alternatives which appellant indicated could have been used to adapt the switches which it had ordered, we have found that, even had these alternatives been specifically presented, the A/E would not have considered either of them acceptable and recommended that either be approved and that appellant was "directed" to comply with the A/E sketches. In our view, this direction was tantamount to an order.

We, therefore, conclude that the general rule of contract construction applies to the switches, namely, that the contract will be interpreted against the drafter, *Hol-Gar Manufacturing Corp. v. United States, supra*, and that supplying switches which complied with the sketches supplied to appellant from the A/E constituted a contract change for which appellant is entitled to an equitable adjustment. See also, *C. Sanchez and Son, Inc. v. United States* [39 CCF ¶ 76,578], No. 95-5010, slip. op. at 10, 11 (Fed. Cir. Oct. 3, 1993).

Appellant's appeal is sustained.

ASBCA No. 42095: THE TRANSFORMER CLAIM

Applying the general principles concerning defects in drawings and specifications set forth in the introduction of this decision, we conclude that the discrepancy between the listing of transformers on Drawings E-7 and E-8 and the reference on Drawing E-22, labelled Building 106, was far too subtle to constitute a blatant discrepancy which should have been obvious to appellant at the time of bidding. It was a latent ambiguity which raised no obligation to inquire on appellant.

However, in our view, appellant has failed to prove that had it complied with contract requirements it would have suffered any damage. While the record shows what the replacement transformer cost, it does not indicate that, unlike the switchgear involved in ASBCA No. 41235, the 240 volt transformer originally ordered could not be returned or used for some other purpose nor that the 208 volt transformer was more costly than the 240 volt. More important, in our view, is the fact that, despite two requests from the A/E, appellant failed to supply a correlation between each transformer and its proposed location. This is different from the switchgear appeal, where the switch locations were recognizable and we have concluded that the failure to specify was never noted as a defect in the submittal. Here the A/E engineer testified that had he had the correlation information he requested he would have checked out each drawing. Appellant's argument that the A/E would probably have only checked the one-line diagrams is just that—argument and conjecture on its part. We conclude that appellant has failed to prove it is entitled to recover for the erroneous listing on E-7 of the Building 17 transformer.

The appeal in ASBCA No. 42095 is denied.

Summary

We have concluded in ASBCA No. 41235 that there was an ambiguity in the drawings, that the error was latent, not patent, and that appellant, having bid in reliance on its interpretation and unaware of any discrepancy, is entitled to an equitable adjustment for additional costs incurred in replacing the switches. In ASBCA No. 42095, we have concluded that had appellant supplied the A/E through the Government the list of where it intended to place each transformer, the requirement for a 208 volt transformer for Building 17 rather than the 240 volt transformer listed on the one-line diagram would have probably been discerned in time to avoid ordering the wrong transformer. We have also noted appellant's failure to show that the 208 volt transformer was more costly.

The appeal in ASBCA No. 41235 is sustained. The appeal in ASBCA No. 42095 is denied.

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[¶ 26,540] Hicks & Ingle Company of Virginia, Inc.

ASBCA No. 38182, November 30, 1993. Contract No. DACA65-87-C-0068.

Interpretation of Contracts—Ambiguities, Latent—Reliance on Subcontractor's Interpretation.—A contractor was not entitled to an adjustment for the cost of asbestos abatement for insulated pipes that it was required to remove and replace, because it did not rely on the interpretation of its asbestos subcontractor that asbestos abatement would be required only for pipes shown to be demolished. In computing its bid, the contractor had allowed substantially more for asbestos abatement than the subcontractor had quoted. The subcontractor had notified the contractor of its interpretation after negotiation of the subcontract and had requested additional compensation.

For the appellant: Eliades & Eliades, Hopewell, Virginia, by Peter D. Eliades. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Robert L. Oswald, Engineer Trial Attorney, U.S. Army Engineer District, Norfolk.

Before STEMPLER, SPECTOR, and TING, Administrative Judges.

STEMPLER, Administrative Judge: This is a timely appeal from a contracting officer's decision denying appellant's claim for $42,474 for asbestos abatement work allegedly beyond the requirements of the contract. The Contract Disputes Act is applicable. Appellant's asbestos abatement subcontractor, Insulation Specialties, Inc. (ISI) is the real party in interest. A hearing was held at the Board's offices. The Government has filed a brief, appellant has not. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 26 May 1987, the Army awarded contract No. DACA65-87-C-0068 to Hicks & Ingle Company (HIC). The $996,000 firm fixed-price construction contract called for the modernization of the existing steam plant at the Radford Army Ammunition Plant, Radford, VA. The contract required that the plant remain operational during the work (R4, tab 3; R4, Vol. IV § 3.2.1).

2. The contract contained the standard FAR clause, "Site Investigation and Conditions Affecting the Work (1984 APR)," § 52.236-3 (R4, tab 3).

3. The dispute here concerns the extent to which HIC was responsible to remove the existing asbestos insulation [1] from piping that was to be removed and replaced under the contract.

4. The contract drawings contained a legend which used one symbol for new pipe, another for existing pipe, and another for existing pipe to be demolished. The symbol for pipe to be demolished was cross-hatches. Approximately 160 l.f. of one pipe with asbestos insulation had this cross-hatching. This pipe was not to be replaced with new pipe once removed. There was approximately 420 l.f. of existing piping with asbestos insulation that was to be removed and replaced with new piping. A site visit would make it clear to a reasonable contractor that this piping, and its insulation, had to be removed before the new piping could be installed. Furthermore, the contract required the existing pipe hangers to be re-installed in approximately the same locations (R4, tab 6, sheet 178, 179; tr. 1/39-40, 98, 144, 147, 179, 267-68).

5. On 12 May 1987, without making a site visit, ISI submitted a quote to HIC for subcontract work.[2] Included in that quote was $21,000 [3] for asbestos abatement (*i.e.*, removal of the asbestos pipe insulation). It was ISI's testimony that it had interpreted the contract drawings [4] to require asbestos abatement only for the 160 l.f. that had the cross-hatches and for a short distance where each new pipe tied into existing pipes that were to remain (tr. 1/18, 24-26, 33; R4, tab 18A; exh. G-3, -4).

[1] The contract specifications required almost all existing insulation to be considered asbestos (R4, tab 5).

[2] ISI had an original complete bid package from the Government when it prepared its quote to HIC (tr. 1/49, 104).

[3] The eventual subcontract price for the asbestos abatement work was $21,636 (tr. 1/89, 2/63; R4, tab 30).

[4] We have in evidence drawings called sheets 1000, 2000 and 3000, and extensive testimony concerning them. We find these drawings are not contract drawings, were not used in the contract, were not used in preparing HIC's or ISI's bids, were not in the possession of appellant when the problem being litigated was brought to the Government's attention, and are irrelevant to this dispute (R4, tabs 7, 16; tr. 1/48, 54, 92, 107-08, 111, 129, 209-10, 227-29, 2/74).

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6. HIC did not, either prior to, or after award, interpret the contract as did ISI. HIC interpreted the contract drawings to require the removal of the pipe in question, including the asbestos insulation. In preparing its bid, HIC used a figure of $70,000 for the asbestos abatement work. We find that HIC did not rely on the interpretation of the drawing now being advanced by ISI in submitting HIC's bid to the Government (R4, tab 21; tr. 1/120-22, 138-39, 160-61, 2/55-58).

7. Neither HIC nor ISI inquired of the Government prior to award regarding ISI's now advanced interpretation (tr. 1/61, 78-79).

8. After a site visit by ISI on 15 June 1987, ISI and HIC entered into a subcontract on 6 July 1987. HIC agreed to remove the existing piping after ISI encapsulated the asbestos insulation (R4, tabs 31, 34; tr. 1/59, 62-64, 148-49, 2/75).

9. On 24 July 1987, ISI notified HIC of its current position that insulation on pipes not shown to be demolished, but to be removed and replaced are not included in the contract. ISI requested an additional $42,474 for this work (R4, tab 15H; tr. 1/69).

10. On 11 August 1987, ISI submitted its asbestos abatement plan to HIC. The Government approved the plan (forwarded by HIC) on 11 September 1987. The plan was intended to include only the asbestos abatement work ISI felt was required under the contract, but did not indicate that it was deviating from the work that ISI knew HIC and the Government felt was required. The phrasing of the plan leaves doubt as to exactly what work was being covered (exh. A-1; tr. 1/41-42, 192-94, 2/71-74).

11. The Government was first notified of ISI's differing interpretation by letter from HIC on 3 September 1987 (R4, tab 11).

12. On 24 September 1987, the Government wrote HIC stating that the contract required the work in question (R4, tab 12).

13. On 26 February 1988, HIC submitted a $60,011.16 certified claim, comprised of $47,086.50 for ISI's alleged additional work, and $12,924.66 for HIC's indirect costs. HIC does not seek any additional monies itself for removing the pipe in question (R4, tab 15; tr. 1/99, 138, 213).

14. On 29 September 1988, the contracting officer issued a decision denying the claim (R4, tab 2).

15. On 4 January 1989, HIC filed a timely appeal.

DECISION

We agree with the Government that when the contract documents are read as a whole, there is no ambiguity that asbestos abatement is required for those pipes required to be removed and replaced. The drawings require the existing pipe hangers be re-installed in approximately the same locations. It was evident that the new pipe was replacing the existing pipe along the same runs, and that the existing pipe (including its asbestos insulation) had to be removed in order to install the new pipe. Assuming *arguendo*, that the contract was ambiguous, to recover based on an interpretation of an ambiguous contract, a contractor must show that it relied on the interpretation in submitting its bid. *Fruin-Colnon Corp. v. United States* [36 CCF ¶ 75,923], 912 F.2d 1426 (Fed. Cir. 1990). The evidence is clear that HIC did not rely on ISI's interpretation in submitting its bid, or does it even share ISI's interpretation at this date.

CONCLUSION

The appeal is denied.

[¶ 26,541] Hogan Construction, Inc.

ASBCA No. 37241, November 26, 1993. Contract No. F41613-87-C-0043.

Interpretation of Contracts—Walls, Ceilings, and Floors—Visible Gaps.—Under a contract modification for the installation of walls, a contractor was not entitled to additional compensation for providing trim to cover visible gaps between ceilings and walls, because the gaps evidenced performance that was not skillful or workmanlike. The government acted properly to reduce economic waste by directing the contractor to provide trim rather than to replace the walls.

For the appellant: Williams & Jensen, P.C., Washington, D.C., by Robert J. Martinez and Sally B. Pfund. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and R. Stephen Houlihan and John M. Taffany, Trial Attorneys.

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Before SCHEPERS, RUBERRY, and RIISMANDEL, Administrative Judges.

SCHEPERS, Administrative Judge: This timely appeal, tried with other appeals under this construction contract, is from a contracting officer's decision denying appellant's claim for the costs of adding trim at the top of certain gypsum board paneling walls which appellant installed. The parties stipulate to quantum in this appeal.

FINDINGS OF FACT

On 27 September 1987 appellant was awarded Contract No. F41613-87-C-0043 in the initial amount of $278,770 for renovation of the Willis-Cartwright School at Carswell Air Force Base, Texas (the contract). Modifications raised the contract price to $339,943.75.

The contract incorporated by reference the standard Disputes, FAR 52.233-1 (APR 1984), Changes, FAR 52.243-8 (APR 1984), and Material and Workmanship, FAR 52.236-5 (APR 1984) clauses, the latter of which states:

> (c) All work under this contract shall be performed in a skillful and workmanlike manner....

Also the contract contained the ASPR contract clause Contract Drawings, Maps and Specifications (1965 JAN) which states:

> (b) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

Richard D. Hogan, appellant's president and sole owner, had over 25 years' experience in the construction industry and had been in business for himself since 1966, with experience in a wide range of general construction projects.

On 24 November 1987 appellant received the Government's undated memorandum which requested a pricing proposal for certain contemplated changes. After appellant's submittal and the parties' negotiations, the Government issued Modification P00001 to the contract, a bilateral modification, dated 10 December 1987, which made a number of changes to the contract and increased the contract price by $62,500.

Paragraph n. of Modification P00001 states:

> n. Remove/cover all school chalk greenboards and repair walls to match existing. Install walls with studs @ 24" center to center and 5/8" fire rated gypsum board paneling. Extend all affected electrical fixtures to be flush with new walls. Install 4" vinyl base around new walls. Tape, bed, texture, and paint walls in accordance with Technical Provisions 9A and 9H. See drawing sheets 4 and 5 of 11.

Technical Provision 9A states:

> 2.02 GYPSUM BOARD ACCESSORIES.
>
> * * *
>
> B. Edge Trim: LC Bead.
>
> * * *
>
> 3.01 GYPSUM BOARD INSTALLATION.
>
> * * *
>
> G. ... Place edge trim where gypsum board abutts [sic] dissimilar materials.

We are given no definition for "LC Bead."

The requirement for "4" vinyl base around new walls" was not included in contract provisions other than Modification P00001. Modification P00001 did not specify that 10' wall material was to remain 10' in height or was to extend through the ceiling. "Match existing" walls refers to color, texture, wall decor. The walls constructed under Modification P00001 were the only sheetrock walls in the rooms, and were to cover chalkboard on CMU walls. Walls constructed under the contract but unrelated to Modification P00001, extended only to ceiling height. In the area pertinent to this appeal the ceiling tiles sagged with respect to the grids (the metal strips under the ceiling placed to hold the ceiling tiles) prior to the contract work. In other areas where walls were constructed under the contract work unrelated to Modification P00001, ceiling tiles were placed after the walls were constructed, thus did not sag.

During negotiations, both Mr. Hogan and Olin Long, Chief of Contract Management for Carswell Air Force Base, visited the site primarily because appellant disagreed with the Government's estimation of the wall dimensions. The parties found the walls to be 9' 10" high, approximately 8" higher than the Government's original figures. Mr. Long testified that he and Mr. Hogan agreed that appellant would order 10" lengths in the sheetrock, studs, and the like, and cut the

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ceiling so the walls would extend through the ceiling. Mr. Hogan testified that no such agreement was made, rather that during pricing of Modification P00001 Mr. Hogan assumed that since other walls constructed under the contract extended only to the ceiling, that the 10′ sheetrock, studs, and the like used to construct the walls covered by paragraph n. of Modification P00001, were to be cut to 9′ 10″ lengths with no cuts in the ceiling. We find, based on the demeanor of the witnesses, and the findings made in this appeal (specifically within paragraphs 6—8) and other appeals heard the same day (specifically ASBCA Nos. 37347 and 37348), that Mr. Hogan and Mr. Long agreed that the ceiling would be cut so that the 10′ wall materials would extend through the ceiling.

Appellant cut the wall materials to 9′ 10″ lengths and did not cut the ceiling. Appellant finished the walls where they met the ceiling, with J channel, the same method used on the walls required by the contract prior to negotiation of Modification P00001. The J channel is a piece of metal that "caps" the termination of the wall and gives a smooth appearance. Prior to 25 February 1988, the Government found the walls defective due to visible gaps between the ceiling and the walls caused by: (1) uneven sawing of sheetrock; and (2) sagging of the suspension ceiling tiles between the grids. The ceiling would have ultimately conformed, so that the gaps would not have shown as they did initially; however, the parties dispute the length of time this would have required. Over a month's time elapsed from the initial construction to installation of the trim. There is no evidence that the ceiling conformed at all prior to installation of the trim.

On 3 March 1988 the Government rejected the walls, stating they were not 10′ high and did not present a finished appearance. The Government indicated that the walls would be acceptable if appellant added trim at the ceiling to cover the gaps between the walls and ceiling. On 24 March 1988, the Government directed trim for the top of the walls, citing FAR 52.236-5, the Material and Workmanship clause. The Government ordered trim rather than installation of 10′ walls in an effort to complete the job.

Appellant placed the trim on the walls as directed. Some gaps between the walls and ceiling still existed after the trim was installed. On 26 April appellant wrote the Government and demanded its costs for adding the trim.

DECISION

Appellant contends that under paragraph n. of Modification P00001, appellant was to extend the gypsum board paneling walls only to, rather than through, the ceiling and without the trim ultimately ordered by the Government, despite the fact the results were visible gaps between the walls and ceiling. The Government contends that it was entitled to reject the walls under the first sentence of paragraph (c) of the Material and Workmanship, FAR 52.236-5 (APR 1984) clause. We agree with the Government's position. The undisputed visible gaps between the top of the walls and the ceiling gave an undesirable appearance and evidenced performance in a manner neither skillful nor workmanlike. The Government's right under (c) of the Material and Workmanship clause is limited by the rule of economic waste. *Toombs & Co., Inc.*, ASBCA Nos. 35085, 35086, 91-1 BCA ¶ 23,403 at 117,423. The Government, in permitting appellant to place a trim between the top of the walls and the ceiling, rather than replace the walls, adhered to this rule.

The parties pointed to nothing in either the specifications or drawings in support of their positions. Other than the portions of Technical Specification 9A quoted in our findings, we are aware of nothing else in the specifications and drawings which pertains to this appeal. The parties do not address the requirement in Technical Specification 9A for "LC Bead" edge trim "where gypsum board abutts [sic] dissimilar materials." We have no definition of the LC Bead. We do not know whether the J channel, which was used on the walls concerned in this appeal and seemingly all other walls constructed under the contract, met this requirement. However, even if the trim ordered by the Government was not specifically required by the specifications and drawings, a reasonable reading of the contract overall, particularly in light of paragraph (b) of the Contract Drawings, Maps and Specifications clause dictates that some type of finish to the top of the walls sufficient to hide the gaps, is manifestly necessary and a customary means to carry out the intent of the drawings and specifications. *See Blinderman Construction Co., Inc.*, ASBCA No. 35589, 91-1 BCA ¶ 23,457.

Further, a contract is read in accordance with its express terms and the plain meaning thereof; when the matter in dispute is not expressly provided for in the contract, it is necessary to determine whether the contractor's interpretation of the contract require-

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ments was reasonable. *C. Sanchez and Son, Inc. v. United States* [39 CCF ¶ 76,578], No. 92-5010, slip op. at 9-10 (Fed. Cir. Oct. 5, 1993). The reading of Modification P00001 which appellant urges results in visible gaps between the walls and ceiling, an unreasonable interpretation.

Accordingly the appeal is denied.

[¶ 26,542] National Medical Staffing, Inc.

DOT BCA No. 2568, December 10, 1993. Contract No. DTCG84-92-C-3KB290.

Defaults, Grounds—False Statement—Government Knowledge.—A default termination was not necessarily justified by the contractor's false certification in its offer that it had not previously had a contract terminated for default, because it was not shown whether the contracting officer knew of the prior default. The contracting officer terminated the present contract for performance deficiencies, but when the contractor appealed, the government moved for summary judgment on the basis of the certification. Even if the certification was false, it would not support summary judgment, because the contracting officer's knowledge of the prior termination was a significant factual issue.

For the appellant: James D. Thrasher, Marietta, Georgia. For the government: Bernard J. Roan, United States Coast Guard, Washington, D.C.

Before STERN, Administrative Judge.

STERN, Administrative Judge: The U.S. Coast Guard ("respondent" or "Coast Guard") has moved for summary judgment on the appeal of National Medical Staffing, Inc. ("appellant" or "National"). Appellant has filed a reply opposing respondent's motion.

The Coast Guard issued a request for proposals (RFP) on January 3, 1992, for the services of two nurse practitioners at the U.S. Coast Guard, Aviation Training Center Clinic, Mobile, Alabama.[1] Appellant responded to the RFP with its initial offer to provide one nurse practitioner, Dr. Gloria Bertacchi. The appellant's president signed the initial offer on January 31, 1992. Appellant submitted its best final offer on March 26, 1992, slightly modifying the initial offer. Based on appellant's proposal, the Coast Guard awarded the contract to National Medical for one nurse practitioner on July 21, 1992. The solicitation contained the following provisions:

> Part IV—Representations and Instructions
>
> Section K—Representations, Certifications and Other Statutes of Offerors
>
> K.6. FAR 52.209-5 Certification Regarding Debarment Suspension, Proposed Debarment and Other Responsibility Matters (May 1989).
>
> (a)(1) The Offeror certifies, to the best of its knowledge and belief, that—
>
> * * *
>
> (ii) The Offeror has ( ) has not (x) [this block was hand marked by appellant], within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.
>
> * * *
>
> THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.
>
> (b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
>
> (c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in con-

[1] The facts herein are taken from the filings of the parties and the appeal files. They do not represent final findings by the Board which may ultimately appear in a decision after a trial in this case.

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nection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the contracting Officer may terminate the contract resulting from this solicitation for default.

On February 1, 1990, less than three years preceding both the initial and the best and final offers of Appellant, the Naval Supply Center Jacksonville, Florida terminated for default contract N68836-90-C-0028 with Appellant. Appellant appealed the termination to the Armed Services Board of Contract Appeals (ASBCA). After a two-day trial in Jacksonville, a trial at which Dr. Bertacchi testified, the ASBCA denied the appeal. See *National Medical Staffing, Inc.*, ASBCA No. 40391, February 21, 1992, 92-2 BCA ¶ 24,837. Appellant appealed the ASBCA denial to the Federal Circuit, *National Medical Staffing, Inc. v. United States*, Civ. No. 92-1357 (Fed. Cir.). That appeal was dismissed by a clerk's order on July 15, 1992, six days before award of the Coast Guard contract.

On August 26, 1992 the contracting officer issued a final decision terminating the contract with appellant for default. The contracting officer based the determination to terminate the contract on appellant's failure to perform the contract. The termination was not based on an erroneous certification.

Appellant's principal, Dr. Gloria Bertacchi, who executed the certification that appellant had no terminations for default within a three year period, filed an affidavit that she made this certification with the belief that terminations for default are not final if the termination is on appeal.

The Coast Guard argues that as a matter of law, appellant's erroneous certification is sufficient basis to uphold the termination for default.[2]

Appellant contends that summary judgment is inappropriate since there has been no intentional misrepresentation by appellant.

In *General Dynamics Corporation*, DOTBCA No. 1232, 83-1 BCA ¶ 16,386 (1983) at 81,458-59, we summarized the general principles applicable to motions for summary judgment:

> We are guided by the general principles that summary judgment is only appropriate where there is no issue as to any material fact present, *Bouchard v. Washington*, 514 F.2d 824, 827 (D.C. Cir. 1975), that any doubt on whether summary judgment is appropriate is to be resolved against the moving party, *Erco Industries, Ltd. v. Seaboard Coast Line Railroad Co.*, 644 F.2d 424 (5th Cir. 1981), and that the moving party shoulders the burden of proving that no question of material fact exists, *Adickes v. Kress and Co.*, 398 U.S. 144, 157 (1970).
>
> Under Fed. R. Civ. P. 56(e), however, more than mere allegations are necessary to defeat a properly supported motion for summary judgment. *Fireman's Insurance Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3d Cir. 1982); *Filden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604 (3d Cir. 1979).

Thus, if the Board determines that any material fact needs to be proven at trial, summary judgment is inappropriate.

Here, appellant filed a certification which the Coast Guard alleges is erroneous and supports the termination of the contract. For purposes of this motion, we need not determine whether this certification is erroneous, because assuming *arguendo* that the certification was erroneous, summary judgment would be inappropriate.

We find that an erroneous certification is, by itself insufficient to support a termination for default. To support a termination for default on this basis respondent would have to demonstrate that the contracting officer was unaware of the contractor's prior default termination at the time of award.

[2] The contract was terminated for default based on appellant's failure to perform the contract. Respondent does not contend that summary judgment would be appropriate on the basis of appellant's non-performance.

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The Board may not sustain a termination for default if the contracting officer had knowledge of appellant's prior termination for default and made award in spite of that knowledge. In such a case, respondent may have waived or may be estopped from relying on the certification provision as a ground for terminating the contract. *American Contractors v. General Services Administration,* GSBCA No. 10363, 92-2 BCA ¶ 24,899 (1992). Assuming the contracting officer was aware of appellant's erroneous certification, taken to its logical conclusion, the Coast Guard's position could lead to an unconscionable result: the Coast Guard could award the contract and retain the right to terminate it at any time. This situation is similar to that when one party finds the other has breached the contract.

As we stated in *General Dynamics:*

> "[W]hen one party breaches a contract, the contract does not automatically end. The injured party must make an overt act to declare the contract over. If this party does not act, but, treats the contract as continuing, it will be precluded from asserting such a breach . . . at a later time.

(at 81,461.)

Here, there is no evidence regarding the contracting officer's knowledge of the prior termination for default at the time of award. This is a significant factual issue.

Respondent has failed to meet its burden of establishing the absence of any genuine issues of fact.

The Motion for Summary Judgment is denied.

[¶ 26,543] Pindar Donnelley Partnership and GraphicData, Inc.[1] v. Department of Commerce; International ComputaPrint Corporation, Intervenor

GSBCA Nos. 12667-P, 12670-P, November 23, 1993. Proposal No. 52-PAPT-0-00027.

Protests, GSBCA—Suspension of Procurement Authority—Extension of Incumbent Contract.—A protester's request for suspension of an agency's procurement authority governing the award of an extension of an incumbent contract under a request for proposals was denied as untimely because the protester did not file its protest and request for suspension within 10 calendar days of award of the extension. However, the agency agreed to a voluntary suspension of its authority to proceed under the request for proposals, pending resolution of the protest.

For the protester, Pindar Donnelley Partnership: Sidley & Austin, Washington, D.C., by Michael A. Nemeroff, Francis J. O'Toole, Gary P. Quigley, Joseph C. Port, Jr., and Denise W. DeFranco. For the protester/intervenor, GraphicData, Inc.: Sullivan & Worcester, Washington, D.C., by Richard D. Lieberman, J. Randolph MacPherson, and Jane B. Maxwell. For the government: Jerry A. Walz, Mark Langstein, Lisa J. Obayashi, and Fred Kopatich, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C. For the intervenor, International ComputaPrint Corporation: Petrillo & Hordell, Washington, D.C., by Joseph J. Petrillo, Michael A. Hordell, Laurel A. Heneghan, and Jessica C. Abrahams, and Schwalb, Donnenfeld, Bray & Silbert, Washington, D.C., by Burton Schwalb.

Before WILLIAMS, Administrative Judge.

WILLIAMS, Administrative Judge:

Background

In this protest, Pindar Donnelley Partnership (Pindar) challenges the Patent and Trademark Office's (PTO's) proposed award of a contract to International ComputaPrint Corporation (ICC) under request for proposal (RFP) number 52-PAPT-0-00027. ICC is also the incumbent contractor on an existing contract for similar services.

This matter comes before the Board on protester's request for a suspension of the agency's procurement authority pending resolution of this protest. Protester seeks a suspension not only of the imminent award

[1] The Board has not yet ruled on the objection to GraphicData, Inc.'s request to intervene or on its status as a protester, but has allowed it to participate in the protest proceedings pending such ruling.

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being challenged here,[2] but also of the contract under which ICC is currently performing.[3]

Discussion

On April 30, 1993, PTO published a notice in the Commerce Business Daily announcing its intent to modify ICC's incumbent contract by extending the period of performance from June 1993 through November 30, 1993, with two additional three-month options for extension through February 1994 and May 1994 respectively, while PTO continued the competitive procurement under Request for Proposal (RFP) No. 52-PAPT-0-00027. Intervenor ICC's Suspension Hearing Exhibit 1.

On June 1, 1993, PTO awarded ICC the extension of its incumbent contract. Declaration of Joseph Dariano, President, International ComputaPrint Corporation (November 15, 1993), ¶ 1.

The instant protest was filed on November 5, 1993, long after award of the contract extension. Pindar's protest complaint fails to establish the timeliness of its request that work being performed under this extension to the incumbent contract be suspended. Because Pindar did not file its protest and request for suspension within ten calendar days of award of the extension, its request for suspension is untimely and must be denied. 40 U.S.C. § 759(f)(3) (1988); *see RMTC Systems, Inc. v. Department of the Army*, GSBCA 12303-P, 93-2 BCA ¶ 25,890, 1993 BPD ¶ 51; *Federal Support Group, Inc. v. Department of the Army*, GSBCA 11803-P, 92-3 BCA ¶ 25,078, 1992 BPD ¶ 119.

As a result of a telephonic conference between the Board and the parties on November 19, 1993, respondent has agreed to a voluntary suspension of its authority to proceed under RFP No. 52-PAPT-0-00027 pending resolution of this protest.

Decision

Protester Pindar's request for a suspension of respondent's procurement authority is **GRANTED IN PART.**[4] Pindar's request for a suspension of the agency's procurement authority governing ICC's incumbent contract is **DENIED AS UNTIMELY.** Pindar's unopposed request that the PTO suspend any further action under RFP No. 52-PAPT-0-00027 pending resolution of this protest is **GRANTED.**

[¶ 26,544] Metropolitan Technical Services, Inc. v. Defense Information Systems Agency

GSBCA No. 12659-C(12490-P), November 12, 1993. Solicitation No. DCA100-93-R-0042.

Protests, GSBCA—Costs of Protest and Attorney Fees—Expert Witness.—A protester was not entitled to recover the fees and expenses it incurred in retaining an expert witness, despite its request that the board consider reimbursement of such fees if it revisited its holding in a precedential cost case that was currently on appeal, because the appellate court did not overrule or revise the cost case, which therefore remained binding precedent.

For the protester: Elizabeth N. Forgotson and Johnson & Roche, McLean, Virginia, by Jon E. Shields. For the government: Roger B. Sabin, Eileen P. Manley, and Capt. Daniel M. Kline, Office of General Counsel, Defense Information Systems Agency, Arlington, Virginia.

Before GOODMAN, DEVINE, and NEILL, Administrative Judges.

GOODMAN, Administrative Judge: This protest was filed by Metropolitan Technical Services, Inc. (MTS or protester) on July 8, 1993, alleging that respondent, the Defense Information Systems Agency (DISA or respondent), improperly rejected MTS's pro-

[2] The agency expects to award this new contract within thirty days of the suspension hearing in this protest, which was held on November 17-18, 1993.

[3] Pindar requested that the Board "suspend the PTO's procurement authority and direct that the PTO suspend any contract performances by ICC pending a decision by the Board on the merits of this protest." Complaint at 17.

[4] Respondent has moved to dismiss this protest on the ground that the procurement is not for automatic data processing equipment. Although the question of jurisdiction is open, we have proceeded with a hearing and this ruling on the issue of suspension of contract performance consistent with the general rule that we may, if appropriate, preserve the status quo while determining our authority to consider the case fully. *Sector Technology*, GSBCA 10566-P, 90-2 BCA ¶ 22,865, at

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posal for computer equipment to be supplied to respondent. After discovery and negotiations, on September 13, 1993, the parties met at the Board and filed a stipulation of fact signed by respondent and protester. By this stipulation, the parties entered into the record the depositions of two government witnesses and the following factual determination:

> Respondent's determination that protester's proposal, submitted in response to solicitation DCA100-93-R-0042, was technically unacceptable was not supported by substantial evidence.

The parties jointly requested that the Board close the record in this matter on September 13, 1993. By decision dated September 30, 1993, the Board granted the protest. *Metropolitan Technical Services, Inc. v. Defense Information Systems Agency*, GSBCA 12490-P, 94-1 BCA ¶ 26,448 (Sept. 30, 1993).

Under Board Rule 35[1] and 40 U.S.C. § 759(f)(5)(C) (1988), the Board may award protest costs, including reasonable attorney fees, to an "appropriate interested party" when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. An appropriate interested party has been defined as a "prevailing party" or "one that has succeeded on any significant issue in the litigation that achieves some of the benefit it sought in bringing suit." *Bedford Computer Corp.*, GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,811, 1989 BPD ¶ 121, at 3. MTS is an appropriate interested party entitled to recover its costs pursuant to Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988).

On October 27, 1993, protester filed its motion for payment of protest costs pursuant to Rule 35 in the amount of $37,332.21. On November 2, 1993, protester filed an amendment to its motion for costs correcting several clerical errors and increasing the total amount requested to $37,369.42. This amount is composed of $34,066.44 for outside attorney fees and taxable costs, $963.50 for the cost of the deposition transcripts, and $2,339.48 for expert witness fees and expenses. Respondent objects to the payment of fees and expenses incurred by protester for retaining an expert witness. Respondent's Reply to Protester's Motion at 1-2.

In its motion for costs, with regard to expert witness fees and expenses, protester states:

> Protester has included the charges of [its] expert witness ... in its fee petition. Protester respectfully requests that the Board consider reimbursement of these fees should it revisit its holding in *Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration*, GSBCA 10000-C(9835-P), 92-3 BCA ¶ 25,118, 1992 BPD ¶ 141, during the pendency of this cost case.

In its amendment to its motion for costs, protester notes that the *Sterling Federal* decision has been appealed to the Court of Appeals for the Federal Circuit and states that "[p]rotester accepts that *Sterling Federal* remains binding precedent unless the Court of Appeals overrules or revises it. It asks only that the Board consider award of [the expert's] fees if the Court of Appeals overturns *Sterling Federal* during the pendency of its cost case." Protester's Amendment to Motion for Costs at 5.

As of this date, no decision has been rendered in the *Sterling* appeal. We, therefore, follow our decision in *Sterling* and deny protester's request for $2,339.48 for the fees and expenses incurred by protester for retaining its expert witness.

We have independently examined the documentation filed by MTS in support of its motion and otherwise find its request for costs reasonable. Accordingly, we award $34,066.44 for outside attorney fees and taxable costs and $963.50 for the cost of the deposition transcripts, for a total of $35,029.94.

Decision

Protester's motion is **GRANTED IN PART.** Protester is awarded $35,029.94 to be paid, without interest, in accordance with statute, 31 U.S.C. § 1304 (1988). 40 U.S.C. § 759(f)(5)(C) (1988).

(Footnote Continued)

114,854, 1990 BPD ¶ 79, at 6, *citing United States v. United Mine Workers of America*, 330 U.S. 258, 291-93 (1947).

[1] 48 CFR 6101.35 (1992).

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[¶ 26,545] Amdahl Corporation v. Department of the Treasury; Federal Computer Corporation and ViON Corporation, Intervenors

GSBCA No. 12658-P, November 8,1993.

Protests, GSBCA—Suspension of Procurement Authority—Partial Suspension.—A protester's request for suspension of an agency's delegation of procurement authority in connection with a procurement for automatic data processing equipment and services was granted because the government's mere assertions that the protester would not be harmed by the continuation of the procurement or that delay would inconvenience the agency did not justify the continuation of the procurement or even the imposition of only a partial suspension. Although the government contended that the contractor was not seeking an award and would thus suffer no harm from the denial of the suspension request, the protester's amended protest requested reinstatement into the competitive range. Moreover, the government failed to show that the continuation of the evaluation process was critical or that it would not be possible to minimize the effect of delay attributable to the protest.

For the appellant: Arent Fox Kintner Plotkin & Kahn, Washington, D.C., by Richard J. Webber, Craig S. King, and Adam J. Ruttenberg. For the government: Donald M. Suica, James W. Corbitt, Jr., Greg M. Weinman, and Duane L. Zezula, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, D.C. For the intervenor, Federal Computer Corporation: David S. Kovach. For the intervenor, ViON Corporation: Latham & Watkins, Washington, D.C., by David R. Hazelton and C. Chad Johnson.

Before HYATT, Administrative Judge.

HYATT, Administrative Judge: On October 27, 1993, protester, Amdahl Corporation, challenged the elimination of its proposal from the competitive range of a procurement under which the Internal Revenue Service (IRS) will purchase or lease automated data processing equipment and support services. The IRS opposes protester's request for suspension of the delegation of procurement authority applicable to this procurement and asks that the Board permit it to proceed with the procurement. In the alternative, respondent requests a limited suspension that would allow it to proceed with work on the procurement up to but not including making award. For the reasons stated, respondent's motion is denied and protester's request for an interim suspension is granted.

Background

The purpose of this procurement is to acquire large-scale IBM compatible mainframe computers and associated peripheral equipment and support services to replace existing, outdated systems at two IRS computing centers located in Martinsburg, West Virginia, and Detroit, Michigan. These centers will provide centralized support of tax administration processing over an eight-year systems life while the IRS converts to a more decentralized tax processing architecture.

Amdahl's protest complaint states that Amdahl is one of three manufacturers that produces equipment suitable for the IRS's requirements. As originally issued, however, the solicitation required two features, "dual copy" and "native ESCON [Enterprise Systems Connection Architecture]" which Amdahl could not provide immediately. After reviewing the solicitation, Amdahl informed the IRS that it could not submit a compliant proposal if these two features were required at initial installation, but that it could supply both features by the time of the first hardware upgrade, which was scheduled for the thirteenth month of the contract. In response, the IRS amended the solicitation to provide that these two features would not be required until the time of the first hardware upgrade.

Amdahl, in light of this amendment to the solicitation, prepared an initial proposal, which was timely submitted to the IRS. At that time, Amdahl commenced work on the required benchmark. Thereafter, the IRS issued clarification requests and conducted oral discussions.

The protest alleges that the benchmark script was prepared for the IRS by a consultant. The script was designed in such a fashion that, because of extensive input/output transaction demands of the workload, a non-native ESCON solution would be substantially disadvantaged in the interactive response time portion of the benchmark.

Amdahl's protest alleges, alternatively, that it was either illegally induced to waste its efforts and was not timely notified that it

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had no reasonable chance of award or that it should not have been eliminated from the competitive range because the exclusion resulted from the agency's misevaluation of the Amdahl proposal and a change in the agency's needs. In its initial protest, by way of relief Amdahl requested an award of attorney fees and wasted bid and proposal costs and any other relief the Board deemed appropriate; in an amended protest filed on November 2, 1993 (after the filing of respondent's motion), Amdahl expressly requested reinstatement into the competitive range.

Discussion

This is a preaward protest. Respondent concedes that it cannot establish that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the Board's decision, nor does it contend that it would be in a position to make award within thirty days of a hearing convened to determine if the delegation of procurement authority (DPA) should be suspended.[1] 40 U.S.C. § 759(f)(2)(A) (1988). Although the statute provides that absent such a showing the Board "shall suspend" the agency's DPA, respondent urges it should nonetheless be permitted to proceed without restriction because the delay would inconvenience the agency and the purpose of the interim suspension, to preserve meaningful relief for the protester, would not be served. Alternatively, the IRS, citing *NCR Comten, Inc.*, GSBCA 7698-P, 85-1 BCA ¶ 17,903, 1985 BPD ¶ 1, urges that if a suspension is ordered it should be partial, permitting the agency to evaluate best and final offers from the remaining offerors.

Generally, the requirement to impose a suspension has been recognized to be mandatory in the absence of the requisite showing, which respondent concedes it cannot make. *See Prime Computer, Inc.*, GSBCA 9000-P, 87-2 BCA ¶ 19,918, 1987 BPD ¶ 98; *TAB, Inc.*, GSBCA 8769-P, 87-1 BCA ¶ 19,495, 1986 BPD ¶ 213. The Board has, however, recognized that a less than total suspension may be imposed in appropriate circumstances. In *NCR Comten* the agency demonstrated in a suspension hearing that the protested procurement was part of an overall modernization program designed to produce more than $100 million in ultimate cost savings for the agency. In addition, testimony was adduced to the effect that the delay occasioned by the protest would cost the agency many millions of dollars. As a result the Board was persuaded to allow the procurement, which was in an early stage, to proceed on a limited basis, under which respondent was permitted to perform evaluations and seek clarifications, but was proscribed from conducting discussions. In *Federal Systems Group, Inc.*, GSBCA 10518-P, 90-2 BCA ¶ 22,796, 1990 BPD ¶ 64, the Government demonstrated that if the procurement did not proceed "apace" there would likely be "devastating ramifications to the United States and its trade partners." *Id.* at 114, 472, 1990 BPD ¶ 64, at 6. Having so found, the Board balanced the competing interests of the parties, and allowed the evaluation process to proceed in a limited fashion.

Protester contends that respondent's points do not justify denial of a suspension request or even the imposition of only a partial suspension. Respondent's principal point, that Amdahl is not contending for an award and thus would suffer no harm, has been addressed by the amended protest. Amdahl now expressly seeks reinstatement into the competitive range if appropriate. In addition, there has been no showing here that it is critical to continue the evaluation process. Respondent simply states in its motion that:

> Delays in the ... procurement will likely result in decreased access [to certain computer-stored tax information] for ... IRS employees. As resources on the existing hardware are stretched, workload prioritization will negatively impact Service employees using the system. This could take a number of different forms: degraded response time, a limitation on the numbers of concurrent users, and a reduction in the hours of availability to on-line users.

As protester observes, this surmise falls far short of the large dollar cost savings demonstrated in *NCR Comten* and of the "devastating impact" demonstrated in *Federal Systems*. In both of these cases the Board had a record, with testimonial evidence, that showed it was essential to proceed in some fashion short of making award during the pendency of the protest. The mere assertion that the protester would not be harmed by continuation of the evaluation process does not serve to justify imposition of a partial suspension over protester's objection. *See Corporate Systems Resources, Inc.* v.

[1] Respondent represents that no hearing is necessary.

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Tennessee Valley Authority, GSBCA 11938-P, 93-1 BCA ¶ 25,342, 1992 BPD ¶ 206. Additionally, respondent offers no evidence of what its award schedule is or that it would not be possible to make adjustments to minimize the effect of delay attributable to the protest. *See Prime Computer.*

Decision

Respondent's motion opposing a suspension is DENIED. Protester's request for a suspension is GRANTED.

[¶ 26,546] MCI Telecommunications Corporation v. Peace Corps; AT&T Communications, Inc., Intervenor

GSBCA No. 12632-P, November 10, 1993.

Timeliness of Protests, GSBCA—Significant Issue—Sole-Source Award.—An intervenor's motion to dismiss as untimely a protest of the Peace Corps' refusal to immediately end its sole-source arrangement with the intervenor for telecommunications services was denied because the protest was filed within 10 working days of the protester's receipt of a letter stating that the Peace Corps would not immediately initiate a competitive procurement for the services.

For the appellant: Robin L. Redfield and Linda P. Armstrong. For the government: Kirby Mullen, Office of the General Counsel, Peace Corps, Washington, D.C. For the intervenor, AT&T Communications, Inc.: Jonathan S. Hoak and Steven H. Talkovsky and McKenna & Cuneo, Washington, D.C., by C. Stanley Dees, Thomas C. Papson, and William Lewis Taylor.

Before DANIELS, DEVINE, and BORWICK, Administrative Judges.

DANIELS, Administrative Judge: In November 1984, the Peace Corps gave to AT&T Communications, Inc. (AT&T) an Appointment of Communications Representative (ACR). Since then, AT&T has been meeting all of the agency's requirements for international switched voice telecommunications services (ISVS).

On October 8, 1993, MCI Telecommunications Corporation (MCI) filed a protest alleging that as long as the Peace Corps fails to satisfy its needs for ISVS through a competitively-awarded contract, the agency is violating requirements of statute and regulation. MCI maintains that the current arrangement between the Peace Corps and AT&T is illegal for two reasons—first, because it was made without competition and an exemption from competition was not justified, and second, because the General Services Administration (GSA) never granted a delegation of procurement authority (DPA) to the Peace Corps to enter into it. MCI maintains that the Peace Corps can secure ISVS legally only by obtaining the services under MCI's contract with the Defense Commercial Communications Office (DECCO) or by soliciting and awarding a separate contract. Because the second of these alternatives cannot be accomplished immediately, MCI asks that if the Peace Corps selects it for the long-term fulfillment of its needs, we direct the agency to buy ISVS under the DECCO contract in the interim.

AT&T, an intervenor of right in this case, has moved the Board to dismiss the protest as untimely filed. We deny the motion.

Findings of Fact

1. The Peace Corps appointed AT&T its communications representative on November 20, 1984, "to participate in and coordinate the subscription process for all customer lines listed (none are listed) and to issue instructions to and to otherwise deal with the Local Exchange Company regarding the same." The appointment may be revoked at any time. Protest, Exhibit F at 4th unnumbered page.

2. Under this arrangement, AT&T charges the Peace Corps monthly for international telecommunications services that it has provided. The charges are made pursuant to the published Government International Communications Service (GICS) tariffs. MCI's Response to AT&T's Motion to Dismiss (MCI's Response), Exhibit 6 at 5.

On February 16, 1993, MCI requested that the Peace Corps provide, pursuant to the Freedom of Information Act (5 U.S.C. § 552) (FOIA):

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a copy of any documents, memoranda, correspondence, contract(s), agreement(s), purchase order(s), etc., together with any modifications or amendments, with the current telecommunications provider(s) reflecting the terms and conditions under which the Peace Corps receives [ISVS].

Motion to Dismiss, Exhibit 4.

4. Eight days later, on February 24, an MCI account executive sent to his superiors, a branch manager and the firm's director of civilian sales, an electronic mail message which described his efforts to persuade the Peace Corps to obtain ISVS through the MCI/DECCO contract. The message concludes, "I think we should continue putting the heat on them to make a move—the bottom line is still that PC has sole sourced this business to AT&T for atleast (sic) ten years." Motion to Dismiss, Exhibit 6.

5. By letter dated March 2 (and marked as received on March 4), the Peace Corps responded to MCI's FOIA request by sending a copy of the one-page ACR and stating, "No other contracts, agreements, or purchase orders relative to Peace Corps' [ISVS] were located." Motion to Dismiss, Exhibit 5.

6. By letter dated March 10, the Peace Corps' director of information resources management told MCI that the agency had performed an analysis of costs that would be incurred if ISVS were purchased under the MCI/DECCO contract instead of the current AT&T GICS tariffs. He said that the analysis showed the Peace Corps would pay considerably more if it were to buy ISVS from MCI. Consequently, he concluded, "[I]t is more economical for Peace Corps to utilize the GICS tariff for ISVS than to obtain these services under the non-mandatory DECCO ISVS contract." Motion to Dismiss, Exhibit 7.

7. On April 13, 1993, MCI asked that "the Peace Corps issue an RFP [request for proposals] for its [ISVS] requirements no later than April 23, 1993." The letter stated, "It is MCI's belief that the Peace Corps has not conducted a full and open competition for its (ISVS) requirements since at least 1984. This violates the spirit and intent of the Competition in Contracting Act ('CICA'), the Federal Acquisition Regulation[] ('FAR') and Federal Information Resource(s) Management Regulation[] ('FIRMR')." Motion to Dismiss, Exhibit 8.

8. In response to this letter, the Peace Corps' information resources management director said on April 22 that "due to the complexity of the effort involved," the Peace Corps "will be unable to prepare and issue an RFP for ISVS by April 23." He also stated, "Peace Corps has never received a delegation of procurement authority from GSA to compete an ISVS contract." Protest, Exhibit B.

9. On May 4, MCI protested to the Peace Corps contracting officer his "action of April 22, 1993, in refusing to issue a request for proposals or otherwise compete the [ISVS] requirements of the Peace Corps." This agency-level protest maintained that the Peace Corps' action of "sole-sourc[ing] all of its requirements for [ISVS] to AT&T violated 41 U.S.C. § 253(c) and (f)." MCI observed that this statute prohibits the unjustified use of sole-source contracts, and maintained that the justification of "only one responsible source" (41 U.S.C. § 253(c)(1)) is clearly inapplicable because many companies can provide ISVS. The agency protest alleged that the Peace Corps' arrangement with AT&T is also illegal because the agency "has admittedly not obtained a [DPA] from the Administrator of General Services." This protest asked "that the Peace Corps obtain a [DPA], and give [MCI] written assurances that it will take the necessary steps to procure these services by competitive means and that it will do so within the next six months." Protest, Exhibit C.

10. The Peace Corps responded to the agency protest by letter dated September 22 (and marked as received on September 24). The agency stated that GSA was negotiating with a private firm to perform an analysis of the Peace Corps' requirements for ISVS; the analysis should be completed within 90 to 120 days; and "[i]t appears likely" that the Peace Corps would subsequently "obtain communications services through the Department of State, purchase services under the ISVS contract awarded by DECCO, or . . . procure our communications needs through the competitive RFP process." Protest, Exhibit D.

11. On October 29—three weeks after the Board protest was filed—the Peace Corps informed the parties that GSA and the firm hired to analyze the Peace Corps' ISVS requirements "have agreed to expedite the procurement process and estimate that a contract for Peace Corps' international telecommunications service would be ready for award within approximately 6 months." Respondent's Supplemental Document Production (cover letter). On November 8, the Peace Corps stated further in this regard, "We expect a competitive contract award to be made within six months." Answer at 3.

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Discussion

A protest which does not complain about improprieties in a solicitation is timely only if filed with this Board "no later than 10 [working] days after the basis for the protest is known or should have been known, whichever is earlier. Rule 5(b)(3)(ii) (48 CFR 6101.5(b)(3)(ii) (1992)); *see also* Rule 2(c)(computing time). If the protest is from the denial of a protest made earlier at the agency level, the complaint is timely only if (a) the agency protest would have been timely under this rule if it had been filed here instead of with the agency and (b) the complaint arrives here within ten working days of adverse action on the agency protest. Rule 5(b)(3)(iii).

AT&T and MCI both understand these rules, and each firm believes that applying them will result in a ruling in its favor on the motion to dismiss. We agree with MCI's perception of the case; AT&T has misinterpreted the principal subject of protest.

AT&T views this protest as one against the existence of the ACR arrangement under which AT&T is, and has been for the past nine years, the purveyor of ISVS to the Peace Corps. *See* Findings 1, 2. If that were all that MCI is complaining about, we would have no doubt that AT&T is correct. MCI knew at least by February 24 that AT&T was supplying ISVS to the Peace Corps under a sole-source arrangement. Finding 3. MCI had a copy of the documentation of this arrangement by March 4, and by April 13, the firm was able to conclude that this compact was in violation of statute and regulation. Findings 4, 6. The Peace Corps' response of April 22 provided no new information about this situation. MCI's May 4 protest to the Peace Corps was filed more than ten working days after whichever of the earlier dates—February 24, March 4, or April 13—we select. Thus, to the extent that the complaint objects solely to the existence of the arrangement, it would not have been timely if filed with us instead of the contracting officer. Given this predicament, the Board protest cannot be timely, even though it was filed within ten working days of MCI's receipt of the denial of the agency protest.

This analysis is not conclusive as to the timeliness of the instant case, however, because MCI is concerned not so much with what has transpired for the past nine years, but rather, with what will happen in the future. The protest is principally against the Peace Corps' refusal to bring to an end a revocable arrangement which MCI considers to be in violation of statute and regulation. *See* Finding 1. The triggering event for the agency protest, as MCI asserts, was the firm's receipt of the Peace Corps' April 22 letter stating that the agency would not immediately initiate a competitive procurement for ISVS services and that the agency did not have a DPA from GSA. *See* Finding 8. To the extent that the agency protest challenges the agency's decision not to issue a solicitation at once, that protest would have been timely if filed at the Board because the filing occurred seven working days after the date of the letter. *See* Finding 9. The Board protest was timely filed ten working days after MCI's receipt of the Peace Corps' denial of the agency protest. *See* Finding 10.

As stated earlier, MCI maintains that the Peace Corps can secure ISVS legally only by obtaining the services under the MCI/DECCO contract or by awarding a separately solicited contract. After the protest was filed, the Peace Corps agreed to proceed with the second alternative. Finding 11. Whether the agency should acquire ISVS through competitive procedures is consequently no longer in dispute. MCI has not explained what issue remains regarding this matter, other than whether the protest should be granted or dismissed as moot. The pertinent questions, for this purpose, are (a) whether the agency's action may fairly be taken as an admission that its prior failure to compete its requirements was in violation of law, and (b) whether the protest was the proximate cause of the present decision to conduct a competitive procurement. *See HSQ Technology, Inc.*, GSBCA 10802-P, 91-1 BCA ¶ 23,326, 1990 BPD ¶ 271; *Severn Companies, Inc.*, GSBCA 9344-P, et al., 88-2 BCA ¶ 20,566, 1988 BPD ¶ 25.

The issue clearly remains, however, whether the Peace Corps has authority to procure ISVS from AT&T—or any vendor—during the period of time between now and the date on which a competiting award is made. The agency has no power to acquire any telecommunications services, MCI alleges, because GSA has not given it a DPA to do so.

The Brooks Act vests in the Administrator of General Services, who heads GSA, the authority to "coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment [ADPE] by Federal agencies." 40 U.S.C. § 759(a)(l)(1988). ADPE includes telecommunications services. *Id.* § 759(a)(2)(A). The Administrator may carry out this re-

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sponsibility by acquiring ADPE himself and providing it to other agencies; he may also carry it out by delegating to other agencies or officials thereof the authority to make the acquisitions. *Id.* § 759(b). When the Administrator exercises his responsibility in the second of these ways, he issues what is called a DPA. 41 CFR 201-20.305 (1992). Without a DPA, an agency has no authority to acquire ADPE, or even to conduct a procurement for ADPE. *CACI, Inc. v. Stone* [38 CCF ¶ 76,501], 990 F.2d 1233 (Fed. Cir. 1993).

MCI's assertion that the Peace Corps does not have a DPA for the current arrangement with AT&T is the product of a misunderstanding. The first mention of a DPA in this whole affair occurred, so far as we know, on April 22. On that date, the Peace Corps' director of information resources management told MCI that his agency "has never received a [DPA] from GSA to compete an ISVS contract." Finding 8. MCI immediately assumed that this statement referred to the ACR arrangement with AT&T. There is no reason to believe that it does; to the contrary, it refers to "compete" and "contract," both of which are apparently alien to the ACR designation. From context, the statement appears to refer to a future competition; the official was telling MCI that his agency was not ready to issue a request for proposals, and the lack of a DPA is a bar to such an issuance. *See CACI.*

Notwithstanding the peculiar origin of the allegation, all parties to this protest appear to be proceeding on the belief that MCI is contending that the agency does not have a DPA for its current arrangement with AT&T. This circumstance, if true, is "a matter of fundamental importance and requires close review." *Universal Automation Labs, Inc. v. Department of Transportation* GSBCA 12370-P, 93-1 BCA ¶ 26,142, 1993 BPD ¶ 211, at 27 (July 7, 1993); *see also Science Applications International Corp. v. National Aeronautics & Space Administration*, GSBCA 12600-P, et al., 94-1 BCA ¶ 26,553 (Nov. 3, 1993). How to approach a determination as to the merit of the allegation is not clear at this point, however. Among the outstanding questions are these:

1. GSA grants DPAs by three methods—regulation, specific delegation to an agency for a class of acquisitions, and specific delegation to an agency for a particular acquisition. 41 CFR 201-20.305(a)(1) (1992) (FIRMR 201-20.305(a)(1)). The Peace Corps and AT&T acknowledge that no specific DPA has been issued. Motion to Dismiss at 16 n.7; Board's Memorandum of Conference of Nov. 2, 1993, at 2. These parties maintained initially that a regulatory DPA permitted the Peace Corps to acquire the services without prior approval of GSA because the total dollar value involved does not exceed $2,500,000. *See* FIRMR 201-20.305-1(a). The relevant period of time within which the total dollar value should be counted is in dispute, however: should it be the period from inception of the arrangement to the present, the period from inception until eternity (because the ACR has no end date), the period from the present until anticipated award of a contract through competition, or some other duration of time?

2. Whatever time is relevant, given that the Peace Corps has been able to locate billing records only for the period from October 1, 1991, through September 30, 1993, how can dollar value be measured (or at least reliably estimated)? *See* Peace Corps' Response to MCI's First Request for Production of Documents at 3 & Exhibit 7.

3. Has AT&T's provision of ISVS to the Peace Corps actually been under a contract between GSA and AT&T during at least part of the period in which AT&T has held the ACR from the Peace Corps? *See* Board's Memorandum of Conference of Nov. 2, 1993, at 2; AT&T's Reply to MCI's Response to Motion to Dismiss at 7 n.3. If so, does this affect the relevant time period for computation of the total dollar value of the services with which we are concerned—or does it mean that because GSA was the agency that contracted for the services, no DPA has been necessary? *See* FIRMR 201-20.305-1(c).

4. Has GSA issued a specific DPA for the ACR arrangement (or more precisely, the continuation of that arrangement until a competitive award is made) since the protest was filed? If so, does that moot MCI's contention that the Peace Corps cannot buy ISVS from AT&T because it lacks a DPA to do so?

The questions remaining before the Board involve matters of fact as well as law. We have authorized the parties to supplement the documentary record on which our decision on the merits of the protest will be based. Our previous authorization was solely to select, from among documents that had been exchanged on or before November 5, which ones should constitute part of the record. To permit a full analysis of the questions raised, we now extend this authorization to place in the record additional relevant documents. The documents must be designated as a party's exhibits and

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filed with the Board no later than Monday, November 15.

Decision

AT&T's motion to dismiss the protest as untimely filed is DENIED.

[¶ 26,547] Citicorp v. General Services Administration; American Express Travel Related Services Co., Inc., Intervenor

GSBCA No. 12631-P-R, November 19, 1993.

Automatic Data Processing Equipment—Brooks Act Applicability—Card Readers.—A protester's motion to amend a solicitation to delete a reference to mechanical readers under the assumption that the procuring agency sought to procure electronic readers that were automatic data processing equipment was rejected because there was no language in the solicitation that suggested that the agency had sought to procure card readers that possessed electronic or ADPE capabilities. The board's conclusion was consistent with the facts that the awardee had offered a reader that contained no electronic features and that the agency, by accepting the proposal of the awardee, clearly had decided that the capabilities of a mechanical printer would fulfill the requirements of the solicitation.

For the protester: Diantha McJilton, Arnold & Porter, Washington, D.C., by David B. Apatoff and Steven S. Diamond, and Howrey & Simon, Washington, D.C., by Michael R. Charness and William A. Roberts III. For the government: George Barclay, Michael J. Ettner, Janet L. Harney, Michelle A. Harrell, Seth P. Binstock, Pamela J. Reiner, and Glynis Lloyd, Office of General Counsel, General Services Administration, Washington, D.C. For the intervenor, American Express Travel Related Services Co., Inc.: Paul, Hastings, Janofsky & Walker, Washington, D.C., by Hamilton Loeb, Bruce D. Ryan, Scott M. Flicker, John M. Oseth, and Randall M. Stone.

Before DEGRAFF, LABELLA, and HENDLEY, Administrative Judges.

DEGRAFF, Administrative Judge: On October 13, 1993, the General Services Administration (GSA) filed a motion to dismiss this protest for lack of jurisdiction. On October 14, 1993, American Express (AmEx) filed a similar motion. The parties' motions were based upon their assertion that the procurement at issue is not one for the purchase, lease, or maintenance of automatic data processing equipment (ADPE). One of the many requirements of the solicitation is that the awardee provide "card readers (point of sale machines) at no cost to the Government, to agencies/organizations issuing travelers checks, if requested by the participating agency/organization." Respondent's Motion to Dismiss, Attachment 1. Anticipating one of Citicorp's arguments, GSA and AmEx asserted that this solicitation language does not require the awardee to provide ADPE. They argued that the requirement of the solicitation would be met if the awardee were to provide mechanical devices, commonly used by merchants, which are operated by placing a credit card and a carbon interleaved receipt form in the device and then sliding a bar across the top of the receipt form so that the embossed information contained on the card is imprinted onto the receipt form. These mechanical devices are known as manual imprinters. Because such mechanical devices do not constitute ADPE, GSA and AmEx asserted that the procurement of card readers (point of sale machines) does not amount to a procurement of ADPE. Respondent's Motion to Dismiss at 20; Intervenor's Motion to Dismiss at 16.

In opposing the motion to dismiss, Citicorp asserted that "a card reader (point-of-sale machine) is electronic computer hardware." Protester's Opposition to the Motion to Dismiss at 11. In support of its assertion, Citicorp attached a statement that explains that an electronic card reader works by scanning the information encoded in the magnetic strip on a card. The statement asserts that a manual imprinter could not be offered to satisfy "a customer's requirement for a card reader." This statement is not sworn and does not meet the requirements of 28 U.S.C. §1746 (1988) for unsworn declarations provided under penalty of perjury. Protester's Opposition to the Motion to Dismiss, Attachment D. Citicorp also attached to its opposition brief a portion of AmEx's

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proposal. In response to GSA's requirement for a card reader (point of sale machine), AmEx states in its proposal that it will provide electronic point of sale machines when the parties agree that the volume of transactions at a particular location justifies their use and that it will provide manual imprinters in other locations. Protester's Opposition to the Motion to Dismiss, Attachment E. AmEx's proposal was accepted by GSA.

On October 22, 1993, we dismissed this protest for lack of jurisdiction. At page 8 of our opinion, we discuss Citicorp's allegation that the solicitation seeks to procure and requires contractors to furnish ADPE in the form of electronic credit card readers. Based upon an examination of the requirements of the solicitation, we determined that there is no requirement for an electronic reader and, thus, we concluded that the solicitation's requirement for card readers is not one for ADPE. In our opinion, we refer to the manual imprinters as "mechanical" readers.

Pursuant to Rule 32, Citicorp asks that we modify or amend our October 22, 1993 opinion to delete the reference to "mechanical" readers and to conclude that GSA sought to procure electronic card readers (point of sale machines) which are ADPE. According to Citicorp, the record contains no basis for any other conclusion. AmEx and GSA oppose Citicorp's motion. For the following reasons, Citicorp's motion is denied.

The point of the discussion contained at page 8 of our October 22, 1993 opinion is that the terms of the solicitation simply do not contain any requirement for an electronic device capable of electronically reading the information contained on a credit card. The basis for our conclusion is the language of the solicitation itself, which does not contain any suggestion that GSA sought to procure card readers (point of sale machines) which possessed any electronic or ADPE capabilities. Our conclusion is consistent with the fact that AmEx determined when it prepared its proposal that the requirement of the solicitation can be fulfilled by something other than an electronic device, namely the manual imprinter that it proposed to supply, and is also consistent with the fact that GSA, by accepting AmEx's proposal, clearly decided that supplying manual imprinters will fulfill the requirements of the solicitation.

Although Citicorp denominates its motion as a request for a modification or amendment of a finding of fact, what it actually requests is that we reach a different conclusion of law concerning our interpretation of the solicitation. Citicorp asserts that the statement that it provided in response to the motions to dismiss establishes that our interpretation of the solicitation is incorrect. Whether Citicorp's proffered statement has any value is doubtful, given that it is unsworn and does not meet the statutory requirements for an unsworn statement made under penalty of perjury. Even if the statement were entitled to some weight, it would not persuade us that our interpretation of the solicitation is incorrect. Although the statement discusses the features of electronic card readers, the card readers (point of sale machines) that GSA sought to procure are not required to possess any of these features. The statement's discussion, therefore, does not persuade us that our interpretation of the solicitation is incorrect. Similarly unpersuasive is the statement's conclusory assertion that a manual imprinter, which we referred to as a mechanical reader in our opinion, will not meet some hypothetical customer's unspecified requirements.

It is important to keep in mind the scope and purpose of the discussion contained at page 8 of our opinion. We were called upon to resolve whether the solicitation's requirement for "card readers (point of sale machines)" is a requirement for ADPE. Based upon our reading of the solicitation, we concluded that GSA did not seek to procure ADPE when it sought to fulfill its requirements. Our reference to a "mechanical" reader is nothing more than the means we chose to describe the manual imprinters which AmEx proposed to supply and which GSA determined to accept. Our opinion does not suggest that the term "mechanical" reader has any meaning beyond that necessary to resolve the jurisdictional issue that was before us. Our conclusions are grounded in the language of the solicitation itself and are supported by the remainder of the record.

Decision

For the reasons set forth above, Citicorp's motion to modify or amend our opinion is **DENIED.**

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[¶ 26,548] Storage Technology Corporation v. Department of the Army; Comparex Informationssysteme GmbH, Intervenor

GSBCA No. 12626-P, November 2, 1993.

Certification of Integrity—Responsiveness—Completion of Certificate.—Although an awardee under a procurement for a retrieval system failed to complete a certificate of procurement integrity as required by regulations, the board concluded that the awardee's failure did not render the certification materially defective, because the three dashes placed on a response line provided in a paragraph of the certificate indicated the awardee's intent to show that it had not committed a violation of the Procurement Policy Act. The awardee's use of dashes rather than the word "none" called for in the instruction to the certificate was consistent with its responses in another provision in the RFP. The awardee had inserted three dashes under all five of the paragraphs in the other provision of the RFP to illustrate that it had not had prior contracts with the government.

For the protester: Cohen & White, Washington, D.C., by David S. Cohen, Andrew Tenenbaum, and G. Brent Connor. For the government: Col. Riggs L. Wilks, Jr., Maj. Charles R. Marvin, Jr., Maj. Karl M. Ellcessor III, and Capt. Gerald P. Kohns, Jr., Office of the Chief Trial Attorney, Department of the Army, Arlington, Virginia. For the intervenor, Comparex Informationssysteme GmbH: Gerisch Liebrich.

Before BORWICK, LABELLA, and DeGRAFF, Administrative Judges.

BORWICK, Administrative Judge:

Background

Storage Technology Corporation (STC) protests the Department of the Army's (Army's) contract award to Comparex Informationssysteme GmbH (Comparex) for acquisition of an automated tape cartridge and library retrieval system. STC alleged that the award was improper because the machine Comparex proposed failed to meet the request for proposal's (RFP's) mandatory requirements for dimension and electrical capacity. These counts have been withdrawn. The remaining count is that Comparex failed to complete a certificate of procurement integrity, which failure renders Comparex's offer materially defective. STC maintains that the contracting officer violated statute and regulation—41 U.S.C. § 423 and FAR 3.104-9(b)—in accepting Comparex's offer with the defective certification.

In filling out the certificate, Comparex put three dashes "---" in paragraph K.4(b)(3) of the certificate, rather than the word "NONE" as instructed. Respondent and STC have moved for summary relief. The material facts are not in dispute and respondent is entitled to summary relief as a matter of law. We conclude that the placement of the three dashes in place of the word "NONE" does not render the certification materially defective, as Comparex's intent that it meant "none" was clear.

The following facts are not in dispute. On June 4, 1993, the Army issued an RFP for the acquisition of an automated tape cartridge and library retrieval system. Section K of the RFP listed the requirements for representations, certifications, and other statements of offerors.

Paragraph K.3 of the RFP, which addressed "Prior contracts with the U.S. Government," stated:

> Designate below all contracts with the United States Government (including the Army, Navy, and Air Force) in excess of $25,000 during the last four years. If fewer than 3 contracts in excess of $25,000 during the last four years have been performed with the United States Government, also list contracts below $25,000 and contracts older than four years. Attach additional sheet if necessary.

Respondent's Motion for Partial Summary Relief, Attachment 2.

Paragraph K.3 then listed five columns for the bidder to enter information pertaining to the prior contracts with the U.S. Government: CONTRACT #, DATES PERFORMED, DM OR $ AMOUNT, TYPE OF WORK, WHERE DONE. *Id.* Comparex also placed three adjacent dashes in paragraph K.3 to indicate it did not have prior contracts with the U.S. Government.

Paragraph K.4 of the RFP incorporated the certificate of procurement integrity. Paragraph K.4(b)(1) and (b)(3) of the certificate stated:

> (1) I, _____ [Name of certifier], am the officer or employee responsible for the preparation of this offer and hereby cer-

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tify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation or possible violation of subsection 27(a), (b), (d), or (f) of the Office of Federal Procurement Policy Act, as amended (41. U.S.C. 423), (hereinafter referred to as "the Act"), as implemented in the FAR, occurring during the conduct of this procurement _____ _____ (solicitation number).

. . . .

(3) Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity (Continuation Sheet), ENTER NONE IF NONE EXIST)

_____

_____

_____

Id.

Comparex submitted an executed certification as part of its proposal. In paragraph K.4(b)(1), Comparex listed two officers responsible for the offer, but left the solicitation number portion blank. *Id.* Comparex entered three adjacent dashes "---" in the space provided in paragraph K.4(b)(3) of the certificate. *Id.* On September 28, 1993, Comparex received the award.

Discussion

Summary relief should be granted as long as there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Mike Creech v. GSA*, GSBCA 11726, 93-3 BCA ¶ 25,952. There is no dispute that the dashes were placed in paragraph K.4(b)(3) of the certification or that the certification instructions stated "Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity (Continuation Sheet), ENTER NONE IF NONE EXIST)." Submission of a properly executed certificate is a material requirement of a solicitation; failure to complete the certificate is a material deficiency in the proposal and grounds for rejection of the proposal. *See generally Mid-East Contractors, Inc.*, 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342.

The sole question regarding Comparex's certification is whether entering three adjacent dashes in the space provided in paragraph K.4(b)(3) results in a defective certification, requiring rejection of the proposal for failure to meet a material requirement of the RFP. We hold that the dashes placed in paragraph K.4(b)(3) of the certification signify Comparex's intent to indicate that there were no violations or possible violations of the Office of Federal Procurement Policy Act.

The General Accounting Office (GAO) has ruled on the sufficiency of dashes in bids or proposals. In *Custom Environment Service, Inc.*, B-234774, 89-1 CPD ¶ 501 (May 24, 1989), the awardee placed dashes in its pricing bid sheet. The GAO concluded that the bid was unclear as to whether the awardee intended to perform the work at no cost to the government. The dashes in the bid could have been the result of an oversight by the awardee, and so "did not clearly express MJW's [awardee's] intent to perform the work . . . at no cost to the government." *Id.* at 3. In another GAO decision, an awardee placed dashes in its bid's unit price and amount columns. The GAO decided that entry of dashes "is certainly less clear an indication of intent than either a dollar price entry or a statement like 'No charge.' But it is a more meaningful expression of intent than a mere blank space. . . . Therefore, while there is no explicit indication that the data was to be supplied at no cost, the bidder's intent to do so was clear and the failure to state this intent in a more positive fashion did not render the bid nonresponsive." 48 Comp. Gen. 757, 762 (1969). In both *Custom Environment* and 48 Comp. Gen. 757, the GAO's ruling depended upon whether the awardee's intent was clearly expressed by the insertion of the dashes. *See also Keahey's Moving Co.*, B-224273, 86-2 CPD ¶ 602 (Nov. 24, 1986). (In lieu of submitting a price, a bidder may indicate *intent* to be obligated by insertion of a notation—"zero," the words "no charge," or a dash—that the item will be provided at no cost or charge to the government).

The GAO has decided that leaving *blank* the space provided in paragraph (b)(3) of a certificate of procurement integrity does not render a bid nonresponsive. In *Neighborhood Development Corp.*, B-246166, 92-1 CPD ¶ 162 (Feb. 7, 1992) the certificate was signed by officers and no other information was submitted to indicate a violation or possible violation of the Office of Federal Procurement Policy Act. Paragraph (b)(3) was blank. Because paragraph (b)(1) states that the person signing the certificate has no information concerning violations except those listed in paragraph (b)(3), GAO decided that leaving paragraph (b)(3) blank is a "redundant affirmation" that the person has no such information.

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Because Comparex properly signed the certificate, its offer would not have been materially defective if had left paragraph (b)(3) blank. The question is whether the offer is materially defective because three dashes were inserted into paragraph K.4(b)(3) of the certification. STC argued that the three dashes may not be enough to constitute an answer to paragraph K.4(b)(3)'s request for information. STC argued that "---" meant that there was an attached sheet listing further information. We find this interpretation unreasonable. Comparex undoubtedly was aware of paragraph (b)(3), since it completed the paragraph with a symbol (the three dashes) commonly understood as signifying the term "none." (Indeed, GAO considers that using dashes is more meaningful of intent than leaving spaces blank. 48 Comp. Gen. 757.) Thus, it is evident that Comparex had no knowledge of violations or possible violations of the Office of Federal Procurement Policy Act, as implemented by the FAR.

Comparex's use of dashes to signify "none" was consistent with its responses to paragraph K.3 of the RFP; Comparex also inserted "---" under all five of the columns in paragraph K.3 to illustrate that it did not have prior contracts with the U.S. Government. Therefore, since the bidder's intent is clearly expressed, we hold that Comparex's certification is not defective.

Respondent's motion for partial summary relief is **GRANTED;** STC's motion for partial summary judgment is **DENIED.** The protest is **DENIED.** The suspension of respondent's delegation of procurement authority lapses by its terms.

[¶ 26,549] Integrated Systems Group, Inc. v. Department of the Army

GSBCA No. 12611-P, November 2, 1993. Solicitation No. DAKF49-92-R-0017.

Selection of Contractor—Information to Be Considered—Material Misrepresentation.—The government's elimination of an offeror from a procurement for automatic data processing equipment on the basis of bidder's incorrect certification was proper because the bidder's erroneous certification that it had not been subject to any terminations for default on any federal contracts was a material misrepresentation. In attempting to diminish the significance of its incorrect certification, the offeror noted that the default termination had been appealed to the board and that the appeal had not yet been decided. The offeror also pointed out that the equipment to be supplied under the defaulted contract was not manufactured by it. The certification requirements, however, unequivocally called for disclosure of any default action applicable to the offeror. The nature of the equipment to be supplied under the defaulted contractor was irrelevant to the offeror's duty to accurately certify with respect to default actions. Similarly, the offeror's filing of an appeal of the termination did not negate the fact of the default action, which the certification required the offeror to report.

For the protester: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, Amy M. Hall, Wayne W. Finegar II, and Bruce Trimble. For the government: Col. Riggs L. Wilks, Jr., Maj. Charles R. Marvin, Jr., Maj. Karl M. Ellcessor III, and Capt. Gerald P. Kohns, Office of the Chief Trial Attorney, Department of the Army, Arlington, Virginia.

Before HYATT, WILLIAMS, and DEGRAFF, Administrative Judges.

HYATT, Administrative Judge: Integrated Systems Group, Inc. (ISG) has challenged the rejection of its proposal by respondent, the Department of the Army, to supply automated data processing equipment and services pursuant to solicitation number DAKF49-92-R-0017. Respondent has filed a motion to dismiss the protest for lack of an interested party or, in the alternative, a motion for summary relief.[1] The basis for the motion is ISG's incorrect certification that it had not been subject to any terminations for default of any contract with a federal agency for the three years preceding its offer.

[1] Hereinafter, for the purpose of citing to the attached exhibits, respondent's motion is referred to as "Motion for Summary Relief."

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Background

1. Solicitation number DAKF49-92-R-0017 sought offers to configure, furnish, deliver, install, and provide software technical support and training for a computer system for the Army Medical Department Center and School in Fort Sam Houston, Texas. The equipment to be provided included 80486 central processing unit (CPU) workstations. Protest File, Exhibit 1.

2. Pursuant to Federal Acquisition Regulation (FAR) clause 52.209-5, section K of the solicitation included the following certification, which provides in pertinent part:

> CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (MAY 1989)
>
> (a)(1) The Offeror certifies, to the best of its knowledge and belief, that—
>
> ....
>
> (ii) The Offeror has / / has not / /, within a three year period preceding this offer, had one or more contracts terminated for default by any Federal agency.
>
> ....
>
> THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.
>
> (b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
>
> ....
>
> (e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award.

Protest File, Exhibit 1, ¶ K.12.

3. In letters dated February 16, 1993, addressed to Valix Federal Partnership I, the Army terminated for default two contracts for the delivery of 80486 personal computers. The reasons stated included failure to deliver conforming goods. Motion for Summary Relief, Exhibits 2-3. Valix appealed these termination decisions to the Armed Services Board of Contract Appeals (ASBCA) on March 11, 1993. Motion for Summary Relief, Exhibit 4. A settlement agreement, signed by the contracting officer on September 30, 1993, subsequently converted the two terminations for default to terminations for the convenience of the Government. Motion for Summary Relief, Exhibit 14.

4. ISG submitted an initial proposal responding to the subject solicitation on April 10, 1993. At that time, ISG affirmatively certified that it had *not* "had one or more contracts terminated for default by any Federal agency." Protest File, Exhibit 6.

5. In a letter addressed to Integrated Systems Group, and dated May 15, 1993, the U.S. Army Information Systems Selection and Acquisition Agency (ISSAA) terminated for default a contract to supply computer equipment for, among other reasons, failure to deliver conforming equipment. ISG acknowledged receipt of this letter on May 26, 1993. Motion for Summary Relief, Exhibit 6.

6. In a revised offer submitted to the Army on June 15, 1993, ISG included what it referred to as "corrected Section K pages." None of these corrected pages altered the prior certification concerning default terminations. Protest File, Exhibit 6.

7. On July 12, 1993, ISG appealed the ISSAA default termination action to the Armed Services Board of Contract Appeals. Motion For Summary Relief, Exhibit 7. This appeal is still pending.

8. In an amendment to the solicitation dated July 8, 1993, the Army added the following provision:

> The Contractor shall submit with his proposal a history of recent experience (within the last five years) in providing services similar to those described in the performance statement...; The description shall include a minimum of three references to include company name, points of contact, addresses with associated telephone numbers and types of equipment.

Protest File, Exhibit 5. ISG responded to this solicitation amendment in a letter dated July 20, 1993. The letter provides three references but makes no mention of the terminations of the Valix contracts or of the ISG contract. Protest File, Exhibit 18.

9. In a letter dated September 9, 1993, the contracting officer reopened written discussions with ISG for the specific purpose of addressing concerns regarding the quality of performance. The contracting officer re-

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quested further information with respect to a particular contract, awarded to Valix, for similar equipment:

> 1. Your offer is for Integrated Systems Group (ISG) brand workstations (CLIN 0001AB). There are unresolved problems on a contract awarded by the Contract Administration Division in our Directorate on 29 October 1992 ... for ninety-four (94) computer workstations (similar to the instant procurement) to Valix Federal Partnership.... Numerous memorandums from various users in the contract file indicate problems with the equipment.
>
> ....
>
> 3. Since there are known deficiencies in your equipment, how will the offer on this procurement be different to ensure a high quality, reliable system with sound performance? *Are there any other customers who have experienced difficulties with the equipment?* What has your research shown to be the cause of the problems?

Protest File, Exhibit 16 (emphasis added).

10. ISG responded to this inquiry in a letter dated September 13, 1993. In part, ISG stated:

> ISG disputes many of the details of the September 9, 1993 letter. ISG chooses not to respond to each allegation at this time. The contract referenced was the first contract requiring delivery of over 90 systems that Valix/ISG won and occurred almost a year ago. Since that time we have performed on PC [personal computer] contracts with an aggregate value of over $2M without any major problems. Major changes to all aspects of the ISG manufacturing facility have been instituted since that time.
>
> ISG made these changes in order to eliminate problems and are [sic] convinced that future contract performance will not be an issue. We are not aware of other contracts having difficulties [as] extensive as the ones alleged in your letter.

Protest File, Exhibits 6, 18.

11. In a memorandum written on September 17, 1993, the contracting officer issued a determination that ISG's proposal was technically unacceptable. The memorandum details the problems experienced with similar ISG brand workstations delivered under a contract with Valix. Given the problems with this contract, and the unsatisfactory responses provided by ISG to the reopened discussions directed at this issue, the contracting officer deemed ISG to be technically unacceptable. Protest File, Exhibit 16.

12. Subsequently, the contracting officer learned of the terminations for default of the two Valix contracts and the ISG contract. On October 7, 1993, a letter was issued to ISG informing it that its failure to properly notify the contracting officers of those three default termination actions was a material misrepresentation which left the Government no alternative but to eliminate ISG from the procurement. Protest File, Exhibit 16.

Discussion

The Army contends that ISG's failure to disclose the three termination actions constituted a material misrepresentation which disqualified ISG from the procurement. ISG's protest should therefore either be dismissed for lack of an interested party or, in the alternative, denied summarily since the controlling facts are not in dispute. Since ISG is an interested party to challenge the determination of ineligibility, we deem this issue to be one more properly addressed by the motion for summary relief.

The standard by which a motion for summary relief, or summary judgment, should be measured is whether there are any genuine issues of material fact to be resolved that would affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Stroh Corp. v. General Services Administration*, GSBCA 11029, 93-2 BCA ¶ 25,841. In considering a motion for summary relief, we draw all inferences in favor of the non-moving party. *See Reliance Insurance Co. v. United States* [37 CCF ¶ 76,083], 931 F.2d 863, 865 (Fed. Cir. 1991).

ISG maintains that it should not have been disqualified from the procurement and that its failure to inform the Government of the default actions does not disqualify it from the procurement. ISG further asserts that the Board cannot decide this matter summarily because there are disputed facts material to the outcome of the case. Specifically, ISG contends that the Valix contracts that were defaulted cannot be ascribed to ISG and that the ISG contract that was defaulted was not for ISG equipment.

In a recent decision, the Board has extensively addressed the duty to disclose default termination actions under this certification. *RMTC Systems, Inc. v. Department of the Air Force*, GSBCA 12346-P, 93-3 BCA ¶ 26,046, 1993 BPD ¶ 129, *aff'd on reconsideration*, 1993 BPD ¶ 169 (June 21, 1993). In *RMTC Systems*, the offeror had, like ISG, affirmatively certified that it had not been subject to any default termination actions by

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any federal agencies for the prior three years. In evaluating proposals, the contracting officer received information that RMTC had in fact had a contract terminated for default and that that default action had been upheld by the ASBCA. On the basis of this information, the contracting officer declared RMTC Systems to be nonresponsive and thus ineligible for award.

In its defense, RMTC explained that its miscertification was not intentional but was the result of lack of knowledge on the part of a new employee who was simply unaware of the termination action. RMTC further argued that the matter was a clerical error that could readily have been clarified by the contracting officer. The Board rejected RMTC's efforts to diminish the importance of the certification, noting that inclusion of the clause in the solicitation is mandatory under the Federal Acquisition Regulation (FAR) and that the clause itself expressly cautions offerors that the representation made is "material." The Board found the miscertification to be a material misrepresentation that compromised the integrity of the procurement process. Thus, the Board denied the protest on the ground that the contracting officer had properly eliminated RMTC from the procurement because of the false certification.

Because the factual record is inadequate to impute the first two default terminations of Valix contracts to ISG, to decide this motion we focus only on the third termination, which plainly involved an ISG contract. Moreover, ISG does not dispute that this contract was terminated for default, nor does it claim to have notified the contracting officer of this fact. Instead, ISG urges that the circumstances in this procurement are distinguishable from those in *RMTC Systems* because (1) the equipment to be supplied under the defaulted contract was not manufactured by ISG, and (2) in *RMTC Systems* the ASBCA had upheld the default termination. Here, ISG points out, the default termination has been appealed to the ASBCA and that appeal has not yet been decided.

Neither of these distinctions is persuasive. The certification unequivocally calls for disclosure of any default action applicable to the offeror. The fact that different equipment was supplied under the defaulted contract is irrelevant to the offeror's duty to certify accurately and to properly update the certification to inform the contracting officer of termination or debarment actions occurring after submission of the initial proposal and prior to award. ISG failed to correct its certification despite the fact that it had occasion to correct other certifications in a submission that was made subsequent to the third termination action. This is in direct violation of the plain terms of the certification requirement. In addition, the filing of an appeal of the termination did not negate the fact of the termination action which the certification requires ISG to report to the contracting officer.

In conclusion, the contracting officer properly disqualified ISG from further participation in the procurement on the basis of its failure to update its certification. ISG's protest of this action is denied. Since ISG is not eligible for award, the remaining allegations of the protest must be dismissed for lack of an interested party. *See, e.g., Datasouth Computer Corp.*, GSBCA 10536-P, 90-2 BCA ¶ 22,794, 1990 BPD ¶ 74.

Decision

Respondent's motions are **GRANTED**. The protest is **DENIED IN PART** and **DISMISSED IN PART.**

[¶ 26,550] Integrated Systems Group, Inc. v. National Aeronautics and Space Administration

GSBCA No. 12603-P, November 9, 1993.

Invitations for Bids—Restrictiveness—Design v. Performance.—Under an invitation for bids calling for the upgrading of computers, a design specification that did not permit bidders to meet the agency needs by replacing computers but instead required bidders to replace motherboards present in the computers was overly restrictive, because the agency's conclusion that replacement computers would cost far more than replacement motherboards was not correct. The 10-slot motherboards that the agency specified were rarely manufactured and commanded a premium price. On the other hand, a new computer, even with a replacement hard drive and necessary combination card was likely to cost less than a new 10-slot motherboard. The government's information about the costs of new

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computers was unrealistic and admittedly out of date. Further, the government engineer's belief that buying new computers would necessitate buying integration kits for the new computers made no sense. The board ordered the agency to replace in its invitation for bids the contested design specifications with functional specifications.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, Amy M. Hall, Wayne W. Finegar II, and Bruce J. Trimble. For the government: Sumara M. Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C., and Jerald J. Kennemuth, Office of Chief Counsel, Lewis Research Center, Cleveland, Ohio.

Before DANIELS, BORWICK, and HYATT, Administrative Judges.

DANIELS, Administrative Judge: The National Aeronautics and Space Administration's Lewis Research Center (NASA) needs to replace microcomputers containing 80286 central processing units (CPUs) with microcomputers containing 80386 and 80486 CPUs. The agency has invited bids for replacement motherboards which, when installed in the existing computers, will accomplish this goal. Integrated Systems Group, Inc. (ISG), has demonstrated that if NASA were to permit a vendor to supply entirely new computers, rather than the specified motherboards alone, the agency might be able to secure machines which would perform identical functions at lower cost. We consequently find that the specifications are unnecessarily restrictive—in violation of statute and regulation—and grant the protest.

Findings of Fact

1. NASA currently has 245 microcomputers in the engineering directorate of its Lewis Research Center. Of these, 73 are Zenith Z-248 models which contain microprocessors that are based on the 80286 chip. NASA needs to upgrade these machines "to address the need for more rapid, efficient desktop computing and the increased [use] of Windows applications for both the engineering analysis and office automation environments." Protest File, Exhibits 2 at 2, 10, 23 at 1; Transcript at 72.

2. Each Zenith Z-248 computer contains what was referred to in our proceedings as a ten-slot motherboard (although the parties understand that the computer actually has a backplane configuration, rather than a motherboard). Transcript at 10, 16-17; Protest File, Exhibit 23 at 1. A "motherboard" is the printed circuit board that holds the microprocessor, expansion slots, and other items. A "slot," or "expansion slot," is a place on the motherboard into which a printed circuit card may be plugged. Most motherboards now being produced have eight slots; ten-slot motherboards are unusual and command a premium price. Transcript at 10, 99-100.

3. NASA solicited bids to upgrade 34 of the computers into machines whose microprocessors are based on the 80386 chip and 39 into machines whose microprocessors are based on the 80486 chip. Protest File, Exhibit 7 at B-1. According to the invitation for bids, each upgrade must have numerous specified features, including "Ten (10) 16-bit ISA expansion slots" and "Form factor and drill/mounting pattern [to] conform to the Zenith 286/8 and 286/12 chassis." *Id.* at C-1 to C-2. ISG correctly read these specifications as requiring replacement of each computer's motherboard, rather than replacement of the entire chassis. Transcript at 9; *see also id.* at 72-73. When asked to relax the specifications to permit replacement of the machine, NASA refused. Protest File, Exhibit 15.

4. NASA insisted on ten-slot motherboard replacements because it wanted to retain the basic configuration of the boards in the computers it now has. Transcript at 42. As one of the individuals who wrote the specifications testified: "That was determined as a requirement due to the fact that the existing equipment currently had ten slots and the chassis or case contained the fit to reaccept that." *Id.* at 80.

5. NASA needs computers which will perform the functions of ten cards now in the agency's computers. Each computer has separate cards that perform six basic functions—input/output, MFM hard disk drive controller, floppy disk drive controller, mouse bus, video bus, and ethernet connection. The agency needs space inside each computer for installing as many as four optional cards. Transcript at 42-43, 84-85; Protest File, Exhibits 7 at C-1, C-2, 13 at 3.

6. There are readily available in the marketplace combination cards each of which contains an IDE hard drive controller, a floppy drive controller, two serial ports, a parallel port, and a game port. Transcript at

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17-18, 43-44, 83, 104. According to uncontested testimony by ISG witnesses, the price of one of these cards to an integrator such as ISG is under ten dollars. *Id.* at 17-18, 102.

7. The solicitation requires a bidder to provide, as part of its solution, "[s]upport for MFM." Protest File, Exhibit 7 at C-1, C-2. MFM is an older style hard disk drive which is lower in performance, has a slower response time, is more durable, and generally has less capacity than an IDE hard drive. Transcript at 18, 26-27, 45, 104. An MFM drive requires a controller which is contained on a separate card which can be inserted into a motherboard. *Id.* at 18.

8. The combination card described in Finding 6 could only work in NASA's computers if the MFM hard drives now in the computers were replaced with IDE hard drives, because the IDE controller will not work with the existing MFM drives. *Id.* at 44. ISG understands this; it knows that if it proposes to eliminate the MFM controller card, it must also replace the existing hard drives and move all the data on the MFM drives to the IDE drives. *Id.* at 19. A NASA contractor's engineer confirmed that this solution would be technically acceptable. *Id.* at 86.

9. If the combination card is employed, three cards now installed in each of NASA's computers—each of which fits into one slot—would be replaced with a single card. Thus, ISG's vice-president testified, "[I]f they think ten [slots] is required to get their job done, then I could do the same job in eight." Transcript at 19-20.

10. The NASA center where the relevant computers are being used needs to communicate with its customers through an electronic messaging system. To perform this function, each computer must contain an ethernet card and associated software. Transcript at 65. The cost of these items, which are collectively called a "LIMS [for "Lewis Information Management System"] integration kit," is estimated by NASA to be $1,366. *Id.*; Protest File, Exhibit 23 at page 2 of Attachment 4.

11. The LIMS integration kits now present in NASA's computers can physically be removed and installed in replacement machines, where they will work acceptably. Transcript at 46-47.

12. NASA's computer manager testified that the agency insists on buying replacement motherboards, rather than new computers, for reasons of cost, not any technical problems. Transcript at 51.

13. Before issuing the invitation for bids, NASA considered the price differential between buying new computers through an existing contract and buying new motherboards only. The agency presented two separate analyses. The conclusion of one was that buying each new 486 computer to perform the necessary functions would cost $1,626 for a base system and $1,366 for a LIMS integration kit, whereas replacing a motherboard would cost only $1,120 for a base system and nothing for an integration kit. Transcript at 62-65; Protest File, Exhibit 23 at Attachment 4. The conclusion of the other study was that buying new motherboards would cost about $65,000 in all, and that buying new computers instead would cost about $202,000, a figure that was considered "not . . . realistic." Transcript at 126-28; Protest File, Exhibit 2.

14. This case comes to us in an unusual posture: although the protest complains about solicitation provisions, the case was not initiated until after NASA had received bids. Although such a sequence would generally make a protest untimely, Rule 5(b)(3)(i), ISG's protest is timely because it is a reprise of an agency protest which was timely filed and denied, and this case was initiated within ten working days of that denial. Rule 5(b)(3)(iii). We are consequently able to know about the bids that NASA actually received in response to the solicitation. Protest File, Exhibit 21. Among the bids that the agency believes are responsive to the solicitation, the lowest would yield a cost for replacement motherboards that is roughly the same as NASA's estimate. Protest File, Exhibit 21; letter from agency counsel to Board, Oct. 22, 1993.

15. ISG's vice-president testified that if his firm were permitted to supply replacement chassis, rather than replacement motherboards, "roughly speaking, even including a hard drive, [our] price is in the neighborhood of about $__ for the 486 requirement. For the 386 requirement, that's about $__ less. That's even including the hard drive." Transcript at 22. (The actual amounts were provided under protective order; we do not specify them so as not to prejudice competition when the agency resolicits bids or proposals as directed in this decision.) At these amounts, ISG's total price to NASA for the 73 computers involved in this procurement would be considerably less than the amount of the agency's estimate for replacement motherboards. We have independently reviewed advertisements in published sources for the retail sale of 486 and

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386 computers, with special attention to machines that more or less meet the specifications listed in the solicitation at issue. Our review shows that the prices quoted by ISG's vice-president are well within the range of prices advertised for computers meeting NASA's needs. *See, e.g., Computer Shopper* (Oct. 1993 ed.). We consequently find the testimony to be credible.

16. The NASA contracting officer who is responsible for this procurement has been purchasing automatic data processing equipment for the agency for eight years. She testified that in that time, she has never bought a microcomputer for less than $1,000.

Transcript at 119. She admitted, however, that she has actually bought few if any microcomputers during the past two years. *Id.* at 126.

17. If NASA replaces the motherboards in its 73 existing computers, at the completion of the transaction, it will have 73 machines that perform all functions the agency needs and 73 spare motherboards. If NASA instead purchases 73 new 386 and 486 computers, it will have 73 machines that perform all functions the agency needs and 73 286 computers that could function as free-standing units if supplemented with keyboards, monitors, and video cards. Transcript at 47-48, 72-74.

18. ISG's vice-president testified, without challenge, that the present fair market value of the computers NASA needs to upgrade is about $200 to $250 each. Transcript at 27-29. NASA has not performed an analysis of the difference in value between 73 spare motherboards and 73 286 computers. *Id.* at 74.

19. Because of NASA's need to communicate electronically with its customers, a free-standing computer which does not contain a LIMS integration kit is of virtually no use to the agency. Thus, if NASA buys new computers to replace the 73 286 computers in question, it would need to buy 73 integration kits in order to make use of all 144 computers it would have. Transcript at 65-66, 69-71, 74-75. NASA's computer-aided engineering manager believes that the agency does not have sufficient funds to purchase these kits. *Id.* at 112.

20. NASA's computer manager believes that to compare the price to the agency of buying replacement motherboards with the price of buying replacement chassis, the agency must include with the cost of the replacement chassis the cost of new integration kits to be installed in them. Transcript at 113.

21. ISG's vice-president believes that to install a replacement motherboard in each of NASA's computers would take about two to two and one-half hours per computer. Transcript at 10-16; Protester's Exhibit 1. NASA's computer manager believes, based on information provided to him by his center's support service contractor, that the work would take only one hour. Transcript at 55-56. He also believes, based on information provided to him by the contractor, that installing new machines would take one hour. *Id.* A representative of the contractor testified that transferring data from an MFM hard drive to an IDE drive takes between 30 seconds and one minute per megabyte of data. *Id.* at 89-90. Most of the MFM drives now on the computers in question contain a maximum of either twenty or forty megabytes of data; a few contain a maximum of eighty. *Id.* at 44, 90-92.

Discussion

When an agency conducts a procurement for property or services, it is with limited exceptions to "obtain full and open competition through the use of competitive procedures." 10 U.S.C.A. § 2304(a)(1)(A) (West Supp. 1993). To do this, an agency shall "develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired." *Id.* at § 2305(a)(1)(A)(iii). Specifications may "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." *Id.* at § 2305(a)(1)(B)(ii). "Full and open competition" means that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. § 403(6) (1988). The statute's mandates are reflected in the Federal Acquisition Regulation, in provisions such as 48 CFR 6.101(a), 10.002(a)(1), (3), and 10.004(a) (1991).

As we explained in *Amdahl Corp. v. Department of Health and Human Services*, GSBCA 11998-P, 93-2 BCA ¶ 25,612, 1992 BPD ¶ 325—

> In evaluating the merit of a protest which alleges that full and open competition has been compromised by an agency's insertion into a solicitation of an unnecessarily restrictive specification, we take as a given the agency's requirements. This does not mean, though, that every specification is necessarily associated with those

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requirements.... We have a limited role in these protests: to determine whether the challenged specification bears a rational relationship to fulfillment of the requirements. The protester has the burden of establishing by a preponderance of the evidence that the narrowing of competition is impermissible in that it does not have such a relationship.

93-2 BCA at 127,486, 1992 BPD ¶ 325, at 8-9 (citations omitted).

In the instant case, NASA needs 386 and 486 microcomputers, rather than the 286s it has now, to handle "the need for more rapid, efficient desktop computing and the increased [use] of Windows applications." Finding 1. The 386s and 486s must be able to support the functions of all ten printed circuit cards that are now installed in the 286s. Finding 5. These are the only agency requirements that have been identified to us. NASA is interested in meeting them at the lowest possible cost. Finding 12.

Congress has enunciated a policy that agencies "require descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required." 10 U.S.C.A. § 2301(b)(7) (West Supp. 1993). In furtherance of this policy, the Federal Information Resources Management Regulation provides that agencies shall "[d]escribe requirements in terms of functions to be performed and performance to be achieved, unless a more restrictive statement of requirements is necessary to satisfy the needs of the agency." 41 CFR 201-20.103-3(b)(1992). The use of functional specifications is consistent with the legislature's direction that agencies maximize the opportunities for full and open competition for Government contracts. *Microsolve, Inc.*, GSBCA 8564-P, 88-1 BCA ¶ 20,321, at 102,743, 1987 BPD ¶ 244, at 9, *aff'd*, 856 F.2d 202 (table) (Fed. Cir. 1988).

NASA inserted into its invitation for bids, however, design specifications that limit the ways in which a vendor may meet the agency's needs: a bidder may only propose to supply ten-slot motherboards which have a certain drill/mounting pattern and thus could replace the motherboards now present in the 286 computers. Finding 3. NASA refused to permit a vendor to meet the agency's needs by supplying replacement computers, rather than replacement motherboards, even though it believes that technically, new computers could serve it just as well. Findings 3, 12. It wanted to retain the same boxes and board configuration that it now has. Finding 4.

NASA believed that this decision was reasonable because replacement computers would cost far more than replacement motherboards. Finding 13. The evidence adduced at hearing demonstrates that this conclusion is not correct. The agency's needs can actually be satisfied by a less restrictive statement of requirements—and very likely, at a lower cost.

The ten-slot motherboards that NASA specified are rarely manufactured and command a premium price. Finding 2. A computer with an eight-slot motherboard can provide the same functionality because a single, inexpensive combination card can substitute for three of the cards occupying slots on the ten-slot board. Findings 5, 6, 9. Based on the evidence in the record, we find that the two options available to NASA compare, for each of the 73 computers involved, as follows:

	REPLACEMENT MOTHERBOARD	REPLACEMENT COMPUTER
Materials	New motherboard	New computer; new combination card; new IDE hard drive(s)
Labor	Remove and replace old motherboard; remove cards on old board and install them on new board	Remove LIMS integration kit and some cards from old computer and install them in new one; transfer data from MFM hard drive(s) to IDE hard drive(s); set up computer
Salvage items	Old motherboard	Old computer, less LIMS integration kit, keyboard, monitor, and video card

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An analysis of this information demonstrates that NASA's cost estimate was badly flawed. A new computer, even with the addition of a necessary combination card and replacement hard drive or drives, Findings 6-9, is likely to cost considerably *less* than a new ten-slot motherboard. Findings 14, 15. Even if the NASA contracting officer's information about the cost of new computers was ever realistic, it is admittedly out of date. Finding 16. The amount of labor involved in the two options is in dispute, but it is not large for either choice. Finding 21. The salvage value of the old motherboard, which could be used by the agency as a spare for computers in other offices, is unknown; the old computer, on the other hand, has significant value on the marketplace, even if (because it could not be used for communication with outsiders) it would have marginal utility to the agency. Findings 17-19. A NASA engineer's belief that buying replacement computers rather than replacement motherboards would necessitate also buying integration kits for the new computers, Findings 19, 20, makes no sense; the old kits could be transferred to new computers virtually as easily as the cards in them could be installed on new motherboards. Finding 11.

Requiring NASA to permit competition against functional, rather than design, specifications will not necessarily result in an award to ISG. Indeed, it will not even necessarily result in an award to a bidder who proposes a solution like the one that ISG wishes to bid. Competition will, however, give the Government an opportunity to benefit from vendors' exercise of innovative powers; NASA will have a chance to select, from among alternative solutions, the approach which is truly most advantageous to the Government. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1429 (1984). The crucible of the marketplace will be the true test of how the agency's needs can most economically be met.

Decision

The protest is **GRANTED.** The General Services Administrator's delegation to NASA of authority to proceed with the subject is amended as follows: NASA shall replace the contested design specifications in its invitation for bids with functional specifications. If the agency believes that various proposed ways of meeting its needs will result in different sorts of ancillary financial impacts (such as labor costs imposed on the agency, or benefits from having different sorts of salvage items), it shall state in the solicitation how those impacts will be evaluated. The agency may then permit further competition to meet its needs.

[¶ 26,551] Golden West Environmental Services

AGBCA No. 93-232-1, December 6, 1993. Contract No. 53-9A23-1-1M610.

Timeliness of Appeals to Boards—Filing—Effective Date.—Although a contractor placed its notice of appeal in the possession of a private delivery service within 90 days of its having received the contracting officer's final decision, the appeal was untimely because the appeal notice was not received by the board until 96 days after the final decision, and the date of receipt of the notice was considered the effective filing date. Unless a contractor sends the notice of appeal through the United States Postal Service, the board considers the date of receipt of the notice as the filing date.

For the appellant: D. Bailey Neff, President. For the government: James E. Andrews, Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California.

Before SETO, HOURY, and DOHERTY, Administrative Judges.

SETO, Administrative Judge: Appellant Golden West Environmental Services appeals the decision of the Forest Service, U. S. Department of Agriculture, Contracting Officer (CO) denying Appellant's claims for Prompt Payment Act interest and for repayment of Forest Service deductions for permit fees on Contract No. 53-9A23-1-1M610. The Government filed a Motion to Dismiss the appeal because Appellant did not appeal within 90 days of receiving the CO's final decision.

The Board has substantially adopted the opinion of its Chief Counsel, M. C. Shager.

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BACKGROUND

The Forest Service awarded Contract No. 53-9A23-1-1M610 to Appellant on September 26, 1991. The contract covered packing, manifesting, loading, transportation, and salvage or disposal of hazardous and extremely hazardous waste chemicals. The contract required work completion no later than November 1, 1991. The parties later agreed to contract modifications extending the completion date to January 31, 1992.

During performance of the contract, a dispute arose as to Appellant's entitlement to interest on several invoices under the Prompt Payment Act and whether the Forest Service was entitled to deduct fees for obtaining permits from payments due Appellant. The CO issued a final decision denying Appellant's claims on June 14, 1993. Appellant acknowledges that it received the final decision on June 17, 1993.

On September 13, 1993, Appellant placed a Notice of Appeal in the custody of United Parcel Service for transmittal to the Board. The Board received the Notice of Appeal on September 21, 1993, 96 days after Appellant received the CO's final decision.

DISCUSSION

The Government moved to dismiss the appeal because it was not timely filed, *i.e.*, was not filed within 90 days of Appellant's receipt of the CO's final decision.

The Contract Disputes Act (CDA), at 41 U.S.C. § 605(a), states that the CO shall mail or otherwise furnish a copy of the final decision to the contractor, while 41 U.S.C. § 606 provides that a contractor may appeal a CO's final decision to the Board within 90 days of receiving the CO's final decision. Appellant opposed the Government's Motion because the Notice of Appeal left its offices within 90 days, and because the Board's mandate to provide "informal, expeditious, and inexpensive resolution of disputes" is not served by dismissing the appeal.

While the Board is well aware of its responsibility to provide an informal, expeditious, and inexpensive forum for the adjudication of contract disputes, the Board may not decide appeals over which it has no jurisdiction. The requirement that an appeal be filed within 90 days is statutory; the Board has no authority to extend this period or waive the requirement. *Cosmic Constr. Co. v. United States* [30 CCF ¶ 70,732], 697 F.2d 1389 (Fed. Cir. 1982); *Tom Farrell*, AGBCA No. 93-185-1, 93-3 BCA ¶ 26,026.

An appeal is deemed to be filed when it is placed in the mail with the United States Postal Service (USPS), or, if not mailed, when the Board receives it. *Butkin Precision Mfg. Corp.*, ASBCA No. 41961, 91-2 BCA ¶ 23,858. In this case, the Notice of Appeal was placed in the possession of a private delivery service within 90 days of Appellant's receiving the CO's final decision. However, use of a private delivery service is not afforded the same status as use of USPS. Unless the Appellant sends the Notice of Appeal through the USPS, the Board considers the date of receipt of the Notice as the filing date. *Kirchhan Indus., Inc.*, ASBCA No. 39260, 90-1 BCA ¶ 22,340.

The Board received Appellant's Notice of Appeal on September 21, 1993, 96 days after Appellant received the CO's final decision. Because Appellant used a private delivery service rather than USPS, the Board considers September 21, 1993 to be the filing date. The appeal is thus untimely and the Board lacks jurisdiction to decide it.[1]

RULING

Because the appeal was not filed within 90 days of Appellant's receipt of the CO's final decision, the Motion to Dismiss is granted. The appeal is dismissed.

[¶ 26,552] Tidewater Contractors, Inc.

AGBCA No. 93-236-10, December 6, 1993. Contract No. 50-04H1-7-3270.

Attorney Fees and Costs Under Equal Access to Justice Act—Prevailing Party—Evidentiary Standard.—In determining whether an applicant under the Equal Access to Justice Act met the definition of a "party" as set out in the Act, the board concluded that the evidentiary standard was the preponderance of evidence standard, not the more stringent standard approaching beyond a reasonable doubt, because there was

[1] The Board notes, however, that the CDA provides for appeal to the U. S. Court of Federal Claims (formerly the U. S. Claims Court) within 12 months after a oontractor receives a CO's final decision. 41 U.S.C. § 609(a)(1).

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nothing in the Act or in the implementing regulations imposing a more stringent burden on the applicant. The board found that the contractor's conclusory affidavit without supporting evidence established by a preponderance of the evidence that the applicant met the definition of a "party."

Attorney Fees and Costs Under Equal Access to Justice Act—Eligibility Criteria—Net Worth.—Although an affidavit without supporting documentation was inadequate when submitted to prove that a corporate contractor had met net worth requirements in connection with its application under the Equal Access to Justice Act, the contractor succeeded in proving that it met net worth requirements, because it supplemented its application with an acceptable net worth exhibit. The relevant regulations require an applicant to provide with its application a detailed exhibit showing the net worth of the applicant. The board noted that the contractor filed and supplemented its application well within 150 days of the board's decision on reconsideration.

For the appellant: Hanna, Kerns & Strader, Portland, Oregon, by Todd A. Bradley. For the government: Holly R. McLean, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon.

Before HOURY, DOHERTY, and EATON, Administrative Judges.

HOURY, Administrative Judge: This decision is being rendered on the application of Tidewater Contractors, Inc. (Applicant), for attorney fees and expenses in the amount of $31,473.87 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, as amended. Under the Act, attorney fees (up to $75 per hour) and other expenses may be awarded to eligible prevailing parties when the Government's position in an adversary proceeding was not "substantially justified." Current eligibility standards are a net worth of not more than $7 million and not more than 500 employees.

The appeal upon which this application is based arose under contract No. 50-04H1-7-3270 between the Forest Service, U.S. Department of Agriculture, and Applicant. The contract was awarded June 30, 1987, in the amount of $1,771,558.95, and required the reconstruction and paving of approximately 16 miles of road in the Siskiyou National Forest in Oregon.

On appeal, with minor exceptions, the Board sustained Applicant's claims in the amount of $235,789.33. *Tidewater Contractors, Inc.*, AGBCA No. 90-195-1, 93-3 BCA ¶ 26,050, *aff'd on reconsideration* (increasing the amount of recovery from $173,536.97 to $235,789.13), AGBCA No. 93-201-R, 93-3 BCA ¶ 26,151. The Government apparently concedes that Applicant not only is a prevailing party but also that the Government's position was not substantially justified, since the Government did not raise these issues in its Objection to Award of Attorney Fees. Nor does the Government oppose the amount of Applicant's claim.

In opposition to Applicant's application, the Government asserts:

> An application that includes only an affidavit as to the net worth of the corporation is inadequate to establish that the applicant meets the definition of "party" found at 5 USC 504(b)(1)(B). *Fields v. United States* [39 CCF ¶ 76,580], __ Fed. Cl. __, 1993 WL 385702 (September 30, 1993)....
>
> In this case, Appellant has filed as evidence of its eligibility, a one page affidavit merely stating that its net worth is less than $5,000,000. This affidavit does not meet Appellant's burden of proving that it meets the eligibility requirements of 5 USC 504(b)(1)(B), *Fields v. United States*, supra, (1993), nor does it meet the requirements of the regulations regarding such applications. 7 CFR 1.191(a).

Applicant's Proof That It Is a Party under 5 U.S.C. § 504(b)(1)(B)

The EAJA provides that an agency shall award to a prevailing "party" fees and other expenses incurred unless the Government's position in an adversary proceeding was "substantially justified." 5 U.S.C. § 504(a)(1). In 5 U.S.C. § 504(b)(1)(B) "party" is defined as follows:

> "Party" means ... partnership, corporation, association ... the net worth of which did not exceed $7,000,000 ... at the time the adversary adjudication was initiated....

With its application, Applicant submitted an affidavit signed by the corporate secretary, asserting that the secretary was knowledgeable about all aspects of the corporation's finances and assets, and that the net worth of the corporation was less than $5 million at all times during the performance of the

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contract and the pendency of the claim. The Government does not controvert the amount of Applicant's net worth but simply asserts Applicant has failed adequately to prove it.

In *Fields, supra,* the court's holding that a conclusory affidavit without supporting evidence is inadequate to establish such "party" status is based upon the court's reliance on *Scherr Constr. Co. v. United States* [38 CCF ¶ 76,314], 26 Cl. Ct. at 248 (1992) and *United States v. Harper,* 569 F. Supp. 602 (E.D. Penn. 1983), neither of which requires nor necessarily supports the conclusion reached.

Scherr, supra, did not involve the adequacy of a supporting affidavit. In *Scherr* the application and supporting documentation were not submitted under oath, contrary to the requirements of the court's rules. Rules of U.S. Claims Court 81(e)(1). Moreover, Scherr's claimed costs lacked itemization or specificity. Finally, as proof of net worth Scherr submitted an unaudited balance sheet. The application was denied.

In *Harper, supra,* the Government controverted Harper's eligibility and Harper refused to answer Government inquiries pertaining to its eligibility. Even under these circumstances, the court dismissed the application without prejudice to Harper's willingness to litigate the question of its eligibility.

Moreover, the court in *Fields* held that because the EAJA is a waiver of sovereign immunity, the Act must be strictly construed. It was also on this basis that Fields' unopposed and uncontroverted affidavit was rejected.

We do not disagree that EAJA should be strictly construed. Strict construction is a matter of statutory interpretation, however, and unless required by the Act, it does not change the applicable evidentiary standard or burden of proof.

The evidentiary standard for contract claims is the preponderance of the evidence, not a more stringent standard approaching beyond a reasonable doubt. *Teledyne McCormick-Selph v. United States* [25 CCF ¶ 82,891], 218 Ct. Cl. 513, 588 F.2d 808 (1978); *Youngdale & Sons Constr. Co. v. United States* [38 CCF ¶ 76,467], 27 Fed. Cl. 541 (1993); *Neal & Co. v. United States* [36 CCF ¶ 75,802], 19 Cl. Ct. 470 (1990). We find nothing in the EAJA or implementing regulations imposing a more stringent burden on Applicant to prove entitlement to attorney fees and expenses. Indeed, 7 CFR § 1.185(a) and 5 U.S.C. § 504(a)(1) place the burden on the Government to prove that its position was "substantially justified," based upon the existing administrative record. Moreover, for Applicants, affidavits are prescribed for proof of time expended, hourly rates, and expenses. 7 CFR § 1.192.

We conclude that Applicant's affidavit established, by a preponderance of the evidence, that Applicant meets the definition of a "party" set forth in 5 U.S.C. § 504(b)(1)(B).

The Requirements of 7 CFR § 1.191(a)

The regulations at 7 CFR § 1.191(a) require as follows:

> An applicant . . . must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates . . . when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart . . . .

Applicant filed only the affidavit mentioned above with its application. The affidavit does not show assets and liabilities, nor is it a "detailed exhibit" showing the components of assets or liabilities. Therefore, Applicant's application did not initially meet the requirements of 7 CFR § 1.191(a).

By letter dated October 19, 1993, 133 days after the Board's ruling on June 8, 1993, granting the parties' joint motion for reconsideration, Applicant supplemented its application with an acceptable net worth exhibit, showing the net worth of Applicant and affiliates to be $2,332,255 during 1990 when the appeal was initiated.

The Government asserts that the time for filing an application and supporting information has expired, citing 5 U.S.C. § 504(a)(2), which provides as follows:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to an agency an application . . . .

The regulations at 7 CFR § 1.193 provide:

> **§ 1.193 Time for filing application.**
>
> (a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after final

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disposition of the proceeding by the Department.

(b) For the purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy ....

Under the Contract Disputes Act, 41 U.S.C. §§ 601-613, the decision of an agency board of contract appeals is final unless appealed within 120 days. 41 U.S.C. § 607(g)(1)(A) and (B). Therefore, Applicant had 150 days in which to file an application. Contrary to the Government's position, Applicant filed and supplemented its application well within 150 days of the Board's decision on reconsideration. *See B&M Constr., Inc.,* AGBCA No. 93-160-10, 93-3 BCA ¶ 26,126; *Francis Paine Logging,* AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043. Indeed, the regulations contemplate additional proceedings and proof after the initial filing. 7 CFR §§ 1.196 and 1.199.

Substantial Justification And Quantum

The Government has the burden of proving its position was substantially justified. The Government has not controverted this issue and accordingly we conclude that the Government's position was not substantially justified. *See Siska Constr. Co.,* VABCA No. 3381E, 92-1 BCA ¶ 24,730.

The Government has not controverted the amount claimed of $31,473.87. Our review indicates the attorney fee rates charged were reduced to $75 per hour for purposes of this application, that the number of attorney and support staff hours charged was reasonable, and that the nature and amounts of other expenses were also reasonable.

DECISION

Applicant is entitled to its attorney fees and other expenses in the amount of $31,473.87.

[¶ 26,553] Science Applications International Corporation and HSQ Technology v. National Aeronautics and Space Administration; Engineering Design Group, Inc., Intervenor

GSBCA Nos. 12600-P, 12616-P, November 3, 1993. Solicitation No. RFP2-35117(BEJ). (The text below is the redacted version issued to the public on November 10, 1993.)

Protests, GSBCA—Jurisdiction—ADP Services Procurement.—A government motion to dismiss a protest against an intended award under a solicitation for a wind tunnel automation system was denied, despite the government's contention that the procurement was not for automatic data processing services and was thus exempt from Brooks Act coverage, because the solicitation clearly required an interconnected system of ADPE for the acquisition, storage, and manipulation of data for the operation of the wind tunnels. Although the government indicated that the procurement's principal product, the distribution control systems, controlled the mechanical and electrical operations of the wind tunnel rather than acquired, stored, or managed data, the court determined that the systems acquired data about the wind tunnel environment, processed it to ensure that the tunnels were functioning within operating limits, and transmitted the data to control systems that regulate the wind tunnels.

Automatic Data Processing Procurement—Brooks Act Applicability—Exemptions.—A government motion to dismiss a protest against an award under a solicitation for a wind tunnel automation system was denied, despite the government's contention that the microprocessors being procured fell within the Federal Information Resources Management Regulation's embedded exception for equipment valued below a threshold dollar amount, because the FIRMR only exempted the acquisition, management, and use of equipment and this procurement was for an automation system rather than for a product containing an automated system. Moreover, even if the thresholds were relevant, the system was ADPE that was valued at well over the threshold amount. The system, which was more than the microprocessor, included distribution control systems, an antisurge control system,

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a vibration monitoring system, an annunciation system and sequence-of-events recorder, transmitters, and a time code generator system. The fact that installing the system involved a significant amount of construction did not diminish its significance as ADPE.

Automatic Data Processing Procurement—Authority to Procure—Delegation of Authority.—A government motion to dismiss a protest against an award under a solicitation for a wind tunnel automation system was denied and the protesters' cross motion for summary relief was granted because the government failed to show that it was entitled to rely on a regulatory delegation of procurement authority. The government did not show that the federal information processing equipment being procured was valued at less than $2.5 million, which was the threshold value for applicability of the regulatory DPA. The board relied on the government's estimates in determining that the threshold of the regulatory DPA had been exceeded and concluded that the government needed a specific acquisition DPA for this procurement.

Awards—Relief for Improper Award—Void v. Voidable.—A government motion to dismiss a protest against an intended award under a solicitation for a wind tunnel automation system was denied, despite the government's contention that its failure to obtain the requisite delegation of procurement authority voided only the intended award under the procurement rather than the entire procurement process, because the board was not required to render an advisory opinion as to whether the General Services Administration could ratify a procurement that the agency lacked authority to create. The government's contention that it had time to obtain a specific acquisition DPA amounted to a suggestion that GSA should ratify the completed procurement actions. A board decision as to whether GSA should ratify the procurement actions would be premature.

Timeliness of Protest, GSBCA—Apparent Improprieties—Delegation of Procurement Authority.—A government motion to dismiss a protest against an intended award under a solicitation for a wind tunnel automation system was denied, despite the government's contention that the protesters' allegations regarding the government's failure to obtain a delegation of procurement authority were untimely filed after the closing time for the receipt of proposals, because the protesters' allegations affected the board's jurisdiction to hear the merits of the protest and thus enabled the board to decide the issue regardless of its lack of timeliness. Although the government contended that its failure to obtain a specific acquisition DPA was apparent before the closing time for receipt of proposals and that the absence of a prescribed Federal Information Resource Management Regulation clause regarding DPAs put protesters on constructive notice of the lack of a DPA, the board was obligated to first determine subject matter jurisdiction before determining any other alleged violations of procurement law.

For the protester/intervenor, Science Applications International Corporation: Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C., by James J. McCullough, Joel R. Feidelman, James S. Kennell, and Deneen J. Melander. For the protester/intervenor, HSQ Technology: Canterbury, Stuber, Pratt, Elder & Gooch, Dallas, Texas, by Donald O. Pratt and Paul H. Sanderford. For the government: Sumara M. Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C., and Rosamond M. French, Office of the Chief Counsel, Ames Research Center, Moffett Field, California. For the intervenor, Engineering Design Group, Inc.: Gardner, Carton & Douglas, Washington, D.C., by L. Stephen Quatannens, James J. Henningan, and George N. Grammas.

Before LABELLA, BORWICK, and NEILL, Administrative Judges.

LABELLA, Administrative Judge: Science Applications International Corporation (SAIC) and HSQ Technology, Inc. (HSQ), have protested the intended award of a contract by the National Aeronautics and Space Administration, Ames Research Center (the Government or respondent) to Engineering Design Group, Inc. (EDG). SAIC and HSQ intervened in each other's protests and EDG intervened in both protests. Respondent moved to dismiss both protests for lack of jurisdiction and for untimely submission of one count of the protests. SAIC and HSQ each made cross-motions for summary relief.

Protesters raised numerous issues in their protests concerning the Government's actions during the course of the procurement

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process. We stayed consideration of those issues. In this decision, we only address the allegation in Count I of both protests that the Government failed to obtain a valid delegation of procurement authority (DPA).

Background

Respondent has commenced a modernization project to provide a major overhaul of its Unitary Plan Wind Tunnels (UPWT) Complex at Ames Research Center in California. As a part of this project, respondent issued Solicitation No. RFP2-35117(BEJ) (solicitation) for the delivery and installation of a Facility Automation Control System. The existing facility consists of three wind tunnels and an auxiliary facility. The offeror selected for the automation project is required to design, furnish, install, and test all materials necessary to automate the operation of the facility. Technical Specifications for the Automation System for the Modernization of the Unitary Plan Wind Tunnel Section 01011 at 1.1.2 (Technical Specifications).

Terms of the solicitation

The automation project requires the selected offeror to demolish existing tunnel and auxiliary equipment, motor control centers, and concrete foundations. Technical Specifications Section 01011 at 1.1.2. The offeror would then rebuild the facilities and include the automation systems discussed below during the course of construction.

Distributed Control Systems

The solicitation required that contractors offer a total of five distributed control systems (DCSs) to automate the control of the UPWT complex. Technical Specifications Section 16960 at 2.1.1.1. Three DCSs were required for the existing wind tunnels; one was designated as an auxiliary; and one was designated as a developmental unit. *Id.* The wind tunnel DCSs were designed to "control and monitor all phases of wind tunnel operation. ..." *Id.* at 1.4.1. The auxiliary DCS unit was designed to provide "regulatory and supervisory control" of auxiliary and ancillary systems. *Id.* The developmental DCS was to be used for development work and testing of hardware and software. *Id.*

Pursuant to the terms of the solicitation, each DCS is required to contain:

a. Communications systems consisting of:
   * DCS communications network
   * Inter-DCS communication equipment
   * Foreign systems communications

b. Operator interface hardware consisting of:
   * Operator consoles
   * Operator stations
   * Engineering stations
   * Printers
   * Hand-held terminals

c. Process control units:
   * Network communication processors
   * Controllers
   * I/O modules
   * Power supplies
   * Cabinets

d. Disk storage
   * Two times that needed for system and custom software plus an additional 120 megabytes minimum.

Technical Specifications Section 16960 at 2.1.1.1.

Operator and engineering stations must include CRTs, support electronics, keyboards, and mice. Technical Specifications Section 16960 at 2.4.2.1, 2.4.3.1. Operator stations must be able to perform configuration and maintenance functions. *Id.* at 2.4.2.2. Each engineering station also must include disk storage facilities. *Id.* at 2.4.3.2. Engineering stations in the wind tunnel must be capable of configuring and editing wind tunnel test matrices and parameters, and monitoring test progress and equipment operation. *Id.* at 2.4.3.5. Hand-held terminals must consist of a display, numeric keypad, programmable function keys, and dedicated hardware switches. *Id.* at 2.4.4.1. This equipment must acquire, manipulate, control, display, and transmit data to perform these functions.

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Each process control unit is required to "perform the real-time process monitoring and control functions of data acquisition, regulatory and sequential (supervisory) control, and shall communicate with other process control units and operator engineering stations." Technical Specifications Section 16960 at 2.5.1. It shall consist of modular components including communications processors, microprocessor based controllers, I/O modules, power supplies, etc. *Id.* Portable programming units must be provided for process control unit interrogation and configuration. *Id.* at 2.5.4. The portable programming units must be configured with floppy and hard disk storage, and software for process control unit configuration. *Id.* The required DCS controllers are defined as "microprocessor-based multi-tasking processors" and were required to "process inputs, perform calculations, alarms and algorithm control and logic, and provide outputs." *Id.* at 2.6.1. The processors and controllers are required to acquire, manipulate, manage, and control data.

Each controller must be capable of communicating with the process control units. Technical Specifications Section 16960 at 2.6.1. The controller and processors also are required to interface with the wind tunnels and auxiliary processors. *Id.* at 2.8.1. Furthermore, a "fiber optic communications network/data highway" must be provided to link the DCSs. *Id.* at 2.9.1. Each DCS must be capable of communicating with other DCSs, foreign systems, and the data system computers. *Id.* at 2.9.2, 2.9.3, 2.9.4. To be capable of interfacing with the wind tunnels and processors, the equipment must be capable of transmitting and receiving data.

Moreover, each DCS must be equipped with a laser graphics printer to print operator's or engineer's station graphic displays. Technical Specifications Section 16960 at 2.10.1. Each DCS must also be equipped with a dot-matrix printer which will automatically print alarms, system events, and operator actions. *Id.* at 2.10.2.

The contractor is required to prepare custom supervisory and regulatory software to implement the tunnel, model support, and auxiliary automation design. Technical Specifications Section 16960 at 2.12.1.2. Each DCS also must include database and spreadsheet software. *Id.* at 2.12.5.1, 2.12.6.

Antisurge control system

The solicitation also requires an antisurge control system for use with the make-up air compressor system. Technical Specifications Section 16910 at 1.1.1. The antisurge control system must continuously monitor compressor inlet and outlet conditions, and modulate a recycle valve to keep the compressor within operating limits. *Id.* at 2.1.1. The antisurge control system must include controllers which scan all inputs, perform calculations, and update outputs at least once every forty milliseconds. *Id.* at 2.1.4, 2.2.1; *see also id.* at 2.2.8.

Engineering personnel must be able to communicate with the antisurge control system through a CRT based monitor. Technical Specifications Section 16910 at 2.4.1. Compressor maps must be displayed to show operating points with respect to changing inlet conditions. *Id.* In addition to this display capability, critical events must be archived so "incidents and disturbances" can be replayed. *Id.* The antisurge control system must also be capable of communicating with the auxiliary DCS via a serial data link. *Id.* at 2.5.1. The antisurge control system must be capable of acquiring, storing, manipulating, controlling, displaying, transmitting, and receiving data.

Vibration monitoring system

Furthermore, the solicitation requires a "vibration monitoring system for continuous online monitoring, trending, archival, analysis, diagnostics, and predictive maintenance" of various existing drive trains. Technical Specifications Section 16961 at 1.1.1. The vibration monitoring system must consist of communication processors and a computer system with software capable of providing the functions described above. *Id.* at 2.4.1.1. The vibration monitoring system operator must be able to access historical and current information, startup and shutdown data, and information collected by the attached computer system. *Id.* The computer system must include a central processing unit, data storage devices, a CRT, modem, mouse, keyboard, and printer. *Id.* at 2.4.2.1, 2.4.2.2. The vibration monitoring system must also be capable of communicating and exchanging data with the auxiliary DCS. *Id.* at 2.5.1. The vibration monitoring system must, therefore, acquire, store, control, transmit, and receive data.

Annunciator system and sequence of events recorder

An annunciator system and sequence of events recorder must also be included in the offer. Technical Specifications Section 16962 at 2.1.1. The system must consist of "an annunciator, sequential events recorder,

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cabinet, programming terminal, operator panel, printer, audible horns and rotating lights, visual display unit, and means for bulk storage and off-line programming." *Id.* The offeror must provide an IBM compatible PC system for alarm monitoring, system configuration, and programming with the system. *Id.* at 2.1.7. The PC system must include disk storage devices, a keyboard, and CRT. *Id.* The sequence recorder must interface with the auxiliary DCS. *Id.* at 2.1.6. Thus, this system must store, manipulate, and transmit data.

Pressure profile monitoring system

Three systems must be provided for the pressure profile monitoring system. Technical Specifications Section 16968 at 1.1.1. Each system must measure tunnel pressure, store and convert the data, and transmit the data to the DCSs. *Id.* The pressure profile monitoring system must consist of pressure scanners, a scanner interface unit, a data acquisition and calibration system, and software and hardware for pressure measurement and data acquisition. *Id.* at 2.1.1. The system must, therefore, be capable of data acquisition, storage, manipulation, movement, and transmission.

Transmitters

The solicitation requires transmitters to collect data regarding the temperature, level, pressure, humidity, and flow rates from the wind tunnels and transmit it to the DCSs. *See e.g.,* Technical Specifications Section 16965 at 2.1.2, 2.1.5.1, 2.2.1, 2.3.1.1, 2.4.1, 2.5.1, 2.9.1. The temperature and pressure transmitters must also contain "smart" circuitry. *Id.* at 2.1.5.5.1. Smart transmitters must be capable of analog and digital communications, and on board data storage. *Id.* They must also be capable of allowing users to remotely configure and store information. *Id.* at 2.1.5.5.3. Thus, this equipment must acquire and transmit data.

Time code generator system

The solicitation requires a time code generator system to provide synchronized time to control devices and remote displays. Technical Specifications Section 16969 at 1.1.1. The time code generator system is a "programmable, multi-system digital clock/calendar, with a digital front display panel" and must include a programmable processing unit with memory. *Id.* at 2.1.1. This equipment must store and display data.

Intended award of the contract

On or about September 14, 1993, NASA informed protesters that intervenor EDG was the intended contract awardee. The Government held a debriefing for SAIC on or about September 27, 1993, and for HSQ on or about September 28, 1993. Both SAIC and HSQ filed their protests following their debriefing sessions.

Discussion

Our jurisdiction in bid protest cases is limited to procurements subject to the Brooks Act. 40 U.S.C. § 759(f)(1)(1988). We have the authority to "determine whether any procurement is subject to (the Brooks Act) and ... to review regulations to determine their consistency with applicable statutes." *Id.*

The Brooks Act applies to the lease, purchase, and maintenance of automatic data processing equipment (ADPE) by federal agencies. *Id.* § 759(a)(1). The Act goes on to define ADPE as:

> any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information—
>
> (i) by a Federal agency, or (ii) under a contract with a Federal agency which (I) requires the use of such equipment, or (II) requires the performance of a service or
>
> the furnishing of a product which is performed or produced making significant use of such equipment.
>
> (B) Such term includes—
>
> (i) computers; (ii) ancillary equipment; (iii) software, firmware, and similar procedures; (iv) services, including support services; and (v) related resources as defined by regulations issued by the Administrator for General Services.

Id. § 759(a)(2).

Both protesters argue that the Government failed to obtain a DPA for this procurement. The Government advances three arguments in support of its position that this count in the protests should be dismissed. We briefly summarize these arguments and will discuss each in turn.

The Government's first argument is that the embedded exception contained in the Federal Information Resources Management Regulation (FIRMR) applies to remove this procurement from Brooks Act coverage. The Government contends that because the Brooks Act does not apply, the Board lacks jurisdiction over this protest. The Government's second argument is that even if the embedded exception does not ap-

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ply and the Board does have jurisdiction, the regulatory or blanket DPA contained in the FIRMR applies. Thus, it avers, the procurement actually proceeded with a valid DPA. The Government's final argument is that, even if the embedded exception and the regulatory DPA do not apply, there is still time for the General Services Administration (GSA) to ratify the unauthorized procurement process because the contract has not yet been awarded.

When reviewing motions for summary relief, the Board has previously stated that

> . . . summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. . . . The court must view all the evidence in a light most favorable to the opponent (or non-movant) and draw all reasonable inferences in its favor.

Richard S. Carson & Associates, Inc., GSBCA 9411-P, 88-2 BCA ¶ 20,685 (quoting *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986)). The parties disagree on the cost of the equipment in this procurement and whether the equipment is ADPE. With regard to the cost of the equipment, the parties' disagreements involve either a question of law which we are free to decide for ourselves or differences in cost estimates that are immaterial to the outcome of this decision. To the extent there are material fact disagreements, the Board has relied exclusively on figures presented by the Government in its Motion to Dismiss and its Answer to Protester's Statement of Material Facts in reaching its decision. Whether the equipment is actually ADPE is a question of law and we are not bound by the Government's characterization of this equipment. We have drawn our own conclusions on this issue based solely on the Government's description of the equipment in its Technical Specifications.

Embedded exception

The General Services Administration (GSA) has issued the FIRMR to implement the Brooks Act. The FIRMR applies whenever a Federal agency acquires Federal information processing (FIP) resources, or whenever a Federal agency solicitation or contract requires the delivery of FIP resources or requires a contractor to make significant use of FIP resources. 41 CFR 201-1.002-1(a), (b) (1992) (FIRMR 201-1.002-1(a), (b)). "FIP resources" are, generally, what the Brooks Act calls "ADPE." Agencies conducting procurements which are not subject to the FIRMR do not have to obtain DPAs from GSA. FIRMR 201-39.106-1.

The FIRMR does not apply if the procurement falls within the embedded exception. *See* FIRMR 201-1.002-2(e). A procurement for FIP equipment falls within the embedded exception when:

> (1) The embedded FIP equipment would need to be substantially modified to be used other than as an integral part of the product; or
>
> (2) The dollar value of the embedded equipment is less than $500,000 or less than 20 percent of the value of the product, whichever amount is lower. Embedded FIP equipment is FIP equipment that is an integral part of the product, where the principal function of the product is not the "automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information."

FIRMR § 201-1.002-2(e).

The Government contends that the primary product of this procurement is the DCS and that the principal functions of the DCSs are "to run the wind tunnel; or alternatively, to control the mechanical and electrical operations of the wind tunnel, and its auxiliaries," not to "acquire, store, or manage data." Respondent's Motion to Dismiss at 11. Therefore, it states, the DCSs do not perform ADPE applications and the Board lacks jurisdiction.

The protesters proffer two main arguments to rebut the Government's position. Both protesters argue that an examination of the terms of the solicitation reveals that the procurement is for ADPE, and that the cost of the DCSs exceeds the dollar limit bet in the embedded exception.

Our appellate authority instructs us that in deciding whether we have jurisdiction over a bid protest, we should examine the nature of the items called for in the solicitation. *Best Power Technology Sales Corp. v. Austin* [38 CCF ¶ 76,468], 984 F.2d 1172, 1176 (Fed. Cir. 1993). In this procurement, the Government is not buying a wind tunnel, or even an automated wind tunnel. It is buying automation for an existing wind tunnel. Thus, the very purpose of this procurement is automation. The products in this procurement are ADPE as defined by the Brooks Act and as noted above. We conclude the embedded exception does not apply. There-

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fore, the Board has jurisdiction over this protest.

The Government is unable to see the forest for the trees. As stated above, the embedded exception only applies to "FIP equipment that is an integral part of the product, where the principal function of the product is not the 'automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.'" FIRMR 201-1.002-2(e)(2). In this procurement, a principal product at issue is the DCS, a fact which the Government admits in its Motion to Dismiss. Respondent's Motion to Dismiss at 11. However, the Government contends that the DCSs do not acquire, store, or manage data.

An examination of the terms of the solicitation illustrates the tenuousness of the Government's argument. According to the solicitation, each DCS is required to provide regulatory and supervisory control and system interface of test conditions in the wind tunnel. Technical Specifications Section 16960 at 1.4.1. The DCSs must ensure that safe operating limits are not exceeded, and must control and monitor all phases of wind tunnel operation. *Id.* In order to perform these functions, the DCSs must acquire data about the wind tunnel environment; process it to ensure that the wind tunnels are functioning within operating limits; and transmit the data to control systems which regulate the wind tunnels. All of these functions are clearly ADPE functions as defined in the Brooks Act. The Government has strained its credibility by arguing that the DCSs do not perform ADPE functions when the solicitation for this procurement clearly establishes this fact.

The Brooks Act defines ADPE, in part, as "any equipment or interconnected system or subsystems of equipment." Even a cursory examination of the requirements of the solicitation reveals that this procurement is for an interconnected system of ADPE. The antisurge control system must monitor compressor conditions and modulate the recycle valve to keep the compressor within operating limits. The vibration monitoring system must monitor various drive trains, store data, and communicate with the auxiliary DCS. The annunciator system must record events, and display and store data. The pressure profile monitoring system must measure wind tunnel pressure, store data, and transmit the data to the DCSs. All of these systems acquire, store, and manipulate data. These systems then must transmit the data to the DCSs so that they can operate the wind tunnels. Therefore, whether we focus on the DCSs or the entire automation system, it is clear this procurement is for ADPE.

Respondent, relying on FIRMR 201-1.002-2(e)(2), argues that the FIRMR and the Brooks Act do not apply because the FIP resources—the DCSs microprocessors—have a value of $200, considerably below the threshold of $500,000 or twenty percent of the value of the products. Respondent's argument is specious.

FIRMR 201-1.002-2(e)(2) only exempts the "acquisition, management, and use of products containing embedded FIP equipment." As noted above, this procurement is for the automation system, not for a product containing an automated system. The thresholds in the section are, thus, irrelevant.

Even if the thresholds are relevant, the system is more than the microprocessor. It includes as a minimum: (1) the DCSs; (2) the antisurge control system; (3) the vibration monitoring system; (4) the annunciator system and sequence of events recorder; (5) the transmitters; and (6) the time code generator system. Considering the system as ADPE is the only approach faithful to the Brooks Act definition of ADPE as "any ... interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission or reception, of data ...." 40 U.S.C. § 759(a)(1). As discussed below, we conclude the FIP equipment in this procurement exceeds $2,500,000, which is considerably above the thresholds.

We rejected an argument similar to the Government's in *S&W Associates International, Inc. v. Department of the Navy,* GSBCA 12118-P, 1992 BPD ¶ 412 (Dec. 18, 1992). In *S&W Associates,* the Navy claimed that the microprocessor in cesium frequency standards was embedded equipment. In that case, the standard was required to "manage, move, control, display, and transmit" data, as well as provide remote access and control from computer terminals. *Id.* at 9. In rejecting the Navy's argument, we stated that "the exception only applies to products where the principal function of the product is *not* an ADPE application." *Id.* at 8 (emphasis in original). The function of the product in this procurement, whether we look at the DCSs or the entire system, is ADPE. Thus, the embedded exception by definition does not apply. If these arguments

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are taken to their logical extreme, then no computer would ever be classified as ADPE because a computer essentially consists mainly of a processor, wires, and formed plastic. That is not the proper interpretation to be given to the embedded exception.

Furthermore, the fact that the procurement involves a significant amount of construction does not change the analysis. The single driving force behind this procurement is the automation of the operation of the wind tunnels. As discussed above, the systems needed to satisfy the Government's requirements are ADPE. "The fact that installing the ADPE system also involves a considerable amount of construction does not diminish [the significance of the ADPE]." *Vikonics, Inc.*, GSBCA 10575-P, 90-3 BCA ¶ 23,044, at 115,693, 1990 BPD ¶ 148, at 7-8. This Board has repeatedly considered protests involving automated systems which are built into Government facilities. *See, e.g., HSQ Technology, Inc.*, GSBCA 10802-P, 91-1 BCA ¶ 23,326 (procurement for the upgrade of an existing energy monitoring and control system for an Army facility); *Johnson Controls, Inc.*, GSBCA 10115-P, 89-3 BCA ¶ 22,172, 1989 BPD ¶ 245 (procurement for a supervisory control system for a desalting plant); *Advanced Control Systems*, GSBCA 10098-P, 89-3 BCA ¶ 22,136, 1989 BPD ¶ 235 (procurement for a control and monitoring system for well fields and a sludge pipeline).

Regulatory Delegation of Procurement Authority

The Government contends that even if the embedded exception does not apply, the value of the FIP equipment is less than the threshold of $2,500,000 contained in GSA's regulatory DPA and thus it has, in fact, proceeded with the necessary authority to procure. The Government avers that the threshold will not be crossed no matter if the Board examines the Government's estimates or any of the offeror's proposals. This is not a determination made at the time this procurement was initiated, but is now proffered only after reliance on the embedded exception has been seriously challenged.

The protesters argue that the Government did not include the cost of all the FIP equipment contained in the DCSs when it made its determination that the regulatory DPA applied. They dispute the figures proffered by the Government and contend that the dollar threshold is exceeded no matter whose figures are used.

The Brooks Act gives the GSA exclusive authority to procure all ADPE for the Federal government. 40 U.S.C. § 759(a)(1), (b)(1) (1988). GSA is authorized to delegate its procurement authority to other agencies. *Id.* § 759(b)(2). In the FIRMR, GSA has granted a blanket or regulatory DPA to agencies' designated senior officials (DSOs). FIRMR 201-20.305(a)(2). Each agency's DSO may redelegate GSA's authority to qualified officials. *Id.* at 201-20.305(a)(3).

The regulatory DPA provides that

> (a) Agencies may contract for the following FIP resources without prior approval of GSA:
>
> (1) FIP equipment, software, services, and support services when the dollar value of any individual type resource including all optional quantities and periods over the life of the contract, does not exceed $2,500,000 ($250,000 for a specific make and model specification or for requirements available from only one responsible source)...

FIRMR 201-20.305-1(a)(1). If the dollar value of any resource exceeds the threshold, a specific acquisition delegation is required. *Id.* 201-20.305-1(b).

FIP equipment is defined as "any equipment or interconnected system or subsystems of equipment used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information." FIRMR Bulletin A-I Attachment A. Examples of FIP equipment include microcomputers, disk drives, tape drives, optical storage and/or retrieval equipment, printers, storage and backup devices cable connected to computers, data communications networks, and fiber optics and other communications networks. *Id.*

The Government looks solely to the value of the DCSs and argues that it does not exceed the dollar limit of the regulatory DPA whether the Board examines NASA's estimates or any of the offerors' proposals. The Government examined the proposed costs for the DCSs for each of the three offerors and its estimate as of May 10, 1993, and concluded that the dollar threshold for FIP equipment had not been exceeded. The Government provides the following figures in its motion to support its argument with respect to its own estimates:

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Description	Cost
DCSs	[exceeds $2,500,000]
Deduction for state taxes	[redacted]
Deduction for non-FIP equipment	[redacted]
Total	[less than $2,500,000]

Respondent's Motion to Dismiss at 17-19. The Government contends that because the value of the DCSs is less than $2,500,000, regardless of which figure is used, the regulatory DPA should apply.

The Government admits that because it decided that the embedded exception applied, it never determined the value of individual FIP resources, such as equipment, software or related supplies. Respondent's Answer to Protester's Statement of Material Facts at 5. The Government further states that "the Government's estimates do not readily lend themselves to the kind of analyses that need [sic] to be made for determining the dollar value of the reputedly FIP type categories. This explains why the [exceeds $2,500,000] figure [representing its estimate of the cost of the DCSs] is misleading." *Id.* While the Government is obviously attempting to dispute its own estimates, it has not submitted any sort of affidavits or documentation to support its argument.

The Government's attempt to raise an issue of material fact is deficient. The Board's Rule 8(g), which the Board has applied in this case and which outlines the procedure for motions for summary relief, provides that

> Parties opposing [a motion for summary relief] shall serve and file, together with their opposing legal memoranda and opposing affidavits and documents, if any, a concise statement setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. All material facts set forth in the statement required to be served and filed by the moving party are deemed to be admitted unless controverted by the statement required to be served by the opposing party.

As discussed below, the Government disputes Protester's Statement of Material Facts through the use of broad conclusions and does not support those conclusions with affidavits or other documents. Because the Government has not adequately controverted SAIC's statement as required by the Rule 8(g), we could deem the material facts set forth by SAIC, based as they are on the Government's own documents, to be admitted and adopt SAIC's statement of facts for purposes of this decision on summary relief. While we could take this course of action, we will use the Government's unsubstantiated figures for our analysis. Even giving the Government every benefit of the doubt in this regard, it can be demonstrated that the threshold of the regulatory DPA has been exceeded.

While the Government has focused its discussion solely on the DCSs, other systems, such as the antisurge control system and the vibration monitoring system, constitute FIP equipment. The Government has not provided the Board with any in-depth analysis regarding the cost of these other systems and whether the line item costs listed in its estimates include FIP related supplies or FIP software. Because the Government has not engaged in this exercise and is not disputing the amounts contained in these estimates, the Board adopts the line item costs for those systems in its analysis of FIP equipment costs. Even if the cost of any non-FIP equipment included in these systems was deducted from the line item cost, our analysis would not change. As discussed below, only a small amount attributable to these systems is needed to exceed the threshold of the regulatory DPA and this amount can easily be found within costs of the other systems.

The FIRMR does not clearly state how an agency determines whether a procurement will exceed the $2,500,000 threshold. The Government argues that the only rational, fair, and consistent interpretation of the FIRMR concerning when the "dollar value" of any individual type of FIP resource exceeds $2,500,000 is to interpret "dollar value" as referring to the principal value of an item before imposing handling charges, markups, or taxes on it. Respondent's Response to Protester's Cross-Motion for Summary Relief at 4-5; Respondent's Answer to Protester's Statement of Material Facts at 2-3. However, FIRMR Bulletin C-5 offers guidance on this issue. The Bulletin describes the procedure for obtaining a DPA for a specific acquisition exceeding the $2,500,000 limitation for a regulatory DPA. When requesting such a DPA, each agency is required to submit an agency procurement request (APR) which provides, among other information, a description of the project and the FIP resources to be acquired. FIRMR Bulletin C-5 Attachment A at 1. The APR

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must also include the "estimated contract cost" of the acquisition. *Id.* at 2. Thus, when determining whether to authorize a DPA for a specific acquisition, GSA examines the cost of the resource to the agency, not the cost of the resource to the offeror. The agency's contract cost would include overhead, profit, and taxes.

When determining whether the dollar limits of the regulatory DPA have been exceeded, a similar analysis should be used because of its direct relationship to the possible need for a specific acquisition DPA. The analysis should remain consistent because it is an exercise which the Government should undertake to determine what type of DPA is applicable to the procurement at issue. Before the Government begins the procurement process, it should determine the estimated contract cost of the acquisition and not engage in post-protest rationalizations of its actions. Therefore, we will examine the Government's estimate, as it would exist in an APR, to determine whether the dollar threshold of the regulatory DPA has been exceeded in this procurement and an APR for a specific acquisition is necessary.

The Government's argument to exclude markups and taxes might have merit if it considered acquiring the products from the manufacturer itself and providing them as Government-furnished equipment. However, the Government is not going directly to the manufacturer for these products and has not considered that option. Moreover, if the Government went to the manufacturer directly, we would still be examining what the Government would actually have to spend to acquire the products. Thus, we will examine the Government's estimates of the cost of the FIP equipment in this procurement with sales tax, overhead and G&A, and profit included.

In its response to Protester's Statement of Material Facts, the Government filed three versions of its estimate for this procurement. Two versions discuss the entire automation system by section and subsection of the specifications. These versions are dated May 10, 1993, and May 12, 1993. The final version discusses the DCSs exclusively and is undated. Only the May 10 estimate was filed with the Government's Motion to Dismiss. The other estimates were filed with its Answer to Protester's Statement of Material Facts.

The figures contained in the May 10 and May 12 estimates do not include "profit, bonds and insurance, shipping, escalation, mark-up, supervision of subcontractors, and effects of schedule." Respondent's Answer to Protester's Statement of Material Facts Exhibits A and B at 1. The line total calculations do include the cost of labor and 8.25% sales tax. *Id.* The Government's entries on both sets of estimates do not include overhead and general and administrative costs (G&A), or profit. However, it estimated those figures to be [redacted] for overhead and G&A, and [redacted] for profit. Respondent's Motion to Dismiss, Exhibit 3 at 2d unnumbered page. Using the figures contained in the Government's own estimates, the DCSs alone exceed the dollar threshold in the regulatory DPA. If we examine the entire automation system, it is clear that the Government cannot even suggest that the regulatory DPA is applicable. The May 10 figures are as follows:

Description	Total Estimate
DCSs (Section 16960)	
Operator stations	[redacted]
Engineering Stations	[redacted]
Hand-held terminals	[redacted]
Process control units	[redacted]
Portable processing units	[redacted]
Controllers	[redacted]
Input/Output cards or modules	[redacted]
Fiber optics	[redacted]
DCS-DCS communications	[redacted]
DCS-Other communications	[redacted]
Subtotal	[less than $2,500,000]
Sales Tax at 8.25%	[redacted]
Subtotal	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[exceeds $2,500,000]

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Antisurge control system (Section 16910)	
Subtotal	[redacted]
Sales tax of 8.25%	[redacted]
Subtotal	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Vibration monitoring system (Section 16961)	
Subtotal including sales tax at 8.25%	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Annunciator system (Section 16962)	
Subtotal including sales tax at 8.25%	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Transmitters (Section 16965)	
Temperature transmitters	[redacted]
Pressure transmitters	[redacted]
Flow transmitters	[redacted]
Level transmitters	[redacted]
Level transmitters	[redacted]
Level transmitters	[redacted]
Humidity transmitters	[redacted]
Subtotal	[redacted]
Sales Tax of 8.25%	[redacted]
Subtotal	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Pressure profile monitoring system (Section 16968)	
Subtotal	[redacted]
Sales Tax of 8.25%	[redacted]
Subtotal	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Time code generator system (Section 16969)	
Subtotal	[redacted]
Sales Tax of 8.25%	[redacted]
Subtotal	[redacted]
Overhead and G&A at [redacted]	[redacted]
Subtotal	[redacted]
Profit at [redacted]	[redacted]
Total	[redacted]
Total for the automation system (including sales tax, overhead and G&A, and profit)	[substantially exceeds $2,500,000]

The May 12 figures are quite similar and provide a total cost for the automation system, including sales tax, overhead and G&A, and profit, of [substantially more than $2,500,000].

The material costs contained in the Government's undated Exhibit E are the same as the figures provided in the May 12 estimate in Exhibit B. However, several deductions have been made to the total cost of the DCSs in an attempt to focus solely on the cost of FIP equipment. For the most part, the Government does not explain how it obtained the figures associated with the deduc-

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tions through the use of affidavits or any other documentation and it is impossible to assess whether its figures are correct. The total cost for the DCSs is listed at [exceeds $2,500,000], and includes sales tax of 8.25%, shop drawings, software, and testing. Respondent's Answer to Protester's Statement of Material Facts, Exhibit E. The deductions made in the exhibit are as follows:

Deductions	Amount
Dead man switches	[redacted]
Cabinet structures	[redacted]
Field installation materials costs	[redacted]
Factory acceptance testing miscellaneous costs	[redacted]
Test procedures miscellaneous cost	[redacted]
Shop drawings documentation materials cost	[redacted]
Loop drawings documentation materials cost	[redacted]
Loop lists documentation material cost	[redacted]
Input/Output lists documentation material cost	[redacted]
Vendor supplied system costs that are software related	[redacted]
DCSs required package software included in hardware costs	[redacted]

Once the deductions listed in Exhibit E are made, the Government contends that the actual total equipment cost of the DCSs is [less than $2,500,000]. When overhead and G&A of [redacted], and profit of [redacted] are added to the Government's revised figure in Exhibit E, the total cost is [less than $2,500,000].

The following items are listed by the Government to be vendor supplied, software related system costs:

Specification subsection	Description
1.3.1n	Certification of bonded storage of source code for proprietary languages
2.12.4	Programming Language "C" and compiler
2.12.6	Commercially available spreadsheet program
2.12.9	Historical storage and retrieval system

Respondent's Answer to Protester's Statement of Material Facts, Exhibit E.

The following items are listed by the Government as required package software included in hardware costs:

Specification subsection	Description
2.4.2	Operator stations, including the support electronics to run the CRTs
2.4.3	Engineering stations, including data storage facilities consisting of hard disks, optical disks, or floppy disk drives; magnetic tape units; and the capability to configure and maintain the system, and to edit test matrices and parameters
2.5.4	Portable programming unit, including floppy and hard disk storage, and software
2.6	Controllers
2.9.1	Fiber optic communications network
2.9.2	Communication network between the DCSs
2.9.3	Communication network between the DCSs and foreign systems

Respondent's Answer to Protester's Statement of Material Facts, Exhibit E.

We note that some of the items the Government includes within its software totals are actually either FIP equipment or FIP related supplies. As discussed above, examples of FIP equipment include disk drives, tape drives, optical storage and/or retrieval equipment, and fiber optics and other communications networks. FIRMR Bulletin A-1 Attachment A. An examination of the entries reveals that the fiber optic communications network, the communication networks for the DCSs, the disk drives, and the magnetic tape units are FIP equipment and should not be included within this software entry. The historical storage and retrieval system also appears to be FIP equipment and should not be included within this entry.

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The FIRMR defines FIP related supplies as "consumable item[s] designed specifically for use with FIP equipment, software ...." FIRMR Bulletin A-1 Attachment A. Examples of FIP related supplies include floppy disks and magnetic tapes. *Id.* Thus, the Government should not have included the cost of any disks or magnetic tape within this software entry, although they are properly excluded from consideration of the cost of FIP equipment.

Due to the Government's wholly inadequate submissions, it is impossible to determine the exact amount which should be excluded from NASA's software deductions. After examining the specifications for the products at issue, we can determine that the Government is making too many deductions from the total equipment cost of the DCSs because of its erroneous legal conclusions as to the non-FIP nature of the products at issue. However, as discussed below, no matter which of the Government estimates we adopt, the total cost of the FIP equipment included in the automation system will exceed the threshold of the regulatory DPA.

When we examine the May 10 and May 12 estimates, it is obvious that the threshold of the regulatory DPA has been exceeded. The cost of the DCSs alone was estimated to be [exceeds $2,500,000] on May 10 and [exceeds $2,500,000] on May 12. Both of these figures exceed the regulatory threshold. The threshold is exceeded by an even greater amount when we examine the automation system as a whole.

Even if we adopted the Government's total for the equipment cost of the DCSs, [less than $2,500,000], the final result does not change. As discussed above, when overhead and G&A, and profit are added to the Government's total, this figure is increased to [less than $2,500,000]. Because FIP equipment includes not only individual pieces of equipment, but also a system or subsystem of equipment, the cost of the remaining FIP equipment in the automation system must be added to the total cost of the DCSs. Regardless of whether we base our calculations on the May 10 or May 12 estimates, the cost of the remaining FIP equipment well exceeds $150,000. This relatively small sum is all that is needed to push this procurement over the threshold. Thus, when we focus on the entire system at issue, rather than merely the DCSs, it is clear that the threshold for the regulatory DPA has been exceeded.

The Government contends that we should also examine the costs contained in the offerors' proposals because their costs are below the regulatory DPA threshold. We give more credence to the Government's own estimates because they were prepared contemporaneously with the initiation of the procurement process, i.e., when the analysis should have been prepared. Moreover, the figures NASA provides for EDG, the intended contract awardee, are incomplete. The Government has only provided us with EDG's cost for the DCSs, annunciator and sequence of events recorder, and the time code generator. The cost for these products does not include any markups and it is unclear whether it includes sales tax. In addition, we do not have EDG's costs for the remaining portions of the automation system. While we might examine EDG's proposal as requested by NASA, we lack sufficient information to know the costs of all the FIP equipment at the rates charged by EDG in order to conduct an analysis similar to that done on the Government's own estimates. For that reason, we are relying exclusively on the Government's estimates to determine whether the threshold of the regulatory DPA has been exceeded.

Because the estimated cost of the total automation system exceeds the threshold, the Government cannot rely on the regulatory DPA for this procurement. The Government needs a specific acquisition DPA for this procurement.

Applicability of CACI, Inc. v. Stone

The Government's final argument centers on whether the Federal Circuit's decision in *CACI, Inc. v. Stone* [38 CCF ¶ 76,501], 990 F.2d 1233 (Fed. Cir. 1993), requires us to void this entire procurement action and require it to begin the entire process anew if we conclude that the Government has failed to obtain a proper DPA.

In that case, CACI, Inc., filed a protest against the award of a contract for engineering services and data processing support services by the Department of the Army alleging, in part, that the Army had failed to obtain a DPA before proceeding with the procurement. *Id.* at 1233-34. Although the Army admitted its failure to obtain the requisite DPA, this Board declined to suspend the contract because the Army "had taken necessary steps to obtain a DPA with dispatch." *Id.* at 1234.

The Federal Circuit disagreed with the Board's statement that the failure to obtain a DPA is a "remediable deficiency that 'does not necessarily nullify and render void the solicitation and all actions taken pursu-

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ant.' " *Id.* at 1236 (quoting *Computervision Corp.*, GSBCA 8709-P, 87-1 BCA ¶ 19,518 (1986), at 98,651-52). The Court stated that there was no clearer example of an illegality than where there is an absence of actual authority to enter into the contract. *Id.* Thus, the Court concluded, a "government procurement or contract" may not proceed without a valid DPA. *Id.*

The Government argues that *CACI* does not void the entire procurement process if the agency lacks a DPA, but only voids any contract award which might result from the process. The Government goes on to state that because it has not awarded the contract, there is still time to obtain a specific acquisition DPA from GSA any time before contract award. The Government is essentially suggesting that GSA may ratify the procurement actions NASA already took and will issue a specific acquisition DPA for this acquisition and thereby allow NASA to proceed to award on the basis of the ratified procurement actions already completed.

Following the *CACI* decision, the Board itself may not ratify a procurement or contract that the agency lacked authority to create. 990 F.2d at 1236. Thus, we do not consider the numerous remaining counts raised by protesters regarding the propriety of NASA's procurement actions. Whether GSA may ratify the Government's procurement actions is a decision that GSA will have to make at least in the first instance. We will not render an advisory opinion on the issue. If GSA should decide to ratify the Government's procurement actions, its decision may be protestable. We need not address that issue because GSA has not considered whether to ratify this unauthorized procurement and it is premature for us to address it. However, NASA should fully inform GSA if it does not intend to redo this procurement completely once it receives a proper DPA.

Timeliness

The Government also argues that the protesters' allegations that it failed to obtain a DPA are untimely. The Government states that, pursuant to the Board's rule 5(b)(3)(i), a protest based upon alleged improprieties in a solicitation which are apparent before the closing time for receipt of initial proposals must be filed before the closing time for receipt of the proposals. The Government contends that its failure to obtain a specific acquisition DPA should have been apparent before the closing time for receipt of proposals because the clause prescribed in FIRMR 201-39.5202-3 was not present. That clause states that "the acquisition is being conducted under [a regulatory, specific agency, or specific acquisition] delegation of GSA's exclusive procurement authority of FIP resources." FIRMR 201-39.5202-3. It contends that the absence of the clause put protesters on constructive notice that a DPA had not been obtained. Therefore, it states, protesters should have filed their protests on this count prior to the closing time of receipt of proposals.

The Government cites *The Orkand Corp.*, GSBCA 11405-P, 92-1 BCA ¶ 24,624 (1991), 1991 BPD ¶ 320, and *NCR Corp.*, GSBCA 9787-P, 89-1 BCA ¶ 21,499 (1988), 1988 BPD ¶ 331, in support of its contention that protesters' allegations are untimely. The Government correctly notes that the Board held that issues related to DPAs were untimely in both of those cases. However, the cases are factually distinguishable, all other protest issues were considered and denied in those cases, and the Government's reliance on them is misplaced. Moreover, given the Court's decision in *CACI*, we are required to determine our subject matter jurisdiction before we can proceed to consider other alleged violations of procurement law.

In *The Orkand Corp.*, protester alleged that the Department of Labor (DOL) improperly awarded a contract without obtaining an amendment to its specific acquisition DPA reflecting an increase in the estimated contract cost. 92-1 BCA at 122,834, 1991 BPD ¶ 320 at 16. The DOL included the DPA at issue in its protest file. *Id.* Protester received the protest file on September 5, 1991, but did not raise the issue until September 23, 1991. *Id.* The Board dismissed the count as untimely because it was filed eleven working days after protester received the protest file.

In *NCR Corp.*, protester argued that the DPA under which the Health Care Financing Administration awarded a contract was invalid due to an alleged failure to obtain an amendment to its specific acquisition DPA. 89-1 BCA at 108,326, 1988 BPD ¶ 331 at 16. Protester received the documents on which it based its allegations in the protest file, but did not raise the issue of the alleged defective DPA until thirteen business days later. *Id.* The Board stated that protester was on "constructive notice" of the terms of the DPA because it had the document in its possession. *Id.* The Board charged protester with knowledge of the possible lack of a valid DPA from the time it received the protest file. *Id.* Because protester waited thirteen business days after receiving the

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protest file to raise the issue, the Board dismissed the count as untimely.

The Board did not decide in either case that a protester must raise the absence of a DPA prior to the closing time for submission of proposals. The issue was never before the Board because in both cases, the Government had received a specific acquisition DPA and protesters had possession of the DPA well before the issue was raised. In this protest, neither SAIC nor HSQ was aware that NASA had never qualified for or obtained a DPA until their debriefings sessions at the end of September. Both protests were filed within ten days of acquiring this knowledge.

We note that both cases were decided prior to the Court's decision in *CACI*. After *CACI*, however, the Board must consider whether it has subject matter jurisdiction to hear a protest as a preliminary matter. Before we can address any allegations concerning the agency's actions during the course of the procurement process, we must first determine whether the procurement is subject to the Brooks Act and whether the agency obtained a valid DPA prior to commencing the procurement process. *See Universal Automation Labs, Inc. v. Department of Transportation*, GSBCA 12370-P, 93-3 BCA ¶ 26,142 (July 7, 1993) (although protester did not specifically allege the Government lacked a valid DPA, the Board *sua sponte* raised the issue because it was "a matter of fundamental importance and requires close review").

In this protest, both protesters allege that the Government did not obtain a valid DPA before initiating the procurement process. Because protesters' allegation that the Government lacked a valid DPA affects our jurisdiction to hear the merits of this protest, we may decide the issue regardless of its timeliness. Even prior to *CACI*, we have raised the issue of our jurisdiction *sua sponte* if jurisdiction appeared in doubt. *Businessland, Inc.*, GSBCA 8586-P, 86-3 BCA 19,188; *see also Artic Corner, Inc. v. United States* [34 CCF ¶ 75,472], 845 F.2d 999, 1000 (Fed. Cir. 1988) ("A court may and should raise the question of its jurisdiction *sua sponte* at any time it appears in doubt.").

Decision

The Government's motion to dismiss is **DENIED** and the protester's cross motion for summary relief is **GRANTED**. The Government is directed to obtain a DPA, and to proceed with this procurement in accordance with statute and regulation.

[¶ 26,554] Advanced Information Network Systems, Inc. v. Department of Commerce

GSBCA No. 12576-P, November 16, 1993.

Protests, GSBCA—Grounds for Protest—Selection of 8(a) Programs.—Denial of a protest against an 8(a) procurement for a trade data systems study was proper, despite the protester's contention that the Commerce Department unfairly failed to include it in a group of small companies being interviewed for the proposed study, because when the Commerce Department decided to conduct the study, its contracting officer was not aware of the protester's interest in the procurement or of its existence when she interviewed vendors. The protester's prior meetings and conversations with the Commerce Department covered trade data systems and other projects in which the protester was interested. Although the protester filed capability statements with the SBA and the Commerce Department's International Trade Administration, it did not file such statements with the Commerce Department's procurement office. The Federal Acquisition Regulation requirement that the procuring agency transmit the names of interested vendors to the SBA when conducting an 8(a) set-aside procurement did not apply to unknown interested vendors.

For the protester: David Kruger, Business Development Manager. For the government: Kenneth A. Lechter and F. Jefferson Hughes, Department of Commerce, Washington, D.C.

Before DEVINE, LABELLA, and VERGILIO, Administrative Judges.

DEVINE, Administrative Judge: Advanced Information Network Systems, Inc. (AINS) has protested the Commerce Department's failure to include it in a group of small companies being interviewed for a trade data system study proposed by the Department. The Government filed a motion to dismiss the protest on the ground that it failed to

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state a claim upon which relief can be granted. The Government also filed a motion for summary judgment. Both motions were taken under advisement pending a hearing. The Government renewed its motion to dismiss for failure to state a claim at the close of the evidence. In view of the disposition we make, these motions are moot.

Findings of Fact

According to its evidence, protester is experienced in developing and setting up computerized trade data systems. Its president, Moe Goswami, worked on the World Bank's original trade data system. One of its executives, Ken Mason, a former Secretary of the United States International Trade Commission, has more than 20 years of trade data related experience.

The Department of Commerce owns and maintains an international trade data system called COMPRO, which runs on a mainframe computer located at the National Institutes of Health in Bethesda, Maryland. According to AINS the system is slow, cumbersome and "user unfriendly." Also according to AINS Congress has directed NIH to get out of the government-wide trade data business. AINS is a small business which is eligible for 8(a) set aside contracts. It was interested in assisting the Department of Commerce to develop a new trade data system based on smaller, faster and cheaper computers, under the Small Business Administration's 8(a) set-aside program. To this end it sent an unsolicited capability statement on August 27, 1992, to the head of Commerce's International Trade Administration, Dr. Thomas Lowe.

A capability statement is a form of corporate resume. On November 12, 1992, at AINS' request, Dr. Lowe and his superior, John Menes, met with protester's president and business manager. Protester's Supplemental Protest File, Exhibit 4. The follow up letter written the next day by Mr. Kruger, the business manager, indicates that the participants discussed Mr. Menes' idea that the trade data system be "privatized." The letter closed with the statement, "The next logical step is to find some seed money to conduct a systems requirement study involving all the user representatives from their respective agencies." *Id.* The user agencies of the existing trade data system, in addition to the Department of Commerce, include the United States International Trade Representative, the United States International Trade Commission, and the Departments of Agriculture, Labor, Treasury, and State. Protester's Supplemental Protest File, Exhibit 5. Protester also made a similar visit to the United States International Trade Commission, an independent government agency. *Id.*, Exhibit 9.

On February 3, 1993, protester sent a letter to Mr. Menes seeking a briefing with Mr. Ron Brown, the new Secretary of Commerce. The letter enclosed a document entitled "Executive Summary" for transmission to Secretary Brown; it sought access to the Secretary to convey AINS' ideas concerning trade data systems. *Id.*, Exhibit 7. There is no evidence of any response from the Department of Commerce. On February 23, 1993, an AINS employee, Mr. Mason, visited with Dr. Thomas Lowe at the Department of Commerce. *Id.*, Exhibit 10. Mason's memorandum of the meeting reads as follows:

> Dr. Tom Lowe and I discussed the status of the COMPRO database. Commerce still seems to be groping about. Lowe noted that, within several agencies, an attempt was being made to find enough money to fund an initial study. He clarified the status of the computer center at Springfield, Va. It is not part of the NTIS as we had been told previously. Over the years he has been pressured to use Springfield rather than NIH but has resisted. Now, with the NIH disappearing, he may have no choice. He asked how business was—in AINS. I'm not sure the purpose of that question. During the discussion with Lowe and Lee Beller, an employee of the Court of International Trade, I talked up the seminar on downsizing so as to build interest if it is given again or offered at clients' offices.

Protester's Supplemental Protest File, Exhibit 10.

Mason's report covered the week of February 22, 1993, and dealt with visits to the International Trade Commission, the Court of International Trade, the National Labor Relations Board, the Resolution Trust Corporation, and the Postal Rate Commission. *Id.*

Although protester's complaint alleges that it was not properly treated with respect to the procurement at issue, its president admitted at hearing that Commerce had not broken any law or regulation. Transcript at 17, 18. At hearing protester's president stated that its case "is based on what is fair and what effort we have made and the treatment we have been given." *Id.* at 52. The Government's contracting officer testified that the procurement branch had no copy of

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protester's capability statement on file, a fact that protester does not dispute, although the planning branch had received a capability statement in the mail during late August 1992. Protester's Supplemental Protest File, Exhibit 1. The contracting officer who handled the procurement testified that she did not know of the existence of AINS. Transcript at 36, 46. Protester has produced no evidence to show any connection, between the Commerce officials with whom AINS employees discussed trade data systems and the Commerce officials who conducted the subject procurement, of such a nature as to require the contracting officer to inquire into the matter.

The only Federal Regulation that might assist protester in its fairness issue of which we are aware is 48 CFR 19.804-2(a)(12) (1993) which requires the Commerce Department, when notifying the Small Business Administration of its 8(a) procurement plans, to identify "all known 8(a) concerns which have expressed an interest in this specific requirement as a result of self-marketing." As it happens protester had itself filed a statement of its capabilities with the Small Business Administration on August 18, 1993, as a part of a request that a requirements letter be sent on protester's behalf to the Department of Commerce. Protester's Supplemental Protest File, Exhibit 13. This request included a general outline of the study requirements for a new trade data system, estimating its cost at close to one million dollars. *Id.* There is no evidence that the SBA acted on protester's request.

Discussion

Protester's complaint is based on what it believes to be its unfair treatment by the Government because it was not one of the firms interviewed by Commerce as a prospective awardee under an 8(a) set-aside procurement which protester believed it was fully qualified to carry out, and for which it had made an effort to be considered for. Protester views the Government's sin to be one of omission rather than commission. Protester's contacts with the Commerce Department consist of two meetings three months apart, the first between protester's president and business manager, and Dr. Thomas Lowe of Commerce's International Trade Administration; the second between one of protester's employees and Dr. Lowe. Protester's employees also made two telephone calls in December 1992. One was to Mr. Menes and one to Dr. Lowe. Transcript at 44. The conversations dealt in part with trade data systems, but also included other work subjects in which protester was interested. Protester also had meetings with at least two other agencies to discuss trade data systems, and with a number of other agencies to discuss other areas of interest that might result in business for protester. Although protester filed capability statements with Dr. Lowe's International Trade Administration and with the SBA itself, it did not file such a statement with Commerce's procurement office. Thus, when Commerce decided to conduct a limited study of the trade data base requirements its contracting officer did not interview protester because she did not know that protester existed. We do not believe that the Federal Acquisition Regulation requirement that the procuring agency, when conducting an 8(a) set-aside procurement, must transmit the names of interested vendors to the SBA, applies to those that are unknown.

We can find nothing that the Government did that it shouldn't have done, and protester agrees with us. The only thing that the Government didn't do that it might have done was indicate to the SBA (whose files already contained protester's capability statement) that protester might be interested in the procurement. It didn't do so for the same reason that it didn't itself interview protester in connection with the projected procurement: Commerce's procurement division did not know of protester's interest or even of its existence.

Decision

For the reasons given the protest is DENIED.

[¶ 26,555] ViON Corporation and Integrated Systems Group, Inc. v. General Services Administration; Amdahl Corporation and Federal Computer Corporation, Intervenors

GSBCA Nos. 12565-P, 12575-P, October 29, 1993.

Automatic Data Processing Procurement—Solicitations—Drop-In Contracts v. Schedule Contracts.—A protest against the General Services Administration's author-

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ity to award three indefinite delivery, indefinite quantity "drop-in" contracts under which other agencies could place orders for computers was denied, despite the protester's contention that the program amounted to a nonmandatory schedule program that did not comply with competition requirements, because the proposed contracts were part of a regular competitive procurement that involved full and open competition, including being publicized twice in the *Commerce Business Daily*. The protester, who could compete for the contracts, failed to show how it was prejudiced by the procurement method. The protester's fears that an agency might attempt to order a computer at the lowest price even though the computer might not meet the agency's needs were speculative and premature.

Automatic Data Processing Procurement—Solicitations—Performance Validation.—A protest against a solicitation for three indefinite quantity, indefinite delivery "drop-in" contracts under which other agencies could place orders for mainframe computer systems was denied, despite the protester's contention that the specifications were improperly based on a survey of several agencies' workloads rather than on a particular agency's workload, because the survey was a reasonable exercise of GSA's authority to provide for the economic and efficient purchase of automatic data processing equipment for the government under the Brooks Act. The survey showed that the government currently needed the different types of computer systems being procured. The protester also failed to show that the GSA's "prove-it" method of validating performance of the computer systems was unreasonable. The proposed method involved the submittal of data by offerors to enable the government to verify that the systems met requirements, rather than a benchmark test or performance validation technique based on a particular agency's workload.

Automatic Data Processing Procurement—Solicitations—Current Production.—A protest against a solicitation for three indefinite quantity, indefinite delivery contracts for mainframe computer systems was denied, despite the protester's contention that the solicitation's definition of "in current production" was vague and ambiguous, because the protester failed to identify any specific ambiguity in the definition. The protester did not provide any competing interpretations of any of the terms or identify any particular reading of the definition that would harm the protester's ability to submit a responsive offer. Although it contended that the definition did not indicate that a proposed system must be one that is currently being manufactured, no statute or regulation required the government to purchase systems that were currently being manufactured. Although prior board decisions required agencies to include a manufacturing component in their definitions of "in current production," the solicitations underlying those cases required computers that were currently being manufactured. However, the instant solicitation required that the proposed computers be supported and maintained, but not currently manufactured.

Automatic Data Processing Procurement—Solicitations—Outdated Equipment.—A protest against a solicitation for contracts for computer systems was denied, despite the protester's contention that the solicitation permitted offers of outdated equipment in violation of the Federal Information Resources Management Regulation, because the protester did not show that the solicitation's and the FIRMR's definitions of outdated equipment were contradictory. Although the FIRMR and the solicitation defined "outdated equipment" as items over eight years old, the FIRMR based age on the initial commercial installation date, whereas the solicitation dated equipment from the time of initial offers. The protester contended that the solicitation violated a FIRMR bulletin that advised against buying equipment that would become outdated before the need for the equipment ended. This nonregulatory bulletin, which did not require setting specific dates for measuring age, admonished agencies to consider the intended period of use before buying equipment. The protester failed to show that it was restricted from competing by the challenged clause, and its support for a more rigid definition of outdated equipment was in effect an attempt to limit competition.

Automatic Data Processing Procurement—Solicitations—Evaluation of Upgrades.—A protest against a solicitation for indefinite delivery contracts for mainframe computer systems was denied, despite the protester's contention that the solicitation failed to include the evaluation of possible upgrades to the proposed processors in violation of the Federal Information Resources Management Regulation, because the protester failed to

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show that the decision not to include upgrades in the procurement was unreasonable. If an agency anticipated a need to upgrade a processor during its system life, it could consider the cost of such an upgrade in determining which processor to buy and how to buy it. The protester did not provide any evidence regarding the frequency with which agencies upgrade processors. The protester's argument in support of evaluating prices based on options that may not be needed by a hypothetical user agency was speculative and premature.

For the protester, ViON Corporation: Latham & Watkins, Washington, D.C., by Irwin Goldbloom, David R. Hazelton, and Martin F. Petraitis. For the protester/intervenor, Integrated Systems Group, Inc.: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: John C. Sawyer, Kurt D. Summers, and Seth Binstock, Office of General Counsel, General Services Administration, Washington, D.C. For the intervenor, Amdahl Corporation: Cohen & White, Washington, D.C., by David S. Cohen, Nikki Koulizakis, and G. Brent Connor. For the intervenor, Federal Computer Corporation: David S. Kovach.

Before PARKER, WILLIAMS, and GOODMAN, Administrative Judges.

PARKER, Administrative Judge: These protests challenge the General Services Administration's (GSA's) authority to award three indefinite quantity, indefinite delivery contracts from which other agencies of the Government may place orders for mainframe computer systems. As discussed below, we hold that GSA's proposed procurement scheme does not violate any statute or regulation. In addition, we find the protesters' specific objections to various portions of the solicitation to be without merit. Thus, we deny the protests.

Findings of Fact

1. In an effort to streamline the twelve to twenty-four month procurement process for mainframe computer systems, GSA established the "Drop-in Technology For Mainframe Computers Program." Protest File, Exhibit 5 at 1. GSA issued the solicitation at issue here on June 23, 1993, as part of a pilot project for the program. *Id.*, Exhibit 30 at C-2.

2. The solicitation provides for the award of indefinite quantity, indefinite delivery contracts for mainframe computer systems (including site surveys), the design of which is based on International Business Machines Corporation's System 370/390-class technology. Protest File, Exhibit 30 at C-1. The solicitation would result in separate contracts in each of three different performance classes or "bands." *Id.* at C-6. The minimum guaranteed purchase for each contract is $50,000. *Id.* at B-1.

3. The purpose of the procurement is to avoid the need for separate mainframe computer procurements by individual user agencies by establishing non-mandatory contractual vehicles from which agencies can order commercially available hardware and software:

> It is the goal of this program to establish contractual vehicles to expedite the procurement of commercially available hardware and software for use throughout the Federal Government. Use of the contracts by agencies will be voluntary. GSA believes, however, substantial ordering activity will occur because of the potential savings in time and cost that agencies will realize using this contract versus conducting their own individual competitive procurements.

Protest File, Exhibit 30 at C-1 to C-2.

4. The initial contracts will last for one year, with two six-month options. The optional periods are only to cover unanticipated delays in the recompetition, which will occur yearly to avoid "locking out" unsuccessful vendors for long periods of time. Protest File, Exhibit 30 at C-3. The relatively short contract term is also intended to simplify the contract by obviating the need for "technology refreshment" or "substitution" provisions. *Id.* Although GSA does not know how long a particular agency will use a particular computer, GSA established a five-year systems life for evaluation purposes. *Id.*, Exhibit 26 at M-7.

5. Agencies that wish to order computers from the contract will be required to justify their needs to GSA:

> The availability of the Drop-in Technology contract will not exempt agencies from conducting all of the studies (requirements analysis, alternatives analysis, conversion study) required by the Federal Information Resources Information Resources Management Regulations (FIRMR). These studies will enable each agency to determine the characteristics of processor needed to satisfy its requirements, to identify and evaluate acquisition alternatives, and to select the most advantageous alter-

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native. Only agencies with a bona fide requirement for compatibility-limited, 370/390-architecture processors will be permitted to use these contracts. GSA will establish a Drop-in Program Management Office to assist agencies in the use of the contract and to process delivery orders on their behalf. The GSA PMO will ensure that agencies have met the FIRMR requirements and have satisfactorily demonstrated a need for IBM compatibility-limited equipment that can be satisfied through this contract.

Protest File, Exhibit 30 at C-3. The contract does not require an agency to publicize its intention to order a computer from the contract.

6. Prior to issuing the solicitation, GSA conducted a detailed survey of other federal agencies currently using IBM or IBM compatible mainframe computers. Protest File, Exhibits 6, 7, 9. Although the survey was not all-inclusive[1], GSA's analysis of the results led it to conclude that there exists a present need within the Government to purchase these types of computers. *Id.*, Exhibit 9.

7. Although GSA's survey revealed significant differences among agencies in terms of their types and amounts of workload, GSA analyzed the workload data and established the three performance categories of computers based upon "typical" levels of required processing power. In establishing these "bands," GSA also took into account the extent to which it could expect a fair competition among the three manufacturers of IBM and IBM compatible mainframe computers. *See* Protest File, Exhibits 6, 9.

8. In order to determine whether an offered computer will satisfy the performance requirements of the band for which it is proposed, GSA adopted a performance validation method termed "prove-it." Essentially, the solicitation requires offerors to submit data which they believe will enable the Government to verify that the proposed processor meets the requirements. The solicitation encourages offerors to provide reliable and easily verifiable technical information and states that "[t]he Government may independently collect and use its own evidence to supplement the evaluation of the proposed processor." Protest File, Exhibit 30 at L-7 to L-10. There is no provision for a "benchmark" test or any other performance validation technique based upon any particular agency's workload.

9. The solicitation requires that proposed computers be "in current production":

> the "in current production" requirement is met if: (a) the item is being actively marketed and supported with ongoing enhancements; (b) the item is being maintained without any significant reduction in maintenance related resources; and (c) the manufacturer has not announced discontinuance of such marketing, support, and maintenance levels.

Protest File, Exhibit 30 at C-10.

10. Although the solicitation permits offers of used equipment, it prohibits offers of "outdated" equipment:

> Federal agencies are prohibited from including outdated equipment in their specification unless the agency's Designated Senior Official determines that such action will be in the best interest of the Government. Therefore, equipment that is outdated, as of the due date for the submission of initial offers, will not be considered acceptable. Outdated equipment is defined as any mainframe processor that is over eight (8) years old, based on the initial commercial installation date of that processor, and is no longer in current production as defined in C.4.2 above.

Protest File, Exhibit 30 at C-11.

Discussion

The Drop-in Technology Procurement

Protester ViON argues that, by awarding indefinite quantity, indefinite delivery (IDIQ) contracts from which other agencies may place orders for mainframe computers, GSA is in essence establishing nonmandatory schedule contracts without complying with statutory and regulatory requirements designed to ensure competition within the GSA schedule program. As discussed below, we disagree with ViON's characterization of the proposed contracts at issue here. Although similarities exist between the IDIQ contracts to be awarded under the "Drop-in Technology" program, and contracts awarded under GSA's nonmandatory schedule program, the two programs are fundamentally different. These contracts will be awarded as a result of full and open competition; schedule contracts are awarded without competition. Thus, the statutory and regulatory requirements

[1] GSA sent out eighty-eight survey questionnaires and received forty-three responses. Of these responses, approximately twenty-eight provided "usable data." Protest File, Exhibit 9.

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which apply specifically to GSA's non-mandatory schedule program do not apply here.

The Administrator of GSA possesses broad authority to "coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment [ADPE] by Federal agencies." 40 U.S.C. § 759(a)(1) (1988). GSA may purchase directly ADPE for use by other agencies, or it may delegate to the agencies the authority to make such purchases. *Id.*, § 759(b)(1), (2). The Brooks Act was broadly drafted so as to permit GSA to "enter into any method of procurement or arrangement that [it deems] economical, efficient and appropriate to foster the objectives of the Act." *Amdahl Corp.*, GSBCA 7859-P, 85-2 BCA ¶ 18,111, at 90,933, 1985 BPD ¶ 18, at 20. In carrying out its Brooks Act responsibilities, GSA sometimes purchases ADP directly for use by agencies, and sometimes delegates authority to agencies to make such purchases.

Pursuant to its statutory authority, GSA also established the non-mandatory ADP schedule program. *See* 41 CFR 201-39.803 (1992) (FIRMR 201-39.803). Under the program, GSA awards contracts to numerous vendors—often for exactly the same items—with prices based upon discounts from the vendors' commercial price lists. 48 CFR 38-102.2 (1992) (FAR 38.102.2). These contracts are not competitively awarded; any vendor which complies with GSA's requirements may be awarded a schedule contract. *See Insyst Corp.*, GSBCA 9946-P, et al., 89-2 BCA ¶ 21,782, 1989 BPD ¶ 132.

In schedule contracting, the competition occurs not in the award of the schedule contract, but in connection with an agency's determination whether to place an order under one of the contracts. Consequently, before placing an order under a non-mandatory GSA schedule contract, an agency is required to publicize its intention in the *Commerce Business Daily* (CBD) and consider all responses received in order to determine whether the proposed schedule purchase "results in the lowest overall cost alternative to meet the Government's needs." FIRMR 201-39.803-2. If the proposed schedule buy is not the lowest overall cost alternative, the agency, depending on the responses received, must either order from another schedule contract that does offer the lowest overall cost alternative, or issue a solicitation and conduct a competitive procurement. *Id.* This is how the Government obtains competition under the schedule program.

In contrast, the proposed IDIQ contracts at issue here will be awarded as a result of full and open competition at the front end. The procurement was publicized twice in the CBD and at least forty-six vendors requested copies of the solicitation.[2] GSA is conducting a "regular" competitive procurement which will result in three IDIQ contracts. We are unable to find, nor has ViON pointed us to, any statute or regulation which prohibits GSA from exercising its Brooks Act authority in this manner. We also fail to see how ViON will be prejudiced by this procurement method; ViON will be able to compete for the contracts just like every other vendor.

It is true, as ViON points out, that agencies must, at some point, assess their individual needs before deciding whether to ask GSA to place an order under one of the contracts. GSA, however, will require agencies to perform all of the analyses and studies required by the FIRMR prior to making such a decision. Finding 5. ViON's fears that an agency may attempt to order a computer that does not meet its needs at the lowest price are both speculative and premature. The possibility that a contract may, at some point, be misused does not make the contract itself illegal.[3]

In a related ground of protest, ViON argues that the proposed contracts violate statute and regulation because the specifications for the three performance bands are based upon a survey of several agencies' requirements, rather than on the specific workload requirements of a particular agency. We deny this ground of protest, as well. GSA's survey, which ViON has not shown to be unreasonable, showed that there exists a present need within the Government for these types of computers. Finding 6. GSA's decision to analyze workload data from a

[2] Protest File, Exhibits 11, 12, 24, 25.

[3] We recognize, as does ViON, that unless either GSA or the agency publishes its intent to place an order under the contract, it will be more difficult for vendors to challenge individual orders that competitors believe to be improper. We assume that GSA will comply with whatever publication requirements are applicable to the placement of orders under an IDIQ contract. GSA's failure to include publication requirements applicable to the non-mandatory schedule program in this solicitation, however, does not render the solicitation defective in any way. As discussed above, these contracts are not part of the schedule program.

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number of agencies, and to establish the three performance categories based upon "typical" levels of required processing power, is a reasonable exercise of GSA's Brooks Act authority to provide for the economic and efficient purchase of ADP equipment for the Government.

ViON also challenges GSA's decision to validate the performance of proposed computer systems through the use of a methodology called "prove-it." Under that methodology, offerors submit data which they believe will enable the Government to verify that the proposed processor meets the requirements of the band for which it was proposed. No "benchmark" test or other performance validation technique based on a particular agency's workload will be used. Finding 8.

This ground of protest is related to the previous two, and our analysis is, consequently, similar. ViON has not shown that GSA's proposed method of validating performance is unreasonable. To the contrary, given the nature of the procurement, "prove-it" seems to make a great deal of sense. GSA is soliciting offers of computer systems with certain performance capabilities which different agencies may use to satisfy their requirements. We agree with GSA that using a particular agency's workload to validate performance would not make sense under these circumstances. Although validating the performance of a particular processor based upon its ability to process the specific workload of the agency purchasing it is generally the preferred method, *see* FIRMR 201-24.215(a), it certainly is not the only method. We refuse to apply the FIRMR so rigidly as to force the Government to act in a way which is unreasonable, if not impossible.

Again, ViON has not shown that it will be prejudiced by GSA's use of this technique. ViON has not even alleged that it will be unable to prove that its proposed processors meet the requirements of the solicitation. Moreover, if after contract award ViON believes that an awardee failed to prove the capabilities of its proposed processor, ViON will be able to protest the award at that time. Rule 5(b)(3)(ii).

In Current Production

In its next ground of protest, ViON maintains that the solicitation's definition of "in current production" is vague and ambiguous. We disagree.

The solicitation states that the "in current production" requirement is met if:

> (a) the item is being actively marketed and supported with ongoing enhancements; (b) the item is being maintained without any significant reduction in maintenance related resources; and (c) the manufacturer has not announced discontinuance of such marketing, support, and maintenance levels.

Finding 5. We begin our analysis by pointing out that ViON has not identified any particular ambiguity in the definition. ViON has neither provided the Board with competing interpretations of any of the terms, nor identified a particular reading of the definition which would harm ViON's ability to submit a responsive offer. Thus, we have no basis upon which to hold that the definition is vague or ambiguous.

ViON's brief makes it clear, however, that ViON is really complaining about the fact that the solicitation's definition of "in current production" does not require that a proposed system be one which is currently being manufactured. Instead, the definition concerns itself with the extent to which a manufacturer is marketing and maintaining the processor. The problem with ViON's argument, however, is that no statute or regulation requires that the Government purchase computer systems that are currently being manufactured.

Lacking a statute or regulation upon which to rely, ViON points to prior Board decisions which purportedly require agencies to define "in current production" to include a manufacturing component. ViON's reliance on those cases, however, is misplaced. In *ViON Corp.*, GSBCA 11002-P, 91-2 BCA ¶ 23,809, 1991 BPD ¶ 8, the Board held that a contract was wrongly awarded because the awardee's computer did not meet the solicitation's requirement that equipment be in current production. The solicitation provided that "[o]nly new, or used equipment certified as new by the [manufacturer] . . . in current production shall be offered." Finding that the phrase "in current production" was not a term of art, the Board interpreted the solicitation to require computers "actually being manufactured" as of the relevant date. 91-2 BCA at 119,221, 1991 BPD ¶ 8, at 9-10.

Similarly, in *Federal Computer Corp. v. Department of the Treasury*, GSBCA 11872-P, 93-1 BCA ¶ 25,347, 1992 BPD ¶ 207, the Board was called upon to interpret a solicitation which defined the term "in current production" to refer to "a product which is out of the design phase, on the assembly line, and being manufactured as of

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the proposal due date, with the expectation that such production will continue on a scheduled basis." 93-1 BCA at 126,257, 1992 BPD ¶ 207, at 4. We held that the awardee's product was in current production because it was, among other things, in the manufacturing phase.

In each of these cases the Board was called upon to interpret the meaning of the phrase "in current production" in the context of a particular solicitation. In those cases we found the term to include a manufacturing component because the solicitations themselves, reasonably interpreted, required it. Here, the situation is quite different. The solicitation clearly does not require that a proposed computer be one which is currently being manufactured. GSA has simply determined that it requires that proposed computers be supported and maintained, but not currently manufactured. The term "in current production" may be inapt to describe what GSA wants, but it is clearly defined.[4]

ViON urges the Board to require GSA to adopt a more restrictive (and, therefore, less competitive) definition of the phrase "in current production." We decline to do so. ViON has not shown that the current definition fails to meet the needs of the Government, is unreasonable, ambiguous, or violates any statute or regulation.

Outdated Equipment

In its final ground of protest, ViON argues that the solicitation permits offers of outdated equipment, in violation of the FIRMR. We deny this ground, as well.

Section C.4.4 of the solicitation provides:

> Federal agencies are prohibited from including outdated equipment in their specification unless the agency's Designated Senior Official determines that such action will be in the best interest of the Government. Therefore, equipment that is outdated, as of the due date for the submission of initial offers, will not be considered acceptable. Outdated equipment is defined as any mainframe processor that is over eight (8) years old, based on the initial commercial installation date of that processor, and is no longer in current production, as defined in C.4.2 above.

Finding 10. This definition closely mirrors the definition of outdated equipment contained in the FIRMR. The FIRMR defines outdated equipment as "any [ADP] equipment over eight years old, based on the initial commercial installation date of that model of equipment, and that is no longer in current production." FIRMR 201-4.001.

ViON argues the solicitation permits offers of outdated equipment because it prohibits equipment that is outdated *at the time of initial offers*, whereas FIRMR Bulletin C-29 states that "agencies should not acquire outdated equipment or equipment which will become outdated *before the need for the equipment ends.*" Thus, argues ViON, because agencies may order computers for up to two years under the terms of the contracts, *see* Finding 4, and the systems life of the computers is five years, *Id.*, any computer more than one year old (eight minus seven equals one) as of the date of award would be outdated, unless it is in current production. ViON also argues that "in current production" in the context of this FIRMR definition must be read to include a manufacturing component.

There are several problems with ViON's position. First, although the solicitation establishes a systems life of five years for evaluation purposes, Finding 4, the actual life of an agency's system may vary substantially from that number. In answering a vendor's question on this subject, GSA noted:

> The FIRMR Bulletin C-29 contains "guidelines for consideration by agencies when solicitations allow offerors to propose used equipment", and these guidelines were taken into account in the development of this solicitation. Offerors are reminded that the FIRMR definition of "outdated" is conjunctive, requiring that the equipment be over eight years old AND no longer in current production. The FIRMR does not define "current production", therefore a definition of the phrase was developed in concert with the requirements of this solicitation.

[4] We recognize that the definition of "in current production" in the solicitation is contrary to the ordinary meaning of this term—which does include the concept of currently being manufactured. *See ViON.* While we do not encourage agencies to define terms in such an inconsistent manner, we do not find the definition to be illegal here where no prejudice inures to any vendor. The only conflict we see here is with the definition of outdated equipment in FIRMR 201-4.001, which defines outdated equipment in part using the term "in current production." While we interpret that FIRMR provision to mean "currently being manufactured," the inconsistency is not problematic in this case. *See* discussion, *infra.*

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> As the Government has no means of predicting, and feels certain that offerors and manufacturers will not predict, the "last production date" for a model of equipment, the Government has determined that equipment that is not "outdated" (as defined in this solicitation) as of initial proposal submission will be eligible for award, provided that such equipment meets all of the other solicitation requirements and is offered at the lowest evaluated cost.
>
> The agencies who acquire equipment under the contracts resulting from this solicitation may or may not have a need to use the equipment for the full five year system life cycle that has been established for the cost analysis for this procurement as stated in M.5.2.

Protest File, Exhibit 35 at Q.61. Thus, an agency may use ordered equipment for a shorter period or a longer period than the solicitation's evaluated systems life. Until the agency defines the period of need for each ordered processor, it is impossible to determine whether that processor is likely to become outdated during the agency's projected period of use. And, since the Drop-in contracts are not mandatory, an agency can select another contract vehicle if any processor on the Drop-in contract is likely to become obsolete during the agency's projected use period.

Second, we do not find the solicitation to run afoul of the FIRMR's definition of outdated equipment. As stated above, the FIRMR contains a two-pronged test for determining whether equipment is outdated: equipment is outdated if it is "over eight years old based on the initial commercial installation date of that model of equipment *and* ... is no longer in current production." FIRMR 201-4.001 (emphasis added). Thus, if a piece of equipment "passes" either prong of the test, it is not outdated.

As to the first prong of the definition, the solicitation virtually mirrors the FIRMR: outdated equipment is "over eight (8) years old, based on the initial commercial installation date of that processor ...." Finding 10. The solicitation will measure the age of equipment as of the date initial offers are due. *Id.* ViON argues that this latter date runs afoul of FIRMR Bulletin 29, which states in part that "agencies should not acquire outdated equipment or equipment which will become outdated before the need for the equipment ends."

ViON reads too much into this Bulletin. FIRMR Bulletins are "nonregulatory publications to provide guidance and information." FIRMR 201-3.001(b)(1). Thus, even if ViON could prove that GSA's definition of outdated equipment is inconsistent with FIRMR Bulletin C-29, the Board does not grant protests on the basis of violations of FIRMR Bulletins alone. *ViON Corp.*, GSBCA 11048-P (10218-P-REM), 91-2 BCA ¶ 23,792, 1991 BPD ¶ 38. In any event FIRMR Bulletin 29 does not require agencies to set any particular date for measuring the age of computer equipment. We read FIRMR Bulletin 29 as admonishing agencies to consider the intended period of use before deciding which computers will meet their requirements. There is no indication here that any agency intends to purchase a computer from one of the Drop-in contracts which is or will become outdated. We hold that GSA's decision to measure the age of proposed processors at the time of initial proposals is reasonable and does not violate the FIRMR.[5]

Under the FIRMR definition, a system cannot be outdated (even if it is more than eight years old) if it is in current production. This is the second prong of the FIRMR definition. Because the term "in current production" is not defined in the FIRMR, we agree with ViON that the term must assume its common meaning for purposes of the outdated equipment requirement. This is irrelevant, however, because we have found that, under the solicitation, the proposed processors must pass the first prong of the FIRMR's outdated equipment test (less than eight years old based upon initial commercial installation date). Thus, the solicitation does not permit offers of outdated equipment, regardless of how it defines "in current production."

Finally, we deny this ground of protest because ViON has failed to show that it will be prejudiced by the challenged clause. ViON has not alleged that it will be restricted from competing for the contracts; to the contrary, by arguing for a more rigid definition of outdated equipment, ViON is

[5] Under ViON's restrictive reading of the FIRMR, an agency could not purchase *any* computer that it anticipated keeping for more than eight years. This is because, under ViON's reading, every computer would be "outdated" ("over eight years old" "before the need for the equipment ends") before it was even manufactured. Clearly FIRMR Bulletin C-29 was not intended to mandate such an absurd result.

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attempting to limit competition. As long as the solicitation accurately reflects the Government's requirements (and ViON has not shown otherwise) restricting competition is not an interest that the Competition in Contracting Act protects. *Teradata Corp. v. Department of the Air Force,* GSBCA 11642-P, et al, 92-2 BCA ¶ 24,895, 1992 BPD ¶ 74; *Computer Consoles, Inc.,* GSBCA 8453-P, 86-2 BCA ¶ 18,941, 1986 BPD ¶ 74. ViON's protest is denied.

ISG's Grounds of Protest

ISG maintains that the solicitation violates the FIRMR because it fails to include evaluation of possible upgrades to the proposed processors. According to ISG, because agencies often upgrade the capacity of their processors during their useful lives, GSA cannot not know which processor offers the lowest system life cost without evaluating offers of upgrades along with the cost of the processors. In a related ground of protest, ISG argues that this situation encourages offerors to "buy in" at low prices, knowing that they can sell an agency expensive upgrades at a later time.

The FIRMR provides:

> The use of options may be appropriate in [ADP] resources acquisitions because—
>
> (a) The FIRMR requires agencies to determine a system life for each [ADP] resource requirement and to evaluate costs over the system life . . . .

Putting aside the fact that this provision states that options *may* be appropriate, ISG's argument, like ViON's similar arguments, is speculative and premature. By awarding three IDIQ contracts, GSA is obtaining firm, competitive prices for three types of processors. When agencies have a requirement for this type of processor, they will perform all of the studies (requirements analysis, alternatives analysis, etc.) required by the FIRMR prior to purchasing a mainframe computer system. Only if ordering from one of the IDIQ contracts is found to be the most advantageous alternative will an agency be permitted to do so. Finding 5. Obviously, if an agency anticipates a need to upgrade a processor during its system life, it should take into account the cost of such upgrade in determining which processor to buy, and how to buy it.

ISG has not shown that GSA's decision not to include processor upgrades in this procurement is unreasonable. ISG has produced no evidence whatsoever regarding the frequency with which agencies upgrade their processors. Under these circumstances, evaluating prices based upon options which may not be needed by a hypothetical user agency is just as silly as failing to evaluate them when they will be needed. The fact that these decisions will be made later on an agency-by-agency basis does not mean that GSA lacks authority under the Brooks Act to establish the Drop-in IDIQ contracts as a non-mandatory alternative for agencies to consider.

In its final ground of protest, ISG maintains that the solicitation fails to state a minimum quantity of supplies or services to be ordered. ISG cites FAR 16.504(a):

> (1) The contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. . . .
>
> (2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

The solicitation establishes a guaranteed minimum purchase of $50,000 for each contract. Finding 2. These amounts clearly are more than "nominal," and certainly constitute sufficient consideration to bind the Government. *See Coastal States Petrochemical Co. v. United States* [23 CCF ¶ 81,512], 214 Ct. Cl. 520, 559 F.2d 1 (1977), *cert. denied,* 435 U.S. 942 (1978) ($100 minimum order sufficient consideration for $19,000,000 indefinite quantity contract). The payment will be made whether or not any deliverables are ordered and, although $50,000 will not purchase a mainframe computer system, it will purchase a site survey under the contract. *See* Finding 2. To the extent ISG argues that the FAR requires GSA to agree to purchase at least one computer system under each contract, we find ISG's reading of the FAR to be unsupported by both a plain reading of the regulation and the case law interpreting it.

Decision

For the reasons discussed above, the protests are **DENIED.** The suspension of respondent's authority to proceed with this procurement lapses by its terms.

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[¶ 26,556] Integrated Systems Group, Inc. v. Department of Agriculture

GSBCA No. 12552-P, November 3, 1993. (The text below is the redacted version issued to the public on November 10, 1993.)

Timeliness of Protests, GSBCA—Adverse Agency Action—Ten-Day Rule.—A protest against a solicitation for mainframe central processing units was timely because the protester filed its protest with the board within 10 days of the agency's denial of the protester's agency protest. When the protester filed its protest with the board, alleging that the agency was altering its requirements without a written amendment, the closing time for receipt of proposals had not yet passed. Acceptance of the agency's contention that the protest clock started to run when the protester received written discussion questions would encourage resolution of issues through protests rather than through agency-level discussions.

Protests, GSBCA—Grounds for Protest—Statement Adequacy.—A protest against a solicitation for mainframe central processing units was not dismissed, despite the agency's contention that the protest's grounds were not adequately stated, because the alleged specific factual problems and general legal violations were sufficiently explained so that the contracting officer could respond to the agency protest. The protest incorporated by reference the underlying agency protest that noted that the agency had yet to determine applicable provisions of the solicitation and expressly referenced the Federal Acquisition Regulation in urging the contracting officer to provide sufficient time to respond to solicitation amendments.

Timeliness of Protest, GSBCA—Knowledge of Basis—Amended Protest.—A protest against a solicitation for mainframe central processing units was not dismissed, despite the agency's contention that the protest was untimely filed, because the protester filed the amended protest within 10 days of learning of its exclusion from the competitive range. The protest grounds were timely filed independent bases of protest that could have been docketed as separate protests. No party suggested that it would be inappropriate to consolidate the matters with the initial protest. Thus, there was no basis for dismissing the timely raised new issues.

Selection of Contractor—Competitive Range—Reasonable Chance of Award.—A determination that a protester lacked a reasonable chance of being selected for award under a solicitation for mainframe central processing units was improper, because the agency precluded the protester from submitting a best and final offer without giving the protester an opportunity to respond to finalized terms of the solicitation. In its agency protest, the protester expressed concern regarding the agency's interpretation of a solicitation paragraph and contended that a related written discussion question revealed changed agency requirements. The agency's response to the protest and subsequent amendment to the solicitation reflected the agency's belief that the protester's interpretation was reasonable. The solicitation language at the time that responses to written discussion questions were due did not accurately reflect the agency's requirements, but the agency proceeded with discussions, evaluations, and competitive range determinations even though the solicitation failed to reflect its requirements.

For the protester: Skolnick & Leishman, Derwood, Maryland, by Shelton H. Skolnick, Judy Leishman, and Amy M. Hall. For the government: Jane H. Talley, Office of the General Counsel, Department of Agriculture, Washington, D.C.

Before VERGILIO, WILLIAMS, and GOODMAN, Administrative Judges.

VERGILIO, Administrative Judge: On August 25, 1993, Integrated Systems Group, Inc., filed with the Board this pre-award protest. Protester maintains that the respondent, the Department of Agriculture, "attempted to modify solicitation requirements without formal amendment." On September 1, the protester amended its protest to allege that the agency had improperly excluded it from the competitive range and had failed to provide the protester with timely and proper notice of its exclusion.

The agency has moved to dismiss the initial protest, contending that these issues have been untimely protested to the Board

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because they had been untimely protested to the agency. The Board concludes that the issues raised in the agency protest initially, and subsequently raised in the initial protest at this Board, are matters which would normally be discussed or resolved through the discussion process. The agency had not yet requested best and final offers. The protest to this Board was timely filed.

In light of fundamental, unresolved aspects of the solicitation, and the ambiguity of certain provisions, the agency's rigid approach to the discussion process was unreasonable, as was its exclusion of the protester from the second competitive range. The agency's actions impermissibly stifled competition and improvidently excluded a potential offeror from the competition.

Findings of Fact

Initial proposals and discussions

1. The agency obtained initial proposals for the delivery, installation, maintenance, and support of IBM-compatible, large scale, mainframe CPU (central processing unit) complexes on a lease or lease-to-ownership basis. Protest File, Exhibits 7, 9-12, 14, 15, 19. The solicitation dictates, "To be considered for source selection, both the technical (pass/fail) and the cost proposal must be compliant without exception, qualification, and/or reservation." *Id.*, Exhibit 14 at 369 (¶ M.3, proposal evaluation). Further, award would be made to the offeror proposing the lowest overall cost to the Government based upon a cost model described in the solicitation. *Id.*, Exhibits 10 at 321, 14 at 373, 386-87, 15 at 397-99 (¶ ¶ M.4 through M.6).

2. Following its evaluation of initial proposals, one of which the protester had submitted, the agency concluded:

> The evaluations revealed that all offerors' proposals could be made acceptable with revisions and no complete rewrites would be needed. ... It is felt that all [] offerors have a reasonable chance for award.

Protest File, Exhibit 19 at 777. The agency included the protester and others in the initial competitive range, and proceeded to issue written discussion questions. *Id.* The agency did not exclude any offeror because of price disparity. Transcript at 125.

3. The protester received its written discussion questions on July 19. Protest File, Exhibit 30(a) (¶ 17). The cover letter to these questions noted: "These questions need to be addressed by submitting an addendum to your proposal." "Revised cost and price information and technical information shall be submitted in separate, sealed envelopes[.]" "Your signed addendum must be received by 11:00 a.m., Eastern Standard Time, on August 2nd, 1993 .... Late responses will be governed by the 'Late Submissions, Modifications, and Withdrawals of Proposal' clause in the solicitation document." *Id.*, Exhibit 20 at 781-82.[1] The response time and date were later extended through 11:00, August 3. *Id.*, Exhibit 22 at 900.

4. The protester received forty-four numbered questions. The questions were pigeonholed into three categories—those relating to general contract terms (five questions); technical requirements (ten questions); and cost requirements (twenty-nine questions). Protest File, Exhibit 20. Those in the first category asked if the protester "will": submit a copy of various solicitation sections, as amended; provide written acknowledgement of receipt of amendments; submit specific section K certifications fully completed; provide additional information on [REDACTED]; and provide a certificate of insurance as required under section H. *Id.* at 783-86.

5. The questions in the second category focused upon sections C, J, and L of the solicitation, asking if the protester "will": [

REDACTED

]

Protest File,

Exhibit 20 at 787-93.

6. Although arising from evaluation of the cost proposal, the questions in the cost category reached into cost and technical areas of the initial proposal. A sampling of the questions is indicative of the agency's concerns. [

REDACTED

] Protest File, Exhibit 20 at 794-880.

7. By amendment eight to the solicitation issued with an effective date of July 29,

[1] The solicitation incorporates by reference Federal Acquisition Regulation (FAR) clauses 52.215-9 (Submission of Offers) (Dec. 1989) and 52.215-10 (Late Submissions, Modifications, and Withdrawals of Proposals) (Dec. 1989). Protest File, Exhibit 23 at 1000 (¶ L.1).

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prior to the due date for responses to the written discussion questions, the agency noted that questions pertaining to clauses involving the Buy American Act, Trade Agreements Act and Small Business Act "have been taken under advisement and no final decision has been made on whether or not to apply an evaluation preference for, or to restrict eligibility to, domestic products." Protest File, Exhibit 22 at 900. The parties were not informed of any resolution of these questions prior to the due date for responses to written questions. *Id.*, Exhibit 3 at 23.

Protest to agency

8. On August 3, prior to the time set for receipt of responses, the agency received by facsimile from the protester an agency protest. Protest File, Exhibit 2; Transcript at 128; Answer at 5 (¶ 3). The letter states that the protester:

> is interested in participating in the referenced solicitation. The Government's clarification questions recite "requirements" of the solicitation which have not been made solicitation requirements by formal amendment (see attached for specific examples).
>
> Please (1) remove these questions or (2) restate the clarification questions to [re]move the amendments or (3) make the changes as a formal amendment and provide sufficient time to respond to that amendment IAW FAR 15.410.
>
> We are confused by the most recent amendment which implies that the Government is changing its requirements for US Made products. This change would represent a significant change, requiring us to reevaluate the products which we have proposed. Should the Government make such a change, please provide sufficient time IAW FAR 15.410.
>
> When these issues are resolved, we will promptly respond to the remaining clarification questions. Please suspend immediately the conduct of this solicitation until these matters are resolved . . . .

Protest File, Exhibit 2.

9. Only through the agency protest, as the protester's referenced attached specific examples, did the protester provide "responses" to eight of the forty-four written discussion questions. Two responses relate to the technical category of questions, six to the cost category of questions. See Findings 11-12. The protester did not submit a written response specific to any of the other thirty-six questions. Transcript at 136.

10. By letter dated August 13, to the protester, the contracting officer responded to the agency protest. Protest File, Exhibit 3. The letter provides specific determinations. Namely, the "protest based upon Amendment 7 is untimely"—any protest based upon changed requirements was known or should have been known on July 19 (the date protester picked up that amendment); ten working days hence was August 2. The response also addresses the merits of each item raised in the agency protest by the protester.

11.

[

REDACTED

]

12. The second written discussion question in the technical category, protester's response (contained in its agency protest), and the agency response to that protest are as follows:

[

REDACTED

]

Protest File, Exhibit 3 at 24-25.

13. While the actual requirements of the agency may not have changed, the agency recognized that the existing solicitation could be (and was being) interpreted in a manner inconsistent with the agency's intent. In amendment nine, issued to those in the second competitive range (not the protester) with an effective date of August 13, the agency altered the very provision addressed by the protester. Protest File, Exhibit 27 at 1032 (¶ M.3.1.6).

14. In addition to responding to the cost category of questions, the agency concluded its August 13 response to the agency protest by stating, "The Government will not remove the questions issued under written discussions dated July 19, 1993 nor relax the due date of August 3, 1993 as the deadline for submission." Moreover, "The protest is denied." Protest File, Exhibit 3 at 29.

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Second competitive range determination

15. After the date and time had elapsed for receipt of responses to the written discussion questions, the agency reviewed the initial proposals, as supplemented or not by written response. The agency did not consider the "responses" in the protester's agency protest during this process because they had been submitted by facsimile, and the original was received after the closing date had elapsed. Transcript at 132-33, 135-36. The agency made a new competitive range determination. The contracting officer "had to look to see, did [each offeror] still stand a reasonable chance for award. The offerors that responded had improved theirs significantly, so that the [protester's] relative standing, you know, was a lot further down." *Id.* at 149. The determination of relative standing was made in terms of "how close were they to having a technically acceptable proposal." *Id.* The contracting officer concluded that the protester still had much to address in many areas, while others had only minor areas to address. The protester "didn't seem to understand what we were looking for in terms of satisfying the requirements." *Id.* at 150. The contracting officer testified: "I don't know that anything would have been difficult for [the protester] to have corrected. They did not choose to submit a response. So I'm not in a position to say what they could have corrected or not." *Id.* at 151. The contracting officer noted: "I'm just saying that the other offerors had made a good faith effort of responding to the Government's questions and had satisfied a lot of those questions that had—so that their proposal was nearer to being technical[ly] acceptable at that point in time and [protester]'s had remained stagnant." *Id.* at 152.

16. Although the contracting officer testified that, at the time of second competitive range determination, the protester's proposal was capable of being made acceptable, "in comparison to the other offerors, I did not feel they had a reasonable chance (of receiving the award). Their initial submission, with everyone else's initial submission, they had approximately the same reasonable chance." Transcript at 153. Price was not a discriminating factor in the second competitive range determination. *Id.* at 158.

17. The agency placed multiple offerors, but not the protester, in the second competitive range. The contemporaneous rationale notes that the protester did not respond to the agency's written discussion questions, states that the initial proposal is not acceptable, and concludes, "Therefore, [protester] can no longer be considered." Protest File, Exhibit 26 at 1020-21. This conclusion rests, in part, on the conclusions of technical evaluation team's (TET's) revised technical evaluations (conducted taking into consideration the initial proposals and written responses, if any). The TET found the protester's proposal to be technically unacceptable, because, as originally submitted, it did not meet all mandatory requirements." *Id.* at 1022.

18. The contracting officer went through the summaries of the panels and "concluded that the offerors that had responded had improved their proposals sufficiently, that the gap had widened enough that I did not feel that [protester] had a reasonable chance for award, particularly considering the time that we had left prior to making award." Transcript at 344.

19. On August 18, the protester received from the agency a letter dated August 16. Appeal File, Exhibit 30(a)(¶ 24). After stating that the protester did not provide a response to the written discussion questions, and that the protester's initial proposal did not satisfactorily meet all of the mandatory requirements, the letter concludes, "Therefore, a determination has been made that FCC is no longer within the competitive range and cannot be considered further." Protest File, Exhibit 28.

20. Amendment nine to the solicitation, with an effective date of August 13, states that the agency

> has concluded its original determination that the (Trade Agreements Act] does not apply to this procurement was correct. Further, [the agency] has determined that offered end products must comport with the requirement that they be manufactured domestically. ... Accordingly, [the agency] will not be applying the Buy American Act differential to end products determined to be foreign made.

Protest File, Exhibit 27 at 1027. Finding 13 describes another provision of amendment nine.

The Board protest

21. On August 25, the protester filed its initial protest with the Board. The stated ground of protest reads: The agency "attempted to modify solicitation requirements without formal amendment." Protest at 2.

22. On September 1, the protester amended its protest to include additional alleged agency violations: (1) Failure to give

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protester timely and proper notice of its exclusion from the competitive range. (2) Improper exclusion from the competitive range because the agency had "admitted the validity of some of the Protester's [agency] protest issues. Those protest issues could affect ma[n]y of the Protester's responses to the [agency's] written discussions." (3) Improper exclusion from the competitive range because the agency "expected to amend the protested solicitation (thus resulting in changes to prior respons[e]s to written discussion) at the time" the [agency] excluded the protester. (4) Improper exclusion from the competitive range because the agency had failed to make a finding the protester's proposal was not capable of being made acceptable.

Discussion

In its protest filed with the Board, the protester initially raised a single ground: the agency attempted to modify the solicitation without formal amendment. Thereafter, by amendment, the protester raised additional grounds, contending that the agency had failed to provide the protester properly and timely with notice of its removal from the competitive range, and had improperly excluded the protester from the competition.

The agency maintains that the protest should be dismissed. On the merits, the agency contends that all bases of protest must be denied.

Agency motion to dismiss

The agency raises alternative grounds to dismiss the protest: the protest to the agency and ensuing protest to the Board were untimely; the protest and clarification fail to conform to the requirements of Rule 7(b)(2); and the amendment of the protest was filed without leave of the Board and impermissibly enlarges the grounds of protest.

Timeliness

Contrary to the assumptions of the agency, the timeliness of the agency protest is not relevant, and Rule 5(b)(3)(i), not 5(b)(3)(ii), is here applicable.

The allegation in the initial protest that the agency was improperly altering its requirements without a written amendment to the solicitation focuses on language in amendment eight which explicitly left unresolved the applicability of Buy American Act, Trade Agreement Act, and Small Business Act provisions and on eight written discussion questions. Amendment eight was issued fewer than ten days before the protester submitted its agency protest and before the agency requested a second round of proposals. The protester filed its protest with the Board within ten days of the agency denial. Thus, even under the agency's theory, that aspect of the initial protest was timely filed. Rule 5(b)(3).

The other aspect of the initial protest focuses upon the written discussion questions. Rule 5(b)(3)(i) provides that alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested no later than the next closing time for receipt of proposals following the incorporation. The questions were part of the discussion process; under regulation, this process did not request a modification to the initial proposals. FAR, Part 15, defines the term "modification" to mean a "modification of a proposal, including a final modification in response to the contracting officer's request for 'best and final' offers. *The term does not include normal revisions of offers made during the conduct of negotiations by offerors selected for discussions.*" 48 CFR 15.412 (1992) (emphasis added). At the time the protest was filed with the Board, the closing time for receipt of proposals had not yet passed—best and final offers were still to be submitted and ten days had not elapsed from the agency denial. Hence, the protest was filed timely with the Board, regardless of the timeliness of the underlying protest to the agency.

Alternatively, the concerns of the protester revealed in the eight questions could all have been raised (whether or not ultimately resolved) during the discussion process. To start the protest clock with the receipt of written discussion questions, as urged by the agency, would encourage protests while greatly limiting the scope and benefits of, and the possibility of resolving matters through, the discussion process. Such a position is inconsistent with the regulatory preference that matters be raised with an agency before being protested at this Board. 48 CFR 33.102(c) (1992) ("An interested party wishing to protest—(1) Is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO or the GSBCA.").

Rule 7(b)(2)(v)

The agency maintains that the initial protest must be dismissed for failure to comply with Rule 7(b)(2)(v) which requires a "simple, concise, and direct statement of the grounds for protest, including citations to provisions of statute, regulation, or the dele-

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gation of procurement authority that the protester alleges were violated." The protest incorporates by reference the underlying agency protest which notes that the agency had yet to determine applicable provisions of the solicitation and expressly references FAR 15.410 in urging the contracting officer to provide sufficient time to respond to solicitation amendments. Even if the protest could have provided more detail as to the underlying legal violations, the specific factual problems and general legal violations were sufficiently explained so that the contracting officer could respond to the agency protest. The protester complied with Rule 7(b)(2)(v).

Amended protest

The protester filed with the Board the amended protest within ten days of learning of its exclusion from the competitive range. The grounds of protest raised serve as timely filed, independent bases of protest which could have been docketed as a separate protest. No party suggested that consolidating the matters with the initial protest would be inappropriate. There exists no basis to dismiss the timely raised new issues.

Failure to issue written amendment

The protester maintains that the agency improperly attempted to modify the solicitation without a formal amendment. That is, the protester alleges that the agency sought responses to written discussion questions before it had finalized terms of the solicitation relating to product eligibility and evaluation preferences, and before it had eliminated an ambiguity in the stated requirements. The protester contends that the agency acted improperly by proceeding with the discussion process without amending the solicitation so as to accurately set forth true requirements.

The contracting officer, not an offeror or protester, is charged with controlling discussions. 48 CFR 15.610 (1992). Filing a protest with the agency is not to be equated with the suspension of the procurement process. 48 CFR 33.103 (1992). By not formally participating in the discussion process, and by filing an agency protest instead, the protester limited the benefits it (and the agency) could gain through discussions. However, as explained below, the agency had yet to finalize solicitation provisions which substantively could affect what would be offered and the ultimate responses to many of the questions. In light of the recognized need to amend the solicitation, the agency has not demonstrated the reasonableness of rigidly proceeding with discussions and requiring the protester to finalize technical and cost aspects of a proposal when the underlying items to be offered could change with future amendments to the solicitation.

Notice of the exclusion from the competitive range

The protester's allegation that the agency failed to provide the protester with timely and proper notice that it had been excluded from the competitive range rests on a sentence in the letter addressed to the protester: "Therefore, a determination has been made that FCC is no longer within the competitive range and cannot be considered further." Finding 19. Indeed, protester is not FCC. However, the protester learned of its exclusion from the competitive range and amended its protest within ten days of receiving the letter referencing FCC. The protester suffered no prejudice. To pursue the allegation regarding notification under these circumstances is frivolous.

Exclusion from the competitive range

The protester asserts that it was improperly excluded from the second competitive range.

Having concluded that the protester's initial proposal could be made acceptable without a complete rewrite, the agency included the protester in the initial competitive range. Finding 2. At the time of the second competitive range determination, the agency concluded that the unamended initial proposal was unacceptable, and therefore, excluded the protester from the competitive range.

This determination was made, despite the protester's agency protest and the agency's determinations and conclusions revealed in amendments eight and nine to the solicitation and its response to the agency protest. Amendment eight explicitly recognized that the terms of the solicitation and, hence, the underlying competition, remained incomplete. Finding 7. The agency had yet to make determinations regarding evaluation preferences and restrictions on the eligibility of products. Contending that the resolution of these matters could affect its determination of the products to be offered, the protester raised this as a basis in support of delaying responses to the written discussion questions in its agency protest. Finding 8.

In its agency protest, the protester expressed concern regarding the agency's inter-

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pretation of paragraph M.3.1.6 and contended that the related written discussion question revealed changed agency requirements. Finding 12. While the actual requirement of the agency may well have remained unchanged, both the agency's response to the protest question, Finding 12, and the subsequent amendment to the solicitation, Finding 13, reflect the agency's belief that the protester's interpretation of the provision was reasonable. In short, the solicitation language at the time responses to written discussion questions were due did not accurately reflect the requirements of the agency.

The agency's actions, particularly as reflected in amendments eight and nine, demonstrate that the agency was proceeding with discussions, evaluations, and competitive range determinations while the solicitation failed to reflect its true requirements. Moreover, while so proceeding, the agency was aware that the protester was contending that its ultimate response to the solicitation would be dependent on the agency's answers to unresolved and ambiguous matters. To preclude an offeror from submitting a best and final offer, without giving that offeror the opportunity to be responsive to finalized terms of a solicitation, is inconsistent with requirements that the agency obtain competition.

With the information in the agency protest and the knowledge that the solicitation was not finalized in fundamental aspects (relating to evaluation preferences and eligibility of products, and to a provision acknowledged by the agency to be ambiguous), the contracting officer's determination that the protester lacked a reasonable chance of being selected for contract award is unwarranted. 48 CFR 15.609(b)(1992).

Decision

The Board **GRANTS** the protest. The previously entered order suspending the agency's applicable procurement authority lapses by its terms. The Board revises the procurement authority of the agency to require the agency to place the protester in the competitive range and to conduct discussions and proceed as permitted by statute and regulation. 40 U.S.C. § 759(f)(5)(B) (1988).

[¶ 26,557] HSQ Technology v. National Aeronautics and Space Administration

GSBCA No. 12543-P, October 19, 1993. Solicitation No. 1-121-5690.0665.

Protests, GSBCA—Interested Party—Direct Economic Interest.—A protest against an award under a request for proposals for hardware and software to upgrade a utility control system at a research center was dismissed because the protester's proposal did not meet the solicitation's mandatory requirements, and thus the protester was not an interested party with an economic interest in the contract award. The protester did not show that its proposal fulfilled the government's requirements for interfaces with other control system manufacturers or the requirements of the statement of work. Although the protester indicated that its proposed system would have fulfilled the government's needs, it was the government's exclusive right to determine its needs and to set forth the requirements for meeting its needs. Moreover, the protester would not have amended its proposal to fulfill the government's requirements even if the government conducted discussions.

For the protester: Canterbury, Stuber, Pratt, Elder & Gooch, Dallas, Texas, by Donald O. Pratt and Paul H. Sanderford. For the government: Sumara M. Thompson-King, Office of the General Counsel, National Aeronautics and Space Administration, Washington, D.C., and Jeremy Becker-Welts, Office of the Chief Counsel, National Aeronautics and Space Administration, Hampton, Virginia.

Before DEGRAFF, DEVINE, and BORWICK, Administrative Judges.

DEGRAFF, Administrative Judge: On May 21, 1993, the National Aeronautics and Space Administration (NASA) issued solicitation 1-121-5690.0665, which requests proposals to supply the hardware and software necessary to upgrade the utility control system (UCS) at the Langley Research Center in Hampton, Virginia. Protest File, Volume I, Exhibit A. The UCS monitors and controls the heating, ventilating, and air conditioning systems for nineteen major buildings at the research center. Transcript at 230.

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NASA received proposals from three vendors in response to the solicitation. Protester, HSQ Technology, Inc. (HSQ), offered the lowest price of $336,342.00. Protest File, Volume IV. The awardee, Dorsett's, Inc. (Dorsett's), offered a price of $461,069.33. Protest File, Volume II, Exhibit B. The third offeror submitted two proposals, priced at $496,545.00 and $487,545.00. Protest File, Volume II, Exhibit A-4.

HSQ filed this protest when it learned that NASA intended to award the UCS contract to Dorsett's. In its third amended complaint, HSQ alleges that 1) NASA should have performed a technical/cost trade-off analysis; 2) NASA's technical evaluator was not sufficiently experienced to evaluate HSQ's proposal properly; 3) NASA should have conducted discussions with offerors; 4) NASA provided Dorsett's with an unfair competitive advantage in both technical and cost areas; and 5) NASA did not properly conduct an analysis of Dorsett's price and so could not determine which proposal was most advantageous to the Government.

HSQ was not eligible for contract award, because HSQ did not propose to fulfill NASA's requirements. Instead, HSQ proposed to supply a system that failed to meet several mandatory requirements of NASA's statement of work. For this reason, HSQ is not entitled to pursue this protest and the protest is dismissed.

Findings of Fact

Developing The Solicitation

NASA's Technical Project Engineer (TPE) was responsible for preparing the statement of work for this solicitation. Transcript at 14. He began by collecting several statements of work from contracts entered into by other Government facilities for UCS upgrades and replacements, and he used these to prepare a draft statement of work for this procurement. The TPE provided this draft to the UCS users in order to obtain their ideas. *Id.* at 236-38.

The TPE prepared several drafts of the statement of work, obtaining input from his supervisor, an engineering contract specialist, an individual from another NASA facility, the contract specialist, and the contracting officer. Transcript at 236-38. HSQ's president testified that he recognized the statement of work as having been issued by the Army Corps of Engineers ten years ago. It is certainly possible that the Corps' statement of work resembles the statement of work prepared by the TPE, given that the TPE based his initial draft upon other Government contracts. *Id.* at 298, 307.

The contract specialist and the contracting officer reviewed the statement of work in order to ensure that competition for the procurement would not be limited and that the solicitation contained no restrictive requirements. In keeping with this goal, NASA decided to permit offerors to choose among upgrading the UCS, replacing the UCS, or partially replacing the UCS. Transcript at 96-97, 355. Because the statement of work had been prepared by the engineering division which, in the contracting officer's experience, is very adept at preparing detailed specifications, the contracting officer considered whether to issue the solicitation as an invitation for bids or as a request for proposals. The contracting officer decided to issue a request for proposals because he and the contract specialist anticipated having to negotiate software licensing requirements. *Id.* at 97, 200, 355.

After the contracting officer decided to issue a request for proposals, he had to decide which contract clauses to include in the solicitation. He discussed the possibilities with the contract specialist and they determined that, because the requirements set forth in the statement of work were very clear, a technical evaluator would simply have to compare those requirements with the contents of offerors' proposals and determine whether the requirements were met. In other words, a technical evaluator would be required to make a comparison, rather than exercise any judgment as to relative merits of proposals. Transcript at 90, 356-57.

Contents Of The Solicitation

As explained above, the contracting officer and the contract specialist believed that the requirements set forth in the statement of work were very clear. As a result, they informed offerors that NASA would evaluate proposals by using the "Simplified Evaluation Method," and directed offerors to prepare their proposals accordingly. Sections L and M of Part IV of the solicitation contain the following provisions, which explain the "Simplified Evaluation Method."

SECTION L—INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS

* * * *

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L.13 CONTRACT AWARD (FAR 52.215-16) (JUL 1990)—ALTERNATE III (AUG 1991)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this solicitation, considered.

(b) The Government may (1) reject any or all offers if such action is in the public interest, (2) accept other than the lowest offer, and (3) waive informalities and minor irregularities in offers received.

(c) The Government intends to award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary.

* * * *

L.30 PROPOSAL PREPARATION INSTRUCTIONS—SIMPLIFIED EVALUATION METHOD

In order to facilitate proposal evaluations, your proposal should include adequate details to verify that *all* requirements as defined in the RFP's specifications/Statement of Work are met. Your proposal shall include detailed information, including descriptive product literature as applicable, sufficient to unequivocally confirm that *each requirement* of the specifications/Statement of Work is completely met.

Protest File, Volume I, Exhibit A.

Section M of the solicitation reads, in its entirety:

SECTION M—EVALUATION FACTORS FOR AWARD

M.1 EVALUATION AND SELECTION—SIMPLIFIED EVALUATION METHOD

A. All proposals will be evaluated for compliance with the specifications set forth in the Statement of Work. Proposals which do not clearly meet each requirement of the specifications will be rejected. Accordingly, proposals should include adequate details to verify that all specifications are met. Proposals which do not include fixed prices cannot be considered and will be rejected.

B. The responsible offeror proposing acceptable item(s) at the lowest total aggregate price will be selected for negotiation leading to contract award.

Protest File, Volume I, Exhibit A.

The solicitation's statement of work consists of sixty-nine pages of detailed requirements for the components of the utility control system. Only a few of these requirements are important to the resolution of this protest.

In section 1.0 of the statement of work, NASA defines the scope of work as "providing all labor, parts, and materials to upgrade the Langley Research Center Utility Control System (UCS) to meet the performance and design requirements specified herein and to be fully functional." Section 1.0 also provides that all of the existing UCS's capabilities had to be preserved or improved as delineated in the statement of work. In section 1.4, NASA explains that an offeror could propose to upgrade the existing UCS, to replace the existing UCS, or to replace part of the existing UCS. Protest File, Volume I, Exhibit A.

Section 4 of the statement of work is titled, "System Description." Section 4.9 provides that the system "shall have full, transparent interfaces with at least two direct digital control system manufacturers. The interfaces shall consist of common compatible protocol and exchanged [sic] with common engineering units easily available to the operators." Protest File, Volume I, Exhibit A.

Section 11 of the statement of work is titled, "Field Equipment." Section 11.5.5.3 provides that each latching relay's "[o]perating time shall be 20 milliseconds or less, with release time of 10 milliseconds or less." Protest File, Volume I, Exhibit A.

Section 12 of the statement of work is titled, "System Equipment." Sections 12.7.1, 12.7.2, and 12.7.3 address disk storage systems. These three sections require a primary rigid disk system and an identical backup rigid disk system, each "having a maximum average seek time of 17 milliseconds," and consisting of one disk drive. Section 12.9 requires two operator's terminals, one data collection terminal, one system terminal, and one PC operator's terminal. Protest File, Volume I, Exhibit A.

Also contained in section 12 of the statement of work is section 12.11, which requires a magnetic tape system that exhibits the following characteristics:

Provide high performance $1/2$-inch streaming tape drive backup. The tape

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drive shall be equipped with an autoload feature that accommodates any standard size tape reel from 6 to 10-1/2 inches. The tape drive shall operate with both 6250 cpi (characters per inch) and 1600 cpi industry standard densities. Operating with 6250 cpi density, the tape unit shall be rated for a tape drive transfer rate of 751 Kilobytes. Internal buffer size shall be minimum of 512 kilobytes. Read/write speed shall be 125 ips. Minimum data capacity shall be 140 megabytes per 2,400 foot reel at 6250 cpi.

Sections 13.1 and 13.15 of the statement of work contain requirements identical to the requirements contained in sections 4.9 and 12.9 of the statement of work.

Section 14 of the statement of work requires certain command software for the UCS. Section 14.1.4.1 requires the operator's console commands to provide the means for entry of commands and for retrieving UCS information, and to perform certain tasks. Protest File, Volume I, Exhibit A.

Technical Evaluation

The TPE reviewed each proposal in order to determine whether it unequivocally confirmed that each requirement of the statement of work was met. Transcript at 53-54. The TPE determined that the Dorsett's proposal met the requirements of the statement of work, and that the third offeror's proposals did not. Protest File, Volume I, Exhibit B.

The TPE decided that HSQ's proposal did not meet the requirements of sections 4.9 or 13.1, because the proposal does not state that HSQ's system would have the specified interfaces with at least two direct digital control system manufacturers. Protest File, Volume I, Exhibit B. HSQ's proposal states, in response to section 4.9, that HSQ intended to supply a particular graphical user interface that was rapidly becoming a standard interface for computers manufactured by DEC, Sun, Hewlett-Packard, and IBM. The "Executive Summary" section of HSQ's proposal states that HSQ was proposing an "open systems environment" that was flexible enough to permit NASA to integrate other computer applications and to expand the system. *Id.*, Volume III. In its responses to NASA's discovery, HSQ stated that its proposal was not required to name any system manufacturer with which HSQ's system would interface. HSQ also stated that it has a transparent interface to Allen-Bradley PLCs, Modicon PLCs, and ASI Controls. Respondent's Supplemental Protest File, Exhibit 1.

The TPE decided that HSQ's proposal did not meet the requirements of section 11.5.5.3, because the proposal states that HSQ will provide latching relays with operating and release times of 25 milliseconds. Protest File, Volume I, Exhibit B. The statement of work required an operating time of 20 milliseconds or less and a release time of 10 milliseconds or less. Protest File, Volume I, Exhibit A. HSQ stated that this requirement cannot be met. Transcript at 306-07.

The TPE decided that HSQ's proposal did not meet the requirements of sections 12.7.1, 12.7.2, and 12.7.3, because the proposal states that HSQ will provide a disk system with eight disk drives and a maximum average seek time of 19 milliseconds. Protest File, Volume I, Exhibit B. The statement of work required a disk system with two disk drives (one for the primary system and one for the backup system) and a maximum average seek time of 17 milliseconds. *Id.*, Volume I, Exhibit A.

The TPE determined that HSQ's proposal did not meet the requirements of sections 12.9 or 13.15, because the proposal states that HSQ will provide four terminals instead of the five terminals required by the statement of work. Protest File, Volume I, Exhibits A and B. In HSQ's view, it was not necessary to supply the dedicated system terminal required by sections 12.9 and 13.15. Transcript at 158. There are two primary users of the system, and three more individuals support the users. The users required the fifth terminal because there may be times when other terminals are not available. Transcript at 230, 250-51; Respondent's Supplemental Protest File, Exhibit 4, page 2 of 7.

The TPE determined that HSQ's proposal did not meet the requirements of section 12.11, because the proposal states that HSQ will provide a cartridge type tape unit instead of the specified reel-to-reel type unit, and that HSQ's unit will not meet either the specified densities or transfer rates. Protest File, Volume I, Exhibit B. HSQ agrees. Transcript at 160, 182. HSQ also described the equipment specified by NASA as a "very expensive piece of hardware." *Id.* at 159.

Finally, the TPE determined that HSQ's proposal did not meet the requirements of section 14.1.4.1, because HSQ's proposal does not contain any response to that section. Protest File, Volume I, Exhibits A and B. The TPE is correct. *Id.*, Volume III. The

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TPE testified that HSQ supplied several manuals with its proposal and that he reviewed these manuals and could not determine that they addressed section 14.1.4.1. Transcript at 71-73. HSQ's expert witness testified that he assumed that one of the manuals addressed the section. He based his opinion upon a review of the title pages of the manuals and not upon a review of the manuals themselves. *Id.* at 161-62, 183.

HSQ acknowledges that its proposal was not "fully responsive" and "did not unequivocally meet every requirement of the (statement of work]." HSQ's Post-Hearing Brief at 29-30. In its proposal, HSQ took exception to several items contained in the statement of work, and proposed several items which were different from the items required by NASA. Transcript at 300; Respondent's Supplemental Protest File, Exhibit 1. HSQ believed that the statement of work had been prepared by the Corps of Engineers and had not been edited by NASA for use in this procurement. HSQ decided, therefore, that several of the statement of work's requirements were "not part of this particular contract," were not "required for the project," and had "no application in this particular project." Transcript at 306-08. Before submitting its proposal, HSQ did not request or recommend that NASA alter any of the requirements of the statement of work and did not complain to NASA that any of the requirements were unnecessary, inappropriate, or impossible to meet. *Id.* at 360.

There is no evidence to suggest that HSQ would have ever been willing or able to submit a proposal which met all of NASA's requirements. No such evidence was elicited by HSQ, which did not call anyone associated with HSQ to testify during its case in chief. NASA called HSQ's president to testify; he stated that he believed that HSQ met the "intent" of the specifications, that HSQ was offering NASA a "superior" system, and that HSQ was offering a system that would have operated "satisfactorily." Transcript at 310-12. Although HSQ's president testified that he wished NASA had conducted discussions before award, he did not state that HSQ would have altered its proposal in order to meet NASA's requirements. *Id.* at 301-02, 309. Instead, he testified that, if HSQ had been able to discuss its proposal with NASA, HSQ would have taken the opportunity to clarify for NASA the "changes that we recommended in the specification." *Id.* at 331.

Selection of Awardee

The TPE prepared a memorandum for the contract specialist, which contained the TPE's evaluation of the offeror's technical proposals. Protest File, Volume I, Exhibit B. The contract specialist and the contracting officer recommended to counsel's office that award be made to Dorsett's because, although HSQ proposed the lowest price, HSQ's proposal took exception to some of the statement of work's requirements, and Dorsett's proposed the second-lowest price. Transcript at 86-89, 209-10; Protest File, Volume I, Exhibit C.

The contracting officer knew that he could conduct discussions with offerors, if discussions were necessary. He decided that discussions were not necessary, for the following reasons. Sections L and M of the solicitation explained that offerors were required to confirm unequivocally that they would meet the requirements of the statement of work. In addition, Sections L and M explained that a proposal which failed to contain such a confirmation would be rejected. The contracting officer knew that he had one proposal which took no exceptions to the statement of work's requirements, and two proposals which were deficient. If discussions had been held, the contracting officer would have been obligated to conduct discussions with all offerors, including Dorsett's. In the contracting officer's view, such "discussions" would have been discussions in name only because there would have been nothing to discuss with Dorsett's, given that it had supplied a technically compliant proposal. He decided that, given the nature of the deficiencies contained in the proposals of HSQ and the third offeror, any "discussions" with them would have resulted in his identifying weaknesses in their proposals and then providing solutions to cure those weaknesses. The contracting officer knew that he could waive "minor informalities" in a proposal. But, in his opinion, the deficiencies contained in HSQ's proposal did not amount to minor informalities. Instead, portions of HSQ's proposal simply failed to meet the requirements of the statement of work. Transcript at 118-25, 132-37, 364-65.

The contract was awarded to Dorsett's on August 6, 1993. NASA notified HSQ of the award that same date, and this protest followed. Protest File, Volume I, Exhibits E and G.

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Discussion

Pursuant to 40 U.S.C. § 759 (1988), the Board possesses jurisdiction to consider a protest filed by an interested party in connection with a procurement. The term "interested party" is defined at 40 U.S.C. § 759(f)(9)(B) as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." Because an agency cannot award a contract to an offeror who does not propose to fulfill mandatory requirements of a solicitation, such an offeror lacks an economic interest in the award of a contract and is not an interested party to pursue a protest. *Integrated Systems Analysts, Inc.*, GSBCA 10750-P, 91-1 BCA ¶ 23,383, 1990 BPD ¶ 298.

It is clear that, in its proposal, HSQ did not intend to provide latching relays with the operating and release times required by NASA, a disk system with the required number of disk drives or the required seek time, the required number of terminals, or a reel-to-reel tape unit with the required densities and transfer rates. HSQ believed that it was impossible to meet the latching relay requirement. In addition, HSQ did not establish that its proposal fulfills NASA's requirements for interfaces with other direct digital control system manufacturers, or whether it fulfills the requirements of section 14.1.4.1 of the statement of work. Although HSQ believes that its proposed system would have operated well and would have fulfilled NASA's needs, it was NASA's exclusive right to determine its needs and to set forth the requirements for meeting those needs. There is no doubt that the system proposed by HSQ does not fulfill all of NASA's requirements.

NASA asserts that, when it states in a solicitation that it intends to award without discussions, an offeror who submits an imperfect proposal cannot be in line for award and so is not entitled to pursue a protest of NASA's award decision. According to NASA, the deficiencies in HSQ's proposal demonstrate that HSQ was not eligible for award and so, NASA maintains, we may not give any further consideration to this protest because HSQ is not an interested party to pursue it. NASA's Post-Hearing Brief at 34.

In order to resolve this protest, it is not necessary for us to decide whether NASA's view is correct. Here, in addition to the fact that HSQ's proposal was deficient, it became apparent at the hearing that HSQ would not have amended its proposal in order to fulfill NASA's requirements, even if NASA had conducted discussions. HSQ believes that not all of NASA's stated requirements are necessary or capable of being met and if NASA had conducted discussions, HSQ would have used that opportunity only to clarify its recommended changes to the specifications. If HSQ wished to recommend that NASA change its specifications, it should have done so before it submitted its proposal. After proposals were submitted, HSQ was eligible for award only if it was willing and able to fulfill all of NASA's mandatory requirements. HSQ has not established that, if NASA had conducted discussions, HSQ would have submitted an amended proposal which met those requirements.

HSQ is not a potential candidate for award because its proposal failed to meet several mandatory requirements contained in the statement of work. HSQ also did not establish that it was willing or able to amend its proposal in order to meet any of those requirements. Because HSQ is not a potential candidate for award, it lacks a direct economic interest in the award of the contract and it is not an interested party to maintain this protest.

Decision

The protest is **DISMISSED,** for lack of an interested party.

[¶ 26,558] Cleveland Telecommunications Corporation v. General Services Administration

GSBCA No. 12540, November 15, 1993. Contract No. GS05P92GAC0085.

Contract Disputes, Contracting Officer's Decision—Government Claims—Deduction Upheld.—Although there were no contracting officer decisions on deductions made by the government under a janitorial services contract for six months, a letter from the contracting officer to the contractor the seventh month stating that the deduction would be upheld constituted a decision on that claim. Although there were no decisions on

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the first six government claims, the decision on the seventh claim gave the board jurisdiction over that claim.

Contract Disputes, Contracting Officer's Decision—Government Claims—Existence of Dispute.—Five letters sent by a contractor taking issue with an agency's proposed deductions did not constitute claims conferring jurisdiction on the board, because there was no dispute between the parties at the time the letters were sent. The letters were sent in response to the proposed deductions, and the purpose of the letters was to notify the agency that the contractor had contested the proposed deductions. None of the five letters by itself was sufficient to constitute a claim, and viewing the letters collectively, as the contractor asked the board to do, did not cure their deficiencies.

For the protester: Arter & Hadden, Cleveland, Ohio, by Carl E. Anderson. For the government: Julia C. Allen, Assistant Regional Counsel, General Services Administration, Chicago, Illinois.

Before DEGRAFF, DANIELS, and GOODMAN, Administrative Judges.

DEGRAFF, Administrative Judge: Cleveland Telecommunications Corporation (CTC) contracted with the General Services Administration (GSA) to provide a variety of services at a federal building. During the course of the contract, GSA made several deductions from CTC's monthly payments. In this appeal, CTC complains that the deductions were improper, that GSA is discriminating against CTC, and that GSA improperly suggested that the contract should be terminated. GSA filed a motion to dismiss this appeal for lack of jurisdiction. As explained below, we grant GSA's motion in part.

Findings of Fact

On December 18, 1992, GSA awarded contract GS05P92GAC0085 to CTC for janitorial and related services at the federal building in Cleveland, Ohio. The term of the contract was one year, beginning January 1, 1993, with two one-year options. In exchange for its performance, CTC was to be paid a fixed price of $19,544.53 each month. Appeal File, Exhibit 1.

GSA was supposed to inspect CTC's work and, if GSA determined that CTC's performance was unsatisfactory, GSA was entitled to make deductions to CTC's monthly payments. The contract contains clause 552.232-78, which establishes a procedure for making such deductions: No later than the tenth work day of the month following the performance period for which GSA wished to make a deduction, a GSA representative was to send CTC a written notice of the type and amount of deduction that GSA proposed to make. CTC was permitted to respond to the notice within ten work days after receipt. CTC's response was to be provided to the contracting officer and was to contain "specific reasons why any or all of the proposed deductions are not justified." No response from CTC within the ten-day period "will be interpreted to mean that the Contractor accepts the deductions proposed." If the contracting officer determined that any or all of the proposed deductions were warranted, the contracting officer was to notify CTC and adjust CTC's monthly payment accordingly. Appeal File, Exhibit 1 at I-E-2, I-G-1, I-G-2. GSA made deductions from CTC's monthly contract price, as described below.

Deductions for February 1993: On March 8, 1993, GSA sent CTC a notice proposing to deduct $327.10 from the monthly payment due for February 1993.[1] Appeal File, Exhibit 4. There is nothing in the appeal file to establish when this notice was received by CTC, although CTC does not contest that it received the notice. There is no evidence that CTC responded to the notice. GSA deducted $327.10 from the monthly payment due for February 1993. *Id.*, Exhibit 5.

Deductions for March 1993: On April 5, 1993, GSA sent CTC a notice proposing to deduct $375.92 from the monthly payment due for March 1993. Appeal File, Exhibit 6. This notice was received by CTC on April 7, 1993, and there is no evidence that CTC responded to the notice. *Id.*, Exhibit 32. GSA

[1] This notice, like the notices discussed in the following paragraphs, was addressed to CTC Technologies, Inc. The party with whom GSA has a contract is CTC, not CTC Technologies, Inc. The addresses for each company are the same and it appears that there are common personnel. Neither party has suggested that the jurisdictional issue currently presented is affected by the fact that the letters were addressed to CTC Technologies, Inc.

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deducted $375.92 from the monthly payment due for March 1993. *Id.*, Exhibit 7.

Deductions for April 1993: On May 7, 1993, GSA sent CTC a notice proposing to deduct $654.38 from the monthly payment due for April 1993, due to deficiencies in general office cleaning, court space cleaning, and restroom cleaning. Appeal File, Exhibit 8. This notice was received by CTC on May 8, 1993. *Id.*, Exhibit 32. In a July 26, 1993 letter to the contracting officer, CTC asserts that it contested this deduction within the ten-day period permitted by the contract, in letters dated May 18 and 21, 1993. *Id.*, Exhibit 15. Although the May 18, 1993 letter does not refer to GSA's May 7, 1993 notice, it does mention cleaning restroom fixtures. Instead of contesting the amount deducted, CTC acknowledged that there was a "problem" and stated that it intended to remedy the problem by assigning additional personnel and by directing its staff to "focus on the problem." *Id.* In its May 21, 1993 letter, which is addressed to the contracting officer's representative with a copy to the contracting officer, CTC explains that the "problem" with the restroom fixtures was due to metal corrosion and not due to improper cleaning. CTC requested in the May 21 letter that it be credited for all deductions that had been made as a result of this item. CTC did not contest the deductions for general office cleaning and court space cleaning. *Id.*, Exhibit 18. Sometime after June 3, 1993, GSA deducted $654.38 from the monthly payment due for April 1993. *Id.*, Exhibit 9.

Deductions for May 1993: On June 3, 1993, GSA sent CTC a notice proposing to deduct $327.05 from the monthly payment due for May 1993, due to deficiencies in general office cleaning, court space cleaning, and restroom cleaning. Appeal File, Exhibit 10. This notice was received by CTC on June 7, 1993. *Id.*, Exhibit 32. On June 23, 1993, CTC sent a letter to the contracting officer which discusses the restroom fixture issue and notes that CTC expected that the remaining deficiencies would be corrected as a result of CTC's new quality control program.[2] CTC's letter requests a refund of amounts which had been deducted. *Id.*, Exhibit 18. Sometime after July 8, 1993, GSA deducted $327.05 from the monthly payment due for May 1993. *Id.*, Exhibit 11.

Deductions for June 1993: On July 6, 1993, GSA sent CTC a notice proposing to deduct $359.20 from the monthly payment due for June 1993, due to deficiencies in general office cleaning, court space cleaning, restroom cleaning, carpet spotting, and elevator cleaning. Appeal File, Exhibit 12. This notice was received by CTC on July 8, 1993. *Id.*, Exhibit 32. On July 22, 1993, CTC responded to GSA's July 6, 1993 notice by sending a letter to the contracting officer's representative with a copy to the contracting officer. CTC stated it was "in total disagreement with the deductions" proposed in GSA's notice and requested payment for all past deductions. *Id.*, Exhibit 16 (first letter).[3] Sometime after July 22, 1993, GSA deducted $359.20 from the monthly payment due for June 1993. *Id.*, Exhibit 13.

Deductions for July 1993: On August 12, 1993, GSA sent CTC a notice proposing to deduct $1,891.93 from the monthly payment due for July 1993, due to eight deficiencies, including unsatisfactory restroom cleaning. There is a memorandum to the file that states that this notice was hand delivered to CTC's site supervisor on August 13, 1993. Appeal File, Exhibit 14. It was also received by CTC at its offices on August 17, 1993. *Id.*, Exhibit 32. On August 19, 1993, CTC sent a response to the notice to the contracting officer, suggesting that no deduction should be made because the August 12, 1993 notice was not timely. CTC's response also discusses the restroom fixture issue and asserts that the cause of the problem is not deficient cleaning. CTC did not contest the deductions for the other seven deficiencies. *Id.*, Exhibit 33. On September 30, 1993, the contracting officer informed CTC that, in her view, the notice was timely and the proposed deduction was being "upheld." *Id.*, Exhibit 34. GSA states that it has made this deduction. Respondent's Supplemental Motion to Dismiss at 1 n.1.

CTC filed its notice of appeal with the Board on August 17, 1993. The notice contains seven numbered paragraphs which CTC has labeled "Issues." In Issues One, Two, and Seven, CTC alleges that GSA assessed unwarranted deductions, failed to no-

[2] This letter was sent on CTC Technologies, Inc. letterhead. As we state in the preceding footnote, neither party has suggested that this affects the resolution of the motion to dismiss.

[3] Exhibit 16 contains two letters dated July 22, 1993. When referring to this exhibit, we will identify which of the two letters supports our factual finding. Both letters are written on CTC Technologies, Inc. letterhead.

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tify CTC of deductions within the time permitted by the contract, failed to respond to CTC's letters protesting the deductions, and conducted inspections that were inconsistent with the contract's requirements. In Issues Three, Four, and Six, CTC alleges that GSA is discriminating against CTC due to CTC's business practices and due to CTC's status as an 8(a) contractor. In Issue Five, CTC alleges that GSA improperly considered terminating CTC's right to perform this contract.

GSA's contracting officer states that she has never received a claim from CTC and has never issued a decision upon any matter raised in CTC's notice of appeal to the Board. Appeal File, Exhibit 20. The contract defines a "claim" as a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a certain sum, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." The contract provides that a demand for payment which is not in dispute when it is submitted to the contracting officer does not amount to a claim. The contract also explains that a claim by the Government against the contractor "shall be subject to a written decision by the Contracting Officer." *Id.*, Exhibit 1 at II-1-23.

GSA filed a motion to dismiss this appeal for lack of jurisdiction. GSA asserts that CTC never submitted a claim to the contracting officer and that the contracting officer never issued a decision concerning the issues raised in CTC's notice of appeal. GSA also contends that the deductions do not constitute government claims and have not been the subject of a decision by the contracting officer because the contracting officer never sent CTC a written notice which described GSA's claim, referred to pertinent contract terms, contained a statement of facts and a statement of the decision, and informed CTC of its appeal rights. GSA alleges that the contracting officer never issued a written decision addressing any of the deductions that it made to CTC's monthly payments, even though contract clause 552-232-78 provides a deduction could be made after the contracting officer made a "final decision" concerning the deduction and provided a notice to CTC.

In response to GSA's motion, CTC identifies five letters from CTC to GSA which, according to CTC, constitute a claim. Four of the letters—dated May 21, June 23, July 22, and July 26, 1993—are discussed above. The fifth letter is also dated July 22, 1993. The letter, which was sent to the contracting officer, sets out a number of questions that suggest that CTC had several complaints about GSA. *Id.*, Exhibit 16 (second letter). According to CTC, these five letters establish "CTC's intent to obtain relief from the proposed deductions and to have the contracting officer render a final decision on the matter." Appellant's Response at 6. CTC asserts that the amounts deducted were in dispute and that its letters requested a sum certain, explained the basis for CTC's request, and made it clear that CTC wanted a decision from the contracting officer. CTC contends that the lack of a written response from the contracting officer constitutes a deemed denial of CTC's claim. CTC does not contend that the contracting officer ever issued a written decision concerning a government claim.

Discussion

In their briefs, the parties recognize that our jurisdiction is defined by the Contract Disputes Act, 41 U.S.C. §§601-613 (1988). The statute provides us with jurisdiction to entertain this appeal provided that one of the parties has asserted a claim and provided that the contracting officer has issued a decision upon that claim. 41 U.S.C. §607. A contracting officer's decision upon a contractor's claim can be either written or, in some circumstances, implied. 41 U.S.C. §605(a), (c)(5). A contracting officer's decision upon a Government claim must be written. 41 U.S.C. §605(a).

In order to analyze GSA's motion to dismiss, we must determine what issues CTC wishes to present to us for decision, and whether these issues have been the subject of a claim and a contracting officer's decision. The issues stated in CTC's notice of appeal fall into three categories: 1. Deduction issue: CTC alleges that GSA assessed unwarranted deductions, failed to notify CTC of deductions within the time permitted by the contract, failed to respond to CTC's letters protesting the deductions, and conducted inspections that were inconsistent with the contract's requirements. 2. Discrimination issue: CTC alleges that GSA is discriminating against CTC due to CTC's business practices and due to its status as an 8(a) contractor. 3. Termination issue: CTC alleges that GSA considered terminating CTC's right to perform this contract.

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Deduction Issue

Government Claims

Deductions to fixed price contracts constitute government claims. *Placeway Construction Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990); *Kleen Master, Inc.*, GSBCA 7657, 89-2 BCA ¶ 21,880. Therefore, we may entertain so much of this appeal as concerns deductions, if the contracting officer issued a written decision concerning these Government claims.

There is no evidence that the contracting officer issued a written decision concerning GSA's claim for deductions for February through June, 1993. Perhaps the contracting officer should have issued a written decision before GSA made its deductions. The fact is, however, that no written decision was issued, and it is this fact that determines the jurisdictional issue. In the absence of a contracting officer's written decision upon these Government claims, we lack jurisdiction.[4]

There is a letter from the contracting officer to CTC concerning the deduction for July 1993. In the letter, the contracting officer states that she has determined that the deduction will be "upheld." GSA states in its motion to dismiss that it has made the deduction. The contracting officer's letter constitutes a decision upon GSA's claim for the July 1993 deduction and it is immaterial that the letter does not notify CTC of its appeal rights. *Placeway Construction Corp.*, 902 F.2d at 907. We possess jurisdiction to entertain an appeal concerning the July 1993 deduction because the deduction constitutes a government claim and the contracting officer has issued a decision concerning that claim. GSA's motion to dismiss is denied, insofar as the deduction for July 1993 is concerned.

Contractor Claims

Even though the February through June 1993 deductions are government claims, CTC could have submitted its own claims concerning the deductions and could have filed an appeal after the contracting officer issued a decision concerning those claims. In its response to GSA's motion to dismiss, CTC contends that it did indeed submit a claim or claims to GSA.

There is no evidence that CTC ever responded to GSA's notice of proposed deductions for February and March 1993, much less any evidence that CTC ever submitted a claim to the contracting officer concerning these deductions. For this reason, we lack jurisdiction to entertain an appeal concerning the deductions for February and March 1993. GSA's motion to dismiss is granted in so far as the deductions for February and March 1993 are concerned.

We also lack jurisdiction to consider an appeal concerning the deductions for April, May, and June 1993. CTC's May 21, June 23, and July 22, 1993 letters take issue with GSA's proposed deductions for April, May, and June 1993, respectively. But, it appears that CTC's letters were sent to GSA in response to GSA's notice of proposed deductions and the purpose of the letters was to notify GSA that CTC contested the proposed deductions. There was no dispute between the parties at the time CTC sent the May 21, June 23, and July 22, 1993 letters to GSA, therefore these letters do not constitute claims and we lack jurisdiction to entertain an appeal concerning the April, May, or June 1993 deductions. GSA's motion to dismiss is granted in so far as the deductions for April, May, and June 1993 are concerned.

We reject CTC's argument that its claim consists of a combination of five letters that it sent to GSA. We discuss the May 21, June 23, and one of the July 22, 1993 letters above and explain why they do not constitute claims. The July 26, 1993 letter contains absolutely no demand or request for anything. It simply notifies GSA that, in CTC's view, CTC responded to GSA's notices of deduction within the time permitted by the contract. Although the second July 22, 1993 letter contains several complaints concerning GSA, the letter consists of a series of questions and concludes by stating that CTC intends to "file a brief with the GSA Board of Contract Appeals, the Inspector General, and the General Accounting Office . . . ." The letter does not make any demand or request for relief, and does not seek the payment of money in a sum certain or the adjustment or interpretation of contract terms. None of these five letters by itself is sufficient to

[4] CTC has not requested that we suspend proceedings until the contracting officer issues a decision upon these claims. Even if it had made such a request, we would not have suspended proceedings. Jurisdiction is determined by the facts as they exist at the time the appeal was filed and, at that time, there was no contracting officer's decision. *Keene Corp. v. United States* [38 CCF ¶ 76,523], 113 S. Ct. 2035, 2040 (1993). The Contract Disputes Act provides a narrow exception to this general rule when it permits us to stay proceedings if a contracting officer has failed to issue a written decision within the time permitted for consideration of contractor claims. 41 U.S.C. § 605(c)(5). This exception does not apply to government claims.

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constitute a claim, and viewing the letters collectively, as CTC suggests we do, does not cure their deficiencies.

Discrimination and Termination Issues

CTC never presented a claim to the contracting officer concerning either the discrimination or the termination issue.[5] We have examined the five letters that CTC identifies as containing its claim. None of those letters contains a demand for the payment of money in a certain sum, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract, concerning either the discrimination or the termination issue. Therefore, we lack jurisdiction to consider these issues. GSA's motion to dismiss is granted insofar as the discrimination and termination issues are concerned.

Decision

We possess jurisdiction to entertain an appeal from the contracting officer's decision concerning the July 1993 deduction. We lack jurisdiction to consider any of the remaining issues that CTC wishes to present in this appeal. The appeal is **DISMISSED IN PART FOR LACK OF JURISDICTION.**

[¶ 26,559] Integrated Systems Group, Inc. v. Department of Commerce

GSBCA No. 12532-C(12420-P), October 28, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Employee Wages.—Although the government agreed to an award of the costs of the protest and attorney fees, the board declined to pay a portion of the award, because the costs of corporate employees were included in the agreed award, and case law precludes an award of costs incurred by corporate employees working on a protest. The contractor was a prevailing party in a protest in which the government was found to have violated a statute, regulation, or the conditions of a delegation of procurement authority.

For the protester: Skolnick & Leishman, P.C., Derwood, Maryland, by Shelton H. Skolnick, Judy D. Leishman, and Amy M. Hall. For the government: Jerry A. Walz and Kenneth A. Lechter, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C.

Before GOODMAN, WILLIAMS, and DEGRAFF, Administrative Judges.

GOODMAN, Administrative Judge: This protest was filed by Integrated Systems Group, Inc. (ISG or protester) on May 7, 1993, alleging that respondent, the Department of Commerce (Commerce or respondent), improperly rejected ISG's bid for computer equipment to be supplied to the National Climatic Data Center, Asheville, North Carolina. After a hearing on the merits, we granted the protest in a decision dated July 16, 1993. *Integrated Systems Group, Inc. v. Department of Commerce,* GSBCA 12420-P, 93-3 BCA ¶ 26,198 1993 BPD ¶ 215 (July 16, 1993).

Under Board Rule 35[1] and 40 U.S.C. § 759(f)(5)(C)(1988), the Board may award protest costs, including reasonable attorney fees, to an "appropriate interested party" when an agency has violated a statute, regulation, or the conditions of a delegation of procurement authority. An appropriate interested party has been defined as a "prevailing party" or "one that has succeeded on any significant issue in the litigation that achieves some of the benefit it sought in bringing suit." *Bedford Computer Corp.,* GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,811, 1989 BPD ¶ 121, at 3. ISG is an appropriate interested party entitled to recover its costs pursuant to Rule 35 and 40 U.S.C. § 759(f)(5)(C) (1988).

On August 9, 1993, protester filed its motion for payment of protest costs pursuant to Rule 35 in the amount of $3,260.25. This amount represents $2,475 for outside attorney fees, $297.25 for the cost of the transcript of the hearing on the merits, $120 for a corporate employee to review the protest,

[5] In its response to GSA's motion to dismiss, CTC does not assert that it presented claims concerning these issues. Even so, we have an obligation to examine the facts in order to determine whether jurisdiction exists.

[1] 48 CFR 6101.35 (1992).

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consult with counsel, and testify at the hearing (six hours at $20 per hour), and $368 for a corporate officer to file the protest, consult with counsel, and prepare the motion for costs (4.6 hours at $80 per hour).

On October 20, 1993, protester and respondent filed a joint Request for Stipulated Judgment which reads as follows:

> The Department of Commerce ("Respondent") has agreed to pay $3,140.65 to Integrated Systems Group, Inc. ("Protester") for the Protester's protest costs in the above-captioned protest.
>
> Accordingly, both the Respondent and Protester request the Board to enter a judgment in favor of the Protester for the amount of $3,140.65.

Thus, respondent has agreed to an award of costs of $3,140.65, which is $119.60 less than originally sought by ISG. While respondent has agreed to pay this amount, the full Board decision in *Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration*, GSBCA 10000-C(9835-P), 92-3 BCA ¶ 25,118, 1992 BPD ¶ 141, precludes any award of costs incurred for corporate employees to work on a protest. *See also, Integrated Systems Group, Inc. v. Department of the Navy*, GSBCA 12236-C(12127-P), 93-2 BCA ¶ 25,718, 1993 BPD ¶ 25. We have independently examined the documentation filed by ISG in support of its motion and otherwise find its request for costs reasonable. Accordingly, we award $2,475 for outside attorney fees and $297.25 for the cost of the transcript, for a total of $2,772.25.

Decision

Protester's motion is **GRANTED IN PART.** Protester is awarded $2,772.25 to be paid, without interest, in accordance with statute, 31 U.S.C. § 1304 (1988). 40 U.S.C. § 759(f)(5)(C)(1988).

[¶ 26,560] EG&G Florida, Inc. v. National Aeronautics and Space Administration

GSBCA No. 12318-C(12204-P), November 5, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulation Agreement.—In response to a joint stipulation, a protester was awarded attorney fees and costs because the record clearly demonstrated that the protester prevailed. As a result of the protest, the proposed award to another offeror was canceled and another round of offers was received and evaluated. The government conceded that it had violated the law and that the fees and costs were compensable.

Protests, GSBCA—Costs of Bid and Proposal Preparation—Stipulation Agreement.—Proposal preparation costs were awarded in response to a stipulation because the government conceded that wasted effort was incurred by the protester and that the wasted effort was a direct result of the government's violation of the law. The government conceded that it failed to evaluate the offerors' proposals in accordance with regulations, and the record demonstrated that the protester prevailed inasmuch as the proposed award to another offeror was canceled and another round of offers was received and evaluated. The board examined the detailed expenses and found them to be both reasonable and appropriately documented.

For the protester: Wiley, Rein & Fielding, Washington, D.C., by Rand L. Allen, Paul F. Khoury, Mitchell R. Kreindler, and John F. Guyot. For the government: David P. Forbes, Sumara M. Thompson-King, and Robert M. Stephens, Office of the General Counsel, National Aeronautics and Space Administration Headquarters, Washington, D.C., and Dudley R. Cannon, Jr., and Douglas G. Hendriksen, National Aeronautics and Space Administration, Kennedy Space Center, Florida.

Before HENDLEY, DANIELS, and VERGILIO, Administrative Judges.

HENDLEY, Administrative Judge: The protester seeks to recover its costs of filing and successfully pursuing its protest before this Board. Under 40 U.S.C. § § 759(f)(5)(B), (C) (1988), when this Board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority, ... it may ... further declare an appropriate interested party to be

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entitled to the costs of—(i) filing and pursuing the protest, including reasonable attorney's fees, and (ii) bid and proposal preparation.

This statute authorizes the Board to award costs and exercise discretion to determine both if a party is "appropriate" and entitled to payment of costs from the permanent indefinite judgment fund, and if the amount requested is "reasonable."

On December 2, 1992, the Board docketed a protest filed by EG&G Florida, Inc., contending that the respondent, the National Aeronautics and Space Administration (NASA), had improperly selected Lockheed Space Operations Company, an intervenor in the protest, for award of a contract for automatic data processing services. That protest was followed by protests filed by Bamsi, Inc. on December 3 and Westinghouse KSC Company, Inc. on December 4. Each protester intervened in the other protests. The protests were consolidated for further proceedings before this Board. The respondent's delegation of procurement authority was suspended on December 10.

In our order on proceedings of December 4, we set forth a schedule for resolving the protests. However, shortly before the originally scheduled hearing date, the parties sought a postponement of the hearing and informed the Board that they were in the process of settling the cases. We rescheduled the hearing, and a settlement ensued.

On January 26, 1993, the parties filed a "joint stipulation of dismissal without prejudice" in each protest. The requested dismissals were to become dismissals "with prejudice 10 working days after debriefings following the announcement of a selection of an awardee based on the evaluation of best and final offers ('BAFOS') submitted in accordance with the revised BOC [Base Operations Contract] request for Proposals ('RFP')." Accordingly, on January 28, 1993, the Board dismissed without prejudice EG&G's protest pursuant to EG&G's and the respondent's signed joint stipulation of dismissal without prejudice, with attached settlement agreement. *EG&G Florida, Inc. v.* National Aeronautics and Space Administration, GSBCA 12204-P, et. al, 1993 BPD ¶ 28 (Jan. 28, 1993).

Under the terms of the motion to dismiss, which we expressly declined to make a part of our order of dismissal, we note that the respondent was obliged to engage in another round of BAFOs, that the protesters, for the purposes of the agreement, are deemed prevailing parties in these protests, and that the respondent agrees that the protesters' "attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests."

In particular, the parties agreed that:

> 11. NASA acknowledges that it failed to evaluate the offerors' proposals in accordance with NASA FAR Supplement 18-15.613-71(b)(5). NASA agrees that for the purposes of recovering protest costs, including any reasonable attorneys' fees and disbursements, protesters shall be deemed to have prevailed on the merits of this proceeding under 40 U.S.C. sect. 759(f)(5)(C). In compromise of the protesters' claims for protest costs and full bid and proposal costs, and in consideration of the foregoing provisions and the implementation of the revisions and actions specified herein, the parties agree that attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests. Protestors shall follow the procedures of Rules 35 and 36 of the Board's Rules of Procedure in seeking recovery of these costs.

The record clearly demonstrates that the protester prevailed in its protest. The proposed award to another offeror was canceled and another round of offers received and evaluated. On February 28, 1993, EG&G filed a motion for award of its costs of filing and successfully pursuing its protest, which was docketed as GSBCA 12318-C(12204-P). That motion was further supplemented on April 12, 1993. On May 12, 1993, the respondent responded to the protester's motion, conceding that $357,444.16 in protest costs and $649,179.11 in proposal preparation costs were compensable under 40 U.S.C. § 759(f)(5)(C). These costs total $1,006,623.27. In its response, the respondent further stated:

> Although NASA believes that EG&G's estimation of wasted costs related to SB/SDB/WOB plans is on the high side, NASA acknowledges that costs were wasted related to the development of EG&G's SB/SDB/WOB plans. NASA also acknowledges that EG&G has provided a reasonable approach to quantify waste related to both the ODC and SB/SDB/WOB issues. It has provided an estimate based on a proportion of its proposal preparation effort that was wasted. After reviewing the documentation provided by the company in support of its

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petition, the Agency also believes that the company has adequately established a nexus between the procurement violation and the wasted effort to the and (sic)[1] claimed in its Supplemental submission.

From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

We consider *Communications Technology Applications, Inc.*, GSBCA 10172-C(9978-P), 90-3 BCA ¶ 23,261, 1990 BPD ¶ 207, cited by the dissent, to be inapposite. In that case the Board had already found in our prior decision on the merits of the protest the facts necessary to reach a decision as to entitlement. In the instant case, we did not decide the merits of the original protest. In addition, in the instant case, further litigation would not adduce any evidence inconsistent with the result reached by the parties in their agreement because the parties agree as to all evidence which might be pertinent.

Although NASA, in its response, moved that we award those costs[2], it further stated that "NASA recognizes a need for an audit of these costs, as to their incurrence, accounting and previous or pending Government reimbursements."

In light of the respondent's reservation of an audit, we contacted the parties and suggested that issue be clarified. We noted that the parties do not appear to differ on the amounts due the successful protester. On October 25, 1993, we received a letter from respondent's counsel which states that:

> NASA, therefore, again moves the Board to award to EG&G protest costs of $357,444.16[3] and proposal preparation costs of $649,179.11 based on the documented costs presented in its cost petition, as amended.
>
> We have examined the detailed expenses and find them to be both reasonable and appropriately documented.

Decision

The protester's motion for attorney's fees and other costs associated with the pursuit of this protest together with a portion of the cost of the preparation of its proposal is **GRANTED.** The protester is awarded $1,006,623.27 as costs incurred in pursuing this protest and preparing its proposal. This award is to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988); 40 U.S.C. § 759(f)(5)(C) (1988).

Vergilio, Board Judge, dissenting in part.

I respectfully dissent from the conclusion of the majority that the protester is entitled to recover proposal preparation costs. The record in this case and the prior case law at this Board dictate a denial of the requested proposal preparation costs. To me, the record does not demonstrate that the changes to the solicitation were made because the existing clauses were improper or that efforts and expenses were wasted as a result of the underlying agency-acknowledged misevaluations and violations.

Previously, the Board has denied a motion for the award of proposal preparation costs, stating:

> Although the respondent made substantive changes in the solicitation requirements, none of the subsequent amendments to the solicitation followed from the protest or were required by our decision. In fact, and more to the point, the protester had not protested any of the terms of the original solicitation. Consequently, our decision never dealt with the propriety of any of the solicitation terms. Our decision dealt solely with the actions taken by the respondent in evaluating and awarding the contract. The protester has not and can not point out any change in

[1] We believe the word "and" should be "amount". This belief was confirmed by respondent's counsel.

[2] In the conclusion of its motion, the respondent cited protest costs in the amount of $337,552.45 rather than the $357,444.16 it had moved that we grant. Inasmuch as $337,552.45 was the amount in the original motion and the supplemental motion added an additional $19,891.71 for a total of $357,444.16, we conclude that the respondent had simply misstated the intended figure. The respondent noted the correction in its October 25, 1993 filing and we have used the correct figures in the body of our decision.

[3] The respondent acknowledged that its May 12, 1993 filing contained an arithmetic error which was recognized and corrected in its October 25th filing.

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the solicitation requirements that resulted from our decision. It can not do so for the simple reason that neither the protest nor our decision dealt with the propriety of the terms of the solicitation.

Communications Technology Applications, Inc., GSBCA 10172-C (9978-P), 90-3 BCA ¶ 23,261 at 116,700, 1990 BPD ¶ 207 at 5. The Board noted that it has "declined to award proposal costs to successful protesters because the agency lawfully changed its requirements." *Id.*

The majority in the present case recites its analysis thusly:

From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

Majority opinion at 3.

The changes to the terms of the solicitation described in the protester's justification of its request[4] do not demonstrate to me that the costs were incurred because of agency violations and represent wasted effort. As noted in *Communications Technology*, an agency may legitimately alter its requirements during the course of a procurement. Every amendment does not entitle an offeror to recover some of its proposal preparation costs through the protest process at this Board. While an agency may choose to not object to the payment (through non-reimbursed funds) of the proposal preparation costs of potential contractors, the lack of objection cannot serve as the touchstone of this Board's determinations. The Brooks Act should not be read as legitimizing a wholesale shift in the costs of doing business with the Government.

[¶ 26,561] Westinghouse KSC Co., Inc. v. National Aeronautics and Space Administration

GSBCA No. 12317-C(12208-P), November 5, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulation Agreement.—In response to a joint stipulation, a protester was awarded attorney fees and costs because the record clearly demonstrated that the protester had prevailed. As a result of the protest, the proposed award to another offeror was canceled and another round of offers was received and evaluated. The government conceded that it had violated the law and that the fees and costs were compensable.

Protests, GSBCA—Costs of Bid and Proposal Preparation—Stipulation Agreement.—Proposal preparation costs were awarded in response to a stipulation because the government conceded that wasted effort was incurred by the protester and that the wasted effort was a direct result of the government's violation of the law. The government conceded that it failed to evaluate the offerors' proposals in accordance with regulations, and the record demonstrated that the protester prevailed inasmuch as the proposed award to another offeror was canceled and another round of offers was received and evaluated. The board examined the detailed expenses and found them to be both reasonable and appropriately documented.

For the protester: Dunnells, Duvall & Porter, Washington, D.C., by Richard O. Duvall, Timothy J. Bloomfield, Richard L. Moorhouse, William J. Dempster, Michael H. Ditton, and Giannina Lynn. For the government: David P. Forbes, Sumara M. Thompson-King, and Robert M. Stephens, Office of the General Counsel, National Aeronautics and Space Administration Headquarters, Washington, D.C., and Dudley R. Cannon, Jr., and Douglas G. Hendriksen, National Aeronautics and Space Administration, Kennedy Space Center, Florida.

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[4] The Board has also described the solicitation amendments in findings of fact in a subsequent protest to this Board. *Electronic Systems & Associates, Inc. v. National Aeronautics & Space Administration*, GSBCA 12492-P, 94-1 BCA ¶ 26,283, 1993 BPD ¶ 207 (July 28, 1993).

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Before HENDLEY, DANIELS, and VERGILIO, Administrative Judges.

HENDLEY, Administrative Judge: The protester seeks to recover its costs of filing and successfully pursuing its protest before this Board. Under 40 U.S.C. §§ 759(f)(5)(B), (C) (1988), when this Board

> determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority, ... it may ... further declare an appropriate interested party to be entitled to the costs of—(i) filing and pursuing the protest, including reasonable attorney's fees, and (ii) bid and proposal preparation.

This statute authorizes the Board to award costs and exercise discretion to determine both if a party is "appropriate" and entitled to payment of costs from the permanent indefinite judgment fund, and if the amount requested is "reasonable."

On December 2, 1992, the Board docketed a protest filed by EG&G Florida, Inc., contending that the respondent, the National Aeronautics and Space Administration (NASA), had improperly selected Lockheed Space Operations Company, an intervenor in the protest, for award of a contract for automatic data processing services. That protest was followed by protests filed by Bamsi, Inc. on December 3 and Westinghouse KSC Company, Inc. on December 4. Each protester intervened in the other protests. The protests were consolidated for further proceedings before this Board. The respondent's delegation of procurement authority was suspended on December 10.

In our order on proceedings of December 4, we set forth a schedule for resolving the protests. However, shortly before the originally scheduled hearing date, the parties sought a postponement of the hearing and informed the Board that they were in the process of settling the cases. We rescheduled the hearing, and a settlement ensued.

On January 26, 1993, the parties filed a "joint stipulation of dismissal without prejudice" in each protest. The requested dismissals were to become dismissals "with prejudice 10 working days after debriefings following the announcement of a selection of an awardee based on the evaluation of best and final offers ('BAFOS') submitted in accordance with the revised BOC [Base Operations Contract] request for Proposals ('RFP')." Accordingly, on January 28, 1993, the Board dismissed without prejudice Westinghouse's protest pursuant to Westinghouse's and the respondent's signed joint stipulation of dismissal without prejudice, with attached settlement agreement. *EG&G Florida, Inc. v. National Aeronautics and Space Administration*, GSBCA 12204-P, et. al, 1993 BPD ¶ 28 (Jan. 28, 1993).

Under the terms of the motion to dismiss, which we expressly declined to make a part of our order of dismissal, we note that the respondent was obliged to engage in another round of BAFOs, that the protesters, for the purposes of the agreement, are deemed prevailing parties in these protests, and that the respondent agrees that the protesters' "attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests."

In particular, the parties agreed that:

> 11. NASA acknowledges that it failed to evaluate the offerors' proposals in accordance with NASA FAR Supplement 18-15.613-71(b)(5). NASA agrees that for the purposes of recovering protest costs, including any reasonable attorneys' fees and disbursements, protesters shall be deemed to have prevailed on the merits of this proceeding under 40 U.S.C. sect. 759(f)(5)(C). In compromise of the protesters' claims for protest costs and full bid and proposal costs, and in consideration of the foregoing provisions and the implementation of the revisions and actions specified herein, the parties agree that attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests. Protestors shall follow the procedures of Rules 35 and 36 of the Board's Rules of Procedure in seeking recovery of these costs.

The record clearly demonstrates that the protester prevailed in its protest. The proposed award to another offeror was canceled and another round of offers received and evaluated. On February 26, 1993, Westinghouse filed a motion for award of its costs of filing and successfully pursuing its protest, which was docketed as GSBCA 12317-C(12208-P). This motion and its corresponding exhibits were stamped on each page with the protective seal. On March 11, 1993, Westinghouse, in response to this Board's directions, filed a substitute motion for the award of protest costs and proposal preparation costs, in which it withdrew the protective seal from every page of the motion except for those limited portions of the motions and exhibits containing Westing-

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house proprietary information. That motion was supplemented on March 12, 1993 and again on April 15, 1993.[1] On March 25, 1993, the respondent responded to the protester's motion, conceding that $257,164.15 in protest costs and $942,835.85 in proposal preparation costs were compensable under 40 U.S.C. § 759(f)(5)(C). These costs total $1,200,000.00.

In its response, the respondent further stated:

> Westinghouse has provided an estimate on a category-by-category basis of the proportion of its proposal preparation effort that was wasted. (Exhibits 1 and 5). After review of documentation provided by the company in support of its petition, the Agency also believes that the company has adequately established a nexus between the procurement violation and the wasted effort to the ceiling established in the Joint Stipulation.

From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

We consider *Communications Technology Applications, Inc.*, GSBCA 10172-C(9978-P), 90-3 BCA ¶ 23,261, 1990 BPD ¶ 207, cited by the dissent, to be inapposite. In that case the Board had already found in our prior decision on the merits of the protest the facts necessary to reach a decision as to entitlement. In the instant case, we did not decide the merits of the original protest. In addition, in the instant case, further litigation would not adduce any evidence inconsistent with the result reached by the parties in their agreement because the parties agree as to all evidence which might be pertinent.

Although NASA, in its response, moved that we award those costs, it further stated that "NASA recognizes a need for an audit of these costs, as to their incurrence, accounting and previous or pending Government reimbursements."

In light of the respondent's reservation of the right to audit the amounts, we contacted the parties and suggested that issue be clarified. We noted that the parties do not appear to differ on the amounts due the successful protester. On October 25, 1993, we received a letter from respondent's counsel which states that:

> NASA, therefore, again moves the Board to award protest costs of $257,164.15 and proposal preparation costs of $942,835.85 to Westinghouse based on the documented costs presented in its cost petition.
>
> We have examined the detailed expenses and find them to be both reasonable and appropriately documented.

Decision

The protester's motion for attorney's fees and other costs associated with the pursuit of this protest together with a portion of the cost of the preparation of its proposal is **GRANTED.** The protester is awarded $1,200,000.00 as costs incurred in pursuing this protest and preparing its proposal. This award is to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988); 40 U.S.C. § 759(f)(5)(C) (1988).

Vergilio, Board Judge, dissenting in part.

I respectfully dissent from the conclusion of the majority that the protester is entitled to recover proposal preparation costs. The record in this case and the prior case law at this Board dictate a denial of the requested proposal preparation costs. To me, the record does not demonstrate that the changes to the solicitation were made because the existing clauses were improper or that efforts and expenses were wasted as a result of the underlying agency-acknowledged misevaluations and violations.

Previously, the Board has denied a motion for the award of proposal preparation costs, stating:

> Although the respondent made substantive changes in the solicitation requirements, none of the subsequent amendments to the solicitation followed from the protest or were required by our decision. In fact, and more to the point, the protester had not protested any of the terms of the original solicitation. Consequently, our decision never dealt with the

[1] We note that protester's April 15th supplement did not request additional funds and was merely provided as additional support for its original motion.

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propriety of any of the solicitation terms. Our decision dealt solely with the actions taken by the respondent in evaluating and awarding the contract. The protester has not and can not point out any change in the solicitation requirements that resulted from our decision. It can not do so for the simple reason that neither the protest nor our decision dealt with the propriety of the terms of the solicitation.

Communications Technology Applications, Inc., GSBCA 10172-C (9978-P), 90-3 BCA ¶ 23,261 at 116,700, 1990 BPD ¶ 207 at 5. The Board noted that it has "declined to award proposal costs to successful protesters because the agency lawfully changed its requirements." *Id.*

The majority in the present case recites its analysis thusly:

From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

Majority opinion at 3-4.

The changes to the terms of the solicitation described in the protester's justification of its request [2] do not demonstrate to me that the costs were incurred because of agency violations and represent wasted effort. As noted in *Communications Technology*, an agency may legitimately alter its requirements during the course of a procurement. Every amendment does not entitle an offeror to recover some of its proposal preparation costs through the protest process at this Board. While an agency may choose to not object to the payment (through non-reimbursed funds) of the proposal preparation costs of potential contractors, the lack of objection cannot serve as the touchstone of this Board's determinations. The Brooks Act should not be read as legitimizing a wholesale shift in the costs of doing business with the Government.

[¶ 26,562] Bamsi, Inc. v. National Aeronautics and Space Administration

GSBCA No. 12316-C(12206-P), November 5, 1993.

Protests, GSBCA—Costs of Protest and Attorney Fees—Stipulation Agreement.—In response to a joint stipulation, a protester was awarded attorney fees and costs because the record clearly demonstrated that the protester had prevailed. As a result of the protest, the proposed award to another offeror was canceled and another round of offers was received and evaluated. The government conceded that it had violated the law and that the fees and costs were compensable.

Protests, GSBCA—Costs of Bid and Proposal Preparation—Stipulation Agreement.—Proposal preparation costs were awarded in response to a stipulation because the government conceded that wasted effort was incurred by the protester and that the wasted effort was a direct result of the government's violation of the law. The government conceded that it had failed to evaluate the offerors' proposals in accordance with regulations, and the record demonstrated that the protester had prevailed inasmuch as the proposed award to another offeror was canceled and another round of offers was received and evaluated. The board examined the detailed expenses and found them to be both reasonable and appropriately documented.

For the protester: Brand & Lowell, P.C., Washington, D.C., by Stephen M. Ryan and William M. Hathaway. For the government: Sumara M. Thompson-King and Robert M. Stephens, Office of the General Counsel, National Aeronautics and Space Administration Headquarters, Washington, D.C., and Dudley R. Cannon, Jr., and Douglas G. Hendriksen, National Aeronautics and Space Administration, Kennedy Space Center, Florida.

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[2] The Board has also described the solicitation amendments in findings of fact in a subsequent protest to this Board. *Electronic Systems & Associates, Inc. v. National Aeronautics & Space Administration*, GSBCA 12492-P, 94-1 BCA ¶ 26,283, 1993 BPD ¶ 207 (July 28, 1993).

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Before HENDLEY, DANIELS, and VERGILIO, Administrative Judges.

HENDLEY, Administrative Judge: The protester seeks to recover its costs of filing and successfully pursuing its protest before this Board. Under 40 U.S.C. § § 759(f)(5)(B), (C) (1988), when this Board

> determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority, . . . it may . . . further declare an appropriate interested party to be entitled to the costs of—(i) filing and pursuing the protest, including reasonable attorney's fees, and (ii) bid and proposal preparation.

This statute authorizes the Board to award costs and exercise discretion to determine both if a party is "appropriate" and entitled to payment of costs from the permanent indefinite judgment fund, and if the amount requested is "reasonable."

On December 2, 1992, the Board docketed a protest filed by EG&G Florida, Inc., contending that the respondent, the National Aeronautics and Space Administration (NASA), had improperly selected Lockheed Space Operations Company, an intervenor in the protest, for award of a contract for automatic data processing services. That protest was followed by protests filed by Bamsi, Inc. on December 3 and Westinghouse KSC Company, Inc. on December 4. Each protester intervened in the other protests. The protests were consolidated for further proceedings before this Board. The respondent's delegation of procurement authority was suspended on December 10.

In our order on proceedings of December 4, we set forth a schedule for resolving the protests. However, shortly before the originally scheduled hearing date, the parties sought a postponement of the hearing and informed the Board that they were in the process of settling the cases. We rescheduled the hearing, and a settlement ensued.

On January 26, 1993, the parties filed a "joint stipulation of dismissal without prejudice" in each protest. The requested dismissals were to become dismissals "with prejudice 10 working days after debriefings following the announcement of a selection of an awardee based on the evaluation of best and final offers ('BAFOS') submitted in accordance with the revised BOC [Base Operations Contract] request for Proposals ('RFP')." Accordingly, on January 28, 1993, the Board dismissed without prejudice Bamsi's protest pursuant to Bamsi's and the respondent's signed joint stipulation of dismissal without prejudice, with attached settlement agreement. *EG&G Florida, Inc. v. National Aeronautics and Space Administration,* GSBCA 12204-P, *et al.,* 1993 BPD ¶ 28 (Jan. 28, 1993).

Under the terms of the motion to dismiss, which we expressly declined to make a part of our order of dismissal, we note that the respondent was obliged to engage in another round of BAFOs, that the protesters, for the purposes of the agreement, are deemed prevailing parties in these protests, and that the respondent agrees that the protesters' "attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests."

In particular, the parties agreed that:

> 11. NASA acknowledges that it failed to evaluate the offerors' proposals in accordance with NASA FAR Supplement 18-15.613-71(b)(5). NASA agrees that for the purposes of recovering protest costs, including any reasonable attorneys' fees and disbursements, protesters shall be deemed to have prevailed on the merits of this proceeding under 40 U.S.C. sect. 759(f)(5)(C). In compromise of the protesters' claims for protest costs and full bid and proposal costs, and in consideration of the foregoing provisions and the implementation of the revisions and actions specified herein, the parties agree that attorneys' fees and partial bid and proposal costs in a sum not to exceed $1.2 million for each protester may be recoverable under these protests. Protestors shall follow the procedures of Rules 35 and 36 of the Board's Rules of Procedure in seeking recovery of these costs.

The record clearly demonstrates that the protester prevailed in its protest. The proposed award to another offeror was canceled and another round of offers received and evaluated. On February 26, 1993, Bamsi filed a motion for award of its costs of filing and successfully pursuing its protest, which was docketed as GSBCA 12316-C(12206-P). This motion and its corresponding exhibits were stamped on each page with the protective seal. On March 4, 1993, Bamsi, in response to this Board's directions, filed a substitute motion for the award of protest costs and proposal preparation costs, in which it withdrew the protective seal from every page of the motion except for those limited portions of the motions and exhibits containing Bamsi proprietary information.

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That motion was further supplemented on April 16, and April 19, 1993. On May 12, 1993, the respondent responded to the protester's motion, conceding that $249,718.54 [1] in protest costs and $942,916.28 in proposal preparation costs were compensable under 40 U.S.C. § 759(f)(5)(C). These costs total $1,192,634.82. In its response, the respondent further stated:

> Although NASA believes that BAMSI's estimation of the percentage of wasted costs attributable to each areas [sic] identified on pages 10 through 11 of its Motion are on the high side, NASA acknowledges that costs were wasted related to the preparation of BAMSI's proposal. NASA also acknowledges that BAMSI has provided a reasonable approach to quantify waste, and it has provided an estimate based on a proportion of its proposal preparation effort that was wasted. After reviewing the documentation provided by the company in support of its petition, the Agency also believes that the company has adequately established a nexus between the procurement violation and the wasted effort to the ceiling established in the Joint Stipulation.

From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

We consider *Communications Technology Applications, Inc.*, GSBCA 10172-C(9978-P), 90-3 BCA ¶ 23,261, 1990 BPD ¶ 207, cited by the dissent, to be inapposite. In that case the Board had already found in our prior decision on the merits of the protest the facts necessary to reach a decision as to entitlement. In the instant case, we did not decide the merits of the original protest. In addition, in the instant case, further litigation would not adduce any evidence inconsistent with the result reached by the parties in their agreement because the parties agree as to all evidence which might be pertinent.

Although NASA, in its response, moved that we award those costs, it further stated that "NASA recognizes a need for an audit of these costs, as to their incurrence, accounting and previous or pending Government reimbursements."

In light of the respondent reserving the right to audit the amounts, we contacted the parties and suggested that they reduce the matter to a final settlement executed by both parties. We note that they do not appear to differ on the amounts due the successful protester. On October 25, 1993, we received a letter from respondent's counsel which states that:

> NASA, therefore, again moves the Board to award to BAMSI protest costs of $248,913.54 [2] and proposal preparation costs of $942,916.28 based on the documented costs presented in its cost petition, as amended.

On October 27, 1993, we received a stipulation from the parties, in which Bamsi and NASA stipulate that Bamsi "is entitled to $1,192,635.82 consisting of $249,719.54 in protest costs and $942,916.28 in proposal preparation costs . . ." [3]

We have examined the detailed expenses and find them to be both reasonable and appropriately documented.

Decision

The protester's motion for attorney's fees and other costs associated with the pursuit of this protest together with a portion of the cost of the preparation of its proposal is GRANTED. The protester is awarded $1,192,634.82 as costs incurred in pursuing this protest and preparing its proposal. This award is to be paid, without interest, from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (1988); 40 U.S.C. § 759(f)(5)(C)(1988).

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[1] NASA has made a mathematical error in its response. NASA notes that Bamsi, in its first submission, requested $217,297.62 in protest costs and in its supplement requested an additional $32,420.92 for a total of $248,913.54. This total is incorrect. The correct total is $249,718.54. We have accounted for NASA's error in the body of our decision.

[2] The respondent again has failed to note that it has made a mathematical error. As previously noted the correct figure is $249,718.54. We have accounted for this error in our decision.

[3] The stipulation inexplicably raises by one dollar the amount for protest costs, and, hence, the total.

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Vergilio, Board Judge, dissenting in part.

I respectfully dissent from the conclusion of the majority that the protester is entitled to recover proposal preparation costs. The record in this case and the prior case law at this Board dictate a denial of the requested proposal preparation costs. To me, the record does not demonstrate that the changes to the solicitation were made because the existing clauses were improper or that efforts and expenses were wasted as a result of the underlying agency-acknowledged misevaluations and violations.

Previously, the Board has denied a motion for the award of proposal preparation costs, stating:

> Although the respondent made substantive changes in the solicitation requirements, none of the subsequent amendments to the solicitation followed from the protest or were required by our decision. In fact, and more to the point, the protester had not protested any of the terms of the original solicitation. Consequently, our decision never dealt with the propriety of any of the solicitation terms. Our decision dealt solely with the actions taken by the respondent in evaluating and awarding the contract. The protester has not and can not point out any change in the solicitation requirements that resulted from our decision. It can not do so for the simple reason that neither the protest nor our decision dealt with the propriety of the terms of the solicitation.

Communications Technology Applications, Inc., GSBCA 10172-C(9978-P), 90-3 BCA ¶ 23,261, at 116,700, 1990 BPD ¶ 207, at 5. The Board noted that it has "declined to award proposal costs to successful protesters because the agency lawfully changed its requirements." *Id.*

The majority in the present case recites its analysis thusly:

> From the above, we conclude that the respondent clearly has conceded that wasted effort was incurred by the protester, and that this was a direct result of respondent's violation of law. In light of the fact that the respondent canceled the proposed award to another, it had no motive in agreeing to the amount of the costs of the protester's wasted effort. There can be no suspicion of "Fed Mail" in its agreement involving the protester's costs of wasted effort. We therefore conclude that the amounts involved are reimbursable.

Majority opinion at 4.

The changes to the terms of the solicitation described in the protester's justification of its request[4] do not demonstrate to me that the costs were incurred because of agency violations and represent wasted effort. As noted in *Communications Technology*, an agency may legitimately alter its requirements during the course of a procurement. Every amendment does not entitle an offeror to recover some of its proposal preparation costs through the protest process at this Board. While an agency may choose to not object to the payment (through non-reimbursed funds) of the proposal preparation costs of potential contractors, the lack of objection cannot serve as the touchstone of this Board's determinations. The Brooks Act should not be read as legitimizing a wholesale shift in the costs of doing business with the Government.

[¶ 26,563] Marci Enterprises, Inc. v. General Services Administration

GSBCA No. 12197, November 9, 1993. Contract No. GS-02F-58159.

Defaults, Waiver—Delivery Date—Failure to Reestablish.—The government improperly terminated a Federal Supply Service contract for waterproof barrier material because it waived the delivery date when it told the contractor to delay the first shipment for inspection and continued to encourage the contractor to correct its deficiencies without establishing a new delivery date. The government contacted the contractor to inspect the first lot of material produced for the contract but did not schedule the inspection until three days after delivery was due. Thus, even before the government's inspection, the government indicated that the contractor was not to comply with the original delivery date, so it was reasonable for the contractor to assume that a new delivery schedule would be established.

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[4] The Board has also described the solicitation amendments in findings of fact in a subsequent protest to this Board. *Electronic Systems & Associates, Inc. v. National Aeronautics & Space Administration*, GSBCA 12492-P, 94-1 BCA ¶ 26,253, 1993 BPD ¶ 207 (July 28, 1993).

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For the appellant: Frederick P. Weiner, President. For the government: Michael D. Tully, Office of General Counsel, General Services Administration, Washington, D.C.

Before PARKER, DANIELS, and NEILL, Administrative Judges.

PARKER, Administrative Judge: Appellant, Marci Enterprises, Inc. (Marci), appeals the decision of respondent's contracting officer to terminate for default Marci's contract to provide waterproof barrier material. The parties have submitted the case for decision on the record. As discussed below, we find that respondent improperly terminated the contract. Thus, we grant the appeal.

Findings of Fact

1. On January 17, 1992, the General Services Administration's (GSA's) Federal Supply Service (FSS) awarded contract number GS-02F-58159 to Marci. Appeal File, Exhibit 1. The contract required Marci to furnish GSA's normal requirements for waterproof, flexible barrier material. *Id.*

2. On February 4, 1992, GSA placed two orders with Marci for barrier material, designating March 30, 1992, as the date the shipment was due. Respondent's Record Submission, Exhibit 13. According to the terms of the contract, delivery was due at the destination within forty-five calendar days after receipt of the order. Appeal File, Exhibit 1 at 26.

3. On March 19, 1992, GSA's Quality Assurance Specialist (QAS) contacted Marci's subcontractor and supplier, Salinas Valley Wax Paper Company (Salinas), pursuant to the Source Inspection clause of the contract. Appeal File, Exhibit 3. That clause provides in part as follows:

> (c) Inspection by Government personnel.
>
> (1) Although the Government will normally rely upon the Contractor's certification as to the quality of supplies shipped, it reserves the right under the Inspection of Supplies—Fixed Price clause to inspect and test all supplies called for by this contract, before acceptance, at all times and places, including the point of manufacture. When the Government notifies the Contractor of its intent to inspect supplies before shipment, the Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. *Shipment shall not be made until inspection by the Government is completed and shipment is authorized by the Government.*
>
> ....
>
> (d) Quality deficiencies.
>
> (2) If supplies in process, shipped, or awaiting shipment to fill Government orders are found not to comply with contract requirements, or if deficiencies in either plant quality or process controls are found, the Contractor may be issued a Quality Deficiency Notice (QDN). Upon receipt of a QDN, the Contractor shall take immediate corrective action and shall suspend shipment of the supplies covered by the QDN until such time as corrective action has been completed. The Contractor shall notify the GSA quality assurance office, within 5 workdays, of corrective action taken or to be taken to permit onsite verification by a Government representative. Shipments of nonconforming supplies will be returned at the Contractor's expense and may constitute cause for termination. Delays due to the issuance of a QDN do not constitute excusable delay under the Default clause. Failure to complete corrective action in a timely manner may result in termination of this contract.

Id., Exhibit 1 at 22-23 (emphasis added). Mr. Nelson, President of Salinas, informed the QAS that the orders would be available for inspection either that day (March 19) or sometime in the next week. However, due to the QAS's work schedule and the 125-mile distance to Salinas' facility, the QAS scheduled the inspection for April 2, 1992, three days after the delivery date. Respondent's Record Submission, Exhibit 18.

4. On April 2, 1992, Salinas presented the material for inspection. The QAS inspected the first lot and found deficiencies in the subcontractor's quality control system and issued a Quality Deficiency Notice (QDN). Appeal File, Exhibit 4. The QDN required Marci to correct the deficiencies and provide a written response within five days after receiving the notice. *Id.* Marci did not respond to the QDN. *Id.*, Exhibit 5.

5. The QAS, however, continued to work with Salinas:

> I also spent considerable time with this subcontractor reviewing their quality control manual and advising them as to certain changes that were required in order to bring their quality control program and manual into conformance with Federal Standard 368A .... Although I spent considerable time and energy assisting Salinas

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in order for them to be able to perform in accordance with the conditions of the contract, my duties do not require me to supervise or conduct the inspection procedures of the prime or its subcontractor.

Respondent's Record Submission, Exhibit 18.

6. On May 1, 1992, the QAS returned to inspect Salinas' facility and two days later issued an Evaluation of Corrective Action which stated that no corrections had been implemented. Appeal File, Exhibit 5. The QAS stated that the facility was not in accordance with the quality control standards set forth in Federal Standard 368A and that the packaging had not been marked in accordance with Federal Standard 123F. Respondent's Record Submission, Exhibit 18.

7. The administrative contracting officer (ACO) stated in his declaration:

On May 1, 1992, the QAS returned again to the subcontractor's facility and found that no corrective action was taken .... In light of the considerable time spent by the QAS assisting the subcontractor to bring its quality control system in compliance with the above reference standards and the fact that they could not, or would not, implement the necessary changes, the QAS referred this matter to me for appropriate action.

Respondent's Record Submission, Exhibit 19.

8. Marci claimed that its subcontractor needed more time to correct the quality control and marking systems. *See* Respondent's Record Submission, Exhibit 17. On May 6, 1992, the ACO contacted Mr. Weiner, President of Marci, and negotiations for a contract extension took place. Appeal File, Exhibit 6. Marci alleges that the ACO offered, and Marci accepted, an extended delivery date in return for the consideration of $300 ($150 per order), while the ACO contends that no agreement was reached. *See* id., Exhibit 10; Respondent's Record Submission, Exhibit 19.

9. On May 14, 1992, the ACO terminated Marci's right to proceed with performance of the contract by reason of default. Appeal File, Exhibit 8. The termination letter stated that the termination was for Marci's failure to "deliver material to the Government pursuant to the delivery requirements of the contract." *Id.*

10. On May 18, 1992, Mr. Weiner wrote a letter to the ACO stating:

I believed that we had an agreement due to the consideration you offered, and which I accepted in the aforementioned telephone call. Our plant subsequently proceeded to make the additions and corrections to the paperwork as requested by the QAS .... Both orders have been manufactured and have been sitting on the floor of our plant for many weeks. The plant has also completed the additional paperwork requested by the QAS.

Appeal File, Exhibit 10. On September 5, 1992, Marci filed the instant appeal with the Board, contending that the ACO improperly terminated the contract. *Id.*

11. The contract incorporates by reference GSA Form 3507, which contains the clause found at Federal Acquisition Regulation (FAR) section 52.249-8, Default. That clause provides:

(a)(1) The Government may ... by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract ...; or

(iii) Perform any of the other provisions of this contract ....

Appeal File, Exhibit 2 at 22.

Discussion

Marci contends that GSA improperly terminated the contract, and we agree. GSA waived the delivery date when it told Marci to delay the first shipment for inspection and continued to encourage Marci to correct its deficiencies. Because GSA never established a new delivery date (and, thus, a date by which Marci had to comply with the packaging and quality control requirements), GSA could not terminate the contract based upon either Marci's failure to deliver by the original due date, or to comply with the packaging and quality control requirements.

Timely Delivery

The Government has the burden of proving that a default termination is warranted because it is a "drastic sanction ... which should be imposed (or sustained) only for good grounds and on solid evidence." *J.D. Hedin Construction Co. v. United States* [13 CCF ¶82,580], 408 F.2d 424, 431 (Ct. Cl. 1969). When a contractor fails to make timely delivery of the contract item, the Government has a reasonable period of time,

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known as the period of forbearance, to settle upon its course of action. *R & O Industries, Inc.*, GSBCA 4800, 80-1 BCA ¶14,195 at 69,874. If, however, the Government fails to act within a reasonable time, the original delivery schedule is deemed to have been waived:

> In essence, the Government loses its right to terminate a contract for default . . . if by its subsequent conduct it condones the default, encourages or asks for continued performance, or fails to set a new delivery schedule for the contractor's performance after it has permitted performance to continue unhampered for too long a period of time.

Id.

In *DeVito v. United States* [13 CCF ¶82,319], 413 F.2d 1147 (Ct. Cl. 1969), the Court of Claims articulated the two necessary elements for the non-defaulting party to waive the delivery schedule: (1) failure to terminate within reasonable time after the default under circumstances indicating forbearance; and (2) reliance by contractor on failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent. *Id.* at 1154. Thus, if GSA's conduct following the March 30, 1992, delivery deadline constituted a constructive election to permit continued performance, which was relied upon by appellant, a waiver of the delivery date occurred.[1]

The two purchase orders dated February 4, 1992, designated March 30, 1992, as the delivery date. The QAS contacted Salinas on March 19, 1992, to inspect the first lot of material produced for the contract. Mr. Nelson, President of Salinas, informed the QAS that the orders would be available for inspection that day or sometime during the next week. The QAS, however, did not schedule the inspection until April 2, 1992, *three days after delivery was due.* Thus, even before the QAS's inspection, the Government indicated that the contractor was not to comply with the original delivery date. According to the terms of the contract, the shipment was not to proceed until inspection by the Government was completed. Once the inspection date was set by the QAS, the subcontractor could not ship the materials until after the inspection was completed or it risked violating that contract term. Obviously, it became impossible to comply with both the inspection clause and the designated delivery date; thus, it was reasonable for the contractor to assume that a new delivery schedule would need to be established.

The QAS issued a Quality Deficiency Notice on the same day as the inspection, April 2, 1992. The QDN instructed Marci to provide the QAS with a written response of corrective action taken or to be taken QAS within 5 workdays after receiving the notice. This was neither a "cure notice" which allows the delinquent contractor additional time to deliver, nor a "show cause" letter which affords a delinquent contractor an opportunity to advance reasons why the contract should not be terminated. *See* 48 CFR 49.607 (1990). Although the QAS also noted that the "cited purchase orders are now delinquent" as one of the specific deficiencies, the QDN encouraged the subcontractor to make the necessary corrections and continue performance.

FAR Part 49 regulates contract termination. 48 CFR Part 49 (1992). FAR 49.402-3(c) directs that "if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance." In the typical "DeVito cure," the Government issues a cure notice, establishes a new delivery date, and terminates the contract in the event the contractor fails to deliver in accordance with the new schedule. *W.S. Jenks & Son*, GSBCA 10278, et al., 91-3 BCA ¶24,262, at 121,298. Here, after waiving the original delivery schedule, GSA never established a new delivery date upon which a default termination could be based.

Marci relied on GSA's waiver of the original delivery schedule. According to both the QAS and the ACO, the QAS spent time assisting Salinas so that it could perform in accordance with the conditions of the contract. Marci claimed that its subcontractor needed time to make the changes requested

[1] The underlying principle in termination of a contract containing fixed performance dates is that time is of the essence. Thus, when a due date has passed and the Government does not terminate for default, an inference is created that time is no longer of the essence. *DeVito*, 413 F.2d at 1154. Thereafter, the proper way for the Government to proceed is "to issue a notice under the Default clause setting a reasonable but *specific* time for performance on pain of default termination." *Id.* (emphasis added). Time is reinstated as being of the essence and a new time for performance is given to the contractor.

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by the QAS but, because no new delivery date had been provided, Marci did not know how much time it had to make those changes.

The parties agree that negotiations for a contract modification took place on May 6, 1992, although they differ in regard to the outcome of those negotiations. Mr. Weiner believes that he and the ACO agreed to extend the due date for a consideration of $150 per shipment, whereas the ACO contends that no agreement was reached. By that time, however, the Government had already waived the delivery date. Although Marci's efforts to comply with the contract requirements were not as GSA would have liked, GSA could not suddenly terminate the contract for failure to deliver the goods without giving Marci a firm date by which the goods were to be delivered.

Conforming Goods

Although the Government terminated the contract based upon Marci's failure to make timely delivery, the Government in its brief offers additional grounds for the termination. The ACO's final letter of termination pointed out that Salinas did not furnish the QAS with an updated quality control manual, forward copies of GSA Form 1678, or conform to the requirements for case markings. Thus, according to GSA, the orders were incomplete at the time of inspection and the contract could have been terminated for that reason as well.

The problem with respondent's argument, however, is that these requirements for packaging and quality control are all related to appellant's delivery schedule, which was waived by GSA. The Government waived the original delivery date when the QAS scheduled the inspection test three days after the deadline and continued to work with the contractor with respect to these other items. The Government should have established a new delivery schedule, and if the contractor subsequently failed to meet the new delivery date, or if the goods were not in accordance with the contract requirements at the later deadline, the ACO could have terminated the contract. After waiving the schedule, however, and encouraging the contractor to correct these items so that the first shipment could be made, the contracting officer was unreasonable in terminating the contract without giving the contractor a firm date by which the contractor had to comply with the contract requirements.

Decision

For the reasons set forth above, the appeal is **GRANTED**. The termination for default is converted to one for the convenience of the Government. As requested by appellant, the termination shall be at no cost to either party.

[¶ 26,564] Keller & Sons Enterprises, Inc. v. General Services Administration

GSBCA No. 11970, November 3, 1993. Contract No. GS-09P-89-KSC-0099.

Modifications—Reduction in Requirements or Prices—Computation Method.—An appeal was granted in part because the government's calculation of a downward equitable adjustment to which it was entitled as a result of deleted contract work was erroneous. Under a janitorial services contract, the contractor was responsible for maintaining an outside water fountain. The government deleted by a constructive change, not by a suspension of work, daily water tests, thrice-weekly vacuuming, and semiannual cleaning. The appropriate reduction in price was to be calculated by ascertaining the number of hours it would have required the contractor to perform the deleted tasks and multiplying that sum by the contractor's cost per hour. The government's calculation that water testing was required 24 days each month was erroneous, as was its calculation that vacuuming was required 11 times each month. The board recalculated the reduction in price.

For the appellant: Sam Zalman Gdanski, Montebello, New York. For the government: Michele M. Feher, Assistant Regional Counsel, General Services Administration, San Francisco, California.

Before DEGRAFF, DANIELS, and PARKER, Administrative Judges.

DEGRAFF, Administrative Judge: Keller & Sons Enterprises, Inc. (Keller) contracted with the General Services Administration (GSA) to provide a variety of services at a

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federal building. During the course of the contract, GSA made certain deductions from Keller's monthly payments, and Keller contends that the deductions were improper. As explained below, Keller's appeal is granted in part.

Findings of Fact

On July 10, 1989, GSA awarded contract GS-09P-89-KSC-0099 to Keller for providing janitorial and related services at the federal building in Tucson, Arizona. Keller was required to work a normal five-day work week, and was to be paid a fixed price per month for its services. The performance period was one year, with four one-year options. Appeal File, Exhibit 4. GSA exercised three of the options. *Id.,* Exhibits 17, 45, 58.

The federal building has an outside water fountain that Keller was required to maintain. The contract provides that Keller was required to perform a daily test in order to determine the pH level and chlorine content of the water, and to add chemicals to ensure that the proper chemical balance was maintained. Keller was also required to vacuum the fountain three times per week and to drain and clean the fountain twice each year. Appeal File, Exhibit 4 at III-J-1, III-J-21.

The contract provides that "Figure G-1, Criteria for Deductions" was to be used to calculate the amount that GSA would deduct from Keller's monthly payments if there were deficiencies in Keller's work, if Keller failed to perform satisfactorily, or if Keller omitted work. Appeal File, Exhibit 4 at I-G-1, I-G3. Figure G-1 explains that if Keller "omitted or unsatisfactorily performed" a task, GSA was entitled to deduct a specified amount per hour from Keller's monthly payments, based upon the number of hours needed to perform the task. For August 1, 1989, through July 31, 1991, the amount to be deducted for water fountain maintenance was $16.20 per hour. *Id.,* Exhibits 8, 17. For August 1, 1991, through July 31, 1992, the amount to be deducted was $16.54 per hour. *Id.,* Exhibit 45.

The contract also permits GSA to make deductions from Keller's monthly payments in the event of a suspension of work. The contract defines a suspension of work as a period of time when "the building is closed due to inclement weather, unanticipated holidays declared by the President, failure of the Congress to appropriate funds, etc." The contract provides that the deduction rate will be equal to the monthly contract price divided by twenty-one, multiplied by the number of days that services were not provided. Appeal File, Exhibit 4 at I-G-6.

The contract permits GSA's contracting officer to make changes in the services performed by Keller. If a change resulted in a decrease in either Keller's cost or time of performance, the contract provides that GSA was supposed to make an equitable adjustment to the contract price and to modify the contract accordingly. Appeal File, Exhibit 4 at II-I-18.

On August 14, 1990, GSA wrote to Keller concerning the fountain. This letter is signed by GSA's Tucson field office manager, on behalf of the contracting officer's representative. The letter states that the fountain had been drained and had not been used since May 1, 1990. The letter also states that GSA did not know when, if ever, it would begin using the fountain again and, as a result, water testing, vacuuming, and semi-annual cleaning (April and October) were not required. GSA estimated that daily water testing required fifteen minutes per day, thrice-weekly vacuuming required thirty minutes per day, and semi-annual cleaning required four hours for each cleaning. GSA stated that, at $16.20 per hour, this amounted to $97.20 per month for water testing, $89.10 per month for vacuuming, and $64.80 per cleaning. In the letter to Keller, GSA stated that it intended to deduct $186.30 per month, except in April and October when it intended to deduct $251.10, for the work not being performed. Appeal File, Exhibit 16. GSA's calculations are based upon water testing being performed twenty-four days per month and vacuuming being performed eleven days per month.

GSA took the following deductions associated with the water fountain:

Period of Service	Amount of Deduction
October 1-31, 1990	$251.10
December 1-31, 1990	$186.30
January 1-31, 1991	$186.30
February 1-28, 1991	$186.30
March 1-31, 1991	$186.30
April 1-30, 1991	$251.10
May 1-31, 1991	$186.30
June 1-30, 1991	$186.30
July 1-31, 1991	$186.30
November 1-30, 1991	$186.30
January 1-31, 1992	$186.30
February 1-29, 1992	$186.30
April 1-30, 1992	$251.10
May 1-31, 1992	$186.30
June 1-30, 1992	$186.30

Appeal File, Exhibit 59. There is no evidence to suggest that deductions were taken for any months other than those listed

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above. The total amount of these deductions is $2,988.90.

On October 11, 1991, Keller submitted a claim to the contracting officer concerning deductions to its monthly payments. Keller stated that GSA had taken deductions "each month since the first part of 1991 for non-service of a[n] outside water fountain." Keller asserted that the deductions were not proper because Keller stopped servicing the fountain for the convenience of the Government. Keller requested that GSA repay all amounts that had been deducted. Appeal File, Exhibit 46.

On June 10, 1992, the contracting officer denied Keller's claim. According to the contracting officer, the deductions were appropriate because a suspension of work had occurred. The contracting officer stated that the August 14, 1990 letter to Keller explained the method by which the amount of each deduction was calculated. Appeal File, Exhibit 56.

This appeal was filed August 10, 1992, and in its complaint, filed March 4, 1993, Keller alleges that no deductions were appropriate. The parties agreed to submit the case on the record. In its brief, Keller asserts that GSA should not have taken any deductions concerning the water fountain, because Keller incurred costs when it repaired the water fountain in 1990. Keller also asserts that the amounts deducted by GSA are inappropriate, and requests that the amounts be recomputed based upon Keller's "more accurate" cost figures. Keller concludes its brief by stating, "The Brief [sic] dispute here really concerns whose cost figures should be computed. Premised on the legal arguments submitted with respect to the claim above, Appellant takes the position that his own cost data should be utilized."

During the life of the contract, the minimum wage rate that Keller was required to pay its janitors and cleaners was $6.04 per hour. Appeal File, Exhibits 5, 17, 45, 58. During the course of performance, the parties agreed that Keller's labor costs included this hourly amount, plus approximately $2.36 per hour for health and welfare benefits costs, workers compensation benefits costs, payroll taxes costs (FICA, FUTA, SUTA), bond costs attributable to labor, and insurance costs attributable to labor. Keller calculated its profit at ten percent, and GSA accepted this profit margin during the course of the contract. Appeal File, Exhibits 33, 34, 36, 48. Adding the minimum wage rate, Keller's other labor-related costs, and Keller's profit results in a total hourly labor cost rate of approximately $9.24 per hour.

Discussion

After a dispute arose between the parties, Keller submitted a claim to the contracting officer and the contracting officer rendered a decision. Keller filed this appeal within ninety days after it received that decision. Therefore, the Contract Disputes Act, 41 U.S.C. §§601-613 (1988), provides us with jurisdiction to consider this appeal.

We reject Keller's argument that, because Keller incurred costs when repairing the fountain in 1990, GSA is not entitled to reduce Keller's monthly payments. If Keller was not compensated properly for its repair costs, Keller should have submitted a claim to the contracting officer. Whether Keller is entitled to be paid for its repair costs has no bearing upon whether GSA is entitled to reduce Keller's monthly payments.

Although the contracting officer's decision states that a suspension of work occurred, this is not accurate. According to the contract, a suspension would have been the result of an event, temporary in duration, which closed the entire federal building. Directing Keller to discontinue the work related to the fountain does not amount to a suspension of work.

What occurred here was a change in the work required by the contract, even though the contracting officer did not give effect to the change by issuing a contract modification. A constructive change occurred when the fountain was drained and not refilled, which effectively deleted the daily water tests, thrice-weekly vacuuming, and semi-annual cleaning required by the contract.

When work is deleted in a fixed-price contract, the Government is entitled to a downward equitable adjustment to the contract price. The amount of the adjustment is the reasonable cost that the contractor would have incurred if the work had been performed. The amount of the adjustment includes direct and indirect costs plus profit. The Government has the burden of proving the amount of the adjustment that is appropriate. *Nager Electric Co. v. United States* [16 CCF ¶80,367], 194 Ct. Cl. 835, 442 F.2d 936 (1971); *J.S. Alberici Constr. Co.*, GSBCA 10306, 91-2 BCA ¶23,846; *John N. Brophy Co.*, GSBCA 5122, 78-2 BCA ¶13,506; *G & M Electrical Contractors Co.*, GSBCA 4771, 78-2 BCA ¶13,452.

In order to calculate the amount that it would have reasonably cost Keller to per-

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form the work that was deleted from the contract, we must ascertain the number of hours that it would have taken Keller to perform the daily water tests, thrice-weekly vacuuming, and semi-annual cleaning, and then multiply the number of hours by Keller's cost per hour. Keller does not dispute that the daily water test could be performed in fifteen minutes per day, that the thrice-weekly vacuuming could be performed in thirty minutes per day, and that the semi-annual cleaning required four hours for each cleaning. GSA's calculation that water testing was required twenty-four days each month is erroneous, as is its calculation that vacuuming was required eleven times each month. The correct calculations for both of these tasks are set forth below.

The total number of hours that Keller would have taken to perform the daily water test (fifteen minutes per test), is as follows:

Period of Service	Work Days Per Month [1]	Hours Per Month
October 1-31, 1990	22	5.50
December 1-31, 1990	20	5.00
January 1-31, 1991	21	5.25
February 1-28, 1991	19	4.75
March 1-31, 1991	21	5.25
April 1-30, 1991	22	5.50
May 1-31, 1991	22	5.50
June 1-30, 1991	20	5.00
July 1-31, 1991	22	5.50
November 1-30, 1991	19	4.75
January 1-31, 1992	21	5.25
February 1-29, 1992	19	4.75
April 1-30, 1992	22	5.50
May 1-31, 1992	20	5.00
June 1-30, 1992	22	5.50
Total Hours To Perform Daily Water Test		78.00

The total number of hours that Keller would have taken to perform the thrice-weekly vacuuming (thirty minutes per vacuuming), is as follows:

Period of Service	Vacuumings Per Month	Hours Per Month
October 1-31, 1990	14	7.0
December 1-31, 1990	13	6.5
January 1-31, 1991	13	6.5
February 1-28, 1991	12	6.0
March 1-31, 1991	13	6.5
April 1-30, 1991	13	6.5
May 1-31, 1991	14	7.0
June 1-30, 1991	12	6.0
July 1-31, 1991	14	7.0
November 1-30, 1991	13	6.5
January 1-31, 1992	14	7.0
February 1-29, 1992	12	6.0
April 1-30, 1992	13	6.5
May 1-31, 1992	13	6.5
June 1-30, 1992	13	6.5
Total Hours To Perform Vacuuming		98.0

The semi-annual cleaning was to be performed each April and October. GSA reduced the contract price during October 1990, April 1991, and April 1992. Keller would have taken a total of twelve hours to perform the cleaning during these months.

Adding the number of hours that Keller would have taken to perform the daily water tests (78), the number of hours that Keller would have taken to perform the thrice-weekly vacuuming (98), and the number of hours that Keller would have taken to perform the semi-annual cleaning (12), yields a total of 188 hours of work which Keller did not have to perform, due to the constructive change in the contract's requirements.

We must next determine what would have been Keller's reasonable hourly cost to per-

[1] We arrived at the number of days by consulting a calendar.

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form this work. There is no evidence that the $16.20 per hour figure that GSA utilized has any relationship to Keller's performance costs. This figure was to be utilized in order to calculate GSA's damages if Keller failed to perform satisfactorily. More likely than not, the $16.20 figure reflects the loss to GSA if work is not performed, rather than the cost to Keller of performing the work. Neither party offered us any assistance in estimating what Keller's costs would have been if it had performed the work that was deleted from the contract. The appeal file contains sufficient evidence to permit us to conclude that Keller's costs plus a ten percent profit would have amounted to approximately $9.24 per hour.

The total amount of the downward equitable adjustment to which GSA is entitled is $1,737.12 (188 hours × $9.24 per hour). GSA deducted a total of $2,988.90. Therefore, Keller's appeal is granted in the amount of the difference between these two figures, which is $1,251.78.

Decision

This appeal is **GRANTED IN PART.** Keller is entitled to recover $1,251.78 plus interest at the rate set forth in 41 U.S.C. § 612 from October 11, 1991, until paid.

[¶ 26,565] Tele-Sentry Security, Inc. v. General Services Administration

GSBCA No. 11639-C(10945(7703)-REIN)-R, November 2, 1993.

Procedure, Boards—Reconsideration—Justifiable or Excusable Mistakes.—A motion for reconsideration, alleging that the board misread the contractor's expense itemization sheet because of a smudge and that the board did not understand that a payment was made to a person who was not an employee, was denied because the contractor did not explain why the alleged mistakes were justifiable or excusable. The contractor did not provide the board with an explanation of the items prior to its original decision and could not later use a motion for reconsideration to further develop arguments it previously lost. The contractor is required to present clear and convincing evidence to show that a mistake has occurred and equally convincing evidence supporting the alleged correct figures.

For the appellant: Kenneth K. Takahashi, Rockville, Maryland. For the government: Robert W. Schlattman, Office of General Counsel, General Services Administration, Washington, D.C.

Before HENDLEY, LABELLA, and BORWICK, Administrative Judges.

Reconsideration of 93-2 BCA ¶ 25,816 denied.

HENDLEY, Administrative Judge: Appellant, Tele-Sentry Security, Inc., filed a timely motion for reconsideration of our decision in *Tele-Sentry Security, Inc. v. General Services Administration,* GSBCA 11639-C(10945(7703)-REIN), 93-2 BCA ¶ 25,816 (Feb. 9, 1993), which was docketed as GSBCA 11639-C(10945(7703)-REIN)-R.

Appellant asserts that it is entitled to reconsideration because:

(1) this Board "mis-read the appellant's expense itemization sheets which were made difficult by duplicating smudges;"

(2) this Board "found that appellant was not entitled to recover payments made to Bob Brown ($5,012) 'as appellant's employee,' and 'salary' paid 'Ken Takahashi' ($2,520) as counsel, a total of $7,532" however, appellant "inadvertently" placed the $2,520 figure on the "Ken Takahashi" line when the the $2,520 figure "should have been carried across on [the Bob Brown Line]" and failed to cross-reference the "Bob Brown" line so as to alert this Board to the notation that "Bob Brown was not an employee of TSSI after 1983."

Neither basis is sufficient for an order of reconsideration. Hence, appellant's motion is **DENIED.**

Discussion

Under Rules 32(a) and 33(a)(2) of our Rules of Procedure, we may grant a motion for reconsideration if there is a "[j]ustifiable or excusable mistake, inadvertence, surprise, or neglect." Appellant has not identified any "justifiable or excusable mistake(s)." Hence, we decline to reconsider our decision.

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Appellant has the burden of proving why the alleged mistakes are "justifiable or excusable." However, appellant has not identified any reason as to why these alleged mistakes, which were made on its behalf, are "justifiable or excusable." It is not enough for an appellant to point to the mistakes and say they occurred. Appellant must explain why these mistakes are "justified or excusable." This it has not shown.

We stand by our original interpretations of the evidence. Appellant has not provided us with any additional documentation to support its contention that mistakes were made, and we have no additional information to either alter our conclusions as to what the smudged photocopy said or change our view as to what alleged costs may be recovered for the appellant's expenses incurred employing Messrs. Takahashi and Brown. The appellant's current version of what it contends the document shows is no more credible than the original copy of the document provided to us. We cannot rely on shifting, self-serving versions of what appellant contends the document should show. We require clear and convincing evidence that a mistake has occurred and equally convincing evidence supporting the alleged correct figures. This appellant has failed to provide.

Moreover, we believe that under these circumstances, neither basis appellant identified can be a "justifiable or excusable mistake." The errors appellant has attributed to this Board appear to result from dissatisfaction with the manner in which appellant's claim has been presented. It is incumbent upon an appellant to present a carefully documented claim to this Board. If appellant has complaints about the poor quality of the photocopying or the structuring of its claim it should address these concerns elsewhere. It is not our responsibility to correct the errors set out in its claim. *See Universal Development Corp. v. General Services Administration,* GSBCA 11252-R, 93-2 BCA ¶ 25,845 (counsel's error in failing to present fully its case before this Board is not sufficient to support a motion for reconsideration).

Finally, we note that even if the alleged errors appellant posits could be construed to be a justifiable or excusable mistake, we would still not grant appellant's motion.

First, appellant has not provided us with any new information sufficient to justify the granting of costs associated with the activities of Bob Brown. Appellant now tells us that Bob Brown was not an employee of Tele-Sentry during the course of this appeal.[1] However, appellant has failed to provide us with sufficient information to enable us to determine the precise status of Mr. Brown. Through our best efforts we have been able to determine that appellant maintains, although without documentation, that Bob Brown was an electronic technician on the project in question. Appellant's Application For Fee and Expenses Under the Equal Access to Justice Act, GSBCA 11639-C, at 7. However, it is unclear what capacity Bob Brown acted in during the appeal. The only evidence before us as to Bob Brown's capacity, is a statement by appellant in which appellant asserts that Bob Brown worked in conjunction with appellant's attorneys to prepare the claim. *Id.* Was Bob Brown an expert witness, an expert consultant, or simply a former employee brought back to help appellant's attorneys with the appeal? Did Bob Brown perform anything more than secretarial functions? We could not determine Mr. Brown's contribution to the case because the appellant did not provide us with sufficient evidence. This evidence was necessary for us to reach a conclusion under the Equal Access to Justice Act (EAJA). *See* 5 U.S.C. 504(b)(1) (1988) (" 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees"). Hence, appellant has not met its burden of proof with regard to the costs associated with Mr. Brown. There is therefore no reason to reconsider our original decision. If there was any error in our original decision concerning costs associated with Mr. Brown, it was harmless.

[1] Appellant's new position is undercut by its past statements before this Board. For instance, appellant stated in its Application for Fee and Expenses Under Equal Access to Justice Act, GSBCA 11639-C, at 1, (emphasis added) that "[i]n 1986 Mr. Tenerowicz traveled to Tempe, Arizona, to go through TSSI's files, select documents, and discuss the case with James Watt, President of TSSI, and Bob Brown, *the project superintendent.*" Hence, it would appear from appellant's own statement's that Bob Brown was employed by appellant at least through 1986. However, appellant apparently contradicts itself, later in the same document, when it explicitly claims that Bob Brown was not appellant's employee after 1983. *Id.* at 7.

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Second, appellant argues that duplicating smudges caused this Board to err in our original decision. As a matter of fact we do not think that duplicating smudges were the problem with the item in question. In fact, our reading of line 33, page 3 of the expense itemization sheet is the same as appellant's.[2] However, that item is cryptic. Appellant did not see fit to provide us with an explanation of that item prior to our original decision. This Board interpreted that item to the best of its ability, considering the paucity of evidence available. Appellant cannot now use a motion for reconsideration to further develop arguments it has previously lost. *Universal Development*, 93-2 BCA ¶ 25,845.

As we have said many times, this Board does not grant reconsideration on the basis of arguments already made and reinterpretations of old evidence. Appellant's arguments are now more learned and complex than they were earlier, but that is not sufficient reason for reopening our consideration of the case; because the issue was before the Board previously, appellant could have made this more sophisticated presentation then.

Id. (citations omitted). Hence, we will not now consider vesting this item with a new interpretation.

Decision

Appellant's motion for reconsideration is **DENIED.**

[¶ 26,566] Planning Research Corporation, Inc. v. Department of Commerce

GSBCA Nos. 11286-COM, 11576-COM, November 24, 1993.

Subcontracting—Prime Contractor on Behalf of Subcontractor—Severin Doctrine.—In an appeal by a prime contractor on behalf of two of its subcontractors for equipment leases, the government was not entitled to a summary decision that the contractor was entitled to permit subcontractor leases to lapse thus requiring application of the *Severin* doctrine, because the existence of potentially exculpatory language in the subcontracts was not sufficient to bar equitable adjustment claims asserted by a prime contractor on behalf of its subcontractors. The *Severin* doctrine provides that a subcontractor cannot recover against the government when its agreement with the prime contractor completely exculpates the prime contractor from any liability to the subcontractor. Further refinements on the doctrine require an iron-bound release immunizing the prime contractor completely from any liability to the subcontractor to be applicable. In this case, because the contractor sought payment under a contract clause providing for a price adjustment rather than under a breach-of-contract theory, the *Severin* doctrine might be inapplicable.

For the appellant: Graham and James, Washington, D.C., by A. Wayne Lalle, Jr., and Paul J. Kennedy. For the government: Jerry A. Walz, Mark Langstein, and Leslie Viguerie, Office of the Assistant General Counsel for Finance and Litigation, Department of Commerce, Washington, D.C.

Before HYATT, DEVINE, and NEILL, Administrative Judges.

HYATT, Administrative Judge: This appeal is of a contracting officer's decision denying claims sponsored by appellant, Planning Research Corporation, Inc. (PRC), on behalf of two of its subcontractors under certain equipment leases. These claims arose from the decision of respondent's Patent and Trademark Office not to fund a renewal of equipment leases in the option years, allowing the leases to expire. PRC asserts that the nonexercise of the options to renew the leases constituted a breach of contract, an improper termination for convenience, and a deductive change.

Respondent has moved that the appeal be denied summarily because under the plain, unambiguous terms of the contracts, PRC, and thus the Government, were entitled to permit the leases to lapse. PRC has opposed the motion, arguing that material facts are in dispute and, in addition, that the cases relied upon by respondent are inapplicable in this context, involving options between a prime contractor and its subcontractors. Be-

[2] Both appellant and this Board believe that line 33, page 3 of the expense itemization sheet reads: "(5) Sets of GSA Claims—Consisting of (15) books of receipts, letters compiled by secretary & copied." Appellant's Motion for Reconsideration, at 1.

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cause we cannot determine at this juncture that the Government is entitled to prevail as a matter of law, we deny the motion.

Background

Respondent, the United States Department of Commerce, Patent and Trademark Office (PTO), awarded a cost-reimbursement contract to PRC for the design, development, and implementation of an automated patent system (APS) for the PTO. The contract was awarded in April of 1984. Appeal File, Exhibit 1.

The APS design developed by PRC, and approved by the PTO, provided that the APS text search function would be performed by computer processor "search engines" that would be coupled to mainframe computers. Appeal File, Exhibit 10. In connection with this design feature, PRC entered into a subcontract with Federal Technology Corporation (FTC) for the acquisition of UNIX-based processors and associated equipment. Complaint ¶ 14. In conjunction with the FTC subcontract, PRC also entered into equipment lease agreements (the "leases") with Finalco and Eden Hannon (the "lessors"). Complaint ¶¶ 15, 16. The equipment leases were of the "lease to ownership plan (LTOP)" type, providing that after sixty months the equipment, which would be purchased by the lessors and furnished to PRC, would be owned outright by the PTO.

The lease with Finalco was executed on August 9, 1986; the lease with Eden Hannon was executed on October 1, 1987. Appeal File, Exhibits 2, 4. The parties contemplated that the term of each lease would be sixty months. Appeal File, Exhibits 3, 5, 6, 10; Supplemental Appeal File, Exhibits 15, 18, 19. These leases, although entered into between the lessors and PRC, are stated to have been authorized and funded by the prime contract between the PTO and PRC.

The equipment lease agreement between Finalco and PRC provides that equipment needed by PRC to perform its prime contract with the PTO would be purchased by Finalco from a designated equipment vendor on a schedule negotiated and executed by PRC and Finalco. PRC would assign any subcontract rights it had with such vendor to Finalco, which would lease the equipment to PRC under the terms stated in the schedule. The equipment lease agreement further provides that upon payment of sixty monthly lease payments, Finalco shall transfer and deliver title to the equipment to the Department of Commerce as directed by PRC. Appeal File, Exhibit 2.

On July 23, 1987, PRC and Finalco executed an assignment of subcontract purchase rights, as provided under the equipment lease agreement. The assignment permitted Finalco to purchase equipment from FTC pursuant to the August 1985 contract entered into by PRC and FTC. Complaint ¶ 17.

Also on July 23, 1987, equipment schedule number F003A to the PRC-Finalco equipment lease was executed. The schedule provided that PRC would lease thirty search engines and other associated items from Finalco. Under the heading "lease term," the lease is stated to be a "60 month Lease to Ownership Plan [LTOP] subject to section 9.2 of the Agreement and subject to any cancellation or termination rights of Lessee [PRC] under the Agreement." Appeal File, Exhibit 3.

On October 1, 1987, PRC entered into an equipment lease agreement with Eden Hannon and Company. This lease is almost identical to the PRC-Finalco agreement. It similarly provides for a sixty month LTOP schedule for the subject equipment and for assignment of PRC subcontract rights. Appeal File, Exhibit 4. On April 16, 1988, PRC and Eden Hannon executed an assignment of subcontract purchase rights, permitting Eden Hannon to purchase equipment from FTC pursuant to the August 1985 PRC-FTC contract. They also executed equipment schedule number E003D providing that PRC would lease twenty-two search engines and associated items from Eden Hannon. Appeal File, Exhibit 5.

Section 9 of both leases contains flowdown clauses such as disputes (paragraph 9.3), termination for the convenience of the Government (paragraph 9.4) and various Federal Acquisition Regulation (FAR) clauses incorporated by reference (paragraphs 9.5 and 9.6). Paragraph 9 in each lease states that "[t]he following contract clauses are based upon equivalent clauses contained in the User Contract."[1] Appeal File, Exhibits 2, 4. Both leases include paragraph 9.1, which states as follows:

> *Option to Extend the Term of the Equipment Leases.* Notwithstanding any provision below to the contrary, Lessee shall be deemed to have exercised its option to extend the term of any Equipment

[1] The "User" is defined in the leases to be the PTO. Appeal File, Exhibits 2, 4.

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Lease for the next Government Fiscal Year (as defined below) if the User issues a modification to the User Contract providing Government Fiscal Year funding for the Equipment Lease and authorizing Lessee to exercise its option to extend the term of the Equipment Lease for the next Government Fiscal Year. This clause is applicable and shall be deemed to be included in each and every Equipment Lease executed under this Agreement notwithstanding the term of this Agreement or the expiration of any other Equipment Lease. The initial term of each Equipment Lease is from the stated commencement date until the end of the then-current Government Fiscal Year. Each Equipment Lease is renewable at the same monthly rate applicable at the inception of the appropriate Equipment Lease, at the option of Lessee, by Lessee giving written notice of renewal to lessor by the commencement of the next Government Fiscal Year or within 30 days after Government funding for such Government Fiscal Year becomes available, whichever date is later, such notice to include a copy of the User Contract funding document; provided that Lessee shall have given preliminary notice of Lessee's intention to renew at least 15 days before the Equipment Lease is to expire. Such a preliminary notice of intent to renew shall not be deemed to commit Lessee to renewals. If the User has not so authorized Lessee, by the end of the then-current Government Fiscal Year, to exercise the option to extend the term of the Equipment Lease for the next Government Fiscal Year, Lessee may, at its option, so extend such Equipment Lease on a month-to-month basis. In such event the terms and conditions applicable to such Equipment Lease under this Agreement shall be in full force and effect including the provisions of this Section 9.1. The total duration of such Equipment Lease, including the exercise of any options under this Section 9.1, shall not exceed 60 months.

Appeal File, Exhibits 2, 4.[2] In contrast to paragraphs 9.3 through 9.6, there is no clause that equates to paragraph 9.1 in the prime contract between PRC and the PTO.

PRC contends that all the principals, including various PTO officials, intended and construed the leases to require exercise of the options to the extent funds were available. This, according to PRC, was a clear condition of obtaining financing for the leases. The following averments, relating to the Eden Hannon lease, are made in an affidavit offered by PRC:

> In connection with the Lease Equipment Agreement ("Lease") relating to the provision of search engines and related equipment to the United States Department of Commerce, Patent and Trademark Office ("PTO"), I attended a meeting on behalf of Connecticut General in Washington, D.C. on September 30, 1987, to confirm the PTO's commitment to performance of the Lease for the full 60 months. The meeting was held at my request and as a precondition to Connecticut General's participation in the Lease financing. In attendance at this meeting were ... the Director of Procurement of PRC and ... the Assistant Commissioner for Information Systems of the PTO. I advised [the PTO Commissioner] that Connecticut General's willingness to finance the lease depended on the correctness of the representation that the risk of non-appropriation was limited to the case in which the entire PTO automation project was discontinued and that, other than in the case of a lessor default, any other termination would be "for convenience," which would result in damages that would make a lender whole. I further advised [the PTO Commissioner] that my purpose in requesting the meeting was to obtain assurance that PTO interpreted the Lease arrangement in a way wholly consistent with Connecticut General's understanding and that such assurance was a condition to financing the Lease. [The PTO Commissioner] indicated that the only impediments to continued funding of the Lease for the full term were non-appropriation of funds by Congress for PTO automation as a whole and termination by the PTO for convenience or default.
>
> I was interested in obtaining this commitment from the PTO because the equipment to be provided under the Lease was designed specifically for the PTO, and we had no basis for judging whether it would have any value on the open market, a point I made to [the PTO Commissioner]. [The PTO Commissioner's] response was that even if the Government had the right

[2] Paragraph 9.2 of the PRC-Finalco agreement permits PRC to discontinue leasing equipment upon 25 days written notice if the PTO discontinues leasing under its agreement with PRC. Appeal File, Exhibit 2. This provision is omitted in the agreement between PRC and Eden Hannon. Appeal File, Exhibit 4.

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to terminate individual items of equipment without full compensation (a right he repeated it did not have), the government would not exercise such a right in this case because the equipment was of such general utility within the Commerce Department. Without the PTO's affirmation of the interpretation of the Lease arrangement, Connecticut General would not have financed the Lease.

Declaration of Donald F. Rieger, Jr. (Rieger Declaration) (August 20, 1991) ¶ ¶ 2-3.[3]

On March 31, 1988, the Findings and Recommendations of the Automated Patent System Industry Review Panel were issued. The Review Panel endorsed an alternative system not using search engines. Supplemental Appeal File, Exhibit 20.

On April 22, 1988, PRC and Eden Hannon entered into a letter agreement amending the terms of the lease agreement and equipment schedule. The letter agreement provided that PRC would pay an amount equal to the aggregate amount of unpaid monthly lease payments if 1) the user contract between PRC and the Department of Commerce was modified to provide for the expiration of the user contract on a date on which not all of the monthly lease payments had been paid in full, or 2) if the PTO discontinued payment for the use of the equipment at any time prior to the end of the Lease Term "for any reason other than a termination for convenience as contemplated by Section 9.4 of the Lease Agreement or a nonrenewal as contemplated by Section 9.1 of the Lease Agreement." Appeal File, Exhibit 6.

In a letter dated September 19, 1989, the contracting officer for the PTO-PRC prime contract notified PRC that "[d]ue to budgetary constraints" the fiscal year 1990 lease schedules with Finalco and Eden Hannon should not be funded. At the same time, other leases, pursuant to different equipment schedules under the same Equipment Lease Agreements, would be funded. Appeal File, Exhibit 7.

In letters dated September 29, 1989, PRC in turn informed Finalco and Eden Hannon that "in accordance with Section 9.1, Option to Extend the Term of the Equipment Lease" of its lease agreements with these companies, PRC had been informed by the PTO that the lease schedules would not be funded in fiscal year 1990. Appeal File, Exhibits 8, 9.

On August 13, 1990, American Security Bank (ASB), assignee for Finalco, forwarded a claim to PRC for $793,722.47, plus interest and attorney fees for the termination of the equipment lease. Appeal File, Exhibit 10. On August 21, 1990, Eden Hannon similarly submitted a claim for the remaining lease payments from the date of the last lease payment made. PRC in turn certified these claims[4] and submitted them to the contracting officer, who denied them.

Discussion

PRC's complaint alleges that the PTO improperly terminated the portion of PRC's prime contract that related to the subcontracts of Finalco and Eden Hannon. According to PRC, the PTO's actions constituted a beach of contract, an improper partial termination for convenience, and a deductive change. PRC contends that recovery would be justified under any of these alternative legal theories.

Respondent's motion for summary relief is premised on paragraph 9.1 of the lease agreements PRC entered into with Finalco and Eden Hannon. Respondent argues that this lease provision is an option clause providing PRC the absolute right not to renew the leases. Based on this clause, respondent further urges that the term of each lease is limited to a single fiscal year. Accordingly, respondent contends, when PRC, in consonance with the PTO's instructions that the leases would not be funded, did not opt to renew the leases, no further cause of action was available to these subcontractors.

Relying on *Government Systems Advisors, Inc. v. United States* [34 CCF ¶ 75,496], 847 F.2d 811 (Fed. Cir. 1988), respondent thus urges that this appeal raises a matter of pure contract interpretation as to which summary relief is clearly available because

[3] Connecticut General financed the Eden Hannon lease and received an assignment of the proceeds; American Security Bank financed the Finalco lease under a similar arrangement.

[4] The initial certification of the claims by PRC has been challenged by the Government as inadequate to establish jurisdiction at the Board. A decision on this motion has been deferred because PRC, as a precautionary measure, submitted a second certification of its claim, one which PTO agrees is satisfactory under the FAR. The "second" certification of PRC's claim is docketed as GSBCA 11576-COM. Thus, the certification issue has become a matter of resolving the date from which entitlement to interest commences, a matter which is not pressing unless the appeal is resolved in appellant's favor, at least in part.

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the plain language of the option clauses in the leases controls. Appellant disagrees, pointing out that summary judgment is not always available in cases involving contract interpretation absent a record sufficient to show the circumstances surrounding the contract. *Campbell v. United States,* 2 Cl. Ct. 247, 249 (1983); *Jay Automotive Specialties, Inc.,* ASBCA 38930, 91-2 BCA ¶ 23,716. The standard by which a motion for summary relief, or summary judgment, should be measured is whether there are any genuine issues of material fact to be resolved that would affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Stroh Corp. v. General Services Administration,* GSBCA 11029, 93-2 BCA ¶ 25,841. In considering a motion for summary relief, we draw all inferences in favor of the non-moving party. *See Reliance Insurance Co. v. United States,* 931 F.2d 863, 865 (Fed. Cir. 1991).

In the principal case cited by the PTO, *Government Systems Advisors, Inc.,* the Government had entered into a lease to ownership contract with Government Systems Advisors, Inc. The terms of the lease were similar to those of the subcontracts in issue here, and the lease contained an option clause comparable to section 9.1 of the Finalco and Eden Hannon leases. In *Government Systems,* the agency decided not to renew the leases in option years; the lessor asserted a claim, urging that the Government was obligated to exercise the options unless no funds were available. Pointing out that the case did not involve any allegations of Government conduct or actions that might affect the interpretation of the contracts, the Court held that the language in question was unambiguous and established a true option contract. The Government, therefore, was not bound to exercise the options regardless of the availability of funds. In these circumstances, the Court affirmed the lower court's decision granting the Government's motion for summary judgment.

The PTO's position is that *Government Systems* is controlling —under the plain language of the leases there was absolutely no obligation for PRC (or thus the PTO) to renew; PRC was therefore well within its contractual rights to let the leases expire. Section 9.1 establishes one-year terms for the leases, with options to renew for up to a total of a sixty months. As the PTO points out, in general, option clauses are deemed to be just that—there is no requirement that an option be exercised. *See, e.g., Government Systems Advisors, Inc.; Vehicle Maintenance Services v. General Services Administration,* GSBCA 11663, 93-3 BCA ¶ 25,929; *Centennial Leasing v. General Services Administration,* GSBCA 11409, 93-2 BCA ¶ 25,609; *Gricoski Detective Agency,* GSBCA 8901, 90-3 BCA ¶ 23,131; *Optimal Data Corp.,* NASA BCA 381-2, 85-1 BCA ¶ 17,760 (1984). Thus, respondent contends, since the subcontracts contain exculpatory language relieving PRC from any liability to the lessors, the Government is also immune from liability to PRC.

At the outset, PRC points out that there is no privity of contract between the PTO and the lessors, such that the PTO might properly invoke these clauses as a defense to this appeal.[5] This is particularly so because there is no comparable option provision in the prime contract entered into between the PTO and PRC.[6] Thus, PRC argues, the Government cannot in any event rely on section 9.1 of the leases to avoid the dispute that exists between it and the prime contractor, PRC. Accordingly, PRC claims that the cases cited by respondent do not apply here.

In *Severin v. United States,* 99 Ct. Cl. 435 (1943), *cert. denied,* 322 U.S. 733 (1944), the Court of Claims held that a subcontractor could not recover against the Government when its agreement with the prime contractor completely exculpated the prime contractor from any liability to the subcontractor. Subsequent cases have clarified that this is a limited defense and that

[5] It is unclear whether respondent, in urging that both PTO and PRC were entitled to allow the options to expire, is suggesting that for this purpose, PTO and PRC shared the same shoes. In any event, to the extent respondent is intimating that there is an agency type of relationship that permits PTO to establish privity of contract with the lessors, such that it might have the right to rely on this clause, the record is insufficiently developed to ascertain whether this is factually correct under controlling precedent. *See U.S. West Communications Services, Inc. v. United States* [37 CCF ¶ 76,142], 940 F.2d 622 (Fed. Cir. 1991); *United States v. Johnson Controls, Inc.* [31 CCF ¶ 71,374], 713 F.2d 1541 (Fed. Cir. 1983). In addition, at least one court, in addressing the same contract, has held that there is no agency relationship. *See Amdahl Corp. v. Baldridge,* 617 F. Supp. 501 (D.D.C. 1985).

[6] Indeed, PRC has made an argument that the option clauses in paragraph 9 of the leases are inapplicable in light of the introductory language stating that the provisions in paragraph 9 are based on equivalent provisions in the prime contract and the absence of a corresponding option clause in the prime contract.

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the Government, to the extent it seeks to invoke the *Severin* doctrine, has the burden to prove that the sponsoring prime contractor has no liability to its subcontractor. *Southern Construction Co. v. United States* [11 CCF ¶ 80,552], 364 F.2d 439 (Ct. Cl. 1966); *Folk Construction Co. v. United States* [31 CCF ¶ 71,247], 2 Cl. Ct. 681 (1983). Indeed, *Severin* has been refined to the extent that "it requires an iron-bound release or contract provision immunizing the prime contractor completely from any liability to the sub[contractor]" to be applicable. *Cross Construction Co. v. United States,* 225 Ct. Cl. 616, 618 (1980). The limited record available to us in this matter does not show this to be the case. PRC has alleged facts that, if proven, could show that it is in fact obligated to the lessors to pay for the equipment. Even if we might, on a fully developed record, deem this lease clause to be one that completely exonerated PRC from liability to its lessors, the Government cannot rely on it in the context of a summary relief motion to defeat this claim.

Additionally, PRC notes that to the extent it may be eligible to recover the amounts claimed under a contract clause providing for a price adjustment, rather than under a breach of contract theory, the *Severin* doctrine is simply inapplicable. *Seger v. United States* [18 CCF ¶ 81,826], 469 F.2d 292 (Ct. Cl. 1972); *Blount Brothers Construction Co. v. United States,* 348 F.2d 471 (Ct.7Cl. 1965); *F.E. Constructors,* ASBCA 25784, 82-1 BCA ¶ 15,780.[7] PRC has alleged, and offered some substantiating evidence to corroborate, certain facts that support its contention that the Government should have treated the decision to jettison these particular leases as a partial termination for convenience of the prime contract, or, alternatively, as a deductive change under the prime contract. The record is not sufficiently developed to determine if these theories are viable or not. The existence of potentially exculpatory language in the subcontracts is thus not sufficient to bar equitable adjustment claims asserted by a prime contractor on behalf of its subcontractors.

Even assuming *arguendo* that the *Severin* doctrine might bar the breach of contract claim,[8] however, PRC opposes the motion because there are disputed factual issues concerning the intent of the parties in entering into the lease agreements, which are subcontracts to which the PTO is not even a party. In particular, PRC contends that there are at least two material facts that appear to be disputed: 1) PRC's assertion concerning the contemplation of the parties that notwithstanding section 9.1, which was intended only to cover the contingency that funds might not be appropriated, the lease terms would be for 60 months; and 2) PRC's assertions concerning the reliance of the finance companies on the representations of the PTO as to the extent of the Government's commitment. PRC has provided an affidavit to support its contentions in this regard. The affidavit raises sufficient doubt as to the intentions of the parties to the subcontracts to prevent the summary disposition of this matter. In addition, section 9.1 is set forth in a group of flow-down clauses, but does not have a counterpart in the prime contract, another circumstance that contributes to ambiguity as to the intentions of the parties.

Decision

The motion for summary relief is DENIED.

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[7] The rationale for not permitting an exculpatory clause to bar recovery of an equitable adjustment is that these clauses were intended merely to protect the prime contractor from liability to the subcontractor in the event its prime contract did not permit recovery of a particular cost. *Seger v. United States* [18 CCF ¶ 81,826], 469 F.2d 292 (Ct. El. 1972).

[8] To overcome the summary relief motion as to its breach of contract allegation, appellant must simply demonstrate the existence of a question of fact as to whether the Government acted properly. One way to prove breach of contract would be to provide evidentiary support for the contention that PTO's decision directing PRC not to renew the leases was improperly motivated by bad faith. *Vehicle Maintenance Services,* 93-3 BCA at 128,967. PRC has alleged that the timing of the issuance of the Industry Review Panel's report, coupled with the Government's decision to drop the search engine leases, provides evidence of possible bad faith.

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[¶ 26,567] Integrated Systems Analysts, Inc. v. Department of the Navy; Information Systems & Networks Corporation, Intervenor

GSBCA No. 10750-P-R, November 2, 1993.

Automatic Data Processing Equipment—Evaluation—Notice of Rejection.—Upon reconsideration of a decision in which the board had determined that the government properly rejected the protester's proposal as nonconforming, the board concluded that it had erred in holding that the protester lacked standing to challenge the untimely notification of the rejection; nevertheless, it declined to hear this claim because the issue of timeliness of notice was academic. The issue of timeliness was a minor allegation in the context of this procurement, and even if the board were to grant the untimeliness claim, the protester would not be able to demonstrate a significant violation of law or regulation or obtain any benefit regarding the procurement as a result of the protested actions.

For the protester: Venable, Baetjer and Howard, McLean, Virginia, by William L. Walsh, Jr., Thomas J. Madden, J. Scott Hommer III, and Wm. Craig Dubishar. For the government: Harvey J. Nathan, Robert D. Hogue, and Naomi J. Miske, Space and Naval Warfare Systems Command, Department of the Navy, Washington, D.C. For the intervenor, Information Systems & Networks Corporation: Piliero, Tobin & Mazza, Washington, D.C., by Pamela J. Mazza and Andrew P. Hallowell.

Before WILLIAMS and LABELLA, Administrative Judges.

WILLIAMS [1], Administrative Judge: On September 21, 1990, the Board denied Count 2 of a protest filed by Integrated Systems Analysts, Inc. (ISA) challenging the Department of the Navy's award of a contract for Shipboard Nontactical ADP Program (SNAP) II systems to Information Systems & Networks Corporation (ISN). We concluded that the Navy had properly rejected ISA's proposal as nonconforming and dismissed the other seven counts of ISA's protest for lack of an interested party. *Integrated Systems Analysts, Inc.*, GSBCA 10750-P, et al., 91-1 BCA ¶ 23,383, 1990 BPD ¶ 298.[2] On October 1, 1990, ISA asked that we reconsider that portion of our decision dismissing Count 3 of the protest, in which ISA claimed that it did not receive timely notice that its proposal had been rejected. For the reasons set forth below, we grant ISA's motion for reconsideration.

Background

The findings pertinent to the request for reconsideration are as follows.[3] In the procurement at issue, the Navy solicited SNAP II systems. These are computer systems installed on board Navy ships and submarines which provide an automated data processing capability for maintenance, supply, and administrative matters. The procurement was a 100% set aside for small and disadvantaged businesses (SDBs).

Thirteen proposals were evaluated and nine, including that of ISA, were determined to be in the competitive range. On March 26, 1990, after receipt of best and final offers, the Navy issued Amendment 005 to the solicitation, requesting the offerors to update their proposals by March 29, 1990. The letter accompanying this amendment specified: "It is the Government's intention to award a contract on the basis of these offers without further discussion." *Integrated Systems Analysts, Inc.*, 91-1 BCA at 117,344, 1990 BPD ¶ 298, at 7. Revised proposals were received from the remaining offerors in the competitive range on March 29.

On April 6, 1990, the Navy notified ISA and other offerors in the competitive range that Systems Management American Corporation (SMA) was the apparent successful offeror and that challenges to the SDB or size status of SMA could be made by April 13, 1990. *Integrated Systems Analysts, Inc.*, 91-1 BCA at 117,344-45, 1990 BPD ¶ 298, at 8-9. Two protests as to SMA's SDB status

[1] This case was originally decided by a panel of three judges, Judges Suchanek, LaBella, and Williams. Judge Suchanek has since resigned from the Board. Because this decision involves reconsideration of the original opinion, no new judge has been added to the panel. *See Universal Restoration, Inc. v. United States* [33 CCF ¶ 74,555], 798 F.2d 1400, 1406 n.9 (Fed. Cir. 1986).

[2] Systems Management American Corporation (SMA) intervened in ISA's protest solely on one count not in issue here.

[3] Because none of the Board's factual findings are challenged in the motion for reconsideration, references are to the findings in *Integrated Systems Analysts, Inc.*, GSBCA 10750-P, et al., 91-1 BCA ¶ 23,383, 1990 BPD ¶ 298.

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were filed and forwarded to the Small Business Administration (SBA). On June 4, 1990, the contracting officer determined SMA to be nonresponsible.

With SMA's disqualification, the Navy concluded that ISA was next in line for award. However, the contracting officer had previously overlooked a cover letter to ISA's March 29 proposal. The contracting officer interpreted that cover letter to indicate that ISA's price was conditioned on its substitution of the unacceptable Fujitsu disk drive for the required Harris disk drive. *Integrated Systems Analysts, Inc.*, 91-1 BCA at 117,345-46, 1990 BPD ¶ 298, at 9-11. Because of this condition, on approximately July 12, 1990, the Navy concluded that ISA had submitted an unacceptable offer. *Id.* at 117,346-48, 1990 BPD ¶ 298, at 12, 15. However, the Navy did not notify ISA of its rejection at that time. Rather, as the Board found:

> By letter dated July 13, 1990, offerors were advised that ISN was the apparent successful offeror. Protest File, Exhibit 19.[4] ISA was not notified that its proposal had been rejected due to the perceived "condition" concerning the disk drive. Transcript at 165. Notwithstanding the contracting officer's judgment that ISA's offer was nonresponsive, ISA was asked to extend its offer twice after March 29, 1990, once in May 1990 and again on July 20, 1990, seeking an extension of ISA's proposal until August 31, 1990. Protest File, Exhibits 36, 37; Transcript at 166.

Id. at 117,348, 1990 BPD ¶ 298, at 15-16.

By letter dated July 20, 1990, ISA, through counsel, protested to SBA ISN's SDB status on the ground that ISN was not disadvantaged. Protester's Motion for Reconsideration and Motion for Summary Disposition (Motion for Reconsideration), Exhibit A; Protest File, Exhibit 38. The Navy proceeded with award to ISN despite the SBA protests. *Integrated Systems Analysts, Inc.*, 91-1 BCA at 117,348, 1990 BPD ¶ 298, at 16.

ISA protested to this Board the award to ISN, raising the following eight grounds of protest. In Count 1, ISA claimed that the Navy evaluated ISN's proposal based upon lesser quantities than were specified in the solicitation and modified the delivery schedule in making award to ISN, violating the requirement that the agency amend the solicitation when changing its requirements. In Count 2, ISA claimed that the Navy improperly rejected its proposal as nonresponsive. In Count 3, ISA alleged that the Navy failed to notify it promptly that its proposal was ineligible for award. In Count 4, ISA contended that the Navy's award to ISN was invalid in that the Navy had never called for a second round of best and final offers (BAFOs), had not obtained approval from the Source Selection Authority for a second request for BAFOs, and awarded to ISN based on its response to Amendment 5 of the solicitation without closing discussions.

In Count 5, ISA challenged the Navy's communications with ISN, claiming that the Navy provided ISN information concerning a decrease in quantities, *inter alia*, which afforded ISN a competitive advantage and constituted illegal unequal treatment of offerors. In Count 6, ISA claimed that it was denied the opportunity to clarify or meaningfully discuss its proposal. In Count 7, ISA claimed that the Navy engaged in illegal post-BAFO discussions with ISN. In Count 8, ISA alleged that the Navy's decision to go forward with the procurement despite the pendency of two protests at the SBA concerning ISN's SDB status was erroneous.

We concluded that the Navy properly rejected ISA's proposal as not conforming to a material requirement of the solicitation. We therefore denied Count 2 of ISA's protest and dismissed the remainder of its claims, including Count 3, on the ground that ISA was no longer an interested party. ISA is requesting here that we reconsider our decision to dismiss Count 3. For the reasons stated below, we grant reconsideration, conclude that ISA was an interested party for the purpose of raising that ground of protest, but dismiss the claim.

Discussion

ISA argues that if ISA had standing to challenge the Navy's rejection of its offer, ISA necessarily had standing to challenge the untimely notification. ISA states:

> The Board ruled that when the Navy determined that ISA's price update was unacceptable, ISA was at "the end of its protest trail." Opinion at 18. Count 3 does not take ISA a single step past the end of this protest trail. Count 3 merely asserts that when the Navy decided that ISA was at the end of the SNAP II trail it had an

[4] This letter also notified ISA that it had five days in which to file a protest against ISN's SDB status.

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obligation under the FAR and the decisions of this Board to give ISA timely notice of that determination.

Motion for Reconsideration at 11.

We agree that the untimely notice allegation is so intertwined with the Navy's determination that ISA's proposal was nonconforming that ISA did have standing to raise that ground of protest as well.

Although protester has standing to raise Count 3, we decline to address that claim. The issue is subordinate to the question whether the rejection of ISA's proposal as nonconforming was proper. Having denied that claim, we view the timeliness of the notice of such rejection to be academic in this forum. Even if we were to grant Count 3, protester would not be entitled to any relief in this forum. While protester may have incurred legal expenses pursuing an SDB protest at SBA, such expenses are not compensable at this Board. Nor would the late notification violation entitle protester to bring a cost case under the circumstances here. Count 3 was by no means the thrust of the protest; it was a minor ancillary allegation in the context of this procurement. Protester recognizes that all of its other seven counts were properly dismissed for lack of an interested party. Thus, even if the Board were to grant Count 3, protester would not have demonstrated a *significant* violation of law, regulation, or DPA or have obtained any benefit regarding the procurement as a result of the protested action. *Bedford Computer Corp.*, GSBCA 9837-C(9742-P), 89-2 BCA ¶ 21,827, at 109,814, 1989 BPD ¶ 121, at 7. As such, protester would not be entitled to an award of costs.[5]

In conclusion, even if protester were to prevail on Count 3, protester would not be entitled to any relief in this forum other than a declaration that a regulation was violated; the Board, therefore, deems it inappropriate to address the merits of this count at this time. *Cf. Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986) (District Court properly declined to grant declaratory relief where declaration would have been "so narrow as to be useless to the plaintiffs.")

Decision

The motion for reconsideration is **GRANTED.** The Board's decision dismissing Count 3 is affirmed on other grounds.

[¶ 26,568] P. M. Hagel & Associates, Inc. v. General Services Administration

GSBCA No. 10742, November 24, 1993. Contract Nos. GS-09P-50109, GS-09P-50111.

Labor—Price Adjustment for Change in Wage Determinations—Reliance on Agency Representations.—A contractor's reliance on an affirmative representation from another agency under a prior contract that its work assignment practices were proper did not validate its decision to assign the work under the instant sprinkler installation contract to laborers as opposed to higher paid sprinkler fitters, because the contractor was aware that only the Department of Labor could determine a proper assignment, and no such determination had been issued under the prior contract. Under the prior contract, the contractor's work assignment practices were questioned by the contracting officer, but the contractor eventually received an affirmative representation that no violations of labor provisions had occurred. Given the contractor's awareness of the critical importance of a determination from the DOL on such matters, the board concluded that the contractor should not have attributed any special significance to the representation provided by the other procuring agency. The contractor's request for a price adjustment for paying its employees at the higher sprinkler fitter rate was denied.

Labor—Disputes Concerning Labor Standards—Boards of Contract Appeals.—A board of contract appeals had jurisdiction to consider a dispute concerning an alleged ambiguity in labor classifications because the contractor's claim was not a challenge to a Department of Labor wage determination but a claim focusing on the impact of the wage determination on the contractor's contractual rights. Jurisdiction to resolve disputes involving mutual contract rights and obligations is not lost by a board of contract appeals simply

[5] The Board's decision awarding costs in *Gallegos Research Group Corp.*, GSBCA 10125-C(9983-P), 90-1 BCA ¶ 22,609, 1990 BPD ¶ 21 is distinguishable. There, protester had standing to proceed with the protest, protester had abandoned all claims other than the notification claim, and the Board concluded that the notification in *Gallegos* was misleading and inaccurate.

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because labor standard issues within the exclusive DOL jurisdiction form the partial factual predicate for the dispute between the parties.

Interpretation of Contracts—Trade Usage—Labor Classifications.—Under a contract to install a sprinkler system, a contractor's contention that the contract was ambiguous with respect to the labor classifications to be assigned to work items was rejected because the contractor's work assignment problems were caused not by the provisions of the wage determination but by its failure to comply with the prevailing local practice of assigning the work at issue to sprinkler fitters as opposed to laborers.

Mistakes—Mutual Mistakes—Labor Classifications.—A contractor's request for reformation of a sprinkler system installation contract based upon the mutual but mistaken belief that labor classifications to be assigned to work items were proper was denied because there was no showing that either the contractor or the government was operating under such a mistaken belief when the contract was being administered. The board could not accept the fact that the contractor had assumed its labor classifications were proper, because the contractor's prior experience with a similar contract for the installation of a sprinkler system alerted the contractor to the possibility of problems in the area of proper labor classifications. The fact that a government representative certified the correctness of the contractor's payroll record did not signify the government's belief in the propriety of the assignments. The certification addressed only the correctness of the labor rate paid when compared to the rate shown in the applicable wage determination. In the absence of any record containing a description of the work actually done, the board was unwilling to conclude that the representative found the work assignment proper.

Contract Disputes—Implied-in-Fact Contract—Wage Determinations.—Under a contract to install a sprinkler system, a procuring agency's actions in retaining funds to satisfy a Department of Labor wage determination and in providing information for the wage dispute did not create an implied contract that required the agency to fund the agreement the contractor reached with DOL regarding the wage determination, because the communications between the agency and the DOL did not rise to the level of an express or implied promise. Even if it were assumed that the communication did rise to the level of a promise, the contractor did not explain how such a promise converted to an implied contract. A promise, even if made, would have been unilateral, and in fact, even if there had been an implied contract in this case, the parties would have been the DOL and the procuring agency, not the contractor and the agency.

For the appellant: Schwabe, Williamson & Wyatt, Portland, Oregon, by Thomas M. Triplett. For the government: Sharon A. Roach, Office of General Counsel, General Services Administration, Washington, D.C.

Before NEILL, LABELLA, and HYATT, Administrative Judges.

NEILL, Administrative Judge: In this case, appellant, P.M. Hagel & Associates, Inc. (Hagel), disputes the refusal of the General Services Administration (GSA or respondent) to make an equitable adjustment to the price of two contracts calling for the installation of fire sprinkler systems in federal buildings located in the San Francisco city area. Appellant also disputes the refusal of GSA to fund a portion of a settlement agreement which appellant entered into with the Department of Labor (DOL) regarding certain labor violations which allegedly occurred during the performance of the two contracts in question.

The parties have elected to have this case decided on the record without the benefit of a hearing. Rule 11. They have also agreed to a detailed stipulation regarding the facts in this case. We have reviewed these stipulations and find them substantially in accordance with documentation contained in the appeal file. We, therefore, are relying upon them in great part for our own findings of fact in this case. Upon review of the record in its entirety, we conclude that the appeal should be denied for the reasons set out below.

Findings of Fact

1. GSA awarded firm fixed price contract no. GS-9P-50111 (hereinafter "contract 111") to appellant on September 26, 1985. Under the terms of the contract, appellant was required to perform all labor, and supply all materials, equipment, and incidentals

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to install a fire sprinkler system at the Federal Building at 50 United Nations Plaza in San Francisco. Hagel agreed to perform the work for $997,500, subsequently modified to $1,045,300. Joint Stipulation No. 1.

2. Firm fixed price contract no. GS-09P-50109 (hereinafter "contract 109") was awarded to Hagel on September 30, 1985. Under the terms of the contract, appellant was required to perform all labor, and supply all materials, equipment, and incidentals to install a fire sprinkler system at the U.S. Appraisers Building, 630 Sansome Street in San Francisco. Hagel agreed to perform for $1,191,000, subsequently modified to $1,185,424. Joint Stipulation No. 2.

3. Both contracts were awarded by respondent's Region 9 in San Francisco. Joint Stipulation No. 3.

4. Both contracts contained GSA Form 3505 (Apr. 1984) entitled "Labor Standards (Construction Contract)." This form sets forth, *inter alia*, GSAR 552.220-70—Davis Bacon Act (40 U.S.C. Section 276a to 276a-7) (Apr. 1984); GSAR 552.222-71—Contract Work Hours and Safety Standards Act—Overtime Compensation (40 U.S.C. Section 327 to 333) (Apr. 1984); GSAR 552.222-73—Payrolls and Basic Records (Apr. 1984); GSAR 552.222-78—Disputes Concerning Labor Standards (Apr. 1984); and GSAR 552.222-81—Applicable Minimum Hourly Rates of Wages (April 1984). Joint Stipulation No. 4.

5. Both contracts also contained, *inter alia*, the following clauses: FAR 52.236-3, "Site Investigation and Conditions Affecting the Work (Apr. 1984)" and FAR 52.243-4, "Changes (Apr. 1984)." Joint Stipulation No. 5. The clause regarding site investigation has the following provision:

> The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost .... Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

Appeal File, Exhibits 1, 2.

6. Both contracts contained wage determination no. CA84-5022, published October 5, 1984 (49 Fed. Reg. 39416), as modified nine times. Joint Stipulation No. 6. The determination sets out the prevailing wages for sprinkler fitters, painters, and laborers by group. No definitions are offered in the determination for the type of work performed by sprinkler fitters or painters. The wage determinations for laborers are broken out into separate groups. These groups of laborers are differentiated one from another by brief definitions. There is no similar breakdown for the sprinkler fitters or painters. Appeal File, Exhibits 1-2.

7. Prior to award of the two contracts which are the subject of this appeal, Hagel had experience in the installation of fire sprinkler equipment in the area covered under the wage determination. This was in connection with performance of work for the U.S. Army Corps of Engineers at Fort Ord, in Monterey County, California. Appeal File, Exhibit 21.

8. During performance of the Army contract, the contracting officer's representative questioned whether it was appropriate for Hagel to pay some of its employees at a laborer's rate when they were doing journeyman sprinkler fitter work. Appellant's Brief of February 19, 1993,[1] Exhibit 1. Counsel for Hagel responded that the contract contained no definition of a fire sprinkler fitter journeyman or a laborer. He asserted that the contractual definition of labor included the work being performed by those designated as laborers on the certified payroll. He further pointed out that if the Army insisted on all employees being paid at the fire sprinkler journeyman rate, then the contract would require revision and Hagel would ask for "an extra." Finally, counsel for Hagel asked for the name and address of the DOL official who presumably made the determination upon which the Army was relying. Appeal File, Exhibit 21.

9. The Corps' District Labor Officer promptly informed counsel for Hagel that his district would take no further action in the matter. He wrote:

> I have investigated the jurisdictional matter involving fire sprinkler fit-

[1] This brief, received by the Board on February 19, 1993, has been mistakenly styled by appellant as "Respondent's Memorandum." We cite it here and elsewhere in this opinion as "Appellant's Brief of February 19."

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ters/laborers. I have determined, based on the information available, that there are no violations of the Davis-Bacon Act involved.

Appeal File, Exhibit 21.

10. There is no evidence in the record that appellant sought clarification from either GSA or the DOL regarding the wage determination included in the solicitation which led to the two contracts which are the subject of this appeal. *See* Joint Stipulation No. 7.

11. Work began on contract 109 in March 1986, and on contract 111 in May 1986. Both contracts were substantially complete by December 1986. Joint Stipulation No. 8.

12. There is, in the record for this case, a certification signed by an employee of the company which served as project manager for contract 109. The certification says that this employee spot checked payroll records and found them to be accurate "according to the pay scale in effect at the time the records were submitted." Appellant's Brief of February 19, Exhibit 7. Among the various responsibilities assigned to this corporate project manager was the task of checking for compliance with labor standards provisions of the contract. *Id.,* Exhibit 4. Appellant has submitted what are purported to be copies of such payroll records provided to the project manager. These records indicate that the individuals listed are salaried employees, owners, laborers, fitters, etc. The records also show the hourly rate paid to each individual not on regular salary. They do not, however, provide any description of the type of work done by these individuals. *Id.,* Exhibits 5-6.

13. By letter dated December 17, 1986, DOL advised GSA that it was conducting a "concurrent Fair Labor Standards Act, Davis Bacon Act (DBA) and Contract Work Hours and Safety Standards Act (CWHSSA) investigation" of Hagel under the contracts. In its letter, DOL advised that its investigation had disclosed DBA and/or CWHSSA violations, and requested that GSA withhold $213,900.04 from contract funds. Joint Stipulation No. 9.

14. By subsequent letter, dated December 30, 1986, DOL advised GSA that its investigation had disclosed DBA violations by one of Hagel's subcontractors. DOL requested that GSA withhold an additional $12,569.38 ($6,868.26 from contract 111, and $5,701.12 from contract 109). Joint Stipulation No. 10.

15. By letter dated December 31, 1986, GSA notified Hagel that based on DOL's December 17, 1986, letter, it would withhold further progress payments. Joint Stipulation No. 11.

16. On January 26, 1987, counsel for Hagel wrote the contracting officer a letter concerning DOL's investigation and the findings thereof and requesting an equitable adjustment. Enclosed with counsel's letter of January 26 was the DOL's "Summary of Unpaid Wages," totalling $214,129.62. Joint Stipulation No. 12.

17. The letter of January 26, 1987, from counsel for Hagel also informed GSA that the basis of DOL's findings was that "there could be no laborers on the project, but that only painters and pipefitters could be used." Hagel's request for an equitable adjustment was based on (1) the lack of a specification which specified the classification of laborer to be used on the project; and (2) that Hagel had submitted weekly payroll certifications to the agency without objection, which payrolls "where applicable" specified work being performed under the laborers' classification. Joint Stipulation No. 12.

18. By letter dated March 27, 1987, the contracting officer's representative, Mr. Wilby, responded to the letter of January 26, 1987, from counsel for Hagel. The contracting officer's representative declined to authorize additional compensation to Hagel for the contracts. The basis for his conclusion was his understanding that the basis for the DOS investigation was whether laborers performed pipefitters' work, not whether laborers could be used for any work under the contracts. The contracting officer's representative stated that to the best of his knowledge, laborers "certainly can be used" on the projects, *provided* that laborer's work was performed. Appeal File, Exhibit 18.

19. Counsel for Hagel responded to the foregoing in a letter dated April 15, 1987, advising that he would explore the issue with DOL. In this letter, counsel also clarified the basis for Hagel's request for an equitable adjustment, stating that DOL had taken the position that no laborers could be assigned to perform work under the contracts, and that since that was contrary to the "common expectation" of the parties to the contract, an equitable adjustment should be considered to reflect the parties' intent. Appeal File, Exhibit 19.

20. According to the narrative report prepared by the DOL to document its investigation, Hagel had classified and paid almost all of its workers on these contracts as laborers. The DOL had determined that the correct

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classification and wage rate for the work at issue was sprinkler fitters. Based on an area practice survey conducted by DOL of "most sprinkler fitter installing contractors" in the geographic area, it was concluded that contractors assign the type of work at issue to sprinkler fitters and/or to apprentices, as opposed to assigning the work to members of the Laborers Union or a separate craft. DOL further concluded that its finding was reinforced by the collective bargaining agreements relating to both the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and the Laborers Masters Agreement. Joint Stipulation No. 15.

21. By letter dated October 21, 1987, to the contracting officer, counsel for Hagel renewed his client's request for an equitable adjustment. The basis for the renewed request for an equitable adjustment was the allegation that the specifications do not contain any indication as to whether union or nonunion practice prevails in the applicable geographic area and that accordingly, bidders are not alerted as to labor assignments that may be made. Appeal File, Exhibit 21.

22. By letter dated November 24, 1987, to the contracting officer, DOL confirmed its continuing investigation of Hagel for DBA and CWHSSA violations. Further, DOL advised GSA that it was not willing to settle with Hagel for less than the full amount of the back wages, or $200,648.07. Joint Stipulation No. 17.

23. On December 1, 1987, the contracting officer's representative, Mr. Wilby, responded to the request of October 21 from counsel for Hagel asking for an equitable adjustment. He advised that because DOL had jurisdiction over resolution of the issues, he could not entertain settlement proposals. Joint Stipulation No. 18.

24. The DOL investigation of Hagel continued, as did Hagel's attempts to reach a settlement with DOL. GSA was not a party to the negotiations. By letter of May 4, 1988, counsel for Hagel proposed settlement to DOL, noting that GSA had declined Hagel's request for extras, and that GSA had declined to participate in a joint offer. Joint Stipulation No. 19.

25. By letter dated May 20, 1988, the Administrator of the Employment Standards Administration of DOL advised Hagel that, based on a careful review of the investigation report, she found reasonable cause to believe the DBA and CWHSSA violations constituted a disregard of Hagel's obligations under the DBA and CWHSSA regulations. At this point, Hagel was provided an opportunity for a hearing. Joint Stipulation No. 20.

26. DOL, in its Summary of Investigation Findings, concluded that Hagel:

a) violated the DBA by failing to pay the prevailing wages and misclassifying employees as laborers who performed painters' and sprinklers fitters' work;

b) violated CWHSSA by failing to pay overtime for work in excess of 40 hours a week; and

c) submitted falsified payroll records (the records not only "routinely falsely indicated" that certain employees were owners and salaried when in fact they weren't, but were falsified to show that employees had not worked over 40 hours in a week).

Appeal File, Exhibit 26; Joint Stipulation No. 21.

27. On June 15, 1988, Hagel requested a hearing from DOL. In its request, Hagel admitted that it did not pay its employees overtime as required by CWHSSA (although it continued to contest classification for purposes of computing the overtime rate). Hagel also admitted that it furnished incorrect certified payrolls to the compliance officer, when it listed nine individuals as salaried owners when only two were. Joint Stipulation No. 22.

28. The matter was referred to an administrative law judge. DOL issued its prehearing information on February 17, 1989, and Hagel answered on March 6, 1989. Appellant's Complaint at ¶10; Joint Stipulation No. 23. The information expressly stated in paragraph ten that $200,048.78 is being withheld by the GSA pending resolution of this matter. In its answer, Hagel expressly admitted the statements of paragraph ten of the information. Appellant's Brief of February 19, Exhibits 15-16.

29. Shortly thereafter, Hagel's counsel resumed settlement negotiations with DOL. Specifically, by letter dated March 21, 1989, Hagel offered the full amount of retainage on the contracts, $157,090, as payment for unpaid back wages, plus an additional $20,000 should Hagel recover any monies from GSA, in return for the DOL dropping debarment proceedings. Joint Stipulation No. 24.

30. At some point during this latest period of discussions between DOL and Hagel, an attorney for DOL telephoned GSA's then contracting officer, James Solomon. Accord-

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ing to the DOL's attorney's notes, she was told that for contract 109, GSA was withholding $200,978 and for contract 111, GSA was withholding $215,382. These notes further stated as follows:

> Called Red . . . told him that K officer saying $416,000 . . . being . . . -He checked . . . 2 letters sent, one in '9/86 and one in '87, asking that $200,000 be held—he thinks they may have held too much.

Joint Stipulation No. 26.

31. The DOL attorney advised counsel for Hagel that GSA was withholding $200,978 on 109 and $215,382 on 111. Joint Stipulation No. 27.

32. Hagel questioned these numbers because they were inconsistent with the records of the company. However, Hagel did not communicate with GSA during this time. Joint Stipulation No. 28.

33. On May 12, 1989, DOL and Hagel entered into consent findings on case no. 89-DB-33. Under the terms of these consent findings, it was agreed that Hagel had underpaid 26 employees under the contracts by a total of $199,818.49. Joint Stipulation No. 29.

34. After the consent findings were entered into, DOL requested an accounting of funds from GSA. By letter dated May 26, 1989, the contracting officer responded that $58,368 remained on contract 109 and $215,382 remained on contract 111. Joint Stipulation No. 30.

35. Subsequently, by letter dated July 5, 1989, DOL requested that GSA release $199,818.49 to DOL because its investigation had been completed and Hagel had agreed to make full restitution. Appeal File, Exhibit 34.

36. In response to the July 5 letter from DOL, on August 29, 1989, the acting chief of the Construction A/E Contracts Branch instructed the GSA Accounts Payable Division to release $199,818.49 to DOL. Appeal File, Exhibit 35.

37. This internal instruction of August 29 to GSA's accounts payable reflected a total balance on the two contracts of $273,750. Release of the $199,818.49 to the DOL left an aggregate contract balance on both contracts of $73,931.51. That balance was subject further to liquidated damages in the amount of $350, leaving $73,581.51. Joint Stipulation No. 33.

38. The information contained in the August 29, 1989, internal memorandum to GSA's accounts payable branch was incorrect. By memorandum dated on or about September 12, 1989, the acting branch chief advised accounts payable that an accounting error had occurred and that the total contract funding available on the contracts was $156,740. He requested that all remaining funds be remitted to DOL. Joint Stipulation No. 34.

39. Having received a copy of the foregoing GSA memorandum, counsel for Hagel wrote to the acting chief of the Construction A/E Contracts Branch on September 18, 1989, expressing his dissatisfaction with the situation. Joint Stipulation No. 35.

40. On March 9, 1990, Hagel submitted a claim to the contracting officer pursuant to the Contract Disputes Act (CPA), 41 U.S.C. §§ 601-613 (1988). As required by the CDA, 41 U.S.C. § 605(a), Hagel's claim was properly certified. Hagel submitted three alternative theories for recovery, as follows:

> (1) **$73,581.50** This amount reflects the accounting calculations on Hagel's remaining contract balance as set forth in GSA's August 29, 1989, memorandum at Rule 4, Exhibit 35. It is the difference between the mistaken contract balance of $273,382 and the sum of $199,818.49 as contained in the Consent Findings between Hagel and DOL. Of the $73,581.50, $43,078.49 would be payable to DOL, with Hagel receiving the balance of $30,503.01.
>
> (2) **$216,544.51** This amount is based on the oral information the DOL attorney informed Hagel she received from the then GSA contracting officer. It is the difference between $416,360 and the amount set forth in the Consent Findings of $199,818.49.
>
> (3) **$199,818.49** This amount represents the amount set forth in the Consent Findings between Hagel and DOL and is based on Hagel's request for an equitable adjustment under the contract.

Joint Stipulation No. 36.

41. The contracting officer did not issue a final decision within the requisite time, and Hagel appealed the deemed denial to this Board on July 25, 1990. Joint Stipulation No. 37.

Discussion

Appellant's Request for Equitable Adjustment

Appellant contends that it is entitled to an equitable adjustment or change order increasing the contract price by $199,818.49.

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In its complaint, appellant explains the basis for this claim:

> [T]he parties to the agreement, General Services Administration and P.M. Hagel & Associates, Inc. reasonably understood and believed and conformed to the understanding set forth in the contract that assignment of laborers to perform work as described herein above satisfy the contractual responsibilities of the parties.

Complaint ¶ 20.

In briefing this argument, counsel for appellant urges us to consider four factors which allegedly support its claim for equitable adjustment. We consider them in turn.

The first factor is that shortly before bidding on the two GSA contracts which are the subject of this appeal, Hagel had a similar contract with the Army. Under that contract, Hagel's assignment practices were questioned by the contracting officer but eventually "received an affirmative representation from the U.S. Department of the Army."

We find this argument unconvincing. The Army's so called "affirmative representation" hardly appears to have been a reasonable basis for appellant to conclude that its assignment practices were above reproach. The contracts in this case were with GSA, a civilian agency, obviously distinct from the Army. Nevertheless, in view of subsequent events, this contretemps with the Army should have at least served as a wake-up call, alerting appellant that it was vulnerable on this matter.

Documentation in the record demonstrates that it was the Army which first contacted Hagel on the issue of whether the contractor's assignment practices were proper. There is no indication that the DOL was involved. Indeed, counsel for appellant, in replying to the Army's inquiry, not only raised the prospect of a contract price increase, but also challenged the Army to identify the DOL official who issued the determination on which the Army was relying. *See* Finding 8. We find this comment particularly significant. It demonstrates that appellant's counsel was very much aware that ultimately only a DOL determination could validate a contracting officer's concern over proper assignments.

Counsel's letter appears to have moved the Army to back down in the dispute with Hagel. A carefully worded reply from the Corps' district labor officer advised that "based on information available" he had determined that no violation of the DBA was involved. *See* Finding 9. Given counsel's obvious awareness of the critical importance of a determination from DOL on such matters, we do not believe that appellant either could or should have attributed any special significance to the determination provided by the Corps. If appellant did so, this was clearly unreasonable on its part.[2]

The second factor presented by appellant in support of its claim for equitable relief is that the contracts with GSA were ambiguous with respect to the type of labor classifications permitted. Hagel complains that the contracts did not contain the appropriate wage determination. That which was contained did not designate specifically the work to which the determination should apply. Rather, the wage determination is said to have been an open-ended specification which included every craft and trade in the geographic area and was totally insensitive to the type of work to be performed under the two GSA contracts in question. Appellant also points out that there was no descriptor of the work of sprinkler fitters and that it is clear a significant portion of the challenged work fell within the description of laborers' work. *See* Appellant's Brief of February 19 at 9-10.

Relying on a decision of the Court of Appeals for the Federal Circuit, namely, *Emerald Maintenance, Inc. v. United States* [36 CCF ¶ 76,018], 925 F.2d 1425 (Fed. Cir. 1991), GSA argues that we do not even have jurisdiction to hear appellant's contention regarding the alleged inadequacy of the wage determination. According to GSA, appellant's complaint regarding this contract

[2] Appellant has also cited 29 U.S.C. § 255, a statute of limitations provision regarding actions to enforce any cause of action for damages under the DBA. This provision, according to appellant, is a "safe harbor to contractors acting in good faith reliance on certain types of agency statements." We think not. This argument was apparently offered to the DOL as well and was rejected with the following observation:

> The firm intends to offer as a defense, the fact that on the previous DBRA [Davis-Bacon Related Acts] contract at Ford [sic] Ord California, the firm was given a clean bill of health by the U.S. Army Corps of Engineers.
>
> This argument is unimpressive. Because the firm avoided detection of a previous violative practice is hardly justification for current violations.

Respondent's Brief of February 17, Exhibit 1 (Narrative Report), Addendum I.

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specification is nothing more than a thinly veiled challenge to the labor standard itself. GSA reminds us that, in *Emerald Maintenance,* the Court held that such disputes, regardless of how a claimant chooses to style its complaint, relate to contract labor standard provisions. Such disputes are exempt from the contract's general disputes clause and, by specific contract provision, are to be resolved in accordance with the DOL procedures. Respondent's Brief of February 17 at 24-25.

We find GSA's reliance on *Emerald Maintenance* misplaced. The facts in that case differ significantly from those in the present case in one particularly important aspect. In *Emerald Maintenance,* the contractor made no effort to challenge the DOL determination; it simply filed a claim for recovery of funds withheld by the Government in response to DOL's request. In such a situation one can readily understand why the Court concluded that the contract claim in that case was tantamount to a challenge to DOL's determination.

By contrast, in the instant case, the record shows that Hagel did, in fact, challenge the labor standards applicable to its contracts with GSA—albeit unsuccessfully. The focus of its claim now, therefore, is on the impact DOL's determination has had on Hagel's contract rights. This is a matter which we can and should address. *See Burnside-Ott Aviation Training Center, Inc. v. United States* [38 CCF ¶76,479], 985 F.2d 1574 (Fed. Cir. 1993) (jurisdiction to resolve disputes involving mutual contract rights and obligations not lost simply because labor standard issues within exclusive DOL jurisdiction form the *partial* factual predicate of dispute between the parties).

We have considered, therefore, this second factor raised by appellant in support of its request for equitable relief. Nevertheless, we reject it. In this particular case, we do not see Hagel's problems arising from any alleged deficiency in the wage determination. GSA did insert the applicable wage determination in its solicitations and that determination contained the prevailing wages for sprinkler fitters, painters, and laborers. Finding 6. Hagel's problem did not stem from the provisions of this wage determination, but from its failure to comply with the prevailing local practice of assigning the type of work at issue to sprinkler fitters and/or to apprentices, as opposed to members of the laborers union or a separate craft.

It is well established that because wage determinations are the responsibility of DOL, a contracting agency owes no legal duty to an offeror to interpret or clarify the labor classifications they contain. *Collins International Service Co. v. United States* [32 CCF ¶ 73,099], 744 F.2d 812 (Fed. Cir. 1984). The responsibility of determining the appropriate labor classification applicable to the contracts in question rested, therefore, with Hagel. The record, however, contains no evidence that Hagel sought clarification from either GSA or DOL regarding the wage determination included in the solicitation. Finding 10. Similarly, Hagel, notwithstanding its previous entanglement with the Army on this very issue, in preparing its bid for a similar contract with GSA apparently made no inquiry regarding the prevailing local practice for labor assignments.

In sum, if Hagel lacked critical information regarding the appropriate labor classifications to use in preparing its bid for the GSA contracts, we would attribute this more to its own lack of diligence than to any alleged deficiency in the wage determination provided by GSA.

The third factor offered by appellant in support of its request for equitable relief is that the parties allegedly administered the two contracts based upon the mutual but mistaken belief that the labor assignments were proper. Appellant's Brief of February 19 at 10.

We are not convinced that either appellant or GSA was operating on such a belief. The Government does not appear to have had enough information to form an opinion one way or the other. Appellant attaches special significance to the fact that a representative of respondent certified to the correctness of the contractor's payroll records. The certification, however, goes only to the correctness of the rate paid when compared to the rate shown in the applicable wage determination. These records do not contain any description of the work actually done by the employees in question. In the absence of that information, we can hardly conclude that the certifying official believed the assignments to be proper. There simply was not sufficient information to permit him to make any determination in this regard. *See* Finding 12. As a matter of fact, nothing in the record convinces us that, prior to the DOL investigation, respondent had any idea of how appellant was making its various labor assignments.

As to appellant, we have already noted that prior experience with an Army contract for the installation of a sprinkler system alerted Hagel to the possibility of problems

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in the area of proper labor classifications. In view of the absence of any DOL involvement in that earlier case, it is puzzling that Hagel did not seek clarification on this matter before submitting its proposal on the two GSA contracts. Hagel contends that it entered the GSA contracts on the mistaken assumption that its labor assignments were correct. Under the circumstances, we cannot accept this fact as certain. It is equally possible that Hagel made no such assumption but chose instead to let sleeping dogs lie. In any event, its labor assignments were simply an exercise of business judgment and not a matter of shared responsibility.

Given the record before us, we are not convinced that a mutual mistake existed regarding the proper labor assignments for the two GSA contracts. Nevertheless, even if this were the case, our appellate authority has spoken clearly on this issue. In *Emerald Maintenance,* the contractor sought relief for a mistake similar to that alleged in this case—neither party was aware of the local area practice of classifying all employees working on roofs, as part of a roofing contract, as roofers. The Court held, however, that the inclusion of the Site Investigation Clause in the contract placed the risk of any mistake as to local labor practice on the contractor.

The Court's decision in *Emerald* focused, in particular, on the provision of the Site Investigation Clause which states that the contractor has "investigated and satisfied itself as to the general and local conditions which can affect the work or its cost" and that failure of the contractor to do so "will not relieve the contractor from responsibility" for estimating properly the cost of performing the work. This investigation on the part of the contractor was expressly held by the Court to include inquiry into area practice in classifying workers. For this reason, the Court refused to hold the Government responsible for Emerald's inadequate investigation. *Emerald Maintenance,* 925 F.2d at 1430-31.

The two contracts in this appeal contain the same Site Investigation Clause as was indicated in the contract in *Emerald Maintenance.* Finding 5. Accordingly, even if we were to find the existence of a mutual mistake as alleged by appellant (which we do not), we would still, given the conclusion reached by the Court of Appeals in *Emerald Maintenance,* reject Hagel's claim for relief based on the alleged mistake.

The fourth and final factor which appellant offers in support of its claim for an equitable adjustment in the contract price is that the contracting officer allegedly misrepresented the amount of retainage when DOL and Hagel were settling their dispute. This alleged representation is also at the heart of the other dispute in this case, namely, the contracting officer's refusal to fund the settlement between DOL and Hagel. For reasons described in detail later in this opinion, we find that the circumstances in this case do not warrant relief for the contracting officer's error. This holds true not only for appellant's demand that GSA fund the settlement but also for its claim to equitable relief based on the same facts.

Appellant's Demand that GSA Fund its Settlement with DOL

Hagel lists various sums to which it claims it is entitled as a result of GSA's failure to communicate to DOL and appellant the precise amount retained under the two contracts to satisfy DOL's demands. These sums range from $73,581.50 to $216,544.51. *See* Finding 40.

Appellant's theory for recovery here is not altogether clear. In briefing this case, counsel for Hagel states:

> Here it is certain that the fundamental dispute arose out of the contract, be its interpretation or mutual mistake. Appellant simply seeks to enforce the resolution reached of that dispute.

Appellant's Brief of February 19 at 12.

GSA takes this statement to mean that Hagel is asking us, in this count of its complaint, to enforce the settlement agreement reached with DOL. GSA is correct in pointing out that Hagel's agreement with DOL did not include GSA as a party, did not involve negotiations with GSA, and is not an agreement within the purview of the CDA; and that, even if it were, the agency in question is not one within our CDA jurisdiction. Accordingly, GSA urges us to dismiss this count. Respondent's Brief of February 17 at 16-17; Respondent's Reply Brief at 2-3.

We do not understand appellant's claim in quite the same manner that GSA does. Rather, we understand appellant to be complaining of GSA's failure to live up to a promise made prior to the signing of the Consent Findings.

In its complaint, Hagel alleges:

> [GSA] promised in its discussions with ... Labor, to fully fund the consent [agreement] and to remit to P.M. Hagel & Associates, Inc. the sum of $216,544.51 ....

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Complaint ¶ 23. We understand appellant to argue that it is this promise and not the settlement agreement itself which is the contract over which we have jurisdiction. In his brief, counsel for Hagel states:

> The jurisdiction of the Board of Contract Appeals exists whether the contract is implied or express. Implied contracts may arise out of oral representations of the contracting officer. *Balboa Systems Company, Inc.,* ASBCA No. 39400, 91-2 BCA ¶ 23,715 (Jan. 1991). The facts and circumstances here most distinctly give rise to an implied contract, particularly given the stated purpose of the inquiry and the resulting agreements which followed.

Appellant's Brief of February 19 at 13.

Even with this qualification, we find appellant's theory insufficient to support its claim. The information provided in this case by the GSA contracting officer to the inquiring DOL attorney certainly does not rise to the level of either an express or implied promise. The inquiry was an informal one and the amount mentioned was immediately recognized as being at variance with the amount formally requested at an earlier date by DOL. Finding 30. Furthermore, even if one is to assume that the communication did rise to the level of a promise, appellant does not explain how such a promise converts to an implied contract. The promise, even if made, is unilateral. We see the contracting officer getting nothing in return—except perhaps this dispute. Further, even if we are to assume that an implied contract did arise, the parties would be GSA and DOL. Such an agreement between two agencies or representatives of two agencies is obviously not one over which we would have jurisdiction.

The most egregious flaw, however, in appellant's demand that GSA fund the DOL settlement is Hagel's contention that it reasonably relied on the contracting officer's alleged promise. The record in this case supports the opposite conclusion. The accuracy of the information provided by the contracting officer to the DOL attorney was questionable from the start. The $416,000 was immediately recognized as being in excess of DOL's original requests. *See* Finding 30. This figure was also over twice the amount of retainage DOL had stated in its prehearing information and to which Hagel had agreed in its answer to the same. Finding 28. Furthermore, the parties have stipulated that Hagel, itself, questioned the numbers as being inconsistent even with its own records. Nevertheless, despite the enormous difference in estimates, Hagel did not seek to clarify matters by conferring with GSA. Finding 32.[3]

The difficulties encountered by GSA in determining the precise amounts withheld on the contracts are indeed disconcerting. It would be fanciful, however, for us to assume that these accounting errors on the part of GSA are without parallel in the annals of contract administration. What is astonishing here is that Hagel, under the circumstances in this case, made no effort to flush the matter out and resolve it prior to signing its settlement with DOL. We will not speculate on why Hagel elected not to question the figures provided. Rather, we conclude only that such undiscerning reliance was clearly unreasonable under the circumstances and, in itself, vitiates any argument Hagel now raises in support of an equitable price adjustment or funding of its settlement with DOL.

Decision

This appeal is **DENIED.**

[¶ 26,569] Ingenieurgesellschaft Fuer Technische Dienste

ASBCA Nos. 42029, 42030, April 24, 1992. Contract Nos. F61503-90-M-0514, F61503-90-M-0745.

Payments, Prompt—Interest—Foreign Vendors.—An award of Prompt Payment Act interest was granted to a foreign contractor, even though a regulation provided that the interest penalty provisions of the PPA did not apply to contracts awarded to foreign vendors, because there was nothing in the PPA or its legislative history showing that Congress intended to restrict the benefit of the Act to domestic contractors performing contractual work within the United States. The legislative history made clear that the

[3] We also note here that in an earlier settlement proposal, Hagel had estimated the retainage to be $157,090—a figure which differed by only $350 from GSA's ultimate figure of $156,740. *Compare* Finding 29 *with* Finding 38.

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purpose of the PPA was to encourage every agency to pay all of its bills in a timely fashion. There was no distinction drawn in the PPA between a foreign or domestic vendor. Moreover, the PPA was expressly linked to the Contract Disputes Act for purposes of the computation of the interest rates. The reference to the CDA, which applied to covered agency contracts awarded and performed outside the of the United States, was further confirmation that Congress's perspective was not limited to an agency's domestic operations. The regulation excluding foreign contractors, being inconsistent with the intent and purpose of the PPA, was not binding on the parties.

For the appellant: Paul D. Reinsdorf, Frankfurt, Germany. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Maj. Kathleen G. O'Reilly, USAF, Trial Attorney.

Before HARTY, RIISMANDEL, and RUBERRY, Administrative Judges.

HARTY, Administrative Judge: These consolidated appeals seek interest pursuant to the Prompt Payment Act (PPA), 31 U.S.C. §§3901-3907, on amounts due under two repair contracts performed by Ingenieurgesellschaft Fuer Technische Dienste (ITD), a German corporation, in the Federal Republic of Germany during 1990. ITD also seeks DM 1,300 for return charges incurred as a result of cancellation of some of the work called for under one of the contracts. The parties have submitted the appeals on the record under Board Rule 11. Both parties submitted briefs and the Government submitted a reply. We decide entitlement only.

We sustain the appeals as to the PPA interest claims, but deny the claim for return charges.

FINDINGS OF FACT

ASBCA No. 42029

Contract No. F61503-90-M-0514 (M-0514) called for ITD to repair and provide parts for various pieces of equipment located at Rhein-Main Commissary, Rhein-Main Air Base, Federal Republic of Germany. The completion date for work was 15 March 1990. On 14 February 1990, ITD met with representatives of the Base contracting office. During the meeting, the contracting officer advised the ITD representative that the Government no longer required repair of two of the pieces of equipment. The ITD representative was told to attempt to cancel orders that ITD may have placed for repair parts. (Affidavit of R.S. Kennedy; G-4, G-5)

The Government received ITD's 17 January 1990 invoice for DM 4,358 for the work performed no later than 22 January 1990. ITD also sought DM 1,300 for return charges on spare parts that were to be used in connection with the cancelled work. On or about 27 March 1990, the Government's contracting officer received three bills from ITD assertedly supporting its claim for return charges. A translation of the supporting documents shows that the orders were placed in March of 1990, after the 14 February 1990 cancellation of the work covered by the parts requested. (G-1A-C, G-2, G-3, G-4) Appellant has offered no evidence in rebuttal. We find that the orders were placed after cancellation.

ASBCA No. 42030

On or about 27 February 1990, the contracting officer issued Contract No. F61503-90-M-0745 (M-0745) for the repair of two forklifts also located at the Rhein-Main Commissary. The forklifts were repaired and the Government accepted the work on 9 March 1990 and 22 March 1990. On 30 March 1990 ITD submitted an invoice for the contractual amount of DM 10,944.40. The Government received the invoice no later than 4 April 1990.

Request for Contracting Officer's Decisions

No payment was forthcoming under either contract. By separate letters, each dated 27 August 1990, ITD submitted formal claims for payment. The Government received the claims no later than 29 August 1990 (Gov't br. at 3). ITD demanded payment of the outstanding balance of DM 4,358 under contract M-0514, together with PPA interest from 17 February 1990 until the Government received the claim and interest thereafter under section 612 of the Contract Disputes Act (CDA), 41 U.S.C. §§601-613. ITD also filed a claim of DM 1,300 for return charges. DM 10,944.40 was claimed under M-0745 together with PPA interest from 30 April 1990 until claim receipt and CDA interest thereafter. ITD's 27 August 1990 claim letters specifically requested a contracting officer's final decision within 60 calendar days. The contracting officer did not respond. By letters of 31 October 1990, appellant appealed to the Board from deemed denials in accordance with the CDA, 41 U.S.C. §605(c)(5).

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DISCUSSION

Contract Performance

The Government has admitted liability for the principal amounts of DM 4,358 under contract M-0514 and DM 10,944.40 under contract M-0745. We understand payment was made in February, 1991 (app. br. at 8 n.6). The Government has also acknowledged liability for appropriate CDA interest. However, the Government does contest the claim for return charges under contract M-0514 on the ground that ITD failed in its duty to mitigate damages by placing the orders for the parts after the work was cancelled, citing *The McCarthy Corp.*, ASBCA No. 35204, 88-1 BCA ¶ 20,485. We agree and note that appellant has offered no rebuttal, apparently abandoning this claim.

Prompt Payment Act Interest

The only question remaining here is ITD's entitlement to PPA interest.[1] The Government maintains that the PPA was not intended to have extraterritorial effect. Counsel argues that there is neither an express statement in the Act concerning extraterritorial effect, nor does the legislative history appear to specifically address the question whether Congress intended the PPA to have extraterritorial effect. In this context, counsel urges that we apply the "long standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1230, 113 L.Ed 2d 274, 281 (1991), citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 93 L.Ed 680, 683 (1949).

The Government also emphasizes that both Federal Acquisition Regulation (FAR) 39.901 and Air Force Regulation (AFR) 177-102, Commercial Transactions at Base Level, dated 15 November 1987, as amended, preclude payment to foreign vendors in these circumstances.[2] FAR 32.901 provides that "the interest penalty provisions" of the PPA "do not apply to contracts awarded to foreign vendors outside the United States for work performed outside the United States." Paragraph 12-131 of AFR 177-102, in effect during the period covered by the contracts in dispute here, provided that:

> Interest Penalties required by the Prompt Payment Act are not payable to foreign vendors or foreign governments serving as vendors for purchases made outside the U.S. This exclusion does not apply to U.S. vendors doing business overseas or to purchases made from foreign vendors doing business in the U.S.

(Gov't reply br., attachment 1)

Appellant argues that the PPA unambiguously requires the payment of interest to foreign vendors. In appellant's view, the purpose of the Act plainly applies equally to a Finance Office in Cleveland, Ohio, and to a Finance Office in Frankfurt, Germany. In the present case, two contracts were made, the work performed, invoices submitted, and then the contractor was simply ignored, a result which frustrates the manifest congressional purpose in enacting the PPA.

The presumption against extraterritoriality is an important canon of construction. As the Supreme Court explained in *Arabian American Oil*, the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1230, 113 L.Ed 2d at 282. In the context of *Arabian American Oil*, the Court was "unwilling to ascribe to [Congress] a policy which would raise difficult issues of international law by imposing this country's employment discrimination regime upon

[1] By order dated 8 April 1991, we dismissed appellant's request for attorney's fees as premature and not properly before the Board. *Maintenance Engineers, Inc.*, ASBCA No. 34431, 87-2 BCA ¶ 19,915; *J.M.T. Machine Co.*, ASBCA Nos. 23928 *et al.*, 86-2 BCA ¶ 18,928, *aff'd*, 826 F.2d 1042 (Fed. Cir. 1987).

[2] Government counsel has also candidly pointed out that prior to March of 1989, paragraph 12-12c of AFR 177-102 as originally published provided for the payment of PPA interest to foreign vendors in the following terms:

> c. Contracts with foreign governments (bilateral agreements and memoranda of understanding) are excluded from provisions of the Prompt Payment Act. All other contracts with foreign vendors, and foreign governments serving as vendors (government ownership or control of railroads, utilities, port facilities, etc.) are subject to the Act ....

Counsel has also noted that Air Force Pamphlet 110-4, entitled Fiscal Law, dated 30 September 1988, indicated the PPA applied to foreign vendors. Counsel emphasizes, however, that while the initial version of AFR 177-102, paragraph 12-12c would have allowed payment of PPA interest to foreign vendors, the section was deleted in March 1989. We accept that at all times relevant to these contracts Air Force regulations precluded payment of PPA interest to appellant.

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foreign corporations operating in foreign commerce." *Id.* at 1234, 113 L.Ed 2d at 286.

However, we think the Government's reliance on the presumption alone is misplaced. We do not understand the Supreme Court's most recent application of this important guide to ascertaining congressional intent to require an express statement to the effect that the Act applies outside the United States, its territories and possessions before the presumption can be overcome. The absence of an express statement does not foreclose an inquiry into Congressional intent, although it may otherwise "buttress" a conclusion that the legislation was not intended to have extraterritorial effect. *Id.* at 1235, 113 L.Ed 2d at 288.

We agree with appellant's analysis. In our view, Congress intended that the PPA be given extraterritorial effect and we recently reached this conclusion with respect to the precise questions presented by these appeals in *Held & Francke Bauaktiengesellschaft mbH*, ASBCA Nos. 42463, 42464, 92-1 BCA ¶ 24,712.

Under the PPA an agency head "acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the due date, shall pay an interest penalty to the concern on the amount of the payment due." 31 U.S.C. § 3902(a). The legislative history makes clear that "[t]he Prompt Payment Act requires every Federal Agency to pay an interest penalty on amounts owed to business concerns for the acquisition of property or services when the agency does not pay on time." H.R. Rep. No. 97-461, 82d Cong., 2d Sess. 8 (1982), *reprinted* in 1982 U.S. Code Cong. & Admin. News 111-126. The aim was

> to accomplish what administrative rules and regulations have failed to do—provide incentives for the Federal Government to pay its bills on time. Those suppliers of goods and services who do business with the Government, in particular small companies, are being treated unfairly by the Government when it fails to pay its bills on time. The companies frequently must borrow money at high interest rates to secure operating funds which would have been available if the Government had paid its bills promptly. The Government itself is also hurt because its reputation as a slow payer discourages businesses from bidding for Government contracts. The Government consequently is deprived of the innovation and lower prices that result from vigorous competitive bidding for contracts.

Id. at 1.

The focus of the Act is principally on the agency and its total operations. Congress was concerned that every agency pay *all* of its bills in a timely fashion. No distinction is drawn between a foreign or domestic vendor. Instead, the emphasis is on a "business concern," which the Act defines as including "a person carrying on a trade or business" and "a nonprofit entity operating as a contractor." 31 U.S.C. § 3901(a)(2)(A), (B). Moreover, the PPA is expressly linked to the CDA for purposes of the computation of the interest rate, delineating interest penalty payable under the PPA from interest payable under the CDA, and specifically authorizing claims for unpaid interest under the CDA. 31 U.S.C. §§ 3902, 3907. The references to the CDA, which applies to covered agency contracts awarded and performed outside the territorial jurisdiction of the United States, are further confirmation that Congress's perspective was not limited to an agency's domestic operations when it enacted the PPA.[3]

In summary, as we said in *Held & Francke*,

> the Act's purpose was "to provide incentives for the Federal Government to pay its bills on time." Nothing contained either in the Act or in its legislative history demonstrates that Congress intended to restrict this benefit to domestic contractors performing contractual work within the boundaries of the United States.

Held & Francke at 123,350

[3] Though we find Congress's intent clear, we do note that the presumption against extraterritorial effect is particularly pertinent in assessing domestic socioeconomic legislation. When the PPA is measured against the purpose underlying the presumption, a congressional direction to pay an interest penalty if an agency does not honor its contractual commitments to pay in a timely fashion poses virtually no risk of "international discord," unlike the imposition of domestic socioeconomic legislation abroad. If for some reason a foreign contractor is unwilling to accept a PPA interest penalty, it may refuse the payment. *Matter of Central Intelligence Agency*, 62 Comp. Gen. 673 (1983) (waiver of PPA interest authorized). Alternatively, a foreign contractor might decline to contract or insist on a choice of foreign law to govern the contract if the amount of a late payment penalty were a serious concern. *See Gesellschaft Fuer Fertingungstechnik u. Maschinenbau AG*, ASBCA No. 24816, 81-1 BCA ¶ 14,924 for a discussion of choice of law.

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We also found FAR 32.901 to be inconsistent with the purposes of the PPA. *See also R & B Bewachungsgesellschaft mbH,* ASBCA No. 42221, 92-1 BCA ¶ 24,752, 27 January 1992. As we observed, Section 3903(a) of the PPA charges the Director of the OMB with proscribing regulations implementing the Act. Under this authority, OMB issued Circular A-125 on 19 August 1982. From its original form until a revision was publicly proposed on 14 April 1989, 54 Fed. Reg. 15,053, Circular A-125 never purported to exclude foreign vendors from the Act's application. In the proposed revision, OMB made the following proposal:

> Contracts with foreign contractors for work performed outside the United States are not covered by the circular. The Prompt Payment Act does not specifically address the question of geographic coverage. In the absence of clear congressional intent, the general principle, articulated by the Supreme Court, is that statutes can only operate upon persons and things within the territorial jurisdiction of the law making power. In addition, a number of requirements of the Act, reflecting domestic industry practice, either have no counterparts overseas or are in conflict with industry practice abroad. Interest rates vary widely among countries so that application of the Act in foreign countries would result in windfalls to contractors in some countries and would undercompensate vendors in others. Further, some vendors overseas do not willingly accept application of U.S. law.

Id. at 15,056.

However, in formulating its most recent revision of the Circular on 21 December 1989, 54 Fed. Reg. 52,700, OMB stated:

> We received comments from three agencies, one industry association, and a foreign government agency, asking for clarification or complaining about precluding applicability to foreign vendors outside the United States for work performed outside the United States. We have conferred with the FAR Council, the Office of the U.S. Trade Representative, and a number of affected agencies and concluded that the proposed exclusion should be removed to avoid possible discrimination on the basis of nationality.

Id. at 52,701.

The "proposed exclusion" referred to and dropped by OMB from Circular A-125 is embodied in the FAR 32.901 injunction that "the interest payment provisions" of the PPA "do not apply to contracts awarded to foreign vendors outside the United States for work performed outside the United States." We also note that neither FAR 32.901 nor the parallel paragraph 12-131 of AFR 177-102 are apparently based on an assessment that Congress intended to limit the territorial effect of the PPA since the regulations are directed only to foreign vendors performing outside the United States. Domestic vendors performing contracts awarded outside the United States would be covered under the regulations.

Against this background, we concluded that:

> OMB, the agency entrusted by Congress to draft regulations to carry out the Act's intent, has—after some deliberation—publicly opposed the exclusion contained in FAR 32.901 so as to avoid possible discrimination on the basis of nationality.
>
> As we stated in *Zinger Construction Co.,* 87-3 BCA ¶ 20,043:
>
> > Although administrative construction of a statute should be given deference because of the expertise of the administrative agencies, it is still proper to resort to legislative history and to consider the intent of the lawmakers as well as the purpose of the statute in determining the meaning of a statutory provision where the language of the statute leaves room for interpretation and there have been inconsistencies in its application. See *Texas State Commission for the Blind v. United States,* 796 F.2d 400, 415 (Fed. Cir. 1986).
> >
> > We have performed such an analysis and conclude, as we did in *Zinger,* that the regulation at issue is "inconsistent with the intent and purpose of the" Prompt Payment Act. Since FAR 32.901 does not "carry out the legislative intent," it is "not reasonable in this respect" and is not binding on appellant. *Southeastern Community College v. Davis,* 442 U.S. 397, 411 (1979); *cf. Brown & Root Development, Inc. v. Tennessee Valley Authority,* 681 F.2d 1313 (11th Cir. 1982) [cited in *Zinger, supra*]."

Held & Francke at 123,350-51. *See also New York Guardian Mortgagee Corp. v. United States,* 916 F.2d 1558 (Fed. Cir. 1990).

This analysis is controlling here and applies with equal force to AFR 177-102.

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DECISION

ITD's claims for PPA interest penalty under ASBCA Nos. 42029 and 42030 are sustained and the matter is remanded to the parties for the determination of quantum. ITD is entitled to PPA interest penalty from 30 days after Government receipt of the invoices until receipt of the claims and interest thereafter on the amount of the interest penalty in accordance with the CDA. The claim for return charges in connection with ASBCA No. 42029 is denied. ASBCA No. 42030 is sustained and ASBCA No. 42029 is sustained in part as indicated.

[¶ 26,570] Monoko, Inc.

ASBCA No. 46283, December 15, 1993. Contract No. NAS10-11830.

Performance—Interference by Government—Inspection Services.—The costs of inspection services performed by a contractor after the original completion date for its repair contract were not recoverable, because the contractor failed to prove that its alleged increased inspection costs were caused by disruptive effects of government changes in the later period of time. The inspection costs were required by the contract and were not shown to be attributable to change orders or government delay. It was not shown that performing the inspections after the completion date increased the cost of the required inspections. Moreover, the sheer volume or the continued flow of change orders did not constitute proof of disruption to the contract work.

For the appellant: De Renzo & Karraker, P.A., Altamonte Springs, Florida, by Donald E. Karraker. For the government: Donald H. Schiller, Counsel, National Aeronautics & Space Administration, Kennedy Space Center, Florida.

Before TODD and RIISMANDEL, Administrative Judges.

TODD, Administrative Judge: This appeal involves a claim for costs of inspection of protective coatings and surface preparations on water tanks caused by delay and disruption. Appellant elected the accelerated procedure provided by Board Rules, and both parties agreed to waive a hearing and submit the appeal for decision on the record. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 12 July 1991, the National Aeronautics and Space Administration (NASA) awarded Contract No. NAS10-11830 for the repair and maintenance of two water tanks at Kennedy Space Center (KSC) to appellant Monoko, Inc., d/b/a Quality Painting & Construction Co. (Monoko), for a firm fixed price of $193,432 (R4, tab 4). Monoko is a small business and did not have prior Government contracting experience (R4, tab 42). The contract work involved sandblasting and coating steel water tanks. The contracting officer was to provide a National Association of Corrosion Engineers (NACE) certified inspector for inspection of coatings to assure compliance with the specifications. (R4, tab 2, at 6, 30, 62) The specifications required the contractor to provide quality control inspection and included the following provision related to Government-provided NACE inspection:

> The Contracting Officer will provide NACE certified coating inspectors to ensure the requirements of this Specification are fulfilled. The Contractor shall provide safe walking surfaces and access to his work areas for all Government inspections.

(R4, tab 2, § 09892, at 46, ¶ 3.4; § 09893, at 62, ¶ 3.4) The contract incorporated by reference the standard clauses "Changes (AUG 1987)" (FAR 52.243-4), "Suspension of Work (APR 1984)" (FAR 52.221-12), and "Disputes (APR 1984)" (FAR 52.233-1) (R4, tab 4, at 54, 56-57).

2. On 18 September 1991, the contracting officer issued the notice to proceed (R4, tab 14). It is agreed that the original contract completion date was thereby set as 15 April 1992 (R4, tab 4, at 6; app. br. at 1; Gov't br. at 3).

3. NASA did not have NACE certified inspectors employed at KSC available to support the contract and decided the services should be supplied by the contractor (exh. G-46). By letter dated 18 September 1991, the contracting officer requested a proposal from appellant for providing the technical services of a NACE certified inspector to

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"inspect all protective coatings and surface preparations both on-site and off-site as required in contract specifications and drawings." The letter began, "NOTICE: THIS IS NOT A NOTICE TO PROCEED WITH THE WORK." The proposal was to "include a firm, fixed price for all work within the proposed change." (R4, tab 15)

4. Appellant obtained a quotation from Aerotek Services, Inc. (Aerotek) to submit a proposal to NASA. Aerotek quoted an hourly rate of $26.50 and higher rates for inspection at locations other than KSC. (Exh. G-10, -11) On 31 October 1991, appellant proposed a price of $57,500 (exh. G-12). After a NASA request, appellant submitted a cost breakdown and confirmed its proposal of "the lump sum" of $57,500. Appellant's hourly rate was $48 and, after calculating overtime, payroll taxes, overhead and profit, the "[t]otal per average week" would be $4,486. Appellant's proposal included the following:

> The project should run 13 weeks @ $4,486/wk, we than [sic] have a total of $58,318. If the project should run more than the 13 weeks, we will add the necessary amount, if the project should be completed before we can than [sic] pro-rate and deduct from the proposal amount, which ever [sic] may be the case.

(R4, tab 17)

5. Mr. Thomas E. DeLaet, the contracting officer's technical representative (COTR), evaluated appellant's proposal with assistance from Mr. Chuck Belt, a NASA Base Support contractor employee. NASA reduced the hourly rate to $34.22 and calculated that $23,274 would be a fair and reasonable price for the inspection services during the 13-week period the contractor scheduled. NASA expected the contractor to begin work 7 November 1991 and complete the project 9 March 1992. (Exh. G-46)

6. Negotiations were conducted by telephone on 27 November 1991. Participants were Messrs. DeLaet and Belt, Ms. Anne D. Reed, the NASA contract administrator at that time, and Ms. Keri Monokandilos, appellant's president. Appellant represented that its quoted hourly rate was high because it included payroll taxes and insurance and travel expenses. Accordingly, NASA considered the proposed costs fair and reasonable. Appellant's proposal in the amount of $57,500, which had been evaluated at $23,274, was settled at $28,704. (R4, tab 6)

7. During the negotiations the Government representatives told Ms. Monokandilos that appellant was to provide NACE inspection services on a firm, fixed price basis. Ms. Reed explained the effect to Ms. Monokandilos. If the company finished the job early it would make more profit, but if the work went beyond the contract completion date, there could be a loss that the company might have to absorb. The lump sum was not considered adjustable based on actual cost experience or the period of time during which the work would be performed. (R4, tab 27; exh. G-44, -46) The Government did not hear any objection from Ms. Monokandilos (exh. G-46). According to appellant's attorney, Ms. Reed said that if the contract duration were extended, the costs of NACE inspection would be considered in a contract modification to increase the costs of providing NACE inspection for the extended time of the contract (R4, tab 42).

8. Modification No. SA-1 to the contract (SA-1), signed by appellant on 20 December 1991, provided a negotiated equitable adjustment in the amount of $28,704 for NACE inspection services and was the Notice to Proceed for the NACE inspection work. The contract completion date was unchanged. The contractor was required to submit a certification of the NACE inspector to the contracting officer for approval (R4, tab 5). This submission was made on 19 December 1991 (exh. G-13). SA-1 included the following accord and satisfaction language:

> It is hereby agreed that the adjustments agreed to herein constitute an accord and satisfaction and fully satisfy any and all claims against the Government arising out of or related to the changes specified in this Supplemental Agreement including, but not limited to, claims for additional costs associated with delays, disruptions, extended overhead or time impact.

(R4, tab 5)

9. Some mobilization had begun on the job site as of 24 October 1991, but there was no significant contractor activity until 7 January 1992, when the NACE inspector began work (R4, tabs 9, 12; exh. G-14). During the course of the contract, the contracting officer was concerned with the lack of progress and the progress that appellant reported. Requests were made for recovery plans beginning 7 January 1992. (R4, tabs 19, 20, 25; exh. G-44). As of mid-April there had been numerous causes of delay, all of which appellant considered beyond its control (exh. G-29). Among the causes of delay were seven separate change orders involving extra work, material supplier and subcontractor delays, bad weather, and there had been delay get-

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ting acceptance of the interior coating (R4, tabs 5, 22). Appellant worked overtime and on Saturdays and Sundays as needed to increase its rate of progress (exh. G-15, -17, -19, G-21 to -25, G-28, -29, -31).

10. On 10 April 1992, appellant requested an extension of time for completing the contract to 30 May 1992, and submitted a claim for additional NACE inspection costs in the amount of $19,972 (R4, tabs 22, 23). Appellant explained that it had proposed providing the services for 13 weeks, which was negotiated at a cost of $2,208 per week, and the project was now delayed beyond the 13 weeks, in part because of the Government-ordered changes to the scope of the work. The basis for the amount of the claim was nine additional weeks of services at $2,208 per week. (R4, tab 23)

11. On 15 May 1992, appellant's claim for additional NACE inspection costs was denied with a statement that the SA-1 amount, which was $28,704, was adequate compensation (R4, tab 28). The contracting officer had received a "Summary of Monoko Account Receivable" from Aerotek as of 13 May 1991, which showed $12,486.50 had been billed to date. Aerotek estimated the subcontract billings as of an anticipated completion date of 14 June 1992, at $17,786.50. (R4, tab 26) By letter dated 29 May 1992, appellant disagreed and indicated its intention to appeal (R4, tab 29).

12. Cost proposals for change orders were negotiated, settled and incorporated into modifications to the contract (R4, tabs 5, 6, 27). Specifically, Change Order No. 14, negotiated 27 May through 5 June, 1992, and settled for $24,196 and a five-day contract extension, was incorporated into Modification No. SA-15, effective 17 June 1992, with substantially the same accord and satisfaction language that was in SA-1. This agreement included additional costs of NACE inspection for work added by the change order. (R4, tabs 5, 6) All of the change orders, in total, extended the time of performance of the contract from 210 days to 328 days, which is an increase of approximately 56 percent, and increased the contract price by the amount of $113,458 from $193,432 to $306,890, which is an increase of approximately 59 percent (R4, tab 5; app. supp. R4, tabs 7, 8).

13. On 10 September 1992, appellant submitted a second claim for NACE inspection services in the amount of $22,974 for the period 6 June 1992 through 11 August 1992, and a time extension from 5 June 1992 through 11 August 1992. Appellant included amounts for "loss in downtime and production" while NACE inspection occurred. Attachment C to the claim identified the loss as one hour occurring each time an inspector inspected a tank because the crew had to stop work, collect supplies, come down from the tank, wait during an average 32 minutes needed for inspection, climb back to their work stations, and resume work. (R4, tab 34)

14. By letter dated 16 September 1992, the contracting officer denied the claim as without merit. The letter noted that Aerotek total costs for inspection services through 10 August 1992, were $25,049.62, and SA-1 had settled the amount of $28,704 for the inspection services. (R4, tab 36)

15. The final negotiations to settle all outstanding change orders and claims were conducted on 7 October 1992 (R4, tab 6). Both parties understood and agreed that these were final negotiations prior to closing out the contract (R4, tabs 41, 44; exh. G-34, -35, -37, -40).

16. On 12 October 1992, appellant resubmitted its first claim for NACE inspection services for costs rather than estimates during the period 15 April through 5 June 1992, in the amount of $11,482. The cost breakdown included "downtime of crew." (R4, tab 43) On the same date by separate letter, appellant requested a contracting officer's final decision on the second NACE inspection claim that had been denied on 16 September 1992, and enclosed a copy of a letter of advice, dated 5 October 1992, that it had received from its attorney (R4, tab 42). The claims were not discussed during the final negotiations, and no reservation of rights was made then (R4, tab 6). Since Ms. Monokandilos had not mentioned the claims, Ms. Lisa G. Kestel, the contract administrator, considered that she had not negotiated in good faith and so informed her in a telephone conversation on or about 19 October 1992 (R4, tab 44). The Government had recognized that appellant was a small business and, despite communication difficulties, gave the benefit of the doubt to the contractor in conducting negotiations when it was reasonable to do so (exh. G-45).

17. On 21 December 1992, the contracting officer denied the claims as without merit on the grounds that the NACE inspections were required under the firm fixed-price contract as agreed to in SA-1 (R4, tab 47). Appellant expressly reserved its right to appeal this final decision in its letter, dated 6 January 1993, transmitting the signed final contract modifications (exh. G-41, -42). On 16 March 1993, appellant filed its timely

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notice of appeal to initiate these proceedings at the NASA Board of Contract Appeals. The appeal was docketed NASA BCA No. 87-0393 prior to the merger of the NASA BCA and ASBCA that was effective 12 July 1993. The total amount of the claims is $34,456.

DECISION

Appellant claims entitlement to costs of NACE inspection services performed after the original contract completion date on the grounds that Government changes increased the scope of work and extended the time for performance. Appellant alleges that it was not required by SA-1 to provide inspection services beyond the original contract completion date, but that the time of performance was "expressly agreed" (app. compl., ¶ 8). Since Government changes extended the contract performance period, appellant maintains it should recover costs of inspection that were allegedly caused by the changed work and the delay.

Appellant's attorney in numerous references in a claim letter, dated 5 October 1992, and its briefs has asserted that appellant, a small business without prior experience in Government contracting, was taken advantage of by unfair, unethical and unscrupulous NASA personnel. A series of different contracting officers and contract administrators exercised responsibility for the contract, but we do not believe they acted to keep the contractor off balance or in pursuit of "a Machiavellian plan" (app. br. at 9, 11). We consider it unnecessary to respond to all of appellant's attorney's assertions which are without confirmation from any Monoko individual or other source. We understand the difficulties appellant's president may have had with Government procedures that were new to her, but there is evidence that the contractor was given the benefit of the doubt, and we have no basis without proof from appellant to consider whether there was actionable Government bad faith.

The Government's position has been that SA-1 constitutes an accord and satisfaction that operates to bar NACE inspection claims regardless of when the costs were incurred (Gov't br. at 25). The Government maintains that appellant has mischaracterized its position and a correct statement is that "SA-1 required the Contractor to perform all NACE inspection for base contract work without regard to whether the NACE inspection was performed during the originally scheduled contract completion period or later" (Gov't reply br. at 6). Since there is no evidence that delay caused any increase in cost to perform NACE inspections, the Government argues there is no basis for the claim.

SA-1 by its terms reflects an intention that the fixed price adjustment stated would satisfy "any and all claims against the government arising out of or related to the changes specified," *i.e.*, the NACE inspection change (finding 8). The Government's evidence that the parties contemplated that the fixed price would cover the performance period of the contract that could be either shorter or longer than the contract term has not been disputed. Appellant has stated that it was induced to enter into SA-1 by the assurances of Ms. Reed that if the contract were extended, the costs of NACE inspection would be considered in a contract modification and that those false statements constitute material misrepresentation. The affidavit of Ms. Reed is to the contrary (finding 7). If there were some factual basis for appellant's claim, it would be necessary for appellant to establish that there was a false representation, there was knowledge of falsity or other evidence of an intent to deceive, and that appellant relied and was in fact injured by a misrepresentation that went to the essence of the transaction. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992); *Spalding and Son, Inc. v. United States* [37 CCF ¶ 76,029], 24 Cl. Ct. 112, 143 (1991); *Acres American, Incorporated*, ASBCA No. 27743, 85-1 BCA ¶ 17,865. Appellant was given the opportunity in this Rule 11 proceeding to supplement the record with affidavits and other documentary evidence, but has declined to submit any affidavit evidence. Allegations and arguments made by appellant's attorney are insufficient to meet the burden of proof on appellant's claims. An assertion or allegation standing alone does not constitute proof. *D.J. Simons Construction Co.*, ASBCA No. 41336, 93-1 BCA ¶ 25,306; *Advanced Control Technology*, NASA BCA Nos. 24-0790 et al., 92-2 BCA ¶ 24,947; *Tri-State Services of Texas, Inc.*, ASBCA No. 38019, 89-3 BCA ¶ 22,064. We have no indication in the record that appellant was misled by anything said by Government representatives during the negotiations of the price appellant would accept for performance of the NACE inspection.

Subsequent change orders were not within the contemplation of the parties and are not the subject of SA-1. The Government has in fact provided compensation when NACE inspection costs were increased by Change Or-

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der No. 14. We have concluded that the agreement in SA-1 does not operate to bar future claims which were not within the contemplation of the parties at the time of its execution, and as to which there could be no meeting of the minds. *Todd-Grace, Inc.*, ASBCA No. 34469, 92-1 BCA ¶ 24,742; *RCA Corp.*, NASA BCA No. 676-4, 78-1 BCA ¶ 13,220, at 64,666.

The parties' agreement was that NACE inspection as required by the contract would be performed for a price not to exceed $28,704. NACE inspection was performed by appellant's subcontractor at less than that cost. Appellant presents the additional costs claimed as costs incurred by appellant, not its subcontractor, in connection with loss of productivity, downtime and disruption because of NACE inspection. Appellant argues the "disruptions" of providing safe walking surfaces and access to the work, as well as the provision of required supervision and coordination, which occurred after the contract completion date are compensable. (App. reply br. at 3-8) Appellant's supervisor and crew time would have been spent on this work whether NACE inspection was conducted during the original contract term or later, and for this reason we find no basis for a claim for disruption. *Gaffny Corporation*, ASBCA Nos. 37639, *et al.* (Nov. 22, 1993).

The costs described by appellant as its costs related to NACE inspection were incurred for the contractually required inspection work and were not attributable to the change orders or any delay. It has not been shown that the fact that NACE inspections were performed later increased the cost of inspection. In addition, the sheer volume and continued flow of change orders does not constitute proof of disruption to the contract work. There must be evidence of the effect of the changes that actually occurred in performance of the contract work. *Bechtel National, Inc.*, NASA BCA No. 1186-7, 90-1 BCA ¶ 22,549, *aff'd*, 90-3 BCA ¶ 23,105. We have insufficient evidence to conclude that there were any costs of NACE inspection that increased as a result of subsequent change orders that have not been paid. Appellant has failed to prove the causation of its increased costs and that there were unforeseeable disruptive effects in the later period of time.

The appeal is denied.

[¶ 26,571] Essex Electro Engineers, Inc.

ASBCA No. 46202, December 20, 1993. Contract No. N00383-90-C-9680.

Contract Disputes, Jurisdiction—Boards of Contract Appeals—Existence of Dispute.—A settlement proposal submitted following the convenience termination of a contract for exciter regulators did not constitute a claim, even though it expressly stated it was a claim and sought a final decision, because there was no evidence that there had been communication on the proposal. A dispute cannot be manufactured and interest cannot be made applicable by the mere assertion that a submission is a claim. The proposal's demand for a decision within 60 days did not activate the requirement for a final decision within 60 days, because the proposal was not a claim.

Contract Disputes, Contracting Officer's Decision—Failure to Decide—Insufficient Information.—The failure of a contracting officer to respond to a contractor's request for a decision was not deemed to be a denial of a claim, even though six months had expired between the contractor's request and its appeal, because the request was inadequate as a claim. Sufficient basic information to permit a contracting officer to construct an informed opinion must be provided if the contracting officer is to be obligated to issue a final decision. The contractor's failure to provide necessary information outweighed the contracting officer's failure to respond.

For the appellant: Israel & Raley, Washington, D.C., by Charles E. Raley and James S. Phillips. For the government: Arthur H. Hildebrandt, Chief Trial Attorney, and Lawrence S. Rabyne, Trial Attorney, Defense Contract Management Office (DLA), Chicago, Illinois.

Before DICUS, RUBERRY, and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: Respondent's brief contests the Board's jurisdiction in this appeal, asserting, *inter alia*, appellant's termination settlement proposal was not in dispute when submitted and does not constitute a claim. Appellant's response ar-

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gues principally that respondent's failure to respond within a reasonable time establishes the existence of a claim.

This appeal was filed under Rule 12.2. Appellant has moved to withdraw its election under that rule. That motion is granted, as respondent has not opposed it.

FINDINGS OF FACT

1. Contract N00383-90-C-9680 for the production and delivery of 24 exciter regulators was awarded to appellant in the amount of $42,480.00 on 26 June 1990, with a delivery date of 22 March 1991. The contract contained the following Termination for Convenience clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with Part 49 of the Federal Acquisition Regulation in effect on the date of this contract.

(R4, tab 1; deposition of Frank J. Pawloski (Pawloski dep.))

2. By letter of 23 October 1990 appellant requested legible drawings (app. SR4, tab A-1). When they were not received, appellant again requested the drawings by letter of 7 January 1991 (app. SR4, tab A-2). Appellant received aperture cards on 25 January 1991. Appellant characterized them as "inadequate" in a letter of 30 January 1991, in which new drawings were again requested (R4, tab 6).

3. The contract was terminated for convenience by Modification P00001, dated 12 April 1991 (R4, tab 3). By letter of 23 April 1991 the Termination Contracting Officer (TCO) provided instructions to appellant. The letter provides, in relevant part:

> In accordance with our telephone conversation of 19 April 1991, enclosed are the following forms to be used by your firm in preparation of a Settlement Proposal on subject completely terminated contract.
>
> A. *Settlement Proposal Under $10,000*
>
> 1) SF 1438—Settlement Proposal (Short Form)
>
> 2) SF 1434—Termination Inventory Schedule E (for use with SF 1438 only)
>
> * * *
>
> Should you be considering settlement expenses, FAR 31.205-42 addresses this subject. Please maintain separate records for the directly charged settlement expenses, the time, type of task performed, and employee performing the effort. The cost must be reasonable, i.e. related to time a person or company would expend on their own, in the normal conduct of business, without expecting reimbursement by another party.
>
> Your final Settlement Proposal, subcontractors Settlement Proposals, Schedule of Accounting Information and Inventory Schedules should be submitted as soon as possible, but *no later than one year from the effective date of termination.* (Emphasis in original.)
>
> Please advise me no later than 15 May 1991 of the estimated amount of your proposal to facilitate the required recommendation for release of excess funds in accordance with FAR 49.105-2.

(R4, tab 5)

4. Appellant submitted its 12 March 1992 Settlement Proposal on Standard Form (SF) 1438, requesting payment of $9,942.00. In explanation of its request for payment, appellant submitted the following exhibit:

	Essex Claim	Contract '9680 Summary
		I. Claim Elements
1.	Award Date	07/11/90
2.	T4C Date	04/15/91
3.	Days of Performance	278 days
4.	Contract Sales	$42,480.00
5.	Plant Sales—July '90 - June '91:	$10,000,000.00 (Estimated)
6.	Plant Burden—July '90 - June '91:	$2,300,000.00 (Estimated)
		II. Claim

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A. Unamortized Burden Allocable to Contract

1.	Plant Burden / 365 Days	×	Contract Sales / Plant Sales	=	Daily Burden Allocable to Contract	
2.	$2,300,000.00 / 365	×	$42,480.00 / $10,000,000.00	=	$26.77 per day	
3.	$23.65 per day × 278 days			=	$7,442.06	
					SubTotal =	$7,442.06

B. Settlement Expenses (Estimated)

1.	$2,500.00	SubTotal =	$2,500.00
		Total =	$9,942.06

(R4, tab 8)

5. The letter forwarding the SF 1438, also dated 12 March 1992, states:

> In accordance with the Contract Disputes Act, and also in compliance with FAR 33.206 and FAR 52.249(d), enclosed please find Essex's termination claim under the above-referenced Contract.
>
> Inasmuch as the amount of this claim is less than $10,000, I can perceive no reason why we may not promptly meet and negotiate this claim. I therefore request that you schedule a meeting to resolve the claim within the next 60 days, or issue your Contracting Officer's final decision within that time. Absent a meeting or a decision within the next 60 days, we will conclude that you have disputed this claim on receipt, and we will proceed to invoke our rights to appeal under the Contract Disputes Act.

(R4, tab 7)

6. When no response was received, appellant sent the following 28 January 1993 letter:

> We have not received a response to the above referenced claim, even though the amount of the claim is less than $10,000.
>
> For the purpose of preserving our rights under the Contract Disputes Act, and without waiver to our right to interest from your receipt of the claim submitted on March 12, 1992, we hereby resubmit the termination claim. In the event you fail to issue a final decision or otherwise resolve this claim within 60 days of your receipt of this submission, we will proceed to docket our appeal from your failure to decide this claim, and request that the appeal be processed under the "Expedited" procedures available at the Armed Services Board of Contract Appeals.

(R4, tab 9)

7. An appeal was filed 16 June 1993 from the contracting officer's failure to issue a final decision. There is no evidence respondent communicated with appellant on its Settlement Proposal up to the date of the appeal notice. Appellant's Complaint asserts it was delayed in performance by inadequate Government drawings as the basis for the costs claimed in its Settlement Proposal. In its brief, appellant increases the requested payment to $12,975.59. Appellant asserts the burden, sales, and settlement expense figures used are "actuals." Appellant also changed the period used for computation to 293 days, as follows:

Plant burden / 293 days	×	Contract sales / Plant sales	=	Daily Burden Alloc. to Contract	
$1,891,427 / 293 days	×	42,480 / 9,117,536	=	$30.08 per day	
Daily burden	×	days of delay	=	Unamortized standby Burden	
$30.08	×	293 days	=	$ 8,813.44	

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B. Profit 20%			1,762.69
			$10,576.13
C. Settlement Expenses:			
(1)	Essex labor: 6.5 hrs. @ $150/hr.:	$ 975.00	
(2)	Prof. Fees:	832.50	
		$1,807.50	
(3)	Burden, 1991 Rate: $2,282,184 = 32.75% 6,968,414	591.96	
		$2,399.46	2,399.46
	Total:		$12,975.59
	Plus interest from Mar. 12, 1992		

(App br. at 10)

DECISION

Appellant argues that its 12 March 1992 submission is a claim because it expressly states it is a claim and sought a final decision. We disagree. Under *Dawco Construction Inc. v. United States* [37 CCF ¶ 76,056], 930 F.2d 872, 878 (Fed. Cir. 1991), a cost proposal is not a claim unless the parties are already in dispute over the amount requested when the proposal is submitted. A dispute cannot be manufactured and interest cannot be made applicable by the mere assertion that a submission is a claim. *CPT Corp. v. United States* [37 CCF ¶ 76,282], 25 Cl. Ct. 451, 455 (1992). There is no evidence of communication on the Settlement Proposal (finding 7) and thus no evidence of a dispute. Therefore, the 12 March 1992 submission was not a claim. Moreover, as it was not a claim, the requirement for a final decision in 60 days under the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(c)(1), did not apply.

The events thereafter present the issue in a somewhat different context. The second writing (finding 6) invoked the CDA, purported to "resubmit the termination claim," and asserted an appeal would be filed if a final decision or other resolution was not forthcoming in 60 days. An appeal was filed nearly 5 months later when no response was received (finding 7). Appellant argues that "one need look no further than the length of time that the claim was ignored by the Government and the allegations made by the Government in the Answer to the Complaint and their brief" to establish a dispute (Appellant's Response to the Board's Order of November 3, 1993 (App. Response) at 4-5). We find nothing in the Answer or respondent's brief to establish the existence of a dispute contemporaneously with the Settlement Proposal or at any time prior to the filing of the appeal. As to appellant's complaint assertion that it was delayed by respondent's failure to provide adequate drawings (finding 7), appellant had not identified it as an issue prior to filing this appeal. Appellant's argument that the Settlement Proposal was converted to a claim by respondent's refusal to respond for over a year, however, warrants close examination.

Respondent argues, in this regard, that appellant submitted an unsupported proposal based on estimates that never rose to the level of a sum certain, one of the requisites of a claim. Respondent cites *Essex Electro Engineers v. United States* [37 CCF ¶ 76,304], 960 F.2d 1576 (Fed. Cir. 1992), which establishes the requirement for a writing setting forth a demand for a "sum certain." *Id.* at 1580. Indeed, even as a Settlement Proposal appellant's submission fails to comply with the Federal Acquisition Regulation (FAR), which requires at 49.602-1(c) that proposals be in "reasonable detail" and permits use of estimated costs "if the method of arriving at the estimates is approved by the TCO." There is no evidence TCO approval of the estimate was ever sought. Moreover, appellant was directed to submit an SF 1434—Termination Inventory Schedule E. There is no evidence this was ever done.

Further, the estimating method employed by appellant in its settlement proposal is not the inventory basis preferred under FAR 49.206-2. If construed as a total-cost propo-

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sal, advance approval by the TCO is required. FAR 49.206(b). If construed as an "other" basis, FAR 49.206-2(c) requires the prior approval of the chief of the contracting or contract administration office. The FAR provides no relief from these requirements for proposals under $10,000.00. There is no evidence the approvals were obtained. Had they been obtained, information identifying the drawing issue may have emerged and a greater understanding of the substance of the proposal might have been possible. As it stands, there is no way to know that a delay claim is its substance.

It is well-settled that a termination for convenience proposal is ordinarily not a claim when submitted. *Mayfair Construction Company,* ASBCA No. 30800, 87-1 BCA ¶ 19,542, *aff'd Mayfair Construction Company v. United States* [34 CCF ¶ 75,450], 841 F.2d 1576 (Fed. Cir.), *cert. denied,* 488 U.S. 980 (1988). Here, the submission is lacking even as a termination settlement proposal, both from the standpoint of regulatory compliance and the sufficiency of the information provided for purposes of evaluation by the contracting officer. The adequacy of the information presented affects not only the adequacy of the submission as a termination settlement proposal, but, more importantly, its adequacy as a claim. Thus, we see a broader issue than whether appellant has made a demand for a "sum certain." Sufficient basic information to permit a contracting officer to construct an informed opinion must be provided if the contracting officer is to be obligated to issue a final decision. *J. J. Bonavire Company,* ASBCA No. 29846, 86-2 BCA ¶ 18,788 at 94,664. While we do not condone the contracting officer's inaction for a lengthy period, we cannot find that such inaction excuses contractors from meeting some minimal requirements in submitting a claim. *Cf. Gauntt Construction Company, Inc.,* ASBCA No. 33323, 87-3 BCA ¶ 20,221. Moreover, as noted above, the underlying basis of this submission is the alleged delay from illegible drawings. This is simply not mentioned. "Where a submitted claim fails to include basic factual allegations there is no basis upon which the parties can enter into a meaningful dialogue towards settlement, or upon which the issues can be sufficiently identified by a contracting officer's final decision to facilitate the litigation process...." *Westclox Military Products,* ASBCA No. 25592, 81-2 BCA ¶ 15,270 at 75,615. Accordingly, we conclude that appellant's failure to provide necessary information outweighs respondent's failure to respond. To do otherwise would undermine the Congressional intent that CDA claims be resolved by negotiation. *See, e.g., Gauntt Construction Company, supra* at 102,412; *Newell Clothing Company,* ASBCA No. 24482, 80-2 BCA ¶ 14,774. As essential information was lacking and appellant's Response makes clear it had no intent to pursue negotiations*, we find there was no claim as defined in the "Disputes" clause. Hence, we have no jurisdiction. The appeal is dismissed without prejudice.

[¶ 26,572] **Green Construction Company**

ASBCA Nos. 46157, 46301, December 6, 1993. Contract No. N62467-91-C-8686.

Site Conditions—Unusual Conditions, Category II—Oversize Manhole Covers.—Under a contract for the renovation of a sewer system in a housing area, a contractor was entitled to an equitable adjustment for a differing site condition because the evidence showed that oversize manhole covers constituted an unknown physical condition of an unusual nature that differed materially from what would ordinarily be encountered in such work.

Site Conditions—Contract Indications, Category I—Implied Indications.—Under a contract for the renovation of a residential sewer system, a contractor was not entitled to an equitable adjustment for locating service connections to houses across the street from the sewer lines being replaced, because the lateral connections were not conditions at the site that differed materially from those indicated in the contract. The drawings

* "Here, Essex never indicated any intention other than its intent to pursue the claim procedure under the CDA. Essex's claim of March 12, 1992, expressly stated that it was made under the CDA and sought a final decision. Essex's claim contained no suggestion of waiting for negotiations with the Contracting Officer and, in fact, specifically stated that it was waiting no more than the statutory period and would then proceed to action in the appropriate forum." App. Response at 4.

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contained a note that explicitly required the contractor to reestablish all service connections displaced by line replacement. Although the drawing showed only one main storm drain, it was reasonably implicit that the main sewer had to be connected by laterals to the houses. The contract did not indicate that the subsurface conditions differed from what the contractor actually encountered or that laterals existed only on one side of the street. The unrebutted evidence of the trade practice in installing residential sewer systems showed that the contractor should have expected the condition encountered.

Site Conditions—Contract Indications, Category I—Underground Service Lines.—Under a contract for the renovation of a residential sewer system, a contractor was not entitled to an equitable adjustment for extra time spent in connection with concrete-encased water and sewer lines, because the contract drawings warned that the locations of existing facilities were approximate and the contract indicated that the contractor was responsible for verifying the location of existing utilities and storm drains before excavating.

Site Conditions—Contract Indications, Category I—Reestablishment of Service Connections.—Under a contract for the renovation of a residential sewer system, a contractor was not entitled to an equitable adjustment for the costs incurred in locating and connecting a lateral sewer line to the main sewer line, because the contract drawings required the contractor to reestablish all service connections. Although 28-year-old as-built drawings showed a different lateral location, the contractor did not base its bid on the drawings. The record indicated that the drawings were provided without any representation as to updated accuracy.

Interpretation of Contracts—Drawings—Omission.—Under a contract for the renovation of a residential sewer system, a contractor was entitled to an equitable adjustment for extra work resulting from the fact that storm drains crossed sewer lines because the drawings failed to show that the storm drains crossed the sewer lines, and the contractor did not take such interferences into account when bidding. Although the drawings depicted a catch basin, they did not show any connections to the basin that affected the work.

For the appellant: Smith, Collins & Dusenbury, P.A., North Charleston, South Carolina, by Steven L. Smith and Joe S. Dusenbury, Jr. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Stirling Adams, Trial Attorney, Naval Facilities Engineering Command, Chesapeake Division, Washington, D.C.

Before LUSSIER and STEMPLER, Administrative Judges.

LUSSIER, Administrative Judge: These appeals arise out of decisions by the contracting officer denying claims by Green Construction Company, the appellant, in connection with work performed at the Naval Weapons Station, Charleston South Carolina. The appellant has elected to have the appeals processed under the accelerated procedure set forth in Board Rule 12.3. A one day hearing was held in Charleston, S.C. and each party has filed a post-hearing brief. Only liability (entitlement) is before us for decision.

SUMMARY FINDINGS OF FACT

1. Contract No. N62467-91-C-8686 was awarded to appellant on 12 May 1992. It called for renovation of a sewer system in a housing area at the Naval Weapons Station, Charleston, South Carolina, for a total price of $490,000.

2. The "Differing Site Conditions, FAR 52.236-2 (APR 1984)" clause of the contract provides for an equitable adjustment in price where there exist: "1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or 2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." During the course of the contract, appellant submitted eight claims for equitable adjustment for alleged differing site conditions. ASBCA No. 46157 is an appeal from a final decision of the contracting officer denying five of these claims. ASBCA No. 46301 is an appeal from a final decision of the contracting officer denying the other three claims.

Oversize Manhole Bottoms

3. The contract drawings contained one drawing, NAVFAC DWG No. 5227583, "Typical Details" which depicted a "Typical Manhole Detail." This detail reflected new

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manholes appellant was to install (tr. 92). The left side of the detail illustrated a precast manhole, and the right side of the detail illustrated a brick manhole. The detail depicted the manhole bottom as 6′ in diameter and 9″ thick. The 6′ length consisted of a 4′ inside diameter, an 8″ wall on each side and a 4″ extension of the concrete bottom beyond the wall on each side. The existing manholes were brick manholes (tr. 176) and appellant was replacing them with precast concrete manholes (tr. 93).

4. In bidding, appellant, who has been in the business for fifteen years, had in mind removing what he termed "standard procedure" size manhole bottoms, his description of which was quite similar to that depicted in the contract detail (tr. 95-7).

5. Prior to bidding, appellant's owner, Marion Green, was unable to confirm the size of the manhole bottoms because all that was visible on site inspection was the 4′ portion constituting the inside diameter. In actual performance, appellant encountered manhole bottoms that extended up to 12′ in length rather than the expected 6′, and that were up to 24″ thick instead of 9″ thick (tr. 29, 96).

6. The Navy inspector, who had past experience with sewer renovation projects, described an "average" concrete bottom to a brick manhole as being "about eight to nine feet (tr. 171) across." He explained that this was so because it was cheaper to simply pour concrete into the hole rather than frame the bottom (tr. 173). Although he had seen concrete bottoms to brick manholes which were up to 28″ thick he conceded the abnormality of that, and his own opinion was that some of the manholes appellant encountered were thick enough to justify a contract adjustment (tr. 208-10).

7. The claim for oversize manhole bottoms was based upon there being thirteen oversized manhole bottoms creating an additional concrete volume of 95 tons to be removed. This was based in turn on an average of 10′ × 10′ × 1′ of additional concrete per manhole (tr. 98-9, R4, tab 4). The 1′ dimension was arrived at by figuring an average thickness of 18 inches per manhole bottom removed, and subtracting the 6 inches appellant expected to find (tr. 109). The oversize manhole bottoms increased appellant's expenses in removing concrete and also in hauling and disposing of the extra concrete and bringing in additional bedding stone to fill in the excess space evacuated (tr. 31, 32). These expenses form the basis for count I of ASBCA No. 46157 and Count II of ASBCA No. 46301.

DECISION

We conclude, from the preponderance of the credible evidence, that manhole bottoms greater than 9″ thick and 8′ in width constituted an unknown physical condition of an unusual nature differing materially from what would ordinarily be encountered in such work. We, therefore, find a type II differing site condition and sustain ASBCA No. 46151 and 46301, on entitlement, as to the oversize manhole claims, to the extent indicated.

Extra Mucking

8. This claim, Count II of ASBCA No. 46157, is for the cost of removing "mucky," or wet, unusable soil and replacing it with bedding stone in the sewer-line trenches. It is based on appellant's contention that it had to dig and replace 6″ more than Mr. Green planned on in bidding the contract (tr. 110-11).

9. The "Typical Details" drawing referred to in finding 3 above contained a detail entitled "Pipe Bedding and Encasement Details" showing pipe emplacements. The detail contained a note reading in pertinent part:

> 1. WET OR UNSTABLE BOTTOMS, EXCAVATE MIN. 4″ BELOW BELL [*] BACKFILL WITH WASHED CRUSHED STONE.

10. Mr. Green prepared appellant's bid, following a "normal rule of thumb," estimating double the distance, *i.e.*, roughly six to eight inches of bedding stone (tr. 34, 113). However, it developed that the soil conditions required him to excavate 10″ below the pipe (tr. 110), but only in certain areas (tr. 34).

11. The specifications at Section 02225, "Excavation, Backfilling and Compacting for Utilities" provided at paragraph 1.7c. that "suitable backfill in the quantities required is available on Government property," and at paragraph 2.1.1 that the contractor was to "[b]ring trenches to grade indicated using material excavated on the site of the project." Mr. Green testified that based on these specifications, he bid assuming the material under the existing pipes was suitable to reuse (tr. 35). At the same time

[*] The "bell" as shown in the drawing detail is the end of a section of pipe enlarged to insert the next section of pipe. Thus it is slightly larger in diameter than the rest of the pipe section.

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however, it is clear from his own testimony that he figured on doing 6″ to 8″ of "mucking" because of the drawing note.

12. The preponderance of the evidence supports finding that appellant encountered 2″ of wet unsuitable soil more than it expected in the trenches, but not throughout the site.

DECISION

The contract drawing note alerted bidders to the fact that wet conditions might be encountered in the pipe beds and directed that pipe bedding be excavated in that event to a "minimum" of 4″, and backfilled with crushed stone. Appellant planned for up to twice that amount in its bid. Appellant has not shown that encountering an additional 2″ of unsuitable wet material in part of the project constitutes a condition differing "materially" from that indicated in the contract. Nor can it be said to constitute an unknown physical condition differing materially from those ordinarily encountered and generally recognized as inhering in such work. This portion of ASBCA No. 46157 is accordingly denied.

Locate Lateral Connections

13. This claim, counts III and V of ASBCA No. 46157, involves time spent by appellant to locate service connections to houses across the street from where appellant was replacing sewer line, and time spent reconnecting those service lines and cleanouts.

14. All of the pertinent contract drawings contained the following pertinent note:

LOCATION OF EXISTING UTILITIES AND STORM WATER PIPING IS APPROXIMATE. CONTRACTOR SHALL VERIFY LOCATION AND ELEVATIONS OF EXISTING UTILITIES AND STORM DRAINS PRIOR TO EXCAVATING. IF INTERFERENCES WITH INTENDED WORK ARE FOUND, NOTIFY THE CONTRACTING OFFICER FOR INSTRUCTIONS. DAMAGE TO EXISTING UTILITY LINES IS CONTRACTOR'S LIABILITY. CONTRACTOR TO REESTABLISH ALL SERVICE CONNECTIONS DISPLACED BY LINE REPLACEMENT.

15. The contract drawings showed the sewer line on only one side of the street. The drawings did not show houses on either side of the street or service connections from the sewer line to houses. They did show concrete driveways on the same side of the street as the sewer line. On Mr. Green's prebid site inspection, it was obvious to him that there were houses and concrete driveways on both sides of the street (tr. 124). He also noticed storm drains and manholes on the side of the street opposite the sewer line and assumed there was a separate sewer line there. The manhole covers were round leading Mr. Green to think they were sewer manholes (tr. 40).

16. The "Typical Cleanout Detail" on Drawing 5227583 depicted cleanouts installed in "earth areas" and the "Typical Service Connection Detail" on that drawing required it to be at a minimum of 10′ and maximum of 25′ from the main sewer line. This would have required the cleanouts for lateral lines going to houses on the side of the street opposite the main sewer line to be placed in the middle of the asphalt roadway. Mr. Green gave this as another reason why he assumed the opposite side of the road had its own sewer line (tr. 40-41). In performance, the Navy required appellant to reconnect the laterals running to the opposite side of the street but waived the 10′—25′ restrictions.

17. After appellant began performance the Government gave it a set of 1964 "as built" drawings which showed laterals from the main sewer line to both sides of the street (app. exh. A1-A5, tr. 25, 28, 43). It is Mr. Green's testimony that had he been given these at the time of bidding, he would have included the costs of reconnecting laterals to both sides of the street (tr. 43).

18. A registered professional civil engineer for the Navy testified, without contradiction, that it is normal practice for residential areas to have a gravity sewer system containing a single main sewer collection line on one side of the street with lateral lines running to houses on each side of the street (tr. 151-54).

DECISION

The lateral connections were not conditions at the site which differed materially from those indicated in the contract. The drawings contained a note explicitly requiring the contractor to reestablish all service connections displaced by line replacement. While the drawing showed only one main storm drain and laterals were not shown for either side of the street, it was reasonably implicit that the main sewer had to be connected by laterals to the houses. The contract gave no reasonably plain or positive indication that the subsurface conditions were different than what appellant actually encountered. *Stuyvesant Dredging Company v. United States* [34 CCF ¶ 75,414], 834 F.2d

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1576, 1581 (Fed. Cir. 1987). The contract gave appellant no cause to reasonably believe that laterals would exist only on one side of the street. Thus there was no type 1 differing site condition under the "Differing Site Conditions" clause. Nor does the existence of the laterals constitute a type 2 differing site condition under the clause. Appellant has not established that the laterals constituted an unknown physical condition, of an unusual nature, differing materially from those ordinarily encountered. In fact, the unrebutted evidence of trade practice in installing residential sewer systems shows that the condition encountered should have been expected. Accordingly, appellant's claims under ASBCA No. 46157 for locating and reconnecting lateral connections to houses across the street from the main sewer line are denied.

Extra Work on Sewer Lines 16 & 17

19. This claim, Count IV of ASBCA No. 46157, is for extra time spent as a result of appellant encountering underground interferences. The contract drawing (NAVFAC Dwg. No. 5227587) showed the water line and sewer line 16 crossing at the southwest corner of Edison Street and Jefferson Street. Appellant found the old sewer line and the water line encased in cement at this juncture after digging for two hours. The evidence establishes however, that if there is no 10′ separation, where water lines and sewer lines cross, it is necessary to encase them in concrete to prevent contamination (tr. 166). The Navy authorized appellant to lower the elevation of the new sewer line to avoid this interference.

20. Section 02225 of the Specifications, "Excavation, Backfilling and Compacting for Utilities," provided at paragraph 1.7(b) that:

* * *

> b. The character of the material to be excavated or found in the trench is as indicated. Rock or hard material as defined in paragraph entitled "Definitions," will not be encountered.

The "Definitions" paragraph at 1.3.10, "Rock," contained within that definition "concrete other than pavement exceeding 1/2 cubic yard in volume." We do not know if the concrete encountered exceeded 1/2 cubic yard in volume. The definition of "hard material" at paragraph 1.3.6 specifically excludes "man made materials such as concrete."

21. When appellant began work the next day at the northeast corner of the same intersection, where the drawing showed a storm drain crossing the sewer line, it made an elevation check and found a storm drain would be in the path of the new sewer line. Again the Navy authorized an elevation change in the new sewer line to avoid the storm drain interference (R4, tab 7).

22. As indicated in finding 14, the contract drawings warned that the location of existing facilities was "approximate" and the contractor was told to verify the location and elevations of existing utilities and storm drains prior to excavating.

23. The record does not establish, as alleged by the appellant, that the AROICC approved these particular changes as the responsibility of the Government.

DECISION

It was the responsibility of the appellant under the contract to verify the location of existing utilities and storm drains prior to excavating, since the location on the drawings was only approximate. It has not been shown that appellant did any more than the contract required. This part of ASBCA No. 46157 is accordingly denied.

Locate Lateral on Hamilton Street

24. This claim, count 1 of ASBCA No. 46301, involves the cost of locating and connecting a sewer line to the house at 1214 Hamilton Street. In the early stages of performance, appellant checked the manholes to be replaced so it could order new manholes with holes already drilled in them for lateral connections. Manhole 5214 showed a stub-out indicating a line going directly to the house (tr. 46, 50).

25. When appellant took the old manhole out preparatory to installing the new manhole it discovered that the stub out was only 3′ to 4′ in length (tr. 47). The 1964 "as built" drawings, which appellant received after award, also showed that lateral going into manhole 5214 (tr. 53). The lateral was in fact tied into the main sewer line some 20′ to 30′ before the manhole (tr. 54). In digging up the old line, and not expecting a tie-in at that location, it was not looked for and consequently missed at the time (tr. 54). This resulted ultimately in appellant having to dig to find the line and then cut into the newly installed main sewer line to make the connection, as well as close the pre-cut hole in the new manhole (tr. 47, 48).

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DECISION

The contract drawing was explicit in requiring the contractor to reestablish all service connections. The Government is correct in contending that the contract as bid did not identify the location of the laterals, and that this lateral was not unusual or differing in location from where lateral connections are normally connected. Thus, it has not been established that the lateral location was either a type 1 or type 2 differing site condition. Further, appellant did not base its bid upon the 1964 "as built" drawings, since it did not have such drawings at the time it bid. Nor is there proof that it examined the manhole interior prior to bidding. Even though the 1964 drawing, when viewed in conjunction with the manhole stub-out, might lead one to conclude that the lateral connection was at the manhole, not 20′ to 30′ before it, these drawings are 28 years old and appellant did not produce any evidence as to what, if any, representation was made at the time. On this record, all we can conclude is that the drawings were given for any assistance they might provide, but without representation as to updated accuracy. They do not supersede the contract requirement that placed upon the contractor the primary responsibility to reestablish all service connections. Accordingly, they provide no basis for recovery. This part of ASBCA No. 46301 is denied.

Storm Drain Interference

26. This claim, Count III of ASBCA No. 46301, involves extra work resulting from the fact that two storm drains, not shown as such on the drawing, crossed the sewer line on Jefferson Street. The pertinent drawing, NAVFAC Drawing No. 5227590, shows storm drains east of the sewer line on Jefferson between Hamilton and Lafayette Streets. While it shows a symbol of a catch basin on the west side of the sewer line, it shows nothing leading to it. The drawing legend reflects that storm drain lines are to shown by broken lines. There are broken lines leading to catch basins east of the sewer line. There are no such broken lines leading to the catch basin symbol on the west side of the sewer line. In fact appellant encountered storm drains crossing the sewer line and leading to the west side catch basin. Appellant did not take such interference into account in bidding because the drawing did not reflect the storm drains crossing the sewer line (tr. 136).

DECISION

While showing a catch basin, the drawing did not show any connections to it which one could reasonably assume would be shown if they affected the work. This is entirely different than requiring the contractor to reestablish service connections to the sewer main, or to verify approximate locations of existing utilities and storm water piping, which were stated to be approximate. There is nothing "approximate" about the complete failure to show the storm drain west of the sewer line. This part of ASBCA No. 46301 is sustained.

To the extent above indicated, the appeals are sustained in part and denied in part.

[¶ 26,573] MIMCO Incorporated

ASBCA No. 46134, December 6, 1993. Contract No. 31-2225-003.

Sales of Government Property—Buyer's Remedies—Dead Freight Charges.—Under a term contract for the sale of scrap metal, a contractor was not entitled to recover dead freight charges, because neither the invitation for bids nor the contract as modified included a clause obligating the government to pay dead freight charges. In his affidavit, the contracting officer stated that he never agreed to add a Dead Freight clause to the contract. Although the contractor contended that another document obligated the government to pay dead freight charges, this document, which was not signed by an authorized government representative and which lacked the requisite contract requirements of an offer and acceptance, was not a binding contract.

For the appellant: Richard Singerman, Vice President. For the government: Cynthia S. Emerson, Trial Attorney, Defense Reutilization & Marketing Region, DLA, Memphis, Tennessee.

Before TUNKS and THOMAS, Administrative Judges.

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TUNKS, Administrative Judge: Appellant requests payment of $4,657.40 in dead freight charges under a term contract for the sale of scrap metal.

FINDINGS OF FACT

1. The Defense Reutilization and Marketing Service (DRMS) issued term Invitation for Bids (IFB) No. 31-2225 for the sale of scrap metal on or about 1 June 1992 (R4, tab 1).

2. The IFB incorporated by reference the DRMS pamphlet entitled "Sale by Reference, August 1989." Option A was for unprepared scrap and option B was for prepared scrap. Paragraph D of Part III of the pamphlet, entitled "Award of Contract," provided, in pertinent part, as follows:

> A written award mailed (or otherwise furnished) to the successful Bidder within the time for acceptance provided in the Invitation shall be deemed to result in a binding contract without any further action by either party.

(R4, tab 1)

3. On 8 June 1992, appellant submitted a bid in the amount of 129.85 percent of market for option B (R4, tab 3).

4. DRMS awarded term contract No. 31-2225-003 to appellant on 24 June 1992. The Notice of Award was signed by sales contracting officer Danny J. Snow. (R4, tab 6)

5. On 25 June 1992, the parties modified the contract to correct an error in the description of the item purchased, change the contract duration, reduce the estimated amount of scrap available and add a demurrage clause (R4, tab 7).

6. Both the Notice of Award and the contract were telefaxed to appellant on 30 June 1992. Richard Singerman, appellant's vice president, signed the contract as modified on 30 June 1992. (R4, tab 7)

7. Neither the IFB nor the contract as modified included a provision for dead freight charges (R4, tab 9).

8. On 20 November 1992, appellant advised DRMS that it was going to issue a check for $180,796.06 as full payment for the scrap purchased under the contract. The proposed payment reflected deductions of $1,750 for demurrage and $4,657.40 for dead freight. (R4, tab 9)

9. The contracting officer at that time, Laurie Hansen, denied the dead freight charges because there was no dead freight clause in the contract (R4, tab 10).

10. Appellant responded to Ms. Hansen's denial on 27 January 1993 stating that the previous contracting officer, Mr. Snow, had agreed that DRMS would pay dead freight charges. In support of this contention, appellant produced a Mimco "contract" signed by a Mimco representative which purported to obligate DRMS to pay dead freight charges. The document was not signed by Mr. Snow or any other DRMS representative. (R4, tab 11)

11. On 3 February 1993, Ms. Hansen indicated that the contract had never been modified to include a dead freight clause and that Mr. Snow denied agreeing to add such a clause to the contract (R4, tab 12).

12. On 10 February 1993, Mr. Singerman requested DRMS to reconsider its denial of dead freight charges. In pertinent part, his letter provides as follows:

> Although our contract calls for Department of Defense to load minimum 180,000 lbs per car a month, we are now aware that Department of Defense did not include that stipulation in there [sic] offering.
>
> With no minimum guarantee, it is possible that all profit margins for our company can be removed. Therefore a bid on a future offering is some what [sic] diminished. Consider the fact that when the Department of Defense loads only 112,000 [pounds] of material in a car, the tremendous loss we would incur. Obviously only the Department of Defense has the ability to load the car properly and to the full capacity or at least the maximum weight of the car. Most major industrial resources of scrap have a guaranteed loading minimum in their bids.
>
> I would appreciate your reconsideration of not accepting our debit due to the dead freight and pay as rendered.

(R4, tab 12)

13. The contracting officer denied appellant's claim because there was no provision in the contract obligating DRMS to pay dead freight charges (R4, tab 14).

14. In support of its case, DRMS submitted an affidavit from Mr. Snow which stated that he never agreed to add a dead freight clause to the contract (R4, tab 15). We find as fact that appellant's contract was not modified to include a dead freight provision.

15. Appellant timely appealed the contracting officer's decision to the board.

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DECISION

There is no basis upon which we can award appellant dead freight charges. Neither the IFB nor the contract included a clause obligating DRMS to pay dead freight charges. Although the contract was modified after award, those modifications did not include a dead freight clause. Mr. Snow, the contracting officer at the time of the modifications, stated in his affidavit that he had never agreed to add a dead freight clause to the contract. Appellant has not presented any evidence to the contrary.

The Mimco "contract" which purported to obligate DRMS to pay dead freight charges was not a contract because it was not signed by an authorized representative of DRMS. In order to create a contract, there must be offer and acceptance. There is no evidence that the "contract" was presented to DRMS for acceptance or that, if it was, DRMS accepted it. Thus, the dead freight clause in the Mimco "contract" did not bind DRMS.

The appeal is denied.

[¶ 26,574] Superstaff, Inc.

ASBCA No. 46112, December 13, 1993. Contract No. N68836-92-C-0015.

Interpretation of Contracts—Methods of Interpretation—Prior Contracts.—Under a contract to perform shelf-stocking services in a commissary that did not mention the location of the staging area, a contractor was entitled to the additional costs resulting from a change in the staging area's location, because it relied on the past practice under prior contracts of using the sales floor as the staging area in preparing its bid. Although the contractor did not make a prebid site investigation, the record indicated that such a visit would not have alerted the contractor to a different practice of moving merchandise. Although a contract chart required the contractor to stock all items placed in the staging area, the chart did not indicate the location of the staging area. Moreover, in light of the commissary's contemporaneous practice, the contract's omission of the staging area location was not obvious, and thus the contractor was not under a duty to inquire regarding the staging area.

For the appellant: Connolly & McCurry, Portland, Maine, by John C. McCurry. For the government: Jay P. Manning, Defense Commissary Agency, Fort Lee, Virginia.

Before DICUS and RIISMANDEL, Administrative Judges.

DICUS, Administrative Judge: This appeal arises from a contracting officer's final decision denying appellant's claim for additional costs from an alleged change in the staging area under a contract for shelf stacking at the Naval Air Station in Jacksonville, Florida. Appellant has elected accelerated procedures under Rule 12.3. The parties have agreed to waive a hearing under Rule 11. Only entitlement is to be decided.

FINDINGS OF FACT

1. Contract N68836-92-C-0015 was awarded 25 January 1992 with an effective date of 1 February 1992. The contract contained the standard Changes—Fixed Price (AUG 1987) and Disputes (APR 1984) clauses. Appellant was to provide all personnel, equipment, and supplies to perform shelf stacking services at a branch commissary store at the Naval Air Station, Jacksonville, Florida (hereinafter "the commissary") (R4, tab 1).

2. The commissary did not have a warehouse attached. It had an "overwrite area" off the sales floor (affidavit of Lloyd R. Messier [Messier aff.]; R4, tab 9). The Statement of Work is silent as to the warehouse and staging areas. It does, however, contain the following relevant definitions:

> *Isolated Staging Area:* A holding area where merchandise is kept prior to being picked up and brought to centralized cutting area by the contractor.
>
> *Centralized Cutting:* An area designated by the Commissary Store Officer to perform the function of cutting merchandise cases.
>
> *Overwrite:* Excess merchandise pulled from the warehouse which cannot be stocked due to unavailable space on the shelf in the Commissary resale area.

(R4, tab 1)

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3. The contract also contained a Performance Requirements Summary Chart ("the chart") which established the performance standard for stocking items placed in the staging area as "All items in holding area stocked or placed in overflow area when stock space is not available." (R4, tab 1) Reading the foregoing in conjunction with the definition of "overwrite," we conclude that excess merchandise was to be placed in the overwrite area shown on the drawing of the commissary which was available for bidders (R4, tab 9; affidavit of R. Allen [Allen aff.]). Our examination of the drawing and the contract does not disclose any area designated "warehouse," "receiving," or "staging" area by respondent (R4, tabs 1, 9).

4. Appellant's bid was prepared relying upon the holding or staging area being the ends of the aisles on the sales floor, based on the past experience of Mr. Messier, appellant's vice president, with the commissary under other contracts performed by contractors other than appellant (Messier aff.). Appellant did not make a prebid site inspection (Allen aff.). Prior to the bid appellant was not told by any employee of respondent that the sales floor served as the staging area (*id.*). Correspondence from the contracting officer establishes that prior to the contract at issue respondent had its own personnel take merchandise to the sales floor and remove overwrites to the overwrite area (R4, tabs 6, 10, 13).

5. The contract Statement of Work provides at 3.7 in relevant part:

> *Familiarization (Phase-in concept).* This plan has been developed to aid the contractor in his or her knowledge of the job requirements.
>
> Observing the job-functions performed by in-house personnel. . . .

(R4, tab 1) In January 1992 appellant's vice president made a familiarization tour of the commissary escorted by the contracting officer's technical representative (COTR). During the tour, Mr. Messier saw commissary personnel moving merchandise to the sales floor which was used as a staging area (Messier aff.). The affidavit of the COTR states Mr. Messier and the COTR "discussed the sales floor, unloading area, staging area and walked thru the aisles . . . . There was no indication given indicating the sales floor and staging area were one and the same." (Allen aff.). The affidavit of Mr. Messier states "At no time did (the COTR) point out to me any area which was designated as the staging area, nor did he indicate that any change from the practice of using the sales floor as the staging areas was being considered." (Messier aff.) We find Mr. Messier's affidavit to be more specific and, thus, more persuasive. We conclude that the staging area was not specifically pointed out by respondent during the visit or at any time prior to the bid (Allen. aff.; Messier aff.; R4, tabs 1, 9).

6. The COTR's affidavit also asserts "The staging area at the commissary . . . has been and always will be the warehouse receiving area. Blue print [sic] of the store which are made available to all bidders, clearly indicate location of the sales floor/staging area/warehouse area." (Allen aff.) We find this inconsistent with the failure of the contract to identify staging and warehouse areas, our examination of the only drawing of the commissary in the record, and with statements in correspondence of the contracting officer which concede the staging area is not identified in the contract (findings 2, 3, 7; R4, tabs 10, 13).

7. The first month of the contract was performed with commissary personnel moving merchandise to the sales floor. On 1 March 1992 the overwrite area was designated as the staging area (R4, tabs 6, 10). Thereafter, appellant was required to move merchandise from the overwrite area which required additional labor hours (R4, tab 2). Appellant complained that this was a contract change, and the contracting officer responded that "The warehouse area of any Commissary is designated the staging area." The contracting officer further asserted that previously commissary personnel had moved merchandise from the staging area to the sales floor for stocking and would then take overwrites back to the "staging area." After 1 March 1992 these commissary personnel were assigned elsewhere (R4, tab 6). A claim in the amount of $17,150.44 was filed on 4 January 1993 (R4, tab 11). It was denied in a final decision dated 2 March 1993, which concedes that the contract does not identify a staging area and that commissary personnel had been available to move merchandise prior to 1 March 1992. However, the contracting officer states "The warehouse area is, and has always been, designated the staging area." (R4, tab 13). An appeal was filed 14 May 1993 (R4, tab 14).

DECISION

The contract contains no identification of the staging and warehouse areas and respondent did not identify the staging area to appellant prior to the bid (findings 2, 4, 5). In fact, the commissary did not have a

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warehouse attached (finding 1). The warehouse/staging area referred to by respondent is designated the "overwrite area" on the floor plan drawing available to bidders (findings 3, 7). It is conceded by respondent that commissary personnel moved merchandise from the staging area to the sales floor and back under previous contracts and the first month of this contract (findings 4, 7). Appellant knew of this past practice and relied on it in preparing the bid (finding 4). While appellant did not make a prebid site visit, there is no basis on this record to find that anything would have been observed at a site visit to indicate that appellant would be required to haul merchandise from the staging area to the sales floor. To the contrary, confirmation of past practice was observed during a post-award familiarization visit (finding 5).

Respondent argues nonetheless that appellant was required to provide all necessary personnel to do the job, and that the Performance Requirements Summary Chart requires appellant to "stock all items placed in staging area." However, the chart does not indicate where the staging area is. The chart also makes appellant responsible to take items to the "overflow" area, which we construe as synonymous with the "overwrite" area, when there is no room on the shelves on the sales floor (finding 3). We are not persuaded that the chart somehow provides information clarifying the location of the staging area, and we do not construe appellant's claim as including costs for taking overwrites back to the overwrite area.

Respondent argues that appellant has not established a course of dealing between the parties. We do not reach that issue, however. The contract omitted any mention of the location of the staging area. "Contractors are not expected to ferret out hidden errors and are protected if they innocently overlook an error." *M.A. Mortenson Company*, ASBCA No. 36759, 88-3 BCA ¶ 21,187 at 106,936. However, a contractor has an obligation to "call attention to an obvious omission ...." *Ring Construction Corp. v. United States*, 162 F. Supp. 190, 192 (Ct. Cl. 1958). We cannot conclude that this was an obvious omission. There is no dispute about the practice at the commissary—commissary personnel had been moving merchandise from the overwrite area to the aisles of the sales floor prior to this contract and continued to do so until 1 March 1993. Moreover, the contract specifically provided that appellant should familiarize itself with "job-functions performed by in-house personnel" (finding 5). Appellant's vice president was familiar with the commissary and job-functions performed by in-house personnel. He prepared the bid on the basis of his experience, which was consistent with actual conditions. We cannot conclude that resolving the omission based on the contemporaneous practice at the commissary was unreasonable, or that, in light of that contemporaneous practice, there was a duty to inquire. Indeed, so long as commissary personnel were moving merchandise to the aisles of the sales floor, the location of the staging area was not critical to the bid. Under the circumstances, the omission was "neither glaring nor substantial nor patently obvious." *Mountain Home Contractors v. United States*, 425 F.2d 1260, 1264 (Ct. Cl. 1970). The appeal is sustained and remanded to the parties to negotiate quantum.

[¶ 26,575] Adkins Construction, Inc.

ASBCA Nos. 46081, 46092, 46093, 46094, 46330, December 3, 1993. Contract No. DAKF40-92-D-0052.

Contract Disputes, Certification—Amount of Claims—Separate Claims.—A government motion to dismiss a contractor's five appeals for lack of jurisdiction on the ground that the appeals constituted a unitary claim that required certification was denied because the contractor showed that two of the appeals were separate and distinct claims that were not based on a common set of operative facts and required interpretation of different specification sections. Although two other appeals regarding the installation of door trim arose out of one set of operative facts and constituted one claim, the amounts of these appeals added together did not require certification.

For the appellant: Sands, Anderson, Marks & Miller, Richmond, Virginia, by Elaine R. Jordan. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Harold F. Clary, JAGC, Trial Attorney.

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Before TUNKS, SPECTOR, and RIISMANDEL, Administrative Judges.

TUNKS, Administrative Judge: The Government moves to dismiss ASBCA Nos. 46081, 46092, 46093, 46094 and 46330 for lack of jurisdiction alleging that the appeals constitute one unitary claim which has not been certified as required by section 605(c)(1) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, *et seq.* Although none of the appeals exceeds $50,000 by itself, in the aggregate, the appeals total almost $100,000. Appellant argues that the claims are separate and distinct, and that they do not require certification.

BACKGROUND

The Government awarded requirements Contract No. DAFK40-92-D-0052 for the installation of new metal siding, doors and windows, the painting of wood surfaces and miscellaneous other work to appellant on 23 September 1992. Delivery Order Number 1 was issued on 25 September 1992 directing appellant to perform the work required by all 18 contract line items. The contract incorporated a number of standard clauses by reference, including: Changes (AUG 1987) FAR 52.243-4; Site Investigation and Conditions Affecting the Work (APR 1984) FAR 52.235-3; and Specifications and Drawings for Construction (APR 1984) FAR 52.236-21.

ASBCA No. 46081 is a claim for additional compensation in the amount of $9,651.44 for providing aluminum trim for overhead doors. Appellant argues that neither the specifications nor the drawings indicated that new trim was required on the overhead doors. As a result, appellant did not include any money for this item in its bid. The Government argues that the drawings only provided a general representation of the trim requirements. Citing paragraphs I.E.1, I.E.5, III.3 and IIIA-2.E.2 of the specifications, the Government asserts that overhead door trim was required.

ASBCA No. 46092 is a claim for additional compensation in the amount of $10,033.37 for painting multi-paned window frames. It is not disputed that the drawings showed single-paned windows. Appellant argues that it bid what was shown on the drawings and that, as a result, it did not include enough money in its bid to paint the window frames. The Government argues that it had to detail the windows as single-paned on the drawings so that it could show the storm windows. If appellant had made the site visit referred to in the Site Investigation clause of the contract and required by paragraph I.D. of the specifications, the Government alleges that appellant would have observed that the windows were multi-paned instead of single-paned.

ASBCA No. 46093 is a claim for additional compensation in the amount of $25,024.37 for providing framing for skirting. Although appellant does not dispute that paragraph III.G of the specifications required it to provide skirting, it argues that neither the drawings nor the specifications indicated that it had to provide framing members for the skirting. The Government argues that if appellant had made a site visit pursuant to the Site Visit clause and paragraph I.D of the specifications prior to bidding it would have observed that there were no framing members on the existing buildings. In addition, the Government points out that paragraph I.E.2 required installation of bracing members "wherever required to provide substantial construction" and that both paragraphs I.E.2 and II.E required installation of wood nailers as necessary.

ASBCA No. 46094 is a claim for additional compensation in the amount of $11,657.87 for providing aluminum trim around entrance doors. According to appellant, neither the specifications nor the drawings indicated that trim was required around the entrance doors. The Government argues that paragraphs I.E.1, I.E.5, III.G and IIIA-2.E.2 of the specifications require trim around entrance doors.

ASBCA No. 46330 is a claim for additional compensation in the amount of $43,192.80 for installing trim around 515 windows. Appellant interpreted a note to trim a window on a particular drawing as typical for that building. Thus, if a drawing did not include a note to trim a window, appellant did not include the windows in that building in its bid. The Government asserts that the drawings included typical details which required trim around all the windows. In addition, the Government cites paragraphs I.E.1, I.E.5, III.G and IIIA-2.E.2 of the specifications which relate to trim around the doors and windows.

Except for the two claims involving trim around the doors, appellant submitted each claim separately and these were denied by the contracting officer in separate final decisions.

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DECISION

Section 605(c)(1) of the CDA requires that all claims of more than $50,000 be certified. Neither the court nor the boards of contract appeals have jurisdiction over uncertified claims of more than $50,000. *United States v. Grumman Aerospace Corp.* [36 CCF ¶ 76,013], 927 F.2d 575 (Fed. Cir. 1991) and cases cited therein, *cert. denied* 112 S.Ct. 330 (1991); *Ball, Ball & Brosamer, Inc. v. United States* [35 CCF ¶ 75,681], 878 F.2d 1426, 1428 (Fed. Cir. 1989). In *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (1990), the Court of Appeals for the Federal Circuit set forth the test for determining whether there are two or more separate claims or a fragmented single claim for purposes of CDA certification:

> ... To determine whether two or more separate claims, or only a fragmented single claim exist, the court must assess whether or not the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists. ... On the other hand, if the claims as presented to the CO will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist. ...

Applying the *Placeway* test to ASBCA Nos. 46092 and 46093, we conclude that these claims are separate and distinct from each other and the other three appeals. ASBCA No. 46092 involves the painting requirements and the Site Investigation clauses of the contract. ASBCA No. 46093 relates to framing for the skirting and requires interpretation of the Carpentry section of the specifications and the omissions and misdescriptions portion of FAR 52.236-7001(d), "Contract Drawings, Maps and Specifications (Dec 1991)." *JAYCOR*, ASBCA No. 40911, 91-3 BCA ¶ 24,082; *Giuliani Contracting Co., Inc.*, ASBCA No. 41435, 91-2 BCA ¶ 23,774.

We reach a somewhat different conclusion with respect to ASBCA Nos. 46081 and 46094. These appeals arose out of one operative set of facts, the requirement to install trim around the doors, whether overhead doors or entrance doors. The Government's defense to both appeals is identical: paragraphs I.E.1 and III.G of the specifications required installation of trim on all doors. The adjudication of each of these appeals will require us to examine the identical specification provisions. If appellant's reading of the specifications prevails, appellant will prevail on both appeals; if its reading is rejected, it will lose both appeals. Under the circumstances, the fact that each appeal involves installation of trim around a different type of door is not determinative. Our conclusion that ASBCA Nos. 46081 and 46094 are one claim does not affect the certification issue because the claims added together total less than $50,000.

ASBCA No. 46330 is separate and distinct from the other four claims. In order to decide ASBCA No. 46330, we will have to look at the contract drawings. The Government alleges that the drawings included typical notes indicating that all windows were to receive trim. Appellant asserts that it only included the windows for a particular building in its bid when there was a note to provide trim around a window on that drawing. If there was no note on a drawing, appellant did not include that work in its bid. Although this claim also involves trim, it is different from ASBCA Nos. 46081 and 46094 because we will have to consider different evidence, namely the drawings, and reach a decision with respect to appellant's interpretation of the typical notes. *Scientific Management Associates, Inc.*, ASBCA No. 42971, 92-2 BCA ¶ 24,912; *Lake Shore, Inc.*, ASBCA Nos. 42577, 42578, 91-3 BCA ¶ 24,075.

The Government's Motion to Dismiss is denied.

[¶ 26,576] Waco, Inc.

ASBCA No. 46085, December 9, 1993. Contract No. N62470-92-C-8299.

Interpretation of Contracts—Contract as a Whole—Meaning to Every Part.—Under an asbestos removal contract, a contractor was not entitled to an equitable adjustment for additional costs incurred in using a full containment method of asbestos removal rather than its proposed glovebag method, because the contract as a whole required removal by the full containment method. The specifications limited the use of the glovebag method to a book storage room, in which full containment was not feasible. Although the contractor contended that it reasonably read the specifications as requiring full containment in areas

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where the asbestos was friable and as allowing the glovebag method in areas other than the book storage room, the contractor's interpretation was inconsistent with the specifications, which specifically limited the use of the glovebag technique to the book storage room. The specifications did not afford the contractor the opportunity to tailor its abatement plan according to its own determination as to the friability of asbestos. Although the contractor contended that the glovebag method was a full containment method, the contract indicated that glovebag techniques were other than full containment methods of asbestos abatement.

For the appellant: Outland, Gray, O'Keefe & Hubbard, Chesapeake, Virginia, by Benjamin A. Hubbard. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Lisa C. Gerideau, Trial Attorney.

Before LIPMAN and STEMPLER, Administrative Judges.

LIPMAN, Administrative Judge: This is an appeal from a decision of the contracting officer denying appellant's claim for compensation for added costs allegedly incurred in performance of this construction contract to remove asbestos. The issue presented is whether the removal method proposed by appellant, but rejected by the Government in favor of a more costly method, met the contract requirements. We are to decide only the question of liability based upon the documentary record and testimony provided at trial. Appellant has elected to proceed under the Board's Rule 12.3 Accelerated Procedure.

SUMMARY FINDINGS OF FACT

On 13 July 1992, appellant was awarded this contract to remove and replace asbestos floor tile, pipe insulation and acoustical ceiling and to do some lighting work at an existing school building at the Marine Corps Base in Camp LeJune, North Carolina. The contract price was $48,800 and the required completion date was 25 November 1992. By contract modification, the asbestos abatement in the school's administrative area was deleted from the contract and the contract price was reduced to $30,301.

Section 02080 of the contract specifications, entitled "Removal and Disposal of Asbestos Materials," incorporated North Carolina law, the North Carolina Asbestos Hazard Emergency Response Act (AHERA) and federal regulations, and contained the following pertinent provisions:

1.4 REQUIREMENTS

1.4.1 Description of Work

The work covered by this section includes the handling of asbestos containing materials which are encountered during repair, construction and demolition projects and describes some of the resultant procedures and equipment required to protect workers and occupants of the building or area, or both, from contact with airborne asbestos fibers. The work also includes the disposal of the generated asbestos containing materials. ... Under normal conditions non-friable or chemically bound materials containing asbestos would not be considered hazardous; however, this material will release airborne asbestos fibers during demolition and removal and therefore must be handled in accordance with the removal and disposal procedures as specified herein. Provide full containment, glovebag, and floor tile techniques as outlined in this specification.

* * *

1.5 SUBMITTALS

* * *

1.5.2.1 Asbestos Hazardous Abatement Plan (NC Abatement Design)

Submit a detailed plan of the safety precautions and work procedures to be used in the removal of materials containing asbestos. ... This plan must be approved in writing prior to the start of any asbestos work. .. Any changes required in the specification as a result of the plan shall be identified specifically in the plan to allow for free discussion and approval by the Contracting Officer prior to the start of work.

* * *

3.3 WORK PROCEDURE

Perform asbestos related work in accordance with 29 CFR 1926.58 and as specified herein. Use wet removal procedures and full containment for friable asbestos pipe insulation, except in the book storage room, where glovebag techniques can be used.

* * *

3.3.4 Asbestos Control Area Requirements

3.3.4.1 Full Containment (Pipe Insulation, Except as Noted Otherwise)

Block and seal openings in areas where the release of airborne asbestos fibers can be expected. Establish an asbestos contain-

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ment with the use of curtains, portable partitions, or other enclosures in order to prevent the escape of asbestos fibers from the contaminated asbestos work area. Containment development shall include protective covering of walls, [sic] and ceilings with a continuous membrane of two layers of minimum 4-mil plastic sheet sealed with tape to prevent water or other damage. Provide two layers of 6-mil plastic sheet over floors and extend a minimum of twelve inches up walls. Seal all joints with tape. Provide local exhaust system in the asbestos control area. Openings will be allowed in enclosures of asbestos control areas for the supply and exhaust of air for the local exhaust system. Replace filters as required to maintain the efficiency of the system.

3.3.4.2 Glovebag (Pipe Insulation in Plywood Enclosure in Book Storage Room)

The construction of an enclosed asbestos containment is infeasible for the removal of pipe insulation in plywood enclosure in Book Storage Room. Use glovebag techniques as indicated in 29 CFR 1926.58 Appendix G, III-A, B, C, D and Figure G-1.

* * *

As used in the specification and, in general in this appeal, the term "friable" means "airborne."

The specification was prepared for the Government by a design engineer who was certified by the Environmental Protection Agency (EPA) in asbestos abatement. He included the information in the parentheses in the title of subsections 3.3.4.1 and 3.3.4.2 in an effort to make clear at which locations the different methods of asbestos removal were to be used since the specifications in previous contracts did not include that information and resulted in ambiguity.

Glovebags are sealed, disposable work chambers placed around asbestos material to facilitate its removal without release of fibers into the atmosphere. They include glove/sleeve assemblies, tool pouches and water entry ports to permit workers to remove the material without becoming exposed to the fibers. Glovebags have been used in asbestos abatement since 1980, and negative air bags, which employ the use of a vacuum with the glovebags, have been used since 1990. The glovebag method has been approved by OSHA, by the State of North Carolina, and meets the requirements of the CFR. However, glovebags have been known to break, and the slit required for the entry of the air hose into the glove bag is another source of possible contamination of the environment outside the glovebag.

The full containment method of asbestos abatement, as reflected by the contract specification, involves, in effect, using plastic barriers to totally enclose a room or part of a room, which the workers, wearing protective clothing, can then enter to remove the asbestos. The full containment method offers better protection to the room, including its carpet, than does the glovebag method used alone. Use of the full containment method does not preclude the use of glovebags within the fully contained room.

Appellant's bid was prepared by its project manager who, while not an engineer, received training in asbestos abatement and was qualified and experienced as an asbestos designer. He visited the site before bidding and found the existing pipe insulation to be in good condition, covered with an intact canvas jacket and located a foot above lay-in ceiling tile. The contract specification did not call for the removal of ceiling tile as asbestos-contaminated, and appellant's project manager considered that to be further indication that the pipe insulation above the tile was intact.

Appellant's bid anticipated wetting the asbestos material and was based upon use of the negative air glovebag method. Appellant planned to use a "5 in 1" glovebag, which consists of five bags connected together with multiple arms for workers to contain a large section of pipe insulation at one time during the removal process. In incorporating that method into the bid, appellant's project manager considered (a) that the specification required the full containment method, as described in paragraph 3.3.4.1, only "where the release of airborne asbestos fibers can be expected," as described in that paragraph, and (b) the good condition of the pipe insulation as constituting a situation where "the release of airborne asbestos fibers" would not occur. He considered the glovebag method as a full containment procedure, because asbestos is fully contained in a small area, despite the language of paragraph 3.3 of the specification calling for "full containment . . . except in the book storage room, where glovebag techniques can be used." In his experience, glovebags did not break.

Appellant's initial asbestos abatement plan, dated 13 July 1992, was rejected by the Government on 16 July 1992 because it proposed using the glovebag method, rather than full containment, in areas other than the book storage room. At a preconstruction meeting held at approximately that date, a

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Government representative incorrectly stated that the glovebag method was not permitted under the requirements of the AHERA, the North Carolina statute. At the same meeting, the Government's asbestos abatement designer incorrectly told appellant that there was no such thing as a negative pressure glovebag based upon his belief that the vacuum collapsed the bag.

Despite appellant's attempts at persuasion, the Government did not change its position and appellant modified its asbestos abatement plan to satisfy the Government. Appellant's 23 July 1992 cover letter to its modified abatement plan stated, in part, that "[g]love bagging has been deleted from the plan" and that "the [a]sbestos control area drawing now reflects full containment." The Government approved the modified asbestos abatement plan on 30 July 1992.

Appellant performed the work in a manner consistent with its modified plan. It constructed wood and polyethylene enclosures to achieve full containment of large areas in lieu of the glovebag method. It did use glovebags without negative pressure for the limited purpose of helping to prevent asbestos insulation falling to the floor during its removal from the pipes. Appellant incurred more costs than it would have incurred had it used the method it originally proposed.

Appellant sought to recover the additional costs it incurred and, in correspondence with the Government, it cited several other projects in which it successfully employed the glovebag method. By letter of 17 December 1992, which the Government received on 23 December 1992, appellant submitted a claim seeking recovery of $29,810.07 due to the additional effort expended in performing the contract work in the manner directed by the Government.

On 22 February 1993, the contracting officer issued a decision denying the claim. Appellant made timely appeal.

DECISION

In this contract for the abatement of asbestos insulation, appellant submitted a plan calling for use of a glovebag method of asbestos removal. That method was rejected by the Government in favor of a more costly full containment method which, the Government contends, was required by the contract specification. Appellant seeks to recover for its additional effort, and our decision on the merits of its claim turns on interpretation of the language of the specification.

It is a basic principle of contract law that the contract is to be interpreted as a whole and, if possible, in a manner so as to harmonize all parts and to avoid rendering any part meaningless. *United States v. Johnson Controls* [31 CCF ¶ 71,374], 713 F.2d 1541, 1555 (Fed. Cir. 1983).

The record reflects that specification subsection 3.3.4.1 specifically required the asbestos removal to be achieved, except as noted otherwise, by the full containment method, the details of which were set forth in the subsection. The exception was the pipe insulation in the book storage room, where full containment was stated by specification subsection 3.3.4.2 to be "infeasible" and with regard to which the glovebag method was authorized. The record also reflects that, due to prior problems with ambiguous asbestos abatement specifications, the Government made a special effort in this contract to ensure that the specification clearly set forth the method of abatement it required. That effort succeeded. The specification is quite clear.

Appellant contends that it reasonably read the specification to require the full containment method only where the insulation was friable and that, since the asbestos in question was wrapped in canvas jackets which had not been breached, it was justified in planning to use glovebag techniques in areas other than the book storage room. That interpretation is inconsistent with the text of section 3.3 of the specification, which specifically limits glovebag techniques to the book storage room. The specification does not afford appellant with the flexibility to make its own determination as to the friability of the asbestos and to tailor its abatement plan accordingly. Although, as appellant points out, it was to be the "designer" of the abatement plan, that design was to meet the requirements of the specification. Furthermore, the specification's subsection 1.4.1 "Description of Work" acknowledges that non-friable materials containing asbestos would not be hazardous, but that the concern was the release of airborne asbestos fibers during demolition, thereby calling for the specification's specifically mandated abatement procedures.

Appellant also maintains that the glovebag method is a full containment method, as it contains the asbestos into a small area. It is quite clear, however, by both the text and spirit of the specification, that glovebag techniques were considered to be other than a full containment method of asbestos abatement.

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Appellant points to the erroneous statements of Government representatives at meetings as indicating that they did not fully comprehend the contract requirements or the current status of asbestos abatement laws, regulations or equipment in the industry. The erroneous statements, however, were limited in scope and, in any event, have no bearing upon the clear requirements of the specification.

Appellant has contended throughout this proceeding that the glovebag method is superior to the full containment method because of the smaller physical area in which the workers are able to confine the asbestos. However, our record also reflects some greater risks of possible contamination posed by use of the glovebag method. In any event, the Government is entitled to get what it has contracted for and, toward that end, to demand strict compliance with its specifications. *Ram Construction, Inc.*, ASBCA No. 22370, 79-1 BCA ¶ 13,646.

The appeal is denied.

[¶ 26,577] Packard Construction Corporation

ASBCA No. 46082, December 9, 1993. Contract No. DACA31-93-C-0014.

Site Conditions—Inspection—Visibility of Condition.—Although a contractor did not make a prebid site inspection, it was entitled to an equitable adjustment for modifications made after award of a contract to cover exposed interior roof trusses and ceiling joists in a large amphitheater, because the condition was not visible and would have required scaffolding or special lift equipment and two days' inspection to learn of the obstructions. In response to a claim for an increase in price caused by a change in specifications, the government contended that the real issue was whether the contractor encountered a differing site condition, and that the contractor was not entitled to an adjustment because it failed to make a prebid visit. However, it was not reasonable to expect a bidder to expend the extra time and effort in preparing its bid.

Modifications—Changes—Government Failure to Remove Obstructions.—A contractor was entitled to an equitable adjustment for modifications made after award of a contract to cover exposed interior roof trusses and ceiling joists in a large amphitheater, because the government's failure to remove obstructions as agreed was the reason that extra work was necessary. The contract required the fabrication of rectangular steel frames that were designed by the government. At the prework conference, the government agreed to remove or relocate the obstructions, but subsequently failed to do so. The contractor produced the frames according to the drawings and specifications, and, were it not for the obstructions, the frames would have fit into the spaces intended. There was nothing in the contract, the drawings, or the specifications to impose any obligations to change the drawings or to redesign the frames to fit around the obstructions at the contractor's expense.

For the appellant: Christine Pak, President. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and John F. Herbert and Douglas P. Knowles, Sr., Engineer Trial Attorneys, U.S. Army Engineer District, Baltimore.

Before HARPER and RIISMANDEL, Administrative Judges.

HARPER, Administrative Judge: Appellant, Packard Construction Corporation, a Virginia corporation located in Newington, Virginia (hereinafter "contractor") appeals from failure of a contracting officer of the United States Army Corps of Engineers (hereinafter "Government") to act upon a claim for an increase in the price of a construction contract because of a change in performance. Contractor elected to proceed under our accelerated procedure pursuant to Board Rule 12.3.

SUMMARY FINDINGS OF FACT AND CONCLUSIONS

On 28 October 1992 Government solicited bids for the materials and labor to cover exposed interior roof trusses and ceiling joists in a large amphitheater or ceremonial hall known as Building 241 at Fort Myer, Virginia, in accordance with Government's own design. The work desired involved fabricating tubular steel frames of rectangular shape which were to rest upon L-shaped steel supports welded to existing steel roof trusses and beams. The steel frames were to

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be covered with a specified cloth. When completed, the cloth covered frames were to serve as a ceiling which would prevent persons seated below in the amphitheater from observing the stage flood lighting equipment and appurtenances which were mounted on and above the roof trusses and beams.

Government's solicitation included the Site Visit (APR 1984) clause, FAR 52.237-0001, which urged offerors to inspect the job site to satisfy themselves regarding all general and local conditions that might affect the cost of performing the proposed contract (R4, tab 4).

The contract specifications, in pertinent part, provided as follows:

Section 01010

* * *

1.6 CONTRACT DRAWINGS

Perform the work *in accordance with the attached drawings*

* * *

Section 01030

* * *

1.3 LAYOUT OF WORK

The Contractor shall layout his work and shall be responsible for all measurements in connection therewith.... The Contractor will be held responsible for the execution of the work *to such dimensions shown on the drawings*....

* * *

Section 13025

1. Scope of Work. The *work* covered by this project *consists of furnishing* all tools, labor, equipment and *materials required to cover exposed ceiling rafters*, Bldg. 241 (Ceremonial Hall) Fort Myer, Arlington, VA *in accordance with these specifications and attached drawings.*

* * *

1.3 Provide removable panel system above main floor....

* * *

1.5 Field verify all measurements shown on drawings prior to submission of bid.

* * *

1.7 Visit site before bidding.

* * *

3. Installation.... Equipment shall be installed ... *per plans and specifications.* (Emphasis added)

(R4, tab 4)

The contract drawings or plans showed 95 steel tubular frames, each rectangular in shape, to be installed in a horizontal plane in spaces between existing roof trusses and joists. Several large notations on the drawing stated: "Provide 1″ × 2″ × 18 Gage steel tube framing *as shown.* (Italics added) The drawings showed specific dimensions for each frame. The drawings also contained a note that stated: "All dimensions are (±) and not intended for field fabrications. The contractor shall field verify all existing conditions prior to ordering and fabrication of materials required." (Exh. G-1, sheet 2) The contract drawings showed existing conduits at Bays 3 and 4 and indicated that they were to remain and that contractor was to adjust the framing panels as required to accommodate such existing conduits. Nowhere else did the drawings or specifications indicate that contractor was to adjust the framing panels to accommodate existing conduits or, for that matter, that there were other existing conduits. (Exh. G-1)

Contractor did not make a site visit prior to preparing its bid (tr. 1/72-73). It would have taken two persons two days to thoroughly survey the work area of the job site and would have required permission and coordination from Government's engineering staff as well as the users of the building to make prebid measurements such as to learn all the general and local conditions that might affect the cost of performing the proposed contract as referred to in the solicitation (tr. 2/73-74, 82-83). Even if someone crawled up, in and about the roof trusses with a flashlight, he would not have been able to see all the local conditions (tr. 1/189). Government awarded contract numbered DACA31-93-C-0014 to contractor on 15 December 1992 to produce and install the steel frames. The contract contained the Changes (AUG 1987), FAR 52.243-0004, clause. (R4, tab 4; tr. 2/137) The contract also contained the Contract Drawings, Maps, and Specifications clause (DEC 1991), FAR 52.236-7001, which requires the work to conform to the specifications and contract drawings (R4, tab 4).

Contractor's subcontractor, S&F Ironworks of Springfield, Virginia (hereinafter "S&F") verified all the dimensions shown on the contract drawings as well as the existing conditions at the job site as called for by the contract (tr. 2/9, 24, 30, 60, 172). S&F found the contract drawing dimensions to be correct so that the frames, if manufactured according to the contract drawing dimensions, would fit into the appropriate spaces as dimensioned on such drawings between the various roof trusses and joists with the ex-

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ception of the spaces containing existing conduits in Bays 1 and 3 shown on the contract drawings. Contractor made the adjustments necessary to make the framing panels to accommodate such conduits (as called for on the drawing). (App. supp. R4, tab 13; tr. 1/114, 208)

After verifying the contract drawing dimensions as called for in the contract S&F prepared and submitted to Government shop drawings covering the rectangular steel frames it intended making (tr. 1/208, 209). Government neither approved or rejected such drawings (tr. 2/46) because Government was anxious to have the job completed as soon as possible. It was a hurry-up job. (Tr. 2/170-71) During S&F's verification of drawing dimensions it discovered that many obstructions were appended to the roof trusses and joists which would conflict with the installation of the steel frames it was to produce. Government was notified accordingly. Government had been aware of the obstructions when it prepared the contract drawings but had omitted showing them on the drawings because it believed it would clutter up the plan. (Tr. 1/100, 103, 109, 114, 189-90, 2/12, 23, 50, 69; exh. B1)

Such obstructions could not have been reasonably discovered by a prudent bidder since they were hidden from view by an existing black cloth ceiling covering, were approximately 25 feet or more above the floor, and could only be seen with the assistance of scaffolding which was not present or special equipment after an investigation which would have taken approximately two days of effort (tr. 1/43, 44, 110, 125-26, 201-02, 2/26, 82, 83).

On 25 February 1993 the parties held a prework conference. Government acknowledged the presence of the existing obstructions to the proper fitting and installation of the steel frames. Government agreed to remove all such obstructions prior to 1 March 1993 so that contractor could start installing the frames. (App. supp. R4, tab 8; tr. 1/205, 2/26, 29, 2/100, 102-03)

Government thereafter visited S&F's shop and observed the manufacture of the steel frames. Such frames were in accordance with the shop drawings. They were rectangular in shape. (Tr. 1/208, 209, 2/47-48) Government made no objections to the steel frames it observed.

On the weekend prior to 1 March 1993 Government removed some of the obstructions complained of by contractor and S&F (tr. 1/205, 2/100-01).

On 2 March 1993 contractor wrote to Government advising that obstructions still remained and requested Government's advice as to how Government wished contractor to proceed with the installation of the frames (App. supp. R4, tab 5). Government refused to advise contractor how to overcome the obstructions since Government believed it was paying contractor to work around such obstructions (tr. 2/49).

When contractor attempted to install the frames in their designated spaces only 60 of the frames fit into the spaces as designed. The remaining 35 frames, although manufactured to Government's design, would not fit into the desired spaces the way Government wished them to be installed because of obstructions which had not been removed or relocated by Government. (Tr. 1/100, 103, 109, 114, 189-90, 2/12, 23, 57, 69, 212, 224; exh. B1)

Contractor continually requested direction from Government how to overcome the obstructions (App. supp. R4, tabs 3, 5, 8, 9, 11, 12, 13; tr. 1/131-32, 2/93, 105, 107, 189, 3/10, 16).

Government visited the job site, saw that the frames built in accordance with the contract plans and specifications could not be fitted into certain of the spaces intended, but refused to instruct contractor how to proceed (tr. 1/198-99, 2/189, 3/16, 37). Government refused to relocate or remove the obstructions. When pressed by contractor for Government's directions as to how to fit the frames into the spaces with the obstructions the contracting officer merely told contractor "to get your tail over there [to the job site] and get to work" (tr. 2/95, 124). Contractor suggested that the frames would have to be cut and reassembled to fit around the obstructions. The contracting officer then advised contractor to "just do it" (tr. 1/131-32, 2/9, 107-08). Government felt that contractor should solve the obstruction problems by itself without any assistance from Government (App. supp. R4, tabs 14-16; tr. 2/189). Government continually threatened to terminate the contract for default in performance and to assess liquidated damages if contractor did not solve the obstruction problems promptly (tr. 2/105-06).

Contractor followed the contracting officer's direction to "just do it", cut the 35 nonfitting frames at 64 corners thereof, remanufactured them at the job site with offsets to fit around the obstructions and installed them to Government's satisfaction (tr. 1/203, 3/87; exh. B1). The modification of frames at the job site caused contractor to

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incur added labor and material costs plus a speedup in performance. (Tr. 1/103, 104, 108, 115, 116, 206, 2/9, 14, 115) The job was finished on time on 23 March 1993 by use of overtime work (tr. 1/91-92, 118, 121). Installation of the frames should have taken a week at most. Because of the obstructions it took contractor from 7 to 21 March 1993 to install the frames. (Tr. 2/112) In addition the changes required to fit around the obstructions caused contractor to use more materials than otherwise would have been needed (tr. 2/116). Contractor's fabric subcontractor was required to be on a standby status while the changes were performed to overcome the obstructions (tr. 2/115-16). On 15 March 1993 contractor faxed a written claim to Government, received on the same day by Government, seeking $21,096 as an equitable adjustment in the contract price to cover its added costs arising out of the delays caused by Government's failure to advise contractor how Government wished contractor to proceed and out of the changes ordered by Government to make the frames fit around the obstructions (App. supp. R4, tabs 13, 15).

On 17 March 1993 the contracting officer visited the job site, observed the obstructions and determined that they were such that contractor could not reasonably have been aware of them at the time of bidding (tr. 3/37, 38, 45-46). The contracting officer later decided that changes had been ordered in contractor's performance for which contractor should be compensated (tr. 3/48). The contracting officer prepared a proposed contract modification, numbered 3, which would have compensated contractor for the cost of changing only 11 frames rather than the 35 actually modified along with certain other changes not pertinent to this appeal (App. supp. R4, tab 29; tr. 3/2, 60). Contractor refused to sign the modification since it did not compensate for all the added costs of the changes and the delays that occurred (tr. 3/24). The contracting officer thereupon held up payment of all sums claimed to be due by contractor (App. supp. R4, tab 33). In justification of such holdup the contracting officer argued that "as-built" drawings were owed to Government. Contractor responded to such argument by stating that the drawings were available, but would not be delivered until all monies due and owing above and beyond the 10 percent retainage permitted by the contract were paid. (App. supp. R4, tabs 27, 33)

The contract's Payments Under Fixed-Price Construction Contracts (APR 1989) clause, FAR 52.232-0005, provides that Government shall pay the amount due the contractor after (1) completion and acceptance of all work, (2) presentation of a properly executed voucher, and (3) presentation of release of all claims against Government arising by virtue of the contract. In addition the contract provided under paragraph 1.6 of Section 01720 that failure to submit as-built drawings and marked prints as required shall be cause for withholding any payment due the contractor under the contract. (R4, tab 4)

The contracting officer refused to issue a decision on contractor's claim for an equitable adjustment within the 60 days required by law. Contractor deemed such failure to issue a decision as a denial and duly appealed therefrom.

At the hearing of this appeal in July 1993 the contracting officer admitted that changes were called for in contractor's performance for which compensation should be made (tr. 3/45-46, 48).

The "as-built" drawings were accepted by the Board pursuant to the parties' stipulation. They are designated as Board exhibit B-1.*

DECISION

Government argues that the real issue in this appeal is whether contractor encountered a differing site condition for which it should receive an equitable adjustment and that contractor is not entitled to an equitable adjustment because it failed to make a prebid site visit during which it would have learned of the obstructions. Government further argues that when contractor learned of the obstructions it should have manufactured the frames to fit around the obstructions.

We disagree with Government's arguments. The evidence disclosed that even if contractor had made a prebid site inspection it would not necessarily have learned of the obstructions, since they were hidden by the existing cloth ceiling and, thus, could not be

* The Board accepted the "as-built" drawings in an effort to expedite the resolution of a dispute involving withholding of monies due the contractor which is not before the Board in the instant appeal. The parties have stipulated, however that in view thereof the government would promptly issue a check payable to the contractor in the amount of $510. The record does not show that this has happened.

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seen. Moreover, it would have required use of scaffolding or special lift equipment and two days of site inspection to learn of the obstructions. To expect a bidder to expend such extra time and effort in preparing a bid is unreasonable. Furthermore, contractor's failure to make a prebid site visit does not affect our decision in this appeal.

Government prepared the frame design covered by the contract. Contractor by entering into the contract with Government obligated itself to build the frames in accordance with Government's design. This it did. Contractor did not promise to redesign the installation sought by Government so as to overcome obstructions that Government promised to remove or relocate and failed to do. There was nothing in the contract, the drawings or the specifications to impose on contractor any obligation to change the drawings or to redesign the frames to fit around the obstructions at contractor's expense. *Raycomm Industries, Inc.*, ASBCA Nos. 16379, 16380, 73-1 BCA ¶ 9806. The contracting officer acknowledged that changes occurred when she issued a contract modification and also in her testimony.

Moreover, Government at the prework conference agreed to remove all obstructions to the installation of the frames in their designated locations. Government's failure to remove all such obstructions was the cause for frames not fitting. Contractor produced the frames according to Government's drawings and specifications. But for the unremoved or nonrelocated obstructions all the frames would have fit precisely into the spaces intended.

There is no question that each of the changes made to the various frames was not called for in the contract. Contractor is entitled to an equitable adjustment in the contract price to compensate it for all of its increased costs arising out of Government's delay in responding to contractor's requests for directions, all of its costs arising out of making the changes, and interest on such amounts from 15 March 1993 pursuant to Section 12 of the Contract Disputes Act.

This matter is remanded to the parties for negotiation of the equitable adjustment required. In the event the parties are unable to agree upon the amount of the equitable adjustment within 60 days from the date of this decision the contracting officer shall issue a decision setting forth her decision as to the proper amount. If contractor disagrees with such amount it may appeal to the Board from such decision.

The appeal is sustained.

[¶ 26,578] General Electric Co.

ASBCA No. 45936, December 23, 1993. Contract No. N00140-83-C-0196.

Interpretation of Contracts—Methods of Interpretation—Summary Judgment.—A motion for summary judgment involving the issue of a contractor's liability for delivery of defective turbines was denied, even though it was clear that the contractor had not committed a breach, because the contractor could be held liable on another theory. The government characterized its claim as one for breach damages and alleged that the amounts claimed were not recoverable under any adjustment provision of the contract. Applying the interpretive rule of *expressio unis est exclusio alterius*, it appeared that the Inspection clause remedies for such defective material were exclusive. However, delay costs might be recoverable as common law damages under the reservation of the Other Rights and Remedies provision of the Default clause.

For the appellant: Pettit & Martin, Washington, D.C., by Michael W. Clancy and Richard P. Rector. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Brad L. Johnson, Trial Attorney.

Before FREEMAN, RUBERRY, and RIISMANDEL, Administrative Judges. Separate opinion concurring in the result by Administrative Judge RIISMANDEL and joined in by Administrative Judge RUBERRY.

FREEMAN, Administrative Judge: General Electric Co. (GE) has appealed a contracting officer's decision holding it liable for breach of contract damages allegedly incurred as a result of GE's initial delivery of defective supplies. GE moves to dismiss the appeal on the ground that the Government has failed to state a claim upon which relief can be

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granted. Since the parties have argued the motion on the basis of matters in the appeal file, beyond the four corners of the complaint, we consider the motion as one for summary judgment.

STATEMENT OF FACTS

1. On 30 August 1985, the Government contracted with GE for delivery of four propulsion turbines and related equipment for the USS KITTY HAWK. The contract was made by a modification to a basic ordering agreement (BOA) and by a delivery order under that BOA. The general provisions of the BOA applicable to the delivery order included the FAR 52.246-2 clause entitled "INSPECTION OF SUPPLIES-FIXED PRICE (APR 1984)," and the FAR 52.249-8 clause entitled "DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984)."

2. Section 5.0 of the delivery order schedule as amended provided that initial inspection and acceptance of the turbines would be made at the GE plant with payment of the contract price (less specified withholding) at that time. Final inspection, acceptance, and payment of the withholding were to be made "after full power test during the ocean trials for the USS KITTY HAWK."

3. The initially specified delivery date for the turbines was 21 June 1987. The record does not indicate whether the delivery date was extended by contract modification prior to the events at issue in this appeal. However, the turbines were delivered and installed in the ship at the Philadelphia Naval Shipyard on or before 24 January 1991.

4. On 24 January 1991 and thereafter, a series of problems were encountered during dock trials of the turbines. The parties dispute responsibility for these problems, but for purposes of this motion we assume that the turbines as initially delivered by GE were defective. When the defects were discovered, GE undertook repair and correction.

5. On 7 February 1991, the Government notified GE that the turbine problems would cost the Government an estimated $1,436,000 and delay sea trials by 14 days. The Government proposed a contract amendment extending the delivery date with consideration to the Government. GE refused to agree to the proposed amendment.

6. On 19 March 1991, by Modification 01 to the delivery order, the Government formally rejected the turbines and unilaterally established a new delivery date of noon, 23 March 1991 for delivery of turbines conforming to the specifications. This modification further stated that the Government was reserving all rights to "delay and any other damages." GE completed the repairs and returned the turbines to the Government on 25 March 1991. Sometime thereafter ocean trials were completed and the turbines were finally accepted by the Government.

7. By letter dated 10 September 1992, the Government demanded payment from GE of $3,862,720 for additional costs allegedly incurred as a result of the defective turbines. The claimed costs included $2,575,147 for "additional costs in the completion of the USS KITTY HAWK overhaul," and $1,287,573 for additional costs on other shipyard work "impacted" by the delay of the USS KITTY HAWK work. GE rejected the claim. By final decision dated 5 February 1993, the contracting officer held GE liable for the full amount claimed. The Government characterizes its claim as one for breach damages and insists that the amounts claimed are not recoverable under any adjustment provision of the contract.

DECISION

The Inspection clause of the contract at paragraphs (e)(2), (f), (h) and (1) specified various remedies for the delivery of defective supplies. Paragraph (1) expressly reserved other rights and remedies, but only as to defects found after final acceptance. Applying the interpretive rule of *expressio unius est exclusio alterius,* it appears that the parties did not intend to reserve other rights and remedies with respect to defective material discovered before final acceptance, and that the Inspection clause remedies as to such defective material are exclusive. *See United Pacific Insurance Co. v. United States* [20CCF ¶ 83,173], 497 F.2d 1402, 1405 (Ct. Cl. 1974). Therefore, to the extent the Government claim is for costs incurred in attempting to test and repair the defective turbines, or for disruption of other work caused by that effort, those costs are recoverable only to the extent allowed by the remedial provisions of the Inspection clause and not as breach damages. *See Triex-Pacific v. Stone,* 958 F.2d 351, 354 (Fed. Cir. 1992) ("contingencies contemplated by various contract clauses are remediable under those clauses of the contract, not as a breach of contract.")

However, to the extent the Government claim is for time delay costs, incident to GE's failure to deliver specification compli-

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ant turbines by the contract delivery date, and not more specifically related to the test and repair work on the turbines, the time delay costs might be recoverable as common law damages under the reservation of other rights and remedies provision in paragraph (h) of the Default clause of the contract.

The motion is denied.

CONCURRING OPINION BY ADMINISTRATIVE JUDGE RIISMANDEL

I concur in the denial of appellant's motion, whether it be considered for dismissal or for summary judgment, but for reasons different from those stated in the proposed opinion.

I respectfully decline to adopt the proposition that the Inspection clause, as a matter of law, constitutes the exclusive remedy for a Government's breach of contract damages claim as presented in this case. The cited *Triax-Pacific* case, as well as *Johnson & Sons Erectors Company v. United States,* 231 Ct.Cl. 753, *cert denied,* 459 U.S. 971 (1982) (relied on by appellant) do not mandate such a result. The inspection clause does not provide an equitable adjustment, other "specific type of relief" or compensation for the costs the Government may have incurred upon rejection of the equipment after its installation and removal by the Government but before final acceptance as do the Changes and Suspension of Work clauses in those cases. *Edward R. Marden Corp. v. United States* [16CCF ¶ 80,368], 442 F.2d 364, 368 194 Ct.Cl. 799, 807 (1971); *Len Company & Associates v. United States* [12 CCF ¶ 81,392], 385 F.2d 438, 450 n.17, 181 Ct.Cl. 29, 50 n.17 (1967).

Neither have we here a case for the application of the rule of *expressio unius est exclusio alterius,* particularly in view of the UCC provision that if the parties intend "the term to describe the sole remedy under the contract, this must be clearly expressed." (¶ 2-719)

Since the contractor agreed to, and in fact did correct, the defects in the turbines, there was no resort to the Default clause. The reservation of Government's rights and remedies in the Default clause thus is not applicable.

The foreseeability of the various elements or categories of the Government's claimed/asserted costs as consequential damages also is an issue to be considered.

The Board should consolidate the instant appeal with that in ASBCA No. 45937 (General Electric's claim for costs of repair, etc.) and proceed with the consideration of both appeals on the merits.

[¶ 26,579] E.M. Scott & Associates, Inc.

ASBCA No. 45869, December 9, 1993. Contract Nos. N00189-90-R-0108, N00189-91-R-0118.

Procedure, Boards—Pleadings—Answer.—The government's certificate of service stating that an answer had been served on the contractor was not a false statement violating the board's rules and punishable by default, because the term "served" used in a certificate of service can refer to the act of sending papers, rather than to the receipt of those papers by the opposing party. Moreover, the board's rules require the board, not the government, to serve a copy of the answer on the contractor. The answer was timely submitted to the board because the due date fell on a Sunday and the next day was a legal holiday; thus, the board's receipt of the answer by the next day fully comported with the board's rules and order.

Procedure, Boards—Discovery—Admissions.—The government's admission that it had accepted, evaluated, and assimilated manuals did not entitle the contractor to summary judgment for damages arising from the unlicensed use of a trade secret, because the admission did not acknowledge the essence of the claim, which was a contractual limitation to the use of the material. The acknowledgment by the government that it assimilated the manuals did not rise to that level.

Procedure, Boards—Discovery—Interrogatories and Depositions.—Although the government's first interrogatory was not signed under oath as required by board rules, a contractor was not entitled to a summary judgment awarding damages arising from the unlicensed use of a trade secret, because the government cured the defect before the (cont'd)

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contractor suffered any prejudice in the conduct of the appeal resulting from the defect. Thus, there was no basis for the imposition of a sanction upon the government.

For the appellant: Edward M. Scott, Owner. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Anita D. Polen, Trial Attorney, Fleet and Industrial Supply Center, Norfolk, Virginia.

Before HARTMAN, SPECTOR, and THOMAS, Administrative Judges.

HARTMAN, Administrative Judge: By letter dated 13 October 1993, appellant, E. M. Scott & Associates ("EMS"), requested grant of "summary judgment in the amount of (its) claim" based "on the Government's failure to follow ASBCA rules, and the false statement made by the Government to the Board." By letter dated 14 October 1993, EMS further requested grant of "summary judgment in the amount of the claim, based on the Respondent's concurrence with the essence of the claim in the Government's Answer." Thereafter, the Government filed a response to both motions opposing the grant of summary judgment and EMS filed a reply to the Government's response. On 15 November 1993, EMS filed a third motion requesting grant of summary judgment due to the Government's failure "to comply with the law with respect to answering interrogatories." Because EMS has not shown that it is entitled to summary judgment as a matter of law or the imposition of a sanction against the Government, we deny all three motions.

1. *13 October 1993 Motion*

In its first motion, EMS asks for summary judgment because the Government "stated in its *CERTIFICATE OF SERVICE* that: '. . . on the 8th of October 1993, a copy of the Government's Answer was served on the Appellant by Federal Express . . . .'" (emphasis in original), but it did not receive a copy of the answer until 11 October 1993. According to EMS, "Federal Express was given the package on the 8th, a Friday, and was not instructed to deliver it on the next day, which they would have done, . . . [but] on Monday, the 11th one day after it was due." EMS contends such action by the Government constituted furnishing of a "false statement" and a violation of the Board's Rules.

Neither contention by EMS, however, is correct. The term "served," when used in a certificate of service, can refer to the act of "sending" papers, rather than to the "receipt" of those papers by an opposing party. *See, e.g., Bloomer v. Dept. of Health & Human Services*, 966 F.2d 1436, 1438 (Fed. Cir. 1992) (MSPB regulation defines service as process of furnishing a copy of any pleading either by mail, facsimile, or by personal delivery); *Huey v Dept. of Health & Human Services*, 782 F.2d 1575, 1578 (Fed. Cir. 1986) (there may be difference between service and filing date).

Further, no provision of the Board's Rules required the Government to deliver its answer to EMS or the Board by 10 October 1993. Board Rule 6(b) provides that the Board, not the Government "shall serve a copy [of the answer) upon appellant." Also, when service of a document is effectuated by the Government or another party, Board Rule 16 provides simply that "[p]apers shall be served personally or by mail, addressed to the party upon whom service is to be made." It does not require next day service on an opposing party by an express courier service such as Federal Express. Use by a party of an express courier service for next day or other expedited service to an opposing party is a courtesy, not a requirement. Moreover, Board Rule 33 expressly provides that, "[i]n computing any period of time, . . . the last day of the period shall be included *unless it is a* Saturday, *Sunday, or a legal holiday, in which event the period shall run to the end of the next business day"* (emphasis added). Thus, while the Board's 3 September 1993 order provided that the Government's answer was to be submitted to "the Board" on or before 10 October 1993, because 10 October was a Sunday and the next day a legal holiday, *i.e.*, Columbus Day, the Board's receipt of the answer by Federal Express on 12 October 1993 comported fully with the Board's Rules and order. *See, e.g., Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961, 962 (Fed. Cir. 1993).

We note for the parties' edification that entry of a "default" judgment as a "sanction" is a drastic step, which is to be employed only in the most extreme cases. *See, e.g., Information Systems & Networks Corp. v. United States*, 994 F.2d 792, 796-97 (Fed. Cir. 1993); *Radcliffe Construction Co.*, ASBCA No. 38478, 90-2 BCA ¶ 22,863 at 114,848, *aff'd in relev. part on recon.*, 90-3 BCA ¶ 22,961. Accordingly, such action should not be sought by a party to an appeal, except under extraordinary circumstances.

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2. *14 October 1993 Motion*

In its second motion, EMS asks for summary judgment because "the Government agrees that the Navy accepted, evaluated, and *assimilated* five tailored, individual manuals (without payment)" (emphasis in original). EMS is correct in noting that the Government admitted in its answer the allegations contained in paragraph 8 of EMS's complaint which provide as follows:

> two weeks later, all technical products (five tailored, individual manuals) had been accepted, evaluated and assimilated by the Navy.

However, such a admission does not entitle EMS to summary judgment.

In our prior decision denying the Government's motion to dismiss EMS's appeal, we explained that " '[o]ne who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use.' " *E.M. Scott & Associates, Inc.*, ASBCA No. 45869, 94-1 BCA ¶ 26,258 (30 July 1993) quoting *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 148 (D.C. Cir. 1951); *accord American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 61 (1st Cir. 1978); *International Engineering Co. v. Richardson*, 512 F.2d 573, 578-79 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976). Thus, in order to maintain a suit for damages arising from unlicensed use of a trade secret appellant must plead and prove a contract.

A simple acknowledgment by the Government that it "assimilated" five manuals does not establish the existence of a contract between EMS and the Government limiting or restricting the Government's use of the manuals. *Compare Airborne Data, Inc. v. United States*, 702 F.2d 1350 (Fed. Cir. 1983), and *The Padbloc Co. v. United States*, 161 Ct. Cl. 369 (1963), *with Radioptics, Inc. v. United States*, 621 F.2d 1113, 1120-29, 223 Ct. Cl. 594, 608-24 (1980). As the Government notes in its opposition to EMS's motion, such an acknowledgment may mean only that the Government concedes it obtained or comprehended specific information. *See, e.g., Webster's II New Riverside University Dictionary* 131 (1988). Thus, EMS has failed to show that, based upon the admission, it is entitled to summary judgment as a matter of law.

3. *15 November 1993 Motion*

In its third motion, EMS asks for summary judgment because "Mary Beth Hacic's response to [its) September 28, 1993 interrogatory" was "not signed under oath, as required by ASBCA rules." EMS correctly notes that the Government's response to its first set of interrogatories did not comply with Board Rule 15 because the answers were not "signed under oath." However, by letter dated 16 November 1993, with a copy supplied to the Board, the Government furnished EMS an amended signature page with Ms. Hacic attesting to the veracity of the interrogatory responses "under penalty of perjury." The Government therefore cured the defect before EMS suffered any prejudice in its conduct of the appeal resulting from the defect. Thus, there is no basis for imposition of any sanction upon the Government. *See, e.g., Radcliffe Construction Co.*, ASBCA No. 38833, 90-1 BCA ¶ 22,480 at 112,833.

In its 16 November letter, the Government asks that, in the future, EMS contact it first regarding "requests that can be easily resolved between the parties." The Government's request comports fully with Board Rules 14 and 21 directing that the parties cooperate and engage in discovery voluntarily.

CONCLUSION

EMS has not shown it is entitled to imposition of any sanction against the Government or to summary judgment as a matter of law. Accordingly, all three of EMS's motions are denied.

[¶ 26,580] Professional Services Unified, Inc.

ASBCA No. 45799, December 14, 1993. Contract No. N00123-91-C-5563.

Interpretation of Contracts—Clear Meaning—Wage Determination.—A Price Adjustment clause governing wage determinations was not applicable to a wage modification made during the base year, because the clause specifically stated that it was applicable on the anniversary date of the multiple year contract or at the beginning of the renewal option period and therefore clearly did not apply to the base year. The parties agreed to a price adjustment to reflect increased wages and fringe benefits during the base period, necessary

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because both parties held an erroneous belief about the minimum wage and fringe benefit rates for service employees applicable at the time of award. Although the government agreed to adjust the contract price to account for the increase in actual wages and fringe benefits applicable to the basic contract, it averred that it did not have to include an amount for indirect costs and profit as part of the equitable adjustment, citing the Price Adjustment clause. However, the contractor's contention that the clause did not apply to the base year was unassailable inasmuch as the clause clearly stated that a base contract period could not be an option or renewal period.

Labor—Service Contract Act—Wage Determinations.—A contract was properly reformed to reflect increased wages and fringe benefits during the base period because the parties both held an erroneous belief about the minimum wage and fringe benefit rates for service employees applicable at the time. A collective bargaining agreement, signed 30 days before the award and scheduled commencement of performance, applied to the contract pursuant to the Service Contract Act. The successorship requirements of the Service Contract Act require a successor contractor to pay its service employees no less than the wages and fringe benefits provided in the predecessor contractor's collective bargaining agreement. However, the parties mistakenly incorporated the previous year's version of the wage determination into the contract for the base year. The contracting officer should have reopened and amended the request for proposals to incorporate the terms of the new agreement. Because that was not done, fairness dictated that the contract price for the base year should be adjusted to reflect the actual increase.

Interpretation of Contracts—Clear Meaning—Economic Price Adjustment for Option.—A contractor was not entitled to be compensated for indirect costs or profit in connection with wage determinations that applied to option periods, because the Price Adjustment clause expressly provided that no adjustment should include any amount for general and administrative costs, overhead, or profit. Although the contractor did not explain its theory of entitlement, the board pointed out that the contract price for the option years should reflect any actual changes in wages and fringe benefits made but that indirect costs and profit were not included in the price adjustment.

For the appellant: Frank H. Russell, President. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and James J. Paris, Trial Attorney, Naval Regional Contracting Center, San Diego, California.

Before GROSSBAUM and SPECTOR, Administrative Judges.

GROSSBAUM, Administrative Judge: This appeal is taken from the contracting officer's failure to issue a decision on a claim by appellant, Professional Services Unified, Inc. (PSU), for an equitable adjustment resulting from the incorporation of Service Contract Act wage determinations into its contract. The only matter in dispute relates to PSU's entitlement to general and administrative (G&A) costs, overhead (claimed as "increased liability insurance"), and profit under the adjustment. There is no dispute regarding PSU's entitlement to price adjustments for increases in wages, fringe benefits and related taxes. After this appeal was docketed the contract was modified to reflect the foregoing undisputed adjustments.

As originally presented, the amount in dispute appeared to relate only to the approximately $3,500 in G&A costs, overhead and profit applicable to the undisputed direct cost adjustment of $35,330.60 for the base contract year. As subsequently clarified and recomputed, PSU claims slightly more than $3,150 for indirect costs and profit for each year of contract performance: the base year and each of two option years. Thus, the total amount in dispute is approximately $9,500.[1]

Appellant has elected the accelerated procedure provided by Rule 12.3. The parties waived hearing and have elected to submit the case for decision on the record, pursuant to Rule 11. Only liability is before us for decision. Appellant filed a brief. The Government's position is reflected in its answer to appellant's complaint.

[1] Only approximate amounts have been stated herein because the claimed indirect cost and profit elements were actually calculable as fixed percentages of direct cost items, the amounts of which varied slightly for each contract year.

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SUMMARY FINDINGS OF FACT

On 6 June 1991 the Government issued a request for proposals (RFP) for procurement of mess attendant services at the Naval Air Station North Island, San Diego, California, for the base period from 1 October 1991 through 30 September 1992. As amended, the RFP set 8 August 1991 as the closing date for offers covering the base period and two one-year option periods.

The solicited services represented a recurring requirement. A contract to furnish substantially the same services at the same location had earlier been awarded to Renaissance Exchange, Inc. (Renaissance). However, this contract had been terminated for default in January 1991 and the services required up through September 1991 were being performed by a completion contractor, Balantine's South Bay Caterers, Inc. (Balantine's).

The Service Contract Act of 1965, as amended (sometimes SCA), 41 U.S.C. § 351 *et seq.*, and implementing regulations promulgated by the Department of Labor (DOL) at 29 C.F.R. Part 4 (1993 ed.) and also published in the Federal Acquisition Regulation (FAR) at 48 C.F.R. Subpart 22.10 (1990 ed.) require the contracting officer, *inter alia*, to submit to DOL Standard Form (SF) 98, "Notice of Intention to Make a Service Contract" (sometimes Notice), for each new solicitation for a service contract in excess of $2,500. Among other things, the SF 98 provides for a Response to the Notice by DOL, wherein the wage determination (sometimes WD) applicable to the procurement may be indicated. *See* 29 C.F.R. § 4.4(a)(1); FAR 22.1007(a).[2]

On or about 23 May 1991, less than two weeks before issuing the RFP, the contracting officer submitted SF 98 Notice A2282535 applicable to the solicitation. Among other things, the Notice identified Balantine's as the incumbent contractor and WD 74-341 (Rev. 21) as the wage determination in the incumbent's contract, which incorporated a collective bargaining agreement (sometimes CBA) between the Industrial, Technical and Professional Employees union (the Union) and the defaulted predecessor contractor, Renaissance. The Notice also stated: "No new agreement available from Balantine's, the incumbent contractor." (R4, tab 6)

The solicitation and resulting contract included the Service Contract Act of 1965, As Amended (May 1989) clause prescribed by FAR 52.222-41 (sometimes SCA clause). The scheme in SCA clause paragraph (c), *Compensation*, provides for paying each service employee "not less than the minimum monetary wages and ... fringe benefits ... specified in any wage determination attached to this contract" and, in the case of contracts with terms of more than one year, provides for adjusting the required minimum monetary wages and fringe benefits "after 1 year and not less often than once every 2 years, under [DOL] wage determinations ..."

With regard to an incumbent prime contractor paying wages and benefits to service employees pursuant to a CBA effective during the contract performance period, SCA clause paragraph (m), *Collective Bargaining Agreements Applicable to Service Employees*, requires prompt reporting of full information about the CBA to the contracting officer, but does not specifically require negotiation of new CBAs. However, to effectuate the "successorship" requirements of SCA section 4(c), 41 U.S.C. § 353(c), SCA clause paragraph (f), *Successor Contracts*, prohibits the contractor under a contract which succeeds a contract subject to the Act under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement,

> from paying any service employee under the contract:
>
> > less than the wages and fringe benefits provided for in such collective bargaining agreement, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement[,] ... unless the limitations of 29 CFR 4.1b(b) apply ...

The RFP and resulting contract also contained the Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) (May

[2] In the case of a service contract for a recurring or known requirement, under paragraph (a) of FAR 22.1008-7, Required time for submission of Notice, the contracting officer must submit the Notice to DOL "not less than 60 days (nor more than 120 days ...) before the earlier of ... (2) issuance of any request for proposals, [or] (3) commencement of negotiations ..." Where circumstances prevent timely submission of the Notice, paragraph (c) of this subsection requires the contracting officer to submit "a written statement of the reason for delay as soon as practicable."

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1989) clause prescribed by FAR 52.222-43 (sometimes the FLSA/SCA Price Adjustment clause), which applies both to contracts subject to DOL wage determinations and to contracts subject to CBAs and provides in part:

> (c) The [DOL] wage determination ... current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract....
>
> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:
>
> (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period...;
>
> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law;...
>
> (e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) [sic—(d)?] of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profit.

Attachments to the RFP, as issued, included WD "74-341(21)." On or about 12 July 1991 the Government issued amendment 0002 to the solicitation, which replaced WD 74-341(21) with WD "74-341 (Rev. 22)" and stated that: "[t]he collective bargaining agreement appended to the Wage Determination is the current bargaining agreement and remains unchanged." WD 74-341 (Rev. 22), dated 17 September 1990, was based on the latest CBA between Renaissance and the Union.

On or about 18 July 1991, while the RFP was outstanding, Balantine's and the Union executed a new CBA covering the food service employees at North Island Naval Air Station, effective 11 January 1991. The agreement increased wages and fringe benefits for the contract year "1991-92" beyond those covered under the then-current WD 74-341 (Rev. 22). According to its terms, this new CBA was to remain in "force and effect until January 10, 1993." (R4, tab A-6)

On 7 August 1991 the Union submitted an executed copy of its new CBA with Balantine's to the contracting officer. The CBA was received by the Government on 9 August 1991. (R4, tab A-7) The RFP was never reopened to incorporate the terms of the new CBA nor to include the clause at FAR 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits.[3]

PSU submitted its proposal in response to the RFP on 2 August 1991. PSU's proposed prices were based mainly on the rates of wages and fringe benefits reflected in WD 74-341 (Rev. 22).

No negotiations were conducted with any offerors from the date proposals were received through the date of contract award. On 30 September 1991 the Government awarded the captioned contract to PSU for the base period from 1 October 1991 through 30 September 1992. WD 74-341 (Rev. 22) was attached to and made part of the contract. (R4, tab 1)

In a 7 October 1991 letter to PSU "as the successor contractor," the Union transmitted a copy of the predecessor contractor's (Balantine's) CBA and informed PSU about various practices and procedures required by the Union. (R4, tab A-6) This was the first time that PSU knew or had reason to know about the terms of the new CBA between Balantine's and the Union.

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[3] In situations involving a "successorship/same locality/incumbent collective bargaining agreement," FAR 22.1012-5, Response to late submission of Notice—with collective bargaining agreement, provides that, if the contracting officer has not filed a timely Notice as required by FAR 22.1008-7 (note 2) nor received a DOL response, and DOL

> is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the contracting officer shall incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement, or the collective bargaining agreement itself, and the clause at 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits. If the contract has been awarded, an equitable adjustment following receipt of the wage determination or revision will not be required, since the wage determination or revision will be based on the economic terms of the collective bargaining agreement.

The aforementioned SCA Minimum Wages and Fringe Benefits clause expressly provides, *inter alia*, that the economic terms of the CBA will apply to the resulting contract "notwithstanding the absence of a wage determination reflecting such terms."

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On 25 February 1992 DOL issued WD 74-341 (Rev. 23), incorporating the terms of Balantine's CBA. This wage determination was attached as a DOL response to the SF 98 Notice A2282535, which had been submitted in May 1991. (R4, tab 6)

On 6 May 1992 the contracting officer issued unilateral modification P00002 to the contract, attaching and incorporating WD 74-341 (Rev. 23) "into the contract for the period 01 October 1991 through 30 September 1992," *i.e.*, the base contract year. The modification invited PSU to "notify the Contracting Officer of any price increase claimed under the Service Contract Act within 30 days . . ." (R4, tab 1)

PSU submitted a price adjustment proposal to the contracting officer on 13 May 1992. The proposal included increases for general liability insurance (an overhead item), G&A costs and profit, in addition to increases in wages and fringe benefits and related increases in social security and unemployment taxes and workers' compensation insurance. (R4, tab 3, attch. C)

On 30 June 1992 the contracting officer issued unilateral modification P00003, exercising the option to extend performance for Option Year I, from 1 October 1992 through 30 September 1993. The wage determination applicable to the contract and current at the beginning of this first renewal option period was WD 74-341 (Rev. 23), dated 25 February 1992. (R4, tab 1)

After discussions between the parties, in November 1992 the contracting officer advised PSU that the Government intended to "adjust the contract amount pursuant to [the] FAR 52.222-43" FLSA/SCA Price Adjustment clause. This adjustment would reflect only PSU's "actual increase or decrease in applicable wage[s] and fringe benefits" and would not include increases in indirect costs (R4, tab 3, attch. D-F). At this point, the parties had reached an impasse regarding an adjustment covering PSU's indirect costs and profit.

By letter to the contracting officer dated 2 December 1992, PSU resubmitted its price adjustment proposal and designated a discrete portion of the proposal as a claim for the "increased liability insurance, G&A, and profit amounts" included therein. Each of these claim elements was expressed as a certain percentage of either the direct labor or total direct cost increases sought in the price adjustment proposal and amounted to a readily calculable annual sum of approximately $3,500 for the base year and each of the option years. PSU requested a contracting officer's decision on its claim. (R4, tab 3, attch. C, G)

PSU's claim letter indicated that it expected to reach agreement with the Government on the direct cost portion of its May 1992 price adjustment proposal and that it intended to reserve its right to appeal the contracting officer's expected rejection of its claim for indirect costs and profit. Shortly thereafter the parties initiated discussions leading to an agreement on the direct cost elements of PSU's price adjustment proposal. (R4, tab 3, attch. G-H)

Meanwhile, on 3 December 1992 DOL issued WD 74-341 (Rev. 24), based on an apparently new ("current") CBA between PSU and the Union. (R4, tabs 1, 2) There is no evidence in the record of any later revision to this wage determination.

In March 1993 PSU appealed from the contracting officer's failure to issue a decision on its pending claim and the appeal was docketed as ASBCA No. 45799. PSU later elected the Rule 12.3 accelerated procedure in a letter that was received by the Board on 14 June 1993.

By letter dated 11 March 1993, the NRCC contracting officer advised PSU that the Government would not allow any claimed overhead, G&A costs, or profit increases. Nevertheless, an adjustment for only direct labor wages, benefits, and associated payroll costs was agreed to by both parties on 16 March 1993. (R4, tabs 4, 5)

Bilateral modification P00007, effective 19 May 1993, purported to provide price increases for the base year and the first option year, pursuant to the revised wage determinations applicable to the period 1 October 1991 through 30 September 1993. These price increases did not include any amounts for G&A costs, overhead or profit. The modification expressed neither a specific reservation of rights nor a specific release with respect to previously claimed indirect costs or profit and made no mention of the instant appeal, ASBCA No. 45799, which was then pending. (R4, tab 1). Nevertheless, we are persuaded by the parties' subsequent conduct that they did not intend this modification to extinguish PSU's instant claim for indirect costs and profit.

DECISION

The Government argues that the FAR 52.222-43 FLSA/SCA Price Adjustment clause applies to the price adjustments resulting from pertinent revised wage determi-

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nations and that the clause expressly precludes recovery of the indirect costs and profit claimed in this appeal. (Ans. at 10-11) By contrast, appellant contends that this price adjustment clause does not apply to the wage determination revisions made after award of the contract. Appellant argues that increases resulting from complying with these revised wage determinations were changes, compensable under the Changes clause by means of an "equitable adjustment," which necessarily includes allowances for increased indirect costs and a reasonable profit. (App. br. at 4-6) To evaluate these conflicting arguments, we must distinguish between the years to which the price adjustments apply.

1. *Base contract year.* Appellant points out that "*no* term, phrase, or other language" in the FLSA/SCA Price Adjustment clause in the contract "specifically names or refers to a contract's base contract period" and that this clause specifically governs only

> *wage determination[s] applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period.* A base contract period cannot, in or of itself, be an option or renewal period.

(App. br. at 5; emphasis in original). Appellant's argument appears unassailable.

Among other things, paragraph (c) of the FAR 52.222-43 clause (quoted in part above) may reasonably be construed to preclude any applicability of the clause's adjustment provisions to the contract's base period.[4] Moreover, we have interpreted a predecessor version of the FLSA/SCA Price Adjustment clause in an option contract as permitting adjustments only for changes in wages and fringe benefits made to comply with or resulting from DOL wage determinations "applicable to the renewal option period" and as "not pertain[ing] to other wage increases the contractor undertakes during the basic contract period." *Ralph Construction, Inc.*, ASBCA No. 35633, 88-2 BCA ¶ 20,731 at 104,756; *cf. Burnside-Ott Aviation Training Center v. United States*, 985 F.2d 1574, 1576 (Fed. Cir. 1993) (wage determination issued during base contract period "became effective at the start of the first option year"). Accordingly, we hold that the FAR 52.222-43 FLSA/SCA Price Adjustment clause in the instant contract does not provide a vehicle for adjusting the contract price with respect to changes in wages or fringe benefits effectuated during the base period of a multiple year or option contract to which the SCA applies.

A price adjustment to reflect increased wages and fringe benefits during the base period of the instant contract became necessary because both parties harbored an erroneous belief about the minimum wage and fringe benefit rates for service employees applicable at the time of award. The parties' mistake as to this basic assumption came about because the Government neglected to follow the procedures prescribed by FAR 22.1012-5 (note 3) as soon as it learned of the new CBA executed by Balantine's and the Union.

The "successorship requirements of SCA section 4(c), 41 U.S.C. § 353(c), recited in paragraph (f) of the SCA clause in the contract, impose obligations on the successor contractor that are "not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement." 29 C.F.R. § 4.163. As applied to the instant contract, from the first day of contract performance through 10 January 1993, PSU was obligated to pay its service employees no less than the wages and fringe benefits provided in Balantine's CBA with the Union, even though a wage determination based on that CBA had not yet been incorporated in its contract, unless PSU was somehow excepted from SCA section 4(c).

None of the exceptions or limitations to the applicability of SCA section 4(c) alluded to in the SCA clause apply to this contract. In particular, the specific "limitations of 29 CFR 4.1b(b)" do not apply here because notice of the terms of the new CBA was received by the contracting agency on 9 August 1991, more than 30 days before both award

[4] Were it not for paragraph (c), the multiple year and option contracts price adjustment clause would be nearly identical to the FAR 52.222-44 FLSA/SCA Price Adjustment clause applicable to one-year service contracts, and might be interpreted in the same manner. The latter clause makes no provision for price adjustments based on ordinary wage determinations issued during the contract term and wage determinations issued after award and before completion of the contract do not change the contractor's obligation with respect to minimum wages to be paid and fringe benefits to be furnished. "Such wage determinations are effective for contracts not yet awarded." 29 C.F.R. § 4.161; *Broad Avenue Laundry and Tailoring v. United States* [30 CCF ¶ 70,003], 681 F.2d 746, 747 (Ct. Cl. 1982); *see Suburban Industrial Maintenance Co.*, ASBCA No. 22875, 79-1 BCA ¶ 13,731 at 67,322; *J&L Janitorial Services, Inc.*, ASBCA No. 31245, 88-3 BCA ¶ 21,137 at 106,725.

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and scheduled commencement of performance of the successor contract. *See* 29 CFR § 4.1b(b)(2); FAR 22.1008-3(c)(2)(i)(B). Therefore, pursuant to FAR 22.1012-5, the contracting officer should have reopened and amended the RFP to incorporate the terms of the new CBA and the FAR 52.222-47 SCA Minimum Wages and Fringe Benefits clause. If the contracting officer had done so, no price adjustment would have been needed during the base contract period to compensate the resulting successor contractor, PSU, for complying with the terms of the predecessor contractor's CBA.

It is unnecessary to speculate about the reasons why the contracting officer failed promptly to follow the FAR 22.1012-5 procedures, although the fact that notice of the new CBA wasn't received until one day after the scheduled closing date for offers may have contributed to this failure. In any event, we may fairly presume that the Government did not intend to violate the law as embodied in the FAR. *See Beta Systems, Inc. v. United States* [34 CCF ¶ 75,429], 838 F.2d 1179, 1186 (Fed. Cir. 1988).

The parties intended to apply the minimum wage and fringe benefit rates required by the SCA to the base period of the contract as awarded. However, the parties mistakenly incorporated WD 74-341 (Rev. 22) into the instrument instead of the economic terms of the predecessor contractor's CBA. This mistake may be rectified by reformation. RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981).

Reformation to effectuate the parties' intended agreement has been accomplished in part by the retroactive incorporation into the contract of WD 74-341 (Rev. 23) for the entire base contract year. Moreover, since the price offered and accepted for performing this labor-intensive contract was based largely on the assumed applicability of the wage and fringe benefit rates reflected in WD 74-341 (Rev. 22), fairness dictates that the contract price for the base year should be adjusted to reflect the actual increase in applicable wages and fringe benefits made to comply with the economic terms provided in Balantine's CBA, as eventually memorialized in WD 74-341 (Rev. 23). The proper measure of such adjustment would be an equitable adjustment, which necessarily makes provision for increased overhead and G&A costs and for a reasonable profit, unless these factors are expressly excluded by some pertinent contract provision.

Since no clause in the contract limits the amount of any price adjustment reflecting changes in wages and fringe benefits applicable to the basic contract period, we hold that appellant is entitled to be compensated for indirect costs and profit as part of the equitable adjustment provided for increased minimum wages and fringe benefits for the base year.

2. *Option years.* Appellant claims G&A costs, overhead and profit in connection with SCA price adjustments made applicable to the two option years of its contract, but does not explain its theory of entitlement. This claim is without merit.

Despite the inapplicability of the FAR 52.222-43 FLSA/SCA Price Adjustment clause to the basic period of a multiple year or option contract, the clause makes the DOL wage determination "current on the beginning of each renewal option period" applicable to the contract. Moreover, subparagraph (d)(1) of the clause expressly provides for price adjustments to reflect increases in wages and fringe benefits made to comply with the DOL "wage determination applicable ... at the beginning of the renewal option period." Accordingly, the FLSA/SCA Price Adjustment clause applies to each of the option years in PSU's contract.

The record before us establishes that the option to extend performance for Option Year I, 1 October 1992 through 30 September 1993, was actually exercised and suggests that the option for Option Year II, 1 October 1993 through 30 September 1994, may already have been exercised. The record also establishes that WD 74-341 (Rev. 23) was applicable at the beginning of the first renewal option period and indicates that WD 74-341 (Rev. 24) would have been applicable at the beginning of the second renewal option period.

Pursuant to subparagraph (d)(1) of the FLSA/SCA Price Adjustment clause, the contact price for Option Year I may have been adjusted to reflect actual increases or decreases, if any, in applicable wages and fringe benefits to the extent made to comply with WD 74-341 (Rev. 23). Similarly, the same subparagraph of the clause permits adjusting the contact price for Option Year II to reflect any actual changes in wages and fringe benefits made to comply with WD 74-341 (Rev. 24).

However, pursuant to paragraph (e) of the FLSA/SCA Price Adjustment clause, no such price adjustment may include "any amount for general and administrative costs, overhead, or profit," as claimed by PSU. Therefore, appellant would not be entitled

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to recover any amount for indirect costs or profit in connection with whatever price adjustments may be applicable to either the first or second renewal option periods.

Accordingly, the appeal is sustained with respect to overhead and G & A costs and profit claimed in connection with the price adjustment negotiated for the base contract year. The matter is remanded to the contracting officer to determine the amount of indirect costs and profit due appellant plus interest on that amount pursuant to 41 U.S.C. § 611. In all other respects the appeal is denied.

[¶ 26,581] Midwest Holding Corporation

ASBCA Nos. 44589, 45222, December 22, 1993. Contract No. DAHC92-89-C-0169.

Contract Types—Vehicle Rentals—Wear and Tear.—The government's argument that a government estimator included fair wear and tear in his estimate of damage to leased vehicles was unconvincing because the estimator knew that fair wear and tear were not recoverable. Although the estimate form listed all deficiencies, many were not priced on the joint inspection reports, indicating that a distinction was made between what was recoverable and what was not. The government was bound by what it obviously agreed to as compensable repair costs during the joint inspection and the resulting estimate.

For the appellant: Elliott, Vanaskie & Riley, Washington, D.C., by Dennis J. Riley and Michael W. Kauffman. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Robert L. Duecaster, JAGC, Trial Attorney.

Before DuVALL, RUBERRY, and SPECTOR, Administrative Judges.

DuVALL, Administrative Judge: These appeals involve three claims for recovery of costs allegedly due appellant following the expiration of a contract to lease commercial sedans to the U.S. Army. The claims are for: 1) Repair costs for deficiencies in excess of fair wear and tear; 2) Rental costs for delay in return of vehicles following contract expiration, and; 3) Additional costs relating to the condition and extended delay in return of a single vehicle. The parties agreed to waive rights to a hearing and have the appeals decided on the available record pursuant to Board Rule 11.

FINDINGS OF FACT

On 17 August 1989 the Government awarded appellant a contract to furnish, on a lease basis, 60 commercial sedans for use by the Military Police Command In Panama. The contract specified that the vehicles would be operated on a continuous basis, twenty-four hours a day, seven days a week, and that the minimum mileage estimate per vehicle was 2000 miles a month (Clause C.1.2). The base year of the contract ran from 1 October 1989 through 30 September 1990. The contract expired at the end of the first option year, on 30 September 1991. The option to renew the contract for a second year was not exercised. The lease price included maintenance and repair of the vehicles, including parts and labor when due to fair wear and tear (Clause C.3.1.2).

Clause C.3.1.7 pertinently stated: "The U.S. Government will return the vehicles in the same condition as received except for normal fair wear and tear."

The following provision dealt with damaged vehicles:

C.3.2 Damaged Vehicles:

C.3.2.1 When due to accidental, willful, or negligent actions by its employees, the U.S. Government shall have the option of accomplishing repairs by either (i) in-house resources, or (ii) by directing the Contractor, in writing, to perform the repairs with cost thereof to be for the account of the U.S. Government.

C.3.2.1 [sic] Whenever a vehicle is returned to the Contractor with damages which are considered over and beyond fair wear and tear, the Contractor shall prepare a written and detailed estimate for the cost of labor and parts necessary to repair the vehicle to its original condition. This estimate will be submitted to the Office in Charge (OIC), DOS Transportation Motor Pool (TMP). The OIC will review the estimate and make a recommendation to the Contracting Officer within three (3) work days after receipt of the estimate.

C.3.2.3 No repair work on any damaged vehicle will be performed until authorized

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in writing by the Contracting Officer. The Contractor is cautioned that any repairs accomplished without the Contracting Officer's authorization is done at its risk and expense and will not be reimbursed by the U.S. Government.

Section E, INSPECTION AND ACCEPTANCE, called for performance of the inspection and acceptance by the chief of the Transportation Motor Pool or his duly authorized representative (Clause E.1). Clause E.2, Inspection of Leased Vehicles, stated:

(a) Each vehicle delivered to the U.S. Government shall be subject to a joint inspection by authorized representatives from the Contractor and the U.S. Government for damages and other deficiencies. The results of such inspection will be evidenced on DA Form entitled "Acknowledgment Of Leased/Rental Vehicles Procedures" which will list all exceptions and be signed by both parties and dated. Exceptions listed will be considered final and conclusive and a copy thereof will be furnished to the contractor. The U.S. Government will not accept any vehicle unless both signatures appear on the inspection form.

(b) A joint inspection in the manner described above will be performed each time a vehicle is returned to the Contractor and/or delivered to the U.S. Government.

Clause I.29, LIABILITY AND INSURANCE, LEASED MOTOR VEHICLES, made the Government responsible for loss or damage to the vehicles except for normal wear and tear and loss or damage caused by the contractor, its agents, or employees.

The contract lease rate for the first option year was $666 per month. Contract Clause I.21, VEHICLE LEASE PAYMENTS, pertinently provided that:

(e) Rent stated in monthly terms shall be prorated on the basis of 1/30th of the monthly rate for each day the vehicle is in the Government's possession.

The proration was thus $22.20 per day per vehicle at the time the contract expired. While there are no contract provisions specifically calling for payment of rent to a contractor for the late return of vehicles after the expiration of the contract, the Government agrees that appellant is entitled to such payment at the above rate. Further, in a memorandum addressed to the chief of the Transportation Division dated 25 March 1992, after appellant's claim was filed, Mr. Tom Benero, the contract administrator, acknowledged that all vehicles were to be returned to appellant by 30 September 1991 (R4, tab 90).

Appellant contends that, following the invasion of Panama on 20 December 1989, the army began using the vehicles for high speed chases on poor roads. The Government disputes this contention, and we are unable to find that the vehicles were used in such a manner. The appellant also contends that the amount of time the vehicles were utilized varied from what it was led to believe when it bid on the contract. We find no evidence that the Government exceeded the 2000 miles a month per vehicle minimum established by the contract. However, memoranda authored by the chief of the motor pool and the director of the U.S. Army Garrison in Panama during the contract and distributed within the command complained specifically about "abuses of vehicles" by MPs, which are characterized as "normal," and generally about the excessive number of accidents involving non-tactical leased vehicles in the command and the resulting "needless drain in money and resources" (R4, tabs 46, 43).

Fifty-nine of the sixty cars leased were involved in one or more accidents during the two year contract period (R4, tab 101, pp. 48, 49).

Shortly after the contract expired, Mr. Charles Pui, who held the title of Chief of Quality Inspection and who was the authorized representative of the Chief of Transportation Motor Pool, and three other Government inspectors inspected the vehicles and prepared an Equipment Inspection and Maintenance Worksheet (hereinafter DA Form 2404, or inspection report) for each vehicle, which listed all deficiencies, including those classifiable as fair wear and tear, in a column on the form headed "deficiencies and shortcomings." Mr. Pui had extensive experience as a vehicle inspector and familiarity with lease contracts (R4, tab 99).

From 9 through 11 October 1991, following the Government inspection, Mr. Pui and three representatives of appellant, including its president, Mr. Blaine Clark, on-site manager, Mr. Mike Chadwick and appraiser, Mr. Bobby Hatton, jointly inspected the vehicles. During this inspection, the DA Form 2404s previously prepared by Mr. Pui and the other Government inspectors were reviewed and repair cost figures added. On some reports additional deficiencies were listed. Appellant's president signed off on the reports indicating that the appellant was essentially in agreement with the inspection results. The reports were then considered

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the joint inspection reports of the parties. Some of the deficiency items on the joint reports listed prices. Other items were left unpriced. (R4, Tab 110)

Most of the DA Forms 2404 indicated that the cars needed repainting. When damage was repaired by the Government during contract performance, the repainting of the repaired portions often failed to match the rest of the vehicle, and repair shops frequently oversprayed the new paint onto unpainted portions of the vehicle (R4, tabs 104, 105).

Mr. Pui then prepared an estimate to repair 52 of the vehicles, at a total cost of $99,111.43 and appellant accepted the Government estimate. Generally, the repair costs for vehicles listed on the estimate were less than the total prices on the individual joint inspection reports (R4, tabs 96, 110).

Six other vehicles were jointly inspected, but, unlike the other 52 vehicles, none of the "deficiency" items, including obvious fair wear and tear items (eg. "replace wiper blades," "replace 3 tires," "align headlamps," "clean up carpet," "clean up seats") were priced on the joint inspection reports for these vehicles. These vehicles were not included in Mr. Pui's estimate. After the vehicles were returned to the mainland, appellant's estimator, Bob Allen Chevrolet, estimated the cost of repair of all of the items appearing on the deficiency reports, including fair wear and tear items (R4, tab 96).

These reports were submitted to support appellant's claim of $17,337.38 for repair of these six vehicles. Appellant has failed to meet its burden of establishing a right to recovery in this amount. We have reviewed Mr. Pui's revised reports relating to these vehicles (discussed, *infra*), and conclude that, except for the elimination of repainting, they establish the extent of required repairs in excess of fair wear and tear. By taking Mr. Pui's repair costs, and adding on the cost of repainting, we find that appellant is due recovery of $13,982.12 for repairs to these six vehicles.*

On 24 January 1992 appellant filed a certified claim with the contracting officer, which included the amount of $117,448 for damage in excess of fair wear and tear for 58 vehicles. This amount consisted of Mr. Pui's and Mr. Allen's estimates.

Following receipt of the claim, the acting chief of transportation for the U.S. Army in Panama directed Mr. Pui to review the Form DA 2404's for the 58 vehicles to differentiate the fair wear and tear items from those that exceeded fair wear and tear. The review was conducted several months after the vehicles were returned to the mainland. By this time the vehicles had been disposed of by appellant.

Based upon Mr. Pui's review, the contracting officer in a final decision dated 13 April 1992, determined that the appropriate recovery for damage in excess of fair wear and tear should be $72,212.02. Over $35,000 of the difference between the claim and the amount awarded resulted from Mr. Pui's removal of repainting from the joint inspection reports. This was the first time, in Mr. Pui's experience, that the joint inspection reports on leased vehicles were later revised (R4, tab 99, p. 103).

Appellant also claimed recovery of rent for 619 days of delay in return of these vehicles. Fifty eight of the vehicles were delivered to appellant from 1 October 1991 through 14 November 1991. On appeal, appellant has adjusted its claim for untimely delivery with respect to these vehicles to 532 days total. Also on appeal, the Government concedes 516 of these days. The Government avers that the delay period should be computed from 2 October, while appellant counts 1 October as the first compensable day of delivery delay. The differing start dates account for the difference between the totals.

The third element of the claim was for $7,025 for one vehicle, identified as no. 8078, which was not returned to appellant by 15 November 1991 and was not included in the joint inspection of the other vehicles held in Panama. The vehicle was withheld because it was being repaired. Appellant has established the amount claimed as the fair market value of the vehicle.

The record contains conflicting statements in sworn affidavits from Mr. Chadwick, appellant's on-site administrator, and Mr. Tom Benero, the Government's contract administrator. Mr. Chadwick swears that on or about 1 November 1991, Mr. Benero told him the Government would purchase any vehicles not returned by 15 November 1991. Mr. Benero swears that he made no such statement. In the absence of

*The two remaining vehicles of the 60 leased under the contract were one used by the commander, which was undamaged and not the subject of the claim, and another, vehicle 8078, which is the subject of a seperate claim, discussed *infra*.

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corroborating evidence, we cannot find that such a committment was made.

The contracting officer's final decision determined that recovery was limited to rental value from 1 October 1991 to the time the vehicle was actually shipped on 3 February 1992, or for 126 days, for a total of $2,797.20 (at the daily rate of $22.20). Since the vehicle was not included in the return shipment to the mainland of the other vehicles in mid November 1991, the Government agreed to ship the vehicle at its own expense. On appeal the Government established that the vehicle was actually available for pickup at a military installation in Panama on 12 November 1991, and that appellant's on-site representative was so advised on that date by Mr. Emilio R. Cooper, chief of the transportation motor pool (R4, tab 77, 102, 107).

On 16 June 1992 appellant submitted a second certified claim regarding this vehicle, increasing the amount claimed to $10,287.40. Attached was an estimate for repairs showing repair costs of $9,533.08. Appellant has produced the estimate for the record, and we have been given no reason to doubt its validity (R4, tab 96). We find that the vehicle could not reasonably be considered salable or usable without extensive repairs. Since the cost of repair exceeded the fair market value, appellant now claimed $6,025 for the vehicle (fair market value minus $1,000 salvage offered by the estimator). In addition, appellant claimed $4,262.40 in rental fees for a 192 day delay in delivery. Appellant measured the delay period from 1 October through 9 April 1992, the date it received shipment of the vehicle. The Government denied this revised claim by affirming its earlier decision. The resulting appeal was docketed as ASBCA No. 45222.

DECISION

Repair costs for deficiencies exceeding fair wear and tear

We find untenable the Government's contention that Mr. Pui's original estimate with respect to 52 vehicles made during the joint inspection and accepted by appellant included fair wear and tear. While the Form DA 2404s listed all deficiencies, many were not priced on the joint inspection reports, indicating that a distinction was made between what was recoverable and what was not. Moreover, there was no reason for Mr. Pui, an experienced estimator, to include in his cost estimate items that were not recoverable. We conclude that the Government was bound by what it obviously agreed to as compensable repair costs during the joint inspection and the resulting estimate. The Government's attempt to change its position as to what was compensable through a review of the inspection reports made several months after the joint inspection, when the vehicles were no longer present, is unconvincing. We hold that appellant is entitled to recover the amount established in the Government estimate for the 52 vehicles, $99,911.43.

We have found that appellant has failed to establish entitlement to the full amount claimed for six vehicles not included in Mr. Pui's estimate, and that the amount of recovery due appellant for these vehicles is $13,982.12.

The total recovery due appellant for 58 vehicles is $113,893.55.

Rental Cost for Delay in Return of Vehicles

The dispute with respect to this claim is whether, in light of the 30 September 1991 contract expiration date, rent to appellant for delays should begin on 1 October or, as the Government contends, 2 October 1991. The Government's position is inconsistent with both the statement of the contract administrator in an internal memorandum that all vehicles were to be returned by 30 September 1991 and with the calculation of the 126 day delay in return of vehicle 8078 by the contracting officer in the final decision, which delay period included 1 October. The Government has offered no sound reason or legal support for eliminating the first day of delay from the calculation. Accordingly, appellant is entitled to recover for 532 days of delay at the agreed upon daily rate of $22.20, or $11,810.40 for this claim.

Vehicle 8078

The dispute relating to the proper calculation of the delay in return of the vehicle is not material to our determination of recovery since the evidence shows that the vehicle was not salable or usable without repairs exceeding its fair market value. Accordingly, appellant's claim for rent for delivery delay is denied. We conclude that in these circumstances the proper recovery is limited to fair market value, minus salvage value, or $6,025.

Summary

The appeals are sustained to the extent that appellant is entitled to the following recovery; plus interest pursuant to 41 U.S.C. § 611:

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Claim 1	$113,893.55	Total	$131,728.95
Claim 2	11,810.40		
Claim 3	6,025.00		

[¶ 26,582] **KAL M.E.I. Manufacturing & Trade Ltd.**

ASBCA Nos. 44367, 45531, 45532, November 30, 1993. Contract No. DLA700-87-C-1480.

Risk Allocation—Risk of Loss—Delivery Failure.—The government was entitled to recover the full purchase price it paid for cover assemblies, even though they were determined to have only scrap value after the covers were accepted, paid for, and lost in transit, because under the Responsibility for Supplies clause the contractor bore the risk of loss until the assemblies reached their destination. The government complied with the Uniform Commercial Code by giving the contractor reasonable notice that the lost shipment had not been received. Under the UCC, after giving reasonable notice, a buyer is entitled to recover the purchase price. The board would not accept the contractor's argument that the Termination for Convenience clause was dispositive. The appeals before the board did not relate to the contractor's termination for convenience settlement proposal.

For the appellant: Shiboleth, Yisraeli, Roberts, Yerushalmi & Zisman, Tel Aviv, Israel, by Asher Goshen. For the government: Stephanie Zimmt-Mack, Assistant Counsel, Defense Logistics Agency, Europe (DLA).

Before YOUNGER, LANE, LUSSIER, RUBERRY, and SPECTOR, Administrative Judges. Separate opinion concurring in part and dissenting in part by Administrative Judge LANE.

YOUNGER, Administrative Judge: In these consolidated appeals under a supply contract, the issues relate to the measure of damages for items shipped by the contractor but lost in transit. The contract provided that completed items would be accepted at origin, shipped f.o.b. destination, and could be paid for upon proof of acceptance and of delivery to a common carrier. After the shipment in dispute was accepted, paid for and lost in transit, it was determined to have only scrap value. The parties join issue over whether respondent is entitled to this amount or to the full purchase price that it paid. The parties have elected to submit the appeals under Rule 11. Both entitlement and quantum are before us. We dismiss one appeal and deny the other two.

FINDINGS OF FACT

A. *The Contract*

1. On 6 January 1987, respondent awarded appellant, located in Israel, contract no. DLA700-87-C-1480 for the supply of 1,655 cover assemblies, which amount was thereafter increased by the exercise of an option. The contract contained various standard clauses, including: "Payments (APR 1984);" "Responsibility for Supplies (APR 1984);" "F.O.B. Destination (APR 1984);" "F.O.B. Destination—Evidence of Shipment (APR 1984);" and "Termination for Convenience of the Government (Fixed-Price) (APR 1984);" all in the form prescribed in FAR 52.232-1, 52.246-16, 52.247-34, 52.247-48, and 52.249-2, respectively. Aside from the standard FAR clauses, the contract contained other clauses, including clause E03, "Acceptance at Origin (MAR 1972)-DCSC," which required compliance with the "F.O.B. Destination" clause "in order that payment may be made prior to receipt of the supplies at destination."

2. It is uncontested that the contract provided for inspection and acceptance of the cover assemblies at origin in Israel. It further provided for shipment f.o.b. destination to various joints in the United States, with title passing to respondent upon acceptance and appellant bearing the risk of loss or damage until delivery of the assemblies at destination. It is also uncontested that appellant was entitled to invoice and be paid for assemblies accepted at origin, before they were received at destination, provided the invoice was supported by a copy of the signed commercial bill of lading indicating the common carrier's receipt of the supplies for transportation to the required destination.

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B. *Contract Performance*

1. *The Lost Shipment*

3. The shipment in issue consisted of 335 cover assemblies destined for Mechanicsburg, PA. On 31 May 1988, respondent's quality assurance representative executed the form DD 250 for these 335 assemblies, indicating inspection and acceptance at origin. That same day, appellant sent an invoice to the Army payment office in Germany for the $42,605.30 contract price for the 335 assemblies, with the form DD 250 enclosed. Appellant did not provide the required evidence of shipment or any evidence of receipt at destination. On or about 5 July 1988, the Army payment office paid appellant the amount of the invoice.

4. Appellant shipped the 335 assemblies from its facility on 13 June 1988 by common carrier, with appropriate arrangements for transportation to the destination in Mechanicsburg, PA specified in the contract. We find that appellant shipped the assemblies in accordance with general practice on such f.o.b. destination contracts. In the words of respondent's transportation officer, such a contractor "generally employs two or three agents to ensure delivery: a shipping agent in the country of origin, the shipping line, and a shipping agent in the United States."

5. The shipment reached the Port of New York by vessel, was devanned approximately 10 July 1988, and cannot be accounted for after that. On this record, we find that respondent never received the shipment at Mechanicsburg, PA, or anywhere else. We further find that the shipment was lost in transit and that neither party was guilty of fault or negligence contributing to the loss itself.

2 *Notice of Loss to Appellant*

6. We find that respondent notified appellant within a reasonable time after discovering the loss. Accepting the affidavit of the administrative contracting officer, we find that "KAL had been notified several times that the Government's records did not reflect receipt of all deliveries KAL had notified us it had made." We find that respondent first notified appellant by telex dated 13 October 1988 from the procuring contracting officer to the administrative contracting officer that recited what shipments under the contract were then known to have been received. This telex did not mention that any shipment had been received at Mechanicsburg, PA, stating only that "THREE SHIPMENTS HAVE BEEN RECEIVED FROM THE CONTRACTOR AS OF THIS DATE: DEFENSE DEPOT TRACY [California] RECEIVED TWO SHIPMENTS TOTALLING 310 EACH AND DEFENSE DEPOT MEMPHIS [Tennessee] RECEIVED ONE SHIPMENT OF 445 EACH." The administrative contracting officer had this telex furnished to appellant.

7. Thereafter, on several occasions between November 1988 and April 1989, respondent sought information from appellant regarding the whereabouts of the Mechanicsburg, PA shipment that had never arrived at destination. The record includes

- a 16 November 1988 letter from the procuring contracting officer to appellant's project manager asking for "[c]opies of DD250s indicating Depot receipt" for the lost shipment, as well as another shipment;
- a 2 February 1989 letter from the procuring contracting officer to appellant's president, confirming a 24 January meeting with him, listing quantities received which appellant had to know did not include the Mechanicsburg shipment, and asking for proof of delivery of any other quantities shipped;
- appellant's responses dated 22 November 1988 and 21 February 1989 to these communications furnishing evidence of shipment to Mechanicsburg but no evidence of delivery to Mechanicsburg;
- credible hearsay evidence that as late as the end of April 1989 appellant itself was making efforts to trace the Mechanicsburg shipment.

Given all of the foregoing evidence, we find not credible assertions by appellant's general manager that appellant "understood that [the procuring contracting officer] wished to see the DD250s in order to compare [appellant's] records of what it had shipped with the Government's records of what it had received in order to identify the source of any discrepancy;" and that when appellant received no further inquiries about the shipments, it "understood that the DD250s had enabled [the procuring contracting officer] to account for all the shipments."

8. In November 1989 appellant submitted a claim to its marine insurer for the price of the lost shipment, but the insurer refused to pay, primarily because the claim was more than one year after the anticipated arrival date of the shipment. It appears that appellant is pursuing a civil action in the Israeli courts against its marine insurer, as well as its shipping agent in Israel.

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3. *Termination for Convenience*

9. In the fall of 1988 respondent discovered that the cover assemblies were useless because the Government-furnished drawings had called for alignment of the holes in each assembly in such a way that it did not match the placement of the bolts in the mating part. Respondent concluded that reworking was not feasible. In September 1988 respondent issued a "Stop-Shipment Order." In October 1988 respondent issued a Stop Work order. In April 1989 respondent terminated the contract for convenience.

4. *Disposal of Delivered and Unshipped Assemblies as Scrap*

10. It is undisputed that the cover assemblies that were delivered to respondent, as well as those in appellant's possession that had not been shipped, were transferred in or about the fall of 1989 to the Defense Reutilization and Marketing Service for disposal. It appears that they were thereafter sold as scrap metal, but there is no evidence of what price respondent may have received.

11. We find that the scrap value of the lost shipment was $400, based upon the parties' estimates. We further find that the assemblies were worthless to respondent except as scrap, based upon respondent's disposition and the absence of any evidence that they had any other value to anyone else.

C. *Termination Settlement Proposal; Unilateral Determination*

12. On 24 May 1989 appellant submitted a final termination settlement proposal seeking $350,080.89 as "Net Payment Requested."

13. In October 1989, the parties entered into negotiations. At that time the administrative contracting officer told appellant that the lost shipment still had not been received and, for the first time, advised that if the shipment was not located the contract price for those items, which had already been paid, would be deducted from payment of the termination settlement amount. Appellant objected, asserting that it had not been told the shipment was missing.

14. By letter dated 13 December 1989 the administrative contracting officer told appellant that the 335 cover assemblies in the lost shipment had still not been received, and that "the Government will deduct the total amount of $42,605.30 (representing the total value of the missing units) from the final settlement costs under subject contract."

15. We find that the parties could not agree on appellant's proposed termination settlement amount. Accordingly, on 20 December 1989, the contracting officer issued a decision (not one giving rise to any of the three present appeals) determining that appellant was due $209,105.27, thereby effectively disallowing $140,975.62 of the $350,080.89 that appellant had requested in its termination settlement proposal. (*See* finding 12) It is undisputed that the amount allowed included compensation at the full contract unit price for all 497 completed but not yet accepted cover assemblies in appellant's possession for which payment had not yet been made. Appellant had previously been paid the full contract unit price for the 1130 cover assemblies shipped and for 310 completed and accepted cover assemblies not shipped because of the Stop-Shipment Order. The 20 December 1989 decision said nothing about a setoff against the termination settlement amount or any other means of recovering from appellant for the price of the lost shipment.

D. *Government Claim for Lost Shipment*

16. On 26 December 1989, the administrative contracting officer issued unilateral contract modification A00002, implementing the 20 December 1989 decision. (*See* finding 15) The modification provided for payment of the $209,105.27 that previously had been determined to be due appellant as a termination settlement. The modification also deducted $42,605.30, representing the contract price for the 335 items in the lost shipment. It stated:

> 1. The purpose of this modification is to release payment in accordance with FAR 52.249-2 entitled Termination for Convenience and in accordance with Contracting Officer's Final Decision dated 20 December 1989, attached hereto and made part hereof.
>
> 2. From the total amount of $209,105.27 determined by the Contracting Officer to be a fair and reasonable settlement cost, the amount of $42,605.30 shall be deducted for the missing 175 ea units under clin 0001 and 160 ea under clin 0004 (DD 250, KAL 0003) and paid for by the Government.

The modification did not characterize the setoff as a Government claim, was not identified as a contracting officer's decision, and did not advise appellant of its appeal rights. The contracting officer also had not issued any separate decision asserting a Government claim for the lost shipment.

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E. *Appeal of Termination Settlement; New Claims; Additional Appeals*

17. By letter dated 12 March 1990, appellant timely appealed from the 20 December 1989 decision unilaterally determining the termination settlement amount. (*See* finding 15) We docketed that appeal as ASBCA No. 40596. We thereafter dismissed ASBCA No. 40596 for lack of proper certification.

18. By letter dated 13 January 1992, appellant submitted a certified claim to the contracting officer dated 10 January 1992 for $176,650.69. This claim was said to represent "the unpaid balance of the amount to which Kal believes it is entitled in connection with termination of the above-captioned contract for the convenience of the Government." This claim did not include any amounts withheld for the lost shipment. The contracting officer has not issued a decision on the claim. The parties have advised the Board that they are in settlement discussions on the claim and do not wish to bring it before the Board at this time through either a contracting officer's decision or an appeal from a deemed denial.

19. With its 13 January 1992 letter, appellant included a second, uncertified, claim dated 10 January 1992 for the $42,605.30 withheld pursuant to modification A00002 as the price of the lost shipment. (*See* finding 16) Appellant states that it separated this claim from its $176,650.69 claim (*see* finding 18) to obtain Rule 12.3 disposition from the Board. In any event, the contracting officer did not issue a decision on the claim. By letter dated 6 April 1992, appellant filed a notice of appeal invoking our deemed denial jurisdiction under 41 U.S.C. § 605(c)(5). We docketed that appeal as ASBCA No. 44367. Appellant initially elected Rule 12.3 disposition, but subsequently withdrew its election.

20. By letter dated 27 April 1992, appellant responded to an 8 April 1992 letter from the administrative contracting officer suggesting that appellant's claim should be certified. With its letter appellant resubmitted to the contracting officer its claim for $42,605.30, including a request for a decision within 60 days, together with a certification and a reservation of its position that its claim as previously submitted without a certification was proper.

21. On 11 January 1993, appellant filed another notice of appeal. By this notice, appellant challenged modification A00002 (*see* finding 16), which it treated as a contracting officer's decision asserting a Government claim for an offset of $42,605.30. We docketed that appeal as ASBCA No. 45531.

22. The contracting officer did not issue a decision on appellant's 27 April 1992 resubmitted, certified claim for $42,605.30. (*See* finding 20) On 11 January 1993, appellant filed a notice of appeal, invoking our deemed denial jurisdiction under 41 U.S.C. § 605(c)(5), regarding that claim. We docketed that appeal as ASBCA No. 45532. Thereafter, we consolidated ASBCA No. 45532 with ASBCA Nos. 44367 (*see* finding 19) and 45531 (*see* finding 21).

DECISION

A. *Jurisdiction*

Respondent has moved to dismiss ASBCA No. 44367 on jurisdictional grounds. In its motion, respondent contends that we lack jurisdiction because the $42,605.30 lost shipment claim at issue in ASBCA No. 44367 (*see* finding 19) is inextricably linked to appellant's larger termination for convenience claim (*see* finding 18), and constitutes a single, unitary claim that must be certified under 41 U.S.C. § 605(c)(1). *See W.M. Schlosser Co. v. United States* [30 CCF ¶ 70,985], 705 F.2d 1336, 1337-39 (Fed. Cir. 1983).

Regardless of the merits of this argument, we dismiss ASBCA No. 44367 as moot on our own motion. We do so for two reasons. First, appellant has certified the claim before us in ASBCA No. 45532 (finding 22), thereby curing any certification problem that may have hovered over ASBCA No. 44367. Second, the merits of ASBCA No. 44367 are in any event before us in both ASBCA Nos. 45531 and 45532. Both of these latter appeals are mirror images of each other. Like ASBCA No. 44367, they relate to the $42,605.30 that respondent withheld under modification A00002 to recover the contract price of the lost shipment. (*See* findings 16, 19, 21, 22)

We plainly have jurisdiction over ASBCA No. 45531. Appellant there challenges respondent's setoff under modification A00002 of the $42,605.30 contract price of the lost shipment. (Finding 21) We have jurisdiction over this appeal for three reasons. First, respondent's withholding constituted "a final decision on a government claim" that was appealable. *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990); *Marlowe Heating & Air Conditioning*, ASBCA No. 39588, 90-2 BCA ¶ 22,753 at 114,214. Second, "certification is not required for government claims." *Placeway*

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Construction, supra, 920 F.2d at 906; *Triasco Corp.*, ASBCA No. 42465, 91-2 BCA ¶ 23,969 at 119,977. Third, while the modification was issued in December 1989 and not appealed until January 1993 (findings 16, 21), there is no timeliness issue. As we have found, the modification was not designated as a contracting officer's decision and contained no advice of rights. (Finding 16) Hence, it "did not start the running of the 90-day filing period [in 41 U.S.C. § 606,] so that we may take jurisdiction." *Marlowe Heating, supra*, 90-2 BCA at 114,214.

We also have jurisdiction over ASBCA No. 45532, which is the contractor's resubmitted, certified claim for the $42,605.30 withheld. (Finding 22) No contracting officer's decision having been rendered on the claim (*id.*), appellant properly invoked our deemed denial jurisdiction under 41 U.S.C. § 605(c)(5). *E.g., Do-Well Machine Shop, Inc. v. United States* [35 CCF ¶ 75,633], 870 F.2d 637, 640 (Fed. Cir. 1989). As indicated, appellant cured any certification defects that may have existed in its original claim with the submission of this claim.

Accordingly, ASBCA No. 44367 is dismissed as moot. Respondent's motion to dismiss ASBCA No. 44367 is denied as moot.

B. *Merits*

The parties join issue regarding the measure of appellant's risk of loss for the lost shipment. While it is undisputed that appellant bore the risk of loss, appellant contends that the Termination for Convenience clause (*see* finding 1) specifies the proper measure of its risk. That measure, appellant says, is the contract price of the lost shipment, less its agreed scrap value. Deduction of the scrap value here ($400) from the contract price (42,605.30) would yield a recovery for appellant of $42,205.30. (*See* findings 11, 14) In the alternative, appellant asserts that it should be absolved from all liability because respondent knew of the nonreceipt of the lost shipment and failed to notify appellant, thereby preventing appellant from making a timely claim under its marine insurance policy. (*But see* finding 8) For its part, respondent argues that the Termination for Convenience clause is inapplicable, and that appellant is liable for the full contract price for failure to fulfill its delivery obligation under the contract. In the alternative, respondent contends that appellant is entitled to the contract price, less the cost of production.

We conclude that, in the present posture of these appeals, the proper measure of the risk of loss is the price that respondent paid for the lost shipment. We reach this conclusion for four principal reasons.

First, appellant plainly bore the risk of loss until the assemblies reached their destination. The Responsibility for Supplies clause (*see* finding 1) provides, in pertinent part:

> Unless the contract specifically provides otherwise, risk of loss or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon—
>
> * * *
>
> Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

FAR 52.246-16. The contract did not provide "otherwise." That is, it contained no provisions that allocated risk of loss in any manner other than in the Responsibility for Supplies clause. In addition, transportation here was f.o.b. destination. (Finding 2) Accordingly, under the clause, the risk of loss remained with appellant until "delivery of the supplies to the Government at the destination specified in the contract," *i.e.*, Mechanicsburg, PA. For its part, the F.O.B. Destination clause (*see* finding 1) provided in part that "[t]he Contractor shall ... [b]e responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract." FAR 52.247-34.

Second, in applying the risk of loss provisions in the contract, we look to the Uniform Commercial Code. While the contract allocated the risk of loss, it did not specify the remedy in the event of a loss. *But cf. R&L Diesel Service, Inc.*, ASBCA No. 22542, 78-1 BCA ¶ 13,177 at 64,443 (holding that under Fast Payment Procedure clause, contractor assumed "risk of loss for supplies ... not received at destination" and hence was "not entitled to retain the payment received" where goods did not arrive). It is familiar that "[t]he Uniform Commercial Code is applicable to the field of public contracts." *John C. Kohler Co. v. United States* [20 CCF ¶ 83,156], 498 F.2d 1360, 1367 n. 6 (Ct. Cl. 1974)

We looked to the Code in resolving a similar dispute in *Electro Optics, Inc.*, ASBCA No. 22017, 78-1 BCA ¶ 12,996, *aff'd on reconsideration*, 78-2 BCA ¶ 13,251. There, the Government accepted, and paid for,

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items that were subsequently lost in transit. The contract contained the Title and Risk of Loss clause prescribed in ASPR 7-103.6, which was the forerunner of the Responsibility for Supplies clause. We held that, before the contractor became obligated to replace lost items, or to "return the payment therefor," the Government had to demonstrate compliance with U.C.C. § 2-608 by "notify[ing] appellant of the non-receipt of those items within a reasonable time." *Electro Optics, supra*, 78-1 BCA at 63,392. Here, by contrast, we have already found that respondent gave appellant reasonable notice that it had not received the lost shipment. (Finding 6; *see also* finding 7) We also cannot conclude that appellant suffered prejudice, as the contractor did in *Electro Optics*. (*See* findings 7, 8)

Having given reasonable notice, respondent is entitled to recover the purchase price. We so recognized in *Electro Optics, supra*. U.C.C. § 2-711 recognizes such a remedy as well. In cataloging a buyer's remedies for breach, U.C.C. § 2-711 provides that "[w]here the seller fails to make delivery," then, among other remedies, "the buyer may cancel and whether or nor he has done so may *in addition to recovering so much of the price as has been paid*," recover damages. (Emphasis added) *See* 3 A. Squillante & J. Fonseca, Williston on Sales § 25-17 (4th ed. 1974) (interpreting U.C.C. § 2-711 to make buyer "unequivocally entitled to so much of the purchase price as he has paid over to the seller" where, *inter alia*, "the seller has failed to make the required delivery"). Recovery of the purchase price is distinct from recovery of damages. *E.g., Frontier Mobile Home Sales, Inc. v. Trigleth*, 505 S.W.2d 516, 518 (Ark. 1974) (holding, in breach of warranty action, that lower court properly allowed recovery of purchase price under U.C.C. § 2-711, rather than damages for breach); *see also* J. White & R. Summers, Uniform Commercial Code § 6-7, at 241 n. 130 (2nd ed. 1980) (noting that U.C.C. § 2-711 "allows a buyer to recover 'so much of the price as has been paid' whether or not he recovers other damages.").

Third, we cannot accept appellant's argument that the Termination for Convenience clause is dispositive. We do not have a termination for convenience claim before us. The three appeals that are before us do not relate to appellant's termination for convenience settlement proposal. Rather, they relate to appellant's certified and uncertified claims regarding modification A00002 (ASBCA Nos. 44367 and 45532) and appellant's challenge to the Government claim asserted in that modification (ASBCA No. 45531). (Findings 19, 21, 22) The only appeal that related to appellant's termination settlement proposal was ASBCA No. 40596, which we dismissed because the proposal had not been certified in accordance with the Contract Disputes Act, 41 U.S.C. § 605(c)(1). *KAL M.E.I. Manufacturing & Trade, Ltd.*, ASBCA No. 40596, 92-1 BCA ¶ 24,713. (*See also* finding 17) Appellant's pending termination for convenience claim has not been appealed. (Finding 18)

Fourth, unlike the dissent, we cannot construe the contract to equate delivery to the common carrier with delivery to respondent. Assuming that the payments under the contract may be characterized as advance payments, we cannot presume that respondent included clause E03 (*see* finding 1) in contravention of 10 U.S.C. § 2307(c), which authorizes advance payments. *See, e.g., Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982) (public official presumed to act "in accordance with the law and governing regulations"). Given the exclusions in FAR 32.404, we do not regard it as conclusive that the contract evidently did not include the Advance Payments clause in the form prescribed in FAR 52.232-12. In addition, we cannot harmonize the dissent's equation with the FAR. FAR 47.001 defines "f.o.b. destination" to mean that "the seller or consignor delivers the goods on seller's or consignor's conveyance at destination." We see no basis for treating the "seller's or consignor's conveyance" as the buyer's—respondent's—agent. Particularly is this so in view of the record before us, which speaks of a practice in which contractors "employ two or three agents to ensure delivery." (Finding 4)

Accordingly, respondent is entitled to recover the price that it paid for the lost shipment.

CONCLUSION

The appeal in ASBCA No. 44367 is dismissed as moot. Respondent's motion to dismiss ASBCA No. 44367 is denied as moot. The appeals in ASBCA Nos. 45531 and 45532 are denied.

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OPINION BY ADMINISTRATIVE JUDGE LANE CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority's holding that we have jurisdiction.[1] I also agree that the Government gave appellant timely notice of nonreceipt of the lost shipment.[2] Otherwise I dissent from the majority's decision on the merits.

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[1] [Introduction to Dissenting Opinion] I would not, however, dismiss ASBCA No. 44367 as moot, because the claim which was appealed under that docket number establishes the starting date for interest on the recovery I would give appellant. See section IV of Discussion in this opinion.

I also observe that the jurisdictional nature of certification has been abolished by statute for defectively certified claims appealed on or after 29 October 1992 (though a failure to certify may not qualify as a "defective" certification—see note 16 *infra*). Sec. 907(a)(1)-(2) of Federal Courts Administration Act of 1992, Pub. L. No. 102-572, enacted 29 October 1992, adding a new subsection 6(c)(6) to the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(6). That amendment does not apply to ASBCA No. 44367, the original appeal here, which was filed on 6 April 1992.

[2] [Introduction to Dissenting Opinion] As to notice, I would also observe—though it is not necessary to the decision in this case since notice was timely given—that at least with respect to an overseas shipment, in light of the apparent frequency of losses or misdeliveries in transit, it would seem prudent for a contractor, on its own initiative and even absent notice of nonreceipt, to follow up to assure actual delivery of shipments to destination and to start a timely trace of shipments that have not arrived so that a timely insurance claim can be filed if necessary.

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SUMMARY OF THE CASE AND BASES FOR DISSENT

These consolidated appeals involve interpretation of the risk of loss provisions of appellant's supply contract and of the Uniform Commercial Code—specifically, whether appellant's admitted risk of loss of items which were accepted at origin, shipped f.o.b. destination by common carrier, paid for, and then lost in transit and so not physically delivered to the Government, is to be measured by the contract price for the items ($42,605.30) or by their value to the Government (which in this case was their $400.00 scrap value because an error in the Government-furnished manufacturing drawings made the items useless.) No termination for default for nondelivery of the lost shipment was issued, and the Government never purported to revoke acceptance of the lost shipment (and in my view neither of those remedies was available to the Government in any event).

The contract expressly provided for payment for accepted items upon delivery to a common carrier for shipment f.o.b. destination. Therefore the Government can recover money back on account of a loss in transit only to the extent appellant is liable under the contract (as amplified by consistent provisions of the Uniform Commercial Code) or by way of breach damages.

The Responsibility for Supplies clause and F.O.B. Destination clause expressly make the contractor responsible for the loss (hence there is no issue as to whether a common carrier transporting end items is a "subcontractor" whose fault is imputed to the contractor[3]), but do not specify how its risk of loss is to be measured. The Termination for Convenience clause (pertinent because the contract was later terminated for convenience) prescribes "fair value" as the measure of the credit due the Government, against the price otherwise payable, for "property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government." The Uniform Commercial Code has two different provisions covering a seller's breach, including nondelivery: one (§ 2-714) applicable to accepted goods and providing for damages "determined in any manner which is reasonable"; the other (§ 2-711) providing for recovery of the price paid, but not, in my view, applicable to accepted goods (absent revocation of acceptance).

I have concluded that appellant's responsibility for the lost items should be measured by the value of the items, not the contract price as the majority holds. For reasons explained in this opinion, I would hold:

(1) Applicability of the "fair value" measure in paragraph (g) of the Termination for Convenience clause is an issue ripe for consideration now, even without a termination for convenience claim before us, because the issue is "fair value" as the proper measure of the Government's claim and of appellant's defense to that claim, and in a way involves an affirmative contractor termination claim.

(The majority holds erroneously that we may not consider this question unless and until appellant brings a termination claim before us.)

(2) The "fair value" measure in the Termination for Convenience clause is applicable to the lost shipment here even though it was accepted, shipped, and lost before the termination. "Fair value" is the express and proper measure of the Government's claim and appellant's liability, overriding any UCC provision to the contrary.

(The majority does not reach this question for the reason stated in (1) above.)

(3) If the Termination for Convenience clause does not apply and the UCC therefore does apply (since there is no express measure of appellant's risk of loss in the Responsibil-

[3] [Summary of the Case and Bases for Dissent, in Dissenting Opinion] *See Hogan Mechanical, Inc.*, ASBCA No. 21612, 78-1 BCA ¶ 13,164, at 64,332-35 (& authorities cited).

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ity for Supplies or F.O.B. Destination clause), UCC § 2-714 (prescribing damages for breach in regard to accepted goods), not § 2-711 (allowing recovery of the price in case of nondelivery), is the applicable provision, because (a) § 2-711 does not apply to nondelivery of *accepted* goods, and (b) even if it did, appellant's delivery of the accepted items to the common carrier (transportation to destination prepaid) had to constitute legal "delivery" to the Government because the contract provided for payment upon such delivery to the common carrier and absent "delivery" to the Government such payment would have violated the statutory prohibition against advance payments.

(The majority refuses to address the complementary nature of UCC §§ 2-711 and 2-714 and the Official Comments thereto which plainly make § 2-711 inapplicable to accepted goods. Furthermore, the majority's finding of nondelivery under UCC § 2-711 disregards over one hundred years of consistent administrative rulings applying the 170-year-old advance payment prohibition; is contrary to the legal position, adopted at the secretarial level of the Defense Department in 1965, that delivery to the carrier constitutes legal "delivery" to the Government; and in one fell swoop renders illegal twenty-eight years of defense contracts entered into in accordance with that legal position under ASPR, DAR, and FAR provisions authorizing payment upon delivery to a carrier under an f.o.b. destination contract—both Fast Payment Procedure small purchases and larger dollar contracts.)

(4) The proper measure of damages under UCC § 2-714 is the value of the lost items, *i.e.*, the $400.00 scrap value in this case.

(The majority does not reach this question because it considers § 2-711 applicable instead.)

I therefore dissent from the majority's conclusion that appellant's risk of loss is to be measured by the contract price of the lost shipment. Appellant should be found liable for the value (*i.e.*, the $400 scrap value) of the lost shipment, and entitled to recover the $42,605.30 contract price the Government paid for the items and then recouped by offset, less the $400.00.

I would also hold that the Contract Disputes Act interest on appellant's recovery starts on the date the contracting officer received appellant's original uncertified lost shipment claim, not the later date of receipt of the resubmitted certified claim, because appellant's claim was an independent claim under $50,000 and was not essentially part of and improperly split off from a larger uncertified unitary termination claim which was over $50,000 and therefore should have been certified. (The majority does not address this interest issue because it denies the appeal.)

FINDINGS OF FACT

I concur in the majority's findings of fact, but I would make the following additional findings.

I. *The Contract*

1. The following contract provisions, in addition to several of those included in the majority's finding No. 1, established appellant's uncontested right to invoice (with proper supporting documentation) and be paid for supplies accepted at origin and shipped by common carrier, before they were received at destination (see majority finding No. 2): (i) Invoices (OCT 1982) (DOD FAR Supplement 52.232-7000); and (ii) Material Inspection and Receiving Report (DEC 1969) (DOD FAR Supplement 52.246-7000), and DOD FAR Supplement Appendix I incorporated therein (particularly paragraph I-306).

2. I include herewith in a footnote the full text of the following clauses for ready reference because of their importance to this case: (i) Payments (APR 1984); (ii) F.O.B. Destination—Evidence of Shipment (APR 1984); (iii) Responsibility for Supplies (APR 1984); and (iv) F.O.B. Destination (APR 1984).[4]

[4] [Section I of Findings of Fact, Finding 2, in Dissenting Opinion] (a) The standard clause Payments (APR 1984) in the contract stated:

PAYMENTS (APR 1984)

The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if—

(a) The amount due on the deliveries warrants it; or

(b) The Contractor requests it and the amount due on the deliveries is at least $1,000 or 50 percent of the total contract price.
(R4, tab 1, clause 101(I)(a), FAR 52.232-1)

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II. *Contract Performance*

A. *Invoicing Generally*

3. There was a technical noncompliance by appellant with the invoicing requirements, because appellant's invoices were apparently not accompanied by signed commercial bills of lading, and the Government paid the invoices anyway. However, appellant did in

(Footnote Continued)

(b) The contract included the standard clause F.O.B. Destination—Evidence of Shipment (APR 1984), prescribed as applicable when, as in this case, the supplies are purchased f.o.b. destination and inspection and acceptance are performed at origin. It stated:

F.O.B. DESTINATION—EVIDENCE OF SHIPMENT (APR 1984)

If this contract is awarded on an f.o.b. destination basis and if transportation is accomplished by—

(a) Common carrier, the Contractor agrees to furnish in support of the Contractor's invoice, a copy of the signed commercial bill of lading indicating the carrier's receipt of the supplies covered by the invoice for transportation to the destination specified in the contract;

(b) Parcel post, the Contractor agrees to furnish a certificate of mailing with the Contractor's invoice; and

(c) Other than common carrier or parcel post, the Contractor agrees to attach to the Contractor's invoice a receipted copy of the appropriate delivery document showing receipt at the destination specified in the contract.
(R4, tab 1, clause F03(a), FAR 52.247-48)

(c) The standard clause Responsibility for Supplies (APR 1984) in the contract stated:

RESPONSIBILITY FOR SUPPLIES (APR 1984)

(a) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon—

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) above shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the Contractor until cure or acceptance. After cure or acceptance, paragraph (b) above shall apply.

(d) Under paragraph (b) above, the Contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.
(R4, tab 1, clause E08, FAR 52.246-16)

(d) The standard clause F.O.B. Destination (APR 1984) in the contract stated:

F.O.B. DESTINATION (APR 1984)

(a) The term "f.o.b. destination," as used in this clause, means—

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (including "piggyback") is used, supplies shall be delivered to truck tailgate at the unloading platform of the consignee. If the Contractor uses rail carrier or freight forwarder for less than carload shipments, the Contractor shall assure that the carrier will furnish tailgate delivery if transfer to truck is required to complete delivery to consignee.

(b) The Contractor shall—

(1)(i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule and designate the mode of delivering carrier; and

(6) Pay and bear all charges to the specified point of delivery.

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fact make its shipments by common carrier and did subsequently furnish the Government copies of bills of lading covering its shipments.

B. Termination Settlement Proposal; *Unilateral Determination*

4. The October 1989 termination settlement negotiations (see majority finding No. 13) was the first time the Government said anything about a deduction for the price of the lost shipment. Neither at that time nor at any other time before or since has the Government purported to revoke acceptance of the Mechanicsburg shipment on account of the nondelivery.

C. Appeal to Board re Termination Settlement; *New Claims; Additional Appeals*

5. Appellant's 10 January 1992 certified claim for $176,650.69 (see majority finding No. 18) was said to consist of "Financing Costs of $85,558.69, G&A Expenses of $74,342.00, Engineering Costs of $7,750.00 and Settlement Expenses of $9,000.00." (R4, tab 27) Appellant has observed that these costs represented not costs of incomplete work but rather "costs associated with delay," including "engineering costs incurred during said periods of delay in an attempt to identify the source of problems which had arisen and to find solutions to such problems" (13 Jan. 1993 ltr from App. to Board re Memorandum of Telephone Conference Call).

6. (a) The certification with appellant's 27 April 1992 claim resubmission (see majority finding No. 20) stated:

> I, Ze'ev Poran, General Manager of Kal M.E.I. Manufacturing & Trade Ltd., hereby certify as follows: (1) the foregoing claim is made in good faith; (2) the data supporting Kal's claim are accurate and complete to the best of Kal's knowledge and belief; and (3) the amount requested accurately reflects the amount for which Kal believes the Government is liable in connection with the lost shipment under Contract DLA700-87-C-1480.

(b) It is undisputed and I would find that appellant's general manager who certified the claim was a senior company official in charge at appellant's plant or location involved in this contract.

DISCUSSION

I. Fundamental Premise: Appellant's Right To *Be Paid Contract Price Upon Shipment*

The ultimate issue is whether the Government's claim and appellant's admitted liability for loss of items which were accepted at origin, shipped f.o.b. destination by common carrier, paid for, and then lost in transit and so not physically delivered to the Government, are to be measured by the contract price for the items or by their value (which in these unusual circumstances was their scrap value).

The starting premise in approaching this issue must be appellant's entitlement to be paid for the lost shipment in the first instance. It is undisputed by the Government, and I confirm upon analysis of the invoicing and payment provisions of the contract, and the majority apparently agrees, that because the lost shipment was accepted at origin and properly packed, marked, and put into the hands of a common carrier for shipment to the proper destination, all in accordance with the contract, appellant was entitled to be paid for the shipment before its receipt at destination.[5] This was not an illegal advance payment (a matter discussed further in III(B) below).

Thus the Government's payment of the contract price to appellant for the lost items after acceptance and shipment but before physical delivery to destination was not an erroneous payment and cannot be recovered on account of the loss except to the extent appellant is liable for such a loss under the contract or by way of breach damages.[6] In

(Footnote Continued)

(R4, tab 1, clause F03, FAR 52.247-34)

[5] [Section I of Discussion in Dissenting Opinion] Apparent technical noncompliance by appellant with the invoicing requirements, by failure to attach a signed commercial bill of lading to its invoice, was not material so as to render the Government's payment improper. The noncompliance was waived by the Government in paying appellant and was cured by subsequent submission of the bill of lading to the Government who never asserted this as a ground for recovering the payment in issue here.

[6] [Section I of Discussion in Dissenting Opinion] Examples of other post-performance liabilities, besides responsibility for loss or damage after acceptance but before physical delivery to destination under an f.o.b. destination contract, which survive the normal finality of acceptance and may allow the Government to recover all or part of the price paid, are liability under the Inspection clause for latent defects, fraud, or gross mistakes amounting to fraud, and liability for breach of warranty.

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determining what the contract provides and what breach damages may be recoverable, I agree with the majority that as a general proposition the express terms of the contract may be amplified by reference to the Uniform Commercial Code[7]—*but only* to the extent that the UCC does not conflict with express provisions of the contract.[8]

II. Express Contract Provision Overriding Any Recovery of Price Under UCC: "Fair Value" Risk of Loss Provision (Paragraph (g)) in Termination for Convenience Clause

A. Ripeness of "Fair Value" Provision (Paragraph (g)) of Termination Clause for Consideration in Present Case as Measure of and Defense to Government's Claim

The majority declines to address whether the "fair value" measure of contractor responsibility for lost items, set forth in paragraph (g) of the Termination for Convenience clause, applies here, because "[w]e do not have a termination for convenience claim before us."

That is a total nonsequitur. The ripeness of the issue of applicability of the "fair value" measure in the termination clause has nothing to do with whether there is a termination for convenience claim before us.

The present dispute was generated in the first instance by the contracting officer's assertion of a *Government claim* by his issuance of Modification A00002 withholding the price paid for the lost shipment from amounts otherwise determined due appellant. I agree with the majority (see section A, Jurisdiction, of majority decision) that ASBCA No. 45531 is an appeal from a Government claim. That appeal involves a Government claim in both form and substance. ASBCA No. 45532 is, as the majority says, a "mirror image" of ASBCA No. 45531; while in form it involves a certified claim by appellant for the money withheld, in substance it presents the same Government claim because in it the Government asserts appellant's liability on account of the lost shipment and a Government right to retain withheld funds otherwise concededly due appellant. ASBCA No. 44367 is identical to ASBCA No. 45532 except that appellant's claim was uncertified.

I find utterly without reason or merit the majority's notion that appellant cannot *defend* against a *Government claim* by arguing that the proper quantum measure of the *Government's claim* is set forth in the Termination for Convenience clause, but rather must amend its *own* termination for convenience claim and bring it before the Board in order to make such a defense.

These appeals do not involve a claim by appellant which is being or should be asserted under the Termination for Convenience clause. Appellant was originally paid for the lost shipment under the standard payment provisions of the contract before the termination occurred. To the extent appellant is asking for release of the withheld funds, it is seeking them under those same payment provisions. Nor was the Government's claim asserted under the termination clause; on the contrary, the Government asserts that the "fair value" provision of that clause does *not* apply, since it wants to recover the price, not the much lower "fair value." Appellant is asserting, and I agree, that the *Government's* claim is cognizable under the termination clause. That does not require a termination claim by *appellant.*

The majority's *refusal to consider* whether the "fair value" provision (paragraph (g)) of the Termination for Convenience clause applies unless and until appellant brings a termination for convenience claim before the Board is insupportable and contrary to the wishes of *both*

[7] [Section I of Discussion in Dissenting Opinion] In addition to the case cited by the majority, see *Northern Helex Co. v. United States* [17 CCF ¶81,069], 197 Ct. Cl. 118, 130, 455 F.2d 546, 553 (1972) ("This court has explicitly recognized the authority and relevance of the Uniform Commercial Code in the field of public contracts" (citing authorities)); *but cf. GAF Corp. v. United States* [37 CCR ¶76,091], 932 F.2d 947, 950 (Fed. Cir. 1991) (refusing to read UCC implied warranties of merchantability and fitness into a contract for Government sale of asbestos fiber, on the dubious basis that a warranty implied in law is the same as a contract implied in law which the Claims Court has no jurisdiction to enforce, without citing the foregoing authorities on applicability of the UCC—a result which should not control over the earlier established authorities and which in any event should not bar application of general remedy provisions of the UCC as distinguished from implied contract terms prescribed by the UCC).

[8] [Section I of Discussion in Dissenting Opinion] The UCC does not supersede express contract language (with some exceptions not pertinent here): section 1-102(3) of the UCC provides that "[t]he effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act." *Artisan Electronics Corp. v. United States* [20 CCF ¶83,180], 205 Ct. Cl. 126, 134, 499 F.2d 606, 611 (1974), held that express contract language regarding the right to terminate the entire contract for default for failure to deliver one installment overrode a contrary provision of the UCC.

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parties. The parties have advised the Board that they are involved in protracted negotiations over the larger termination for convenience claim and want these lost shipment appeals fully decided promptly and independently of that claim. They have agreed that, to the extent the risk of loss provision in the Termination for Convenience clause may apply, this lost shipment dispute has appropriately been bifurcated for appeal and decision separately from their unrelated termination quantum dispute (involving delay costs and settlement expenses). They have also agreed that there are no disputed issues of law or fact common to the lost shipment claim and the termination settlement claim. (See Memorandum of Telephone Conference Call held 11 January 1993, by Administrative Judge Lane, dated 13 January 1993.)

I see absolutely no reason why we should not proceed as the parties have agreed and decide here and now the applicability of the "fair value" provision of the Termination for Convenience clause as the proper measure of the Government's claim and appellant's liability.

There is one respect only in which I concur in leaving open the possibility of recovery by appellant with respect to the lost items by way of a termination claim—that is, with respect to appellant's fall-back argument that if it is not entitled to retain the price of the lost shipment as against the Government's setoff, it is at least entitled to its costs of production plus a reasonable profit under the termination clause. Given the majority's decision denying appellant the contract price, I think that approach has merit. If the lost items were undelivered as the majority holds, then the line items under which they were produced and shipped remained open and were necessarily terminated, and the costs of producing the lost items were costs allocable to terminated items. I still think we could appropriately address the entitlement portion of such an alternative argument in the present case on a bifurcated basis, because in substance it represents not a contractor claim but one more question as to the quantum of the Government's claim, *i.e.*, the extent to which the Government's setoff was proper. However, I do not quarrel with the apparent intent of the majority to leave that matter for an amended termination claim and later determination as part of the termination quantum dispute.

B. Text of "Fair Value" Provision (Paragraph (g)) of Termination Clause and Related Regulations

I now turn to the merits of the termination clause question: whether the express "fair value" measure of the contractor's responsibility for lost and therefore undeliverable and undelivered property, set forth in paragraph (g) of the Termination for Convenience clause, applies to items accepted and shipped f.o.b. destination, paid for, and then lost in transit by a common carrier *before* the termination.

Paragraph (g) of the Termination for Convenience of the Government (Fixed Price) clause provided:

> (g) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (f) above, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

FAR ¶ 49.204, which is the corresponding regulatory provision, provides:

> 49.204 Deductions
>
> From the amount payable to the contractor under a settlement, the TCO shall deduct—
>
> * * *
>
> (b) The fair value, as determined by the TCO, of any part of the termination inventory that, before transfer of title to the Government or to a buyer under Part 45, is destroyed, lost, stolen, or so damaged as to become undeliverable (normal spoilage is excepted, as is inventory for which the Government has expressly assumed the risk of loss); and
>
> (c) Any other amounts as appropriate in the particular case.

The term "termination inventory" for purposes of termination is defined by FAR 49.001 by reference to FAR 45.601, which in turn defines it as "any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract."

C. Applicability of "Fair Value" Provision (Paragraph (g)) of Termination Clause and FAR ¶ 49.204(b) to Lost Items Accepted, Shipped, and Paid For Before Termination

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Since the contract before us was in fact terminated for convenience, the Termination for Convenience clause, including clause paragraph (g), became operative. Applicability of that provision to the particular shipment in issue, however, presents three questions because the shipment was accepted and title passed to the Government before it was lost and the loss occurred before the termination: (1) whether paragraph (g) is wholly inapplicable to property lost before the termination, (2) whether "property" in paragraph (g) covers only termination inventory, and (3) whether paragraph (g) covers only property lost before transfer of title to the Government.

Clause paragraph (g) refers broadly to "property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer."

FAR ¶ 49.204(b), while not specifically purporting to implement clause paragraph (g), is evidently an instruction to the termination contracting officer as to how to apply that paragraph.

As to the first question, neither provision is limited by its terms to property lost after termination. I see no reason to read in such a limitation.

The Government objects that to apply the "fair value" measure established for the termination for convenience context to items lost before termination would improperly allow the contractor to "take advantage" of the termination for convenience, after loss of the shipment, and escape the responsibility it would otherwise have had to incur the cost of replacing the lost shipment. I reject that argument. Very simply, there was a termination; among other things, it ended any replacement obligation appellant might have had; and appellant is fully entitled to "take advantage" of the termination clause and regulations. A termination for convenience may relieve the contractor of many responsibilities; that does not entitle the Government to ignore the provisions of the termination clause and insist the contractor perform responsibilities that have been terminated.

As to the second question, FAR ¶ 49.204(b) mentions only termination inventory. Clause paragraph (g) is not so limited, but dictum in the one case I have found addressing the question says it "could relate only to the termination inventory." [9] Assuming that is correct, it nevertheless may reasonably be held to cover the lost shipment here, at least under the majority's view that the lost shipment was not legally "delivered." Until delivery the line items remained open and so were part of the terminated portion of the contract; thus the lost items were "termination inventory"—"property . . . properly allocable to the terminated portion of the contract."

(If, on the other hand, as I believe, the lost shipment was legally "delivered" to the Government upon delivery to the common carrier, those line items were fulfilled and not terminated and the lost shipment would then not be termination inventory—but in that event there could be no Government recovery of the price for "nondelivery" as the majority allows under UCC § 2-711 (see III(B) below), and paragraph (g) of the termination clause would be irrelevant.)

As to the third question, FAR ¶ 49.204(b) refers to inventory which is destroyed, lost, stolen, or damaged "before transfer of title to the Government or to a buyer," while clause paragraph (g) is not so limited. The quoted language dates back at least to 1960 when acceptance at origin (which effected passage of title) was not authorized in conjunction with shipment f.o.b. destination (ASPR 14-203), so it was probably assumed that passage of title closely approximated transfer of the risk of loss. Be that as it may, however, I would give primacy to the broader wording of the clause. The FAR provision does not purport to be a definitive interpretation of the clause but is merely an instruction to the TCO. Furthermore, FAR ¶ 49.204(b) may reasonably be amplified by reference to FAR ¶ 49.204(c), which contains broad, catch-all language providing for credit to the Government for "[a]ny other amounts as appropriate in the particular case." This broader language permits application of the "fair value" provision in clause paragraph (g) to property lost *after* transfer of title to the Government. As long as the risk of loss has not yet passed to the Government (which it has not under an f.o.b. destination contract), there is no conceivable reason *not* to apply the same "fair value" measure to the contractor's liability for property lost after transfer of title as before.

[9] [Section II(C) of Discussion in Dissenting Opinion] *General Motors Corp. (Ternstedt Div.)*, ASBCA Nos. 2830, 2831, 59-2 BCA ¶ 2323, at 10,599 (discussing the applicability of the risk provision in a termination clause which was a virtually identical predecessor to clause paragraph (g)). This was an *ipse dixit* with no rationale offered, and ignored the predecessor provision to the current FAR ¶ 49.204(c).

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Indeed, consistently with this thinking, I suggest further that even if paragraph (g) and FAR ¶ 49.204 are considered not literally applicable to items lost after acceptance and transfer of title, they nevertheless should be applied in this case as the most nearly applicable provisions of the contract and regulations. Those provisions represent the Government's long-standing policy of assessing a contractor for the value, not the cost or price, of lost termination inventory to which the Government otherwise takes title under a termination. In principle, that policy appears to be equally appropriate for application to lost property to which the Government has already taken title but not the risk of loss before the termination. As appellant persuasively argues:

> The more important point, though, is the *principle* embodied by FAR 49.204(b) [and the corresponding clause paragraph (g)], which essentially sets out an approach for dealing with lost items in the context of Termination for Convenience. This approach recognizes the actual economic effect of the loss, by compensating the contractor fully for the work done on the items in question but also requiring the contractor to compensate the Government for damage caused by the loss. The FAR's approach is eminently fair and appropriate in the present case, whether or not this case is deemed to be within the strict letter of FAR 49.204(b). At all events, FAR 49.204(b) remains the most nearly-applicable FAR provision, and the principle which it embodies should be applied here.

App. Br. at 17.

Finally, I observe that use of "fair value" as the measure of the contractor's responsibility for loss is a two-way street. While "fair value" happens to favor the contractor in this case, it would favor the Government in a case where the "fair value" was higher than the contract price. Use of "fair value" to measure a property loss is fully equitable to both parties, in particular to the Government which is put in the same position it would have been in had the loss not occurred—which (as discussed in III(C) below) is exactly what contractual damages are supposed to do at common law as well as under the UCC. Thus there is no inherent "advantage" to the contractor in the use of "fair value" as the measure of responsibility for the loss.

D. Meaning of "Fair Value"

There surely can be no bona fide dispute over the meaning of "fair value," even though the Government argues (frivolously, in my view) that "fair value" means the contract price.

"Fair value" does not mean contract price or costs incurred for the lost or damaged property. The plain meaning of the words in common usage is different; value, price, and costs mean different things. If the drafters of the clause had meant price or costs, they could easily have said so. *See Bolinders Co.*, ASBCA No. 5740, 60-2 BCA ¶ 2746, at 14,002-07, reciting extensive historical background demonstrating that the "fair value" credit to the Government in the termination clause means fair market value as contrasted with an older approach of eliminating from a termination settlement all costs and profit attributable to missing termination inventory. The Board said:

> The other school of thought [which became the accepted one], also developed in World War II, took the view that the full costs and profit were to be allowed notwithstanding some inventory could not be delivered. The remedy was to deduct the fair market value of the missing inventory.

Id. at 14,003.

Webster's Third New International Dictionary defines "fair value" as "a reasonable value (as set by courts and regulatory commissions) for property—used esp. in application to public-utility property for rate-making purposes."

Black's Law Dictionary (6th ed. 1990) defines "fair value" as follows:

> Fair value. Present market value; such sum as the property will sell for to a purchaser desiring to buy, the owner wishing to sell; such a price as a capable and diligent business man could presently obtain from the property after conferring with those accustomed to buy such property; the amount the property would bring at a sale on execution shown to have been in all respects fair and reasonable; the fair market value of the property as between one who wants to purchase and one who wants to sell the property.... In determining "fair valuation" of property, court should consider all elements entering into the intrinsic value, as well as the selling value, and also the earning power of the property. ... "Actual value," "market value," "fair value," and the like, are commonly used as convertible terms.

Thus "fair value" or market value at a given time, meaning the intrinsic worth of the property reasonably determined by ref-

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erence to what a willing buyer and seller would agree upon at that time, is not necessarily the same as the price which may have been agreed upon for the property at some earlier date or the cost of producing the property, though, of course, the "fair value" may happen to be the same as a previously agreed upon price or the cost of production in a given case. In fact, other things being equal, I would consider the contract price in a case like this one to be persuasive, prima facie evidence of the "fair value" of lost items, inasmuch as it represents the amount agreed upon by a willing buyer (the Government) and a willing seller (the contractor) at the time of contracting. However, changed circumstances can make the contract price an inappropriate measure of "fair value" at a later time, such as when market prices have risen or dropped between the time of contracting and the time of loss or the time delivery was required.

The present case is another example of circumstances which made the contract price an inappropriate measure of "fair value." Appellant has met its evidentiary burden of going forward with the evidence and showing that at all pertinent times,[10] the "fair value" of the lost items was merely their scrap value, because they were manufactured to a defective Government-furnished drawing. (See findings 9-11 in majority opinion.)

E. Conclusion Regarding "Fair Value" Measure of Liability in Paragraph (g) of Termination Clause

Because the express provisions of paragraph (g) of the Termination for Convenience clause apply and make "fair value" the operative measure of appellant's liability for the lost items, and because the "fair value" was their scrap value, not the contract price, any provisions of the UCC which would otherwise permit the Government to recover the contract price of the lost items are overridden and rendered inapplicable. See footnote 8 and accompanying text in I above.

Therefore I conclude that the proper amount of the reduction in the amount paid to appellant as a termination settlement is the scrap value of the items in the lost shipment, which we have found to be $400.00. I would hold the Government entitled to only the $400.00 scrap value on its lost shipment claim, and appellant entitled to recover on its claim the balance of the contract price for the lost shipment which the Government recouped by offset against other payments due, that is, $42,205.30.

III. *The Uniform Commercial Code*

If the majority is correct in declining to consider the Termination for Convenience clause here, or if the termination clause does not apply even if considered, then I agree that we must look to the provisions of the Uniform Commercial Code to determine the proper measure of the Government's recovery.

In my view, however, the majority errs again, in two respects. *First*, it ignores the applicable UCC provision (§ 2-714, covering damages for breach in regard to accepted goods) and relies on an inapplicable provision (§ 2-711, covering nondelivery of unaccepted goods). (See subsection A below.) *Second*, it applies § 2-711 to physical nondelivery of the accepted goods to destination, which in this case renders the contract illegal under the statutory prohibition against advance payments. To avoid such illegality, delivery to the common carrier must be deemed legal delivery to the Government under § 2-711 in the contractual context of this case, and the requirement for physical delivery to destination must be deemed to be in the nature of a post-performance, post-payment warranty obligation, breach of which is remediable under § 2-714 like other breaches of warranty. (See subsection B below.)

The proper measure of the Government's damages under UCC § 2-714 for appellant's breach, consisting of loss in transit of Government-owned property, is the value of the lost items, *i.e.*, their scrap value. (See subsection C below.)

A. UCC § 2-714 Providing for Damages, Not Recovery of Price as Such, Governs Nondelivery of Accepted Goods; UCC § 2-711, Providing for Recovery of Price for Nondelivery, Does Not *Apply to Accepted Goods*

UCC § 2-714 is the controlling provision in a case where a seller breaches his obligation to deliver to destination goods already accepted at origin (absent revocation of acceptance). It provides for recovery of damages

[10] [Section II(D) of Discussion in Dissenting Opinion] It is not necessary for purposes of this case to decide as of what date the "fair value" is to be determined. The items in the present case were worthless except as scrap at all pertinent times—required delivery, loss, termination, and termination settlement.

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reasonably measured, not for recovery of the price. It states in pertinent part:

> § 2-714. Buyer's Damages for Breach in Regard to Accepted Goods
>
> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

"Nonconformity" is broad enough to include failure to make the required physical delivery to destination. According to Official Comment 2 to § 2-714:

> 2. The "non-conformity" referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

Further, the Government's several inquiries to appellant in the present case as to the whereabouts of the lost shipment were sufficient notice within a reasonable time to meet the notice requirement of UCC § 2-607(3), cross-referenced in § 2-714. (See findings 6-8 in majority opinion.)

Official Comment 1 to § 2-714 states:

> 1. This section deals with the remedies available to the buyer *after the goods have been accepted* and the time for revocation of acceptance has gone by.

(Emphasis added.)

UCC § 2-711 provides in pertinent part:

> § 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods
>
> (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
>
> (b) recover damages for non-delivery as provided in this Article (Section 2-713).

Official Comment 1 to § 2-711 states:

> 1. . . . The remedies listed here are those available to a buyer *who has not accepted the goods* or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods.

(Emphasis added.)

In the present case the items in the lost shipment were accepted at origin, and the Government could not, and in any event never purported to, revoke acceptance.[11]

There are a number of reasons why I would find § 2-714 and not § 2-711 applicable to nondelivery of accepted goods.

[11] [Section III(A) of Discussion in Dissenting Opinion] Revocation of acceptance is governed by UCC § 2-608, which provides in pertinent part:

> § 2-608. Revocation of Acceptance in Whole or in Part
>
> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

If this provision applied in the present case, the Government would be entitled under UCC § 2-711(1) to recover the full contract price for the lost shipment. In the event of a justifiable revocation of acceptance, UCC § 2-711(1) expressly allows the buyer to recover so much of the price as has been paid.

UCC § 2-608 does not apply here, for several reasons.

First, unlike UCC § 2-714 which addresses "nonconformity of tender" and the Official Comment to which indicates broad application to "any failure of the seller to perform according to his obligations under the contract," § 2-608 addresses nonconformity of accepted items in the sense of defects, and does not extend to nondelivery after acceptance or indeed to either loss or damage of accepted items in transit. The two conditions in subsections (1)(a) and (b) on their face can only apply to nonconformity existing at the time of acceptance, and so cannot include later nondelivery.

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First, this is plain in the title and text of § 2-714 and in the complementary language of the Official Comments to the two sec-

(Footnote Continued)

Electro Optics, Inc., ASBCA No. 22017, 78-1 BCA ¶ 12,996, *aff'd on reconsideration*, 78-2 BCA ¶ 13,251, is not authority to the contrary. There we held that any right the Government might have had to revoke acceptance under UCC § 2-608 for nondelivery to destination of items accepted at origin was lost by the Government's failure to notify the contractor within a reasonable time. We did not need to decide in that case whether, if the Government had given timely notification, it could have revoked acceptance under UCC § 2-608 for nondelivery. The suggestion in the original decision (78-1 BCA at 63,392, n.2 and accompanying text) that revocation of acceptance was an available remedy for nondelivery was therefore dictum, and furthermore failed to distinguish between (1) a defect as to quantity existing at the time of acceptance, which would be a nonconformity that might justify revocation of acceptance, and (2) a failure to deliver because of a loss in transit after acceptance, which is not a nonconformity justifying revocation. Moreover, the decision on reconsideration appears to refocus the premise for possible contractor liability for the lost items from UCC § 2-608 to the Title and Risk of Loss clause of the contract.

Second, even if "nonconformity" were construed to include nondelivery, acceptance of a lot may be revoked only for a nonconformity which "substantially impairs its value" to the buyer. In this case, nondelivery of the lost shipment could not "substantially impair [the] value" of the items to the Government; even if the items had been delivered, they would have had no significant value to the Government that could be impaired, on account of the defective Government-furnished manufacturing drawing.

Third, the Government has never notified appellant of a revocation of acceptance as absolutely required by UCC § 2-608(2), and has not asserted such revocation as a ground for recovery in this case. Failure to give the required notice precludes a Government claim based on revocation of acceptance:

> Notice of revocation of acceptance to the seller must be clearly demonstrated. *Grossman v. D'Or*, 98 Ill.App.2d 198, 240 N.E.2d 266, 268 (1968). Hence, "[w]hen the conduct of the buyer is ambiguous, it does not constitute a required notice of revocation of acceptance." 4 Anderson, Uniform Commercial Code § 2-608:30 (3rd ed. 1983). Thus, in many circumstances, merely returning the goods to the seller, without more explicit indications of intent, will be inadequate notice of revocation of acceptance. *See Poole v. Marion Buick Co.*, 14 N.C. App. 721, 189 S.E.2d 650, 652-53 (1972).

Delhomme Industries, Inc. v. Houston Beechcraft, Inc., 735 F.2d 177, 182 n.7 (5th Cir. 1984). *See also Electro Optics, Inc.*, ASBCA No. 22017, 78-1 BCA ¶ 12,996, *aff'd on reconsideration*, 78-2 BCA ¶ 13,251, holding that the Title and Risk of Loss clause (an earlier version of the Responsibility for Supplies clause), by implication, required reasonably timely notification of nonreceipt and that the failure to give such notification barred any possible Government claim for loss in transit based on revocation of acceptance or under the Title and Risk of Loss clause. *Electro Optics* did not need to, and did not in fact, focus on the difference between notification of nonreceipt and notification of revocation of acceptance. Since the Government in that case failed to notify the contractor of nonreceipt, as noted above, a fortiori it did not give notification of revocation of acceptance.

In the present case, the parties' communications between October 1988 and February 1989 regarding the whereabouts of the lost shipment, which placed appellant on notice of nonreceipt by the Government, did not operate as an unambiguous notice of revocation of acceptance under UCC § 2-608, since revocation of acceptance (even if it had been an available remedy) was not the only remedy available to the Government. The Government could also rely on the express risk of loss provisions in the contract and on UCC § 2-714 covering breach (including nondelivery) in regard to accepted goods as discussed in this dissent.

(Absent a purported revocation of acceptance, it is not necessary to decide when a "reasonable time" for notification of revocation after February 1989 expired. The parties' communications between October 1988 and February 1989, which placed appellant on notice of nonreceipt by the Government, also placed the Government on notice that the items had probably been lost in transit, since appellant was unable to provide any evidence of receipt at destination and the Government itself had no record of receipt. A "reasonable time" after February 1989 for such notification probably expired at least by 28 April 1989, the date of the termination, which is when the "fair value" risk of loss provision of the termination clause became operative, but certainly no later than appellant's July 1989 deadline for filing an insurance claim (one year after expected arrival of the shipment in late July 1988), for that is when appellant was prejudiced by the absence of such notice. Up to that time, and without notice that the Government was invoking a remedy that included recovery of the full contract price, appellant could have believed that the Government's recovery for nondelivery would be limited to the value of the items, which appellant by then knew was scrap value.)

Fourth, even if the Government could otherwise revoke acceptance under UCC § 2-608 on account of the nondelivery to destination—that is, if nonconformity for purposes of UCC § 2-608 included nondelivery and notice of revocation had been timely given—such revocation of acceptance would be barred by the finality provision of the Inspection clause. If nonconformity were to include nondelivery for purposes of UCC § 2-608, then so must it for purposes of the Inspection clause. The Inspection clause says that "[a]cceptance shall be conclusive,

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tions, even if the text of § 2-711 taken out of context is less than clear.

Second, one of the leading commentators on the UCC states:

> § 2-711:3. Scope and suggestions.
>
> Code § 2-711 begins a series of sections specifying the remedies of the buyer. The section enumerates the remedies of the buyer who has not accepted the goods or who has made a rightful revocation of his acceptance. *If the buyer has accepted the goods and has not made an effective revocation of his acceptance, his remedies are limited to the damages recoverable under Code § 2-714....*
>
> * * *
>
> § 2-711:14. Recovery of purchase price and damages.
>
> * * *
>
> *When the buyer does not act to revoke acceptance and to give notice of any nonconformity, he is barred from recovering the purchase price* and is limited to the damages specified by UCC § 2-714(2).

4 Anderson, Uniform Commercial Code § 2-711:3, at 422, § 2-711:14, at 428 (3rd ed. 1983) (emphasis added; footnotes omitted). The majority ignores this authoritative commentator, relying instead on a superficial summary of UCC § 2-711 in Williston on Sales § 25-17 which does not even mention the Official Comments. Moreover, I think the majority is reading too much into that brief paragraph in Williston. The authors do not there mention § 2-714 which applies to accepted goods and do not specifically suggest that recovery of the price is available for nondelivery of *accepted* goods, and I do not think they so intended. On the contrary, they recognize (in § 25-5, at 443) that if the buyer accepts goods then he must pay the contract price for them. The majority also cites § 6-7 of the White and Summers Hornbook on the UCC, which correctly states that under UCC § 2-711 the buyer can recover damages in addition to recovering the price paid. Like Williston, the authors do not say that § 2-711 applies to nondelivery to destination of accepted goods lost in transit, especially accepted goods delivered to a common carrier and paid for under a Government contract under which payment cannot legally be made before "delivery" (see further discussion of the advance payment prohibition in B below). On the contrary, like Williston, they recognize (in § 7-3, at 256) that under UCC § 2-709(1)(a) the buyer is liable for the price of "goods accepted."

Third, to suggest that the "remedies" referred to in Official Comment 1 to § 2-711 as only available before acceptance do not include the buyer's right under § 2-711 to recover the price paid would be to say that recovery of the price is not a remedy, which would be to ignore the plain meaning of the word "remedy" and the caption of § 2-711, Buyer's Remedies in General.

Fourth, when recovery of the price paid is an available remedy under § 2-711, then § 2-711 unambiguously provides also the additional remedies of § 2-712 (cover) and § 2-713 (damages for nondelivery). But §§ 2-712 and 2-713 on the one hand and § 2-714 (Buyer's Damages for Breach in Regard to Accepted Goods) on the other are mutually exclusive. J. White & R. Summers, Uniform Commercial Code § 10-1, at 375 (2nd ed. 1980). Thus §§ 2-712 and 2-713 do not apply to nondelivery of accepted goods, and by elementary logic recovery of the price under § 2-711 does not either. Indeed, it would make no sense to apply only one remedy among the several parallel remedies listed in § 2-711 to nondelivery of accepted goods.

Fifth, it is not credible that the UCC would allow recovery of the price paid for accepted goods that are lost in transit and therefore undelivered but not those damaged in transit so as to be unusable but nevertheless delivered—yet the majority's application of § 2-711 leaves no room for equivalent treatment of goods so damaged as both logic and the risk of loss provisions of the present contract require. (That disparity does not exist under UCC § 2-711 for goods not accepted at origin because the buyer ob-

(Footnote Continued)

except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." That finality provision negates any remedies inconsistent therewith that the Government might otherwise have as a buyer under the Uniform Commercial Code, on account of the loss in transit, because, as discussed in I above (see note 8 supra and accompanying text), the UCC does not supersede express provisions of a contract. "[O]therwise provided in the contract" means expressly provided; it does not mean impliedly provided by virtue of a UCC provision read into the contract. *Republic Aviation Corp.*, ASBCA Nos. 9934, 10104, 66-1 BCA ¶ 5482, at 25,694 (holding that UCC provisions that might otherwise make oral warranties enforceable after acceptance were negated by the finality provision of the Inspection clause in Government contracts, under which any exception to finality "otherwise provided in the contract" had to be express).

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viously will not accept at destination goods that are lost in transit and likewise can simply reject seriously damaged goods.)

Thus UCC § 2-714 does apply, and § 2-711 does not apply, to nondelivery of accepted goods. Recovery of the price paid in cases of nondelivery under § 2-711 applies where the payment is a partial or advance payment made before acceptance and the remedy of recovering the price is exercised before acceptance or, if after acceptance, only when acceptance has been properly revoked.

This reading of 2-714 and 2-711 together is further confirmed by reading these provisions on the buyer's remedies in conjunction with the UCC provisions on the seller's remedies:

1. UCC § 2-607, Effect of Acceptance, provides unconditionally that "(1) The buyer must pay at the contract rate for any goods accepted."

2. UCC § 2-703, Seller's Remedies in General, provides that "When the buyer ... fails to make a payment due on *or before delivery* ... the aggrieved seller may: ... (e) recover ... in a proper case the price (Section 2-709)" (emphasis added).

3. UCC § 2-709, Action for the Price, provides: "(1) When the buyer fails to pay the price as it becomes due the seller may recover ... the price (a) of goods accepted ...."

These provisions entitle the seller to be paid the price for accepted items; there is no requirement for delivery. Anderson on the UCC confirms this plain meaning:

> Under the Code, the seller recovers the purchase price for goods which are "accepted" rather than goods which are "delivered." *Thus the common law requirement of proving delivery of the goods is no longer recognized.*

4 Anderson § 2-607:14 (emphasis added).

The majority reads UCC § 2-711 as entitling the buyer to recover any part of the price paid in the case of nondelivery of accepted goods. That reading creates a direct conflict in the UCC between the remedies of the buyer and the remedies of the seller. There is no basis in the UCC or in the cases under the UCC for giving primacy to the buyer's remedies over the seller's remedies. That is not to say the buyer is without a remedy for nondelivery of accepted goods. The buyer recovers damages under § 2-714, which is fully consistent with the seller's right to recover the price.

To sum up, UCC § 2-714, which the majority utterly ignores, governs nondelivery of accepted goods and entitles the buyer (the Government here) to damages, reasonably determined (as discussed in C below). The remedies in § 2-711, upon which the majority erroneously relies, including specifically recovery of the price paid in cases of nondelivery, do not apply with respect to items such as those in this case that have already been accepted and as to which there cannot be or has not been revocation of acceptance.

In contrast to the present case where the lost items had already been both accepted and paid for, see *R&L Diesel Service*, ASBCA No. 22542, 78-1 BCA ¶ 13,177, involving an item lost in transit which had *not* been accepted but had already been paid for under the Fast Payment Procedure clause. The Board held, not citing the UCC and without articulating any rationale, that the Government was entitled to recover the contract price under the risk of loss provision in the clause, even though the only express remedy in the clause was replacement of lost items. The difference in facts (especially the absence of acceptance there) and in contract provisions (especially the absence of any express contractual remedy here for loss in transit) make the *R&L Diesel* case inapposite to this case as authority for Government recovery of the price as such under UCC § 2-711 or otherwise. On the contrary, the *R&L Diesel* decision is fully consistent with Government recovery of damages reasonably determined under UCC § 2-714—value, not price as such, as discussed in C below. Since there was no assertion in *R&L Diesel* of a difference between price and value, the normal presumption that price and value are the same would have applied and there was no need to discuss price versus value.[12]

[12] [Section III(A) of Discussion in Dissenting Opinion] Actually, the peculiar combination of provisions in the Fast Payment Procedure clause appears to make both UCC § 2-711 and UCC § 2-714 technically inapplicable as measures of the contractor's liability for a loss in transit. Section 2-711, while applicable to a loss of unaccepted goods, would not apply in Fast Pay cases because delivery to the common carrier must be deemed delivery to the Government in order to avoid illegal advance payments, as discussed in B below. Section 2-714 only applies to breaches in regard to accepted goods, and so would not apply under Fast Pay where acceptance takes place at destination. Perhaps the best approach to determining the measure of damages for loss of Fast Pay items in transit, assuming the contractor refused to replace the items, would be to treat the matter as a breach of the contractor's warranty obligation to replace the items and to adopt a reasonable measure using

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B. UCC § 2-711 Also Does Not Apply Because There Was Delivery: Physical Delivery to Carrier Had To Constitute Constructive Delivery to Government Because of Statutory Prohibition Against Advance Payments

1. *Overview of Advance Payment Question*

Even assuming (contrary to what I have shown in A above) that UCC § 2-711 would normally apply to "nondelivery" of accepted items, it does not apply in this case because legally there was not a "nondelivery" of the lost shipment in this case. Delivery of the shipment to the Common carrier was legal delivery to the Government.

This contract provided unequivocally and unconditionally for payment for items in full upon acceptance at origin by the Government and delivery of end items to a common carrier (transportation prepaid) and before physical delivery to destination.

The majority, however, while agreeing that the contract provided for payment upon delivery to the carrier, reads UCC § 2-711 into the contract so as to render that payment conditional and provisional. The majority permits the Government to recover the price for items delivered to the carrier but then lost in transit and so not physically delivered to destination. This revision of the contract says that even upon delivery to the common carrier, performance is not yet complete and the price is not yet fully earned until physical delivery to destination.

The contract as so revised by the majority is illegal. It violates the statutory prohibition against advance payments (set forth in 2 below), which says that a contract payment "may not be more than the value of . . . the article *already delivered.*" 31 U.S.C. § 3324(a) (emphasis added). I believe instead that the contract provisions were very carefully drafted specifically to avoid this illegality.

It is a fundmental principle that a contract should be given a legal interpretation if reasonably possible:

> For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former rust be adopted.

Hobbs v. McLean, 117 U.S. 567, 576 (1886). *Accord:* Restatement of Contracts (Second) § 203(a) (1979); 4 Williston on Contracts § 620, at 747-48 (3rd ed. 1961).

Under this contract, therefore, delivery of the items to the common carrier had to constitute legal delivery to the Government—constructive delivery because made to a third party (the common carrier) pursuant to contractual authorization. Performance of the contract with respect to those items had to be complete at that point; if there remained any performance with respect to the items, payment would have been illegally made before the "article[s] [had been] already delivered." Appellant's risk-of-loss responsibility had to be a post-performance obligation, in the nature of a warranty obligation, to be monetarily liable for loss of the Government's property (title passed upon acceptance at origin). A post-performance,

(Footnote Continued)

common-law damage principles, such as the Government's cost of obtaining replacement items from a third party, similar to reprocurement costs after a default termination. As noted, the *R&L Diesel* case did not provide any rationale for allowing recovery of the contract price paid; perhaps the tacit presumption, absent evidence to the contrary, was that replacement cost would be the same as the contract price.

Interestingly, the Fast Payment Procedure clause (now authorized by FAR Subpart 13.3 and found in FAR § 52.213-1) provides for payment based on passage of title to the Government upon delivery to a post office or common carrier or point of first receipt by the Government, even though the contractor is responsible for physical delivery to destination and the Government inspects and accepts at destination. This appears intended to avoid violating the prohibition against advance payments discussed in B below. *See* Comp. Gen. B-155253, 18 December 1964 (unpublished), 1964 WL 1892 (C.G.) (questioning the legality of the "fast pay procedure for small purchases" then being used by the Defense Supply Agency (DSA) (predecessor to the Defense Logistics Agency (DLA)) in light of the statutory prohibition against advance payments); Comp. Gen. B-155253, 20 March 1968 (unpublished) (approving DOD's use of the fast payment procedure set forth in ASPR ¶ 3-606); Comp. Gen. B-155253, 20 August 1969 (unpublished), 1969 WL 3693 (C.G.) (approving FAA's adoption of DOD's fast payment procedure on small purchases, then set forth in ASPR ¶ 3-606, as augmented by internal FAA audit procedures); Comp. Gen. B-223827, B-223827.3, 13 February 1987 (unpublished), 1987 WL 101457 (C.G.) (approving changes to the FAR regulations and clause on the fast payment procedure to implement limitations on the use of "fast pay" procedures imposed by Attachment 2, "Subject: Prompt Payment Standards," to OMB Circular A-125, "Prompt Payment," as amended, 50 Fed. Reg. 14688 (12 April 1985) (now ¶ 12 of Attachment to current OMB Circular A-125, 54 Fed. Reg. 52700, 52712 (21 December 1989)).

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post-payment warranty obligation does not render payment in full illegal as a prohibited advance payment. *Morgen & Oswood Construction Co.*, VABCA No. 3318, 92-1 BCA ¶ 24,482, at 122,194-95.[13] Appellant's liability for the loss in transit, established by the risk of loss provisions in the contract (Responsibility for Supplies and F.O.B. Destination), is appropriately determined under UCC § 2-714 which expressly addresses damages for breach in regard to accepted goods, including warranty liability. (As discussed in C below, the proper measure under that section is the usual measure of loss of someone else's property—the value of the property.)

The advance payment statute is not satisfied by the Government's mere taking of title to the items before payment, if a post-payment delivery obligation remains as part of contract performance required to earn the price. Given the applicability of the advance payment statute to this Government contract, UCC § 2-711 must be regarded either as inapplicable to this contract because inconsistent with the statutory prohibition (if UCC § 2-711 is to be read as the majority does), *or* as recognizing that delivery to a common carrier constitutes completion of performance and delivery to the Government under the circumstances and contractual provisions present here.

My view of the advance payment statute is supported by long-standing administrative decisions of the attorney general and the Comptroller General (see 3 below) and by long-standing administrative interpretation by DOD (see 4 below), as well as by a recent amendment to the Prompt Payment Act recognizing that payment for items in full cannot be made without delivery and that delivery to a common carrier can constitute the required delivery which completes performance and earns the full price (see 5 below). I elaborate below upon that history and interpretation because of the importance of the advance payment statute to the proper interpretation of this contract as well as its place as one of the longest-standing controls over Government procurement.

The majority appears to agree that the contract provisions as it interprets them provide for advance payments which run afoul of the advance payment prohibition unless the Government invoked an extraordinary statutory authorization of advance payments. No such authorization was invoked for this contract (see 2 below).

The majority suggests that my equating of delivery to a common carrier with delivery to the Government is contrary to the FAR 47.001 definition of "f.o.b. destination." I do not understand the majority's point. According to FAR 47.001, "f.o.b. destination" (which defines the physical delivery requirement) means free on board the seller's or consignor's conveyance at destination. I would simply hold that the common carrier is deemed to be the Government's agent to receive legal delivery—not that the conveyance, *i.e.*, the vehicle used for transportation, is the Government's agent. I see no inconsistency with the FAR definition of "f.o.b. destination" for the purpose of physical delivery. The majority also perceives some significance in the fact that more than one common carrier was involved in the transportation chain; but that fact has no bearing on my view that the contractor's delivery to the first common carrier constituted legal delivery to the Government.

2. *The Advance Payment Statute*

Title 31 U.S.C. § 3324 (formerly 31 U.S.C. § 529, codifying Revised Statutes (R.S.) § 3648, Pub. L. No. 17-9, 3 Stat. 723 (1823), prohibits advance payments to contractors:

> (a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

The statute goes on to provide for advance payments where authorized by a specific appropriation or other law or the President, but those conditions do not exist here. There are certain other advance payment authorizations (including 10 U.S.C. § 2307, similar to 41 U.S.C. § 255 for civilian agencies) available to the military departments (see FAR Part 32, § § 32.101, 32.102(a), Subpart 32.4), but none of those was made applicable to the present contract.

The majority presumes—in order to avoid facing up to the illegality created by its interpretation of the contract—that the Government authorized advance payments under 10 U.S.C. § 2307 on this routine supply contract. Such authorization would have

[13] [Section III(B)(1) of Discussion in Dissenting opinion] That case held that "guarantee period services" and "post contract maintenance" services were part of contract warranties, not part of the contract work, so the contractor was entitled to the full contract price and the Government need not and could not withhold the portion of the price attributable to those services as an alleged illegal advance payment until after they were performed.

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required compliance with the implementing regulations of FAR Subpart 32.4; the exclusions in FAR 32.404 cover advance payments under other statutes, none of which applies to this case. The majority's presumption is inappropriate, contrary to the record, and unnecessary. It is *inappropriate* because, absent affirmative evidence, we should not presume invocation of an extraordinary, "sparingly" (FAR 32.402(b)) used statutory authority, any more than the courts and boards have presumed over the years that special contract provisions limiting boilerplate FAR clauses had been approved pursuant to an authorized deviation. It is *contrary to the record* because the Rule 4 file would likely reflect an advance payment authorization if there had been one, and, more importantly and indeed conclusively, the contract would contain the Advance Payments clause in FAR 52.232.12 mandated by FAR 32.412, which it does not. It is *unnecessary* because, as I have said in 1 above, this contract can and should be interpreted so that payment upon delivery to the common carrier was not in advance of delivery to the Government. The doctrine of presumed regularity of official Government actions, upon which the majority relies, actually supports my inference that the drafters of the clauses permitting payment upon delivery to a common carrier for f.o.b. destination shipment must have intended such delivery to constitute legal delivery to the Government, precisely to avoid both illegal advance payments and the need to go through laborious justification and special authorization to legalize advance payments.

3. Administrative Interpretations by Attorney General and Comptroller General

It has been the uniform administrative interpretation of the Attorney General of the United States and of the Comptroller General of the United States for over one hundred years that the advance payment statute prohibits payment in full for goods or services before delivery to the Government (which is treated as synonymous with completion of performance), while permitting partial (progress) payments before delivery provided the Government receives an equivalent benefit.

The oldest authority I have found categorically disapproved payment in full while approving partial payment based on a lien. 18 Op. Atty. Gen. 105 (1885) (relied on by 29 Op. Atty. Gen. 46 (1911) which was then relied on by 20 Comp. Gen. 917 (1941)), held:

> The object of that section [R.S. 3648, predecessor of the current statute 31 U.S.C. § 3324] is not to preclude a payment in any case where the money has been actually earned and the Government has received an equivalent therefor, but to prevent payments being made to contractors in advance of the performance of their contracts, whether for services or the supply of articles of any kind. Agreeably to this view of the statute, I observed in my opinion of the 20th instant that payment *in full* for the vessel, in advance of its completion, is forbidden thereby.

18 Op. Atty. Gen. at 106 [emphasis in original]. Thus, while the prior opinion in the same matter two days earlier had disapproved payment in full, 18 Op. Atty. Gen. 101 (1885), this opinion authorized *partial* payment based on the lien as an equivalent received by the Government for its payment—precisely the reasoning later used over the years by the Comptroller General in his numerous rulings authorizing *partial* payments. It should be noted that construction of the ship had been "wholly finished," but the full trial trip and formal acceptance had been delayed due to a fracture of a shaft.

Most recently the Comptroller General has held:

> Under 31 U.S.C. § 3324, absent the exceptions noted above, agencies of the government are prohibited from paying for goods or services in advance of receiving them. *See, e.g.*, B-172054, June 11, 1971. Therefore, notwithstanding the FSS contract language to the contrary, agents of the government are strictly prohibited by statute from compensating contractors for any service of [sic] goods which have not been received.

64 Comp. Gen. 710, 85-2 CPD ¶ 97.

Similarly, where under the terms of a contract the contractor's performance obligation would not be completed until the end items were physically delivered to the Government, and title would not vest in the Government until such delivery, and the contractor would not be entitled to payment under the terms of the contract until receipt and acceptance by the Government, payment without evidence of delivery and acceptance would be an illegal advance payment. 20 Comp. Gen. 230, 231-32 (1940).

On the other hand, the Comptroller General has ruled that *partial* (*i.e.*, progress) payments to contractors are not a violation of the advance payment prohibition as long as the contractor has actually earned the

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amount of the payment and the Government has received an equivalent therefor, such as title to the items, a lien in the amount at least equal to the payment, or other equivalent benefit such as the benefits from performance and payment bonds which were held to accrue at the time the bonds were obtained when the contract specifically provided for reimbursement of the full bond premiums. 57 Comp. Gen. 89, 92-94, 77-2 CPD ¶ 376, at 4-7; 20 Comp. Gen. 917, 918 (1941) (and authorities cited); 1 Comp. Gen. 143, 145 (1921). Thus, for example, the Comptroller General has ruled:

> We have long held that 31 U.S.C. § 529 prohibits the compensation of contractors for services which have not been received, so as to avoid the possibility of Government loss in the event the contractor, after receipt of full payment, should fail to perform his contract obligations. *See, e.g.*, B-180713, April 10, 1974, and cases cited. Where the Government undertakes an obligation in the contract to reimburse the contractor for performance and payment bonds, the contractor earns such reimbursement upon obtaining the bonds. In other words, once the bonds have been obtained, the contractor has fully performed his part of the bargain in order to "earn" full reimbursement. *There is no further performance for him to render in order to receive reimbursement for the bond premiums.*

57 Comp. Gen. 25, 28, 77-2 CPD ¶ 319, at 5-6 (emphasis added).

Under the reasoning of these decisions, if the contract provides for payment of the full contract price for end items, then in order for the payment not to be an illegal advance payment, "the amount of the payment [must have] been actually earned by the contractor and the United States [must have] received an equivalent therefor," 1 Comp. Gen. 143, 145 (1921), and there must be "no further performance for him to render in order to receive reimbursement" for the items, 57 Comp. Gen. at 28, 77-2 CPD ¶ 319, at 6.

This construction has *never* been applied to permit the Government to pay the full contract price for undelivered items, even if the Government has taken title. The only language that even remotely hints at such a construction is found in 20 Comp. Gen. 917, 918 (1941), which stated:

> While, under the prohibition of the statute, payment may not be made for articles in which the United States has acquired no right or interest and from which it derives no benefit, payment may be made for articles in advance of their delivery into the actual possession of the United States if title therein has vested in the Government at the time of such payment, or if the articles are impressed with a valid lien in favor of the United States in an amount at least equal to the payment. 1 Comp. Gen. 143; 17 Comp. Gen. 894; 29 Op. Atty. Gen. 46.

That ruling, read in its entirety, does not hold or even suggest that payment *in full* for undelivered items, *i.e.*, items as to which performance is not complete, may be made based merely on title or a lien, for three reasons: (1) the factual scenario presented by the agency's request for a ruling asked only for permission to make partial payment; (2) the cases cited by GAO in its ruling were partial payment cases; and (3) GAO's ruling in the case only authorized the agency to amend the contract to provide for partial payment.[14]

4. *Administrative Interpretation by DOD*

For at least twenty-eight years, it has been the Defense Department's administrative interpretation of the advance payment statute, as applied to contract payments before physical delivery to destination on an f.o.b. destination contract, that the statute requires not merely passage of title but also delivery to the Government, and that delivery to a common carrier constitutes delivery to the Government and completion of contract performance when the contract provides for passage of title to the Government and payment upon delivery to the common carrier. The documentation of DOD's position in this regard is in the context of the Fast Payment Procedure for small purchases, but the principle involved has nothing to do with dollar amount.

[14] [Section III(B)(3) of Discussion in Dissenting opinion] *Cf.* also discussions of the advance payment statute and the nature of title to work in progress acquired by the Government as a condition of progress payments, in *Coated Sales, Inc. v. Highland Industries, Inc.*, 112 B.R. 560, 561-63 (U.S. Bankrupty Ct., S.D.N.Y., 1988), and in *Marine Midland Bank v. United States*, 231 Ct. Cl. 496, 687 F.2d 395 (1982), *cert. denied*, 460 U.S. 1037 (1983). While *Coated Sales* disagreed with *Marine Midland* as to whether the Government's purported title taken as a condition of progress payments was real or a fictional device to avoid violating the advance payment prohibition, neither case suggested that payment in full could legally be made before delivery, with or without transfer of title.

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This interpretation supports the view that under the terms of this contract, delivery of the lost shipment to the common carrier constituted delivery to the Government and completion of contract performance and that the contract price was thereupon unconditionally, not provisionally, earned, contrary to the majority's view in this case that there was nondelivery under UCC § 2-711.

DOD's statement of position on this matter and the Comptroller General's approval of it are found in correspondence and rulings in connection with a General Accounting Office inquiry about the Fast Payment Procedure under Comptroller General Case No. B-155253. Since this material comprises official Government documents recording the legal foundation of published procurement regulations and clauses, we may appropriately take official notice of it. The material may be summarized as follows:

(1) 9/22/64 Memorandum from GAO Defense Accounting and Auditing Division to the Comptroller General—Raised objections to Defense Supply Agency's fast payment procedure on small purchases whereby Government paid for items shipped f.o.b. destination without evidence of receipt at destination, based on (i) a certification of delivery to a post office, common carrier, or point of first receipt by the Government, (ii) transfer of title to the Government upon such delivery, and (iii) the contractor's agreement to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to the contract (though no provision for recovery of price by Government). Memorandum stated opinion that procedure violated advance payment prohibition of R.S. § 3648.

(2) 12/18/64 Unpublished Decision consisting of letter from Comptroller General to Secretary of Defense—Asked for comments on legality, propriety, and necessity for DSA's fast pay procedure for small purchases. Noted that although title would vest in Government upon delivery to post office or common carrier—

there is some question that the contractor's full obligation on an f.o.b. destination shipment of the type here concerned would be discharged prior to the time the supplies were delivered at the designated destination. The contractor's certification that he has delivered the supplies to the post office or carrier does not purport to be a certification that the contract performance is complete.

Cited R.S. § 3648, as amended, 31 U.S.C. § 529, as "intended to prevent a department from anticipating the performance of a contract [f]or the performance of any service or for the delivery of articles of any description for the use of the United States." Cited Comptroller General decisions endorsing *partial* payments based on title or lien before delivery into actual possession of the United States, but observed that the DSA procedure provided for payment *in full.*

(3) 4/30/65 Letter from Assistant Secretary of Defense (Comptroller) to Comptroller General in response—Specifically addressing the question of legality under the advance payment statute, it stated:

It is our view, however, that the contractor under the "Fast Payment" procedures will have fully performed his contract upon delivery to a post office or common carrier. There remains only his contingent obligation to replace, repair or correct supplies not received, damaged in transit, or not conforming to purchase requirements. This contingent liability is quite similar to that imposed on a contractor under a warranty guarantee article with respect to completion of contract performance. In the latter case there has been no question that the contractor may be fully paid prior to the expiration of the warranty or guarantee period.

It further stated that the fast pay procedure (by then in ASPR 3-606) *"provides for legal delivery to the Government upon delivery to a post office or common carrier;* if other mode of transportation is used, then delivery is effected at point of first receipt by the Government" (emphasis added). It then expressed the legal view that *"once delivered to the carrier or post office,* title having passed, full payment is authorized" under the advance payment statute.

(4) 9/7/65 Internal ruling by the Comptroller General to GAO Defense Accounting and Auditing Division—Held:

Therefore, since title to the supplies vests in the Government *upon delivery to a post office or common carrier* and the postage or freight is prepaid by the shipper, payment to the supplier under the Fast Payment Procedure need not be objected to as an advance payment in direct violation of section 3648 Revised Statutes, as amended, 31 U.S.C. 529.

(Emphasis added.)

(5) 4/21/67 Letter, GAO Defense Division to Deputy Assistant Secretary of Defense

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(Procurement)—Conveyed the ruling quoted in (4) above.

(6) 3/20/68 Unpublished Decision from Comptroller General to Secretary of Defense—Formally approved the fast payment procedure (though the only issues open and addressed at that time involved commercial versus Government bills of lading and internal follow-up controls).[15]

5. *Recent Amendment to Prompt Payment Act*

The foregoing positions of the Attorney General, the Comptroller General, and DOD—that delivery to a common carrier under an f.o.b. destination contract constitutes legal delivery to the Government and completion of performance when the contract provides for passage of title and payment in full upon such delivery—were adopted by the Congress in recent amendments to the Prompt Payment Act.

Section 11 of the 1988 amendments to the Act, P.L. 100-496, 17 Oct. 1988 (which may be found in 31 U.S.C. § 3903 note) included a requirement for a FAR amendment authorizing contracting officers to establish certain payment periods in contracts. One such payment period required to be authorized is 15 days after receipt of invoice on small purchases if "(i) the contract provides for such 'fast payment' terms; (ii) title to any property will vest in the Government *upon delivery (including delivery to a common carrier);* and (iii) the business concern offers appropriate warranties to furnish property or services conforming to the requirements of the contract or purchase order, if payment will be due prior to acceptance of the items or services." (§ 11(b)(1)(C) (emphasis added).)

While that statutory provision and the mandated FAR amendment apply only to small purchases, the underlying legal principle recognizing that delivery to a common carrier may constitute legal delivery to the Government under an f.o.b. destination contract is not so limited.

6. *Conclusion on Advance Payment Question*

In order to give the Government recovery of the contract price of the lost shipment under UCC § 2-711, the majority holds that appellant did not deliver the shipment to the Government. That holding renders the contract illegal under the statutory advance payment prohibition.

In order to avoid unauthorized advance payments and preserve legality of the contract, given the contract provisions for payment *in full* upon delivery to the common carrier, delivery of the shipment to the common carrier must be deemed legal, constructive delivery to the Government and completion of contract performance as to that, shipment which fully earned the price for that shipment. The Government must be deemed to have constituted any common carrier (and the U.S. Postal Service) as its agent to receive delivery of the items, which became Government-owned property upon acceptance at origin. Thus the Government cannot recover the price on account of "nondelivery" under UCC § 2-711 (even assuming—which I have shown in A above to be erroneous—that § 2-711 applies to nondelivery of accepted items). UCC § 2-711 must either (1) be considered inapplicable to a Government contract providing for acceptance at origin, shipment f.o.b. destination, and payment upon delivery to a common carrier, because contrary to the statutory advance payment prohibition, or (2) be interpreted as recognizing delivery of accepted items to a common carrier as contractual delivery to the buyer under contractual provisions like those before us.

The f.o.b. destination requirement for physical delivery to destination must be a post-performance, post-payment obligation in the nature of a warranty. Damages for breach of that obligation may appropriately be determined under UCC § 2-714, "Buyer's Damages for Breach in Regard to Accepted Goods," as discussed in 1 above and in C below. But a loss in transit by the common carrier and consequent failure to make physical delivery to destination does not constitute a failure to perform the contract which forfeits the contract price already earned.

C. UCC § 2-714 Damages for Loss and Nondelivery of Accepted Goods Should Be Measured by Value, Not Price, of Lost Items

As I have shown in A and B above, if it is the UCC rather than the Termination for Convenience clause that is to provide the measure of appellant's liability for the lost shipment, the applicable provision is § 2-714, "Buyer's Damages for Breach in Regard to Accepted Goods," not § 2-711, "Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods."

[15] See also additional references under the same Comptroller General case number in note 12 supra.

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As noted in A above, § 2-714(1) entitles the buyer to "recover as damages ... the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable" for any nonconformity of tender of accepted items, including nondelivery to destination. This phraseology focuses not on the contract price but on the loss suffered by the buyer. In this case, this means to me the value of the lost items, because upon acceptance at origin they had become Government property, and upon shipment performance was complete and the items were then fully paid for. The most logical and sensible way to compensate the Government for the total loss of the Government-owned property in transit is to hold appellant liable for, and the Government entitled to recover, the value of the lost property. This would put the Government in the same position it would have been in had the contract been fully performed, *i.e.*, had the items been delivered to destination. This is a classic formulation of the purpose of breach damages at common law. *Miller v. Robertson*, 266 U.S. 243, 257 (1924); 11 Williston on Contracts § 1338, at 198 (3d ed. 1968); Restatement of Contracts (Second) § 344(a). It is also the standard which the UCC itself establishes for the administration of UCC remedies:

> § 1-106. Remedies to Be Liberally Administered
>
> (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed ....

The value of the lost items could, of course, be the same as the price. Indeed, the contract price would generally be a reasonable way to measure value. As I observed in discussing "fair value" under the Termination for Convenience clause in II(D) above, I would normally consider the contract price to be persuasive, *prima facie* evidence of fair value. But not in this case. The items in the lost shipment were worthless except as scrap, not because of any fault of appellant but because of an erroneous Government manufacturing drawing. It would be unconscionable, would give the Government a windfall, and would impose upon appellant a liability totally out of proportion to the true loss for the Government to recoup the entire contract price for the lost shipment of accepted items and thus escape the consequences of its own faulty drawing, because of the happenstance of a loss in transit.

I observe also that using value rather than price as the measure of damages under UCC § 2-714 for nondelivery of accepted items is the practical approach in light of insurance considerations. Official Comment 3 to UCC § 2-509 indicates that the theory underlying the UCC's allocation of risk of loss is based on the practical consideration of which party (as between the buyer and a merchant seller) would be expected to insure the goods. It seems equally appropriate to take into account insurance considerations with respect to the measure of damages for lost accepted goods. In the present record we have no particulars concerning appellant's marine insurance, but it is most likely casualty insurance under which the insurer would pay only for the value of lost property.

Thus I would conclude that appellant's risk of loss under the Responsibility for Supplies and F.O.B. Destination clauses is to be measured under UCC § 2-714 (if not under the termination clause) by the value of the lost property, which was the $400.00 scrap value under the facts of this case.

D. *Authorities Relied Upon by Majority Are Inapposite*

The majority cites *Electro Optics, Inc.*, ASBCA No. 22017, 78-1 BCA ¶ 12,996, *aff'd on reconsideration*, 78-2 BCA ¶ 13,251, for the proposition that the Government is entitled to recover the purchase price of goods accepted at origin, shipped f.o.b. destination, paid for, and then lost in transit.

Electro Optics did not so hold.

That case held that any right the Government may have had to revoke acceptance and recover the price under the UCC or under the contract for nondelivery of accepted items was lost by failure to give timely notice of nonreceipt. It was unnecessary to the decision to address whether there was such a right under the UCC or under the contract, so the suggestion that the Government upon timely notice could have revoked acceptance and recovered the price paid was dictum.

Furthermore, while reading *Electro Optics* as permitting recovery of the price of lost items under UCC § 2-608, the majority does not mention that that provision deals with *revocation of acceptance*. Even though relying on *Electro Optics*, the majority is *not* finding in the present case that the Government could have revoked or did revoke acceptance, and the fact is the Government never did purport to do so and has not even argued that it did.

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Since the majority is *not* finding a revocation of acceptance in the present case, then its reliance on *Electro Optics* and that case's reference to UCC § 2-608 is misplaced.

I emphasize again, as I have said in A above, that the Government could not revoke acceptance in this case. The reasons, more fully explained in footnote 11, are: (1) UCC § 2-608 involves nonconformity of items, which does not include nondelivery due to loss of accepted items in transit; (2) the nondelivery did not "substantially impair [the] value" of the lost items as required under § 2-608 because they were already worthless except as scrap; (3) the Government's notice to appellant of nonreceipt did not meet the § 2-608 requirement for explicit notice of revocation of acceptance; and (4) if nondelivery is a "nonconformity" under § 2-608, then so is it under the Inspection clause, but nondelivery is not a listed exception to the finality of acceptance under that clause, which as an express contract provision overrides the UCC.

Finally, to the extent *Electro Optics* on reconsideration considered the risk of loss clause rather than UCC § 2-608, it did not present the question or discuss how the quantum of the Government's recovery (if the Government had recovered) for a loss in transit might have been affected by a discrepancy between value and price of the lost item, which is the issue before us here.

Apart from *Electro Optics*, the majority states that "[r]ecovery of the purchase price is distinct from recovery of damages," citing an Arkansas decision. I agree with the statement and with the holding of the cited case that a buyer who justifiably and timely revoked acceptance was entitled under UCC § 2-711 to recover the price paid rather than damages for breach of warranty. I just don't see what either one has to do with the present case. This case involves not nonconforming goods as to which the buyer timely and justifiably revoked acceptance, but accepted conforming goods which were lost in transit and as to which revocation of acceptance was not available and was never even attempted.

The other authorities cited by the majority—the *R&L Diesel* case, UCC § 2-711, Williston on Sales, and the White and Summers Hornbook on the UCC—I have discussed in the course of this opinion and have shown do not support the majority's result.

IV. *Interest Under Contract Disputes Act*

I would also hold appellant entitled to interest under section 12 of the Contract Disputes Act, 41 U.S.C. § 611, on the $42,205.30 I would allow on its claim, starting on 13 January 1992, the date the contracting officer received appellant's original, uncertified lost shipment claim.

If appellant's claim was required to be certified, then interest would run only from the date the contracting officer received appellant's resubmitted certified claim. *Fidelity Construction Co. v. United States* [30 CCF ¶ 70,827] 700 F.2d 1379, 1384-85 (Fed. Cir.), *cert. denied,* 464 U.S. 826 (1983).[16] The Government argues that appellant cannot avoid the consequences of failure to certify by splitting off its lost shipment claim under $50,000 from a larger unitary termination claim over $50,000 (an issue mooted in this case with respect to jurisdiction but reserved with respect to the starting date for interest). *Placeway Construction Corp. v. United States,* 920 F.2d 903 (Fed. Cir. 1990); *Giuliani Contracting Co.,* ASBCA No. 41435, 91-2 BCA ¶ 23,774.

Under the *Placeway Construction* standard of "common or related set of operative facts," I would hold that appellant's lost shipment claim is truly an independent claim, not a fragmented part of its larger termination claim. The facts regarding the lost shipment and the Government's offset to recover the price for it are on their face different from the facts regarding costs of performance, delay, and termination settlement relating to other items. Contrary to the Government's assertion, appellant's lost shipment claim was not part of appellant's termination settlement proposal. Any connection between the two claims is purely incidental.

V. *Attorney's Fees and Expenses*

Appellant in its complaint requested attorney's fees and expenses. If appellant were a

[16] [Section IV of Discussion in Dissenting Opinion] The rule on the starting date for interest has been changed by statute, § 907(a)(3) of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, enacted 29 Oct. 1992, but only for periods of interest from 29 October 1992 onward with respect to claims found on or after 29 October 1992 to have been defectively certified. A failure to certify may not qualify as a "defective" certification, *see Eurostyle, Inc.,* ASBCA No. 45934, 94-1 BCA ¶ 26,458 (20 October 1993), but in any event the statutory change would not apply to this case because appellant resubmitted its claim with a certification on 27 April 1992, before the effective date of the statutory change.

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prevailing party in these appeals, we would need to address that request.

I would point out the following.

First, such fees and expenses are generally not recoverable as a direct award before the Board except pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. *Blue Cross Association and Blue Shield Association*, ASBCA No. 25778, 89-2 BCA ¶ 21,840, at 109,896-900 (& authorities cited).

Second, an EAJA request filed before the appellant has prevailed on a substantive portion of the merits is premature. *Hero, Inc.*, ASBCA Nos. 43258, 43259, 92-3 BCA ¶ 25,048; *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed. Cir. 1984).

Third, if it had prevailed, appellant could submit an EAJA application not later than 30 days after the Board's disposition of the appeals became final (assuming appellant is eligible with respect to maximum net worth and number of employees), in accordance with the Board's "Interim Procedures for Claims Under Section 504 of Title 5 of the United States Code (The Equal Access to Justice Act)." [17]

CONCLUSION

For the reasons stated in this dissent, I would hold appellant entitled to recover from the Government the withheld amount of $42,605.30 less the $400.00 scrap value of the lost shipment, or a net of $42,205.30, plus interest under section 12 of the Contract Disputes Act, 41 U.S.C. § 611, from 13 January 1992 (the date the contracting officer received the claim) until the date of payment.

[¶ 26,583] Koehlke Components, Inc.

ASBCA No. 44354, December 13, 1993. Contract No. DLA900-91-D-5119/0001.

Procedure, Boards—Reconsideration—Arguments Already Considered.—A motion for reconsideration arguing that the board should consider whether the contractor was justified in halting production while awaiting government approval of its request for a change in inspection point was denied because the board had already held that there was no nexus between a government inspection delay and the contractor's failure to produce units for inspection.

For the appellant: Shulman & Hall, Dayton, Ohio, by Thomas G. Kramer. For the government: Michael J. Kraft, Trial Attorney, Defense Electronics Supply Center (DLA), Dayton, Ohio.

Before LUSSIER, RUBERRY, and THOMAS, Administrative Judges.

Reconsideration of 94-1 BCA ¶ 26,374 denied.

LUSSIER, Administrative Judge: Appellant has moved for reconsideration of our decision of 22 September 1993 holding that the Government was bound to accept 36 units but that no contract came into being as to 64 undelivered units. Familiarity with our decision is assumed. In its motion for reconsideration the appellant asks the Board to determine whether or not appellant was justified in "halting production" while awaiting Government approval of its request for a change in inspection point. Our decision was clear in concluding that the record did not establish a nexus between the inspection de-

[17] [Section V of Discussion in Dissenting Opinion] I would further observe that a successful litigant against the United States may not recover attorney's fees under the Act if "the position of the United States was substantially justified." *Gava v. United States*, 699 F.2d 1367, 1370 (Fed. Cir. 1983); *Department of Health, State of Cal. v. Secretary of HHS*, 823 F.2d 323, 328 (9th Cir. 1987).

Without deciding at this point whether the Government's position in the present case was "substantially justified," I would note that several important factors tending to show that the Government's position was substantially justified are: (1) that the issue, as in the present case, is "one of first impression," *Gava*, 699 F.2d at 1371; (2) that the case, as here, "presented novel and difficult issues," *Department of Health*, 823 F.2d at 328; and (3) that the case, as here, presents "peculiar circumstances and a "novel situation [where] there was no clear contrary precedent that would permit us to characterize respondent's position as tenuous or unfounded," *Facilities Engineering & Maintenance Corp.*, ASBCA No. 39405, 93-1 BCA ¶ 25,221, at 125,631 (& authorities cited).

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lay and the failure to produce the 64 units for inspection. We specifically held that:

> ... Inspection took place in Tijuana on 16 December and this permitted shipment from appellant's Ohio facility on 27 December. However, there is no evidence to show why only 36 units were inspected. We have a nexus between the issuance of the modification and the date of the Tijuana inspection, but we have no nexus between the issuance of the modification and the limited number of units inspected on 16 December. In this respect we are influenced by the twin facts that appellant never asked for an extension in the delivery date prior to 30 December 1991 and that it has not established, by evidence we would assume would have been available to it, that it had units, in addition to the 36 units it tendered, ready for inspection on 16 December 1991, which the Government refused to inspect.

Appellant contends that since this was a Rule 11 (record submission) no prejudice would result to either party to reopen the record and take evidence on the point. This misses the point. The time to present evidence and argument is prior to the decision, not after. It has not been shown that evidence was not reasonably available at the time of the submission of the appeal for decision.

The motion for reconsideration is denied.

[¶ 26,584] Technocratica

ASBCA Nos. 44347, 44434, 44444, 45360, 45390, 46007, December 22, 1993. Contract No. F63197-91-C-0001.

Payments, Prompt—Interest—Delayed Progress Payments.—A contractor was entitled to interest under the Prompt Payment Act because the government did not pay the contractor within 14 days of receipt of a proper invoice for progress payments. The government was also required to pay an additional penalty of 100 percent of the interest penalty because it did not timely pay the interest owed to the contractor when it paid the principal. Interest on the sum of interest penalty and additional penalty was compounded under the PPA until the date of receipt of the claim, and interest after that date ran under the Contract Disputes Act until the claim was paid.

Payments, Prompt—Interest—Defective Invoice Not Returned.—A contractor was entitled to interest from the 14th day after the date it submitted an invoice to the date of payment, even though the invoice was defective, because the government never returned the invoice with any notice of defects. The invoice did not contain any substantiation of the amount requested. However, if the government fails to notify a contractor within 7 days that its invoice is defective, the Prompt Payment Act provides that the invoice is deemed a proper invoice for purposes of payment and any interest penalty. The government also had to pay an additional penalty of 100 percent of the interest penalty because it failed to pay the interest owed the contractor when it paid the principal or within 10 days thereafter. Interest on the sum of interest penalty and additional penalty was compounded under the PPA until receipt of a claim. After the claim was filed, interest ran under the Contract Disputes Act until the date on which the government made its interest payment.

Payments, Prompt—Construction Contracts—Retainages.—The government was entitled to withhold 10 percent retainage under a construction contract because the contract gave the government the right to take retainage when it viewed job progress as unsatisfactory. A contracting officer retains considerable discretion in deciding whether to take retainage, and in what amounts, up to the limit prescribed by the contract. To prevail, the contractor here had to show that the contracting officer abused his discretion. Even if the cause of the progress failure is a matter of dispute, it is not an abuse of discretion for the government to consider the lack of progress as redounding against the contractor for progress payment purposes.

Payments, Prompt—Interest—Defective Invoice Not Corrected.—A contractor was not entitled to Prompt Payment Act interest on a defective invoice, because instead of correcting the invoice, the contractor filed a claim. Once the government returns a defective invoice to a contractor for correction, the contractor basically has three options—correct and

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return the invoice, correct and return the invoice under protest, or leave the invoice uncorrected and file a Contract Disputes Act claim asserting wrongful government conduct. The latter route is risky, for if the board holds, as it did here, that the government was correct in rejecting the defective invoice, the contractor loses all rights to interest during the interim period and must then file a proper invoice with the contracting officer if it wishes to get paid.

For the appellant: Harry Cossyphas, Owner. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Robert C. Allen, Trial Attorney.

Before DELMAN, RUBERRY, and RIISMANDEL, Administrative Judges.

DELMAN, Administrative Judge: Under ASBCA Nos. 44347, 44434, 44444, 45360 and 45390, appellant, Technocratica, seeks interest under the Prompt Payment Act (PPA), 31 U.S.C § 3901 *et seq.*, for the Government's alleged failure to timely pay progress payments under Invoice Nos. 5 through 9 of its construction contract with the Department of Air Force.

During the pendency of these appeals, the Government made several interest payments to appellant, but now claims that it overpaid. Under ASBCA No. 46007, the Government seeks to recover these overpayments, including an overpayment of interest allegedly made under an earlier invoice.[1]

Appellant has filed other appeals related to this contract, but this opinion will only address the appeals related to prompt payment. Specifically, we shall deal with the timeliness of any principal payments, any interest due as a result, and the extent of any interest overpayments made by the Government.[2] Our jurisdiction lies under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*

I. *The Contractor's Claims for Prompt Payment*

FINDINGS OF FACT

1. In February 1991, the parties entered into a fixed price construction contract for the relocation of several facilities from Hellenikon Air Base, Greece, to a base in Araxos, Greece. Insofar as pertinent, the contract contained the following standard clauses: FAR 52.232-27, Prompt Payment for Construction Contracts (APR 1989); FAR 52.232-5, Payments Under Fixed-Price Construction Contracts (APR 1989); FAR 52.233-1, Disputes (APR 1984).

ASBCA No. 45360—Invoice No. 5

2. The parties dispute the Government's date of receipt of appellant's request for progress payment, Invoice No. 5. At a meeting of the parties on 29 July 1991, the contracting office representative acknowledged that appellant had invoiced in July and that it was awaiting a Government progress report to process appellant's payment (ASBCA No. 44134, R4, tab 8).[3] No defects in the invoice were noted. The Government has conceded that this discussion related to Invoice No. 5 (see Attachment G to appellant's complaint). Appellant introduced a document from the Greek postal service to the effect that Invoice No. 5 was received by the Government on 24 July 1991. (See Attachment B to appellant's complaint)

3. We find that the Government received a proper invoice for payment purposes on 24 July 1991.

4. Appellant made inquiries about payment under Invoice No. 5 but received no information from the Government. By letter dated 18 October 1991, the Government advised appellant that it had never received Invoice No. 5. Appellant resubmitted a copy of the invoice and a contract progress report under protest.

5. The Government did not dispute that appellant was due DR 1,365,000[4] under Invoice No. 5. The Government cut a check in this amount, dated 2 December 1991 (R4, tab 7), but the check did not contain any

[1] In *Technocratica*, ASBCA No. 44059 (7 July 1992; unpublished, Board Rule 12.2) the Board held that appellant was entitled to prompt payment interest due to the Government's failure to timely pay Invoice No. 4, and remanded the computation of interest to the contracting officer. It is the payment of interest made pursuant to this remand that is part of the Government's overpayment action.

[2] Appellant has been paid an amount of principal under each invoice except under Invoice No. 9. Appellant has not demonstrated any entitlement to a recovery of principal beyond that already paid. The Government's retainage under Invoice No. 8 is discussed, *infra*, under ASBCA No. 44434.

[3] At the hearing on appellant's 13 appeals, the Board ruled that evidence under any one appeal would be considered under all appeals.

[4] At all times relevant, the Greek drachma (DR) had the equivalent value of slightly over $.004.

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interest payment. Appellant received this check.

6. Earlier, by letter dated 30 September 1991 appellant had filed a claim for payment for Invoice No. 5 plus interest, interest penalties and other expenses (R4, tab 4). It later withdrew this claim but reasserted it by letter dated 25 May 1992, received by the Government on 2 June 1992 (R4, tab 10). No contracting officer's decision was issued. This appeal followed.

DECISION

We have found that the Government received a proper invoice for payment purposes on 24 July 1991. Under the PPA, the Government was required to pay appellant within 14 days, or by 7 August 1991, to avoid the payment of interest. 31 U.S.C. § 3903(a)(6)(A)(i) [5]. See also the "prompt payment" clause in the contract, FAR 52.232-27(a)(1)(i)(A). The Government did not pay appellant by this date. Under the PPA, interest runs from the date after the required payment date through the date on which payment is made. 31 U.S.C. § 3902(b). The payment date is deemed the date of the check. 31 U.S.C. § 3901(a)(5). The check was dated 2 December 1991. Hence, appellant is entitled to interest on principal from 8 August through 2 December 1991 (117 days).

The Government must also pay an "additional penalty" since it failed to timely pay the interest owed to appellant when it paid the principal, or within ten days thereafter. 31 U.S.C. § 3902(c)(3).[6] The additional penalty is 100 percent of the interest penalty, but may not be less than $25. See OMB Circular No. A-125, 54 FR 52700 (December 21, 1989), which implements the Act, paras. 8(b), (c). Interest on the sum of interest penalty and additional penalty shall compound under the PPA, per 31 U.S.C. § 3902(e), until 2 June 1992, the date of receipt of the claim, and interest shall then run under the CDA until paid.

The appeal is sustained to the extent indicated.

ASBCA No. 44444—Invoice No. 6

FINDINGS OF FACT

7. The parties also dispute the Government's date of receipt of Invoice No. 6. On 7 October 1991, appellant executed its request for progress payment, Invoice No. 6. According to appellant, this request was mailed and received by the Government on 10 October 1991. According to the Government, the invoice was received on 30 October 1991, and was so date stamped. Appellant did not address its request to the designated payment office identified in the contract (tr. 1/21). We find that appellant's invoice was received by the appropriate Government office on 30 October 1991, the date it was stamped.

8. Appellant's invoice was not accompanied by any documentation to substantiate the amount requested. The Government had seven days from receipt to return the invoice and to advise appellant of any defects. 31 U.S.C. § 3903(a)(7)(B). See also the "prompt payment" contract clause in the contract, FAR 52.232-27(a)(2). The Government did not return the invoice, nor advise appellant of any defects.

9. On 19 November 1991, the contracting officer received a contract progress report from appellant which purported to substantiate the amount invoiced.

10. By letter dated 24 October 1991, appellant sought interest and additional penalty for the Government's failure to pay Invoice No. 6, and also requested a decision under the *Disputes* clause. This "claim" was premature since the Government received the invoice on 30 October 1991. However, as of 13 December 1991, appellant still had not received payment. By letter to the Government of that date, deemed received on 20 December 1991, appellant reiterated its concerns and sought a commitment as to when the Government would decide the issue of prompt payment. We read appellant's letters of 24 October and 13 December together, and find that appellant's claim was filed as of 13 December, and received by the contracting officer on 20 December. The Government advised that a decision would issue by 30 December 1991 (R4, tab 6).

11. The Government did not dispute appellant's invoice, in the amount of DR 1,540,680. A check was cut, dated 5 Decem-

[5] We have held that the PPA applies to foreign vendors for work performed outside the United States. *Held and Francke Bauaktiengesellschaft mbH*, ASBCA Nos. 42463, 42464, 92-1 BCA ¶ 24,712.

[6] The Government has conceded that it owes additional penalty on all invoices, except for Invoice No. 9 under ASBCA No. 45390 (tr. 2/102).

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ber 1991, which included this amount for Invoice No. 6. No interest was included in the payment. The check was mailed, postmarked 24 December 1991, and received by appellant on 10 January 1992.

12. On 8 January 1992, the contracting officer issued a decision, denying appellant's claim (R4, tab 7). This appeal followed. Appellant elected an expedited review of its appeal (Board Rule 12.2).[7]

13. On 19 May 1992, the Government cut a check for the payment of interest to appellant under Invoice No. 6 in the amount of DR 683,944. Appellant did not present any evidence at trial disputing the receipt of this money. The Government's payment vouchers are of record (supp. R4, tabs C, D). The instruction "Hold in Cage" on one of the vouchers is deleted and initialed. We find that appellant received this interest payment.

DECISION

Invoice No. 6, as originally filed, did not contain any substantiation of the amount requested, and was defective. 31 U.S.C. § 3903(b)(1)(A). However, the PPA expressly requires the Government to notify a contractor of any defects in the invoice which would preclude payment. House Report No. 97-461, which accompanied the original Act (reprinted in 2 U.S. Code Congressional and Administrative News 111 (1982)), explained this requirement as follows at 119:

> ... By including this provision, the Committee is placing a burden on the Government to advise a contractor when it cannot pay an invoive [sic] because of some impropriety or defect in the invoice. The Committee intends thereby to eliminate those situations in which vendors have remained unpaid for inordinate amounts of time with no knowledge of the reasons for the Government's failure to remit.

Through the PPA Amendments of 1988, Pub. Law No. 100-496, 102 Stat. 2463, the Congress sought to strengthen this requirement. While the original Act required the Government to merely notify a contractor of defects within 15 days of receipt of invoice, the Act, as amended, requires the Government to return the contractor's invoice with an explanation of defects, and to do so within seven days of receipt. 31 U.S.C. § 3903(a)(7)(B).

It is also clear that the Congress intended to penalize the Government if it failed to meet the statutory notification requirement. According to House Report No. 100-784, reprinted at 5 U.S. Code Congressional and Administrative News 3036, 3058 (1988), if the agency was late in returning the invoice, that is, it took more than seven days to do so, "the number of days available for an agency to make a timely payment after receipt of a corrected invoice would be reduced by the number of days, in excess of 7, that the agency took before returning the defective notice to the vendor." See 31 U.S.C. § 3903(a)(7)(C).

In our case, however, the Government was not merely late in returning the invoice; it did not return the invoice at all. It appears that the Congress contemplated an appropriate sanction for this as well. House Report No. 97-461, which accompanied the original Act, *supra* at 119, provided as follows:

> If the Government receives a defective notice but fails to notify the vendor of such within the [prescribed] period, then *such interest penalties as may become appropriate if that invoice remains unpaid will accrue as if the Government had received a proper invoice.* Failure by the Government to so notify ... does not preclude the Government's right to request and receive a proper invoice prior to paying the vendor. [Emphasis added]

Simply stated, where the Government fails to meet its statutory responsibilities of notification, the defective invoice is deemed a "proper invoice" for purposes of payment and any interest penalty.

Because the Government never returned Invoice No. 6 to appellant with notice of any defects, appellant's invoice, received on 30 October 1991, is deemed a proper invoice. The Government had until 13 November 1991 to pay the invoice without interest penalty. It did not pay appellant by this date. Appellant is entitled to interest on the principal from 14 November 1991 through the date of payment, 5 December 1991 (22 days). The Government must also pay an additional penalty since it failed to timely pay the interest owed to appellant when it paid the principal, or within ten days thereafter. 31 U.S.C. § 3902(c)(3). As stated ear-

[7] Appellant sought to have all its appeals, both Rule 12 (ASBCA Nos. 44347, 44434, 44444) and non-Rule 12 (ASBCA Nos. 45360, 45390, 46007) heard in Greece, and heard consecutively. Because appellant agreed to hold these hearings well beyond the time set for Rule 12 decisions, appellant effectively waived expedited review. We treat all appeals as if processed under regular procedures.

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lier, the additional penalty is 100 percent of the interest penalty, but may not be less than $25. OMB Circular No. A-125, paras. 8(b), (c). Interest on the sum of interest penalty and additional penalty shall compound under the PPA until 20 December 1991, the purported date of receipt of the claim. Interest shall then run under the CDA until 19 May 1992, the date on which the Government made its interest payment.

The appeal is sustained to the extent indicated.

ASBCA No. 44347—Invoice No. 7

FINDINGS OF FACT

14. On 7 November 1991, appellant handdelivered to the Government a request for progress payment, Invoice No. 7. This invoice was accompanied by a contract progress report for the period 28 October through 4 November. We find the Government received a proper invoice for payment purposes on 7 November 1991.

15. The Government has not disputed that appellant is entitled to DR 333,615 under this invoice. It cut a check for this amount, dated 5 December 1991, which was received by appellant. No interest was included with the payment. As of 31 December 1991, however, appellant had not received the check, and by letter of that date it submitted a claim for principal, interest and penalty. The claim was received by the Government on 14 January 1992.

16. By contracting officer's decision dated 20 April 1992, the Government denied appellant's claim (R4, tab 8). This appeal followed.

DECISION

The Government received a proper invoice from appellant on 7 November 1991. The Government was obligated to pay appellant the undisputed amount of DR 333,615 by 21 November 1991 to avoid the payment of interest. It did not do so. The Government's check was dated 5 December. Appellant is entitled to interest penalty on the principal for 14 days (22 November through 5 December) due to the late payment of this invoice. The Government must also pay an additional penalty since it failed to timely pay the interest owed to appellant when it paid the principal, or within ten days thereafter. 31 U.S.C. § 3902(c)(3). The additional penalty is 100 percent of the interest penalty, but may not be less than $25. OMB Circular No. A-125, paras. 8(b), (c). Interest on the sum of interest penalty and additional penalty shall compound under the PPA until 14 January 1992, the date of receipt of the claim. Interest shall then run under the CDA until the date of payment.

The appeal is sustained to the extent indicated.

ASBCA No. 44434—Invoice No. 8

FINDINGS OF FACT

17. On 21 December 1991, appellant executed a request for progress payment, Invoice No. 8. This request was received by the Government on 30 December 1991. The invoice did not include any data substantiating the amount requested.

18. As far as this record shows, the Government failed to return this invoice within seven days after receipt of the invoice.

19. Since appellant had received neither notice nor payment from the Government by 1 February 1992, it filed a claim for principal, interest and penalty as of that date, and also requested a contracting officer's decision (R4, tab 3). For purposes of interest computation, we deem the claim received by the contracting officer on 10 February 1992.

20. On 6 February 1992, the Government received a contract progress report from appellant, which purported to support the amounts sought in Invoice No. 8.

21. On 21 February 1992, the Government cut a check for Invoice No. 8 in the amount of DR 240,203, without interest payment. This payment was received by appellant on 19 March 1992. The Government withheld 10 percent from this invoice as retainage for lack of job progress, pursuant to the "payments" clause of the contract, FAR 52.232-5(e).

22. The Government failed to issue a contracting officer's decision on appellant's claim. This appeal followed.

23. On 19 May 1992, the Government cut a check for the payment of interest under Invoice No. 8 in the amount of DR 56,133. Appellant did not present any evidence at trial disputing the receipt of this money. The Government payment vouchers are of record (supp. R4, tabs D, E). The instruction "Hold in Cage" on one of the vouchers is deleted and initialed. We find that appellant received this payment.

24. Appellant also claims that the Government wrongfully withheld 10 percent retainage from Invoice No. 8. As far as the record shows, this was the only invoice from which the Government took retainage. According to appellant, since the Government

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ultimately extended the contract completion date, it could not be responsible for any lack of progress. The work under Invoice No. 8 was performed in December, 1991, during which time the parties were in dispute over the slab that appellant poured for FAC 361. As a result, the work on this facility slowed. As far as we can tell, the Government did not extend the contract period because of this dispute.

DECISION

The Government failed to return appellant's invoice with an explanation of any defects. For reasons stated under ASBCA No. 44444, we deem the invoice received on 30 December 1991 to be a proper invoice for purposes of payment. The Government had until 13 January 1992 to pay appellant without paying interest. Appellant was paid with a check dated 21 February 1992. Appellant is entitled to 39 days of interest on the amount of principal paid (14 January through 21 February). The Government must also pay an additional penalty since it failed to timely pay the interest owed to appellant when it paid the principal, or within ten days thereafter. 31 U.S.C. § 3902(c)(3). The additional penalty is 100 percent of the interest penalty, but may not be less than $25. OMB Circular No. A-125, paras. 8(b), (c). Interest on the sum of interest penalty and additional penalty shall run under the PPA until receipt of appellant's claim, 10 February 1992. Interest shall then run under the CDA until the date on which the Government paid interest, 19 May 1992.

As for the retainage held by the Government, the contract gives the Government the right to take retainage when it views job progress as unsatisfactory. FAR 52.232-5(e). The contracting officer retains considerable discretion in deciding whether to take retainage and in what amounts, up to the limit prescribed by the contract. To prevail, appellant must show that the contracting officer abused this discretion. Even if the cause of the progress failure is a matter of dispute, we have held that it is not an abuse of discretion for the Government to consider the lack of progress as redounding against the contractor for progress payment purposes. *Fortec Constructors*, ASBCA No. 27480, 83-2 BCA ¶ 16,727. Appellant has failed to show an abuse of discretion on this record. The Government was within its contractual right to withhold 10 percent from Invoice No. 8.

The appeal is sustained to the extent indicated.

ASBCA No. 45390—Invoice No. 9

FINDINGS OF FACT

25. On or about 27 July 1992, appellant executed a request for progress payment, Invoice No. 9. Along with this request, appellant attached a contract progress report for the period covering 13 July to 19 July 1992. In this report, appellant also demanded payment for 25 percent of work performed under contract modification P0004.[8] The Government received these documents on 3 August 1992.

26. By letter to appellant dated 4 August 1992, the Government returned Invoice No. 9 as defective. According to the Government, appellant erroneously calculated the amount due because, among other things, it failed to account for the previous retainage taken under Invoice No. 8.

27. We find that Invoice No. 9 provided a line item for "previous retainage", and that appellant failed to account for said retainage in computing amounts owed under Invoice No. 9.

28. Appellant did not revise its payment request, nor did it resubmit it to the contracting officer. Instead, appellant filed a claim. By letter to the contracting officer dated 31 August 1992, appellant sought payment of Invoice No. 9 including payment under Modification P0004, plus interest, and "financing" costs (R4, tab 5).

29. The Government did not issue a contracting officer's decision on this claim. This appeal followed.

DECISION

Invoice No. 9 was defective. Appellant failed to account for previous retainage in its progress payment request. It was the Government's duty to bring this error to appellant's attention in a timely fashion and it did so. While we hear appellant to argue that the contracting officer could have corrected the math on the invoice, neither the PPA, OMB Circular No. A-125, nor the contract requires this. The Act requires that the Government return the invoice so that the contractor may correct it.

[8] Appellant also made a demand for payment under Modification P0003, but it was later dropped in its claim letter of 31 August 1992.

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Once the Government returns an invoice to a contractor for correction, the contractor basically has three options—correct and return the invoice; correct and return the invoice under protest; leave the invoice uncorrected and file a CDA claim asserting wrongful Government conduct. The latter route is risky, for if the Board holds that the Government was correct in rejecting the invoice, the contractor loses all right to interest during the interim period, and must then file a proper invoice with the contracting officer if it wishes to get paid.

Here, appellant took the risk of filing a claim without correcting its invoice. We have concluded that Invoice No. 9 was defective and properly returned by the Government. Hence, appellant must now submit a proper invoice if it wishes to be paid under Invoice No. 9.

The appeal is denied.

II. *The Government's Claim for Overpayment*

ASBCA No. 46007

FINDINGS OF FACT

30. By contracting officer's decision dated 8 April 1993, the Government calculated interest due appellant for late payment of principal under Invoice Nos. 4 through 8, identified the amount of interest already paid by the Government, and demanded the difference from appellant, in the amount of DR 886,041 which it claimed it had overpaid (exh. G-8). This appeal followed.

31. In the Board's unpublished decision in *Technocratica, supra, note* 1, the Board held that the Government was accountable for the late payment of Invoice No. 4, and that appellant was owed prompt payment interest for 14 days, plus additional penalty, plus interest. The Board remanded quantum to the parties.

32. On remand, the Government calculated the amount of interest due as DR 6,244, and the amount due for additional penalty as 100 percent of this amount, or an additional DR 6,244. However, the Government failed to consider that this interest award also accrued interest, to be compounded every 30 days until receipt of the CDA claim (here 16 October 1991). See 31 U.S.C. § 3902(e). OMB Circular No. A-125, para. 7(a)(4). We find that this corrected sum constitutes the interest award due appellant under Invoice No. 4, plus interest under the CDA from 16 October 1991 until the date the Government paid the interest, 9 September 1992 (see below).

33. On 9 September 1992, the Government cut a check for the payment of interest under Invoice No. 4 in the amount of DR 185,090. Appellant did not present any evidence disputing the receipt of this money. The Government payment vouchers are of record (supp. R4, tabs A, B). We find that appellant received this payment. We also find that it exceeds the interest award due appellant under Invoice No. 4.

34. On 19 May 1992, the Government also paid appellant interest in the amount of DR 683,944 related to Invoice No. 6 (finding 13), and in the amount of DR 56,133 related to Invoice No. 8 (finding 23), for a total of DR 740,077. The interest due appellant under these invoices is set out under ASBCA Nos. 44444 and 44434 above. We find that the amount paid by the Government under Invoice Nos. 6 and 8 exceeds the interest award due appellant under these invoices.

DECISION

There is no question that the Government is entitled to recover payments erroneously made to a contractor. *Affiliated Building Maintenance*, ASBCA No. 28436, 85-1 BCA ¶ 17,863. *Foreman Industries, Inc.*, ASBCA No. 23948, 80-2 BCA ¶ 14,501. We conclude that the Government has overpaid appellant interest under Invoice Nos. 4, 6 and 8, and is entitled to recover the difference between the amount due appellant, and the amount actually paid to appellant, in accordance with this opinion. We remand to the contracting officer to determine quantum.

As for Invoice Nos. 5 and 7 under ASBCA Nos. 45360 and 44347 respectively, while we have concluded that appellant is entitled to interest for the late payment of principal on these invoices, the Government may offset the amounts due against its claim for overpayment. It may also apply any retainage held under the contract towards its claim. See *Foreman Industries Inc., supra*. We remand to the contracting officer to determine quantum.

CONCLUSION

ASBCA No. 45390 is denied. All other appeals are sustained to the extent indicated and are remanded to the contracting officer to determine quantum.

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[¶ 26,585] **Kimmins Contracting Corporation**

ASBCA Nos. 44268, 44642, 44643, December 23, 1993. Contract No. F09650-89-C-0081.

Interpretation of Contracts—Contract as a Whole—Rectifier Coating.—Under a contract to renovate a military plating shop, a contractor's position that the specifications permitted it to use epoxy coating for rectifier enclosures rather than the polyvinyl chloride coated rectifiers insisted upon by the government was unreasonable because the contractor's position ignored relevant provisions and conflicted with the rule that a contract should be construed as a whole to give effect to all provisions. The contractor contended that the phrase "exposed electrical iron work" used in the electrical specifications included the rectifier enclosures and that it was justified in relying on the option provided in this specification of using either the polyvinyl chloride coating or an epoxy coating. This specification, however, stated that it was applicable except as specified in other individual sections, and the rectifier specification specifically stated that all rectifier enclosures would be polyvinyl chloride coated.

Interpretation of Contracts—Interpretation During Performance—Manifested Intent.—Under a contract to repair and renovate a plating shop, the contractor's contention that it reasonably viewed a mechanical room as an exterior surface requiring an enamel coating rather than a coat of epoxy was rejected because the contractor's action during the course of performance clearly manifested its understanding that epoxy finish was required on the steel surfaces within the mechanical room. The specification did not state whether the mechanical room was considered an interior or exterior surface, and the contractor did not ask whether the mechanical room steel was interior or exterior. However, the contractor's field painting schedule proposed epoxy primer and finish coats for surfaces within the mechanical building. Further, the contractor asked the government whether enamel was acceptable instead of epoxy after it received enamel-painted steel items for the mechanical room.

Acceptance of Performance—Rejection of Nonconforming Items—Economic Waste.—Under a contract to repair a plating shop, the government's direction that a contractor remove enamel paint from coil rack steel in a mechanical room and apply a primer or epoxy coating did not amount to economic waste, because the contractor failed to demonstrate that the nonconforming enamel coat was fit for its intended purpose. The paint manufacturer had recommended a primer and could not guarantee that its enamel finish coats would adhere to steel. In fact, the contractor had encountered a problem in getting the second enamel coat to adhere to the unprimed first coat.

Interpretation of Contracts—Painting—Primer Coat.—Under a contract to renovate a plating shop, the contractor's interpretation of the painting schedule as not requiring a primer coat before the application of two coats of enamel to exterior stack steel was rejected because the contractor's reading of the provision specifying where enamel was suitable was unreasonable. The specification at issue stated that enamel paint "was suitable for use on primed exterior and interior wood and metal surfaces" and "was intended for primed exterior and interior wood or metal." The contractor took the position that the word "primed" modified only exterior wood, not metal. The more natural meaning of the specification, however, was that the word "primed" modified surfaces, the object of the prepositional phrase, and thus modified both wood and metal surfaces.

For the appellant: Watt, Tieder & Hoffar, McLean, Virginia, by Robert G. Watt and Barbara G. Werther. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Michael F. Copley and Capt. Thomas J. Helget, USAF, Trial Attorneys.

Before JAMES, RUBERRY, and PAUL, Administrative Judges.

JAMES, Administrative Judge: These consolidated appeals arise from the contracting officer's final decisions denying appellant's claims for additional compensation for PVC coating rectifier enclosures, epoxy coating mechanical room coil rack steel, and priming exterior stack steel for the Robins Air Force Base plating shop. We have jurisdiction of these appeals under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* After a five-day hearing in Savannah, GA, both par-

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ties submitted post-hearing and reply briefs.[1] We decide only entitlement.

FINDINGS OF FACT

A. General Findings

1. On 16 August 1989 the parties entered into contract F09650-89-C-0081 ("contract 81") for the repair and renovation of the Robins Air Force Base, GA, plating shop, building 142 for the fixed price of $14,123,000 (R4, tab 1).[2]

2. Contract 81 contained the usual fixed price construction contract clauses including FAR 52.246-12 "Inspection of Construction (JUL 1986)," which provided:

> (f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price.

(R4, tab 1)

3. Contract 81 required performance in sequential phases I, II, and III, in defined contiguous areas, to permit respondent to operate the plating shop during appellant's demolition and construction work (R4, tab 1, spec. § 01005, ¶ 1.2, § 01652, ¶ 2.1).

4. Contract 81 required appellant to install in phases I, II, and III (a) 38 rectifiers, (b) mechanical room coil rack steel and (c) exterior stack steel (R4, tab 1, spec. § § 16C and 01005, ¶ ¶ 2.1.13, 2.3.1, 2.3.2).

5. Contract 81's specification § 01300, "SUBMITTALS AND CONTRACTOR FURNISHED ITEMS," provided that items requiring manufacturer's literature be submitted to the contracting officer for approval, but such approval would not relieve the contractor from strict compliance with the specifications. The ¶ 5.4 submittal list in § 01300 provided:

> § 9A ¶ 4.1 Color Catalog and Samples
>
> § 9B ¶ 4.1 Color Catalog, Samples and Manufacturer's Literature.

(R4, tab 1)

6. Contract 81's specification § 9A, "PAINTING," provided:

> ¶ 2.1 This section includes ... exterior finish painting .... Interior finish painting shall be as specified in SECTION [9B]: EPOXY COATING.
>
> ¶ 3. APPLICABLE STANDARDS
>
> * * *
>
> ¶ 3.2 Meet requirements and recommendations of applicable portions of the latest edition of the Publications listed.
>
> ¶ 3.2.1 Federal Specifications. (FED. SPEC.)
>
> TT-E-489G-80 Enamel, Alkyd, Gloss (For Exterior and Interior Surfaces)
>
> * * *
>
> ¶ 4.1 Items listed shall be submitted ...: Color catalog ... Samples.
>
> * * *
>
> ¶ 13.1 Apply painting materials according to manufacturer's instructions and recommendations ....
>
> * * *
>
> 14. PAINTING SCHEDULE

Surface	*1st Coat*	*2nd Coat*	*3rd Coat*
d. New and existing exterior ferrous metal.	FED. SPEC. TT-E-489 Class A or FED. SPEC. TT-E-1593	FED. SPEC. TT-E-489 Class A or FED. SPEC. TT-E-1593	None

[1] The Board disregards certain extra-record information improperly cited: (i) Exhibit A-31, on p. 76 of appellant's initial brief, since A-31 was not received in evidence; and in appellant's reply brief: (ii) "Exhibit 1," Allen deposition, never offered or received in evidence; (iii) "Exhibit A-51 in ASBCA No. 46340," which appeal was not consolidated with the six appeals decided herein; (iv) transcript p. "5-175," apparently from ASBCA No. 42671 *et al.*, which transcript the Board has not yet received, for the same reason as the preceding item; and (v) "Exhibit 2," Sauer deposition, which was trial exhibit A-67, not offered or received in evidence (tr. 1/10).

[2] Contract F09650-89-C-0081, with its specifications, contract drawings and 27 modifications, constitute ASBCA No. 43800 R4, Tab 1, and are incorporated by reference as R4, tab 1, in ASBCA Nos. 44268, 44642 and 44643 and all other Kimmins appeals under contract 81.

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e. New and existing FRP [fiberglass reinforced polyester] exhausters and stacks.	FRP Primer	FED. SPEC. TT-E-489 Class A	FED. SPEC. TT-E-489 Class A

(R4, tab 1, spec. § 9A; tr. 2/70-71, 75)

7. Federal Specification TT-E-489G-80 provided:

> ¶ 1.1 *Scope.* This specification covers an alkyd gloss enamel suitable for use on primed exterior and interior wood and metal surfaces.
>
> * * *
>
> ¶ 4.3.3 *Test Panels.* [A]ll panels for test purposes shall be ... aluminum alloy .... When primed panels are specified, primer conforming to TT-P-1757 shall be applied.
>
> * * *
>
> ¶ 6.1 *Intended Use.* This specification covers a high-grade alkyd-type high-gloss enamel intended for use on primed exterior and interior wood or metal but particularly on smooth, exterior metal .... Its main use is for ... automobiles and construction equipment.

(Exh. A-1)

8. Contract 81's specification § 9B, "EPOXY COATING" for interior surfaces, as modified by solicitation amendments 0001 and 0003, provided:

> ¶ 4.1 Items listed shall be submitted ...: Color catalog ... Samples ... Manufacturer's Application Instructions.
>
> * * *
>
> ¶ 10. PRE-COATED ITEMS
>
> ¶ 10.1 Coating at site will not be required for items completely finished before delivery.
>
> * * *
>
> ¶ 16.3 Ferrous metal, other than galvanized, including structural steel ... DC Bus and rectifiers ... (existing and new other than pre-coated items).
>
> * * *
>
> ¶ 16.3.1.1 First coat: Corrosion Resistant Primer with Type I system or Primer 28 with Type II system.
>
> ¶ 16.3.1.2 Second coat: Epoxy Coating
>
> ¶ 16.3.1.3 Third coat: Epoxy Coating

(R4, tab 1, spec. § 9B; exh. A-77, A-79)

9. Contract 81 specification § 16A, "GENERAL REQUIREMENTS, ELECTRICAL," as modified by solicitation amendment 0003, stated:

> ¶ 1.2 This section applies to all sections in Division 16 of the specifications, except as specified otherwise in the individual sections.
>
> * * *
>
> ¶ 19.1 All new exposed electrical ... iron work shall be epoxy coated by the Contractor or be factory applied 40 mil PVC coated .... paint application shall be in accordance with SECTION: EPOXY COATING, if done by the contractor.

(R4, tab 1, spec. § 16A; exh. A-79; ASBCA 44268, R4, tab 29)

10. Contract 81 specification § 16C, "RECTIFIERS," provided in pertinent part:

> ¶ 5.2.2.1 Enclosures: Rectifier cabinets shall be ... fabricated of sheet steel [and] shall be PVC coated as a unit after all welding and cutting is complete, in accordance with Paragraph: PROTECTIVE COATING.
>
> * * *
>
> 5.6 Protective Coating: The rectifier cabinets shall be PVC coated in accordance with Military Specification MIL-T-704M(11).

Table 2 specified in which of 21 enclosures or cabinets to install 38 designated rectifiers. (R4, tab 1, spec. § 16C)

B. ASBCA No. 44268: Rectifier Enclosures

11. On 10 October 1989 appellant subcontracted with W. H. Howell and Associates (Howell) for contract 81 electrical work, including rectifiers in accordance with specification § 16C (exh. A-8). According to appellant, the Kimmins-Howell subcontract provisions:

> Rectifiers shall be painted with a factory finish color that is epoxy based .... All rectifier cabinets shall be PVC coated in accordance with ... MIL-T-704M(11)

gave Howell the option of field epoxy or factory PVC coated rectifier cabinets (tr. 2/18-19). Appellant's subcontractor painting work schedule for § 16C rectifiers said "Factory Finish" and "PVC Coated" (exh. A-106; tr. 2/109-10).

12. On 30 November 1989 Howell and Rapid Power subcontracted for 38 PVC-coated "rectifiers and enclosures" in accordance with specification § 16C, which subcontract did not specify § 16A, ¶ 19.1, field epoxy coated rectifiers (exh. G-22; tr. 3/234-37). Howell said he contemplated a

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deductive change order to Rapid if the field epoxy option became economically advantageous, but did not actually issue one (tr. 3/236, 241-42, 249).

13. Appellant's 26 July 1990 submittal No. 88 proposed three Phase I, sheet steel, PVC-coated, D.C. rectifiers and enclosures, which respondent approved on 2 August 1990 (ASBCA 44268, R4, tab 10). Rapid Power delivered and Howell installed three Phase I, PVC-coated rectifiers and enclosures (tr. 2/124, 3/237).

14. On 28 September 1990 contract 81 bilateral modification P00005 changed the specification § 9B, ¶ 16.3, phrase "DC Bus and rectifiers" to "bus duct," expressly eliminating rectifiers from the epoxy painting provisions of § 9B. P00005 did not alter the provisions of § 16C, ¶ 5.6, for PVC coated rectifier cabinets or § 16A, ¶ 19.1, for epoxy painting of field manufactured ironwork exposed to the elements and the atmosphere (exh. G-26; tr. 2/34, 3/257-59).

15. For financial reasons Howell discontinued performance of its Kimmins subcontract in the early part of Phase II. Appellant completed the installation of rectifiers. (Tr. 2/21-22, 124, 3/238-39)

16. Appellant's 15 May 1991 purchase order with Rapid Power included 35 type 304 stainless steel rectifiers and enclosures as an alternative to PVC-coated steel, for a $6,170 price reduction, if approved by respondent (exh. A-34; tr. 2/29-30).

17. Appellant's submittal No. 175 of 23 May 1991 proposed 13 Phase II rectifiers with stainless steel enclosures. Respondent disapproved it on 31 May 1991, stating "PVC coated steel is required." (ASBCA 44268, R4, tab 11)

18. Appellant's submittal No. 181 of 20 June 1991 proposed 23 Phase III rectifiers with PVC-coated stainless steel enclosures. Respondent disapproved submittal No. 181 on 1 July 1991, stating that the submittal stated "All rectifier enclosures shall be PVC coated, but all drawing [sic] show stainless steel cabinets." (ASBCA 44268, R4, tab 12)

19. Appellant's resubmittal No. 175A of 2 July 1991, which respondent approved on 8 July 1991, proposed 12 Phase II, PVC-coated steel rectifiers and cabinets (ASBCA 44268, R4, tab 13).

20. Appellant's resubmittal No. 175B of 10 July 1991 proposed to coat rectifier enclosures with epoxy in accordance with specification § § 9B, ¶ 16.3, and 16A, ¶ 19.1, which respondent disapproved on 16 July 1991, stating that rectifiers were eliminated from § 9B, ¶ 16.3, and that § 16C, ¶ 5.2.2.1 required PVC-coated rectifiers (ASBCA 44268, R4, tab 14).

21. Appellant's resubmittal No. 181A of 24 July 1991, which respondent approved on 30 July 1991, proposed 23 Phase III, PVC-coated steel rectifiers and cabinets (ASBCA 44268, R4, tab 15).

22. Appellant's 12 August 1991 letter to respondent stated that specification § 16A, ¶ 19.1, provided an epoxy field coating alternative for rectifier enclosures, so disapproval of resubmittal No. 175B was a "changed condition" for which appellant would submit a change order request (COR), designated No. 95 (ASBCA 44268, R4, tab 16).

23. Respondent's 22 August 1991 letter to appellant stated that the interpretation of specification § 16A, ¶ 19.1, to classify rectifiers as "other iron work [was] an extreme stretch of the imagination" and that its previous rectifier submittals had proposed PVC-coated enclosures (ASBCA 44268, R4, tab 18).

24. Appellant's resubmittal No. 175C of 13 November 1991, which respondent approved on 21 November 1991, proposed Phase II, PVC-coated steel rectifier cabinets (ASBCA 44268, R4, tab 20).

25. Appellant's two 31 December 1991 letters to respondent on COR No. 95 claimed $8,795.74 for respondent's rejection of Phases II and III stainless steel rectifier enclosures and $55,595.22 for elimination of the rectifier enclosure epoxy coating alternative, which appellant said it erroneously had omitted from its price submissions for contract 81 Revision No. 2 (ASBCA 44268, R4, tabs 21, 22).

26. Appellant's 9 January 1992 letter to respondent submitted a claim certification for COR No. 95 (ASBCA 44268, R4, tab 24).

27. The 9 March 1992 final decision of the contracting officer denied appellant's COR No. 95 rectifier enclosure coating claim (ASBCA 44268, R4, tab 28). Appellant timely appealed that decision to this Board.

28. Appellant installed PVC-coated rectifier enclosures for Phases II and III (tr. 2/57).

DECISION, ASBCA No. 44268

Appellant has the burden of proving that respondent's disapprovals of stainless steel and of epoxy coated rectifier enclosures were constructive change orders. *Kimmins Con-*

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tracting Corp., ASBCA No. 44513, 94-1 BCA ¶ 26,411, (6 Oct. 1993), *Kimmins Contracting Corp.*, ASBCA No. 44265, 94-1 BCA ¶ 26,348 (20 Sept. 1993). The dispositive issue is whether the contract required PVC coated rectifier enclosures.

To prevail appellant must prove that the contract specification allowed epoxy coated rectifier enclosures and respondent erroneously rejected appellant's epoxy coating submittals for rectifier enclosures. Appellant argues that contract 81's specification § 16A, ¶ 19.1, phrase "exposed electrical iron work" includes rectifier enclosures and therefore entitles it to epoxy coat Phases II and III field manufactured rectifier enclosures. Appellant's argument ignores the § 16C, ¶ 5.6, requirement for PVC coated steel rectifier enclosures.

We need not, and do not, decide whether rectifier enclosures are "exposed iron work" within § 16A, ¶ 19.1; whether the Howell electrical subcontract actually provided an "option" of field epoxy coating rectifier enclosures; whether appellant, when it began to perform Phase II, first conceived the § 16A, ¶ 19.1, field epoxy coating "option" for rectifier enclosures; or whether the parties' Phase I course of dealing established the mutual understanding that rectifier enclosures must be PVC coated.

Interpreted in isolation, the epoxy option in § 16A, ¶ 19.1 (if considered applicable to enclosures), and the PVC coating requirement in § 16C, ¶ 5.6, apparently conflict. Such apparent conflict is readily resolved by § 16A, ¶ 1.2, which states that § 16A terms, including ¶ 19.1, are applicable "except as specified otherwise in the individual sections" of Division 16 (finding 9). Section 16C, ¶ 5.6, specifies otherwise: rectifier enclosures must be PVC coated (finding 10). Therefore, § 16A, ¶ 19.1, is inapplicable to rectifier enclosures.

The foregoing syllogism harmonizes sections 16A, ¶ 19.1, and 16C, ¶ 5.6. Appellant's argument ignores § 16C, ¶ 5.6, and conflicts with the elementary rule which requires us to construe a contract as a whole so as to harmonize and give effect to all its provisions, leaving no provision void, inoperative, meaningless or superfluous. *Julius Goldman's Egg City v. United States* [30 CCF ¶ 70,662], 697 F.2d 1051, 1057 (Fed. Cir. 1983); *Kimmins Contracting Corp.*, ASBCA No. 44265. We deny the appeal.

C. ASBCA Nos. 44642 and 44643: Coil Rack and Exterior Stack Steel

29. The coil rack had steel frames, columns and channels upon which 14 heating coils were mounted (exh. G-29; tr. 4/61). Contract 81 specification § 5A, MISCELLANEOUS METAL, ¶¶ 15.1 and 16.1, required epoxy coating of "[m]iscellaneous plates and shapes for items that do not form a part of structural steel framework, such as ... equipment mounting, and frames" and § 5B, STRUCTURAL STEEL, ¶ 11.1-11.4, required epoxy painting of all structural steel, in accordance with specification § 9B.[3] (R4, tab 1)

30. The contract 81 specification does not define exterior and interior surfaces (tr. 2/60, 5/54). The building 142 mechanical room is exterior to the plating shop but within that building (tr. 2/98-101).

31. George Robinson, appellant's bid preparer, (a) interpreted specification § 9A to include surfaces outside the plating shop proper; (b) did not ask respondent whether the mechanical room was interior or exterior; (c) knew that FED. SPEC. TT-E-489G enamel was intended for use on *primed* exterior and interior metal surfaces; and (d) concluded that such enamel was intended for "smooth metal outside without a primer" (tr. 2/58-64, 101).

32. The record contains no evidence of any trade practice or of the parties' course of dealing to support the proposition that a "smooth" surface is an "unprimed" surface. Mr. Robinson's field painting schedule for steam heating coil frames stated "Prime & Intermediate Coat" upon arrival on site (exh. A-106; tr. 1/102, 2/108).

33. On 5 and 6 February 1990, respectively, respondent approved appellant's submittals (a) No. 21 for coil rack steel with Glidden epoxy primer No. 10309-10414, equal to its No. 5461, and Glidden epoxy finish No. 5250-5242 (exh. G-29; tr. 4/62) and (b) No. 23 for specification § 9B interior metallic surfaces with Glidden epoxy primer No. 5461 and epoxy finish No. 5240/5242, whose descriptive literature listed eight alternate ferrous metal surface primers (ASBCA 43800, R4, tab 2).

34. On 21 March 1990 respondent approved appellant's submittal No. 34 to paint specification § 9A, ¶ 14.d, exterior ferrous metal surfaces with Glidden enamel 4550,

[3] Appellant argues that the coil rack steel was not § 5A "miscellaneous metal" but rather § 5B "structural steel." We need not decide which interpretation is correct, because both specification sections required epoxy primer and finish paint; neither permitted enamel painting.

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whose product literature listed three alternate primers for ferrous metal surfaces but did not mention fiberglass reinforced polyester surfaces (ASBCA 44642, R4, tab 4; exh. G-36, -37).

35. In early August 1990 appellant's project engineer, David Cordova, told respondent's inspector, John Fehr, that the coil rack steel was enamel coated, and asked if that was acceptable in order to avoid a week's steel shipment delay to replace enamel with epoxy. Fehr said that enamel was acceptable for the coil rack steel. The contracting officer was not notified. At that time appellant was unaware that the coil rack and stack steel surfaces were not primed. (ASBCA 44642, R4, tab 9; exh. G-37; tr. 2/74, 4/53-56, 144-45)

36. On 6 August 1990, appellant learned that stack and coil rack steel was not primed and their 2 August enamel second coat was not dry (exh. G-37).

37. On 14 August 1990, while coil racks were being erected, appellant told respondent that the stack and coil rack steel was not primed. Dennis Keene, Government construction manager, told appellant that unprimed Phase I stack steel was acceptable. On 15 August 1990 Keene told appellant to remove enamel from, and to put primer or an epoxy system on, the coil rack steel. (ASBCA 44642, R4, tabs 5, 28; tr. 2/69, 4/57, 226-31, 5/58)

38. Appellant's two 15 August 1990 letters to respondent stated that (a) appellant considered respondent's instruction to remove enamel from the coil rack steel to be a change, designated COR No. 22; (b) specification § 9A, ¶ 14.d, was defective since it specified no primer coat; and (c) Glidden does recommend a primer and cannot guarantee that the submitted paint will adhere to the steel because it is not formulated as a primer and the "finish" is a gloss which also reduces the adhesion between the 1st coat and 2nd coat.

(ASBCA 44642, R4, tabs 5-6; tr. 2/69-72) The record contains no pre-disputatious evidence that appellant proposed to coat the enameled coil rack steel with epoxy or that epoxy could be painted over enamel finish successfully (tr. 2/78-80). Appellant removed coil rack enamel with hand grinders and applied epoxy (ASBCA 44642, R4, tab 29).

39. Respondent's 31 August 1990 letters to appellant stated that (a) unprimed coil rack steel did not comply with the specification requirements, and Glidden's recommendation, to apply the enamel to a primed surface; (b) specification § 9A, ¶ 14.d, was not defective because Fed. Spec. TT-E-489H [sic] specified application of the enamel over a primed surface; and (c) all Phases II and III exterior ferrous metal surfaces had to be primed under the enamel coating (ASBCA 44642, R4, tabs 9-10).

40. Appellant's 19 November 1991 letter stated that it considered respondent's direction to apply unspecified primer to the Phases II and III exterior stack steel to constitute a change, for which it claimed $4,047.81 for COR No. 25 (ASBCA 44642, R4, tab 12; tr. 2/78, 4/226).

41. Appellant's 19 December 1991 letter to respondent claimed $5,158.05 for removal of enamel and application of epoxy paint to the mechanical room coil rack steel for COR No. 22 (ASBCA 44642, R4, tab 16).

42. The contracting officer's undated final decision denied appellant's COR Nos. 22 and 25 claims (ASBCA 44642, R4, tab 27).

43. Appellant appealed that undated final decision to the Board on 8 June 1992, which docketed the COR Nos. 22 and 25 claims respectively as ASBCA Nos. 44642 and 44643. The ASBCA Nos. 44642 and 44643 complaint, ¶ 53, alleges, and ¶ 53 of the answer admits, that the contracting officer's final decision on COR Nos. 22 and 25 claims was issued on 21 April 1992. The appeals are timely.

DECISION, ASBCA No. 44642, Coil Rack Steel

Appellant has the burden of proving that contract 81 allowed unprimed enamel on mechanical room coil rack steel and that respondent's direction to remove such enamel from the coil rack steel and to apply epoxy was a constructive change order. *Kimmins Contracting Corp.*, ASBCA Nos. 44513, 44265, *supra*. The dispositive issue is whether the contract required primed, epoxy coated, coil rack steel.

Appellant argues that it reasonably interpreted contract 81's specification to require epoxy coating of surfaces within the plating shop proper and enamel on surfaces exterior thereto; the mechanical room was exterior to the plating shop proper; so respondent's direction to remove the coil rack enamel and to replace it with epoxy coating was a constructive change order.

Contract 81 specification § 5A, ¶ 16.1, required epoxy coating of miscellaneous plates and shapes for equipment mounting and frames (finding 28). With respect to paint-

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ing, the specification's terms "interior" and "exterior" surfaces were undefined. Building 142's mechanical room is exterior to the plating shop but within that building. (Finding 30) Appellant prepared its bid interpreting the specification § 9A exterior surfaces to include surfaces outside the plating shop proper, and did not ask respondent whether the mechanical room steel was interior or exterior (finding 31). Contrary to its foregoing bid interpretation, appellant's (a) field painting schedule stated that the coil rack steel would have prime and intermediate coats upon arrival at the site and (b) submittal Nos. 21 and 23 proposed epoxy primer and finish coats for the coil rack steel (findings 32, 33). Upon receiving enamel coated coil rack steel in August 1990, appellant asked respondent whether enamel was acceptable instead of epoxy (finding 35), manifesting its understanding that epoxy was the required coating for coil rack steel and that enamel deviated from that requirement.

We hold that specification § 5A, ¶ 16.1, and appellant's approved submittal Nos. 21 and 23 for specification § 9B epoxy paint, required primed and epoxy finish coated coil rack steel.

Appellant argues that since respondent could have accepted epoxy applied over the coil rack steel enamel, it was economic waste to require enamel removal, citing *Granite Construction Co. v. United States* [37 CCF ¶ 76,290], 962 F.2d 998 (Fed. Cir. 1992). In *Granite* the Government did not evaluate whether the public interest warranted acceptance of noncompliant waterstop material under the terms of an Inspection clause corresponding to ¶ (f) of contract 81's "Inspection of Construction" clause (finding 2). There was also unrebutted expert testimony that the waterstop material installed was adequate to serve its intended purpose and appellant's proposed repairs would have rendered the waterstop sufficient. 962 F.2d at 1005-06.

Here, appellant encountered a problem of adhering the second enamel coat to the unprimed first coat, its paint manufacturer recommended a primer and could not guarantee its enamel finish coats would adhere to steel, and the record contains no pre-disputatious evidence that appellant proposed to coat the enameled coil rack steel with epoxy or that epoxy could be painted over enamel finish successfully (findings 36, 38). Appellant has not established economic waste. *Ball, Ball & Brosamer, Inc.;* IBCA No. 2103-N, 93-1 BCA ¶ 25,287 at 125,980-81; *Toombs & Co., Inc.*, ASBCA Nos. 34590 et al., 91-1 BCA ¶ 23,403 at 117,423-24. We deny the appeal.

DECISION, ASBCA No. 44643, Exterior Stack Steel

Appellant has the burden of proving that the contract 81 specification required only two coats of enamel on exterior stack steel, and that respondent's direction to apply primer before the two coats of enamel to the Phases II and III exterior stack steel was a constructive change order. *Kimmins Contracting Corp.*, ASBCA Nos. 44513, 44265, *supra.*

Specification § 9A PAINTING SCHEDULE ¶ 14d, "exterior ferrous metal," specifies the painting of the disputed exterior stack steel. It required 1st and 2nd coats of FED. SPEC. TT-E-489 enamel and "None" for a 3rd coat. In contrast, for ¶ 14e, "FRP [fiberglass reinforced polyester] exhausters and stacks," § 9A specifies for the 1st coat "FRP Primer" and for the 2nd and 3rd coats TT-E-489 enamel. Section 9A required appellant to "apply painting materials according to manufacturer's instructions and recommendations." (Findings 5-6)

FED SPEC TT-E-489G stated that the specified enamel was "suitable for use on primed exterior and interior wood and metal surfaces" and was intended for "primed exterior and interior wood or metal but particularly on smooth, exterior metal," mainly "automobiles and construction equipment" (finding 7). Appellant's bid preparer knew the provisions concerning the TT-E-489G enamel's suitability and intended use, and concluded that it was intended for "smooth metal outside without a primer" (finding 31). Appellant argues that the adjective "primed" modifies only "exterior and interior wood," not metal. The record contains no evidence of any trade practice or the parties' course of dealing to support the proposition that a "smooth" surface is an "unprimed" surface (finding 32). We think that the more natural meaning of TT-E-489G was that "primed" modified "surfaces," the object of the prepositional phrase, and thus modified both wood and metal surfaces.

On 21 March 1990 respondent approved appellant's submittal No. 34 for specification § 9A, ¶ 14.d, to paint exterior ferrous metal surfaces with Glidden enamel No. 4550. Glidden's enamel No. 4550 literature listed three alternate primers for ferrous metal surfaces, but did not mention fiberglass reinforced polyester surfaces. (Finding 34) About one year after contract 81's award,

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Glidden recommended applying primer on ferrous metal surfaces because its finish enamel was not formulated as a primer and would not adhere to steel (finding 38).

Respondent argues that *Atterton Painting & Construction Inc.*, ASBCA No. 30406, 85-3 BCA ¶ 18,475, is dispositive. The contract specification required a coating material with the salient characteristic of "Primer 62 by Tex Cote or equal." Its painting schedule required a first coat "As recommended by manufacturer" and left blank spaces for second and third coats. We held that, read in harmony, all the contract provisions required appellant to apply a multi-coat system, not just one coat of paint. 85-3 BCA at 92,810. *Atterton* is not on all fours with contract 81, which required no salient characteristic of a primer for ferrous metal surfaces.

It was reasonable for § 9A, ¶ 14.e, to specify a first coat primer and second and third coats of TT-E-489 enamel for fiberglass reinforced polyester stack surfaces, because the enamel manufacturer's recommendations were silent with respect to fiberglass reinforced polyester. But there was no need for § 9A, ¶ 14.d, redundantly to specify primer for ferrous metal surfaces because the enamel manufacturer recommended three primers for that application, and ¶ 13.1 expressly required appellant to "apply painting materials according to manufacturer's ... recommendations." (Findings 6, 34) *Cf., R.B. Wright Construction Co.*, ASBCA Nos. 31967 *et al.*, 90-1 BCA ¶ 22,364 (29 Sept. 1989), *aff'd*, 919 F.2d 1569 (Fed. Cir. 1990) (there was no identified contract requirement to apply paint in accordance with its manufacturer's instructions or recommendations; painting instructions of a major paint manufacturer that three coats of paint were unnecessary for previously painted walls did not diminish an unambiguous contract painting schedule requirement for three coats of paint on walls).

We hold that the contract 81 exterior stack steel painting requirements required a primer beneath the enamel finish coatings. We deny the appeal.

In summary, we deny appeals Nos. 44268, 44642 and 44643.

[¶ 26,586] Engineering Technology Consultants, S.A.

ASBCA No. 43454, December 14, 1993. Contract No. F66501-90-C-0009.

Defaults, Grounds—Insurance—Proper Coverage.—Although the Default Termination clause of a repair contract did not contain a provision permitting default termination for failure to perform provisions other than for a failure to timely deliver or for a failure to prosecute, the board concluded that the contractor's failure to maintain the proper amount of insurance was a valid basis for the default termination of the contract because the contractor's failure prevented it from prosecuting the work with the diligence required to ensure completion within the performance period. In prior decisions, the board has ruled that a contractor's failure to maintain adequate insurance coverage is a valid basis for default where general liability insurance is a contractual requirement. In those cases, however, the contracts included a Default Termination clause that specifically permitted the government to terminate for default when the contractors failed to perform provisions of the contract other than a failure to timely deliver, perform, or make progress. In the instant case, the board construed the contractor's inadequate insurance as a failure to perform with the due diligence needed to complete the work.

Defaults, Excuses—Labor and Personnel Problems—Staffing Problems.—A staff member's error that purportedly resulted in the contractor's failure to obtain adequate insurance coverage did not excuse the default termination of its contract for failure to procure adequate insurance coverage, because there was no legal theory supporting a holding that a staff member's or third party error excused a contractor's failure to comply with the contract requirements.

For the appellant: De Obaldia & Garcia De Paredes, Panama, Republic of Panama, by Carlos A. De Obaldia. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Gerald K. Fields and Capt. Michael P. Chiffolo, USAF, Trial Counsels.

Before ELMORE and RIISMANDEL, Administrative Judges.

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ELMORE, Administrative Judge: Engineering Technology Consultants, Inc. (ETC or appellant) has timely appealed the contracting officer (CO) "final decisions" terminating ETC's contract for default.[1] ETC elected to proceed in accordance with Board Rule 12.3, the ACCELERATED procedure. The record includes the appeal (R4) file; appellant's (A) and Government's (G) exhibits; the hearing transcript (tr.) and appellant's (app.) and Government's (Gov't.) briefs. Only entitlement will be decided.

SUMMARY FINDINGS OF FACT

On 28 September 1990 ETC was awarded negotiated firm fixed price contract F66501-90-C-0009 (C-0009) at a contract price of $397,890.12 to "furnish all transportation, plant, equipment, tools, labor and materials, and all necessary operations to perform 'Miscellaneous Repairs/alter Kobbe School, BLDG 841', at Howard AFB, Pn, in strict accordance with the technical specifications and drawings, subject to the terms and conditions of the contract." (44237, tabs 2, 8)[2]

The contract included or incorporated by reference Federal Acquisition Regulation (FAR) clauses: 52.228-5, INSURANCE—WORK ON A GOVERNMENT INSTALLATION (SEP 1989); 52.233-1, DISPUTES (APR 1984); 52.249-10, DEFAULT (FIXED PRICED CONSTRUCTION) (ALL OVER $25 K) (APR 1984). The contract DEFAULT clause provided for the Government to terminate the contract where the contractor fails to prosecute the work or any separable part thereof with the diligence to insure its completion within the required time period. It did not specifically provide for default termination for the contractor's failure to perform "any of the other provisions" of the contract.

Insurance requirements cited in the contract were as follows (44237, tab 2):

SECTION H—SPECIAL CONTRACT REQUIREMENTS

INSURANCE (SEP 1989) (FAR SUBPART 28.310) (FAR 52.228-5)

The contractor shall, during the entire period of performance under this contract, procure and maintain the following minimum kinds of insurance:

	TYPE	AMOUNT
(1)	Worker's Compensation and Occupational Coverage in accordance with statutory limits. Employer's Liability Coverage with a minimum limit of	$100,000
(2)	Comprehensive General Liability with Minimum Limits of	$500,000 per Occurrence
(3)	Automobile Liability Insurance shall be required on the Comprehensive form of policy [sic] shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract	$200,000 Per Person/ $500,000 Per Occurrence for Bodily Injury. $20,000 Per Occurrence for property damage

NOTE: The requirement for Workmen's Compensation Insurance and Employer's Liability Insurance is mandatory for designated Contractors and subcontractors only with respect to those employees who are citizens of the United States or residents of the United States and were hired by the contractor in the United States. Contractors employing Panamanians or foreign nationals will be required to comply with the Labor Laws of the Republic of Panama.

PART II, SECTION I, CONTRACT CLAUSES

Insurance—Work on a Government Installation (SEP 1989)

(a) The contractor shall, at his own expense, provide and maintain during the entire performance of this contract at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract.

(b) Before commencing work under this contract, the contractor shall certify to the Contracting Officer in writing that the

[1] ASBCA No. 43454 is a Rule 12.3 election which was consolidated with ASBCA 44237 for hearing purposes. The decisions on the merits in the two annunciated appeals were delayed awaiting the Board's decision on a Government's Motion to Dismiss filed in docket 44237 and two other ETC appeals. The motion was denied in ASBCA No. 44237 (*Engineering Technology Consultants, S.A.*, ASBCA Nos. 44237, 45277, 45302, 94-1 BCA ¶ 26,334.

[2] References to documents contained in other appeal files filed in other ETC appeals will be made by referencing the docket number of the appeal.

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required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective (1) for such period as the laws of the State in which the contract is to be performed prescribe, or (2) until 30 days after insurer or the contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) The contractor shall insert the substance of this clause, including this (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. The contractor shall maintain a copy of all subcontractors' proofs of required insurance, and shall make copy available to the Contracting Officer upon request.

FAR 28.310, Contract clause for work on a Government installation, states in pertinent part that "the contracting officer may insert the clause at 52.228-5 in solicitations and contracts ... if it is in the Government's interest to do so."

Tactical Air Command (TAC) FAR Supplement clause 28.310, Contract Clause for Work on a Government Installation, provides that (exh. G-4):

Whenever the clause 52.228-5 ... is included in a contract, prime contractors shall be required to either provide copies of insurance certificates or certify in writing that the required insurance has been obtained before commencing work on the installation. If contractor's certification is used in lieu of submission of insurance certificates to the Contracting Officer, [a] Certificate of Compliance with Insurance Requirements shall be used for the prime contractor. After certification by the contractor, the Certificate of Compliance shall become part of the official contract file.

ETC on 28 August 1990 submitted its bid proposal and on 20 September 1990 the CO approved award of contract C-0009 subject to "approval of HQ TAC/LGC" (exh. A-3; tr. 2/19-23; R4, tab 2). ETC's Manager, Mr. Carlos A. Salazar, on 28 September 1990 submitted a signed CERTIFICATE OF COMPLIANCE WITH INSURANCE REQUIREMENTS certifying he had read and understood the insurance requirements specified in the contract and that the certificate would become a part of, and be incorporated into, the contract and be legally binding and enforceable (tr. 2/56-7). The certificate identified ETC's insurance company as "ASSA Compania De Seguros, S.A." and provided (R4, tab 3):

(1) that such insurance will be maintained in at least the amounts and types specified in the contract . . . ;

(2) that the policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective ... until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer; (3) that ... Workmen's Compensation Insurance . . . shall be maintained on this contract for and during the entire performance period . . . ; and (4) that a copy of all subcontractors' proof of required insurance shall be maintained and shall be made available to the Contracting Officer upon request.

Mr. Salazar did not have insurance when he submitted the certification. Mr. Salazar contends he informed the contract specialist, Ms. Charlene Castro, of this fact and was told to sign the certification anyway and he complied (tr. 2/25-27, 56-57). Mr. Salazar did not obtain insurance after having signed the certification until 16 January 1991 when he requested $500,000 general liability insurance from Cia, International de Seguros, S.A. (Cia) for the period 1 January to 31 May 1991 (R4, tab 7; exh. A-1). A clerk from ETC, unbeknownst to Mr. Salazar, on 29 January 1991 requested from Cia $100,000 general liability insurance coverage (R4, tab 7; exh. A-1). ETC subsequently received the $100,000 policy which Mr. Salazar, allegedly without reading, submitted to the Government as proof of insurance (R4, tab 7). Mr. Salazar neither requested that his subcontractor obtain insurance nor is he aware whether his subcontractor had insurance during the term of the contract (tr. 2/60-1).

After damage was incurred to Kobbe school's equipment due to rainwater infiltration, ETC was requested to produce its comprehensive liability insurance. Unable to provide anything more than the $100,000 policy the CO on 25 April 1991 issued to ETC a "Cure Notice" wherein he stated (R4, tab 5):

The Government considers your failure to maintain insurance in the amounts specified ... a condition that is endangering performance of this contract.

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Per my request, Ms. Castro asked ETC for a copy of the insurance certificate for this contract on 18 Apr 91. On 22 Apr 91 ETC furnished a copy of their policy for General Liability. The following observations were made:

a. The contract states that the contractor will maintain Comprehensive General Liability with Minimum limits of $500,000. The policy only has a limit of $100,000 which is clearly in violation of the contract.

* * *

d. This policy only covers ETC between 01 Jan and 31 May 91. Request you provide me a copy of the policy that covered you between 28 Sep 90 and 01 Jan 91.

* * *

From the insurance documents which have been presented to me to date, I have no other choice than to inform you that you are in direct violation of [the] Contract ... which provided you the Insurance requirements .... You are hereby notified to provide me a copy of all policies in effect since the award of this contract to include proof of insurance for all subcontractors of [ETC] under this contract within ten (10) days of receipt of this Notice. Ensure that all policies are in accordance with the requirements of the contract as specified ....

Unless this condition is cured within 10 days from receipt of this Notice, the Government may terminate for default ....

ETC did not respond to the Cure Notice (tr. 2/46, 79).

By letter dated 8 May 1991 the CO issued to ETC a "SHOW CAUSE NOTICE" wherein he stated (R4, tab 6):

Since you have failed to provide the Insurance required in accordance with Contract ... within the specified time, as requested in the Government's Cure Notice dated 25 April 1991, the Government is considering terminating the contract under the provision of default of this contract. Furthermore, the admission by Mr. Salazar during the meeting held 2 May 1991, that [ETC] has only maintained General Liability Insurance on this contract since 1 Jan 91 and then, only with a limitation amount of $100,000 in lieu of $500,000 required under the contract, is unacceptable. ETC's failure to maintain Liability Insurance from the onset of the contract is totally unsatisfactory in as much [sic] as Mr. Salazar signed the Certificate of Compliance with Insurance Requirements on 28 September 1990.

Pending a final decision in this matter, it will be necessary to determine whether your failure to cure the conditions specified in the Government's letter dated 25 Apr 91, arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present in writing any facts bearing on this question to TSgt Jose R. Medina ... within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist.

In response to the "SHOW CAUSE NOTICE" Mr. Salazar, by letter dated 10 May 1991, contended that ETC intended to obtain both "Public Liability and Automotive Liability" insurance from ASSA Compania de Seguros, S.A. but due to staff error only automobile insurance was obtained; that in January 1991, realizing it had no public liability insurance, ETC requested a $500,000 limit comprehensive liability policy from Cia International; that an ETC office clerk requested the same type insurance but with a $100,000 limit; that Cia issued the policy at the $100,000 limit which ETC submitted "without review;" that by letter dated 11 March 1991 ETC informed Cia that the issued policy failed to meet the terms requested for coverage against all risks in the amount of $500,000 coverage; that Cia's response stated that the insurance stipulated in this contract would never have included all the coverages requested and the comprehensive general liability insurance would have excluded damages incurred on adjacent Government property. (R4, tab 7) Mr. Salazar also contends that the Government's reason for terminating the contract was to avoid claims for delay (tr. 2/35-37).

ETC, after receipt of the cure and show cause notices, neither increased its general liability coverage to the contract amount of $500,000 nor provided the CO with subcontractor insurance documents.

On 20 May 1991 the Government terminated ETC's contract for default (R4, tab 8) contending ETC neither responded to the cure notice dated 25 April 1991 nor provided proof of insurance for itself and/or its subcontractors. The CO determined that ETC failed to present an excusable reason for not obtaining general liability insurance between 30 September 1990 and 1 January 1991, as acknowledged by ETC in its response to the show cause notice, or to maintain the correct amount of insurance for the

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period 1 January through 31 May 1991; that ETC failed to follow up with the insurance company and obtain general liability insurance in the amount of $500,000 between 11 March 1991, when ETC requested insurance augmentation, and 18 April 1991, the day the CO requested the insurance policies; and that ETC failed to present certificates of insurance for the three subcontractors working under the contract.

By letter dated 13 August 1991 ETC appealed the CO's 20 May 1991 final decision to default terminate contract C-0009 (Board's correspondence file).

DECISION

Terminations for default "should be imposed (or sustained) only for good grounds and on solid evidence." The Government, as the initiator, has the burden of proof in establishing the validity of the default. *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491, *aff'd. on reconsid.*, 92-1 BCA ¶ 24,693, *aff'd., Local Contractors, Inc. v. Stone, Secretary of the Army*, 988 F.2d 131 (Fed. Cir. 1993) (Table). In prior decisions we have held that where general liability insurance is a contractual requirement a default termination is proper when a contractor fails to either obtain or to maintain adequate insurance coverage. *Ray Service Company*, ASBCA No. 35800, 89-1 BCA ¶ 21,549; *accord, Mary E. St. Clair*, ASBCA No. 2882, 91-2 BCA ¶ 23,948; *Petroleum Terminal Management, Inc.*, ASBCA No. 33680, 89-2 BCA ¶ 21,835. The terminations in the cited cases, however, differ from the instant matter in that the contracts there included a default termination clause which specifically permitted the Government to terminate for default where the contractor fails to perform provisions of the contract other than a failure to timely deliver, perform or make progress.

The default termination clause in the ETC appeal does not contain a provision permitting default termination for failure to perform provisions other than a failure to timely deliver, but does permit the Government to default terminate where the contractor fails to prosecute the work or any separable part of the work with the diligence required to insure its completion within the performance period. It is undisputed that ETC (1) failed to procure general liability insurance, (2) procured a significantly smaller amount than contractually required, during contract performance, and (3) failed to provide its subcontractors' general liability insurance documents when requested. ETC, when issued both the cure and show cause notices, failed to correct the inadequate comprehensive insurance coverage. The Government, reasonably we conclude, had no alternative but to stop performance based on ETC's failure to maintain the proper amount of insurance coverage. Under the circumstances ETC was unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period. Under the circumstances ETC's failure to obtain the correct amount of insurance was a valid basis for the default termination and, accordingly, the default termination was proper.

The default termination being proper we need only determine if ETC's failure to procure and/or maintain adequate insurance was excusable. ETC contends its failure to obtain insurance from 30 September 1990 to 1 January 1991 was due to "staff" error and its failure to maintain the correct amount of insurance from 1 January to 31 May 1991 was due to staff error and a mistake by the insurance company. We find ETC's contentions specious at best.

ETC prepared and submitted a CERTIFICATE OF COMPLIANCE WITH INSURANCE REQUIREMENTS certifying it had procured general liability insurance when in fact it had no general liability insurance coverage. Although ETC contends it was at the Government's instance that it signed the certificate we find nothing in the record to support this. In like fashion, three months after contract award, ETC procured an amount of general liability insurance significantly lower than that required by the contract arguing this was caused by a staff member and insurance company error. ETC has not cited any legal support or theory, and we are unaware of any, which holds that a contractor's failure to comply with a contract requirement is excusable if such failure was due to staff or third party error. Under the circumstances, ETC obviously made a business decision to mislead the Government into believing ETC had complied with the contract requirement for providing general liability insurance coverage.

ETC also contends the CO acted in bad faith when he terminated the contract. It is well established that there is a presumption that public officials perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations, and the burden is on the appellant to prove otherwise. *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766 and cases cited therein. ETC's alle-

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gation that the default termination was done to preclude ETC from filing a delay claim is not supported by the record. Clearly, a termination could not, and in the instant matter did not, estop ETC from filing not only the delay claim but numerous other claims. The default termination was proper and ETC has not provided any proof the CO's actions were arbitrary, capricious, an abuse of discretion, or illegal. *Cf., Darwin Construction Co. Inc. v. United States* [33 CCF ¶ 75,063], 811 F.2d 593, 598 (Fed. Cir. 1987).

The appeal from the default termination is denied.

[¶ 26,587] Inter-Continental Equipment, Inc.

ASBCA No. 43298, December 10, 1993. Contract No. N00123-86-C-0660.

Transportation—Cargo Preference Act—Summary Judgment.—In an appeal concerning the issue of a contractor's liability for failure to comply with the contract's standard Cargo Preference clause, the contractor's assertion that the Cargo Preference Act applied only to government-owned material and that the contractor had only contractor-owned material in its possession did not provide a basis for granting a motion for summary judgment, because issues of material fact remained as to whether the contractor possessed only contractor-owned material and as to whether the government acquiesced in the contractor's interpretation.

Transportation—Cargo Preference Act—Standard Contract Clause.—In an appeal concerning the issue of a contractor's liability for failure to provide bills of lading as required by the contract's Cargo Preference clause, the contractor's assertion that the bill-of-lading requirement applied only to foreign aid programs and not to government contracts did not provide a basis for granting a motion for summary judgment, because the contractor failed to point out any statutory provision that prohibited the application of the requirement.

Transportation—Cargo Preference Act—Administrative Procedure Act.—In an appeal concerning the issue of a contractor's liability for failure to comply with the provisions of the Cargo Preference Act, the contractor's assertion that the Cargo Preference clause's implementation violated the Administrative Procedure Act did not provide a basis for granting summary judgment, because the facts underlying this assertion were not established.

For the appellant: John K. Hobbs, Director. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Douglas J. Hinds, Trial Attorney, Naval Facilities Engineering Command, West Coast Litigation Team, San Bruno, California.

Before YOUNGER, SPECTOR, and STEMPLER, Administrative Judges.

YOUNGER, Administrative Judge: In this appeal of a Government claim under a contract to provide shipping containers, appellant has moved for summary judgment. The contracting officer's decision giving rise to the appeal asserted that appellant was liable to respondent for approximately $1.3 million for failure to comply with the standard clause appearing at FAR 52.247-64, "Preference for Privately Owned U.S.-Flag Commercial Vessels, Alternate I (APR 1984)" (the Cargo Preference clause). The parties included the Cargo Preference clause in the contract by bilateral modification, and appellant's asserted noncompliance was in failing to furnish the ocean bills of lading required by paragraph (c) of the clause. We deny the motion.

BACKGROUND

Appellant filed a three-count complaint, denominating each count as a claim. The gravamen of the first count is laches, appellant alleging that the contracting officer "should have notified the contractor within a reasonable period of time after she knew, or should have know[n], of the alleged problem." The gravamen of the second count is waiver and estoppel, appellant alleging that it advised the contracting officer that it believed that the requirement for bills of lading in the Cargo Preference clause was illegal and, from her failure to take any action

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when appellant refused to comply, "took this acquiescence as relieving the contractor of the requirement." The gravamen of the third count is that the bills of lading requirement constitutes "an illegal requirement" for various reasons.

In its lengthy motion for summary judgment, appellant argues that there are no genuine issues of material fact regarding what it identifies as "the four affirmative defenses." While appellant's complaint is organized around three counts, and respondent did not interpose any affirmative defenses in its answer, the Board understands appellant to use this term to refer to the different arguments that it advances. Appellant summarizes its four arguments as follows:

> The facts show proof of each of the four affirmative defenses, namely, (1) that the [Cargo Preference] clause applies only to Government-owned material, while appellant had only contractor-owned material in his possession and this fact was known by the Government who for 5 years acquiesced to Appellant's interpretation of the clause; (2) the requirement itself comes out of foreign-aid program law, while Appellant's contract was made under the provisions of the Armed Services Procurement Act of 1947; (3) the [Cargo Preference] clause's implementation violates the Administrative Procedure Act; and (4) [the contracting agency] waited too long to assert its rights, assuming it had rights to begin with.

Appellant's motion is not supported by any affidavits. The parties are still engaged in discovery and the Board only recently decided motions to compel discovery brought by both parties.

DECISION

We deny appellant's motion. It is familiar that "[s]ummary judgment is properly granted only where [1] there is no genuine issue of material fact and [2] the movant is entitled to judgment as a matter of law." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Lockheed-California Co.*, ASBCA Nos. 28618, 31314, 92-1 BCA ¶ 24,382 at 121,770. We measure appellant's motion against these two elements.

Appellant's first argument affords no basis for granting summary judgment. We cannot conclude that appellant is entitled to judgment as a matter of law because we cannot harmonize appellant's reading of the Cargo Preference clause with our decision in *Brussels Steel America*, ASBCA No. 34108, 90-1 BCA ¶ 22,268. While appellant reads the clause to apply "only to shipments of Government-owned material," we there read the clause to apply where "[t]itle to the supplies had not passed to the Government when [the] foreign-flag shipments were made" and other legal predicates satisfied. *Id.*, 90-1 BCA at 111,865-66. In addition, we cannot in any event say on this record that there are no genuine issues of fact that: (a) appellant only had contractor-owned material in its possession; (b) respondent so knew; or (c) respondent acquiesced in appellant's interpretation of the Cargo Preference clause for five years. While the first two of these contentions of fact are of dubious materiality, discovery is ongoing, as indicated. The outcome of the parties' discovery may shed light on some of these contentions of fact.

Appellant's second argument also affords no basis for granting summary judgment. We cannot accept appellant's invitation to conclude that the "bill-of-lading requirement [in the Cargo Preference clause] applies to, and only to, foreign aid programs, and not to contracts made under the Armed Services Procurement Act of 1947," 10 U.S.C. § 2301 *et seq.* Appellant has pointed us to no statutory provision that in terms prohibits application of the bill of lading reporting requirement to contracts authorized by that Act, and we know of none. Similarly, appellant has pointed to no express regulatory prohibition or limitation. We have found none in the cargo preference provisions appearing in FAR Subpart 47.5. We likewise have found no prohibition or limitation in the Cargo Preference clause itself. *See* FAR 52.247-64. While appellant looks to 46 C.F.R. § 381.3, which details the reporting requirement for agencies "except for the Department of Defense for which separate regulations will be issued," that qualifier plainly does not preclude application of the reporting requirement to contracts under the Act. Finally, while not dispositive, we note that both the court of appeals and this Board have previously taken note of the reporting requirement in cases relating to Department of Defense contracts, without any suggestion that it was improperly applied. *See Craft Machine Works, Inc. v. United States* [36 CCF ¶ 76,020], 926 F.2d 1110, 1112 (Fed. Cir. 1991); *Brussels Steel America, supra*, 90-1 BCA at 111,865.

Appellant's third argument similarly will not support summary judgment. While appellant asserts that respondent did not promulgate the Cargo Preference clause in

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accordance with Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA), the facts underlying this contention are not established on the record before us. A more serious infirmity, however, steam from our inability to say that appellant would be entitled to judgment as a matter of law even if the material facts were established. That is, we are hard put to reconcile appellant's contention with the "public contracts" exemption in the APA itself. Congress expressly exempted "a matter relating to . . . public . . . contracts" from the application of the rulemaking requirements of the APA. 5 U.S.C. § 553(a)(2) (1988). In *Essex Electro Engineers, Inc. v. United States* [38 CCF ¶ 76,304], 960 F.2d 1576, 1581 (Fed. Cir. 1992), the court of appeals gave effect to this exemption, rejecting an argument that the executive branch failed to comply with the APA "in either the drafting or application" of the definition of a "claim" in the FAR. *See also Westinghouse Electric Corp.*, ASBCA No. 25787, 85-1 BCA ¶ 17,910 at 89,701 n. 26, *aff'd*, 782 F.2d 1017 (Fed. Cir. 1986) (recognizing exemption); *cf. McQuiston Associates*, ASBCA No. 24676, 83-2 BCA ¶ 16,602 at 82,549, *aff'd sub nom McQuiston v. United States*, 746 F.2d 1489 (Fed. Cir. 1984), *cert denied*, 470 U.S. 1004 (1985) (Board proceedings not governed by APA).

Finally, there are disputed issues of material fact regarding appellant's fourth argument. While appellant relies upon *Gresham & Co. v. United States* [18 CCF ¶ 81,896], 470 F.2d 542 (Ct. Cl. 1972), we would need a much fuller record before saying that respondent failed to exact compliance with the Cargo Preference clause during performance over an extended period, thereby reasonably leading appellant to believe that the reporting requirement was "dead." *Id.*, 470 F.2d at 554; *see also Inter-Continental Equipment, Inc.*, ASBCA No. 36807, 90-1 BCA ¶ 22,256 at 111,834 (fact issues precluded summary judgment regarding waiver of reporting requirement in Cargo Preference clause).

CONCLUSION

Appellant's motion for summary judgment is denied.

[¶ 26,588] Aydin Corporation (West)

ASBCA Nos. 43273, 44156, 44157, 44091, December 16, 1993. Contract No. DAAB07-86-C-J007.

Procedure, Boards—Suspensions and Stays—Criminal Proceedings.—In an appeal concerning the propriety of a contractor's testing of radio sets, a government motion to stay proceedings until parallel criminal proceedings against the contractor were completed was granted in order to avoid interference with the criminal case because the facts, issues, and witnesses in both proceedings were substantially similar, there was a need to protect the criminal case, and the contractor failed to show that it would be injured by a stay. The issue in the appeal, the propriety of the testing, was also at the heart of the related criminal proceedings. The facts relating to the manner in which the tests were conducted were central to both sets of proceedings. The witnesses, two convicted employees of the contractor, were likely to give testimony before the tribunal in the criminal proceedings as well as in the appeal before the board. Further, the government made an adequate showing of the need to protect the criminal litigation, and the board concluded that such need overrode the injury to the contractor. Finally, discovery in the criminal case had served to hinder important aspects of discovery in the appeal.

For the appellant: Jones & Donovan, Irvine, California, by Peter B. Jones. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Lt. Col. Thomas O. Mason, JAGC, Trial Attorney.

Before PAUL, RIISMANDEL, and RUBERRY, Administrative Judges.

PAUL, Administrative Judge: After the Board set these appeals for hearing in January 1994, the Army moved to stay proceedings for either 180 days or until parallel criminal proceedings against appellant Aydin Corporation (West) (Aydin) were completed. It contended that granting such a stay would "avoid interfering with the ongoing criminal proceedings involving the same contract at issue in these appeals" and would enable the Board "to ascertain the facts and circumstances surrounding appellant's claims." In a lengthy response, Aydin opposed "Respondent's eleventh-hour mo-

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tion." It argued that the "Government's request is untimely, utterly without merit, and may well be a disingenuous attempt to create leverage in settlement discussions by denying to Appellant its ability to resolve its claims in this forum." In its equally extensive reply brief, the Army reiterated its concerns that proceeding with the scheduled trial of these matters would prejudice the Government's handling of the parallel criminal proceedings.

For the reasons stated below, we grant the Army's motion, cancel the scheduled trial, and stay proceedings for a period of 180 days.

FACTUAL BACKGROUND

The Contract

On 25 September 1986, the Army awarded the underlying contract to Aydin for the design, production, and delivery of 733 microwave radio sets. The radios represented an attempt to integrate modern technology into the communication system used by Army combat signal units. The contract's testing and quality assurance requirements were aimed at producing a product which could withstand the rigors of transport across degraded road surfaces and open terrain without either permanent damage or degradation in performance. Specifically, the contract required Aydin to design mounts which would protect the radios from damage resulting from shock and vibrations. The contract also contained a requirement for a self-testing feature which utilized an RF loopback capability.

Pursuant to Section H.133 of the contract, Aydin warranted that the radios would meet the requirements of their intended use, be free of defects in material and workmanship, and remain free of defects for a two-year period commencing on the date of final acceptance. Upon discovering defects in the radios, the contracting officer had three options: (1) direct Aydin to repair or replace defective radio sets; (2) authorize the Army to repair the radios at Aydin's expense; or, (3) take a contractual price adjustment.

Also specified under the contract were testing, evaluation and inspection procedures which included an Acceptance Test Procedure designed to detect deficiencies in workmanship and materials. A component of this procedure was Environmental Stress Screening, a test designed to discover latent defects in the radios. The contract also required Aydin to conduct reliability testing in a chamber at a set temperature pursuant to certain testing standards.

The Board Proceedings

ASBCA No. 43273

After commencing work on the contract, Aydin encountered difficulties complying with the testing provisions which we have discussed. As a result, Aydin submitted a proposal for a revised delivery schedule, and the Army granted it a time extension. Aydin experienced additional problems and was unable to meet any of the subsequent revised delivery schedules. After negotiating another delivery schedule with Aydin, the contracting officer issued a unilateral modification through which, *inter alia*, the Army exercised a contractual option for 82 radios. Aydin contended that the exercise of the option was untimely and submitted a claim in the amount of $1,068,117.60.

ASBCA No. 44157

After Aydin delivered the first radios in 1988, the Army began to operate them in the field. Soon thereafter, the Army began to complain that the radios displayed a faulty signal upon normal vibration. The Army also purportedly discovered a number of module failures during initial check-out and returned several units to Aydin for repair under the warranty provisions of the contract. In July 1989, Aydin sent an engineer to investigate these alleged deficiencies. The engineer tested several of the radios and concluded that vibrating the sides of the units caused some of them to display faulty signals. Aydin repaired these radios and later submitted a claim in the amount of $2,196,095.

ASBCA No. 44156

As we have stated, the contract required Aydin to develop an RF loopback feature for self-testing purposes. After commencing work on the contract, Aydin modified the radios in an attempt to produce an imbedded RF loopback capability, thereby eliminating the need for an external coaxial cable. Aydin subsequently submitted a claim in an amount of $213,694.36 for costs incurred in altering the RF loopback configuration.

ASBCA No. 44901

The contract required Aydin to subject the radios to certain reliability tests under environmentally stressful conditions, as set forth in paragraph 50.1 of MIL-STD-781C, entitled "combined environments for fixed

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ground equipment." Subparagraphs 50.1.1 through 50.1.5 of this standard stated test requirements for electronic stress, vibration stress, thermal stress, and humidity.

During the course of contractual performance, Aydin experienced extremely high failure rates in environmental stress and reliability tests. Aydin later contended that the contract's specifications relating to testing were defective and proposed to change the testing requirements. It also filed a claim for defective specifications in an amount of $6,622,436.42.

The Criminal Proceedings

Attached to the Army's motion was a detailed, sworn affidavit from Mr. Leland B. Altschuler, an Assistant United States Attorney for the Northern District of California. Mr. Altschuler described the Government's investigation of Aydin and its employees in these terms:

2. The criminal investigation began in November 1989, when Special Agents of the Federal Bureau of Investigation and Army CID served a federal search warrant on Aydin's production facilities located in San Jose, California. During the search, the agents seized a large number of documents relating to Aydin's performance on a government contract with the Department of the Army's Communications and Electronics Command, contract number DAAB07-86-C-J007, to manufacture AN/GRC radio sets.

3. A Grand Jury investigation commenced and further information and materials from Aydin were subpoenaed for use in the Grand Jury proceedings. An indictment (Tab A) was returned by the Grand Jury on February 12, 1992, alleging that between about January 1988 and November 1989, two Aydin employees, Patrick A. Huveldt and Sharon S. Favinger, participated in an unlawful conspiracy and committed fraud against the United States by instructing test technicians to record test data in pencil and, when entries showed failure, erasing those entries and substituting, in ink, passing entries. In addition, the indictment alleges that the defendants wrote about 250 test readings for items when their time cards revealed that they were not at work, asked Aydin technicians to initial test data they did not take, and placed initials of Aydin technicians on test readings without permission. More than 200 tests were recorded originally in pencil and later erased, and the indictment identifies more than 40 radio sets accepted by the Government with false test data. The object of the conspiracy was to minimize time and delays associated with reworking radio sets and spares, and to defraud the United States by causing shipment of radio sets and spares that the Aydin defendants knew did not meet contract specifications, thereby causing payments of money by the United States to Aydin. The indictment charges violations of 18 U.S.C. §§ 371 & 1001.

4. On or about March 5, 1993, Mr. Huveldt and Ms. Favinger entered pleas of guilty to conspiracy to defraud the Government and three counts of making false statements to the Government and concealing material facts from the Government. These pleas were entered after the trial on the merits had started and after the Government had presented evidence against Mr. Huveldt and Ms. Favinger. Sentencing for both Mr. Huveldt and Ms. Favinger is pending.

5. As part of the plea agreement, Mr. Huveldt executed an addendum to the plea agreement describing certain activities of his done while employed by Aydin Corporation (West). In Mr. Huveldt's addendum (Tab B), he admitted that:

1. I had certain practices in the Manufacturing Test Department [sic] I supervised another who had similar practices for recording test data entries in the Manufacturing Test Department. I told Chin Nguyen, Jerry Hovey, John Harris, Greg Benson and Guy Knepp to record ESS test data in pencil;

2. I erased pencil test data entries, made by others, including data entries showing faults, showing failures, showing that alarm lights were "on", and otherwise showing that the AN/GRC-222 radio set or spares under test did not meet test parameters specified by the ATP;

3. I wrote passing test data entries in ink on those test data sheets. The data I substituted:

a. Did not reflect observations I made on the dates and at the time indicated on the test data sheet and,

b. Did not reflect observations that were accurate, true or correct, and

c. Did not reflect the number and type of deficiencies found.

4. I did the above practices, or variations on them, during the entire time period from June 1988 to September 1989.

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6. As part of the plea agreement, Ms. Favinger executed an addendum to the plea agreement. In Ms. Favinger's addendum (Tab C), she admitted that:

1. I instructed swing shift and graveyard shift test technicians in the Manufacturing Test Department including Greg Benson, Wilbert Dees, Steve Labonowski and Chin Nguyen to record ESS test data in pencil;

2. I erased pencil test data entries, made by others, including data entries showing faults, showing failures, showing that alarm lights were "on", and otherwise that the showing [sic] AN/GRC-222 radio set or spares under test did not meet test parameters specified by the ATP;

3. I wrote, passing test data entries in ink, on those test data sheets. The data I substituted:

a. Did not reflect observations I made on the dates and at the times indicated on the test data sheet and,

b. Did not reflect observations that were accurate, true or correct, and

c. Did not reflect the number and types of deficiencies found.

4. I sometimes wrote entire test data entries for the 48-hours ESS test sequence at one sitting, usually taking less than thirty minutes to complete the form. I am informed by the United States that there are more than 160 entirely in my own handwriting [sic] I have examined these sheets and they were in fact prepared by me.

5. From time to time test technicians recorded test data in ink, which I could not change. I took the test data sheets made in ink by others, which showed failing test data entries. I then created test data sheets and placed them in the manufacturing package. The sheets I prepared were made up but showed passing reads.

6. I followed the above practices, or variations on them, during the entire period from June 1988 to September 1989.

7. Mr. Huveldt and Ms. Favinger pled guilty to count Eighteen of the indictment. As such, Mr. Huveldt and Ms. Favinger admitted knowingly and willfully using a false writing in connection with the product reliability acceptance testing for Radio Set No. 0028A. This test was the reliability test upon which the First Article was approved. These same reliability test procedures are at issue in ASBCA No. 44901.

8. Although Rule 6(e) of the Federal Rules of Criminal Procedure precludes me from describing the nature of the Government's criminal case against the Aydin employees or the continuing criminal investigation of Aydin in further detail, I can state that based on information furnished to me in the course of my official duties, it appears that the issues in both the criminal case and the ASBCA proceedings are not only related, but are substantially similar. Moreover, there will be a substantial overlap of witnesses and documentary evidence for all issues pertaining to the manufacture, testing, and performance of the AN/GRC-222 radio sets and spares. The allegations of fraud set forth in the indictment and subject to the continuing investigation of Aydin arise out of the same contract and are based on the falsification of the same Aydin test and inspection records on AN/GRC-222 radio sets involved in Aydin's claims before the ASBCA. A logical implication from the fraudulent activity under investigation is that workmanship defects that were covered up by changing failing test scores to passing scores permitted Aydin to secure Government acceptance of radio sets that subsequently exhibited performance failures when used by troops in the field and caused delays in shipping.

9. Aydin Corporation remains a target of continuing Grand Jury proceedings. Again, because of Rule 6(e), I cannot disclose a complete description of the course of this investigation. I can, however, state that the scope of the investigation relates to Aydin's performance of contract number DAAB07-86-C-J007, and is not limited to the specific time span alleged in the indictment.

10. I hereby formally request that the Board stay the ASBCA proceedings for a period of 180 days to permit this office to proceed with resolution of the criminal case against the two named former Aydin employees and the continuing investigation and charging as appropriate of the Aydin Corporation. Both Mr. Huveldt and Ms. Favinger have agreed to cooperate in the investigation and prosecution of violations of the laws of which they have knowledge. If a stay is not granted, it is likely that Aydin may gain insight into the criminal case and the on-going investigation through the broader discovery of both witnesses and documents permitted in ASBCA proceedings compared with the limited discovery permitted under the Federal Rules of Criminal Procedure and

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thereby prejudice the Government criminal case.

For example, I have reviewed Aydin's 9 October 1993 request to depose certain Government employees. If these depositions occur as required by Appellant, the criminal investigation and any following prosecution would be adversely affected. Accordingly, it is in the public interest to stay the ASBCA proceedings to avoid interference with the criminal case.

11. A vast amount of information has been sequestered pursuant to Rule 6(e). This information directly pertains to the appeals pending before the Armed Services Board of Contract Appeals. I am precluded from releasing this information to either Aydin or the Army at this time.*

DECISION

In *E-Systems, Inc.*, ASBCA Nos. 32033, 32334, 32335, 36102, 88-2 BCA ¶ 20,753, this Board ably set forth the legal standards governing the Army's motion to stay proceedings in the following terms:

> A protracted stay of the civil case requires not only a showing of need in terms of protecting the criminal litigation, but also a balanced finding that such need overrides the injury to the parties being stayed. *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350 at 65,261. The Government, as the moving party, is required to show that there are "substantially similar" issues, facts and witnesses in both proceedings. *See C3, Inc. v. United States*, 3 FPD ¶ 12, (30 July 1984); and *Sentry Insurance, A Mutual Company*, VABCA No. 2617, 88-1 BCA ¶ 20,318. We would add that the promotion of judicial economy is a further consideration for us, here. *Mayfair Construction Company*, NASA BCA No. 478-6 *et al.*, 80-1 BCA ¶ 14,261, citing *Nigro v. Blumberg*, 373 F. Supp. 1206 (1974). *See also Landis v. North America Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), relying upon "the power to stay proceedings [as being] incidental to the power inherent in every court to control the disposition of causes on its docket and with economy of time for itself, for counsel and for the litigants." Indeed, this Board's statutory mandate under the Contract Disputes Act to provide an expeditious resolution of the appeals to the fullest extent practicable requires us to do so. (41 U.S.C. § 607(e))
>
> *Accord Fleischzentrale Sudwest GmbH*, ASBCA No. 37273, 89-3 BCA 21,956; *Container Systems Corp.*, ASBCA Nos. 40614, 43694, 93-2 BCA ¶ 25,798.

Applying these criteria to the facts of this case, we can conclude that the Army has met its burden. First, there are "substantially similar issues, facts, and witnesses" in both proceedings. The key issues in the consolidated appeals before the Board revolve around the battery of tests required before the developmental radios produced by appellant could be successfully integrated into the Army's units in the field. As evidenced by the convictions of two of Aydin's key employees, these tests are also at the heart of the related criminal proceedings. Accordingly, the facts relating to the manner in which the tests were conducted are also central to both sets of proceedings. Finally, Aydin's two convicted employees would very likely give testimony before the district court as well as before this Board. Therefore, the Army has demonstrated the requisite degree of commonality.

The Army has also made an adequate showing of need in terms of protecting the criminal litigation, and we can conclude that "such need overrides the injury to the parties being stayed." Aydin itself remains the target of ongoing grand jury proceedings. In addition, as Mr. Altschuler states in his sworn affidavit:

> ... If a stay is not granted, it is likely that Aydin may gain insight into the criminal case and the on-going investigation through the broader discovery of both witnesses and documents permitted in ASBCA proceedings compared with the limited discovery permitted under the Federal Rules of Criminal Procedure and thereby prejudice the Government criminal case.
>
> For example, I have reviewed Aydin's 9 October 1993 request to depose certain Government employees. If these depositions occur as required by Appellant, the criminal investigation and any following prosecution would be adversely affected. Accordingly, it is in the public interest to stay the ASBCA proceedings to avoid interference with the criminal case.

In contrast to the persuasive showing made by the Army, Aydin has failed to

* In response to the Army's interrogatories filed in the ASBCA proceedings, Aydin identified 68 boxes of documents which the Justice Department has sequestered and which are pertinent to the issues in these appeals.

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demonstrate that it would be seriously injured by a 180-day stay.

A final element of this analysis relates to our power to control the proceedings before us. In response to interrogatories propounded by the Army in these appeals, Aydin admitted that a large volume of relevant documentation pertaining to the underlying contract has been sequestered by the Department of Justice. Simply as a practical matter, this fact has served to halt important aspects of discovery in the ASBCA proceedings. Weighing this development in the light of the remainder of our analysis, we are constrained to grant the motion to stay proceedings.

CONCLUSION

The motion is granted, and the scheduled trial is canceled. The parties are ordered to file a status report with the Recorder's office at the end of the 180-day stay period.

[¶ 26,589] Smitty's Precision, Inc.

ASBCA No. 43189, December 15, 1993. Contract No. F34601-89-C-1533.

Defaults, Grounds—Delivery Failure—Financial Loss.—A default termination of a delivery contract for brass bushings was proper because the contractor failed to make deliveries in accordance with the revised delivery schedule. In response to a show cause notice, the contractor stated that the reason for its failure to deliver was that it was experiencing a loss on the contract because it had underbid the contract. The contractor stated that it would make delivery by a specific date, but it made no such delivery.

For the appellant: Thomas Minnis, Owner. For the government: Col. James C. Babin, USAF, Chief Trial Attorney, and Col. Billy Smith, Jr., USAF, Trial Attorney.

Before STEMPLER, SPECTOR, and PAUL, Administrative Judges.

STEMPLER, Administrative Judge: This is a timely appeal from a contracting officer's decision terminating appellant's contract for default. The Contract Disputes Act is applicable. The parties have elected to waive a hearing and proceed on the record. Only the Government has submitted evidence and a brief.

FINDINGS OF FACT

On 31 May 1989, the Air Force awarded contract No. F34601-89-C-1533 to Smitty's Precision, Inc. (SPI). The $21,829.50 fixed-price supply contract called for SPI to manufacture and deliver 2,079 brass bushings in accordance with the following schedule:

31	July 1989:	177
31	January 1990:	634
28	February 1990:	634
31	March 1990:	634

(R4, tab 1)

The contract contains the standard "Default (Fixed Price Supply and Service) (APR 1984)" FAR 52.249-8 clause (R4, tab 1).

SPI did not deliver the first incremental delivery and requested a delivery extension because of changes in priorities for other Government contracts. On 22 November 1989, bilateral modification PJ0001 was issued, reducing the contract price by $273 and revising the delivery dates to:

31	January 1990:	811
28	February 1990:	634
31	March 1990:	634

(R4, tab 2)

SPI did not meet the revised delivery schedule and on 16 May 1990, bilateral modification PJ0002 was issued. The modification reduced the contract price by $170 if delivery was made by 30 September 1990 and by $1,132.00 if delivery was after 30 September 1990 (R4, tab 5).

SPI did not deliver by 30 September 1990, but did deliver 864 bushings by 11 December 1990. On 11 January 1991, bilateral modification PJ0003 was issued. The modification was at no-cost to either party and extended the delivery date for the balance of the bushings (1,215) to 30 April 1991 (R4, tab 6).

SPI did not deliver any further bushings by 30 April 1991.

The Government issued a show cause notice in mid-May 1991 (R4, tabs 13, 14) and on 22 May SPI responded. SPI's stated reason for its failure to deliver was that the contract was a loss contract for SPI because the contract had been underbid. SPI stated that delivery would be made by 14 June 1991 (R4, tab 15).

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On 27 June 1991, when no deliveries were made, the contracting officer terminated the contract for default for failure to deliver (R4, tab 7).

As of 27 June 1991, SPI did not have any bushings ready for delivery (R4, tabs 16, 17).

On 1 July 1991, SPI filed a timely appeal (R4, tab 18).

DECISION

The Government has proven that SPI failed to deliver in accordance with the terms of the contract. SPI has not proven that its failure to deliver was beyond its control and without its fault or negligence within the meaning of the Default clause of the contract.

CONCLUSION[*]

The appeal is denied.

[¶ 26,590] Burnside-Ott Aviation Training Center

ASBCA No. 43184, December 9, 1993. Contract No. N68520-89-C-0017.

Contract Types—Cost-Plus-Award-Fee—Review of Award Determination.—Although a cost-plus-award-fee contract for aircraft maintenance included a provision that the government's award fee determination was not appealable, the board retained jurisdiction over a claim concerning the amount of the award fee, because the amount to which the contractor was entitled was subject to the board's authority under the Contract Disputes Act to review whether the actions of the government were arbitrary or capricious.

For the appellant: Howrey & Simon, Washington, D.C., by Harvey G. Sherzer and Scott Arnold. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and Robert C. Ashpole, Jr., Trial Attorney.

Before DUVALL, SPECTOR, and STEMPLER, Administrative Judges.

DUVALL, Administrative Judge: The Board has before it the Government's *Motion to Dismiss for Lack of Jurisdiction or in The Alternative Motion for Summary Judgment*, and responsive submissions from appellant and the Government. The appeal concerns a cost-plus-award-fee contract for aircraft maintenance, repair and overhaul at six Naval Air Stations. The dispute concerns the amount of the award-fee due appellant. The following uncontroverted facts are relevant to our consideration of the motion:

The contract provided for a zero base-fee and a maximum award-fee of 10% of appellant's estimated cost. The description and application of cost-plus-award-fee contracts is set forth in FAR 16.404-2, which pertinently states:

> The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause.

FAR 16.405, Contract Clauses, instructs the contracting officer that cost-plus-award-fee contracts shall contain a clause that:

> Expressly excludes from the operation of the Disputes clause any disagreement by the contractor concerning the amount of the award fee.

Clause H-20 of the contract, entitled AWARD FEE, pertinently notes that the amount of the award-fee was not guaranteed and was to be earned as set forth in clause H-21, AWARD FEE EVALUATION CRITERIA, and that an award-fee is based on a unilateral determination of the Government.

Clause H-21 contains "Performance Evaluation Report Criteria" which set forth the award-fee criteria and subcriteria. For each criterion, the clause provides the following rating standards or categories: "Submarginal," "Marginal," "Average," "Above Average" and "Excellent." Immediately below these five standards are five entries: (0-60), (61-70), (71-80), (81-90), and (91-100), which correspond with the five standards. The contractor would receive a total numerical rat-

[*] The Government moved for dismissal for failure to prosecute in accordance with rules 5 and 31 because SPI did not file a brief. The motion is denied.

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ing commensurate with its level of contract performance.

The clause calls for assigned evaluators to assess performance monthly and submit point scores and narrative evaluations to the contracting officer, who discusses the reports with the contractor. The monthly reports are reviewed during quarterly meetings of a Performance Evaluation Board which in turn submits an award-fee recommendation to a designated Fee Determination Official (FDO). The clause then directs that:

> The FDO shall determine the amount of fee to be awarded for the quarter and forward a copy of his final determination to the Contracting Officer. The Award Fee decision is a unilateral determination made by the FDO and is not subject to the "DISPUTES" Clause of the contract.

The contract did not incorporate a conversion table by which a contractor would receive an award-fee percentage that was not equal to its total performance rating. Other Government cost-plus-award-fee contracts include conversion tables.

During performance, the FDO in fact used a conversion table to determine the amount of the award-fee.

Appellant, upon learning of the use of the conversion table, complained that the conversion table was not part of the contract, and that contract provisions required the Government to provide it with a percentage of the award fee which equaled its numerical evaluation score. Appellant maintained that the regulatory and contractual exclusions of the award-fee determination from the application of the contract Disputes clause applied only to the determination of performance scores. The contracting officer responded by maintaining that the Government had fully complied with the contract in deriving award-fees and that the determination of award-fee amounts was not subject to appeal under the Disputes clause. Appellant then submitted a certified claim in the amount of $293,001.56, which represented the difference between what it alleged it had earned under the contract evaluation procedures and what it had received from the Government.

The Government reiterated its position that the determination of award fees is excluded from the Disputes clause by both law and the contract and that there was no right of appeal from the decision. Appellant appealed from the deemed denial of the claim.

Position of the Parties

In opposition to the above stated position of the Government denying Board jurisdiction appellant contends that it advanced a claim cognizable under the Contract Disputes Act (41 U.S.C. § 605(a)). According to appellant, a contract clause which purports to remove a controversy from the Disputes clause is contrary to statute, and "must give way." Appellant cited a U.S. Court of Federal Claims (then Claims Court) decision, *OSHCO-PAE-SOMC*, 16 Cl. Ct. 614, 619 (1989), in support of this proposition. Alternatively, appellant argues that, notwithstanding the contract provision rendering the Government's unilateral determination of award-fees unappealable, the Board should retain jurisdiction over the claim to determine whether the Government acted arbitrarily or capriciously. In its response to the Government's motion, appellant averred that the Government arbitrarily converted the performance ratings it earned into a reduced award fee. (App. response, p. 21) Appellant further maintained that the existence of material issues of fact in this appeal rendered summary judgment inappropriate. Such issues, as identified by appellant, relate to the parties' prior course of dealing, the pre-dispute interpretation allegedly posited by the administrative contracting officer, and interpretations of the solicitation provisions by competing bidders on the contract. Appellant also contends that the case is not ready for summary judgment because discovery relating to outstanding issues has not been completed.

The Government, in support of its summary judgment alternative motion, contends that there are no material fact issues, and that summary judgment in its favor is warranted on the independent grounds of waiver, contract interpretation (appellant's interpretation was unreasonable), failure to inquire about a patent ambiguity, and because appellant is seeking speculative damages.

DECISION

We have confronted the same jurisdictional question raised in this dispute in cases dealing with similar clauses worded to impose finality on unilateral Government determinations on the amount of collateral savings awarded under contract Value Engineering Incentive (VEI) provisions (*e.g.*, DAR 7-104.44).

In *ICSD Corporation*, ASBCA No. 28028, 90-3 BCA ¶ 23,027, *aff'd.*, 934 F.2d 313 (Fed. Cir. 1991), the Board held that the Govern-

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ment's determination of a collateral award under a contract containing the VEI clause was subject to limited review by the Board under the Contract Disputes Act to determine whether it was arbitrary or capricious. The Board supported its position by citing *Hoel-Steffen Construction Company v. United States* [30 CCF ¶70,268], 684 F.2d 843 (Ct. Cl. 1982), where the court held that the contracting officer's decision under a contract clause creating decisional finality was nevertheless subject to such a limited judicial review under the standards of the Wunderlich Act (41 U.S.C. § 321). The court noted that the Contract Disputes Act contained the same standard.

The Board affirmed its jurisdiction to conduct such a limited review of an agency decision regarding the amount of collateral savings under the Value Engineering Clause in *Sayco, Ltd.*, ASBCA No. 39366, 92-1 BCA ¶24,573. The Board cited *ICSD* as precedent, and noted that, on the appeal of that decision by the appellant to the U.S. Court of Appeals for the Federal Circuit, the Court, while not directly addressing the jurisdictional question when affirming the Board's decision, "did agree that the appellant has the burden of proving abuse of discretion and considered the issues as to amount which appellant had appealed." The Board concluded from this holding that the court "found no error in our interpretation of limited reviewability of the collateral savings determination" (at 122,589).

We find no reason for arriving at a different conclusion with respect to the finality clause of the award fee evaluation provision of this contract. Accordingly, the Government is wrong when it contends that the clause is an absolute bar to jurisdiction, and appellant is wrong when it attempts to read the clause out of the contract in light of the Contract Disputes Act.* The appellant is right when alternatively arguing that we may conduct such a limited review.

The appellant has also demonstrated that there are issues of fact that may be material to a determination as to whether or not the Government was arbitrary or capricious in rendering decision on the amount of award-fee due; this serves as a bar to summary judgment. We also note that summary judgment is particularly inappropriate where, as here, in addition to the existence of material factual disputes, discovery has not yet been completed. *National Life Insurance Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975).

The Government's Motion to Dismiss or, in the alternative, for Summary Judgment, is denied. The parties are ordered to confer and, within thirty days of receipt of this decision, propose to the Board a mutually agreed upon schedule for further proceedings.

[¶ 26,591] Holk Development, Inc.

ASBCA No. 43047, December 7, 1993. Contract No. MDA946-88-D-0004.

Procedure, Boards—Pleadings—Particularity of Affirmative Defense.—The government's affirmative defense, stating that an agreement to pay premium rates for non-asbestos-related work was tainted by collusion and therefore void, was not dismissed for failure to meet the particularity requirement of the Federal Rules of Civil Procedure, because the contractor had sufficient notice of the claim to enable it to prepare a meaningful response. The contractor sought to have the defense stricken because the list of indicia of collusion was not sufficiently particular pursuant to the FRCP. However, the FRCP are not binding in proceedings of boards of contract appeals but serve to provide guidance in instances in which specific board rules are not dispositive. The government's affirmative defense was not stricken, however, because the contractor responded to the affirmative defense on its facts and merits, showing that it did not need further particularization.

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*The Claims Court decision cited by appellant, *OSHCO-PAE-SOMC*, deals with an attempt to bar Claims Court jurisdiction by a contract clause; it is unconvincing as precedent here because it is distinguishable on its facts. Even if the general legal precept of that decision, when interpreted broadly (that a contract provision cannot bar jurisdiction granted by statute) was considered applicable here, we would not deem the decision as controlling in the face of the Board and Court precedent cited in our opinion.

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For the appellant: Williams & Jensen, Washington, D.C., by Robert J. Martinez and Sally B. Pfund. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. S. Gregg Kunzi, JAGC, Trial Attorney.

Before MOED, SPECTOR, and STEMPLER, Administrative Judges.

MOED, Administrative Judge:

Facts Relevant to the Motion

Background

This appeal has been consolidated for hearing and decision with ASBCA Nos. 43271, 43377, 44212, 44724, and 45031. These appeals relate to delivery orders issued under an indefinite quantity contract for construction services relating to alteration and renovation of the Pentagon Building, Arlington, VA.

ASBCA No. 43047 relates to the Government's claim to recover amounts of premium pay allegedly improperly paid for non-asbestos related work under delivery orders. In a decision dated 20 October 1992, published at 93-1 BCA ¶ 25,513, we denied Holk's motion for summary judgment in this appeal on the basis that the allegations, in the Government's affidavits, of a collusive working relationship between appellant and certain Government employees created a genuine issue of fact as to the *bona fides* of the orders.

There had been no claim or pleading of collusion prior to these affidavits. After denial of the summary judgment motion, appellant moved for an order directing amendment of the answer so as to plead the allegations of collusion.

On 10 September 1993, the Government filed an amended answer asserting an affirmative defense that any agreements by the Government for payment of premium rates for non-asbestos related work were "tainted by collusion and [are] thus void and unenforceable."

That statement was followed by nine paragraphs of factual allegations, labelled "indicia of collusion," setting forth various alleged improprieties by Holk and Government personnel relating to the award and administration of delivery orders and also in relation to other contracts for these services.

On 12 October 1993, Holk filed a response to the affirmative defense in which it denied the allegation of collusion and addressed each of the "indicia of collusion" on the facts and the merits.

Thereafter, on 14 October 1993, Holk made the present motion for an order dismissing the affirmative defense of collusion and striking the same from the amended answer. The basis of the motion is that the Government has failed to plead the allegations of collusion with particularity, as required by Federal Rules of Civil Procedure (FRCP) Rule 9(b). That Rule provides that in pleading fraud or mistake "the circumstances constituting fraud or mistake shall be stated with particularity." Holk contends that the statement of the collusion defense, including the "indicia of collusion," is defective for failing to comply with that provision.

DECISION

As is correctly noted in the Government's opposition papers, the Federal Rules of Civil Procedure are not binding in proceedings of the boards of contract appeals. They serve, however, to provide guidance in instances where specific board rules are not dispositive. *Dae Lim Industries Co., Ltd.*, ASBCA No. 28416, 87-3 BCA ¶ 20,110

In order to dispose of the present motion, however, we are not required to address the applicability of Rule 9(b) or the sufficiency of the pleading in the light of that rule. Even if the rule were fully applicable and controlling, we could not grant the motion. The primary purpose of the particularity requirement of Rule 9(b) is to give the person accused of fraud sufficient notice of the claim to enable preparation of a meaningful response. *New England Data Services v. Brecher*, 829 F.2d 286, 289 (1st Cir. 1987); *Ochs v. Shearson Lehman Hutton*, 768 F.2d 418, 427 (S.D. N.Y. 1991). Prior to making this motion, Holk responded to the affirmative defense on its facts and merits. In so doing, it showed that it did not need further particularization pursuant to Rule 9(b).

The motion is, accordingly, denied.

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[¶ 26,592] Trataros Construction Co., Inc.

ASBCA No. 42845, December 21, 1993. Contract No. DAAB08-84-C-R234.

Acceptance of Performance—Rejection of Nonconforming Items—Alternate Product.—The government's rejection of a dehumidification unit as an unacceptable alternative was proper because the contractor failed to offer sufficient proof for the board to conclude that the unit submitted either met the salient characteristics of the specified unit or was the functional equivalent. The primary purpose of the dehumidifier was to create a dry room in which to conduct research that required a controlled temperature; the contractor bore the burden of proving that the proffered unit met the specific requirements for temperature and relative humidity. The contractor submitted data showing that the unit had worked successfully for five hours; however, that period was insufficient to conclude that the unit would consistently maintain the temperature and relative humidity, especially because the compressor failed after the test.

For the appellant: Giordano, Halleran, & Ciesla, P.C., Middletown, New Jersey, by Richard D. Stanzione and Paul V. Fernicola. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Lt. Col. Raymond M. Saunders, JAGC, John H. Eckhardt, and Capt. Kurt A. Didier, JAGC, Trial Attorneys, U.S. Army Communications/Electronics Command, Fort Monmouth, New Jersey.

Before ELMORE, RUBERRY, and RIISMANDEL, Administrative Judges.

ELMORE, Administrative Judge: Trataros Construction Company, Inc., (Trataros or appellant) has appealed the contracting officer's (CO) 13 February 1991 "final decision" denying Trataros' certified equitable adjustment claim for $281,432 as follows: $243,670 due to the Government's rejection of a reworked and functionally equivalent dehumidification system; $12,177, additional indirect home and field office overhead costs; and $25,585, "reasonable profit" for work performed during the extended period of the contract.[1] A hearing was held and both parties submitted main and reply briefs. Only the issue of entitlement is before the Board (tr. 1/11-12).

FINDINGS OF FACT

1. On 31 October 1984, later changed by modification P00001 to 29 September 1984, Trataros was awarded negotiated fixed price construction contract No. DAAB08-84-C-R234 [R234] at a contract price of $339,000 to "supply all plant, labor, material, equipment, and perform all work required to Renovate the Battery Room 2C203, Building 2700" at Fort Monmouth, New Jersey[2] in strict accordance with plans and specifications. Appellant was issued a NOTICE TO PROCEED dated 31 October 1984 with instructions to "commence physical work at the site on 3 Dec 84." (R4, tabs 1, 2, 179; stip. 1, 2)[3]

2. The contract called for the renovation of a low humidity facility or "dryroom" to be used primarily by employees of the Electronic Technologies and Devices Laboratory (ET&DL) in connection with research and production of lithium batteries. For its battery research, ET&DL required a self-contained work environment with a constant room temperature of 71° F, a constant humidity level (RH) of 2 percent or less and an independent and reliable means of/for maintaining the same. The contract identified the contracting officer's representative (COR) and alternative representative (ACOR) as Mr. Kevin Dooney and Mr. James Ott, respectively. The contract incorporated by reference the following Federal Acquisition (FAR) clauses: 52.233-01I, Disputes—Alternative I (APR 1984 ALT); 52.212-05, Liquidated Damages—Construction (APR 1984); 52.212-12, Suspension of Work (APR 1984); 52.236-05, Material and Workmanship (APR 1984); 52.243-04,

[1] Although the record indicated the Government took liquidated damages deductions from appellant's payments there is neither a claim for the return of these amounts nor was this addressed in the "final decision." We therefore, find that the liquidated damage amounts are not jurisdictionally before us.

[2] The building to be renovated is referred to as Hexagon building, Building 2700 and Meyer's Center interchangeably throughout the contract documents and the record (tr. 4/29).

[3] References used in this decision will be as follows: Rule 4 (R4) file; Board exhibit (Board exh.); stipulations (stip.); Government brief (Gov't brief) and reply brief (Gov't reply brief); appellant brief (app. brief) and reply brief (app. reply brief); Government (G) and appellant (A) exhibits; depositions (depos.).

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Changes (APR 1984); 52.246-12, Inspection of Construction (APR 1984). (R4, tab 1; stip. 2, 3)

3. The *SPECIFICATIONS FOR RENOVATION OF ROOM 2C203A HEXAGON (ET&DL DRY ROOM FACILITY) BUILDING 2700* provided in pertinent part (R4, tab 4; stip. 3, 7, 9-11):

SECTION 01011—*GENERAL REQUIREMENTS*

3.1 *Submittals:* A list of materials and/or equipment will be established for the Contractor after the Notice of Award is issued; and Pre-Construction Conference date is established. Said submittal list shall be furnished the Contractor at the Pre-Construction conference. There shall not be any materials, equipment, supplies or manpower permitted on or near construction site until submitted items required are approved, unless special exception is requested in writing, and such request is approved, in writing by the Chief, Engineering Plans & Services.

* * *

4. *CERTIFICATE OF COMPLIANCE.* In addition to submitting shop drawings, the contractor shall submit certificates of compliance where required for demonstration of proof of compliance of material with the specification requirements....

Section 15011—*MECHANICAL GENERAL REQUIREMENTS*

18. *MANUFACTURERS' PRODUCTS:* Products are listed for the purpose of operational and physical characteristics. Other manufacturers' products of similar operational capability, physical size and quality will be acceptable as approved by the Contracting Officer.

SECTION 15650—*FACTORY FABRICATED DEHUMIDIFICATION SYSTEM*

1.6.1 The system depicted in the drawings and hereinafter described is based upon Model IDS-G11-6G-3 manufactured by Cargocaire Engineering Corporation [Cargocaire], Amesbury, Massachusetts 01913.

1.6.2 Design Conditions:

Outside Air	88 ° F DB—76 ° F WB
Space Temperature	71 ° F DB ±1 ° F
Space Humidity	2.4 grains/lb + 0 grains/lb
Supply Air Quality	4700 CFM
Return Air Quantity	3200/4000 CFM
Supply Air Temperature	62.5 ° F DB
Space Moisture Removal	6.7 lb/hr
Space Cooling	51000 BTUH
Reactivation	227,500 BTUH
Supply Fan HP	15
Dehumidifier Drive HP	1/4
Power Supply	208/3/60
Full Load Power Consumption	216 amps
Max. Unit Weight	13600 lbs
Max. Unit Size (ft)	36′ L × 8′ 4″ W × 90′ H
Building Main Gas Pressure	6′ W.C.

4. On 7 January 1985 Trataros proffered a Bry-Air, Inc. (Bry-Air) manufactured dehumidification system and a flow diagram showing the unit was capable of meeting the specified temperature and relative humidity (R4, tab 5; stip. 12, 14).

5. On 30 January 1985 the COR informed Trataros the Bry-Air system proffered 7 January was approved provided the manufacturer certifies the painted steel housing provides weather protection, corrosion resistance, and housing life equal to that of the specified aluminum housing; that the use of direct fired heaters for the reactivation air will have no effect upon the desiccant wheel or the conditioned spaces; and the submission of an alternate gas meter with a pressure drop sufficiently low to allow full gas flow to the heaters (stip. 13; exh. G-9, at 12 of 12).

6. On 6 February 1986 the Government notified Trataros the Bry-Air submittals were approved and Trataros purchased the unit from Brangs and O'Brien, Bry-Air's New Jersey vendor. In early April 1986 the unit was installed and on 10 April 1986 it was tendered for beneficial occupancy. On 17 June 1986 a final inspection was conducted and minor deficiencies were noted. (R4, tab 31, 180; stip. 14-17)

7. By letter dated 27 June 1986 the COR informed Trataros the Bry-Air dehumidification system was not maintaining the required humidity levels in the dry room (R4, tab 34).

8. On 14 July 1986 Trataros submitted the "Pressure Test Reports" performed by its subcontractor, Airco Industries, Inc. (R4, tab 37; stip 20).

9. In a 28 July 1986 memorandum the Chief, Tech. Plans & Programs Office, ET&DL, Mr. E.T. Hunter, informed the ACOR the dehumidification system did not keep the dryroom humidity and temperature at the specified levels (R4, tab 43).

10. At a meeting held on 6 November 1986 to discuss problems encountered with the Bry-Air dehumidification system, the minutes of which were prepared by Trataros, the parties agreed the failures were due to

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humidity and that the system, as designed, was "marginal and leaves no room for error." Bry-Air suggested that, due to the lack of a "safety margin," and "in order to deliver a working system" the CFM "must be increased to between 6 and 7 thousand CFM." Bry-Air agreed to remove the unit at no cost to the Government, return it to its factory and repair the defects; make some changes, rebuild certain areas "and build into the unit some safety aspects that would handle the changes that have been found in the design and in the room." Bry-Air further agreed to disconnect and reconnect the unit and to provide the Government with the names of companies that use "this unit." Trataros would submit to the Division of Engineering and Housing (DEH) test reports and submittals on the existing Bry-Air unit and the design calculations for the capacity of the unit. DEH agreed to provide its design analysis upon receipt of the requested test reports. (R4, tab 58) The Government did not object to or suggest corrections to Trataros' meeting minutes. (R4, tab 73)

11. On 13 November 1986 Trataros provided to the Government a two-page test report for the "new" Bry-Air unit and a partial listing of Bry-Air's low RH controlled customers (R4, tabs 60, 193).

12. In a 20 November 1986 memorandum, COL Robert Hackett, Commander, U.S. Army Communication Electronics Command, Fort Monmouth, responding to complaints from ET&DL regarding the contract's late completion stated (R4, tab 65):

> A meeting was conducted on 6 Nov 86 regarding the subject contract. In attendance were representatives from the construction contractor (Trataros), the dehumidification equipment manufacturer (Bry-Air), Division of Engineering and Housing, and Mr. Carlos Guerci of your staff.
>
> As a result of this meeting, Bry-Air will remove the dehumidification equipment and rebuild it to increase capacity, as well as repair damage that affects humidity control incurred prior to installation. However, the Division of Engineering and Housing did not allow this equipment to be removed until the contractor provided test reports on the existing system highlighting areas of noncompliance with contract specifications. This was required to allow the government engineering staff an opportunity to evaluate the capabilities of the equipment.

13. In a letter dated 1 December 1986 the COR acknowledged he had received the requested Bry-Air test reports and that Trataros had removed the existing unit on 13 November 1986, as scheduled (R4, tab 66).

14. By letters dated 6 and 8 January 1987 the Government renewed its request that Trataros provide: a list of facilities currently using Bry-Air units maintaining 2 percent or lower RH; a complete manufacturer's submittal on the unit to be re-installed including all manufacturer's performance characteristics, construction and dimensional shop drawings, catalog cuts, construction shop drawings, control schematic, wiring diagrams, operational and maintenance information; and design calculations from Bry-Air on the required capacity of the unit. In a 4 February 1987 memorandum to the procurement office, Fort Monmouth, the COR, in response to Trataros's 19 December 1986 letter, acknowledged that the Government was assessing liquidated damages due to appellant's delay in prosecuting the work. The COR requested the PCO direct appellant to "provide documentation to substantiate the qualifications of Bry-Air" to manufacture a unit capable of maintaining 2 percent RH as requested. (R4, tabs 67, 71, 72, 73; stip 37, 38)

15. On 3 February 1987 Trataros installed the re-worked Bry-Air unit. Submittals were not provided to the Government prior to installation. On 24 February 1987 Trataros advised the Government the requested information on the re-worked Bry-Air unit would be acquired from Bry-Air by 1 March 1987. (Stip. 39, 40)

16. On 2 March 1987 Trataros provided the submittals for the re-worked Bry-Air unit together with the requested list of Bry-Air users. Bry-Air refused to provide design calculations for its unit stating that it was not a contract requirement and the information was proprietary. (Stip. 41)

17. By letter of 3 March 1987 Trataros notified the Government that the testing and balancing of all equipment would be conducted on 16 March 1987 (R4, tab 74; stip. 42).

18. On 11 March 1987 the COR, in a memorandum to the PCO, acknowledging receipt of Trataros' 2 March 1987 submittal for the reconditioned Bry-Air unit, recommended it be disapproved stating (R4, tab 76; tr. 4/25-30):

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a. Unit provides 7,000 CFM in lieu of 4,700 CFM. Air handling system was not designed for this quantity of air.

b. Unit is 2,400 lbs. heavier than specified.

c. Unit has a minimum circuit capacity of 369A. Specified unit uses 216 full load amps. The electrical service installed does not have the capacity to provide this power. This is a major safety hazard.

d. The reactivation heater utilizes a heat exchanger. No information has been provided on this piece of equipment.

e. Sections of the submittal are poorly reproduced and illegible.

The unit does not meet the contract specifications. Trataros did not provide this submittal in a timely manner. This unit should never have been installed.

The status of this contract is at the same point as in November 1986. The contractor must be directed to remove the Bry-Air unit and to provide a unit which meets the contract specifications. The contractor must be informed that a submittal for a new dehumidification unit must be received within two weeks. If this is not forthcoming, the contract should be terminated.

19. On 16 March 1987 Mr. Wayne Caudle of Bry-Air tested the reconditioned Bry-Air unit using a Bry-Air owned and calibrated General Eastern (GE) manufactured hygrometer. Present during the testing were ET&DL employees, Messrs. Charles Guerci and Charles Walker, neither of whom represented the CO. Also conducting tests to determine the RH and witnessing Mr. Caudle's testing was Mr. James Buttomer of General Eastern Instruments. (Stip. 43, 65; tr. 3/11-14; R4, tab 77)

20. Mr. Buttomer, using a calibrated GE hygrometer, measured the RH levels in the dryroom for comparison with the levels indicated on the Bry-Air hygrometer to determine the Bry-Air instrument's accuracy. Neither Mr. Buttomer, nor anyone else present, recorded the digital readouts from Mr. Buttomer's hygrometer and no interpretative report was prepared. The ET&DL had a Ondyne, Inc. manufactured hygrometer, purchased and calibrated in 1985, and subsequently recalibrated in August 1988, located in the dryroom, which it used to measure the RH. There was no evidence introduced that the Ondyne machine during the period between 1985 and August 1988 had been calibrated although it was used extensively by ET&DL during this time period to monitor the dryroom's RH. (Tr. 2/15-18, 19-20, 188, 234-35, 349, 3/194-95, 215; stip. 44, 45, 64; R4, tab 220)

21. On 19 March 1987 the CO informed Trataros the reconditioned Bry-Air unit was "disapproved" citing the same reasons provided by the COR in the 11 March 1987 memorandum. Trataros was directed to "remove the Bry-Air unit and to provide a unit which meets the contract specifications." (Finding 18; R4, tab 80; tr. 4/30-31, 64; stip. 47)

22. The 30 March 1987 Test and Balance Report for the re-worked Bry-Air unit and prepared by Effective Air Balance, Inc. stated the actual airflow rate was 5,405 CFM and the discharge pressure was 4.35 inches water gauge (wg) (R4, tab 83; stip. 49).

23. On 2 April 1987 Trataros, responding to the CO's 19 March 1987 letter disapproving the reconditioned Bry-Air unit, stated in pertinent part (R4, tab 85; stip. 50):

1. a. The 7,000 CFM is a nominal factory rating of the unit which is subject to variation as required. The 7,000 CFM nominal rating is no surprize [sic] to the DEH since it was clearly indicated to them at a meeting held on November 6, 1986....

b. The test reports show that the unit in [sic] actually is delivering 5,405 CFM which is only 705 CFM above the 4,700 designed.

c. Enclosed is a letter dated March 30, 1987 from Philip J. Eager, P.E. who is a mechanical engineer. As you can see there is no problems with the ductwork system.

2. a. The unit represents a mere 17% increase in weight and structural designs always included a greater safety factor than that percentage.

b. A review of the minutes of the November 6, 1986 meeting reveals DEH was made aware the revised dehumidifier would be larger. There was no objection.

3. a. The dehumidifier contains 2 compressors and 2 heaters. An interlock allows 1 compressor plus 2 heaters to run at any one time or 2 compressors and one heater; Never [sic] 2 compressors plus 2 heaters.

1) With 2 compressors plus 2 heaters (total failure of the interlock) plus all other motors the full load is 295.2 amp.

2) With 2 compressors plus 1 heater the full load is 260.6 amp.

3) With 2 heaters plus 1 compressor the full load is 219 amp.

b. An analysis of the electrical system was prepared by Bill Steelman of CN, Inc. Electrical Contractors and is enclosed.

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c. An analysis of the electrical system was prepared by Mr. Bohdan Kalembka, P.E. of Lech Associates, Inc. He is an electrical engineer.

d. Both analyses indicate there is no problem except the 300 amp trip in the disconnect must be changed to 400 amp. This has already been accomplished.

4. Enclosed are catalog cuts showing the reaction heater for your review.

If you will be specific on what page or pages in the submittal are "poorly reproduced and illegible" we will furnish better copies.

a. As promised by Trataros . . . at our November 6, 1986 meeting we have provided a dehumidifier which provides all required humidity levels specified by the contract. It is now in the best interest of all parties to accept the unit for beneficial occupancy pending a summer test.

In view of all of the following [sic] it is requested that the Government take beneficial occupancy of the facility. The specifications require a test in the summer and we will perform the test at that point in time. The punch list items noted in your letter will be corrected. Mr. Charles Walker of the using agency is most anxious to begin operations and ther [sic] is no reason why he can't. The humidity levels are perfect and in fact have been demonstrated to greatly exceed requirements.

24. On 16 April 1987 the parties met and discussed the installed reconditioned Bry-Air dehumidifier. At the meeting Trataros was provided with "Dryroom Log 1987" showing the dryroom's recorded temperatures during an unspecified 30 day monitoring period were higher than the 71°±1° allowed by the specifications. During discussions the contractor, admitting the unit installed was different than the Government specification, contended it would perform and meet the Government's requirements as proven during a four-hour test performed 16 March 1987. The Government, admitting it did not fully evaluate the information provided by Trataros with its 2 April letter, argued the reconditioned Bry-Air unit was not the same as the unit shown on the submittals and it was never approved; that the unit's compressor broke down on 16 March after four hours of testing and, to date, was still not repaired, precluding the Government from assessing whether it was capable of continually meeting the Government's needs; that the Government wanted "approximately 7000 CFM" and the Bry-Air unit was "providing approximately 5000 CFM." (R4, tabs 87, 88, 90; stip. 51)

25. The COR, in a 7 May 1987 memorandum to the CO discussing Trataros' documentation for the installed reconditioned Bry-Air unit/system, identified the following deficiencies (stip 54; *see* R4, tab 89):

High static pressure. The Test and Balance Report indicated that the unit produced 4.35 inches wg discharge static pressure in the ductwork. The duct work was made of aluminum and no standard existed for aluminum ductwork pressure higher than 3" wg; that the duct work installer refuses to accept responsibility for the operation of the ductwork at the increased air flow; and operating at excessive pressure would eventually degrade the integrity of the flanged connectors;

The submitted performance data on the process and regenerator fans did not match the speeds and pressures at which the fans were actually operated;

The submittal for the heat exchanger indicated that the unit was not suitable for use with combustion exhaust, and failed to include a control to modulate gas flow to reduce consumption during low load hours;

The electrical power consumption of the reconditioned Bry-Air unit indicated a full load consumption of 320 amps which was in excess of the specified 216 amps;

The calculations of allowable voltage drop and power consumption by appellant's licensed electrical engineer were based on incorrect assumptions as to voltage, cable length, power phase, power factor, and cable rating;

Appellant's test on the unit was inconclusive in that it was not performed at design load conditions; and

The unit failed to demonstrate the ability to maintain the required conditions in the dryroom.

26. In its letter of 19 May 1987 Trataros informed the Government it "had replaced the compressor;" that although it wanted to monitor the room temperature with the Government to avoid problems of temperature variances, the Government never responded to Trataros' 20 April letter requesting this; and, therefore, Trataros unilaterally monitored the unit and "feel the reliability his been proven;" and the Government was requested to "accept" the project subject only to its performing the summer test. (R4, tab 90; stip. 55)

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27. In a memorandum of 27 May 1987 the COR outlined for the CO the Government's position as to the inadequacies of the reconditioned Bry-Air unit, restated the deficiencies that he set forth in his 7 May memorandum emphasizing that had Trataros provided submittals for the reworked unit prior to installation, it would have been rejected prior to installation. The CO further reiterated the re-worked unit was inoperative from 16 March to 2 April when it was started up after replacement of the compressor. The COR recommended Trataros be directed to replace the Bry-Air unit with one complying with the specifications. (R4, tab 91; stip. 56; finding 25)

28. By memorandum of 4 June 1987 the COR, responding to Trataros' 19 May letter, informed the CO that although Trataros contends it monitored the unit, no test reports have been submitted since the compressor was replaced; Trataros' contention the dryroom was ready for occupancy during the 16 April 1987 meeting is contradicted by its contention that after replacing the compressor it had not reset all controls; and the dryroom conditions had been monitored by the user agency and found not to be operating reliably (R4, tab 92).

29. On 11 June 1987 the CO issued a "cure" letter wherein he stated that the Government "never had 'beneficial occupancy'" of the dry room because the unit was never able to maintain a 2 percent humidity level, that due to the subsequent breakdown of the compressor the 5-hour test performed on 16 March 1997 did not prove the reliability of the unit, and that the unit had never been tested under maximum load conditions. The cure notice further stated the installed reconditioned Bry-Air unit was unacceptable because (a) it failed to maintain 2 percent RH level within the dryroom (based upon ET&DL's log of the dryroom conditions); (b) the ductwork was not designed for 4.35 inches discharge static pressure; (c) the process and regenerator fans operated at impermissible CFM, static pressure and fan speeds; (d) the heat exchanger was being used with the combustion exhaust from the gas burner and not the building exhaust as the manufacturer recommends; the electrical power consumption was more than that of the specified unit; the electrical power feeder cable was undersized; and the test results failed to demonstrate the unit was capable of removing 6.7 lbs. of moisture per hour. Trataros was given 10 days after receipt of the cure notice to inform the Government of the work "accomplished toward correcting the above stated deficiencies" and provide a "delivery schedule with milestones showing when each deficiency will be corrected." Trataros was advised that its "failure to provide the requested cure and assurances within ten (10) calendar days after receipt of this notice, may result in the Government terminating the contract for default" pursuant to the default clause. (R4, tab 93; stip. 57)

30. By letter dated 17 July 1987 Trataros responded to the 11 June 1987 cure notice averring the accuracy of the Government's monitoring device was questionable because of its demonstrated inaccuracy during the 16 March 1987 test when it recorded a different RH level than the GE and Bry-Air instruments; that the Bry-Air unit did not remove 6.7 lb. per hour of moisture during the performance test because this amount of moisture was not present in the dryroom; that the mechanical and electrical engineers' reports clearly establish the Bry-Air unit to be within specification and would not cause damage to the ductwork. Trataros proposed to furnish a calibrated measuring device to perform the RH test and offered the Government the option of using its own calibrated device. (R4, tab 101; stip. 59)

31. On 23 July 1987 Trataros requested the Government either waive the summer test and use "in room" humidity and temperature readings or permit Trataros to use the GE calibrated dewpointer, which the Government had under contract for monitoring and recording dryroom conditions, for taking the roof top reading for the summer condition test (R4, tab 103; stip. 67).

32. On 29 July 1987 the Government had Mr. Buttomer of GE install a calibrated dewpointer in the dryroom to provide a constant monitoring of the room's humidity. To accomplish this end, Mr. Bruce Bonner of Harris Environmental connected to the dewpointer a recording device which would continually record the frost point in centigrade. (Stip. 68; tr. 5/285-90)

33. The GE hygrometer, an extremely accurate measuring device, has saturation occurring on its mirror and, accordingly, reads directly out in dew point temperatures (tr. 2/225). The Honeywell recorder was used to record the dew point/frost point readings as they were being made by the GE hygrometer. We find that the recordings made were accurate readings of the temperature and dew/frost point in the dryroom during the period 1 August through 15 September 1987. Each dew point chart covered a 24-hour period and the recordings were made continu-

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ally from 1 August to 15 September 1987. The chart was changed daily by ET&DL personnel and the pens when needed. Two recording pens made tracer recordings on the charts with one pen recording dew point inputs from the dewpointer in negative degrees centigrade and the other pen recording temperature, from the chart recorder's own temperature sensor, in degrees Fahrenheit. (Stip. 69, 70; tr. 5/288, 291-92 300-13)

34. On 31 July 1987 Trataros informed the Government that "its representative" has been monitoring and logging the conditions in the dryroom three times per day since 27 July 1987 and the temperature and humidity were found to be "well within the specifications" (R4, tabs 108, 120). The log on which the conditions of the dryroom were recorded was kept by Mr. Darren Bellucci from 27 July to 14 August 1987. Mr. Bellucci testified he could not recall where he obtained the entries for the temperature recorded on the log and he could neither explain why there were double entries for some dates nor why the entries for these dates were different although they were allegedly taken at the same time. (Tr. 2/41-55 *passim;* exh. A-4) We give no probative weight to the log and the entries recorded thereon.

35. The COR, when he contacted Bry-Air unit owners/users, was informed that their respective Bry-Air units have and/or still maintain less than two degrees RH (R4, tabs 60, 109; tr. 4/220-26; finding 11 *supra*).

36. On 8 October 1987 the CO sent Trataros a second cure notice stating the response to the first cure notice was insufficient and listing the deficiencies of the Bry-Air system as: failing to maintain required humidity level; high static pressure in the ducts; regeneration and process fans operating at a higher CFM than the manufacturer recommended; heat exchanger being used with the more corrosive exhaust and at a higher temperature than the manufacturer recommended; high electrical power consumption; undersized electrical power feeder cable; and the failure of the unit to show the moisture removal capacity. Trataros was directed to respond within ten days with reasonable assurances and milestones it expected to take to correct the deficiencies. (R4, tab 114; stip. 79)

37. By letter dated 20 October 1987 Trataros requested the Government provide its GE dewpointer monitored readings so the data could be compared with Trataros' generated during the same time (R4, tab 115; stip. 80).

38. On 6 November 1987 the CO provided Trataros with the requested charts which the Government interpreted to say the Bry-Air unit was not maintaining the specified levels of humidity within the dryroom. Trataros was directed to respond to the 8 October 1987 cure notice within ten days and was notified the Government did not waive its right to terminate the contract for default as a result of the deficiencies noted. (R4, tab 118; stip. 81)

39. On 19 November 1987 [4] Trataros, replying to the 6 November letter, contended the charts did not reflect actual room conditions, but rather "out of control" and "overshooting" conditions associated with the extreme sensitivity of the dewpointer to changes in room moisture.[5] Appellant contended that "the shape of the recordings indicated that when the humidity increased after a bed index, the sensor was overshooting and charting a humidity level which did not actually exist in the room." Appellant informed the Government it intended to conduct a final test under simulated summer conditions on 20 November 1987 to which

[4] We note that there is a second letter, dated 17 November 1987 (R4, tab 204) which has the same first page but a different second page. The record is unclear if both letters were delivered to the Government. After consideration, the second page of this second letter does not cause us to change our finding.

[5] Out of control was defined by Mr. Buttomer as (tr. 2/209-10):

> The instrument is not measuring the — does not measure the dew point within certain preset parameters, actually, or there could have been a situation where there was a sudden influx of water that caused the instrument to heat up to establish control at a new point. There could have been an influx of dry air that caused it to slow down to a dew point to further come into control. But it would have been on — it would have been in the transition period between actual physical points.

and by Mr. Bonner as (tr. 5/295):

> That if you have the instrument running at a particular dew point, frost point, and I say frost point because on this type of application you're always in a frost point situation, and you have a step change in the quality of the air that's impinging on the instrument that you can have the unit lose control and not be able to know exactly what the dew point is until it goes through its cycling and is able to pick up the control point again.

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the Government was invited to attend. Based on the results of the test and assuming the equipment failed to meet contract requirements, Trataros proposed to either correct the equipment presently in place or to negotiate with Cargocaire Corporation to purchase the referenced model in the specifications if immediate repairs cannot be rendered. Trataros was not permitted to perform the proposed test because the CO determined the test could not and would not clear up the deficiencies noted in the Government's 8 October 1987 cure notice. (R4, tabs 121, 124; findings 36 *supra*, 43 *infra*)

40. In a memorandum to the CO dated 20 November 1987 the COR, responding to Trataros' 19 November letter, stated (R4, tab 123):

> The operation of the General Eastern dewpointer is such that when a change in the dew point occurs, there is a delay during which the dewpointer must "catch up" to the actual room conditions. However, the high and low points measured are accurate. The contract specifications called for a moisture level of 2.4 grains per pound (−27° F dew point) + 0 grains per pound. The dewpointer indicated that this level was exceeded consistently.

41. On 20 November 1987 Trataros responded to the "20 November" cure notice, acknowledged as being hand delivered on 20 November, stating in pertinent part that in spite of its insistence, supported by documentation from its engineers, that the Bry-Air unit meets the specifications, the Government's insistence does not leave Trataros any alternative but to remove and replace the Bry-Air unit (R4, tabs 124, 125; stip. 85).

42. During the 20 November 1987 time frame it is undisputed that liquidated damages were being assessed against Trataros. The COR further agreed that although the test of the Bry-Air unit indicated that 5,405 CFM was the output, he "felt that in order for the unit to put out the capacity that was indicated in the submittal, the unit would have to run at 7,000 CFM (although he did not check this with his electrical people); that the compressor failure during the 16 March 1987 test was not critical to the performance test being done; that when he arrived at the 16 March test site at 3 P.M. the test had been concluded (other Government witnesses stated the test did not end until around 5 P.M.); that Trataros had supplied better copies of submittals which satisfied his concern; and catalog cuts were provided for the reaction heater. (Tr. 4/229-37 *passim*)

43. By letter dated 1 December 1987 the CO informed Trataros that its request to perform the summer test on the Bry-Air unit on 20 November could not be adequately evaluated since it was not received until 3:30 P.M. 19 November; that, in any event, the tests could not have cured the stated deficiencies; and that the response to the cure notice "will be considered sufficient only when [Trataros] suppl[ied] a schedule, in writing, of milestones which [Trataros has] set for replacement of the Bry-Air unit." (R4, tab 127; stip. 86)

44. On 14 December 1987 Trataros forwarded to the Government a proposal for the Cargocaire unit including a number of requests for variances (R4, tab 129, 130; stip. 87).

45. On 15 January 1988 the CO advised Trataros its Cargocaire proposal was acceptable subject to the receipt of a complete submittal and the manufacturer's compliance with the specifications. The Government did agree to accept a number of the requested variances. (R4, tab 132, stip. 88) On 27 January 1988 Trataros provided another submittal for the Cargocaire unit (R4, tab 134).

46. On 9 February 1988 Trataros informed the Government it had placed an order for the Cargocaire unit (R4, tab 135; stip. 89).

47. On 11 February 1988 Trataros informed the CO that his direction to remove the reconditioned Bry-Air unit was a constructive change to the contract for which Trataros was seeking an equitable adjustment of: (a) removal and shipping of old system—$5,000; (b) Mounting—$10,000; (c) reconnection of utilities—$6,000; (d) new unit—$127,850; (e) extended overhead, consulting and legal fees, the exact cost of which was unknown at the time, but would be provided when available. (R4, tab 136; stip. 90)

48. On 9 March 1988 the CO unilaterally issued contract modification P00005 setting a schedule for the removal of the Bry-Air dehumidification unit and the installation of the Cargocaire unit (R4, tab 2; stip. 91).

49. On 14 March 1988 Trataros provided to the CO a submittal for the Cargocaire unit which the Government approved by letter dated 23 March subject to receipt of additional information on certain components. On 26 April and 3 May 1988 Trataros provided the additional submittals, (R4, tabs 206, 217; stip. 92, 93, 94)

50. On 23 June 1988 Trataros removed the Bry-Air unit and replaced it with the Cargocaire unit which the Government had ap-

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proved with variances to accommodate the unit's requirement for 278 amps of electrical power vice the contract specified 216 amps and the installation of a fourth power feeder cable (stip. 95; R4, tab 165).

51. On 9 September 1988 the COR advised Trataros the dryroom and Cargocaire dehumidification unit were accepted for beneficial occupancy (R4, tab 219; stip. 99).

52. On 12 September 1988 the Cargocaire unit was tested and balanced and found to have a discharge static pressure of 6.95 inches wg. Although this was greater than the discharge static pressure the Government previously argued would "eventually degrade the integrity of the flanged connectors [in the ductwork]," the Government accepted the report without comment. (Stip. 100; findings 22, 25, 29, *supra*, 55 *infra*)

53. On 21 October 1988 Trataros invited the Government to attend and witness its testing of the reconditioned Bry-Air dehumidification unit at the Bry-Air factory in Ohio (R4, tab 170). No Government representative attended.

54. By letter dated 20 April 1990 Trataros, through counsel, filed with the CO its certified claim for an equitable adjustment in the "total amount of $281,432," the cost allegedly incurred as a result of the Government's constructive change order requiring Trataros to install the Cargocaire dehumidification unit and to remove the Bry-Air unit. (R4, tab 171; stip. 102)

55. On 13 February 1991 the CO issued a "final decision" denying Trataros' equitable adjustment claim (R4, tab 174) stating, in pertinent part, that Trataros installed the reconditioned Bry-Air dehumidification unit without providing submittals which, if provided prior to the unit's installation, would have been disapproved because the reworked Bry-Air unit did not meet critical performance requirements and the following deficiencies were noted:

a. The system consistently failed to maintain the two percent relative humidity level required by the contract;

b. The increased airflow caused the static pressure in the ducts to rise to an unacceptable level;

c. The process fan and regenerator fan were operating at a higher CFM, static pressure, and speed than that recommended by the manufacturer;

d. The heat exchanger was inappropriate for use with combustion gas exhaust;

e. The electrical power consumption of the reworked unit was higher than that of the unit specified in the contract;

f. The electrical power feeder was undersized; and

g. The contractor's test results did not show the moisture removal capacity of the unit as required by the contract.

56. By letter dated 25 April 1991 Trataros' appealed the CO's decision (R4, tab 175).

DECISION

The Court of Claims has defined equivalency between two items as follows: "if it performs *substantially* the same function in *substantially* the same way and for *substantially* the same purpose." *J.B. Williams Company v. United States,* 450 F.2d 1379, 1391 (Ct. Cl. 1971). The true measure of equivalency must come from actual comparative testing and analysis of the instrument and for a contractor's claim to be supportable, the item must prove to be substantially the same as the brand name with respect to specification requirements. *Id.* The CO is within his/her discretion to reject an alternative product if he/she correctly determines the alternative was not the equal of the specified product. However, this discretion is not absolute and must be reasonably and fairly exercised and there must be some explanation given where the alternative is rejected, *Bruce-Anderson Company, Inc.,* ASBCA No. 29411, 88-3 BCA ¶ 21,135.

It is settled law that an alternative product need not be identical to the specified one or comply with every detail of the specifications but, rather, it need only provide all of the essential functions specified and be suitable to the actual needs. *Id.; D.E.W., Incorporated,* ASBCA No. 36698, 89-1 BCA ¶ 21,312. The burden of proof is on the appellant to establish that its proffered "or equal" functions as well in all essential respects as the specified product. *Id.,* citing *Freeman Electric Company v. United States,* 221 Ct. Cl. 884 (1979); *Central Mechanical, Incorporated,* ASBCA Nos. 29360, 29414, 84-3 BCA ¶ 17,674.

In the instant matter the specification for the dehumidification unit was based upon Cargocaire's model IDS-G11-6G-3 and substitution of an equally functional unit/system was permitted (finding 4). The requirements of the dehumidification unit were set out in the specifications and, accordingly, were needed to be met by the proffered unit/system. Appellant contends

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the proffered Bry-Air unit was comparable, and performed in accordance with the specifications.

The Government contends the Bry-Air unit did not perform in accordance with the specifications and that (finding 55):

a. The system consistently failed to maintain the two percent relative humidity level required by the contract;

b. The increased airflow caused the static pressure in the ducts to rise to an unacceptable level;

c. The process fan and regenerator fan were operating at a higher CFM, static pressure, and speed than that recommended by the manufacturer;

d. The heat exchanger was inappropriate for use with combustion gas exhaust;

e. The electrical power consumption of the reworked unit was higher than that of the unit specified in the contract;

f. The electrical power feeder was undersized; and

g. The contractor's test results did not show the moisture removal capacity of the unit as required by the contract.

The primary purpose for the dryroom was to permit ET&DL to conduct research in the production of lithium batteries which required a controlled temperature of 71°F±1° and a relative humidity of 2 percent or less. Whether the Bry-Air unit performed these two specified requirements is a question of fact which Trataros bears the burden of proving.

Trataros contends that its recording in the dryroom during the 16 March 1987 test and the monitoring done during the period 27 July through 14 August 1987 proved that a consistent 2 percent RH or less and the requisite temperature were maintained. We find this argument lacking.

The 16 March 1987 test lasted for a period of approximately four to five hours after which a compressor failed. Between 16 March and approximately 2 April 1987, the system was inoperative (findings 26, 27). We find this 5-hour period insufficient to conclude the Bry-Air unit would consistently maintain a 2 percent or less relative humidity and a 71°F±1°.

As for the monitored period from 27 July to 14 August 1987 we find the reported readings to be of little probative value. Mr. Bellucci's inability to explain the difference between the entries allegedly taken at the same times for a number of the same days, or from where he obtained the temperature readings, leaves the reliability and authenticity of the document questionable (finding 34).

On the other hand, although we give little weight to the monitoring done with the Ondyne hygrometer by ET&DL's employees due to the Government's inability to establish the machine's credibility (finding 20), we do accept the recordings attributed to the GE instrument used by the Government during the period 1 August through 15 September 1987 (finding 33) as credible and reliable and we reject Trataros' contention that all of the aberrations recorded were the result of "out of control" or "overshooting" conditions as unsupported by the record. The "or equal" unit proffered by Trataros was required to be the Cargocaire's functional equivalent and "function as well in all essential respects as the specified" unit. *Central Mechanical, Inc.*, ASBCA Nos. 29360, 29514, 84-3 BCA ¶ 17,674 at 88,157, citing *William P. Sherwin v. United States* [16 CCF ¶ 80,060], 193 Ct. Cl 962, 436 F.2d 992 (1971).

FAR 52.246-12, INSPECTION OF CONSTRUCTION, subparagraph (f) provides (finding 2):

> The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

Trataros has failed to offer proof sufficient for us to conclude the Bry-Air unit/system either met the salient characteristics of the Cargocaire unit or was the Cargocaire's functional equivalent. Under the circumstances the CO's decision to have Trataros remove and replace the Bry-Air unit was contractually proper and no showing was made that his actions were arbitrary, capricious, an abuse of discretion or illegal.

We need not address the remaining contentions raised by the Government. For having determined the Bry-Air system was not an "or equal" item, we have no alternative but to deny the appeal.

Accordingly, the appeal is denied.

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[¶ 26,593] Atlantic Dry Dock Corp.

ASBCA No. 42679, December 21, 1993. Contract No. N00024-85-H-8111, Job Order No. AD-89-09.

Modifications—Bar to Claims—Intention to Release.—The issue of whether claims for cumulative delay and disruption were barred by a series of bilateral modifications containing broad release language was not appropriate for summary judgment, because the contractor raised genuine issues of material fact concerning the parties' intent in exercising the releases. Although the government alleged that the contractor's summary judgment affidavits suffered from various evidentiary deficiencies, the board neither weighs the evidence nor makes credibility determinations in deciding summary judgment motions. The parties' intent was a material fact that might affect the outcome of the case because of its legal import.

For the appellant: Dempsey, Brown & Touhey, Washington, D.C., by James A. Kelley and Bradley A. Rush. For the government: Arthur H. Hildebrandt, Navy Chief Trial Attorney, and John A. Tew, Trial Attorney.

Before PAUL, RUBERRY, and JAMES, Administrative Judges.

PAUL, Administrative Judge: The Navy filed a lengthy motion for summary judgment in which it alleged that appellant Atlantic Dry Dock Corporation's (ADDC) claims for cumulative delay and disruption were barred by a series of bilateral modifications containing broad release language. ADDC opposed the Navy's motion, contending through sworn affidavits that the parties had engaged in a course of dealing through which the Navy precluded consideration of ADDC's cumulative delay and disruption claims until after it had executed the modifications at issue. The Navy subsequently filed two additional briefs, and ADDC submitted a reply brief.

FACTUAL BACKGROUND[*]

On 1 January 1985 ADDC and the Navy entered into Master Agreement for Repair and Alteration of Vessels N00024-85-H-8111 authorizing ADDC to bid on future ship repair projects. On 8 September 1989, the Navy awarded Job Order AD-89-09 to ADDC for the complete performance of the drydocking selected restricted availability repairs to take place on the USS W.S. SIMS from 27 September 1989 through 22 December 1989. The contract contained several clauses which are pertinent to this appeal. Clause H-1 of the Special Contract Requirements was entitled "Complete And Final Equitable Adjustments (NAVSEA 1975)." It provided:

> Whenever the contractor submits any claim for an equitable adjustment to any fact or circumstances regarded as a change order, whether formal or "constructive," under the "changes" or any other clause of the contract, such claim shall include all adjustments (including but not limited to adjustments arising out of delays or disruptions or both caused by such change order) to which the Contractor is entitled under the provisions of this contract. The foregoing requirement shall not preclude the Contractor from revising or resubmitting the aforesaid claim prior to agreement upon the equitable adjustment for the change order. However, upon the execution of the supplemental agreement, setting forth the equitable adjustment for such change order, then, except as the parties may otherwise expressly agree in the aforesaid supplemental agreement, the Contractor shall waive any right under the "Changes" clause or any other clause of this contract to further equitable adjustments attributable to such facts or circumstances giving rise to the aforesaid claim, and, in any event, such right shall be deemed to have been so waived.

ADDC commenced work on the project, and, during the life of the contract, the parties executed 25 modifications settling 81 change orders relating to work in the ship's machinery space. All of the modifications contained the following language:

> The change in price and/or delivery date described above, is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of

[*] We provide this factual narrative solely for purposes of deciding the Navy's motion for summary judgment.

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all claims arising out of this modification including all claims for delays and disruptions resulting from, caused by, or incident to such modifications or change orders.

However, attached to 6 of the 25 modifications at issue in this appeal was a letter from Mr. Edward J. Fleming, ADDC's production manager, in which he stated, in pertinent part, that "to the best of our knowledge this is in full and final settlement of all items on the USS SIMS (FF-1059) with the exception of the following: ... E. Request for Equitable #5, Machinery Space Work, Cumulative Delay and Disruption, letter 3277KEW.032."

On 26 May 1990, ADDC submitted the request for equitable adjustment (REA) to which Mr. Fleming alluded. Through this document, ADDC sought compensation in the amount of $320,534.02 for cumulative delay and disruption which allegedly incurred in connection with the 81 change orders which we have already discussed. On 9 January 1991, Mr. Fleming requested a decision from the contracting officer on REA #5. This request was accompanied by a certification signed by ADDC's president, George W. Gibbs III. The contracting officer denied ADDC's claim in its entirety, and this appeal followed.

In its motion for summary judgment, the Navy relied chiefly upon the release language contained in the 25 modifications executed by the parties, downplayed the impact of the statement contained in Mr. Fleming's cover letter, and failed to discuss any prior course of dealings between the parties relating to the Navy's acceptance of cumulative delay and disruption claims. In its opposition to the Navy's motion, ADDC attached three sworn affidavits from high-ranking officials of ADDC which paint a somewhat different picture. Viewed together, these statements allege that the Navy customarily declined to entertain claims for cumulative delay and disruption until after the parties had executed modifications encompassing ADDC's other claims. At that point, the Navy would consider cumulative delay and disruption claims without even referring to the release language contained in the earlier modifications. The affiants contended further that ADDC relied upon this course of conduct in proceeding under the present contract. In its reply brief, the Navy argued that ADDC's affidavits are replete with hearsay and irrelevant material; however, it did not include any affidavits squarely rebutting the affiants' statements.

DECISION

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the Supreme Court stated that when a party has adequately buttressed a motion for summary judgment, its opponent must come forward with specific facts showing that there is a genuine issue for trial. Moreover, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the high court indicated that the moving party does not bear a preliminary burden of negating its opponent's claim. Finally, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), the Supreme Court re-emphasized that rulings on motions for summary judgment, as with directed verdicts, necessarily implicate the substantive standard of proof that would be required in a trial of the issue. Thus, material facts are those which might affect the outcome of the case due to their legal import; and genuine issues are those concerning which the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party.

Applying these standards to the facts of this case, we must deny the Navy's motion. We agree with the Navy that ADDC's affidavits suffer from various evidentiary deficiencies. However, as the Supreme Court indicated in *Anderson*, 477 U.S. at 248-50, it is not our province in deciding summary judgment motions either to weigh the evidence or to make credibility determinations. Analyzing the evidence as a whole, we conclude that ADDC has raised genuine issues of material fact concerning the parties' intent in exercising the releases at issue. *Cf. Triple "A" South*, ASBCA No. 35824, 90-1 BCA ¶ 22,567; *Service Engineering Corp.*, ASBCA No. 40274, 93-2 BCA ¶ 25,885. Hence, this matter must be fully tried.

CONCLUSION

The motion for summary judgment is denied. The parties are ordered to continue their preparations for trial.

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[¶ 26,594] **MCA Research/Frank E. Basil, Inc.**

ASBCA No. 42431, December 15, 1993. Contract No. DAHA04-90-C-0020.

Contract Disputes, Certification—Failure to Certify—Dismissal Without Prejudice.—A 1990 claim for an equitable adjustment in excess of $50,000 was dismissed without prejudice for lack of jurisdiction, even though the contracting officer had issued a final decision, because the claim was not certified and was not a government claim that did not require certification. Although the contractor alleged that the claim for maintenance services on tracked military vehicles did not require certification because it was a government claim, the dispute between the parties was not solely one of contract interpretation. In reaching a decision, the contracting officer was not merely engaging in contract administration but was attempting to decide an affirmative claim by the contractor that had been reduced to a sum certain.

For the appellant: McKenna & Cuneo, Washington, D.C., by J. Ernest Mincy III. For the government: Col. Riggs L. Wilks, Jr., JAGC, Chief Trial Attorney, and Maj. Daryle A. Jordan, JAGC, and Capt. Jerome C. Cecelic, JAGC, Trial Attorneys.

Before PAUL, SPECTOR, and RUBERRY, Administrative Judges.

PAUL, Administrative Judge: The Government has filed a motion to dismiss for lack of jurisdiction, contending that appellant MCA Research/Frank E. Basil, Inc. (MCA) failed to certify its claim in excess of $50,000. MCA submitted an opposition to the motion, alleging that the claim at issue was a Governmental claim which, pursuant to the Contract Disputes Act, 41 U.S.C. §§601 *et seq.* (CDA), did not require certification.

For the reasons stated below, we grant the motion and dismiss the appeal.

FACTUAL BACKGROUND

On 24 July 1990, the Government and MCA entered into contract No. DAHA04-90-C-0020 for the performance of maintenance services on tracked military vehicles located at Camp Roberts and Fort Irwin, California. The Army gave MCA notice to proceed on 17 August 1990. Soon thereafter, a dispute arose between the parties concerning both the number of services to be ordered and performed during the contract's base year and the Army's payment obligations. On 5 October 1990, Ms. Linda C. Bennett, MCA's program coordinator, wrote the following letter to LTC Charles H. Painter, the Government's contracting officer:

> This letter is pursuant to a telephone conversation with Ms. Sheri Bashaw, in which we informed your office of a financial impact to Basil/MCA Research as a result of the reduction in the performance period of the base year of this Contract. As you will note from our cost proposal, Basil/MCA priced certain costs, such as project implementation, office trailers, management labor, etc., in the base year. As a result of the reduction in the base year (from 4 months to 1 1/2 months), Basil/MCA must spread non-labor costs and fixed costs over a shorter period of time in order to fully recover its cost under this Contract. It is important to emphasize that this impact will not increase the total project cost.
>
> Since this is a fixed-price contract, Basil/MCA will invoice the Government for 1 month and 15 days of the contract price for the base year. This time period represents the Notice-to-Proceed date of 17 August 1990 through 30 September 1990. The invoice amount will be $234,113.49. In addition, all future billings shall be made on the basis of a fixed-monthly amount determined by dividing the total annual contract value by one-twelfth.

LTC Painter responded to Ms. Bennett's letter on 15 October 1990 in these terms:

> The contract is quite explicit concerning what the Government will pay; it did not set individual payments for "project implementation, office trailers, management labor, etc." While it is indeed unfortunate that the award date was delayed, the Government cannot reimburse Basil-MCA for "out of pocket" expenses.
>
> The Government will pay Basil-MCA based on prices set forth in the contract. Government receipt of an invoice for $234,113.49 for other than maintenance services will be returned without action.

On 26 October 1990, Ms. Bennett forwarded the following reply to the Government:

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Reference is made to your letter dated 15 Oct 90 concerning invoicing requirements.

BASIL-MCA submitted it's [sic] bid based upon the RFP requirements for a Firm Fixed Priced contract (page L-4, page L-22 of RFP). The prices indicated for the Base Year, as shown on page B-3 of the Bid Schedule in the RFP, clearly demonstrate that the Contractor would have been entitled to collect the fixed amount of $624,302.65 had the Contractor performed maintenance services for the entire four months of the base year. Actual contract performance did not commence until 17 Aug 90 in accordance with the Notice-to-Proceed which was dated this same date.

The invoice submitted by BASIL-MCA correctly reflects the appropriately prorated price of the firm fixed price contract for the base year. This bill is for services provided by the Contractor in accordance with the contract requirements.

BASIL-MCA contends that this contract falls within the definition of FAR 16.201 and has subsequently billed the government in accordance with the contract clause, 52.232-1, Section I contract and page M-1, paragraph M.2 of the contract.

Conversations between Government and Contractor personnel have surfaced the idea of a "unit" price billing concept. This is clearly incorrect as there are no "unit" prices listed in the Bid Schedules. Prices shown are for services provided under a firm fixed priced contract. The Contractor can find no clauses referencing "unit" billing requirements.

BASIL-MCA representatives are available to provide further information if the Government desires. Your prompt assistance is appreciated.

On 28 October 1990, MCA sent this invoice to the Government:

USPFO for California
Contracting Office
P.O. Box 8104
San Luis Obispo, CA 93403-8104

Attention: Contracting Officer

90-01
Basil-MCA
Contract No. DARA04-90-C-0020
August 17-September 30, 1990

To invoice for costs incurred during the above referenced month(s).

CATEGORY		CURRENT MONTH(S)
TOTAL BASE YEAR CONTRACT VALUE		624,302.65
TOTAL NO. OF MONTHS IN BASE YEAR	(/)	4.00
NO. OF MONTHS PERFORMED (17 AUG-30 SEPT)	(X)	1.50
TOTAL COST		234,113.49

The invoice was received in the Government's offices on 2 November 1990. Neither this invoice nor any of MCA's other submissions contained a certification as set forth in the CDA.

On 31 October 1990, LTC Painter forwarded a purported "final decision" to MCA. He stated:

> The contract does not clearly demonstrate your alleged entitlement to $624,302.65, nor does the contract unequivocally specify a four month base year; rather it stipulates "or date of award." The Notice to Proceed with contract work was conditioned on meeting the requirements of the statement of work. While it is indeed unfortunate that the Notice to Proceed was not issued until some time later, the Government cannot reimburse Basil/MCA for its delays and/or "out of pocket expenses" in meeting these requirements.

As you know, the PAYMENTS clause reads:

> The Government shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. . . .

Thus it is rather clear and convincing concerning what the Government will pay, the prices stipulated in this contract. The contract bid schedule did not include nor did it contemplate costs for project implementation, office trailers, management labor, etc.

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The Government will pay Basil/MCA based on prices set forth in the contract. Government receipt of invoices for other than contact [sic] stipulated maintenance services will be returned without action.

This is the final decision of the Contracting Officer. You may appeal this decision to the Board of contract [sic] Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claim procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less.

This appeal followed.

DECISION

It is axiomatic that we lack jurisdiction to decide an appeal based upon an uncertified claim in an amount in excess of $50,000. Here, MCA clearly announced its intention to seek an equitable adjustment in an amount of $234,113.49, based upon its interpretation of the contract's terms, as early as 5 October 1990. Thereafter, MCA attempted to submit such a claim through its letter of 26 October 1990 and its invoice of 28 October 1990. However, MCA did not attach a CDA certification to any of these documents. Accordingly, the contracting officer's purported final decision of 31 October 1990 has no legal significance.

We reject MCA's argument that the underlying claim was, in essence, a Governmental claim which did not require certification. The dispute between the parties was not solely one of contractual interpretation; and, in reaching his decision, the contracting officer was not merely engaging in contractual administration. Rather, he was attempting to decide an affirmative claim by the contractor which had been reduced to a sum certain. Hence, because MCA's claim was not certified, we lack jurisdiction to review it.

CONCLUSION

The motion to dismiss is granted without prejudice to submission of a properly certified claim to the contracting officer.

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